

SUTHERLAND

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May 14, 2008

VIA EMAIL

Charles A. Trost, Esq.
Waller Lansden Dortch & Davis, PLLC
511 Union Street, Suite 2700
Nashville, Tennessee 37219-1760

Re: Opposition to NCCUSL Review of UDITPA

Dear Mr. Trost:

We write to urge you and the other members of the NCCUSL UDITPA Drafting Committee to table your work on NCCUSL's initiative to amend the Uniform Division of Income for Tax Purposes Act ("UDITPA"). Based upon NCCUSL's criteria that control whether the organization undertakes a uniform law drafting project, we believe that public input to date has clarified that these criteria are not satisfied. In fact, the business community unanimously opposes the effort. We request that at the May 30-31 meeting of the Drafting committee, Sutherland be allowed an opportunity to present why NCCUSL should not move forward with this effort. Below, we further explain our concerns in this regard.

NCCUSL Criteria to Undertake a Uniform Law Drafting Project

NCCUSL applies a standard set of criteria and procedures for designation and consideration of uniform acts. The relevant portions of NCCUSL's policy are reprinted in Appendix A from the Uniform Law Commission 2007-2008 Reference Book. It is our position that these criteria have not been met and are not capable of being met by this project.

The NCCUSL Study Committee, chaired by you, recommended the drafting project based on "review and discussion of the Report of Stakeholder's Meeting."¹ It is our understanding that you called and hosted a stakeholder's meeting and that a limited number of stakeholders² were invited to participate in a "preliminary discussion of the advisability of convening a drafting committee to revise UDITPA."³ This preliminary discussion turned out to

¹ See Memorandum from C. Trost to Study Committee, dated May 10, 2007.

² The stakeholders who participate in the meeting include the Multistate Tax Commission, the Federation of Tax Administrators, the California Franchise Tax Board – the sole state agency participating in this event – as well as the Council On State Taxation (COST) and the Tax Executives Institute (TEI). To our knowledge, no representatives from the legislative branch of government, or their representative associations, were invited.

³ See Memorandum from C. Trost to Study Committee, dated May 10, 2007.

be the *only discussion*, and formed the basis (along with three letters from the Multistate Tax Commission (“MTC”)), for your recommendation to proceed with the drafting effort. It is our position that additional consideration of the NCCUSL criteria is warranted, and that such consideration evidences the fact that this NCCUSL drafting project should be suspended.

The NCCUSL Study Committee’s recommendation does not discuss any of the pertinent NCCUSL criteria, nor does it relate the participants’ views on whether the review of UDITPA would be consistent with NCCUSL’s criteria to undertake such an initiative. Instead, the Committee’s recommendation simply relies on your report of the “preliminary” discussion with stakeholders. While the list of participating stakeholders is incomplete at best, the views expressed by that limited list of participants deserve review here, and support suspending the project.

It is important to note at the outset that the only two business organizations invited to attend the May 2007 preliminary discussion have clarified that they oppose the UDITPA project. Specifically, COST has stated, “we respectfully urge NCCUSL to table the UDITPA project.”⁴ TEI states that they “cannot support the project.”⁵ We are unaware of any other NCCUSL effort that was initiated despite such broad-based business opposition.

While each participant at the May 2007 meeting conceived of the potential utility of a review of UDITPA, even the MTC – the chief protagonist of NCCUSL’s review – cautioned that “in [Mr. Huddleston’s] view we should not set too high a bar for what would constitute success, observing that it took many years before UDITPA achieved widespread approval.”⁶ In a May 2, 2007, Memorandum sent to you, the MTC stated that, “[a]lthough various aspects of the apportionment rule will certainly be controversial, nonetheless there is a reasonable probability that amendments, like the original Act, can be accepted and enacted into law.”⁷ In a January 16, 2007 Memorandum sent to you, the MTC recognized that “state legislatures have modified the model Act in various ways which weaken its effectiveness for uniformity.” At no point does the MTC, or the Study Committee, appear to have considered the reality that state-by-state modifications to the original UDITPA reflect the lack of any “reasonable probability that an Act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly.”⁸

Indeed, in the meeting of stakeholders, COST stated that reworking UDITPA “not only will . . . be a problem for taxpayers, but there is also tension among the states—primarily between the market states and the producing states. [Mr. Lindholm] suggested an interesting

⁴ See letter from COST to C. Trost, dated January 10, 2008.

⁵ See letter from TEI to C. Trost, dated May 13, 2008.

⁶ See Memorandum from C. Trost to Study Committee, dated May 11, 2007.

⁷ Defining success for a revised UDITPA by reference to the enactment of the original Act is completely misplaced – only four states (identified below) are in substantial conformity to the original UDITPA – hardly a benchmark of success.

