



## Review of MTC Model Sales/Receipts

## Sourcing & Special Industry Regulations

### Draft Report to the Standing Subcommittee – July 21, 2022

Working Document – Subject to Change

#### PURPOSE

The MTC Uniformity Committee asked the Standing Subcommittee to review the sales/receipts sourcing rules in the MTC model General Allocation and Apportionment Regulations (GAARs) and special industry regulations (“SIRs”), to identify provisions that may need to be conformed, clarified, updated, or expanded. Depending on the types of issues identified, the subcommittee might make a range of recommendations back to the committee—including minor conforming edits, drafter’s notes, simple amendments, or work group projects to address larger issues.

#### APPROACH

This draft report captures potential issues for discussion by the subcommittee. It reviews and compares relevant provisions from the model regulations, providing basic explanatory notes and highlighting potential edits or cross-references and other questions for discussion. Those questions may include overlap or potential conflict between provisions and developments in the application of the rules.

#### BACKGROUND

The MTC has been drafting and recommending model apportionment regulations since its founding. (See a “Overview of Models and Related Developments” on the Standing Subcommittee webpage, here: <https://www.mtc.gov/Uniformity/Standing-Subcommittee>.)

The formulary apportionment approach followed by the MTC and taxing states is based on the Uniform Division of Income for Tax Purposes Act (“UDITPA”). But most states have modified the traditional UDITPA provisions in two consistent ways—sourcing service and intangible receipts to the market for those items and adopting heavy-weighted or single-sales (receipts)-factor formulas. (See data on the following pages.)

Today over three-quarters of taxing states have market-based sourcing and two-thirds have single-sales factor apportionment. Only 10% of the states still use an equally weighted three-factor formula (and some of those allow a single-sales factor election). In 2014, the MTC recommended model changes to UDITPA which follow market-based sourcing. In 2017, it adopted revisions to the model GAARs to implement that sourcing approach. The SIRs adopted in prior years were believed to be generally consistent with this approach. The MTC has not recommended a single-sales factor formula but its model UDITPA provisions (Section 9) provide for different weighting of the factors by states.

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## SPECIAL INDUSTRY REGULATIONS

MTC model SIRs may have different purposes. They may provide specialized rules that more fairly represent how the particular industry conducts its business activities. But they may also simply explain how the general apportionment rules are applied to the industry. So while the SIRs are adopted pursuant to Section 18's equitable apportionment authority, often they are consistent with Section 17 sourcing rules for services and intangibles. Also, the SIRs may focus on property and payroll factors as well as on the sales/receipts factor.

The 2017 revisions to the GAARs, implementing Section 17 market-based sourcing, now contain detailed examples which often apply to particular businesses in specific industries. It may be that these kinds of detailed examples can meet the need that was previously addressed by SIRs.

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## QUESTIONS RAISED THAT MAY BE RELEVANT TO REVIEW

Certain general questions have been raised by states, practitioners, taxpayers, and academics that may be relevant:

1. How can MTC model rules best maintain consistency without disrupting their use by states?
  2. Going forward, would it be better or easier to keep separate model SIRs or to integrate them (or their receipts sourcing provisions) into the GAARs.
  3. Do the MTC's apportionment regulations fully address and are they consistent with the use of a single-sales-factor approach, and if not, how should states modify those regulations? Example: Should states that have adopted SIRs make clear that they will not use property and payroll factors when applying those regulations?
  4. How should Section 18's standard—that the allocation and apportionment provisions “fairly represent the extent of the taxpayer's business activity in this State”— be applied in states that have adopted a single-sales-factor apportionment formula?
  5. Should a taxpayer with unitary businesses subject to both general regulations and SIRs (or different SIRs) apply separate formulas to the different income or use a combined approach?
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## GENERAL NOTES

The model regulation provisions included in this report are ones that appear to be most relevant for this review. Other provisions, including some detailed examples, have been omitted, but this is noted throughout.

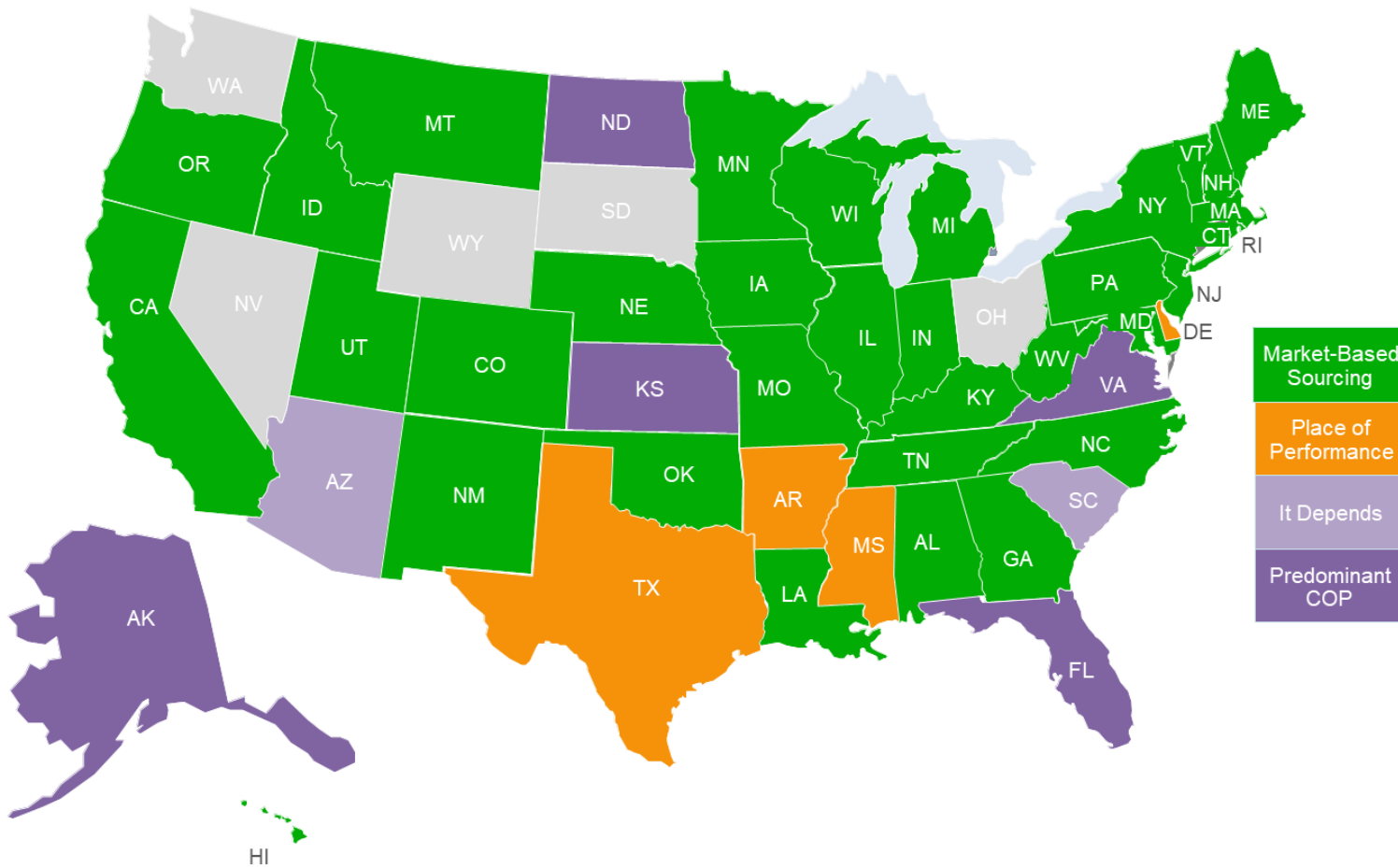
Also note that the numbering format for older regulations is different than for the more recent versions.

Full versions of the model regulations are available on the MTC website, here:

<https://www.mtc.gov/Uniformity/Adopted-Uniformity-Recommendations>.

This report is in Word so that users can view the Navigation Pane by going to the View tab and clicking on the box next to that option (then make sure Headings is clicked in the Navigation pane to the left). This will provide a general outline of the regulations in this report. It will also allow you to move around the document by clicking on a particular heading.

## Sales/Receipts Factor Sourcing



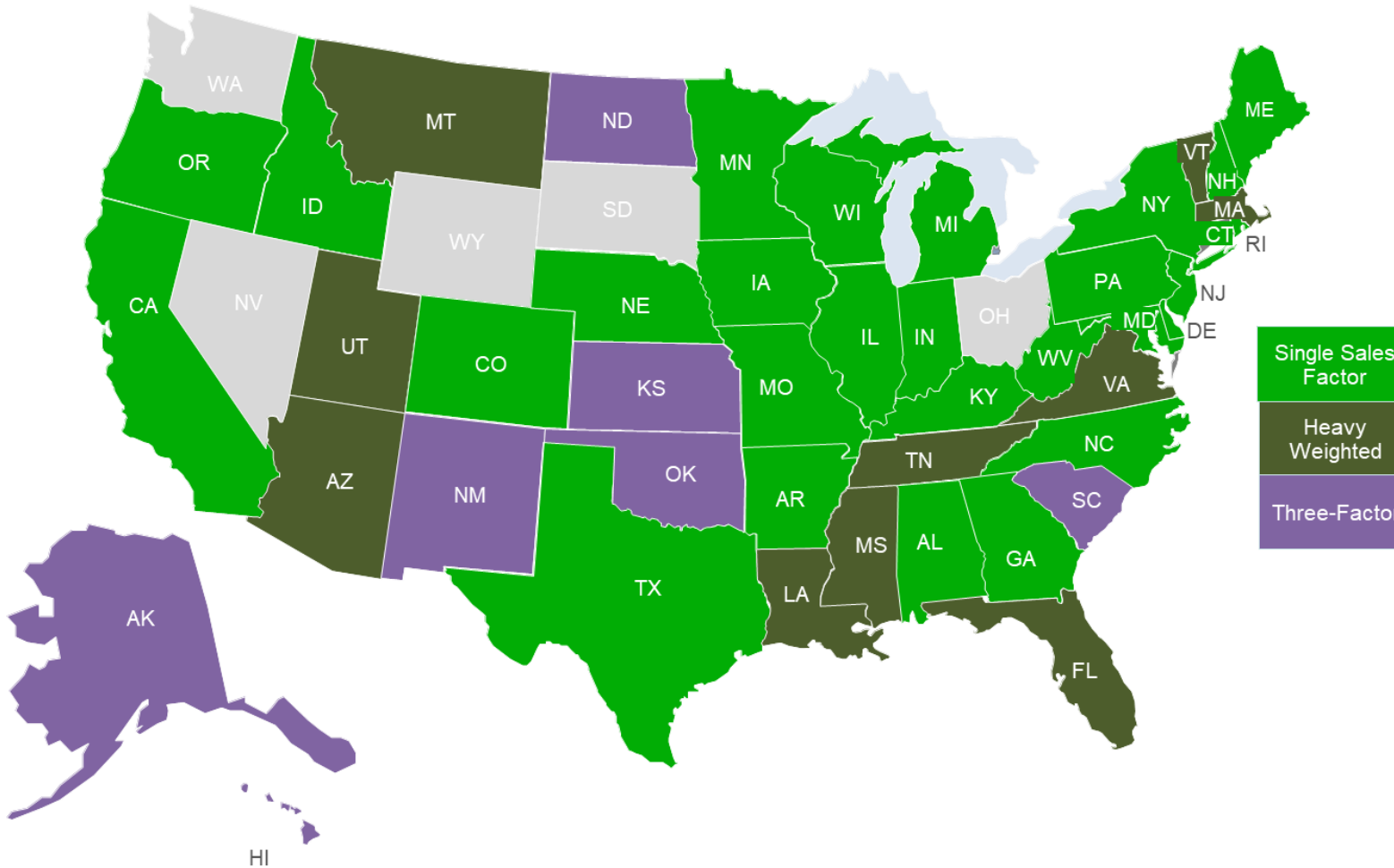
States Using Market-Based Sourcing: Alabama, Arizona (election), California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina (depends), Tennessee, Utah, Vermont, West Virginia, Wisconsin.

States Using Place of Performance: Arkansas, Delaware, Mississippi, Texas.

States Using Predominant Cost of Performance: Alaska, Arizona, Florida, Kansas, North Dakota, Virginia.

*NOTE: States using predominant cost of performance to source income producing activity may do so on a transaction-by-transaction approach, which may lead to the same result as market-based sourcing, and they may also have special industry rules that use market-based sourcing.*

## Sales/Receipts Factor Weighting



Single Sales Factor Apportionment: Alabama, Arizona (election), Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho (election out), Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi (certain industries), Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina (manufacturers), Texas, West Virginia, Wisconsin.

Heavy Weighted Sales Factor: Arizona, Florida, Louisiana, Massachusetts, Mississippi, Montana, Tennessee, Utah, Vermont, Virginia

Equally Weighted Three-Factor: (unless elected out): Alaska, Hawaii, Kansas, New Mexico, North Dakota, Oklahoma

## MTC Model Statutory Provisions (UDITPA)

### Relevant Provisions – MTC’s Uniform Division of Income for Tax Purposes (UDITPA):

#### Section 1.

(g) “Receipts” means all gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer’s trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

#### Section 9.

All apportionable income shall be apportioned to this State by multiplying the income by a fraction, [State should define its factor weighting fraction here. . . .]

Note: The MTC model Section 9 generally prescribe a 3-factor formula, with state-designated weighting of the factors, and other provisions of model regulations assume states will use 3 factors.

in Section 16, are in this State if the taxpayer’s market for the : for sales is in this state:

... .

(3) in the case of sale of a service, if and to the extent the service is delivered to a location in this state; and

(4) in the case of intangible property,

(i) that is rented, leased, or licensed, if and to the extent the property is used in this state, provided that intangible property utilized in marketing a good or service to a consumer is “used in this state” if that good or service is purchased by a consumer who is in this state; and

(ii) that is sold, if and to the extent the property is used in this state, provided that:

(A) a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area is “used in this state” if the geographic area includes all or part of this state;

(B) receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease or licensing of such intangible property under subsection (a)(4)(i); and

Note: Original UDITPA used the term “sales” even though the “sales factor” always included items that are not sales—including leasing and licensing. SIRs may use the term “sales factor.”

