



To: Executive Committee
From: Gregory S. Matson
Date: April 29, 2021
Subject: **Report of the Executive Director**

This report is a summary of the Commission's organizational and staff activities for the period July 1, 2020 through March 31, 2021 (unless otherwise noted).

I. Programs & Activities

A. Joint Audit Program

The Joint Audit Program completed and closed three (3) corporate income tax audits and parts of nine (9) other corporate income tax audits during the first three quarters of fiscal year 2021. The audit program also completed and closed three (3) sales tax audits and parts of eight (8) other sales tax audits. Currently, there are twenty (20) income tax audits and twenty-eight (28) sales tax audits in progress.

During the first three quarters of the fiscal year, the income tax program proposed net assessments of \$24,245,486 (proposed assessments of \$25,377,620 less taxpayer requested adjustments of \$1,132,133) for completed and partially completed corporate income tax audits. Income tax program staff also proposed tax credit and refund reductions of \$82,811. The sales tax program proposed net assessments of \$8,674,620 (proposed assessments of \$9,111,843 less taxpayer requested refunds of \$437,223) for completed and partially completed sales tax audits. Sales tax program staff also proposed \$203,571 in tax refund reductions.

The following chart summarizes hourly data for completed audits during the first three quarters of 2021 fiscal year:

	Income & Franchise	Sales & Use	Total
Total Audits	3	3	6
Total States Audited	55	36	91
Total Hours	19,180	5,141	24,321
Average Hours per State	349	143	267

The Audit Committee last met on November 17, 2020 virtually. This was the second meeting for the Audit Committee in fiscal year 2021. The first meeting was held on July 28, 2020 and was also conducted virtually. During the November meeting, committee members approved

a revised statute of limitations waiver extension form and the updated audit manual for income tax. MTC audit manuals serve as a guide for MTC auditors, but also provide transparency about the MTC audit process for member states and taxpayers.

In closed session, the Audit Committee reviewed a list of nominated companies for addition to the sales tax audit inventory, along with associated voting ballot results. The committee voted to add ten of those companies to inventory. Members also approved a more detailed reporting format for recording audit results for the Joint Audit Program, as proposed by the audit director. New information includes tax refunds requested by taxpayers, recommended refund reductions, and any recommended changes to tax attributes such as tax credits and net operating losses. As always, the program supervisors provided an update for on-going audits.

State Intercompany Transactions Advisory Service Committee

Krystal Bolton with the Louisiana Department of Revenue has agreed to serve as chair of the State Intercompany Transactions Advisory Service Committee (SITAS). Louisiana has been a state on the forefront of using transfer pricing as a tool in its audit program. The SITAS Committee met March 23, 2021 to brief members on the background and history of the SITAS. Future meetings will discuss ways the committee can support member states and to discuss the possibility of holding training and information sessions.

B. National Nexus Program

The Nexus Program 3rd Quarter, FY 2021 results (July 1, 2020 through March 31, 2021) are provided below.

- Nexus states' collections: \$12,782,269 (\$21,551,287 FY 2020)
- Nexus states' executed agreements: 278 (544 FY 2020)
- Nexus states' average contract value: \$45,979 (FY 2020: \$39,616)

The above amounts include checks received by the Commission or amounts paid by the taxpayer directly to the states and reported to the Commission. Interest on back tax paid and the value of a new taxpayer are not included. Applications continue to increase in the post-*Wayfair* era. The Commission received applications from 296 taxpayers in calendar year 2020. So far this calendar year 2021 (as of March 31, 2020), 63 taxpayers have applied. Most of the applications continue to be based on sales tax economic nexus.

Membership

There are currently thirty-eight participating states (including the District of Columbia) in the NNP. Commission staff continues to reach out to non-member states.

Outreach

Staff continues to urge states to put a link to the NNP on their voluntary disclosure web pages and provide other outreach. Nexus director Richard Cram has participated in numerous events which are listed under item III. Outside Presentations and Events.

Nexus School

While no Nexus Schools are currently scheduled, please let a member of the Commission staff know if your state would like to host a Nexus School.