⁸ See **STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS** (January 13, 2001), Criteria 1(c)(ii).

approach would be to look at why states who have not adopted UDITPA have chosen not to and to focus on getting non-MTC states to join the MTC.” Reading the report of the meeting of stakeholders leads one to conclude that even the “preliminary” discussions suggest that the participants were not themselves convinced of the feasibility or likelihood of success of NCCUSL’s review of UDITPA. We do not understand how the Study Committee then voted unanimously to recommend revision of UDITPA without any further discussion or input from stakeholders. It appears to us, and to many other observers, that the decision to move forward had already been made and that the views of even the few stakeholders invited to the discussion were largely disregarded.

Were the NCCUSL criteria given public reconsideration in regard to this effort, we strongly believe that the proposed review and amendment of UDITPA would fail to satisfy these criteria. While it is well-settled that the subject matter of UDITPA is an appropriate one for state legislatures (*see* Criterion 1(a)), we urge reconsideration of the factors set forth in Criteria 1(b)-(f), because we do not believe that they warrant NCCUSL’s review and amendment of UDITPA.

UDITPA served its purpose in 1957, in light of then-prevailing concerns over recent U.S. Supreme Court decisions impacting the states’ ability to tax interstate commerce and the threat of federal preemptive legislation. However, the states’ movement away from UDITPA has been uniform (in fact, the *only* uniformity in state income taxation during the past 50 years); and, the states continue today to assert their interest in and rights to design their income tax regimes so as to ensure competitiveness on the multistate and multinational level. Taxpayers have abetted the states in the pursuit of this agenda. Since the beginning of 1957, NCCUSL’s Reference Book indicates that twenty-five states have fully adopted UDITPA and eleven states have “substantially similar” statutory language. In fact, when state laws are compared, only four states (Missouri, Montana, North Dakota, and Utah) have substantially similar language to the original UDITPA. Every other state has modified its law in ways that deviate dramatically from UDITPA’s core principles. State legislatures have adopted modifications and deviations from UDITPA for various reasons, not the least of which was to meet the needs of in-state businesses, thereby distinguishing their state from, and competing directly with, other states in order to attract jobs and business investments. In this arena, state competitiveness has equaled non-uniform tax provisions. No matter the starting point, uniformity in corporate tax treatment is contrary to the legislative desire to serve constituencies. Given this overriding pressure and undeniable trend, we believe that NCCUSL will not be well-served to undertake the proposed review and amendment of UDITPA at this time, if ever.

The following concerns inform our opposition to NCCUSL’s initiative to review and amend UDITPA:

- NCCUSL’s review of UDITPA does not appear to further the promotion of uniformity (Criterion 1(b)), or stated another way, uniformity has been shown to be neither desirable (based on states’ moves to de-conform from UDITPA as originally drafted) or practicable (based on the MTC’s self-acknowledged failure to achieve uniformity in state income taxation [methods] through the promulgation of model uniform statutes and regulations).

- The Coalition believes that NCCUSL's initiative will likely be undermined by the combined and respective efforts of states and taxpayers to de-conform from the current UDITPA, which underscores the concerns embodied in Criteria 1(c)(i) and (ii).
- Taking NCCUSL's past history and experience into account is both appropriate and required by Criterion 1(f). In this regard, the history of UDITPA demonstrates that revisiting the Act is "controversial because of disparities in social, economic or political policies or philosophies among the various States." (Criterion 1(f)(ii)).
- Assuming that the amendment of UDITPA does not have a reasonable prospect of directly achieving uniformity in state income taxation regimes, the question arises whether NCCUSL's amendment of UDITPA may nevertheless promote uniformity indirectly, in accordance with Criteria 1(c)(ii) and 1(e). However, even should states adopt specific particular provisions of the amended UDITPA (*see* Criterion 1(f)(iii)), uniformity will *not* be promoted absent the wholesale multistate adoption of the amended Act.

NCCUSL Funds Should Underwrite Drafting Initiatives with a Greater Probability of Ultimate Success

As noted above, an important aspect of NCCUSL's criteria relates to whether its past experience would countermand a request to undertake the UDITPA review initiative. Two recent NCCUSL initiatives demonstrate the risks associated with this particular project, and underscore the need for rigorous and continuing review of the feasibility of the UDITPA initiative.

- In one instance, the Uniform Computer Information Transactions Act ("UCITA") project, the inability of NCCUSL drafters, observers, and non-participants to reach consensus until the end of a prolonged drafting process presaged the failure of all but two states (Maryland and Virginia) to adopt that Act.
- In another instance, the Uniform Wage Withholding and Unemployment Insurance Procedures Act project, not a single state adopted the uniform definition of "wages" for tax purposes, although the theoretical justifications for doing so almost certainly exceed the justifications for uniform adoption of a state income tax regime such as UDITPA.

The fifty-year history of UDITPA tells an important story – one that presages failure for a rewrite effort. Since UDITPA's original adoption in 1957, its legislated ebb and flow demonstrates a lack of desire for tax base uniformity among the states. While administrative practice reform may be an appropriate subject for NCCUSL discussion, model legislation that purports to make fundamental tax base determinations for the states is not an appropriate subject for NCCUSL. If NCCUSL rewrites UDITPA, it is inevitable that modifications will continue to be made at the hands of legislatures, encouraged by state tax administrators and businesses alike. The NCCUSL Drafting Committee would be well-served to cease its work on UDITPA in light of these concerns. By doing so at an early stage in the process, the Drafting Committee would forestall draining limited NCCUSL resources. We are certain that in your concurrent role as Treasurer of NCCUSL, this is a consideration that resonates with you. With a surplus of

Charles A. Trost, Esq.