Note: The MTC’s recommended statutory definition of “receipts” is narrower than the original UDITPA’s definition of “sales” in two respects. First it includes only receipts from transactions in the regular course of trade or business. Second, it excludes receipts from hedging and security transactions. (But see further notes below.)

Note: Market-based sourcing states may use somewhat different terms including “delivery,” “receipt,” or “benefit received.” Also, states that apply (or have applied) predominant cost of performance for sourcing services may sometimes attribute receipts from intangibles to the place of use.

Note: In addition to excluding from “receipts” the receipts from hedging and securities (above), Sec. 17 specifically excludes certain sales of intangible property.

(C) all other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the receipts factor.

(b) If the state or states of assignment under subsection (a) cannot be determined, the state or states of assignment shall be reasonably approximated.

(c) If the taxpayer is not taxable in a state to which a receipt is assigned under subsection (a) or (b), or if the state of assignment cannot be determined under subsection (a) or reasonably approximated under subsection (b), such receipt shall be excluded from the denominator of the receipts factor. (d) [The tax administrator may prescribe regulations as necessary or appropriate to carry out the purposes of this section.]

Note: States that use market-based sourcing differ in the extent to which they would exclude receipts, but many would exclude receipts if their source cannot be reasonably approximated.

Issue: States adopting a single sales/receipts factor may need to consider how they may have interpreted and applied the term “business activity” and whether those interpretations continue to be consistent with the legislature’s determination to apportion income using only sales/receipts.

Issue: Model Section 18 may not be entirely compatible with states that use a single sales/receipts factor since the model provides for the “exclusion” of one or more factors.

### Section 18.

(a) If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of any one or more of the factors;
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or
- (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(b)

(1) If the allocation and apportionment provisions of this Article do not fairly represent the extent of business activity in this State of taxpayers engaged in a particular industry or in a particular transaction or activity, the tax administrator may, in addition to the authority provided in section (a), establish appropriate rules or regulations for determining alternative allocation and apportionment methods for such taxpayers.

(2) A regulation adopted pursuant to this section shall be applied uniformly, except that with respect to any taxpayer to whom such regulation applies, the taxpayer may petition for, or the tax administrator may require, adjustment pursuant to Section 18(a).

(c) The party petitioning for, or the [tax administrator] requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer’s income pursuant to subsection (a) must prove by [Drafter’s note: insert standard of proof here]:

- (1) that the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State; and
- (2) that the alternative to such provisions is reasonable. . . .

## General Allocation and Apportionment Regulations – “Receipts”

### Relevant Provisions - Reg. IV.2.(a). Definitions. . . .

**(6) “Receipts”** means all gross receipts of the taxpayer that are not allocated under paragraphs of Article IV, and that are received from transactions and activity in the regular course of the taxpayer's trade or business. The following are additional rules for determining "receipts" in various situations:

. . .

(F) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded. Receipts arising from a business activity are receipts from hedging, if the primary purpose of engaging in the business activity is to reduce the exposure to risk caused by other business activities. Whether events or transactions not involving cash or securities are hedging transactions shall be determined based on the primary purpose of the taxpayer engaging in the activity giving rise to the receipts, including the acquisition or holding of the underlying asset. Receipts from the holding of cash or securities, or maturity, redemption, sale, exchange, loan or other disposition of cash or securities are excluded from the definition of receipts whether or not those events or transactions are engaged in for the purpose of hedging. The taxpayer's treatment of the receipts as hedging receipts for accounting or federal tax purposes may serve as indicia of the taxpayer's primary purpose, but shall not be determinative.

(G) Receipts, even if apportionable income, are presumed not to include such items as, for example:

- 1) damages and other amounts received as the result of litigation;
- 2) property acquired by an agent on behalf of another;
- 3) tax refunds and other tax benefit recoveries;
- 4) contributions to capital;
- 5) income from forgiveness of indebtedness;

Note: Although the MTC recommended statutory definition of “receipts” excludes hedging and investment receipts, those receipts may be included and sourced under either the model Formula for the Apportionment and Allocation of Net Income of Financial Institutions or General Reg. 18.(c) (below).

6) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code; or

7) Amounts realized as a result of factoring accounts receivable recorded on an accrual basis.

Exclusion of an item from the definition of “receipts” is not determinative of its character as apportionable or non-apportionable income. Certain gross receipts that are “receipts” under the definition are excluded from the “receipts factor” under Section IV.17. Nothing in this definition shall be construed to modify, impair or supersede any provision of Section IV.18.

(7) "Security" means any interest or instrument commonly treated as a security as well as other instruments which are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.

Note: This definition of security is broad and would include things like an interest in a pass-through entity (which also is reflected in Sec. 17 regulations below). See notes above concerning when receipts from securities may be included under special industry regulations or Section 18.



## General Allocation and Apportionment Regulations – Section 17

### **NOTE on Structure:**

The Sec. 17 regulations (beginning on the next page) are very detailed. The sections of the model addressing the sourcing of receipts from services and intangibles, have the following structure:

#### **Reg. IV.17.(d). Sale of a Service**

- (1) General Rule
- (2) In-Person Services
- (3) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer
  - (A) In General
  - (B) Assignment of Receipts
    1. Delivery to or on Behalf of a Customer by Physical Means Whether to an Individual or Business Customer
    2. Delivery to a Customer by Electronic Transmission
    3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer
- (4) Professional Services

#### **Reg. IV.17.(e). License or Lease of Intangible Property**

- (1) General Rules
- (2) License of a Marketing Intangible
- (3) License of a Production Intangible
- (4) License of a Mixed Intangible
- (5) License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services

#### **Reg. IV.17.(f). Sale of Intangible Property**

- (A) Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area
- (B) Sale that Resembles a License (Receipts are Contingent on Productivity, Use or Disposition of the Intangible Property)
- (C) Sale that Resembles a Sale of Goods and Services

The Sec. 17 provisions often uses a hierarchy of sourcing rules – the rule of determination, a safe harbor rule, and or rules of reasonable approximation.

## Relevant Provisions - Reg. IV.17.

[NOTE: Certain provisions that appear to raise no issues for review have been omitted.]

### **Reg. IV. 17.(a). Receipts Factor: Sales Other Than Sales of Tangible Personal Property in This State: General Rules.**

In general, Article IV.17. provides for the inclusion in the numerator of the receipts factor of gross receipts arising from transactions other than sales of tangible personal property.

#### (1) Market-Based Sourcing.

. . . In general, the provisions in this section establish uniform rules for (1) determining whether and to what extent the market for a sale other than the sale of tangible personal property is in [state], (2) reasonably approximating the state or states of assignment where the state or states cannot be determined, (3) excluding receipts from the sale of intangible property . . . where the state or states of assignment cannot be determined or reasonably approximated, or where the taxpayer is not taxable in the state to which the receipts are assigned as determined under Article IV.3 and applicable regulations,

. . . [Omitted certain provisions here.]

#### (3) Definitions.

For the purposes of this Reg. IV.17 these terms have the following meanings:

. . . [Omitted certain provisions here.]

(E) “Intangible property” generally means property that is not physical or whose representation by physical means is merely incidental and includes, without limitation, . . . licenses; literary, musical, or artistic compositions; information; ideas; contract rights including broadcast rights; . . . securities; and, except as otherwise provided in Reg. IV.17, computer software. . . .

. . . [Omitted certain provisions here.]

(G) “Population” means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.

(H) “Related party” means:

(1) a stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 per cent of the value of the taxpayer's outstanding stock;

Note: The regulations define “intangible property” but not “services.”

Overlap: Throughout these general regulations there are rules that overlap with the SIRs on broadcasting (see “broadcast rights” here). Those general rules are fairly consistent but some differences exist—primarily in the rules of reasonable approximation.

Issue: Do any of the SIRs need a related-party rule?

(2) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 per cent of the value of the taxpayer's outstanding stock; or

(3) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 per cent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met. [or insert state definition]

(I) "State where a contract of sale is principally managed by the customer," means the primary location at which an employee or other representative of a customer serves as the primary contact person for the taxpayer with respect to the day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

. . . [Omitted certain provisions here.]

#### (4) General Principles of Application; Contemporaneous Records.

In order to satisfy the requirements of Reg. IV.17, a taxpayer's assignment of receipts from sales of other than tangible personal property must be consistent with the following principles:

(A) A taxpayer shall apply the rules set forth in Reg. IV.17 based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing including, without limitation, the taxpayer's books and records kept in the normal course of business. A taxpayer shall determine its method of assigning receipts in good faith, and apply it consistently with respect to similar transactions and year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, and shall provide those records to the [Agency] upon request.

(B) Reg. IV.17 provides various assignment rules that apply sequentially in a hierarchy. . . .

(C) A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the regulatory standards set forth in Reg. IV.17, rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

Issue: Should SIRs directly cross-reference this rule?

Issue: Should the SIRs reference this rule to the extent that there may be a need for reasonable approximation under those rules other than what is provided for?

#### (5) Rules of Reasonable Approximation.

(A) In General. In general, Reg. IV.17 establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in [state]. The regulation also sets forth rules of reasonable approximation, which apply if the state or states of assignment cannot be determined. . . .

(B) Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth in Reg. IV.17.(d). (Sale of a Service), a taxpayer can ascertain the state or states of assignment of a substantial portion of its receipts from sales of substantially similar services (“assigned receipts”), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales which it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. This rule also applies in the context of licenses and sales of intangible property where the substance of the transaction resembles a sale of goods or services. See Reg.s IV.17.(e).(5) and (f).(1)(C).

(C) Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this Reg. IV.17 from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

#### (6) Rules with Respect to Exclusion of Receipts from the Receipts Factor

(A) The receipts factor only includes those amounts defined as receipts under Article IV.1(g) and applicable regulations.

(B) Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor pursuant to Article IV.17(a)(4)(ii)(C). See Reg. IV.17.(f).(1)(D).

(C) In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Reg. IV.17 (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer’s receipts factor pursuant to Article IV. 17.(c). and these regulations.

(D) In a case in which a taxpayer can ascertain the state or states to which receipts from a sale are to be assigned pursuant to the applicable rules set forth in Reg. IV.17, but the taxpayer is not

Issue: Should the SIRs reference this rule (as in the case of the model publishing regulations below)?

taxable in one or more of those states, pursuant to Article IV.3 and applicable regulations, the receipts that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded from the denominator of the taxpayer's receipts factor pursuant to Article IV.17.(c).

(E) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded pursuant to Article IV.1.(g) and Art. IV.17.

Issue: Should the SIRs specifically reference this rule?

(7) Changes in Methodology; [tax administrator] Review

(A) No Limitation on Article IV.18 or Reg. IV.18. Nothing in the regulations adopted here pursuant to Article IV.17 is intended to limit the application of Article IV.18 or the authority granted to [the tax administrator] under Section 18. To the extent that regulations adopted pursuant to Section 18 conflict with provisions of these regulations adopted pursuant to Section 17, the regulations adopted pursuant to Section 18 control. If the application of Section 17 or the regulations adopted pursuant thereto result in the attribution of receipts to the taxpayer's receipts factor that does not fairly represent the extent of the taxpayer's business activity in [state], the taxpayer may petition for or [the tax administrator] may require the use of a different method for attributing those receipts.

. . . [Omitted certain provisions here.]

**Reg. IV.17.(d). Sale of a Service.**

(1) General Rule.

The receipts from a sale of a service are in [state] if and to the extent that the service is delivered to a location in [state]. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth at Reg.s IV.17.(d).(2)-(4).

Note: Presumably, we would not consider any SIR issues to cover "in-person" services other than construction.

(2) In-Person Services.

(A) In General.

Except as otherwise provided in this Reg. IV.17.(d).(2), in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer's real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services

Overlap: This in-person rule sourcing (location) is consistent with the SIR for construction contractors—which primarily addresses how to apply the apportionment rules when different tax/accounting methods are used.

include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry; construction contractor services; pest control; landscape services; medical and dental services, including medical testing, x-rays and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer’s real or tangible personal property. Various professional services, including legal, accounting, financial and consulting services, and other similar services as described in Reg. IV.17.(d).(4), although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this Reg. IV.17.(d).(2).

(B) Assignment of Receipts.

1. Rule of Determination. Except as otherwise provided in this Reg. IV.17.(d).(2)(B), if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. . . .

. . . [Omitted certain provisions here.]

(3) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

(A) In General.

If the service provided by the taxpayer is not an in-person service within the meaning of Reg. IV.17.(d).(2) or a professional service within the meaning of Reg. IV.17(d)(4), and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in [state] if and to the extent that the service is delivered in [state]. For purposes of this Reg. IV.17.(d).(3), a service that is delivered “to” a customer is a service in which the customer and not a third party is the recipient of the service. A service that is delivered “on behalf of” a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services, or the direct or indirect delivery of advertising to the customer’s intended audience (see Reg. IV.17.(d).(3)(B)1 and Example (iv) under (d).(3)(B)1.c.). A service can be delivered to or on behalf of a customer by physical means or through electronic transmission. A service that is delivered electronically “through” a customer is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient.

## (B) Assignment of Receipts.

The assignment of receipts to a state or states in the instance of a sale of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this Reg. IV.17.(d).(3), a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this Reg. IV.17.(d).(3), depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. If the state to which the receipts from a sale are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

Note: This is the first subcategory of these services.

Note: Advertising here is limited to "in the form of a physical medium," but see the section on "Services Delivered Electronically Through or on Behalf" of a customer below.

Overlap: This rule for product delivery service may overlap/conflict with the SIRs for trucking companies (below). See specific example, as part of this general regulation, on the following page.

1. Delivery to or on Behalf of a Customer by Physical Means Whether to an Individual or Business Customer. Services delivered to a customer or on behalf of a customer through a physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers or other direct mail services; the delivery of advertising or advertising-related services to the customer's intended audience in the form of a physical medium; and the sale of custom software (e.g., where software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of corporate taxation) where the taxpayer installs the custom software at the customer's site. The rules in this Reg. IV.17.(d).(3)(B)1. apply whether the taxpayer's customer is an individual customer or a business customer.

a. Rule of Determination. In assigning the receipts from a sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.

b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate the state or states.



c. Examples:

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D).

Example (i). Direct Mail Corp, a corporation based outside [state], provides direct mail services to its customer, Business Corp. Business Corp contracts with Direct Mail Corp to deliver printed fliers to a list of customers that is provided to it by Business Corp. Some of Business Corp's customers are in [state] and some of those customers are in other states. Direct Mail Corp will use the postal service to deliver the printed fliers to Business Corp's customers. The receipts from the sale of Direct Mail Corp's services to Business Corp are assigned to [state] to the extent that the services are delivered on behalf of Business Corp to [state] customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in [state]).

Example (ii). Ad Corp is a corporation based outside [state] that provides advertising and advertising-related services in [state] and in neighboring states. Ad Corp enters into a contract at a location outside [state] with an individual customer who is not a [state] resident to design advertisements for billboards to be displayed in [state], and to design fliers to be mailed to [state] residents. All of the design work is performed outside [state]. The receipts from the sale of the design services are in [state] because the service is physically delivered on behalf of the customer to the customer's intended audience in [state].

Example (iii). Same facts as example (ii), except that the contract is with a business customer that is based outside [state]. The receipts from the sale of the design services are in [state] because the services are physically delivered on behalf of the customer to the customer's intended audience in [state].

Example (iv). Fulfillment Corp, a corporation based outside [state], provides product delivery fulfillment services in [state] and in neighboring states to Sales Corp, a corporation located outside [state] that sells tangible personal property through a mail order catalog and over the Internet to customers. In some cases when a customer purchases tangible personal property from Sales

Overlap: The audience factor here is consistent with the SIRs for publishing and broadcasting.

Overlap: Again, the audience factor here is consistent with SIRs for publishing and broadcasting.

Overlap/Conflict: The method in this example is different than the general method used in the SIR for trucking companies. This may be a place where we should resolve a potential conflict between the regulations.



Corp to be delivered in [state], Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside [state]. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to [state] to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in [state].

Example (v). Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in [state], to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside [state], and then physically installs the software on Buyer Corp's computer hardware located in [state]. The development and sale of the custom software is properly characterized as a service transaction, and the receipts from the sale are assigned to [state] because the software is physically delivered to the customer in [state].

Example (vi). Same facts as Example (v), except that Buyer Corp has offices in [state] and several other states, but is commercially domiciled outside [state] and orders the software from a location outside [state]. The receipts from the development and sale of the custom software service are assigned to [state] because the software is physically delivered to the customer in [state].

2. Delivery to a Customer by Electronic Transmission. Services delivered by electronic transmission include, without limitation, services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following rules apply.

a. Services Delivered By Electronic Transmission to an Individual Customer.

i. Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in [state] if and to the extent that the taxpayer's customer receives the service in [state]. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.

ii. Rules of Reasonable Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has

Note: This is the second subcategory of these services—which is divided between individual and business customers (below).

sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states. If a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall reasonably approximate the state or states using the customer's billing address.

b. Services Delivered By Electronic Transmission to a Business Customer.

i. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in [state] if and to the extent that the taxpayer's customer receives the service in [state]. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this Reg. IV.17.(d).(3)(B)2.b., it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.

ii. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states.

iii. Secondary Rule of Reasonable Approximation. In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, the taxpayer shall reasonably approximate the state or states as set forth in this regulation. In these cases, unless the taxpayer can apply the safe harbor set forth in Reg.IV.17.(d).(3)(B)2.b.iv., the taxpayer shall reasonably approximate the state or states in which the service is received as follows: first, by assigning the receipts from the sale to the state where the contract of sale is principally managed by the customer; second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the receipts from the sale to the customer's place of order; and third, if the customer's place of order is not reasonably determinable, by assigning the receipts from the sale using the customer's billing address; provided, however, if the taxpayer derives more than 5% of its receipts from

Issue: Have there been difficulties in applying these rules?

Issue: Again, do any of the SIRs need to explicitly incorporate or reference the related party transaction rules?

sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

iv. Safe Harbor. In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate under Reg. IV.17.(d).(3)(B)2.b.ii., the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at Reg. IV.17.(d).(3)(B)2.b.iii., apply the safe harbor stated in this subsection. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of [omitted reference] services delivered by electronic transmission to a business customer, and not otherwise.

v. Related Party Transactions. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in Reg. IV.17.(d).(3)(B)2.b.iii but may use the rule of reasonable approximation in Reg. IV.17.(d).(3)(B)2.b.ii, and the safe harbor in Reg. IV.17.(d).(3)(B)2.b.iv, provided that [the tax administrator] may aggregate sales to related parties in determining whether the sales exceed 5% of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

c. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is not related to either the customer to which the service is delivered. Also, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D). Further, assume if relevant, unless otherwise stated, that the safe harbor set forth at Reg. IV.17.(d).(3)(B)2.b.iv does not apply.

. . . [Omitted certain examples here.]

Note: This is the third subcategory of these services.

Overlap – The audience factor here (as with the similar provision in the subsection above) is consistent with the SIRs for publishing and broadcasting.

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically “on behalf of” the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer’s intended audience. A service delivered electronically “through” a customer to third-party recipients is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.

a. Rule of Determination. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in [state] if and to the extent that the end users or other third-party recipients are in [state]. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer’s intended audience by electronic means, the service is delivered in [state] to the extent that the audience for the advertising is in [state]. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in [state] to the extent that the end users or other third-party recipients receive the services in [state]. The rules in this subsection Reg. IV.17(d).(3)(B)3.a. apply whether the taxpayer’s customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.

b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate the state or states.

c. Select Secondary Rules of Reasonable Approximation.

i. If a taxpayer’s service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer’s intended audience, and if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state

for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in that area.

ii. If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that service to end users or other third party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third party recipients from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells the services, relative to the total population in that area.

iii. When using the secondary reasonable approximation methods provided above, the relevant specific geographic area [of delivery] include only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

d. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D).

*Example (i).* Cable TV Corp, a corporation that is based outside of [state], has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in

Issue: Population may not always lead to fair apportionment of advertising revenue, depending on whether pricing and circulation are comparable, when areas outside the U.S. are included.

Overlap: This example demonstrates there may be overlap between this regulation and the SIR for broadcasters.

[state]. Second, Cable TV Corp sells monthly subscriptions to individual customers in [state] and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to [state] to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in [state]. See Reg. IV.17.(d).(3)(B)3.a. If Cable TV Corp is unable to determine the actual location of its audience for the programming, and lacks sufficient information regarding audience location to reasonably approximate the location, Cable TV Corp must approximate its [state] audience using the percentage that reflects the ratio of its [state] subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. See Reg. IV.17.(d).(3)(B)3.c.i. To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to [state] in any case in which the programming is received by a customer in [state]. See Reg. IV.17.(d).(3)(B)2.a. In any case in which Cable TV Corp cannot determine the actual location where the programming is received, and lacks sufficient information regarding the location of receipt to reasonably approximate the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to [state] where its customer's billing address is in [state]. See Reg. IV.17.(d).(3)(B)2.a.ii. Note that whether and to the extent that the monthly subscription fee represents a fee for a service or for a license of intangible property does not affect the analysis or result as to the state or states to which the receipts are properly assigned. See Reg. IV.17.(e).(5).

*Example (ii).* Network Corp, a corporation that is based outside of [state], sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming as distributed by unrelated cable television and satellite television transmission companies. The receipts from Network Corp's sale of advertising time to its business customers are assigned to [state] to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in [state]. See Reg. IV.17.(d).(3)(B)3.a. If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding audience location to reasonably approximate the location, Network Corp must approximate the receipts from sales of

Overlap: This example also overlaps the SIR for broadcasting.

Overlap/Conflict: The SIR for broadcasting does not provide for a rule using population. Rather, those regulations use ratings statistics.

Note: Neither the broadcasting nor publishing regulations directly address digital advertising—but this regulation is consistent with the audience factor used in both of those SIRs.

advertising that constitute [state] sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the [state] population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. See Reg. IV.17.(d).(3)(B)3.c.ii. and iii. In any case in which Network Corp's receipts would be assigned to a state in which Network Corp is not taxable, the receipts must be excluded from the denominator of Network Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

*Example (iii).* Web Corp, a corporation that is based outside [state], provides Internet content to viewers in [state] and other states. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. The receipts from Web Corp's sale of advertising space to its business customers are assigned to [state] to the extent that the viewers of the Internet content are in [state], as measured by viewings or clicks. See Reg. IV.17.(d).(3)(B)3.a. If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of its viewers to reasonably approximate the location, Web Corp must approximate the amount of its [state] receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the [state] population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. See Reg. IV.17.(d).(3)(B)3.c. In any case in which Web Corp's receipts would be assigned to a state in which Web Corp is not taxable, those receipts must be excluded from the denominator of Web Corp's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D).

*Example (iv).* Retail Corp, a corporation that is based outside of [state], sells tangible property through its retail stores located in [state] and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or



prospective customers on behalf of Retail Corp, and must assign the proceeds from this service to the state or states from which the phone calls are placed by the customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate the locations, Answer Co must approximate the amount of its [state] receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the [state] population in the specific geographic area from which the calls are placed relative to the total population in that area. See Reg. IV.17.(d).(3)(B)3.c.i. Answer Co's receipts must also be excluded from the denominator of its receipts factor in any case in which the receipts would be assigned to a state in which Answer Co is not taxable. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

*Example (v).* Web Corp, a corporation that is based outside of [state], sells tangible property to customers via its Internet website. Design Co. designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co.'s services are delivered to Web Corp, the proceeds from which are assigned pursuant to Reg. IV.17.(d).(3)(B)2. The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co.'s services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

*Example (vi).* Wholesale Corp, a corporation that is based outside [state], develops an Internet-based information database outside [state] and enters into a contract with Retail Corp whereby Retail Corp will market and sell access to this database to end users. Depending on the facts, the provision of database access may be either the sale of a service or the license of intangible property or may have elements of both, but for purposes of analysis it does not matter. See Reg. IV.17.(e).(5). Assume that on the particular facts applicable in this example Wholesale Corp is selling database access in transactions properly characterized as involving the performance of a service. When an end user purchases access to Wholesale Corp's database from Retail Corp, Retail Corp in turn compensates Wholesale Corp in connection with that transaction. In this case, Wholesale Corp's services are being delivered through Retail Corp to the end user. Wholesale Corp must assign its receipts

Issue: We define "intangible property" but not "service" although the interpretation of that terms may be inferred from the context in which is used. The difference may or may not affect sourcing.



from sales to Retail Corp to the state or states in which the end users receive access to Wholesale Corp's database. If Wholesale Corp cannot determine the state or states where the end users actually receive access to Wholesale Corp's database, and lacks sufficient information regarding the location from which the end users access the database to reasonably approximate the location, Wholesale Corp must approximate the extent to which its services are received by end users in [state] by using a percentage that reflects the ratio of the [state] population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in that area. See Reg. IV.17(d).(3)(B)3.c.ii. Note that it does not matter for purposes of the analysis whether Wholesale Corp's sale of database access constitutes a service or a license of intangible property, or some combination of both. See Reg. IV.17.(e).(5). In any case in which Wholesale Corp's receipts would be assigned to a state in which Wholesale Corp is not taxable, the receipts must be excluded from the denominator of Wholesale Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

#### (4) Professional Services.

##### (A) In General.

Except as otherwise provided in this Reg. IV.17.(d).(4), professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. These services include the performance of technical services that require the application of specialized knowledge. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

##### (B) Overlap with Other Categories of Services.

. . . [Omitted the provisions distinguishing in-person from professional services here.]

##### (C) Assignment of Receipts.

In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, the location of delivery in the case of

Overlap: There may be overlap between the category of professional services and the SIRs for financial institutions and bank holding companies. This overlap is addressed in the Sec. 17 rules, specifically, below.

professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from a sale of a professional service depends in many cases upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the receipts from a sale of a professional service, a taxpayer's customer is the person that contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer's services. In any instance in which the taxpayer is not taxable in the state to which receipts from a sale is assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor. *See* Article IV.17(c) and Reg. IV.17.(a).(6)(D).

1. General Rule. Receipts from sales of professional services other than those services described in Reg. IV.17.(d).(4)(C)2. (architectural and engineering services), Reg. IV.17(d).(4)(C)3. (services provided by a financial institution) and Reg. IV.17(d).(4)(C)4. (transactions with related parties) are assigned in accordance with this Reg. IV.17.(d).(4)(C)1.

a. Professional Services Delivered to Individual Customers. Except as otherwise provided in Reg. IV.17(d)(4) (see in particular Reg. IV.17.(d).(4)(C)4, in any instance in which the service provided is a professional service and the taxpayer's customer is an individual customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this Reg. IV.17.(d).(4)(C)1.a. In particular, the taxpayer shall assign the receipts from a sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.

b. Professional Services Delivered to Business Customers. Except as otherwise provided in Reg. IV.17.(d).(4), in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth at Reg. IV.17.(d).(4)(C)1.c., the taxpayer shall assign the receipts from the sale as follows: first, by assigning the receipts to the state where the contract of sale is principally managed by the customer; second, if the place of customer management is not reasonably determinable, to the customer's place of order; and third, if the customer place of order is not reasonably determinable, to the customer's billing

address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

c. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in Reg. IV.17.(d).(4)(C)1.a. and b., a taxpayer may assign its receipts from sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of Reg. IV.17.(d).(4)(C)1. and not otherwise.

2. Architectural and Engineering Services with respect to Real or Tangible Personal Property. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this Reg. IV.17.(d)(4). However, unlike in the case of the general rule that applies to professional services, (1) the receipts from a sale of an architectural service are assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in the state or states; and (2) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in Reg. IV.17(d)(4)(C)2, the receipts from a sale of these services must be assigned under the general rule for professional services. See Reg. IV.17.(d).(4)(C)1.

3. Services Provided by a Financial Institution. The apportionment rules that apply to financial institutions are set forth at [financial institutions special apportionment statute or regulation]. [Drafter's Note: not all states have special industry rules or statutes for sourcing financial institution income.] That [financial institutions special apportionment statute or regulation] includes specific rules to determine a financial institution's receipts factor. However, [the statute or regulation] also provides that receipts from sales, other than sales of tangible personal property, including service transactions, that are not otherwise apportioned under [the statute or regulation], are to be assigned pursuant to Article IV.17. and these regulations. In any instance in which a financial institution performs services that are to be assigned pursuant to Article IV.17. and these regulations including, for example, financial custodial services, those services are considered professional services within the

Overlap: This is an example where these Sec. 17 general regulations reference particular SIRs.

Issue: Again, this is an example of how related-party transactions are generally handled—and could potentially be referenced or considered as part of certain SIRs.

meaning of this Reg. IV.17(d)(4), and are assigned according to the general rule for professional service transactions as set forth at Reg. IV.17.(d).(4)(C)1.

**4. Related Party Transactions.** In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers in Reg. IV.17.(d).(4)(C)1.b, the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or (2) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states. The taxpayer may use the safe harbor provided by Reg. IV.17.(d).(4)(C)1.c provided that [the tax administrator] may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

#### 5. Examples:

Unless otherwise stated, assume in each of these examples, where relevant, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in the examples that the receipts must be excluded from the denominator of the taxpayer's receipts factor, see Article IV.17(c) and Reg. IV.17.(a).(6)(D). Assume also that the customer is not a related party and that the safe harbor set forth at Reg. IV.17.(d).(4)(C)1.c<sub>2</sub> does not apply.

*Example (i).* Broker Corp provides securities brokerage services to individual customers who are resident in [state] and in other states. Assume that Broker Corp knows the state of primary residence for many of its customers, and where it does not know this state of primary residence, it knows the customer's billing address. Also assume that Broker Corp does not derive more than 5% of its receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. See Reg. IV.17.(d).(4)(C)1.a.

*Example (ii).* Same facts as in Example (i), except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives 5% or less of its receipts from sales of all services must be assigned as described in example 1. For each customer from whom it derives more than 5% of its receipts from sales of all services, Broker Corp is required to determine the customer's state of primary residence and must assign the receipts from the services provided to that customer to that state. In any case in which a 5% customer's state of primary residence is [state], receipts from a sale made to that customer must be assigned to [state]; in any case in which a 5% customer's state of primary residence is not [state] receipts from a sale made to that customer are not assigned to [state]. Where receipts from a sale are assigned to a state other than [state], if the state of assignment (i.e., the state of primary residence of the individual customer) is a state in which Broker Corp is not taxable, receipts from the sales must be excluded from the denominator of Broker Corp's receipts factor. See Reg. IV.17.(d).(4)(C)1, Article IV.17(c) and Reg. IV.17.(a).(6)(D).

. . . [Omitted certain examples here.]

*Example (ix).* Bank Corp provides financial custodial services to 100 individual customers who are resident in [state] and in other states, including the safekeeping of some of its customers' financial assets. Assume for purposes of this example that Bank Corp knows the state of primary residence for many of its customers, and where it does not know this state of primary residence, it knows the customer's billing address. Also assume that Bank Corp does not derive more than 5% of its receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in Reg. IV.17.(d).(4)(C)1.c. If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to [state] if the customer's state of primary residence (or billing address, in cases where it does not know the customer's state of primary residence) is in [state], even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than [state]. See Reg. IV.17.(d).(4)(C)1.a.

*Example (x).* Same facts as Example (ix), except that Bank Corp has more than 250 customers, individual or business. Bank Corp may apply the safe harbor for

Overlap: The SIRs for financial institutions do not specifically address "custodial services." But those regulations do address "receipts from services" which reference back to these Sec. 17 regulations.

professional services stated in Reg. IV.17.(d).(4)(C)1.c., and may assign its receipts from sales to a state or states using each customer's billing address.

*Example (xi).* Same facts as Example (x), except that Bank Corp derives more than 5% of its receipts from sales from a single individual customer. As to the sales made to this customer, Bank Corp is required to determine the individual customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state. See Reg. IV.17.(d).(4)(C)1.a. and (C)3. Receipts from sales to all other customers are assigned as described in Example (x).

*Example (xii).* Advisor Corp, a corporation that provides investment advisory services, provides these advisory services to Investment Co. Investment Co is a multistate business client of Advisor Corp that uses Advisor Corp's services in connection with investment accounts that it manages for individual clients, who are the ultimate beneficiaries of Advisor Corp's services. Assume that Investment Co's individual clients are persons that are resident in numerous states, which may or may not include [state]. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in [state], receipts from the sale of Advisor Corp's services are assigned to [state]. It is not relevant for purposes of the analysis that the ultimate beneficiaries of Advisor Corp's services may be Investment Co's clients, who are residents of numerous states. See Reg. IV.17.(d).(4)(C)1.b.

*Example (xiii).* Advisor Corp provides investment advisory services to Investment Fund LP, a partnership that invests in securities and other assets. Assuming that Advisor Corp knows that its agreement with Investment Fund LP is principally managed by Investment Fund LP in [state], receipts from the sale of Advisor Corp's services are assigned to [state]. See Reg. IV.17.(d).(4)(C)1.b. Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

*Example (xiv).* Design Corp is a corporation based outside [state] that provides graphic design and similar services in [state] and in neighboring states. Design Corp enters into a contract at a location outside [state] with an individual customer to design fliers for the customer. Assume that Design Corp does not know the individual customer's state of primary residence and does not derive more than 5% of its receipts from sales of services from the individual customer. All of the design work is performed outside [state]. Receipts from the sale are in [state] if the customer's billing address is in [state]. See Reg. IV.17.(d).(4)(C)1.a.

Issue: In examples (xii) and (xiii) here, the professional advisory services would be sourced to where the business customer is and not to its own clients (for whom it may have a fiduciary relationship). A minority of states have adopted a rule for mutual funds or other regulated investment companies or advisors where receipts from the services provided are sourced to the ultimate investor. Would that be consistent with the rules for professional services generally? Should it be addressed?

## **Reg. IV.17.(e). License or Lease of Intangible Property.**

### **(1) General Rules.**

(A) The receipts from the license of intangible property are in [state] if and to the extent the intangible is used in [state]. In general, the term “use” is construed to refer to the location of the taxpayer’s market for the use of the intangible property that is being licensed and is not to be construed to refer to the location of the property or payroll of the taxpayer. The rules that apply to determine the location of the use of intangible property in the context of several specific types of licensing transactions are set forth at Reg. IV.17.(e).(2)-(5). For purposes of the rules set forth in this Reg. IV.17.(e)., a lease of intangible property is to be treated the same as a license of intangible property.

(B) In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of Reg. IV.17. See Reg. IV.17.(f). Note, however, that for purposes of Reg.s IV.17.(e). and (f)., a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.

(C) Intangible property licensed as part of the sale or lease of tangible property is treated under Reg. IV.17 as the sale or lease of tangible property.

(D) In any instance in which the taxpayer is not taxable in the state to which the receipts from the license of intangible property are assigned, the receipts are excluded from the denominator of the taxpayer’s receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

(E) Nothing in this Reg. IV.17.(e). shall be construed to allow or require inclusion of receipts in the receipts factor that are not included in the definition of “receipts” pursuant to Article IV.1.(g). or related regulations, or that are excluded from the numerator and the denominator of the receipts factor pursuant to Article IV.17.(a).(4)(ii)(C). For examples of the types of intangibles that are excluded pursuant to Article IV.1(g), see Reg. IV [insert cross-reference]. For examples of the types of intangibles that are excluded pursuant to Article IV.17.(a).(4)(ii)(C), see Reg. IV.17.(f).(1)(D). So, to the extent that the transfer of either a security, as defined in [cross-reference], or business “goodwill” or similar intangible value, including, without limitation, “going concern value” or “workforce in place,” may be characterized as a license or lease of intangible property, receipts from such transaction shall be excluded from the numerator and the denominator of the taxpayer’s receipts factor.

Issue: The SIR for broadcasters may overlap or possibly conflict somewhat with the result under this general rule. See that SIR's treatment of "films" below.

## (2) License of a Marketing Intangible.

Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items (i.e., a marketing intangible) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to [state] to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in [state]. Examples of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or trade name; certain copyrights; the license of a film, television or multimedia production or event for commercial distribution; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales. In the case of the license of a marketing intangible, where a taxpayer has actual evidence of the amount or proportion of its receipts that is attributable to [state], it shall assign that amount or proportion to [state]. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from [state] consumers, the portion of the licensing fee to be assigned to [state] must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the [state] population in the specific geographic area in which the licensee makes material use of the intangible property to regularly market its goods, services or other items relative to the total population in that area. If the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the portion of the licensing fee to be assigned to [state] must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the [state] population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

## (3) License of a Production Intangible.

If a license is granted for the right to use intangible property other than in connection with the sale, lease, license, or other marketing of goods, services, or other items, and the license is to be used in a production capacity (a "production intangible"), the licensing fees paid by the licensee for that right are assigned to [state] to the extent that the use for which the fees are paid takes place in [state]. Examples of a license of a production intangible include, without limitation, the license of a patent, a copyright, or trade secrets to be used in a manufacturing process, where the value of the intangible lies predominately in its use in that process. In the case of a license of a production intangible to a party other than a related party where the location of actual use is unknown, it is presumed that the use of the intangible property takes place in the state of the licensee's commercial domicile (where the licensee is a business) or the licensee's state of primary residence (where the licensee is an individual). If the [tax administrator] can reasonably establish



that the actual use of intangible property pursuant to a license of a production intangible takes place in part in [state], it is presumed that the entire use is in this state except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside [state]. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.

(4) License of a Mixed Intangible.

If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible (a “mixed intangible”) and the fees to be paid in each instance are separately and reasonably stated in the licensing contract, the [tax administrator] will accept that separate statement for purposes of Reg. IV.17. If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible and the fees to be paid in each instance are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the [tax administrator] can reasonably establish otherwise.

(5) License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services.

(A) In general.

In some cases, the license of intangible property will resemble the sale of an electronically-delivered good or service rather than the license of a marketing intangible or a production intangible. In these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in Reg. IV.17.(d).(3)(B)2 and 3, as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this Reg. IV.17.(e).(5) include, without limitation, the license of database access, the license of access to information, the license of digital goods (*see* Reg. IV.17.(g).(2)), and the license of certain software (*e.g.*, where the transaction is not the license of pre-written software that is treated as the sale of tangible personal property, *see* Reg. IV.17.(g).(1)).

(B) Sublicenses.

Pursuant to Reg. IV.17.(e).(5)(A), the rules of Reg. IV.17.(d).(3)(B)3. may apply where a taxpayer licenses intangible property to a customer that in turn sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the rules set forth at Reg. IV.17.(d).(3)(B)3. that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users. For this purpose, the intangible

property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to that property (e.g., because the sublicensee's rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because that property is bundled with additional services or items of property.

(C) Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D). Also assume that the customer is not a related party.

*Example (i).* Crayon Corp and Dealer Co enter into a license contract under which Dealer Co as licensee is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Co's sale of certain products to retail customers. Under the contract, Dealer Co is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co of products using the Crayon Corp trademarks. Under the contract, Dealer Co is permitted to sell the products at multiple store locations, including store locations that are both within and without [state]. Further, the licensing fees that are paid by Dealer Co are broken out on a per-store basis. The licensing fees paid to Crayon Corp by Dealer Co represent fees from the license of a marketing intangible. The portion of the fees to be assigned to [state] are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its [state] stores relative to Dealer Co's total receipts. See Reg. IV.17.(e).(2).

*Example (ii).* Program Corp, a corporation that is based outside [state], licenses programming that it owns to licensees, such as cable networks, that in turn will offer the programming to their customers on television or other media outlets in [state] and in all other U.S. states. Each of these licensing contracts constitutes the license of a marketing intangible. For each licensee, assuming that Program Corp lacks evidence of the actual number of viewers of the programming in [state], the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's [state] receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the [state] audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. See Reg. IV.17.(e).(5). If Program Corp is not taxable in any state in which the licensee's audience is located, the receipts are excluded from the denominator of Program Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D). Note that the analysis and result as to the state or states to which receipts are properly assigned would be the

Issue: Again, as noted above, there may be overlap or possible conflict between the rules for sourcing programming here and those in the SIR for broadcasters (see below).

same to the extent that the substance of Program Corp's licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. See Reg. IV.17.(e).(5).

. . . [Omitted certain examples here.]

**Reg. IV.17.(f). Sale of Intangible Property.**

(1) Assignment of Receipts.

The assignment of receipts to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold. For purposes of this Reg. IV.17(f), a sale or exchange of intangible property includes a license of that property where the transaction is treated for tax purposes as a sale of all substantial rights in the property and the receipts from transaction are not contingent on the productivity, use or disposition of the property. For the rules that apply where the consideration for the transfer of rights is contingent on the productivity, use or disposition of the property, see Reg. IV.17.(e).(1).

(A) Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area.

In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the receipts from the sale are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state the taxpayer shall assign the receipts from the sale to [state]. If the intangible property is used or is authorized to be used in [state] and one or more other states, the taxpayer shall assign the receipts from the sale to [state] to the extent that the intangible property is used in or authorized for use in [state], through the means of a reasonable approximation.

(B) Sale that Resembles a License (Receipts are Contingent on Productivity, Use or Disposition of the Intangible Property).

In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in Reg. IV.17.(e). (pertaining to the license or lease of intangible property).