Amnesties

The NNP posts on its web page a list of upcoming and current state tax amnesties. Please inform NNP staff if you would like the Commission to post your state's amnesty.

Staffing

The Program presently has four permanent full-time staff members: Richard Cram, Director, Diane Simon-Queen, Voluntary Disclosure Program Manager, Michelle Lewis, Paralegal, and James Lee, Program Specialist.

Nexus Program staff is currently implementing a new software system that should make our processing of voluntary disclosure applications much more efficient. Our goal is for all applications to be received online, instead of some coming in online and others submitted in pdf form, due to difficulties with submitting online.

C. Legal Division

Attorney Responsibilities

The six legal division attorneys:

- staff the Uniformity Committee and its various work groups (including research, drafting, presentations, and reports);
- staff the Litigation Committee;
- staff the SITAS Committee;
- provide attorney and other training;
- offer litigation and *amicus* support and legal advice to states;
- provide legal support to the Commission and its programs and projects, including the Joint Audit and National Nexus Programs and general administrative functions;
- file *amicus* briefs on behalf of the Commission;
- oversee the MTC Alternative Dispute Resolution Program established and governed by Bylaw 14;
- publish articles in tax journals;

- speak at conferences and seminars (as detailed elsewhere in this report under item III. Outside Presentations and Events); and
- oversee the annual Paull Mines Award, which the Litigation Committee established to recognize contributions to state tax jurisprudence by public-sector attorneys.

Uniformity Work

By the end of the third quarter of this fiscal year, the status of various Uniformity Committee projects was as follows:

- The project to draft an alternative to the MTC model combined filing statute using the *Finnigan* approach was approved by the Executive Committee for a Bylaw 7 Survey of the states at its July 30, 2020 meeting. A majority of the states have responded to the survey that they would consider adopting the model. Therefore, the model will now go back to the Executive Committee for further consideration at its April meeting.
- The project to revise the statement of position on P.L. 86-272 was approved by the Executive Committee for a Bylaw 7 Survey of the states at its November 20, 2020 meeting. As of March 31, 2021, we are still waiting on responses from some states and any results will be reported to the Executive Committee at its April meeting. Commission staff have been asked to participate in numerous discussions of the proposed revisions and to engage in various panel discussion with practitioners and other members of the SALT community.
- The project to address potential technical corrections to the partnership provisions of the model statute for reporting federal adjustments, undertaken by the work group that drafted that statute, concluded its work and the Uniformity Committee approved the corrections at its November 5, 2020 meeting. Those technical corrections were also ratified by the Executive Committee and are now included in the adopted model for the states to use.
- The new project selection work group, established by the Uniformity Committee, had reported to the committee its recommendation to adopt a process for evaluating new projects, including establishing a standing subcommittee. The Standing Subcommittee, which was formed by the Uniformity Committee at its July 2020 meeting, had its inaugural meeting in September to discuss the process it will generally use.
- Since its formation, the Standing Subcommittee has been having monthly calls—on the third Thursday of every month—to evaluate a project on state taxation of partnerships, assigned to it by the Uniformity Committee. The subcommittee will be making a recommendation to the Uniformity Committee on that project at the committee’s April meeting.
- On January 14, 2021, Greg Matson, Executive Director; Nancy Prosser, General Counsel; and Helen Hecht, Uniformity Counsel, hosted a training and information session for the Compact and Sovereignty Member state representatives about the uniformity process and the changes to Commission bylaws which now allow Sovereignty Members to participate more in the approval of uniformity proposals.
- At the end of 2020, staff became aware that the Council On State Taxation (COST), which had been a supporter of federal mobile workforce legislation, would be asking state lawmakers to consider state legislation which it had drafted. Commission staff

analyzed the COST draft, along with the federal legislation that had been introduced in the past, and compared those proposals to the Commission's own model Mobile Workforce Statute—setting out the reasons for why the Commission continues to believe its model is the most workable. The resulting analysis was provided to the states for their use in their legislative sessions.

