
STATE MARKET SOURCING RULES

UPDATED AS OF NOVEMBER 17, 2014

Note that the statutory and regulatory sections below omit (to the extent possible) rules that pertain solely to financial institutions or the transportation sector. This summary also includes Massachusetts proposed regulations as of the date shown above.

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ALABAMA

ALABAMA STATUTES

ALA. CODE § 40-27-1 -- COMPACT ADOPTED; TERMS.

In relevant part only

17. Sales, other than sales described in Section 16, are in this State if the taxpayer's market for the sale is in this state.

(a) The taxpayer's market for a sale is in this state:

(1) In the case of sale, rental, lease or license of real property, if and to the extent the property is located in this state;

(2) In the case of rental, lease or license of tangible personal property, if and to the extent the property is located 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;

(4) In the case of lease or license of intangible property; or sale or other exchange of intangible property if the receipts from the sale or exchange derive from payments that are contingent on the productivity, use, or disposition of the property, if and to the extent the intangible property is used in this state; provided that intangible property used in marketing a good or service to a consumer is used in this state if the good or service that is marketed using the intangible property is purchased by a consumer who is in this state; and

(5) In the case of sale of intangible property other than that referenced in section (4) above; where the property sold is a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area; if and to the extent the intangible property is used in or otherwise associated with this state, provided that any sale of intangible property not otherwise described in this section (5) or section (4) above shall be excluded from the numerator and the denominator of the sales factor.

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

(c) If the taxpayer is not taxable in a state to which a sale is assigned under subsection (a), or if the state of assignment cannot be determined under subsection (a) or reasonably approximated under subsection (b), the sale shall be excluded from the denominator of the sales factor.

ALABAMA REGULATIONS

ALA. ADMIN. CODE 810-27-1-4-.17.01. SALES FACTOR: SOURCING SALES DERIVED FROM SERVICES RENDERED TO INDIVIDUAL AND UNRELATED BUSINESS CUSTOMERS.

(1) Effective for tax years beginning after December 31, 2010, §40-27-1, Article IV, Paragraph 17, Code of Alabama 1975 has been amended to state that sales other than sales of tangible personal property pursuant to §40-27-1, Article IV, Paragraph 16, are to be sourced to this state if the taxpayer's market for the sale is in this state. This regulation sets forth the Alabama Department of Revenue's policy regarding the sourcing of sales derived from services rendered to individual and unrelated business customers.

(2) The taxpayer's market for a sale is in this state if and to the extent the service is delivered to a location in this state. This regulation interprets when and to what extent a service will be considered delivered to a location in this state under certain situations.

(a) In the case where the taxpayer's customer is an individual, the taxpayer shall source receipts from the sale of a service consistent with this subparagraph.

1. In the case where a taxpayer's customer is an individual and the service provided is a direct personal service, the sale shall be sourced to the state where the customer received the direct personal service. "Direct personal services" are services that are delivered or rendered in person by or on behalf of the service provider to the customer. This type of service requires the service provider and the customer be together at one location. Direct personal services include, but are not limited to, salon services, medical and dental services including examinations and surgeries, dance lessons and other similar services.

(i) Example (i): Hair Cutting Corp, located in Alabama and other states, provides hair grooming services for individuals. Receipts from hair grooming services performed at Hair Cutting Corp locations in Alabama shall be sourced to this state. Receipts from hair grooming services performed at Hair Cutting Corp locations outside of Alabama shall be sourced to the state in which the services were performed.

2. Services delivered to customers which are individuals with an Alabama billing address that are not direct personal services should be sourced to this state.

(i) Example (i): A brokerage firm provides brokerage services to individuals located both inside and outside of Alabama. The firm's brokerage service receipts are sourced to this state if the customer's billing address is in this state.

3. In the case where the sourcing methodology specified by subparagraphs 1. or 2. is: (1) difficult to administer or (2) fails to reasonably reflect the taxpayers market in this state, the taxpayer may utilize, or the Department may require, the

use of other criteria and methodologies that will reasonably approximate the taxpayer's market in this state. If an alternate approach is utilized, the taxpayer must conspicuously note on the return that an alternate approach was utilized for sourcing its sales. If the taxpayer fails to make such a conspicuous disclosure on the return, it will be deemed the taxpayers consent to the sourcing as detailed in subparagraph 1. or 2. above as applicable. Although not required, it is highly recommended that in addition to the conspicuous notation required above, the taxpayer attach to each tax return a detailed explanation of why it was unreasonable to utilize the methodology specified by subparagraph 1. or 2. and an explanation of the methodology used.

(b) In the case where the taxpayer's customer is a business enterprise which is not affiliated with the taxpayer, the taxpayer shall source receipts from the sale of a service consistent with this subparagraph.

1. A business enterprise is affiliated with the taxpayer if it is a related member pursuant to §40-18-1(29), Code of Alabama 1975. "Business enterprise" includes any person other than an individual.

2. To the extent a service is provided to an unrelated business enterprise and the service being provided has a substantial connection to a specific geographic location , the income shall be sourced to Alabama if the geographic location is in this state. If the service receipts have a substantial connection to geographic locations in more than one state, the sales shall be reasonably sourced between those states.

(i) Example (i): Cleaning Company Inc. has a contract to provide cleaning services to Company B, an unrelated business enterprise. The contract specifies that cleaning services are to be provided to Company B's locations in Alabama and other states. Cleaning Company Inc. should source a portion of the total service receipts to Alabama based on the amount of services performed at Company B's locations in Alabama to the total amount of services performed at the other Company B locations .

(ii) Example (ii): Hard Hat Inc. contracts with Company D, a multistate company commercially domiciled outside of Alabama, to design and build a building in Alabama. Hard Hat Inc. will source service receipts from this project to this state.

(iii) Example (iii): Training Service Inc. contracts with Company A, an unrelated multistate business enterprise, to provide training services to Company A's employees located in Alabama and three other states The training services are related to a specific geographic location , therefore they shall be sourced to the location where Company A's employees received the training and not the location of Company A's commercial domicile. Training Service Inc. sources receipts from its contract with Company A by

reasonably assigning those receipts between Alabama and other states using a formula based on the number of training hours provided to Company A locations in Alabama to the total number of training hours provided to all Company A locations .

3. To the extent a service is provided to an unrelated business enterprise and the service being provided does not have a substantial connection to a specific geographic location , sales from services delivered to unrelated business enterprises, commercially domiciled in Alabama, should be sourced to Alabama. A business enterprise is commercially domiciled in Alabama if its principal place of business is in Alabama. If the “Principal place of business” or the nerve center of the business is unknown or it is cost prohibitive to determine, the taxpayer should source the sale to the “Principal Address” of the entity as noted on the public records of the corporations section of the Alabama Secretary of State or the equivalent in the taxpayer's state of domicile.

(i) Example (i): CPA firm provides tax preparation services to Company A that is commercially domiciled in Alabama. Company A also operates business establishments in four other states. The CPA firm should source these sales solely to Alabama.

4. In the case where the sourcing methodology specified by subparagraphs 2. or 3. is: (1) difficult to administer or (2) fails to reasonably reflect the taxpayers market in this state, the taxpayer may utilize, or the Department may require, the use of other criteria and methodologies that will reasonably approximate the taxpayer's market in this state. If an alternate approach is utilized, the taxpayer must conspicuously note on the return that an alternate approach was utilized for sourcing its sales. If the taxpayer fails to make such a conspicuous disclosure on the return, it will be deemed the taxpayers consent to the sourcing as detailed in subparagraph 2. or 3. above as applicable. Although not required, it is highly recommended that in addition to the conspicuous notation required above, the taxpayer attach to each tax return a detailed explanation of why it was unreasonable to utilize the methodology specified by subparagraph 2. or 3. and an explanation of the methodology used.

(i) Example (i): Computer Fix It Company has a contract with Company C to provide on-site computer repair services to Company C's customers. Company C is an unrelated business enterprise which sells computers to customers in Alabama and many other states. Computer Fix It Company should assign a portion of the total service receipts to Alabama based on the portion of repair services performed for Company B's customers in Alabama as compared to the total portion of repair services performed for all of Company B's customers.

(c) The delivery of a tangible medium representing the output of a service does not control the sourcing of receipts from the underlying service .

1. Example 1.: Law Firm Inc. prepares a bond opinion for refinancing the corporate debts of Corporation A, a multi-state corporation commercially domiciled in Alabama. Law Firm Inc. mails the opinion to an office of Corporation A in Delaware. The receipts from this service will be assigned to Alabama despite the property deed having been mailed to a Delaware address unless the taxpayer shows that it is unreasonable to source the receipts to the commercial domicile of its customer pursuant to (b)4. above.

(d) Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the Department of Revenue and one or more other state taxing authorities, the taxpayer may petition for, and the Department of Revenue shall participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the mediation 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.

Authority: Sections 40-2A-7(a)(5) and 40-27-1, Article IV(17.), Code of Alabama 1975

ARIZONA

ARIZONA STATUTES

§ 43 -1147 -- [APPLICABLE TO TAXABLE YEARS BEGINNING FROM AND AFTER 1-1-2014.] SITUS OF SALES OTHER THAN TANGIBLE PERSONAL PROPERTY.

A. Except as provided by subsection B of this section, sales, other than sales of tangible personal property, are in this state if either of the following applies:

1. The income producing activity is performed in this state.
2. The income producing activity is performed both in and outside this state and a greater proportion of the income producing activity is performed in this state than in any other state, based on costs of performance.

B. For taxable years beginning from and after December 31, 2013, a multistate service provider may elect to treat sales from services as being in this state based on a combination of income producing activity sales and market sales. If the election under this subsection is made pursuant to subsection C of this section, the sales of services that are in this state shall be determined for taxable years beginning from and after:

1. December 31, 2013 through December 31, 2014 by the sum of the following:
 - (a) eighty-five per cent of the market sales.
 - (b) fifteen per cent of the income producing activity sales.
2. December 31, 2014 through December 31, 2015 by the sum of the following:
 - (a) ninety per cent of the market sales.
 - (b) ten per cent of the income producing activity sales.
3. December 31, 2015 through December 31, 2016 by the sum of the following:
 - (a) ninety-five per cent of the market sales.
 - (b) five per cent of the income producing activity sales.
4. December 31, 2016 by one hundred per cent of the market sales.

C. A multistate service provider may elect to treat sales from services as being in this state under subsection b of this section as follows:

1. The election must be made on the taxpayer's timely filed original income tax return. The election is:

(a) effective retroactively for the full taxable year of the income tax return on which the election is made.

(b) binding on the taxpayer for at least five consecutive taxable years, regardless of whether the taxpayer no longer meets the percentage threshold of a multistate service provider during that time period, except as provided by paragraph 2 of this subsection. To continue with the election after the five consecutive taxable years, the taxpayer must meet the qualifications to be considered a multistate service provider and renew the election for another five consecutive taxable years.

2. During the election period, the election may be terminated as follows:

(a) without the permission of the department on the acquisition or merger of the taxpayer.

(b) with the permission of the department before the expiration of five consecutive taxable years.