(C) Sale that Resembles a Sale of Goods and Services.

In the case of a sale or exchange of intangible property where the substance of the transaction resembles a sale of goods or services and where the receipts from the sale or exchange do not derive from payments contingent on the productivity, use or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in Reg. IV.17.(e).(5) (relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in Reg. IV.17.(e).(5).

(D) Excluded Receipts.

Receipts from the sale of intangible property are not included in the receipts factor in any case in which the sale does not give rise to receipts within the meaning of Article IV.1(g). In addition, in any case in which the sale of intangible property does result in receipts within the meaning of Article IV.1(g), those receipts are excluded from the numerator and the denominator of the taxpayer's receipts factor if the receipts are not referenced in Article IV.17(a)(4)(i), (ii)(A) or (ii)(B). See Article IV.17(a)(4)(ii)(C). The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's receipts factor under this provision includes, without limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value. Also, in any instance in which, the state to which the receipts from a sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the receipts that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's receipts factor. See Reg. IV.17.(a).(6)(D).

(E) Examples.

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which some of its receipts would be assigned, so that there is no requirement in these examples that the receipts to other states must be excluded from the taxpayer's denominator. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

*Example (i).* Airline Corp, a corporation based outside [state], sells its rights to use several gates at an airport located in [state] to Buyer Corp, a corporation that is based outside [state]. The contract of sale is negotiated and signed outside of [state]. The receipts from the sale are in [state] because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in [state]. See Reg. IV.17.(f).(1).

*Example (ii).* Wireless Corp, a corporation based outside [state], sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in [state] to Buyer Corp, a corporation that is based outside [state]. The

Issue: These receipts would not be covered by the SIRs for airlines (see below) and is an example of the question of whether the difference in the rules applied should also dictate that the income be apportioned separately using separate formulas, or together, combining receipts.

contract of sale is negotiated and signed outside of [state]. The receipts from the sale are in [state] because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in [state]. See Reg. IV.17.(f).(1)(A).

*Example (iii).* Same facts as in Example 2 except that Wireless Corp sells to Buyer Corp an FCC license to operate wireless telecommunications services in a designated area in [state] and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in [state]. For purposes of making this reasonable approximation, Wireless Corp may rely upon credible data that identifies the percentage of persons that use wireless telecommunications in the two states covered by the license. See Reg. IV.17.(f).(1)(A).

*Example (iv).* Same facts as in Example 3 except that Wireless Corp is not taxable in the adjacent state in which the FCC license authorizes it to operate wireless telecommunications services. The receipts paid to Wireless Corp that would be assigned to the adjacent state must be excluded from the denominator of Wireless Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

*Example (v).* Sports League Corp, a corporation that is based outside [state], sells the rights to broadcast the sporting events played by the teams in its league in all 50 U.S. states to Network Corp. Although the games played by Sports League Corp will be broadcast in all 50 states, the games are of greater interest in the northeast region of the country, including [state]. Because the intangible property sold is a contract right that authorizes the holder to conduct a business activity in a specified geographic area, Sports League Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in [state]. For purposes of making this reasonable approximation, Sports League Corp may rely upon audience measurement information that identifies the percentage of the audience for its sporting events in [state] and the other states. See Reg. IV.17.(f).(1)(A).

*Example (vi).* Same facts as in Example 5, except that Sports League Corp is not taxable in one state. The receipts paid to Sports League Corp that would be assigned to that state must be excluded from the denominator of Sports League Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

*Example (vii).* Inventor Corp, a corporation that is based outside [state], sells patented technology that it has developed to Buyer Corp, a business customer that is based in [state]. Assume that the sale is not one in which the receipts derive from payments that are contingent on the productivity, use or disposition of the property. See Reg. IV.17.(f).(1)(A). Inventor Corp understands that Buyer Corp is likely to use the patented technology in [state], but the patented technology can be used anywhere (i.e., the rights sold are not

rights that authorize the holder to conduct a business activity in a specific geographic area). The receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. See Article IV.17.(a).(4)(ii)(C), Reg. IV.17.(f).(1)(D).

#### **Reg. IV.17.(g). Special Rules.**

##### **(1) Software Transactions.**

A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) transferred on a tangible medium is treated as the sale of tangible personal property, rather than as either the license or sale of intangible property or the performance of a service. In these cases, the receipts are in [state] as determined under the rules for the sale of tangible personal property set forth under Article IV.16. and related regulations. In all other cases, the receipts from a license or sale of software are to be assigned to [state] as determined otherwise under Reg. IV.17. (e.g., depending on the facts, as the development and sale of custom software, see Reg. IV.17.(d).(3), as a license of a marketing intangible, see Reg. IV.17.(e).(2), as a license of a production intangible, see Reg. IV.17.(e).(3), as a license of intangible property where the substance of the transaction resembles a sale of goods or services, see Reg. IV.17.(e).(5), or as a sale of intangible property, see Reg. IV.17.(f).

##### **(2) Sales or Licenses of Digital Goods or Services.**

###### **(A) In general.**

In the case of a sale or license of digital goods or services, including, among other things, the sale of various video, audio and software products or similar transactions, the receipts from the sale or license are assigned by applying the same rules as are set forth in Reg. IV.17.(d).(3)(B)2. or 3., as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. For purposes of the analysis, it is not relevant what the terms of the contractual relationship are or whether the sale or license might be characterized, depending upon the particular facts, as, for example, the sale or license of intangible property or the performance of a service. See Regs IV.17.(e).(5) and (f).(1)(C).

###### **(B) Telecommunications Companies.**

In the case of a taxpayer that provides telecommunications or ancillary services and that is thereby subject to Reg. IV.18(i), receipts from the sale or license of digital goods or services not otherwise assigned for apportionment purposes pursuant to that regulation are assigned pursuant to this Reg. IV.17(g)(2)(B), by applying the rules set forth in Reg. IV.17.(d).(3)(B)2. or 3. as if the transaction were

Note: This reference to the SIR for telecommunications (below) should be mirrored in that regulation.

a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. However, in applying these rules, if the taxpayer cannot determine the state or states where a customer receives the purchased product it may reasonably approximate this location using the customer's place of "primary use" of the purchased product, applying the definition of "primary use" set forth in [MTC Model Regulation for Sourcing Sales of Telecommunications and Ancillary Services].

**Reg. IV.17.(h). Mediation.**

Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the [State Tax Agency] and one or more other state taxing authorities, the taxpayer may petition for, and the [State Tax Agency] may participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution rules promulgated by the Multistate Tax Commission from time to time, regardless of whether all the state taxing authorities are members of the Multistate Tax Compact.

## **General Allocation and Apportionment Regulations – Section 18**

**Reg. IV.18.(a). Special Rules: In General.**

Article IV.18. provides that if the allocation and apportionment provisions of Article IV do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of any one or more of the factors;
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article IV.18. permits a departure from the allocation and apportionment provisions of Article IV only in limited and specific cases where the apportionment and allocation provisions contained in Article IV produce incongruous results.

In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing

Issue: As noted above, single-sales factor states may need to consider whether they have sufficient guidance for how the Sec. 18 standard—fairly represent the extent of business activity in the state—would apply and whether they would include other factors.

regulations in respect to the apportionment formula may not set forth appropriate procedures for determining the apportionment factors. Nothing in Article IV.18. or in this Regulation IV.18. shall preclude [the tax administrator] from establishing appropriate procedures under Article IV.10. to 17. for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

...

### **Reg. IV.18.(c). Receipts Factor.**

#### (1) Definitions. As used in this Reg. IV.18(c):

(A) "Receipts" means receipts as defined in [reference to Compact Article IV.1.g MTC Model Allocation and Apportionment Regulation IV.2.(a)(6) or other similar state law];

(B) "Gross receipts" means gross receipts as defined in [reference to MTC Model Allocation and Apportionment Regulation IV.2.(a)(5) or similar state regulation] that give rise to apportionable income included in the tax base;

(C) "MTC Financial Institutions Apportionment Model" means the Multistate Tax Commission's Recommended Formula for the Apportionment and Allocation of the Net Income of Financial Institutions, as amended July 29, 2015;

DRAFTER'S NOTE: IF YOUR STATE HAS ITS OWN FINANCIAL INSTITUTIONS APPORTIONMENT RULES, YOUR STATE MAY WISH TO REFERENCE THE SPECIFIC RULES OF ASSIGNMENT IN THOSE RULES FOR THESE TYPES OF GROSS RECEIPTS. SEE SUBPARAGRAPH (3)(c)(3).

(D) "Gross receipts from lending activities" means interest income and other gross receipts arising from the activities described in subsections 3(d) through 3(j) of the MTC Financial Institutions Apportionment Model; and,

(E) An entity's apportionment factor is "*de minimis*" if the denominator is less than 3.33 percent of the entity's apportionable gross receipts or if the factor is insignificant in producing income.

DRAFTER'S NOTE: SUBPARAGRAPH (1)(E) DOES NOT APPLY TO THE CALCULATION OF THE TAXPAYER'S RECEIPTS FACTOR UNDER PARAGRAPH (2), BELOW.

(2) This Reg. IV.18.(c) applies to the determination of the receipts factor if the taxpayer's receipts are less than 3.33 percent of the taxpayer's gross receipts. A taxpayer's receipts subject to assignment under Compact Art. IV, Sections 16 and 17 are assigned under those sections and are not assigned by this Regulation IV.18.(c).

Note: This regulation addresses a specific situation where, under the general rules, a taxpayer may have no or a de minimis receipts factor—which can happen if the state imposes separate-entity filing or Joyce combination. This Reg. IV.18.(c) was adopted after the recommended revisions to UDITPA and the related regulations. (We may also want to clarify this as part of the title to this section.)



(3) The following gross receipts are included in the receipts factor denominator and are assigned to the receipts factor numerator in this state as follows:

(A) Dividends paid by a related party, as defined in [reference to applicable state law], are assigned to the receipts factor numerator in this state as follows:

1. If paid from earnings that can be reasonably attributed to a particular year, the dividends are assigned to the receipts factor numerator in this state in a proportion equal to the dividend payor's apportionment factors in this state for that year as determined pursuant to [reference to state law].

2. If the dividends were paid from earnings that cannot reasonably be attributed to a particular year, the dividends are assigned to the receipts factor numerator in this state in a proportion equal to the dividend payor's average apportionment factors in this state for the current and preceding year as determined pursuant to [reference to state law].

. . . [Example omitted here.]

(B) Gains are assigned to the receipts factor numerator in this state as follows:

1. Gains (net of related losses, but not less than zero) from the disposition of stock (or other intangible property rights) representing at least a 20% ownership interest in an entity, are assigned to the receipts factor numerator in this state in a proportion equal to what the entity's separate apportionment factor was in this state for the tax year preceding the disposition as determined pursuant to state law.

2. Gains (net of related losses, but not less than zero) from the disposition of assets of an entity or segment of a business are assigned to the receipts factor numerator in this state in a proportion equal to what the entity's separate apportionment factor was in this state in the tax year preceding the disposition as determined pursuant to [ref. to state law].

3. In applying clauses 1 and 2 of this subparagraph (B), in any case in which the entity did not exist in the prior year, or had an apportionment factor of zero [or had only a *de minimis* apportionment factor], the gross receipts from the gain are attributed to the receipts factor numerator of this state under paragraphs (4), (5), or (6) of this Reg.IV.18.(c) as appropriate.

4. In applying this subparagraph (B), in the case of an entity which was not subject to entity-level taxation, the apportionment percentage shall be computed as if the entity were a C corporation.

. . . [Examples omitted here.]

DRAFTER'S NOTE: IF THE STATE HAS ADOPTED OTHER RULES FOR APPORTIONING AND ALLOCATING THE NET INCOME OF FINANCIAL INSTITUTIONS, THE FOLLOWING SUBSECTION AND THE EXAMPLES SHOULD REFERENCE THOSE RULES IN LIEU OF REFERENCING THE MTC'S FINANCIAL INSTITUTIONS APPORTIONMENT MODEL.

(C) Gross receipts from lending activities are included in the receipts factor denominator and assigned to the receipts factor numerator in this state to the extent those gross receipts would have been assigned to this state under the MTC Financial Institutions Apportionment Model (including the rule of assignment to commercial domicile under 3(p) of that model statute) [or your state's Financial Institutions Apportionment Rules] as if the taxpayer were a financial institution subject to the MTC Financial Institutions Apportionment Model [or your state's Financial Institutions Apportionment Rules], except that:

1. in the case of gross receipts derived from loans to a related party as defined by [reference to state law], which are not secured by real property, including interest, fees, and penalties, the gross receipts are included in this state's numerator in a proportion equal to the related party's apportionment factor in this state as determined by [reference to state law] in the year the gross receipts were included in apportionable income; and,
2. Gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer are assigned under subparagraph (D).

. . . [Examples omitted here.]

(D) Gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer are included in the denominator and assigned to the receipts factor numerator in this state to the extent those accounts receivable are attributed to borrowers located in this state; provided however, that if the taxpayer is not taxable [as defined in Compact Article IV, section 3 or similar state law] in a state in which the borrowers are located, those gross receipts are excluded from the denominator of the taxpayer's receipts factor.

. . . [Examples omitted here.]

(E) The net amount, but not less than zero, of gross receipts not otherwise assigned under this paragraph (3) arising from investment activities, including the holding, maturity, redemption, sale, exchange, or other disposition of marketable securities or cash are assigned to the sales factor numerator in this state if the gross receipts would be assigned to this state under Subsections (3)(n) or (3)(p) of the MTC's Financial Institutions Apportionment Model [or similar state financial institutions receipts factor rules]; all other gross receipts from investment activities not otherwise assigned under this paragraph (3) are assigned to the receipts factor numerator in this state if the investments are managed in this state.

Note: This cross-reference to the SIRs for financial institutions (below) ensures consistency (and a similar cross-reference should be included in those rules). But we may want to consider whether this rule would also apply to taxpayers whose primary activity is investing.

