

Revised Memorandum

TO: Michael Houghton, Chair, Scope & Program

FROM: Dale G. Higer, Chair, Study Committee to Revise UDITPA

DATE: June 30, 2009

SUBJECT: Report of Study Committee

The Study Committee to Revise the Uniform Division of Income for Tax Purposes Act met on Saturday, March 28, 2009 at the Hotel Sax Chicago. The following were in attendance: ULC Committee Members, Charles A. Trost, Robert J. Desiderio, Dale G. Higer, Daniel Robbins and William R. Breetz, Division Chair; Co-Reporters, Richard Pomp and Prentiss Wilson; ABA Section Advisor, Stephanie Galland Lipinski; ULC Chair of the Executive Committee, Robert A. Stein, ULC Executive Director, John A. Sebert, ULC President, Martha Lee Walters; Consultants, Michael J. McIntyre and Charles E. McLure; Advisors, Curtis S. Bramble from ALEC, Robert R. Damron from CSG, and Fiona Ma from NCSL. In addition, there were several Observers ranging from tax administrators to taxpayer representatives affected by UDITPA. The purpose of the meeting was to discuss certain provisions of UDITPA that the Co-Reporters felt needed to be revised to reflect changes in the economy and new methods of doing business that had occurred since UDITPA was adopted in 1957.

At the outset of the meeting, Chair, Charles A. Trost, announced that he was resigning as Chair and as a Member of the Committee because of a conflict of interest with one of his firm's clients. At the request of ULC President, Martha Lee Walters, Dale G. Higer served as Chair of the Committee. Initially, a statement was made by Diann Smith, of Sutherland Asbill & Brennan, which represents a number of taxpayers, that the Study Committee should recommend to Scope and the Executive Committee that the ULC should not revise UDITPA because most, if not all, affected taxpayers were opposed to any revisions and while UDITPA may be outdated, their clients were happy with UDITPA in its current form. Doug Lindhom from the the Council on State Taxation, a committee of the American Chamber of Commerce with six hundred members affected by UDITPA, stated that a survey of its members showed that 63% felt uniformity of the law in this area was desirable, but that 94% did not believe a consensus could be achieved and therefore would oppose any revision to UDITPA.

Joe Huddleston and Shirley Sicilian from the Multistate Tax Commission, which represents state officials who administer UDITPA in twenty-six states, stated there was a serious need to update UDITPA. This view was supported by Ben Miller from the California Franchise Tax Board. Curtis Bramble, a Utah State Senator representing ALEC, stated that the ULC should not undertake to revise UDITPA unless there was legislative support from the various states for the project. He, for one, would not support a revision of UDITPA. On the other hand, Fiona Ma, a California State Assemblywoman representing NCSL, would support a revision. Robert Damron, a Kentucky legislator

representing CSG, stated that the ULC should not proceed without the support of ALEC, CSG and NCSL.

The discussion on the various sections of UDITPA selected by the Co-Reporters elicited comments from tax administrators and consultants to the committee, but no taxpayer representative offered any suggestions or comments. At the end of the meeting, I instructed the Co-Reporters to draft a memo outlining the alternative courses the ULC could take. A copy of their memo is attached, together with an “Issues List” to which the reporters’ memo refers.

At the request of some members of the committee, a conference call of the committee members, co-reporters, consultants and ABA advisors was held on May 14th. Those participating in the conference call generally agreed that there was a need to update UDITPA, but the question was whether any resulting revision would be adopted by any state. Several members of the committee and I were of the opinion that any effort to revise UDITPA would result in total resistance by affected taxpayers and that the ULC would have another UCITA or UCC Article 2/2A result. One of our consultants disagreed and felt once we announced our plans to move forward affected taxpayers would participate in the drafting process. However, several members of the committee felt the study committee should explore with elected executive and legislative leaders of the states the need to revise UDITPA. The committee decided more time was necessary to explore more broadly the feasibility of undertaking a revision of the act and therefore asked Scope & Program in its May 26, 2009 Memorandum, the “Original Memorandum,” to give the committee until the January 2010 meeting of Scope to complete its work.

The Original Memorandum was sent out to all observers of the committee advising them that the recommendation of the committee contained in the Original Memorandum was a tentative decision and asked for comments to the Memorandum be provided to the Chair by June 22, 2009. Letters dated June 18, 2009 from Steve Kranz of the Sutherland firm, dated June 19, 2009 from the National Conference of State Legislatures, dated June 22, 2009 from the American Legislative Exchange Council, dated June 22, 2009 from the Council of State Taxation and dated June 29, 2009 from the Multistate Tax Commission were received. Copies of these letters are attached.

A conference call of the committee members, co-reporters, ABA advisor and observers was held on June 30, 2009. The committee, co-reporters and observers discussed whether the committee should be discharged or whether it should ask for more time to see if there was support for revising UDITPA among elected state officials. Those in favor of discharging the committee felt the proposed undertaking to revise UDITPA did not satisfy the following criteria of the Conference for considering an act: 1. Is uniformity desirable and practicable in this area today? Article 1 of the Constitution. See also § 1(b) of Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts (“Policy Statement”). 2. Is there a reasonable probability of enactment or will the act promote uniformity indirectly? § 1(c)(ii) of the Policy Statement. 3. Is it appropriate to proceed in light of our past experience, including the

controversy that surrounded our analogous effort to amend UCC 2 and create UCITA? § 1(f) of the Policy Statement. Those in favor of discharging the committee argued that even if the committee could revise UDITPA, there was little likelihood that it would be adopted by any state and the undertaking would be very controversial and possibly damaging to the reputation of the Conference. Those opposed to discharging the committee felt more time was necessary to see if there was support for the revision.

At the end of the discussion, the committee voted 5-2 to recommend to Scope and Program that the committee be discharged and that no further work be undertaken on UDITPA at this time, with the understanding that this recommendation should not preclude the Conference from reconsidering the decision at a later time if substantial support for revising UDITPA becomes apparent. The committee decided not to discuss whether the existing version of UDITPA should be withdrawn by the Conference.