- The MTC was asked to participate in the Uniform Law Commission project to draft a model act for direct shipping of alcoholic beverages—including provisions necessary for the enforcement of state taxes. Uniformity Counsel Helen Hecht has been participating in that project drafting group.
- The Washington State Department of Revenue presented Commission staff with a proposal to have the Uniformity Committee review the work done by the state to develop an approach to taxing digital goods and possibly recommend to the states that this approach would be a good model for them to consider. This presentation will be given to the committee at its meeting in April.

Litigation Committee Support

The Litigation Committee has traditionally held in-person training and informational sessions (commonly referred to as roundtables) 2-3 times a year where state tax attorneys in departments of revenue and attorney general offices around the country discuss current and recent tax cases and key litigation issues and share ideas with colleagues in other states. Due to the pandemic, these roundtables have been shifted to the web.

On July 27, 2020, MTC attorneys helped organize the first virtual roundtable, which included both in-depth presentations on significant state tax cases around the country and shorter presentations offered by participants. Since then, the Litigation Committee has held three additional virtual roundtables:

- Income tax and other business activity taxes: October 21, 2020 and March 25, 2021
- Sales tax and other transaction taxes: December 1, 2020
- An additional sales tax roundtable: April 8, 2021.

To ensure that interested state attorneys are aware of Litigation Committee programs and other MTC programs that may be of interest to them (and also to identify attorneys that may be resources to attorneys in other states), MTC legal staff initiated a project to update and expand the Litigation Committee attorney roster. The number of public sector tax attorney participating in MTC events has grown significantly over the past year.

Training

The legal division traditionally provides a combination of in-person and online training programs. Due to the ongoing pandemic, the legal division staff has presented these online training and information sessions for state tax attorneys, department of revenue staff, and the public:

- Special Roundtable to Discuss Tax Issues Relating to Teleworkers (August 20, 2020)

- Reconsidering Economic Development Tax Incentives (October 1, 2020)
- Ethics, Confidentiality, and Data Security in the Remote Workplace (December 16, 2020)
- Supreme Court Amicus Briefs: A Discussion – Joint Presentation with the State and Local Legal Center (January 26, 2021)
- Exclusive Joint Audit Committee SALT Update (February 2, 2021)

MTC attorneys also participated in the Strategic Planning Training Workgroup meetings and helped research and test learning management systems and other training-related technology platforms that might be helpful to providing high-quality training at a reasonable cost to the Commission and state tax staff. Staff have been vetting two possible learning management system platforms since January 2021. Legal staff members also edited videos of statistical sampling training that MTC audit staff recorded for a training program that will be delivered through the MTC learning management system.

Litigation Support and Legal Advice

The legal division regularly consults with state attorneys and other state representatives by request on litigation matters – including strategy, issues, arguments, and moot courts – and on legislative and policy issues. During the first three quarters of the fiscal year, legal staff have worked with Idaho, Iowa, Kansas, Louisiana, Mississippi, Montana, Nebraska, New Mexico, Oregon, Pennsylvania, South Carolina, Vermont, and Washington, D.C. The legal issues were diverse and involved such matters as litigation assistance; review of draft legislation; help implementing RAR/Partnership models, the MTC *Finnigan* alternative, and market-based sourcing; and testimony on SALT issues.

Support for the Commission's Programs and Projects

The legal division supports the Commission's Joint Audit and National Nexus Programs and other Commission programs and projects as requested. The legal division also provides support for the Commission's general administration by addressing open meetings issues, maintaining confidentiality policies, handling records requests, researching and making recommendations for record retention policies, resolving lease disputes, reviewing contracts, and filing corporate registrations and reports.

During the first quarter, MTC attorneys assisted the MTC auditors with the update of the Income Tax Manual, including an updated waiver form.

For the period October 1, 2020 - March 31, 2021, legal staff also completed an update to the MTC Litigation, Nexus, Audit, Strategic Planning, and Uniformity Committee charters, began work on a new SITAS committee charter, and completed work on an update to the program materials for the MTC Alternative Dispute Resolution program.

Amicus Briefs Filed on Behalf of the Commission

On Feb. 12, 2021, the legal division filed an *amicus* brief urging the U.S. Supreme Court to review the Idaho Supreme Court's decision in *Noell Industries, Inc. v. Idaho State Tax Commission*, 470 P.3d 1176 (Idaho 2020). In its decision, the Idaho Supreme Court held that Idaho could not tax a holding company on any portion of its gain from the sale of a multistate business that had operated in that state for almost two decades. In its *amicus* brief, the Commission pointed out that the U.S. Supreme Court has never considered the application of the unitary business principle to a business enterprise that includes a holding company, resulting in a gap in Due Process Clause jurisprudence, and that the Idaho Supreme Court's decision contributes to a growing conflict among state courts and administrative tribunals. Given the now commonplace use of holding companies, the Commission encouraged the Court to take this opportunity to provide needed guidance on how to apply the unitary business principle when a holding company sells a controlling interest in a multistate business. The U.S. Supreme Court denied the petition on February 22, 2021.

Publications

- Uniformity Counsel Helen Hecht is a member of the *State Tax Notes* Advisory Board and submits periodic “board briefs” on various topics.
- An interview of state tax attorneys, including Helen Hecht and Brian Hamer, appeared in *State Tax Notes* on July 20, 2020, entitled “A Conversation on False Claim Act Expansion--Does It Make Sense?”
- An Insider's View of the MTC's P. L. 86-272 Project, Brian Hamer, March 22, 2021 in *State Tax Notes*.

D. Legislative Activities and Resources

The legislative advisor at the MTC continues to engage in these activities:

- Publishes federal and state legislative newsletters.
- Analyzes and reports on current and emerging congressional actions and threats to state-tax sovereignty.
- Analyzes and reports on state legislation that touches on important, multistate issues.
- Maintains a list of high-level legislative and policy professionals in state revenue departments to facilitate their communication with each other on legislative developments.
- Provides technical information and shares information with other state organizations such as the National Governors Association and National Council of States Legislatures.

The highlight issue in Congress recently has been the *American Rescue Plan Act*, H.R. 1319, P.L. 117-2. The bill became law on March 11, 2021. Like the stimulus/relief bills before it, the bill appropriates funds with the stated purpose to stimulate the economy and provide relief to struggling Americans. The budget reconciliation process was used in the Senate to avoid a

filibuster. The legislation passed with no Republican support. The House approved the bill with two Democratic defections and no Republican votes.

Unlike its predecessors, ARPA includes \$350 billion for the general funds of states, D.C., tribes, and territories with few restrictions — except for section 1099. Amended into the bill late in the approval process, section 1099 requires that no ARPA funds be used to reduce net tax revenue by any change in “law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.” The covered period is the earlier of expenditure of all appropriated federal funds and December 31, 2024. Localities are not prohibited from using the funds to lower net taxes.

Republicans in Congress and in the states strongly protested their stated belief that the bill prohibits all tax cuts. Supporters state that it prohibits only tax cuts that decrease *net* revenue. Citing perceived ambiguity in the language and constitutional arguments such as the anti-commandeering principle, several state attorneys general have sued the U.S. Treasury Department. The Secretary offered guidance on March 23rd that did not go beyond the language of the statute, and promised further guidance as soon as possible.

As to remote and mobile workforce legislation, action is not expected to occur in Congress this year. Efforts to pass legislation addressing this issue have shifted to state by state.

Important issues addressed by state legislatures recently:

- The Maryland General Assembly overrode the Governor’s veto and approved the first tax on digital advertising. Also, the General Assembly amended the law on March 23, 2021 to exclude broadcasting and prohibit the passing of the cost of the tax on to users. It has a progressive schedule of rates linked to gross revenue. Connecticut, Massachusetts, Montana, New York, and West Virginia have bills pending (some states have more than one bill).
- Digital goods legislation is pending in Georgia, Kansas, and Texas.
- A Missouri bill authorizes the Department of Revenue to enter into the Streamlined Sales Tax Agreement and conforms state law to the agreement.
- Mobile workforce bills have been introduced in—
 - Louisiana (employees may self-certify in advance and provide estimated time expected out of state).
 - West Virginia has two bills, one very simple, exempting professional athletes, professional entertainers, persons of prominence and, unusually, laborers in the natural resources industries, and construction workers. It does not apply to qualified production employees (films, etc.).
 - Arkansas— The title is, “To adopt *the* Model Mobile Workforce Act”. [Emphasis added]. This bill allows employees to estimate in advance their estimated times working out of their home state. This legislation includes as covered under the bill: qualified production employees (films, etc.), professional athletes, professional performers, and persons of prominence.

