



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

June 19, 2009

The Honorable Martha Lee Walters
President, National Conference of
Commissioners on Uniform State Laws
Oregon Supreme Court
1163 State Street
Salem, Oregon 97301-2563

Mr. John Sebert
Executive Director
National Conference of Commissioners on
Uniform State Laws
111 N. Wabash Avenue, Suite 1010
Chicago, Illinois 60602

Joe Hackney
Speaker
North Carolina House of Representatives
President, NCSL

Gary VanLandingham
Director, OPPAGA
Florida Legislature
Staff Chair, NCSL

William Pound
Executive Director

Dear Justice Walters and Mr. Sebert:

We write to you on behalf of the National Conference of State Legislatures (NCSL) Executive Committee Task Force on State and Local Taxation of Communications and Electronic Commerce (Task Force), to express our concern over the process established by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to undertake the review and revision of the Uniform Division of Income for Tax Purposes Act (UDITPA) and our opposition to your organization's recent decision to continue the Study Committee on UDITPA.

As you may recall, on May 27, 2008, we sent you a letter outlining our concerns to the proposed review and revision of UDITPA by NCCUSL. In our letter we stated, "It is our understanding that the criteria for NCCUSL to undertake a project such as the revision of UDITPA requires that uniformity in the subject area be desirable and practically achievable. We would argue that decisions regarding UDITPA made by state legislatures over the last thirty years, raise serious questions as to whether uniformity in this area is either desirable or achievable."

Last summer, NCSL sent three legislators to the NCCUSL Annual Meeting in Big Sky, Montana to discuss our concerns about NCCUSL's plan to go forward with the revision of UDITPA. While we urged your organization to bring the Drafting Committee to an end, we were pleased that NCCUSL made the decision to downgrade the effort from a "drafting" committee to a "study" committee in order to review whether it is "desirable" to revise UDITPA and whether such revision is "achievable." We also accepted the invitation to add state legislators, representing NCSL, Council of State Governments (CSG), and the American Legislative Exchange Council (ALEC) as advisors to the UDITPA Study Committee. Since last summer there has been one meeting (March 28, 2009) of the Study Committee and four legislators participated, two from each political party.

We were disappointed at the March meeting of the Study Committee that the agenda was clearly set to proceed with a section by section review of UDITPA, not the overall discussion about desirability or achievability that we understood would take place. As you are aware, our colleagues who served as advisors made sure that the Study Committee had this discussion and we are confident that you did indeed hear from state legislators that a revision of UDITPA was not desirable or achievable.

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On May 12th NCSL staff learned about a conference call that was to take place on May 14, 2009, that was to include all the members of the Study Committee. Neal Osten, NCSL's Federal Affairs Counsel, contacted John Sebert to ensure that the legislator advisors had the call-in instructions. He learned from Mr. Sebert that the legislators were not invited to participate in the call, that it was only for Study Committee "members, reporters and etc."

On May 27, 2009, we learned from an article in the Bureau of National Affairs that during this closed conference call the decision was made to proceed with the review and seek a six-month extension until at least January 2010 to continue its work. Besides the fact that the conference call was closed to state legislators and taxpayers, we learned in the BNA article that Mr. Dale Higer, Chair of the Study Committee, declared, "We know that the tax administrators are supportive of the revision, we know that taxpayers are opposed to revision, and **we just need to see where the legislatures are on this.**" As you can imagine this statement was met with incredulity by the members of the Task Force. It made us wonder, given our various communications over the past year, how there could be any doubt about our position on this revision. The Task Force found the decision to exclude legislative advisors from the call incredibly offensive.

However, if we had been allowed to participate in the call, it would not have been closed, as we would have required that the call be open to all, including taxpayers. We find it discouraging that you, as appointed commissioners from your states, would hold closed meetings to make decisions. We would not be able to do so in our legislatures nor at meetings of NCSL. We would strongly encourage you to hold all your meetings in front of the public, especially when making decisions.

As you know, on May 30, 2009, this Task Force met in Raleigh, North Carolina and we discussed your decision. The members of the Task Force by a unanimous public vote, want us to inform you of our opposition to the further continuance of the Study Committee and the efforts to review and revise UDITPA. We are opposed to the request for a six-month extension of the Study Committee in order to find an elected state policymaker somewhere that might support the revision of UDITPA.

The members of the Task Force also asked that we relay to you the concerns that this decision to move forward at this time could undermine the good will and respect that NCCUSL now enjoys among state legislators. Many of our colleagues look upon uniform legislation drafted by NCCUSL as being non-controversial and worthy of legislative consideration. Should this effort to review UDITPA proceed to revise UDITPA, you may well lose the trust that we have had in NCCUSL's uniform legislation.

One of our members, Assemblywoman Fiona Ma, mentioned that it may be helpful for state legislators to have some options to review when addressing the division of income for tax purposes in their state legislatures, a concern she also expressed during the March Study Committee meeting as well. We were dismayed to see that this desire for legislative options was misinterpreted in Mr. Higer's report as being in support of a uniform law. A list of options from which legislators can choose does not make for good uniform laws. We are sure you all know looking at options is exactly what state legislatures have done since 1978 after the United States Supreme Court decision in *Moorman Manufacturing Co v. Bair* opened the door to state variations in the division of income. In

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this regard the members of the Task Force also agreed unanimously that any effort to provide options for corporate taxation would be inappropriate to the stated mission of NCCUSL and that organizations such as NCSL, CSG, ALEC or even the Multistate Tax Commission, which already is undertaking its own review of UDITPA are better positioned to provide these legislative options.

Finally, we respectfully urge that you go back to your core question in determining the need for a uniform law – whether it is desirable and achievable. We believe that over this past year the case regarding the revision of UDITPA has been made quite clear by taxpayers and elected state policymakers: NO! The Task Force appreciates the tireless efforts of NCCUSL members to produce uniform legislation in important and vital areas, however we would caution you not to squander your trusted trademark on an ill-conceived, ill-advised and unwarranted project.

On behalf of the members of the NCSL Task Force, we thank you for taking the concerns of state legislators under consideration and welcome the opportunity to discuss them further with you.

Sincerely,



Representative Christopher Rants, Iowa
Co-Chairs, NCSL Executive Committee Task Force on State and Local Taxation
of Communications & Electronic Commerce



Delegate Sheila Hixson, Maryland

The members of the NCSL Executive Committee Task Force on State and Local Taxation of Communications & Electronic Commerce present and voting unanimously to send this letter to the leadership of NCCUSL:

Delegate Sheila Hixson, Maryland, Co-Chair
Representative Christopher Rants, Iowa, Co-Chair
Senator Curtis Bramble, Utah
Assemblyman Upendra Chivukula, Deputy
Speaker, New Jersey
Senator Dwight Cook, North Dakota
Delegate John Doyle, West Virginia

Representative Mark Falzone, Massachusetts
Senator Carol Fukunaga, Hawaii
Assemblywoman Fiona Ma, California
Representative Mark Maddox, Tennessee
Representative Norman Major, New Hampshire
Representative Deb Peters, South Dakota

CC. Legislative Members of the National Conference of Commissioners on Uniform State Laws