5/14/2008

Page 5

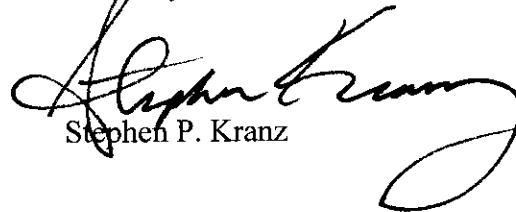
worthwhile projects undergoing constant review and assessment by NCCUSL, we believe that other projects can make a stronger claim today on the human and financial resources of NCCUSL.

**Sutherland Requests an Opportunity to Present
on This Question at the Upcoming UDITPA Drafting Committee Meeting**

At the upcoming May 30-31 meeting of NCCUSL's UDITPA Drafting Committee in Chicago, we will be prepared to present on the question presented herein and request that an opportunity be granted at the beginning of the meeting for such a discussion.

Thank you for considering the concerns outlined above. We request that you share our letter with the members of the NCCUSL Committee on Program and Scope, to seek their input.

Sincerely,


Stephen P. Kranz

cc: John A. Sebert, Executive Director
Martha Lee Walters, President
Robert A. Stein, Chair, Executive Committee
Michael Houghton, Chair, Committee on Scope and Program

Appendix A

STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS (January 13, 2001)

The Conference and its committees shall conform to the following criteria and procedures in proposing or considering Acts:

1. CRITERIA.

(a) The subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to the Congress. If it properly falls within the exclusive jurisdiction of the Congress, it is obviously not appropriate for legislation by the several States. However, if the subject matter is within the concurrent jurisdiction of the federal and state governments and the Congress has not pre-empted the field, it may be appropriate for action by the States and hence by the Conference.

(b) The subject matter must be such that approval of the Act by the Conference would be consistent with the objectives of the Conference, as stated in Article 1.2 of its Constitution: "to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable."

(c) Every Act drafted by the Conference shall conform to the following requirements:

(i) there shall be an obvious reason for an Act on the subject such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity;

(ii) there must be a reasonable probability that an Act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly;

(iii) the subject of the Act shall be such that uniformity of law among States will produce significant benefits to the public through improvements in the law (for example, facilitating interstate economic, social or political relations, or responding to a need common to many States as to which uniform legislation may be more effective, more efficient, and more widely and easily understood) or will avoid significant disadvantages likely to arise from diversity of state law (for example, the tendency of diverse laws to mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the States in their activities or dealings in other States or with citizens of other States or in moving from State to State).

(d) Experience demonstrates that Acts to accomplish the following purposes have met with the widest acceptance by state legislatures;

(i) *Acts to facilitate the flow of commercial transactions across state lines*, such as the Uniform Commercial Code;

(ii) *Acts to avoid conflict of laws when the laws of more than one State may apply to a transaction or series of transactions*, such as the Uniform Act on Transfers to Minors, the Uniform Certification of Questions of Law Act, the Uniform Child Custody Jurisdiction and Enforcement Act, the Uniform Interstate Family Support Act, and the Uniform Attendance of Out of State Witnesses Act;

(iii) *Acts without substantial interstate implications but conceived and drafted to fill emergent needs, to modernize antiquated concepts, or to codify the common law*, such as the Uniform Acts on Simultaneous Death, Limited Partnership, Partnership, Limited Liability Company, Rules of Evidence, Common Trust Fund, Principal and Income, and Fraudulent Transfers.

(e) Acts may promote uniformity indirectly as well as by substantially verbatim adoptions, as, for example, by:

(i) extensive adoptions in principle, such as the Uniform Alcoholism and Intoxication Treatment Act;

- (ii) impact on case law and teaching practices, such as the Uniform Rules of Evidence;
- (iii) gradually increasing adoptions, either in statutes or in case law, of particular sections or parts of a Uniform or Model Act addressing specific problems within the larger area to which the Act is directed, as for example, the Uniform Acts on Intestacy, Wills and Donative Transfers, Testamentary Additions to Trusts, Disclaimer of Property Interests, Statutory Rule Against Perpetuities, International Wills, Succession without Administration, Trustee Powers, Estate Tax Apportionment, Guardianship and Protective Proceedings, Durable Power of Attorney, and Nonprobate Transfers on Death, which address specific and discrete problems within the larger area to which the Uniform Probate Code is directed.

(f) As a general rule, the Conference should consider past experience in determining future projects and should avoid consideration of subjects that are:

- (i) entirely novel and with regard to which neither legislative nor administrative experience is available;
- (ii) controversial because of disparities in social, economic or political policies or philosophies among the various States; and
- (iii) of purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts.