

Proposed Special Apportionment Regulation Based on Workgroup Suggestions Updated 5/10/16:

Where the denominator of the taxpayer's receipts factor as calculated pursuant to [Compact Article IV] is less than 3.33% of the taxpayer's gross receipts subject to apportionment, the rules set forth herein shall be applied in calculating the taxpayer's receipts factor. These rules may also apply, in the discretion of the tax commissioner, in other circumstances in which the apportionment formula does not fairly represent the extent of the taxpayer's business activity in the state.

Comment [BJF1]: New Threshold Proposal Suggested 9/6/16

If the denominator of the receipts factor as calculated pursuant to [Compact Article IV], is less than 3.33% of the taxpayer's apportionable gross receipts or would otherwise fail to reflect the location of the taxpayer's market, then the following rules shall be applied to those gross receipts where application of these rules will effectuate an equitable apportionment of the taxpayer's income (or loss):

Comment [BJF2]: Subjective distortion test, in addition to numeric trigger;

Comment [BJF3]: Back to "shall" based on Phil Skinner's comment that certainty is good.

Comment [BJF4]: "those gross receipts" to suggest that regulation's application is limited to the other 96.66% of gross receipts...

Comment [BJF5]: To conform to (b)(iii)

1) In the case of any taxpayer deriving gross receipts from interest and investment income, dividends from related parties, or proceeds from the disposition of a business, business segment or capital asset, those gross receipts shall be apportioned as follows:

(a) Receipts (but not less than zero) from interest and net investment income from the maturity, redemption, sale, exchange or other disposition of [marketable] securities, which shall be included in numerator of the receipts factor for this state to the extent those receipts would be sourced to this state under this state's [financial institution receipts factor rules] [or the MTC Model Financial Institutions statute, if this state has not adopted a special apportionment rule or statute for financial institutions];

(b) Receipts from dividends paid by a related party [as defined in Sec. 17 or other state law], to the extent included in the taxable base, shall be included in the sales factor denominator and included in the numerator of this state by use of the following percentages:

Comment [BJF6]: Karen Boucher points out that a taxpayer (e.g., investment partnership) could be engaged in investment activity such that dividends would be considered "receipts" from investment activity, not just gross receipts, since receipt of dividends from investment activity would not fall under Article I exclusion "...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." Is marketplace for investment activity the location of investors? Would we need to clarify that investment partnerships should source dividend income to partner/investor location as "customer"?

i) The percentage of the dividend payor's average apportionment factor [or property and payroll factors] for [this state] for the year in which the dividend was paid, if that information is available, or if not, the most recent year available, or

ii) Where dividends are paid from earnings in a year other than the year in which the dividend was paid, the percentage of dividend payor's average apportionment factor [or property or payroll factors] in this state for the year(s) in which those earnings were generated;

(c) Receipts (but not less than zero) from the sale of capital assets of a business or business segment shall be included in the denominator and shall be attributed to the numerator in [this state] in the same percentage as the business or business segment's average apportionment factor [or property and payroll factors] for [this state] for the year preceding the sale; provided that, if more than 50% of the value of the assets being sold represents goodwill or other intangible value, using the same percentage of the receipts factor in this state of the business entity or business segment sold.

2) If the taxpayer has gross receipts that are not included in the receipts factor pursuant to Section (1), and the state requires the use of multiple factor apportionment formulas, those gross receipts shall

Comment [BJF7]: Group seem comfortable this provides guidance that Section 2, 3 and 4 applicable only to "other" gross receipts.

be included in the denominator of the receipts factor and included in the numerator of the receipts factor of this state by the same **percentage** as the taxpayer's property and payroll factors in this state.

Comment [BJF8]: "Percentage" substituted for "ratio."

3) If the taxpayer has gross receipts that are not included in the receipts factor pursuant to Section (1), and if the state apportions income pursuant to the receipts factor only, the taxpayer shall include those receipts in the denominator and shall include those receipts in the numerator for this state the portion of receipts equal to the following **percentages**:

(a) If the taxpayer is part of a unitary group of corporations, then by the same **percentage** of that unitary group's receipts in this state to receipts everywhere, as though the taxpayer were filing on a combined basis;

(b) If the taxpayer is not a member of a unitary group of corporations, then by the same **percentage** of receipts in this state to receipts everywhere applicable to the owner of a preponderance of beneficial interests in that taxpayer.

4) To the extent the taxpayer's gross receipts are not apportioned pursuant to Section (1), and the where the state apportions income pursuant to the receipts factor only:

(a) if the taxpayer is a member of a unitary group of corporations but is filing a return as a separate entity, the taxpayer's income (or loss) **shall** be apportioned to this state to the extent the combined group's receipts are in this state;

Comment [BJF9]: May or shall?

(b) If the taxpayer is not a member of a unitary group of corporations, the taxpayer's income **may** be apportioned to this state to the extent the apportionment factors of the owner of the preponderance of beneficial interest in that taxpayer are in this state.

Comment [BJF10]: Used "may" since non-unitary beneficial owner's factors may not reflect the taxpayer's activities in state

5) To the extent application of Sections (1), (2) (3) **and (4)**, where applicable, fail to result in an equitable apportionment of the taxpayer's **gross receipts**, the taxpayer's income (or loss) shall be apportioned to this state in a manner which reflects the extent to which the taxpayer's income was derived from income-producing activity in this state in comparison to other states, including a comparison of the locations for the costs of performance for that **income-producing activity**, provided that this method would not result in a substantial portion of the income being apportioned to more than one taxing jurisdiction, or not apportioned to any taxing jurisdiction.

Comment [BJF11]: Group questioned whether use of COP would ever be appropriate...

[Alternative to 5] If the taxpayer's [gross receipts] cannot be equitably **assigned** under the paragraphs above, the taxpayer's income may **shall** be apportioned to this state in a manner which reflects the extent to which the taxpayer's income was derived from this state in comparison to other states **provided that this method would not result in a substantial portion of the income being apportioned to more than one taxing jurisdiction, or not apportioned to any taxing jurisdiction.**

Comment [BJF12]: Is this proviso necessary?