D. For a multistate service provider under subsection E, paragraph 3, subdivision (b) of this section, an election under subsection B of this section is limited to the treatment of sales for educational services.

E. For the purposes of this section:

1. "Income producing activity sales" means the total sales from services that are sales in this state under subsection a of this section.

2. "Market sales" means the total sales from services for which the purchaser received the benefit of the service in this state.

3. "Multistate service provider" means either:

(a) A taxpayer that derives more than eighty-five per cent of its sales from services provided to purchasers who receive the benefit of the service outside this state in the taxable year of election, and includes all taxpayers required to file a combined report pursuant to section 43-942 and all members of an affiliated group included in a consolidated return pursuant to section 43-947. In calculating the eighty-five per cent, sales to students receiving educational services at campuses physically located in this state shall be excluded from the calculation.

(b) A taxpayer that is a regionally accredited institution of higher education with at least one university campus in this state that has more than two thousand students residing on the campus, and includes all taxpayers required to file a

combined report pursuant to section 43-942 and all members of an affiliated group included in a consolidated return pursuant to section 43-947.

4. "Received the benefit of the service in this state" means the services are received by the purchaser in this state. If the state where the services are received cannot be readily determined, the services are considered to be received at the home of the customer or, in the case of a business, the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering location cannot be determined, the services are considered to be received at the home or office of the customer to which the services were billed.

5. "Sales for educational services" means tuition and fees required for enrollment and fees required for courses of instruction, transcripts and graduation.

CALIFORNIA

CALIFORNIA STATUTES

§ 25136 -- [OPERATIVE 1-1-2013.] SITUS OF SALES OF OTHER THAN TANGIBLE PERSONAL PROPERTY FOR TAXABLE YEARS BEGINNING ON OR AFTER JAN. 1, 2013; REGULATIONS.

(a) Notwithstanding Section 38006, for taxable years beginning on or after January 1, 2013, sales, other than sales of tangible personal property, are in this state if:

(1) Sales from services are in this state to the extent the purchaser of the service received the benefit of the services in this state.

(2) Sales from intangible property are in this state to the extent the property is used in this state. In the case of marketable securities, sales are in this state if the customer is in this state.

(3) Sales from the sale, lease, rental, or licensing of real property are in this state if the real property is located in this state.

(4) Sales from the rental, lease, or licensing of tangible personal property are in this state if the property is located in this state.

(b) The Franchise Tax Board may prescribe regulations as necessary or appropriate to carry out the purposes of this section.

CAL. CODE REGS 25136 -2. SALES FACTOR. SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE.

(a) In General. Sales other than those described under Revenue and Taxation Code Sections 25135 and 25136 , subdivision (a), are in this state if the taxpayer's market for the sales is in this state.

(b) General Definitions.

(1) "Benefit of a service is received" means the location where the taxpayer's customer has either directly or indirectly received value from delivery of that service.

Example (A): Real Estate Development Corp with its commercial domicile in State A is developing a tract of land in this state. Real Estate Development Corp contracts with Surveying Corp from State B to survey the tract of land in this state. Regardless of where the survey work is conducted, where the plats are drawn, or where the plats are delivered, the recipient of the service, Real Estate Development Corp, received all of the benefit of the service in this state.

Example (B): Builder Corp with its commercial domicile in State A is building an office complex in this state. Builder Corp contracts with Engineering Corp from State B to oversee construction of the buildings on the site. Engineering Corp performs some of its service in this state at the building site and additional service in State B. Because all of Engineering Corp's services were related to a construction project in this state, the recipient of the services, Builder Corp, received all of the benefit of the service in this state.

Example (C): General Corp with its commercial domicile in State A contracts with Computer Software Corp from State B to develop and install custom computer software for General Corp. The software will be used by General Corp in a business office in this state and in a business office in State A. The software development occurs in State B. The recipient of the service, General Corp, received the benefit of the service in both State A and in this state.

Example (C)[sic]: Apartment Corp owns 100 apartments in this state and 400 apartments in State A, and contracts with Pest Control Corp for pest control services for all the apartments. The benefit of the service is received in both State A and in this state.

(2) "Cannot be determined" means that the taxpayer's records or the records of the taxpayer's customer which are available to the taxpayer do not indicate the location where the benefit of the service was received or where the intangible property was used.

(3) "Complete transfer of all property rights" means a transfer of all property rights associated with the ownership of intangible property, as distinguished from a licensing of intangible property where the licensor retains some ownership rights in connection with the intangible property licensed to a buyer. A complete transfer does not require that a seller has sold all of its stock in a corporation or all of its interest in a pass-through entity; rather, it merely means that the seller retains no property rights in the stock or other interest that has been sold. For example, a seller who owns one hundred (100) percent of the stock of a corporation and sells sixty (60) percent of its ownership interest in the corporation, retaining no property rights in the stock sold, has engaged in a complete transfer of all property rights with regard to the 60% of the stock that was sold. The sixty (60) percent ownership interest sold is subject to assignment under subsections (d)(1)(A)1.a. and b.

(4) "Intangible property" includes, but is not limited to, patents, copyrights, trademarks, service marks, trade names, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, trade secrets, stock, contract rights including broadcasting rights, and other similar intangible assets.

(A) A "marketing intangible" includes, but is not limited to, the license of a copyright, service mark, trademark, or trade name where the value lies

predominantly in the marketing of the intangible property in connection with goods, services or other items.

(B) A “non-marketing and manufacturing intangible” includes, but is not limited to, the license of a patent, a copyright, or trade secret to be used in a manufacturing or other non-marketing process, where the value of the intangible property lies predominately in its use in such process.

(C) A “mixed intangible” includes, but is not limited to, the license of a patent, a copyright, service mark, trademark, trade name, or trade secrets where the value lies both in the marketing of goods, services or other items as described in subparagraph (A) and in the manufacturing process or other non-marketing purpose as described in subparagraph (B).

(5) “Reasonably approximated” means that, considering all sources of information other than the terms of the contract and the taxpayer's books and records kept in the normal course of business, the location of the market for the benefit of the services or the location of the use of the intangible property is determined in a manner that is consistent with the activities of the customer to the extent such information is available to the taxpayer. Reasonable approximation shall be limited to the jurisdictions or geographic areas where the customer or purchaser, at the time of purchase, will receive the benefit of the services or use of the intangible property, to the extent such information is available to the taxpayer. If population is a reasonable approximation, the population used shall be the U.S. population as determined by the most recent U.S. census data. If it can be shown by the taxpayer that the benefit of the service is being substantially received or intangible property is being materially used outside the U.S., then the populations of those other countries where the benefit of the service is being substantially received or the intangible property is being materially used shall be added to the U.S. population. Information that is specific in nature is preferred over information that is general in nature.

(6) “Service” means a commodity consisting of activities engaged in by a person for another person for consideration. The term “service” does not include activities performed by a person who is not in a regular trade or business offering its services to the public, and does not include services rendered to another member of the taxpayer's combined reporting group as defined in Regulation section 25106.5(b)(3).

(7) “The use of intangible property in this state” means the location where the intangible property is employed by the taxpayer's customer or licensee. In the case of the complete transfer of all property rights in stock of a corporation or interest in a pass-through entity, the location of the use of the stock of the corporation or interest in the pass-through entity is the location of the use of the underlying assets of the corporation or pass-through entity.

(8) “To the extent” means that if the customer of a service receives the benefit of a service or uses the intangible property in more than one state, the gross receipts from the performance of the service or the sale of intangible property are included in the numerator

of the sales factor according to the portion of the benefit of the services received and/or the use of the intangible property in this state.

(c) Sales from services are assigned to this state to the extent the customer of the taxpayer receives the benefit of the service in this state.

(1) In the case where an individual is the taxpayer's customer, receipt of the benefit of the service shall be determined as follows:

(A) The location of the benefit of the service shall be presumed to be received in this state if the billing address of the taxpayer's customer, as determined at the end of the taxable year, is in this state. If the taxpayer uses the customer's billing address as the method of assigning the sales to this state, the Franchise Tax Board will accept this method of assignment. This presumption may be overcome by the taxpayer by showing, based on a preponderance of the evidence, that either the contract between the taxpayer and the taxpayer's customer, or other books and records of the taxpayer kept in the normal course of business, provide the extent to which the benefit of the service is received at a location (or locations) in this state. If the taxpayer believes it has overcome the presumption and uses an alternative method based on either the contract between the taxpayer and the taxpayer's customer or other books and records of the taxpayer kept in the normal course of business, the Franchise Tax Board may examine the taxpayer's alternative method to determine if the billing address presumption has been overcome and, if so, whether the taxpayer's alternate method of assignment reasonably reflects where the benefit of the service was received by the taxpayer's customers.

(B) If the presumption in (c)(1)(A) is overcome by the taxpayer, and an alternative method cannot be determined by reference to the contract between the taxpayer and its customer or the taxpayer's books and records kept in the normal course of business, then the location where the benefit of the services is received by the customer shall be reasonably approximated.

(C) Examples.

1. Benefit of the Service - Individuals, subsection (c)(1)(A). Phone Corp provides interstate communications and wireless services to individuals in this state and other states for a monthly fee. The vast majority of consumers of mobile services receive the benefit of the services at many locations. As a result, a customer's billing address is not reflective of the location where the benefit of the services is received by the customer. Phone Corp has operating equipment and facilities used to provide communications services ("net plant facilities") located in geographical areas where customers utilize its services, based on market size and demand. Phone Corp's books and records, kept in the normal course of the business, identify the net plant facilities used in providing the communications services to Phone Corp's customers. Because Phone Corp's

books and records show where the benefit of the services is actually received, the presumption of billing address is overcome. Receipts from interstate communications and wireless services will be attributable to this state based upon the ratio of California net plant facilities over total net plant facilities used to provide those services using a consistent methodology of valuing the property, for example, net book basis of the assets that is determined from Phone Corp's books and records.

2. Benefit of the Service - Individual, subsection (c)(1)(A). Travel Support Corp located in this state provides travel information services to its customers, who are individuals located throughout the United States, through a call center located in this state. The contract between Travel Support Corp and its customers provides that for a fee per call, the customer can call Travel Support Corp for information regarding hotels, restaurants and other travel related information. Travel Support Corp's books and records maintained in the regular course of business indicate that fifteen (15) percent of its customers have billing addresses in this state. However, Travel Support Corp's books and records indicate that only seven (7) percent of the calls handled by the call center originate from this state. Because Travel Support Corp's books and records show where the benefit of the services is actually received, the billing address presumption is overcome and the books and records of the taxpayer may be used to assign seven (7) percent of the gross receipts from the support services provided by the call center to this state.

3. Benefit of the Service - Individual, subsection (c)(1)(A). Same facts as Example 2 except the contract between Travel Support Corp and its customers provides for a set monthly fee, regardless of whether the customer actually calls for travel support. The fact that only seven (7) percent of the calls originate from this state does not overcome the presumption that the benefit of the services is received at the billing address. This is because the charges are not based on a per call basis but rather a flat monthly fee.

4. Benefit of the Service - Individual, subsection (c)(1)(B). Satellite Music Corp has a contract with Car Dealer Corp to provide satellite music service to Car Dealer Corp's retail customers who buy Make and Model X car. Car Dealer Corp's customers pre-pay for a two (2) year service plan to receive satellite music at a discounted rate as part of the purchase price of the Make and Model X car. While Satellite Music Corp requires an email address for Car Dealer Corp's customers who receive the benefit of this service, Satellite Music Corp does not have access to information as to the billing address or physical location of Car Dealer Corp's customers. Satellite Music Corp may reasonably approximate the location where Car Dealer Corp's customers receive the benefit of its satellite music service by a ratio of the number of Car Dealer Corp locations that offer the two (2) year

service plan with Satellite Music Corp to its customers in this state to the number of Car Dealer Corp locations that offer the two (2) year service plan with Satellite Music Corp to its customers located everywhere.

(2) In the case where a corporation or other business entity is the taxpayer's customer, receipt of the benefit of the service shall be determined as follows:

(A) The location of the benefit of the service shall be presumed to be received in this state to the extent the contract between the taxpayer and the taxpayer's customer or the taxpayer's books and records kept in the normal course of business, notwithstanding the billing address of the taxpayer's customer, indicate the benefit of the service is in this state. This presumption may be overcome by the taxpayer or the Franchise Tax Board by showing, based on a preponderance of the evidence, that the location (or locations) indicated by the contract or the taxpayer's books and records was not the actual location where the benefit of the service was received.

(B) If neither the contract nor the taxpayer's books and records provide the location where the benefit of the service is received, or the presumption in subparagraph (A) is overcome, then the location (or locations) where the benefit is received shall be reasonably approximated.

(C) If the location where the benefit of the service is received cannot be determined under subparagraph (A) or reasonably approximated under subparagraph (B), then the location where the benefit of the service is received shall be presumed to be in this state if the location from which the taxpayer's customer placed the order for the service is in this state.

(D) If the location where the benefit of the service is received cannot be determined pursuant to subparagraphs (A), (B), or (C), then the benefit of the service shall be in this state if the taxpayer's customer's billing address is in this state.

(E) Examples.

1. Benefit of the Service - Business Entity, subsection (c)(2)(A). Payroll Services Corp contracts with Customer Corp to provide all payroll services. Customer Corp is commercially domiciled in this state and has employees in a number of other states. The contract between Payroll Services Corp and Customer Corp does not specify where the service will be used by Customer Corp. Payroll Services Corp's books and records indicate the number of employees of Customer Corp in each state where Customer Corp conducts its business. Payroll Services Corp shall assign its receipts from its contract with Customer Corp by determining the ratio of employees of Customer Corp in this state compared to all employees of Customer Corp and assign that percentage of the receipts from Customer Corp to this state.

2. Benefit of the Service - Business Entity, subsection (c)(2)(A). Law Corp located in State C has a Client Corp that has manufacturing plants in this state and State B. Law Corp handles a major litigation matter for Client Corp concerning a manufacturing plant owned by its client in this state. All gross receipts from Law Corp's services related to the litigation are attributable to this state because Law Corp's books and records kept in the normal course of business indicate that the services relate to Client Corp's operations in this state.

3. Benefit of the Service - Business Entity, subsection (c)(2)(A). Audit Corp is located in this state and provides accounting, attest, consulting, and tax services for Client Corp. The contract between Audit Corp and Client Corp provides that Audit Corp is to audit Client Corp for taxable year ended 20XX. Client Corp's books and records kept in the normal course of business, as well as Client Corp's internal controls and assets, are located in States A, B and this state. As a result, Audit Corp's staff will perform the audit activities in States A, B and this state. Audit Corp's business books and records track hours worked by location where its employees performed their service. Audit Corp's receipts are attributable to this state and States A and B according to the taxpayer's books and records which indicate time spent in each state by each staff member.

4. Benefit of the Service - Business Entity, subsection (c)(2)(A). Web Corp provides internet content to its viewers and receives revenue from providing advertising services to other businesses. Web Corp's contracts with other businesses do not indicate the location (or locations) where the benefit of the service is received. The advertisements are shown via the website to Web Corp viewers and the fee collected is determined by reference to the number of times the advertisement is viewed and/or clicked on by viewers of the website. If Web Corp, through its books and records kept in the normal course of business, can determine the location from which the advertisement is viewed and/or clicked on by viewers of the website, then gross receipts from the advertising will be assigned to this state by a ratio of the number of viewings and/or clicks of the advertisement in this state to the total number of viewings and/or clicks on the advertisement.

5. Benefit of the Service - Business Entity, subsection (c)(2)(B). Same facts as Example 4 except Web Corp cannot determine the location from which the advertisement is viewed and/or clicked on through its books and records, so Web Corp shall reasonably approximate the location of the receipt of the benefit by assigning its gross receipts from advertising by a ratio of the number of its viewers in this state to the number of its viewers everywhere.

6. Benefit of the Service - Business Entity, subsection (c)(2)(C). For a flat fee, Painting Corp contracts with Western Corp to paint Western Corp's various sized, shaped and surfaced buildings located in this state and four (4) other states. The contract does not break down the cost of the painting per building or per state. Painting Corp's books and records kept in the normal course of business indicate the location of the buildings that are to be painted but do not provide any method

for determining the extent that the benefit of the service is received in this state, i.e. the size, shape, or surface of each building, or the materials used for each building to be painted. In addition, there is no method for reasonably approximating the location(s) where the benefit of the service was received. Since neither the contract nor Painting Corp's books and records indicate how much of the fee is attributable to this state and there is no method of reasonably approximating the location of where the benefit of the service is received, the sale will be assigned to this state if the order for the service was placed from this state.

7. Benefit of the Service - Business Entity, subsection (c)(2)(D). Same facts as Example 6 except the sale cannot be assigned under subsection (c)(2)(C), so that the sale shall be assigned to this state if Western Corp's billing address is in this state.

(d) Sales from intangible property are assigned to this state to the extent the property is used in this state.

(1) In the case of the complete transfer of all property rights (as defined in subsection (b)(3)) in intangible property (as defined in subsection (b)(4)) for a jurisdiction or jurisdictions, the location of the use of the intangible property shall be determined as follows:

(A) The location of the use of the intangible property shall be presumed to be in this state to the extent that the contract between the taxpayer and the purchaser, or the taxpayer's books and records kept in the normal course of business, indicate that the intangible property is used in this state at the time of the sale. This may include books and records providing the extent that the intangible property is used in this state by the taxpayer for the most recent twelve (12) month taxable year prior to the time of the sale of the intangible property. This presumption may be overcome by the taxpayer or the Franchise Tax Board by showing, based on a preponderance of the evidence, that the actual location of the use of the intangible property by the purchaser at the time of purchase is not consistent with the terms of the contract or the taxpayer's books and records.

1. Where the sale of intangible property is the sale of shares of stock in a corporation or the sale of an ownership interest in a pass-through entity, other than sales of marketable securities, the following rules apply:

a. In the event that fifty (50) % or more of the amount of the assets of the corporation or pass-through entity sold, determined on the date of the sale and using the original cost basis of those assets, consist of real and/or tangible personal property, the sale of the stock or ownership interest will be assigned by averaging the payroll and property factors of the corporation or pass-through entity in this state for the most recent twelve (12) month taxable year prior to the time of the sale to the extent indicated by the taxpayer's books and records kept in the normal course of business. If, however, the sale

occurs more than six (6) months into the current taxable year, then the average of the current taxable year's payroll and property factors shall be used.

b. In the event that more than fifty (50) % of the amount of the assets of the corporation or pass-through entity sold, determined on the date of the sale and using the original costs basis of those assets, consist of intangible property, the sale of the stock or ownership interest will be assigned by using the sales factor of the corporation or pass-through entity in this state for the most recent twelve (12) month taxable year prior to the time of the sale to the extent indicated by the taxpayer's books and records. If, however, the sale occurs more than six (6) months into the current taxable year, then the current taxable year's sales factor shall be used.

(B) If the extent of the use of the intangible property in this state cannot be determined under subparagraph (A) or the presumption under subparagraph (A) is overcome, the location where the intangible property is used shall be reasonably approximated.

(C) If the extent of the use of the intangible property in this state cannot be determined pursuant to subparagraphs (A) or (B), then the gross receipts shall be assigned to this state if the billing address of the purchaser is in this state.

(D) Examples.

1. Intangible Property - Complete Transfer, Sale of Stock in a Corporation or Ownership Interest in a Pass-through Entity, subsection (d)(1)(A)1.a. Parent Corp sells all of the of stock of Subsidiary Corp. At the time of sale, the predominant value (over 50%) of Subsidiary Corp's assets consists of tangible personal property and Subsidiary Corp had locations in this state and three (3) other states. Taxpayer's books and records indicate Subsidiary Corp had payroll and property in this state of 15% and 25%, respectively, in its twelve (12) month taxable year preceding the sale. In assigning the receipt from the sale of Subsidiary Corp. Taxpayer may average the property and payroll percentages and assign 20% of the receipt from the sale to this state.

2. Intangible Property - Complete Transfer, Sale of Stock in a Corporation or Ownership Interest in a Pass-through Entity, subsection (d)(1)(A)1.b. Parent Corp sells an interest in Target Entity. At the time of the sale, the predominant value (over 50%) of Target Entity's assets consists of intangible property. Target Entity's books and records indicate that 30% of Target Entity's sales were assigned to California during the most recent full tax period preceding the sale. Parent Corp may assign 30% of the receipt from the sale of the interest in Target Entity to this state.

3. Intangible Property - Complete Transfer, subsection (d)(1)(B). R&D Corp sells a patent to Manu Corp that will be used by Manu Corp to manufacture products for sale in the United States. The contract between R&D Corp and Manu Corp indicates that Manu Corp will have the exclusive rights to the patent for exploitation in the United States. At the time of the purchase, R&D Corp knows that Manu Corp has three factories that will use the patented process in manufacturing, one of which is located in this state. In the absence of specific information as to the amount of manufacturing Manu Corp does at each of the three locations, R&D Corp may reasonably approximate the location of the use by assigning the receipts from the sale equally among the three states where Manu Corp has manufacturing plants, assigning 33% of the sale to this state.

4. Property - Complete Transfer, subsection (d)(1)(C). Same facts as Example 3, except R&D Corp has no information regarding Manu Corp's activities. R&D Corp shall assign the receipt to the billing address of Manu Corp.

(2) In the case of the licensing, leasing, rental or other use of intangible property as defined in subsection (b)(4), not including sales of intangible property provided for in paragraph (1), the location of the use of the intangible property in this state shall be determined as follows:

(A) Marketing Intangible.

1. 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, the royalties or other licensing fees paid by the licensee for such right(s) are attributable to this state to the extent that the fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by the ultimate customers in this state. The contract between the taxpayer and the licensee of the intangible property or the taxpayer's books and records kept in the normal course of business shall be presumed to provide a method for determination of the ultimate customers in this state for the purchase of goods, services, or other items in connection with the use of the intangible property. This presumption may be overcome by the taxpayer or the Franchise Tax Board by showing, based on a preponderance of the evidence, that the ultimate customers in this state are not determinable under the contract or the taxpayer's books and records.

2. If the location of the use of the intangible property is not determinable under subparagraph 1 or the presumption under subparagraph 1 is overcome, the location of the use of the intangible property shall be reasonably approximated. To determine the customer's or licensee's use of marketing intangibles in this state, factors that may be

considered include the number of licensed sites in each state, the volume of property manufactured, produced or sold pursuant to the arrangement at locations in this state, or other data that reflects the relative usage of the intangible property in this state.

3. Where the license of a marketing intangible property 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 taxpayer may be unable to develop information regarding the location of the ultimate use of the intangible property. If this is the case, then the taxpayer may attribute the receipt to this state based solely upon the percentage of this state's population as compared with the total population of the geographic area in which the licensee uses the intangible property to market its goods, services or other items. The population used shall be the U.S. population, unless it can be shown by the taxpayer that the intangible property is being used materially in other parts of the world. If the taxpayer can show that the intangible property is being used materially in other parts of the world, then only the populations of those other countries where the intangible is being materially used shall be added to the U.S. population.

(B) Non-marketing and manufacturing intangibles.

1. Where 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, the licensing fees paid by the licensee for such right(s) are attributable to this state to the extent that the use for which the fees are paid takes place in this state. The terms of the contract between the taxpayer and the licensee of the intangible property or the taxpayer's books and records kept in the normal course of business shall be presumed to provide a method for determination of the extent of the use of the intangible property in this state. This presumption may be overcome by the taxpayer or the Franchise Tax Board by showing, based on a preponderance of the evidence, that the extent of the use for which the fees are paid are not determinable under the contract or the taxpayer's books and records.

2. If the location of the use of the intangible property cannot be determined under subparagraph 1 or the presumption in subparagraph 1 is overcome, then the location of the use of the intangible property shall be reasonably approximated.

3. If the location of the use of the intangible property for which the fees are paid cannot be determined under subparagraphs 1 or 2, it shall be presumed that the use of the intangible property takes place in this state if the licensee's billing address is in this state.

(C) Mixed intangibles.

1. A license of intangible property includes both a license of a marketing intangible and a license of a non-marketing or manufacturing intangible, and the fees to be paid in each instance are separately stated in the licensing contract, the Franchise Tax Board will accept such separate statement for purposes of this section if it is reasonable. If the Franchise Tax Board determines that the separate statement is not reasonable, then the Franchise Tax Board may assign the fees using a reasonable method that accurately reflects the licensing of a marketing intangible and the licensing of a non-marketing or manufacturing intangible.

2. Where the fees to be paid in each instance are not separately stated in the contract, it shall be presumed that the licensing fees are paid entirely for the license of a marketing intangible except to the extent that the taxpayer or the Franchise Tax Board can reasonably establish otherwise. This presumption may be overcome, by a preponderance of the evidence, by the taxpayer or the Franchise Tax Board, that the licensing fees are paid for both the licensing of a marketing intangible and the licensing of a non-marketing or manufacturing intangible, and the extent to which the fees represent the marketing intangible and the non-marketing or manufacturing intangible.

(D) Examples.

1. Intangible Property - Marketing Intangible, subsection (d)(2)(A)1. Crayon Corp and Dealer Corp enter into a license agreement whereby Dealer Corp as licensee is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Corp's sale of certain products to retail customers. Under the contract, Dealer Corp is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Corp of products using the Crayon Corp trademarks. Under the agreement, Dealer Corp is permitted to sell the products at multiple store locations, including store locations that are both within and without this state. The licensing fees that are paid by Dealer Corp are broken out on a per-store basis. The licensing fees paid to Crayon Corp by Dealer Corp represent fees from the licensing of a marketing intangible and the fees that are derived from the individual sales at stores in this state constitute sales in this state.

2. Intangible Property - Marketing Intangible, subsection (d)(2)(A)2. Moniker Corp enters into a license agreement with Sports Corp where Sports Corp is granted the right to use trademarks owned by Moniker Corp to brand sports equipment that is to be manufactured by Sports Corp or an unrelated entity, and to sell the manufactured product to unrelated companies that make retail sales in a specified geographic region. Although the trademarks in question will be affixed to the tangible property to be manufactured, the license agreement confers a license of a marketing

intangible. Neither the contract between the taxpayer and the licensee nor the taxpayer's books and records provide a method for determination of this state's customers of equipment manufactured with Moniker Corp's trademarks. The component of the licensing fee that constitutes sales of Moniker Corp in this state is reasonably approximated by multiplying the amount of the fee by the percentage of this state's population over the total population in the specified geographic region in which the retail sales are made.

3. Intangible Property - Marketing Intangible, Wholesale, subsection (d)(2)(A)3. Cartoon Corp enters into a license agreement with Wholesale Corp where Wholesale Corp is granted the right to use Cartoon Corp's cartoon characters in the design and manufacture of tee shirts and sweatshirts which will be sold to various retailers who will in turn sell them to members of the public. Cartoon Corp is unable to develop information regarding the location of the ultimate customer of the products designed and manufactured in connection with Cartoon Corp's cartoon characters. Cartoon Corp shall assign the licensing fee by multiplying the fee by the percentage of this state's population over the total population in the geographic area in which Cartoon Corp markets its goods, services or other items.