DRAFTER’S NOTE: THIS PROVISION IS FOR STATES THAT USE A MULTI-FACTOR FORMULA. STATES WITHOUT A MULTI-FACTOR FORMULA SHOULD EXCLUDE THIS PROVISION.

(4) Gross receipts, other than those included and assigned under paragraph (3), are included in the receipts factor denominator, and are assigned to the receipts factor numerator in this state in a proportion equal to the average of the taxpayer’s other non-*de minimis* apportionment factors [or other non-*de minimis* apportionment factor] in this state as determined pursuant to [reference to state law].

. . . [Examples omitted here.]

DRAFTER’S NOTE – FROM THIS POINT – THE DRAFT’S NUMBERING ASSUMES THAT THE STATE INCLUDES PARAGRAPH (4). IF NOT – THE FOLLOWING PROVISIONS AND CROSS-REFERENCES TO THE PROVISIONS REFERENCED BELOW WILL HAVE TO BE RENUMBERED.

DRAFTER’S NOTE: THIS PROVISION IS FOR STATES THAT ALLOW OR REQUIRE STATE-LEVEL COMBINED FILINGS. IN PARAGRAPH (5), THE TERM “COMBINED REPORT” IS USED IN THE SAME SENSE AS THAT TERM IS USED IN THE MTC MODEL COMBINED FILING STATUTE.

(5) Except for gross receipts included and assigned under paragraphs (3) or (4), gross receipts of a taxpayer whose income and factors are included in a combined report in this state are included in the receipts factor denominator and are assigned to the receipts factor numerator in this state in the same proportion as the ratio of: (A) the total of the receipts factor numerators of all members of the combined group in this state, whether taxable or nontaxable, as determined pursuant to [reference to state law], to (B) the denominator of the combined group.

. . . [Example omitted here.]

DRAFTER’S NOTE – FROM THIS POINT – THE DRAFT’S NUMBERING ASSUMES THAT THE STATE INCLUDES PARAGRAPHS (4) AND (5). IF NOT – THE FOLLOWING PROVISIONS AND CROSS-REFERENCES TO PROVISIONS REFERENCED BELOW WILL HAVE TO BE RENUMBERED.

(6) Except for those gross receipts included and assigned under paragraphs (3), (4) or (5), gross receipts of a taxpayer that files as part of a federal consolidated return are included in the receipts factor denominator and are assigned to the receipts factor numerator in this state in a proportion equal to a percentage (but not greater than 100%), the numerator of which is the total of the consolidated group members’ income allocated to or apportioned to this state pursuant to [ref. to state law], and the denominator of which is the total federal consolidated taxable income.

. . . [Examples omitted here.]

(7) Nothing in this Reg.IV.18.(c) shall prohibit the taxpayer from petitioning for, or the [state tax agency or administrator] from applying an alternative method to calculate the taxpayer's receipts factor in order to fairly represent the extent of the taxpayer's business activity in this state as provided for in [reference to Compact Article IV, Section 18 or similar state law], including the application of this rule in situations that do not meet the threshold of paragraph (2) of this Reg.IV.18.(c). Such alternative method may be appropriate, for example, in situations otherwise addressed under subparagraph (3)(A) where dividends were paid from earnings that were generated by the activities of a related party of the dividend payor, in which case the dividends may be more appropriately assigned to the receipts factor numerator in this state using the related party's average apportionment factors in this state.

## **SIR – Construction Contractors**

### **Reg.IV.18.(d). Special Regulation: Construction Contractors.**

. . . [This regulation addresses tax accounting differences which do not appear relevant to this review and have been omitted here.]

#### (4) Apportionment of Business Income

(i) In General. Business income is apportioned to this state by a three-factor formula consisting of property, payroll and sales regardless of the method of accounting for long-term contracts elected by the taxpayer. The total of the property, payroll and sales percentages is divided by three to determine the apportionment percentage. The apportionment percentage is then applied to business income to determine the amount apportioned to this state.

. . . [Provisions not relevant to this review are omitted.]

(vi) Sales Factor. In general, the numerator and denominator of the sales factor shall be determined as set forth in Article IV.15-.17, inclusive, and Reg. IV.15-.17, inclusive. However, the following special rules are also applicable:

(A) Gross receipts derived from the performance of a contract are attributable to this state if the construction project is located in this state. If the construction project is located partly within and partly without this state, the gross receipts attributable to this state are based upon the ratio which construction costs for the project in this state incurred during the income 5 year bear to the total of construction costs for the entire project during the income year, or upon any other method, such as engineering cost estimates, which will provide a reasonable apportionment.

Issue: This is an example of a conforming change – since MTC model UDITPA provisions (Section 9) no longer provide for an equal weighting of factors.

Note: This cross-reference would apply the general provisions of Sec. 17 regulations to this industry, which appears reasonable.

...

(B) If the percentage of completion method is used, the sales factor includes only that portion of the gross contract price which corresponds to the percentage of the entire contract which was completed during the income year.

...

(C) If the completed contract method of accounting is used, the sales factor includes the portion of the gross receipts (progress billings) received or accrued, whichever is applicable, during the income year attributable to each contract.

...

(D) The sales factor, except as noted above in subparagraphs (B) and (C), is computed in the same manner, regardless of which long-term method of accounting the taxpayer has elected, and is computed for each income year even though, under the completed contract method of accounting, business income is computed separately.

(vii) Apportionment Percentage. The total of the property, payroll and sales percentages is divided by three to determine the apportionment percentage. The apportionment percentage is then applied to business income to establish the amount apportioned to this state.

(5) Completed Contract Method - Special Computation. The completed contract method of accounting requires that the reporting of income (or loss) be deferred until the year in which the construction project is completed or accepted. Accordingly, a separate computation is made for each such contract completed during the income year, regardless of whether the project is located within or without this state, in order to determine the amount of income which is attributable to sources within this state. The amount of income from each contract completed during the income year apportioned to this state, plus other business income apportioned to this state by the regular three-factor formula such as interest income, rents, royalties, income from short-term contracts, etc., plus all nonbusiness income allocated to this state is the measure of tax for the income year.

Issue: Again – this appears inconsistent with the MTC changes to UDITPA Sec. 9 and is also incompatible with the formula in the majority of states.

## SIR - Airlines

### **Reg. IV.18.(e). Special Rules: Airlines.**

#### (2) Apportionment of Business Income.

##### (i) General Definitions.

...

J. "Transportation revenue" means revenue earned by transporting passengers, freight and mail as well as revenue earned from liquor sales, pet crate rentals, etc.

...

##### (iv) Sales (Transportation Revenue) Factor.

The transportation revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer and miscellaneous sales of merchandise, etc., are included in the denominator of the revenue factor. (See Article IV.1. and Regulation IV.1.) Passive income items such as interest, rental income, dividends, etc., will not be included in the denominator nor will the proceeds or net gains or losses from the sale of aircraft be included. The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year is the result of the following calculation:

The ratio of departures of aircraft in this state weighted as to the cost and value of aircraft by type, as compared to total departures similarly weighted multiplied by the total transportation revenue. The product of this calculation is to be added to any non-flight revenues directly attributable to this state.

Note: This definition is fairly narrow which means that airlines may have receipts/sales that are subject to the GAARs as well. (See example under Sec. 17 regulations above on the treatment of sale of gate rights by an airline.)

Issue: This is an example of a potential conforming change – since the MTC model statute and regulations defining “receipts” would not suffice to limit what goes into the receipts factor and could simply be referenced here.

## SIR - Railroads

### **Reg. IV.18.(f). Special Rules: Railroads**

. . . [Provisions not relevant to this review are omitted.]

#### (iv) The Sales (Revenue) Factor.

A. In General. All revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer which produces business income, except per diem and mileage charges which are collected by the taxpayer, is included in the denominator of the revenue factor. (See Article IV.1. and Reg. IV.1.)

The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year, other than revenue from hauling freight, passengers, mail and express, shall be attributable to this state in accordance with Article IV.15.-.17. and Regulation IV.15.-.17.

B. Numerator of Sales (Revenue) Factor From Freight, Mail and Express. The total revenue of the taxpayer in this state during the income year for the numerator of the revenue factor from hauling freight, mail and express shall be attributable to this state as follows:

1. All receipts from shipments which both originate and terminate within this state; and
2. That portion of the receipts from each movement or shipment passing through, into, or out of this state is determined by the ratio which the miles traveled by such movement or shipment in this state bear to the total miles traveled by such movement or shipment from point of origin to destination.

C. Numerator of Sales (Revenue) Factor from Passengers. The numerator of the sales (revenue) factor shall include:

1. All receipts from the transportation of passengers (including mail and express handled in passenger service) which both originate and terminate within this state; and
2. That portion of the receipts from the transportation of interstate passengers (including mail and express handled in passenger service) determined by the ratio which revenue passenger miles in this state bear to the total everywhere.

Issue: This is another example of a useful cross-reference to the GAARs. Since these cross-references are often included, it would be best to make sure there are no instances where they are inadvertently omitted (which might provide an incorrect negative assumption as to whether the general rules apply).

## SIR – Trucking Companies

### **Reg. IV.18.(g). Special Rules: Trucking Companies.**

The following special rules are established with respect to trucking companies:

(1) In General. As used in this regulation, the term "trucking company" means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking company has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this regulation. In such cases, the first step is to determine what portion of the trucking company's income constitutes "business" income and what portion constitutes "nonbusiness" income under Article IV.1 of the Multistate Tax Compact and Regulation IV.1 thereunder. Nonbusiness income is directly allocable to specific states pursuant to the provisions of Article IV.5 to .8, inclusive. Business income is apportioned among the states in which the business is conducted and pursuant to the property, payroll, and sales apportionment factors set forth in this regulation. The sum of (i) the items of nonbusiness income directly allocated to this state and (ii) the amount of business income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax in this state.

...

#### (3) Apportionment of Business Income

(i) In General. The property factor shall be determined in accordance with Regulation IV.10 to .12, inclusive, the payroll factor in accordance with Regulation IV.13 to .14, and the sales factor in accordance with Regulation IV.15 to .17, inclusive, except as modified by this regulation.

...

#### (iv) The Sales (Revenue) Factor

A. In General. All revenue derived from transactions and activities in the regular course of the taxpayer's trade or business which produce business income shall be included in the denominator of the revenue factor. (See Article IV.1 and Regulation IV.1.) The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total state revenue of the taxpayer, other than revenue from hauling freight, mail, and express, shall be attributable to this state in accordance with Article IV.15 through .17 and Regulation IV.15 through .17.



B. Numerator of the Sales (Revenue) Factor From Freight, Mail, and Express. The total revenue of the taxpayer attributable to this state during the income year from hauling freight, mail, and express shall be:

1. Intrastate: All receipts from any shipment which both originates and terminates within this state; and,

2. Interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

(4) Records. The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as those terms are used in this regulation. Such records are subject to review by [insert here the title of the appropriate administrative agency] or its agents.

(5) De Minimis Nexus Standard. Notwithstanding any provision contained herein, this Regulation IV.18.(g) shall not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:

- a. owns nor rents any real or personal property in this state, except mobile property; nor
- b. makes any pick-ups or deliveries within this state; nor
- c. travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the income tax year do not exceed three percent of the total mobile property miles traveled in all states by the trucking company during that period; nor
- d. makes more than twelve trips into this state

## **SIR – Television and Radio Broadcasting**

### **Reg.IV.18(h). Special Rules: Television and Radio Broadcasting**

The following special rules are established in respect to the apportionment of income from television and radio broadcasting by a broadcaster that is taxable both in this state and in one or more other states.

(1) In General. When a person in the business of broadcasting film or radio programming, whether through the public airwaves, by cable, direct or indirect satellite transmission or any other means of

communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to Article IV. of the Multistate Tax Compact and the regulations issued thereunder by this state, except as modified by this regulation.

...

(3) Definitions. The following definitions are applicable to the terms contained in this regulation, unless the context clearly requires otherwise.

(i) "Film" or "film programming" means any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium.

Each episode of a series of films produced for television shall constitute a separate "film" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(ii) "Outer-jurisdictional" property means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but which are not physically located in any particular state.

(iii) "Radio" or "radio programming" means any and all performances, events or productions broadcast on radio, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of an audio tape, disc or any other format or medium.

Each episode of a series of radio programming produced for radio broadcast shall constitute a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(iv) "Release" or "in release" means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience for which the program was created. Thus, for example, a film is placed in service when it is first publicly telecast for entertainment, educational, commercial, artistic or other purpose. Each episode of a television or radio series is placed in service when it is first broadcast. A program is not placed in service merely because it is completed and therefore in a condition

or state of readiness and availability for broadcast or, merely because it is previewed to prospective sponsors or purchasers.

(v) "Rent" shall include license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.

(vi) A "subscriber" to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

(vii) "Telecast" or "broadcast" (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radio waves or microwaves or by wires, lines, coaxial cables, wave guides, fiber optics, satellite transmissions directly or indirectly to viewers and listeners or by any other means of communications.

#### (4) Apportionment of Business Income.

(i) In General. The property factor shall be determined in accordance with Regulation IV.10 through 12., the payroll factor in accordance with Regulation IV.13. and 14., and the sales factor in accordance with Regulation IV.15. and 16., except as modified by this regulation.

...

(iv) The Sales Factor.

##### A. Sales Factor Denominator.

The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under Reg.IV.18.(c).

##### B. Sales Factor Numerator.

The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to the following:

1. Gross receipts, including advertising revenue, from television film or radio programming in release to or by television and radio stations located in this state.
2. Gross receipts, including advertising revenue, from television film or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter "audience factor") that the

audience for such station (or owned and affiliated stations in the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks).

The audience factor for television or radio programming shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience. Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state.

3. Gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. If the number of subscribers cannot be accurately determined from the books and records maintained by the taxpayer, such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose.

4. Receipts from the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening shall be included in the sales factor as provided in Reg. IV. 16.

## **SIR - Telecommunications**

### **Reg. IV.18.(i). Special Rules: Telecommunications and ancillary service providers.**

The following special rules are established with respect to the apportionment of income from the sale of telecommunications and ancillary services by a person that is taxable both in this state and in one or more other states.

(1) In general A person providing telecommunications or ancillary services whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in [Article IV of the Multistate Tax Compact or state equivalent] and regulations issued thereunder, exclusive of [Art.IV.2. of the Multistate Tax Compact or state equivalent], except as modified by this special rule.

(2) Definitions.

(i) "800 service" means a "telecommunications service" that allows a caller to dial a toll-free number without incurring a charge for the call. The service is typically marketed under the

name “800”, “855”, “866”, “877”, and “888” toll-free calling, and any subsequent numbers designated by the Federal Communications Commission.

(ii) “900 service” means an inbound toll “telecommunications service” purchased by a subscriber that allows the subscriber’s customers to call in to the subscriber’s prerecorded announcement or live service. “900 service” does not include collection services provided by the seller of the “telecommunications services” to the subscriber, or service or product sold by the subscriber to the subscriber’s customer. The service is typically marketed under the name “900” service, and any subsequent numbers designated by the Federal Communications Commission.

(iii) “Air-to-Ground Radiotelephone service” means a radio service, as that term is defined in 47 CFR 22.99, in which common carriers are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

(iv) “Ancillary service” means services that are associated with or incidental to the provision of telecommunications services, including but not limited to the following subcategories: detailed telecommunications billing, directory assistance, vertical service, conference bridging service and voice mail services. The term “ancillary service” is defined as a broad range of services and is broader than the sum of the subcategories.

(v) “Bundled transaction” means the retail sale of two or more products where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. For purposes of this special regulation, a “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction. A transaction that otherwise meets the definition of a “bundled transaction” is not a “bundled transaction” if it is: (1) the “retail sale” of two products where the first product is essential to the use of the second product, and the first product is provided exclusively in connection with the second, and the true object of the transaction is the second; (2) the “retail sale” of more than one product, but the products are sourced the same under this special rule; or (3) the “retail sale” of more than one product, but the sum of the “purchase price” or “sales price” of products which are sourced differently under this special rule is de minimis.

(vi) “Call-by-call Basis” means any method of charging for telecommunications services where the price is measured by individual calls.

(vii) “Coin-operated telephone service” means a “telecommunications service” paid for by inserting money into a telephone accepting direct deposits of money to operate.

- (viii) "Communications Channel" means a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.
- (ix) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call and may include the provision of a telephone number. Conference bridging service does not include the telecommunications services used to reach the conference bridge.
- (x) "Customer" means the person or entity that contracts with the seller of telecommunications services. If the end user of telecommunications services is not the contracting party, the end user of the telecommunications service is the customer of the telecommunication service. "Customer" does not include a reseller of telecommunications service or for mobile telecommunications service of a serving carrier under an agreement to serve the customer outside the home service provider's licensed service area.
- (xi) "Customer Channel Termination Point" means the location where the customer either inputs or receives the communications.
- (xii) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.
- (xiii) "Directory assistance" means an ancillary service of providing telephone number information, and/or address information.
- (xiv) "End user" means the person who utilizes the telecommunication service. In the case of an entity, "end user" means the individual who utilizes the service on behalf of the entity.
- (xv) "Fixed wireless service" means a telecommunications service that provides radio communication between fixed points.
- (xvi) "Home service provider" means the same as that term is defined in Section 124(5) of Public Law 106-252 (Mobile Telecommunications Sourcing Act).
- (xvii) "International" means a "telecommunications service" that originates or terminates in the United States and terminates or originates outside the United States, respectively. United States includes the District of Columbia or a U.S. territory or possession.
- (xviii) "Interstate" means a "telecommunications service" that originates in one United States state, or a United States territory or possession, and terminates in a different United States state or a United States territory or possession.

(xix) "Intrastate" means a "telecommunications service" that originates in one United States state or a United States territory or possession, and terminates in the same United States state or a United States territory or possession.

(xx) "Mobile telecommunications service" means the same as that term is defined in Section 124(7) of Public Law 106-252 (Mobile Telecommunications Sourcing Act).

(xxi) "Mobile wireless service" means a telecommunications service that is transmitted, conveyed or routed regardless of the technology used, whereby the origination and/or termination points of the transmission, conveyance or routing are not fixed, including, by way of example only, telecommunications services that are provided by a commercial mobile radio service provider.

(xxii) "Network access service" means the provision by a local exchange telecommunication service provider of the use of its local exchange network by an inter-exchange telecommunication service provider to originate or terminate the interexchange telecommunication service provider's traffic carried to or from a distant exchange.

(xxiii) "Outerjurisdictional property" means tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in a telecommunications or ancillary service business, but that are not physically located in any particular state.

(xxiv) "Paging service" means a telecommunications service that provides transmission of coded radio signals for the purpose of activating specific pagers; such transmissions may include messages and/or sounds.

(xxv) "Pay telephone service" means a telecommunications service provided through any pay telephone.

(xxvi) "Place of primary use" means the street address representative of where the customer's use of the telecommunications service primarily occurs, which shall be the residential street address or the primary business street address of the customer. In the case of mobile telecommunications services, "place of primary use" shall be within the licensed service area of the home service provider.

(xxvii) "Post-paid calling service" means the telecommunications service obtained by making a payment on a call-by-call basis either through the use of a credit card or payment mechanism such as a bank card, travel card, credit card, or debit card, or by charge made to a telephone number which is not associated with the origination or termination of the telecommunications service. A post-paid calling service includes a telecommunications

Note: This is consistent with the federal Mobile Telecommunications Sourcing Act rules in 4 USC 122.

service, except a prepaid wireless calling service, that would be a prepaid calling service except it is not exclusively a telecommunication service.

(xxviii) “Prepaid calling service” means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(xxix) “Prepaid wireless calling service” means the sale of a telecommunications service that provides the right to utilize mobile wireless service as well as other nontelecommunications services including the download of digital products delivered electronically, content and ancillary services, which must be paid for in advance that is sold in predetermined units of dollars of which the number declines with use in a known amount.

(xxx) “Private communications service” means a telecommunications service that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which such channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of such channel or channels.

(xxxi) “Product” means tangible personal property, digital good or service.

(xxxii) “Service address” means:

A. The location of the customer’s telecommunications equipment, to which the customer's call is charged, and from which the call originates or terminates, regardless of where the call is billed or paid.

B. If the location in subsection (A) is not known, service address means the origination point of the signal of the telecommunications services first identified by either the seller's telecommunications system or in information received by the seller from its service provider, where the system used to transport such signals is not that of the seller. C. If the location in subsection (A) and subsection (B) are not known, the service address means the location of the customer's place of primary use.

(xxxiii) “Telecommunications service” means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term “telecommunications service” includes such transmission, conveyance, or routing in which computer processing applications are used to



act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added.

A. The term “telecommunication service” is defined as a broad range of services. The term includes, but is broader than the sum of, the following subcategories: 800 service, 900 service, fixed wireless service, mobile wireless service, paging service, prepaid calling service, prepaid wireless calling service, private communication service, value-added non-voice data service, coin-operated telephone service, international telecommunications service, interstate telecommunications service, intrastate telecommunications service, network access service and pay telephone service.

B. The term “telecommunications service” does not include:

1. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser’s primary purpose for the underlying transaction is the processed data or information;
2. Installation or maintenance of wiring or equipment on a customer’s premises;
3. Tangible personal property;
4. Advertising, including but not limited to directory advertising.
5. Billing and collection services provided to third parties;
6. Internet access service;
7. Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance and routing of such services by the programming service provider. Radio and television audio and video programming services shall include but not be limited to cable service as defined in 47 USC 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 CFR 20.3;
8. “Ancillary services”; or

9. Digital products “delivered electronically”, including but not limited to software, music, video, reading materials or ring tones.

C. Examples of Included and Excluded Services.

Example 1. An entity provides dedicated network service to an entity which will resell that service as intrastate telecommunications service. Both entities are providing a telecommunications service.

Example 2. An entity provides an interstate telecommunications service to an internet service provider which will use that service in the provision of internet access service. The entity providing interstate telecommunications service is providing a telecommunications service. The entity providing internet access service is not providing a telecommunications service.

Example 3. An entity primarily engaged in the provision of cable television provides an interstate telecommunications service. The entity is engaged in the provision of telecommunications service.

(xxxiv) “Value-added non-voice data service” means a service that otherwise meets the definition of “telecommunications services” in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance or routing.

(xxxv) “Vertical service” means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including conference bridging services.

(xxxvi) “Voice mail service” means an ancillary service that enables the customer to store, send or receive recorded messages. Voice mail service does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(3) Apportionment and Allocation

...

(ii) Sales Factor: Sales of telecommunications and ancillary services in this state.

A. Gross receipts from the sale of telecommunications services, other than those defined in subsections C. through G., which are sold on a call-by-call basis are in this state when (a) the

call originates and terminates in this state or (b) the call either originates or terminates and the service address is also located in this state.

B. Gross receipts from the sale of telecommunications services, other than those defined in subsections C. through G., which are sold on other than a call-by-call basis, are in this state when the customer's place of primary use is in this state.

C. Gross receipts from the sale of mobile telecommunications services, other than air-to-ground radiotelephone service and prepaid calling service, are in this state when the customer's place of primary use is in this state pursuant to the Mobile Telecommunications Sourcing Act.

D. Gross receipts from the sale of pre-paid calling service, prepaid wireless calling service and post-paid calling service are in this state when the origination point of the telecommunications signal is first identified in this state by either (1) the seller's telecommunications system, or (2) information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.

E. Gross receipts from the sale of a private communication service are in this state:

1. if such service is for a separate charge related to a customer channel termination point, when the customer channel termination point is located in this state;
2. if under such service all customer termination points are located entirely within one state, when the customer channel termination points are located in this state;
3. if such service is for segments of a channel between two customer channel termination points located in different states and such segments of channel are separately charged, when one of the customer channel termination points is in this state, provided however that only fifty percent of such gross receipts shall be sourced to this state; and
4. if such service is for segments of a channel located in more than one state and such segments are not separately billed, when the customer channel termination points are in this state, provided however that only a percentage of such gross receipts, determined by dividing the number of customer channel termination points in the state by the total number of customer channel termination points, are in this state.

F. A portion of the total gross receipts from sales of telecommunication services to other telecommunication service providers for resale is in this state in an amount determined by

multiplying such total gross receipts by a fraction, the numerator of which is “total carrier’s carrier service revenues” for this state and the denominator of which is the sum of “total carrier’s carrier service revenues” for all states in which the taxpayer is doing business, as reported by the Federal Communications Commission [in its report titled Telecommunications Revenues by State, Table 15.6, or successor reports which include such information,] for the most recent year available as of the due date of the return, determined without regard to extensions.

G. Gross receipts attributable to the sale of an ancillary service are in this state when the customer’s place of primary use is in this state.

H. Gross receipts attributable to the sale of a telecommunication or ancillary service sold as part of a bundled transaction are in this state when such gross receipts would be this state in accordance with the provisions of sections ii.A. through G.

1. The amount of gross receipts attributable to the sale of a telecommunication or ancillary service which is sold as part of a bundled transaction shall be equal to the price charged by the taxpayer for such service when sold separately, adjusted by an amount equal to the quotient of a) the difference between 1) the price charged by the taxpayer for the bundled transaction, and 2) the sum of the prices charged by the taxpayer for each of the included products when sold separately, and b) the number of products included in the bundled transaction;

2. If the amount of such gross receipts is not determinable under subsection H.1., then it may be determined by reasonable and verifiable standards from taxpayer’s books and records that are kept in the regular course of business for purposes including, but not limited to, non-tax purposes.

I. Gross receipts from the sale of telecommunication services which are not taxable in the State to which they would be apportioned pursuant to sections ii.A through G., shall be excluded from the denominator of the sales factor.

## **SIR - Publishing**

### **Reg.IV.18.(j). Special Rules: Publishing**

The following special rules are established with respect to the apportionment of income derived from the publishing, sale, licensing or other distribution of books, newspapers, magazines, periodicals, trade journals or other printed material.

(1) In General. Except as specifically modified by this regulation, when a person in the business of publishing, selling, licensing or distributing newspapers, magazines, periodicals, trade journals or other printed material has income from sources both within and without this state, the amount of business income from sources within this state from such business activity shall be determined pursuant to [Article IV. of the Multistate Tax Compact and the regulations adopted thereunder].

(2) Definitions. The following definitions are applicable to the terms contained in this regulation, unless the context clearly requires otherwise.

(i) "Outer-jurisdictional property" means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of publishing, licensing, selling or otherwise distributing printed material, but which are not physically located in any particular state.

(ii) "Print or printed material" includes, without limitation, the physical embodiment or printed version of any thought or expression including, without limitation, a play, story, article, column or other literary, commercial, educational, artistic or other written or printed work. The determination of whether an item is or consists of print or printed material shall be made without regard to its content. Printed material may take the form of a book, newspaper, magazine, periodical, trade journal or any other form of printed matter and may be contained on any medium or property.

(iii) "Purchaser" and "Subscriber" mean the individual, residence, business or other outlet which is the ultimate or final recipient of the print or printed material . Neither of such terms shall mean or include a wholesaler or other distributor of print or printed material.

(iv) "Terrestrial facility" shall include any telephone line, cable, fiber optic, microwave, earth station, satellite dish, antennae or other relay system or device that is used to receive, transmit, relay or carry any data, voice, image or other information that is transmitted from or by any outer-jurisdictional property to the ultimate recipient thereof.

(3) Apportionment of Business Income.

...

(iii) The Sales Factor.

A. Sales Factor Denominator.

The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts that may be excluded under Reg.IV.15 through 18.

## B. Sales Factor Numerator.

The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to, the following:

1. Gross receipts derived from the sale of tangible personal property, including printed materials, delivered or shipped to a purchaser or a subscriber in this state.
2. Except as provided in subparagraph (3)(iii)B.3., gross receipts derived from advertising and the sale, rental or other use of the taxpayer's customer lists or any portion thereof shall be attributed to this state as determined by the taxpayer's "circulation factor" during the tax period. The circulation factor shall be determined for each individual publication by the taxpayer of printed material containing advertising and shall be equal to the ratio that the taxpayer's in-state circulation to purchasers and subscribers of its printed material bears to its total circulation to purchasers and subscribers everywhere.

The circulation factor for an individual publication shall be determined by reference to the rating statistics as reflected in such sources as Audit Bureau of Circulations or other comparable sources, provided that the source selected is consistently used from year to year for such purpose. If none of the foregoing sources are available, or, if available, none is in form or content sufficient for such purposes, then the circulation factor shall be determined from the taxpayer's books and records.

3. When specific items of advertisements can be shown, upon clear and convincing evidence, to have been distributed solely to a limited regional or local geographic area in which this state is located, the taxpayer may petition, or the [Tax Administrator] may require, that a portion of such receipts be attributed to the sales factor numerator of this state on the basis of a regional or local geographic area circulation factor and not upon the basis of the circulation factor provided by subparagraph (3)(iii)B.2. Such attribution shall be based upon the ratio that the taxpayer's circulation to purchasers and subscribers located in this state of the printed material containing such specific items of advertising bears to its total circulation of such printed material to purchasers and subscribers located within such regional or local geographic area.

This alternative attribution method shall be permitted only upon the condition that such receipts are not double counted or otherwise included in the numerator of any other state.

4. In the event that the purchaser or subscriber is the United States Government or that the taxpayer is not taxable in a State, the gross receipts from all sources, including the receipts from the sale of printed material, from advertising, and from the sale, rental or other use of the taxpayer's customer's lists, or any portion thereof that would have been attributed by the circulation factor to the numerator of the sales factor for such State, shall be included in the numerator of the sales factor of this State if the printed material or other property is shipped from an office, store, warehouse, factory, or other place of storage or business in this State.

## **SIR – Bank Holding Companies**

### **REG.IV.18.(k). Receipts Factor – Bank Holding Companies and Subsidiaries.**

DRAFTER’S NOTE: THIS REGULATION MAY BE APPROPRIATE FOR USE BY STATES THAT HAVE ADOPTED SPECIAL RULES FOR THE ALLOCATION AND APPORTIONMENT OF FINANCIAL INSTITUTIONS, INCLUDING THE MULTISTATE TAX COMMISSION’S MODEL FORMULA FOR THE APPORTIONMENT AND ALLOCATION OF NET INCOME OF FINANCIAL INSTITUTIONS (AS AMENDED JULY 29, 2015), THAT DO NOT EXPLICITLY INCLUDE BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND MAJORITY6 OWNED SUBSIDIARIES OF SUCH ENTITIES IN THE DEFINITION OF “FINANCIAL INSTITUTIONS” SUBJECT TO SUCH SPECIAL RULES. THIS REGULATION MAY ALSO APPLY TO STATES THAT HAVE NO SPECIAL RULES FOR THE ALLOCATION AND APPORTIONMENT OF FINANCIAL INSTITUTIONS. IF YOUR STATE’S DEFINITION OF “FINANCIAL INSTITUTIONS” ALREADY INCLUDES SUCH ENTITIES, THEN THIS REGULATION MAY BE UNNECESSARY.

(1) For any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended, and any entity more than 50 percent owned [directly or indirectly] by such holding companies, receipts are included in the receipts factor denominator and assigned to the receipts factor numerator in this state to the extent those receipts would be included in the denominator and assigned to this state under the MTC’s Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute (as adopted July 29, 2015). REG.IV.18.(c) does not apply to a taxpayer that is subject to this REG.IV.18.(d).

(2) Nothing in this Reg.IV.18.(d) shall prohibit the taxpayer from petitioning for, or the [state tax agency or administrator] from applying, an alternative method to calculate the taxpayer’s receipts factor in order to fairly represent the extent of the taxpayer’s business activity in this state as provided for in [reference to Compact Article IV, Section 18 or similar state law]



## SIR – Financial Institutions

### **Formula for the Apportionment and Allocation of Net Income of Financial Institutions**

#### Section 1. Apportionment and Allocation.

(a) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this [Act]. All items of nonbusiness income (income which is not includable in the apportionable income tax base) shall be allocated pursuant to the provisions of [ ]. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this [Act].

(b) All business income (income which is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by adding the taxpayer's receipts factor (as described in Section 3 of this article), property factor (as described in Section 4 of this article), and payroll factor (as described in Section 5 of this article) together and dividing the sum by three. If one of the factors is missing, the two remaining factors are added and the sum is divided by two. If two of the factors are missing, the remaining factor is the apportionment percentage. A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

(c) Each factor shall be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for the taxable year.

(d) If the allocation and apportionment provisions of this [Act] do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [State Tax Administrator] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of any one or more of the factors,
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or
- (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

#### Section 2. Definitions.

As used in this [Act], unless the context otherwise requires:

(a) "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year (or on such later date in the taxable year when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) "Borrower or credit card holder located in this state" means:

(1) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or

(2) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state.

(c) "Card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card.

(d) "Commercial domicile" means:

(1) the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(2) if a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile shall be deemed for the purposes of this [Act] to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It shall be presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year.

(e) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the Federal Internal Revenue Code. In the case of employees not subject to the Federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the Federal Internal Revenue Code shall be made as though such employees were subject to the Federal Internal Revenue Code.

(f) "Credit card" means a card, or other means of providing information, that entitles the holder to charge the cost of purchases, or a cash advance, against a line of credit.

(g) "Debit card" means a card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card.

(h) "Employee" means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(i) "Financial institution" means: [insert state's definition here][for a starting point for the development of a definition, see Appendix A]

(j) "Gross rents" means the actual sum of money or other consideration payable for the use or possession of property. "Gross rents" shall include, but not be limited to:

- (1) any amount payable for the use or possession of real property or tangible property whether designated as a fixed sum of money or as a percentage of receipts, profits or otherwise,
- (2) any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement, and
- (3) a proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year. However, where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer.
- (4) The following are not included in the term "gross rents":
  - (A) reasonable amounts payable as separate charges for water and electric service furnished by the lessor;
  - (B) reasonable amounts payable as service charges for janitorial services furnished by the lessor;
  - (C) reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and
  - (D) that portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it.

(k) "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.

(l) "Loan secured by real property" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

(m) "Merchant discount" means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the card holder, net of any cardholder charge-back and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made its cardholder.

(n) "Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(o) "Person" means an individual, estate, trust, partnership, corporation and any other business entity.

(p) "Principal base of operations" with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly (1) starts his or her work and to which he or she customarily returns in order to receive instructions from his or her employer or (2) communicates with his or her customers or other persons, or (3) performs any other functions necessary to the exercise of his or her trade or profession at some other point or points.

(q) "Real property owned" and "tangible personal property owned" mean real and tangible personal property, respectively, (1) on which the taxpayer may claim depreciation for federal income tax purposes, or (2) property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

(r) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(s) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

(t) "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(u) "Taxable" means either: (1) that a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any tax which is imposed upon or measured by gross or net income; or (2) that another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not.

(v) "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

### Section 3. Receipts Factor.

(a) General. The receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts described herein which constitute business income and are included in the computation of the apportionable income base for the taxable year.

(b) Receipts from the lease of real property. The numerator of the receipts factor includes receipts from the lease or rental of real property owned by the taxpayer if the property is located within this state or receipts from the sublease of real property if the property is located within this state.

(c) Receipts from the lease of tangible personal property.

(1) Except as described in paragraph (2) of this subsection, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(2) Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of receipts that is to be

included in the numerator of this state's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(d) Interest, fees and penalties imposed in connection with loans secured by real property.

(1) The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the receipts described in this subsection shall be included in the numerator of the receipts factor if the borrower is located in this state.

(2) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(e) Interest, fees, and penalties imposed in connection with loans not secured by real property. The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans not secured by real property if the borrower is located in this state.

(f) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Internal Revenue Code.

(1) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(2) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to

subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(g) Receipts from fees, interest, and penalties charged to card holders. The numerator of the receipts factor includes fees, interest and penalties charged to credit, debit or similar card holders, including but not limited to annual fees and overdraft fees, if the billing address of the card holder is in this state.

(h) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(i) Card issuer's reimbursement fees. The numerator of the receipts factor includes:

(1) all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to credit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to credit card holders.

(2) all debit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to debit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to debit card holders.

(3) all other card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to all other card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to all other card holders .

(j) Receipts from merchant discount.

(1) If the taxpayer can readily determine the location of the merchant and if the merchant is in this state, the numerator of the receipts factor includes receipts from merchant discount.

(2) If the taxpayer cannot readily determine the location of the merchant, the numerator of the receipts factor includes such receipts from the merchant discount multiplied by a fraction:

(A) in the case of a merchant discount related to the use of a credit card, the numerator of which is the amount of fees, interest and penalties charged to credit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section



and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to credit card holders, and

(B) in the case of a merchant discount related to the use of a debit card, the numerator of which is the amount of fees, interest and penalties charged to debit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to debit card holders.

(C) in the case of a merchant discount related to the use of all other types of cards, the numerator of which is the amount of fees, interest and penalties charged to all other card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to all other card holders.

(3) The taxpayer's method for sourcing each receipt from a merchant discount must be consistently applied to such receipt in all states that have adopted sourcing methods substantially similar to subsections (1) and (2) of this section and must be used on all subsequent returns for sourcing receipts from such merchant unless the [State Tax Administrator] permits or requires application of the alternative method.

(k) Receipts from ATM fees. The receipts factor includes all ATM fees that are not forwarded directly to another bank.

(1) The numerator of the receipts factor includes fees charged to a cardholder for the use at an ATM of a card issued by the taxpayer if the cardholder's billing address is in this state.

(2) The numerator of the receipts factor includes fees charged to a cardholder, other than the taxpayer's cardholder, for the use of such card at an ATM owned or rented by the taxpayer, if the ATM is in this state.

(l) Loan servicing fees.

(1) (A) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount

included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(2) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor shall include such fees if the borrower is located in this state.

(m) Receipts from services. [Note - States should choose one of the following two options for this section:

Alternative Option A. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this section, which receipts shall be sourced in accordance with Reg. IV.17 of the Multistate Tax Commission Allocation and Apportionment Regulations, as amended.

Alternative Option B. Delete this proposed Section 3 (m).]

(n) Receipts from the financial institution's investment assets and activity and trading assets and activity.

(1) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities that are reported on the taxpayer's financial statements, call reports, or similar reports shall be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in subparagraphs (A) and (B) of this paragraph, the receipts factor shall include the amounts described in such subparagraphs.

(A) The receipts factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor shall include the amount by which interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(2) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities described in paragraph (1) of this subsection that are attributable to this state.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D) For purposes of this paragraph, average value shall be determined using the rules for determining the average value of tangible personal property set forth in subsections (c) and (d) of Section 4.

(3) In lieu of using the method set forth in paragraph (2) of this subsection, the taxpayer may elect, or the [State Tax Administrator] may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within

this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(4) If the taxpayer elects or is required by the [State Tax Administrator] to use the method set forth in paragraph (3) of this subsection, it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the [State Tax Administrator] to use, or the [State Tax Administrator] requires a different method.

(5) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established at the commercial domicile of the taxpayer.

(o) All other receipts. The numerator of the receipts factor includes all other receipts pursuant to the rules set forth in [insert your state's regular situsing rules for the receipts not covered by this section].

(p) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this section to a state in which the taxpayer is not taxable shall be included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

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#### Appendix A — Definition of Financial Institution.

The following definition of a financial institution or a variation thereof could be made part of a statutory proposal or could be adopted by regulation if the state legislature has already delegated the authority to do so to the State Tax Administrator or other administrative officer. Again, the following provides a starting point for discussion purposes, and the lack of a uniformly adopted definition by all of the states, while affecting competitive balance, is not critical to the main thrust of the apportionment proposal.

"Financial institution" means:

- (1) Any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;
- (2) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§21 et seq.;
- (3) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. § 1813(b)(1);
- (4) Any bank or thrift institution incorporated or organized under the laws of any state;
- (5) Any corporation organized under the provisions of 12 U.S.C. §§611 to 631.
- (6) Any agency or branch of a foreign depository as defined in 12 U.S.C. §3101;
- (7) A state credit union the loan assets of which exceed \$50,000,000 as of the first day of its taxable year;
- (8) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;
- (9) Any corporation whose voting stock is more than fifty percent (50%) owned, directly or indirectly, by any person or business entity described in subsections (1) through (8) above other

than an insurance company taxable under [insert applicable state statute] or a company taxable under [insert applicable state statute];

(10) A corporation or other business entity that derives more than fifty percent (50%) of its total gross income for financial accounting purposes from finance leases. For purposes of this subsection, a "finance lease" shall mean any lease transaction which is the functional equivalent of an extension of credit and that transfers substantially all of the benefits and risks incident to the ownership of property. The phrase shall include any "direct financing lease" or "leverage lease" that meets the criteria of Financial Accounting Standards Board Statement No. 13, "Accounting for Leases" or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles. For this classification to apply,

(a) the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent (50%) requirement; and

(b) gross income from incidental or occasional transactions shall be disregarded; or

(11) Any other person or business entity, other than [an insurance company taxable under \_\_\_\_\_], [a real estate broker taxable under \_\_\_\_\_], [a securities dealer taxable under \_\_\_\_\_] or [a \_\_\_\_\_ company taxable under \_\_\_\_\_], which derives more than fifty percent (50%) of its gross income from activities that a person described in subsections (2) through (8) and (10) above is authorized to transact. For the purpose of this subsection, the computation of gross income shall not include income from non-recurring, extraordinary items.

(12) The [State Tax Administrator] is authorized to exclude any person from the application of subsection (11) upon such person proving, by clear and convincing evidence, that the income producing activity of such person is not in substantial competition with those persons described in subsections (2) through (8) and (10) above.