- Many states conformed to the federal treatment of Paycheck Protection Program loans by allowing the deduction of business expenses paid for with a tax-free, forgiven loan.

E. Training

Training has been an important focus of the MTC staff. The goal is to utilize technology to expand the availability of training and augment in-person training offerings. The Strategic Planning Committee approved a report from the committee's working group on training during its November 6th meeting. The work group gave detailed recommendations for adjustments to the training program, including use of multiple training formats, improved virtual opportunities, perpetually available trainings, regular evaluations, and flexibility. The full report is available on the MTC website —

<http://www.mtc.gov/The-Commission/Committees/Strategic-Planning>.

The work group on training provided a survey that found that 97% of respondents indicated that they want to participate and attend MTC trainings, both virtual and in-person. The survey findings can be found here —

<http://www.mtc.gov/getattachment/The-Commission/Committees/Strategic-Planning/MTCTrainingSurveyresults.pdf.aspx>

Training report recommendations are being implemented. A team of staff, including from legal, audit, information technology and events, have worked together to choose and implement a Learning Management System for MTC courses and training. The first course to be recorded and implemented as an on-line virtual course has been the Statistical Sampling course.

In addition, the training and event staff have been setting up virtual event and meeting registrations, performing back-end support, and are providing real-time support to various online events and meetings. They continue to work with hotels and are preparing for the return of in-person MTC meetings. Upcoming meetings have been scheduled:

- 54th Annual Conference and Meetings, to be held virtually, Late July, early August 2021
- 2021 Fall Committee Meetings, November 8-11, 2021 – Alexandria, Virginia
- 2022 Spring Committee Meetings, April 19-22, 2022 – Albuquerque, New Mexico
- 55th Annual Conference and Meetings, July 31 to August 5, 2022 – Anchorage, Alaska
- 2022 Fall Committee Meetings, November 13-18, 2022 – Little Rock, Arkansas

II. Administration

There have been no staff arrivals or departures during July 1, 2020, through March 31, 2021. In response to the coronavirus pandemic, all D.C. staff have been set up to work remotely and have done so. The D.C. office has been open throughout the pandemic with very strict health protocols being followed. Loretta King, our staff assistant, comes in daily. Many members of the D.C. office staff have been periodically coming in physically to the office.

This has ensured smooth and uninterrupted regular operations at the MTC. The normal maintenance of server hardware in the D.C. office occurs on a regular basis through on-site visits by the network administrator.

Technology Addendum

The network administrator has facilitated video and audio conference capabilities during this time of remote work for the D.C. office staff. Also, at the request of the Audit Director, the sales tax auditors had additional solid state disk drive space added to their laptops.

The new version of the Voluntary Disclosure Application and Online Application for the Nexus program are in the process of being implemented.

To ensure the protection of MTC information and data, a single-room office has been procured in Covington, Kentucky, for the housing of off-site back up servers and other information. Even with much of our data protected on the cloud, this fosters continuity of operations in the event a calamity in Washington, D.C. prevented access to our office and hardware. Formerly, the audit office in Chicago (now closed) served this purpose.

III. Outside Presentations & Events

The executive director serves as an advisory board member for the Hartman State and Local Tax Forum, the New England State and Local Tax Forum, and New York University's State and Local Tax Institute.

The following are the programs, conferences, and other events of outside organizations at which members of the legal division represented the Commission:

JULY 2020

- None.

AUGUST 2020

- 2020 SEATA Virtual Conference, *2020 Sales Tax Case Update: The Past, Present, and Future* (Prosser, panelist); and *Federal Partnership Regime and Effect on State Taxation* (Hecht, panelist)
- 2020 Georgetown Law Advanced State & Local Tax Institute, *A State-Taxpayer Discussion: The Project to Update the MTC P.L. 86-272 Statement of Information* (Hamer, panelist)
- 2020 Georgetown Law Advanced State & Local Tax Institute, webinar presentation on marketplace facilitator tax collection laws (Cram, panelist)

SEPTEMBER 2020

- FTA Celebrity Speakers Series, *Legal Landscape 2020* (Hecht, panelist)
- FTA Celebrity Speakers Series, *Legal Landscape 2020* (Pattison)
- Webinar on MyCPE.com on sales tax economic nexus, marketplace facilitator tax collection laws, and MTC Multistate Voluntary Disclosure Program on September 16, 2020 (Cram, panelist)

OCTOBER 2020

- 2020 MSATA Virtual Conference, *2020 Sales Tax Case Update: The Past, Present, and Future* (Prosser, panelist); *Federal Partnership Regime and Effect on State Taxation* (Hecht, panelist)
- Tax Executives Institute – Annual Conference, *State Budgetary Issues and Potential Tax Changes* (Hecht, panelist)
- Hartman State Tax Forum, *Top Ten Income Tax Cases to Watch* (Fort, panelist)
- The State Tax Show (podcast) with Matt Hunsaker of BakerHostetler – *Women in SALT* (Prosser, panelist)
- National Association of State Bar Tax Sections, *Evolving State Sales & Income Taxes in the Post-Wayfair World* (Hamer, panelist)
- Webinar on CPAAcademy.com on sales tax economic nexus, marketplace facilitator collection laws, and MTC Multistate Voluntary Disclosure Program on October 6, 2020 (Cram)
- Virtual Annual NASBTS Tax Conference on October 22, 2020, providing update on sales tax economic nexus and marketplace facilitator tax collection laws (Cram and Hamer, panelists)

NOVEMBER 2020

- Alaska Municipal League Annual Conference - *About the Multistate Tax Commission and Trends in Sales/Use Tax Economic Nexus and Marketplace Facilitator Tax Compliance Issues* (Cram and Prosser)
- 2020 NESTOA Virtual Conference, *Federal Partnership Regime and Effect on State Taxation* (Hecht, panelist); *2020 Sales Tax Case Update* (Disque, panelist)
- National Conference of State Legislatures, Task Force on State and Local Taxation, *Remote Work/Mobile Workforce State Taxation Issues* (Hecht, panelist)
- MACPA 2020 Advanced Tax Institute, *National Developments in State and Local Tax* (Disque, panelist)
- NJCPA Society Multistate Tax Conference 2020, to provide update on multistate tax issues (Cram, panelist)

DECEMBER 2020

- Law360 “Tax Trends” Webinar (Prosser, panelist)
- Sales Tax Update for Intuit Tax Experts Webinar (Prosser, panelist)
- AICPA State and Local Tax Technical Resource Panel Meeting with Outside Organizations (Cram, Hecht, and Prosser)
- 2020 NESTOA Virtual Conference, *Federal Partnership Regime and Effect on State Taxation* (Hecht, panelist); *2020 Sales Tax Case Update* (Disque, panelist)
- Iowa Taxpayers Association 85th Annual Tax Symposium (virtual), “*Uncertainty Abounds, Good Tax Policy is Still a Must*” (Pattison, panelist)

JANUARY 2021

- Independent SALT Alliance, *Proposed Revision to the P.L. 86-272 Statement of Information* (Hamer and Matson)
- MTC and State and Local Legal Center host online seminar, *Supreme Court Amicus Briefs: A Discussion*, featuring three former Supreme Court clerks (Prosser, co-host)

FEBRUARY 2021

- 2021 Deloitte National Multistate Tax Symposium: *State officials panel—States’ perspectives on the new normal* (Prosser, panelist)

MARCH 2021

- American Bar Association/Institute of Professionals in Taxation Advanced Tax Seminars, *What To Do With P. L. 86-272* (Hamer, panelist)
- Tax Executives Institute Midyear Conference, *P.L. 86-272—How Much Protection Is Left* (Hamer, panelist)
- Webinar on teleworker nexus issues at Southern Legislative Conference, Fiscal Affairs & Governmental Operations Committee virtual meeting on March 31, 2021. (Cram, panelist)