4. Intangible Property - Non-marketing and Manufacturing Intangible, subsection (d)(2)(B)1. Formula Corp and Appliance Corp enter into a license agreement whereby Appliance Corp is permitted to use a patent owned by Formula Corp to manufacture and sell appliances at stores owned by Appliance Corp within a certain geographic region. The license agreement specifies that Appliance Corp is to pay Formula Corp a royalty equal to a fixed percentage of the gross receipts from the products sold. The contract does not specify any other fees. The appliances are manufactured and sold in this state and several other states. Given these facts, it is presumed that the licensing fees are paid for the license of a manufacturing intangible. Since Formula Corp can demonstrate the percentage of manufacturing by Appliance Corp that takes place in this state using the patent, that percentage of the total licensing fee paid to Formula Corp under the contract will constitute Formula Corp's sales in this state.

5. Intangible Property - Non-marketing and Manufacturing Intangible, subsection (d)(2)(B)2. Mechanical Corp enters into a license agreement with Spa Corp where Spa Corp is granted the right to use the patents owned by Mechanical Corp to manufacture mechanically operated spa covers for spas that Spa Corp manufactures. Neither the terms of the contract nor the taxpayer's books and records indicate the extent of the use of the patent in this state. However, there is public information that Spa Corp has three manufacturing locations in this state and an additional six manufacturing locations in various other states. Mechanical Corp may

reasonably approximate the location of the use of the intangible property and assign 33% of the licensing fees to this state.

6. Intangible Property - Non-marketing and Manufacturing Intangible, subsection (d)(2)(B)3. Same facts as Example 5 except that Spa Corp is a small, privately held manufacturing corporation that has no publicly available information as to its manufacturing locations, Mechanical Corp shall assign all of the licensing fees to this state if Spa Corp's billing address is in this state.

7. Intangible Property - Mixed Intangible, subsection (d)(2)(C)1. Axel Corp enters into a two-year license agreement with Biker Corp in which Biker Corp is granted the right to produce motor scooters using patented technology owned by Axel Corp, and also to sell such scooters by marketing the fact that the scooters were manufactured using the special technology. The scooters are manufactured outside this state, but the taxpayer is granted the right to sell the scooters in a geographic area in which this state's population constitutes 25% of the total population in the geographic area during the period in question. The license agreement specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing agreement constitutes both the license of a marketing intangible and the license of a non-marketing intangible. Assuming that the separately stated fees are reasonable, the Franchise Tax Board will: (1) attribute no part of the licensing fee paid for the non-marketing intangible to this state, and (2) attribute 25% of the licensing fee paid for the marketing intangible to this state.

8. Intangible Property - Mixed Intangible, subsection (d)(2)(C)2. Same facts as Example 7, except that the licensing agreement requires an upfront licensing fee to be paid by Biker Corp to Axel Corp but does not specify which percentage of the fee is derived from Biker Corp's right to use Axel Corp's patented technology. Unless either the taxpayer or the Franchise Tax Board reasonably establishes otherwise, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible. In such cases, it will be presumed that 25% of the licensing fee constitutes sales in this state.

(e) Sales from the sale, lease, rental, or licensing of real property are in this state if and to the extent the real property is located in this state.

(f) Sales from the rental, lease, or licensing of tangible personal property are in this state if and to the extent the tangible personal property is located in this state.

Example: Railroad Corp is the owner of ten railroad cars. During the year, the total days each railroad car was present in this state was 50 days. The receipts attributable to the use of each of the railroad cars in this state are a separate item of income and shall be determined as follows:

$$(10 \times 50 =) 500 \times \text{Total Receipts} / (365 \times 10 =) 3650 = \text{Receipts Attributable to this State}$$

(g) Special Rules.

(1) In assigning sales to the sales factor numerator pursuant to Revenue and Taxation Code section 25136 (b), the Franchise Tax Board shall consider the effort and expense required to obtain the necessary information, as well as the resources of the taxpayer seeking to obtain this information, and may accept a reasonable approximation when appropriate, such as when the necessary data of a smaller business cannot be reasonably developed from financial records maintained in the regular course of business.

(A) Example. Misc Corp, a corporation located in this state, provides limited bookkeeping services to clients both within and outside this state. Some clients have several operations among various states. For the past ten (10) years, Misc Corp's only records for the sales of these services have consisted of invoices with the billing address for the client. Misc Corp's records have been consistently maintained in this manner. If the Franchise Tax Board determines that Misc Corp cannot determine, pursuant to financial records maintained in the regular course of its business, the location where the benefit of the services it performs are received under the rules in this regulation, then Misc Corp's sales of services will be assigned to this state using the billing address information maintained by the taxpayer. Misc Corp will not be required to alter its recordkeeping method for purposes of this regulation.

(2) The following special rules shall apply in determining the method of reasonable approximation of the location for the receipt of the benefit of the services or the location of the use of the intangible property:

(A) Once a taxpayer has used a reasonable approximation method to determine the location of the market for the receipt of the benefit of the services or the location of the use of the intangible property, then the taxpayer must continue to use that method in subsequent taxable years. A change to a different method of reasonable approximation may not be made without the permission of the Franchise Tax Board. Where the Franchise Tax Board has examined the reasonable approximation method and accepted it in writing, the Franchise Tax Board will continue to accept that method, absent any change of material fact such that the method no longer reasonably reflects the market for the receipt of the benefit of the services or the location of the use of the intangible property.

(B) The method of reasonable approximation shall reasonably relate to the income of the taxpayer. For example, if the taxpayer includes in its reasonable approximation methodology countries which are identified in its contracts or its books and records maintained in the normal course of business but for which no sales are made during the taxable years at issue, then the reasonable approximation

methodology being used by the taxpayer does not reasonably relate to the income of the taxpayer.

(3) The sales factor provisions set forth in Regulation sections 25137 through 25137-14 are hereby incorporated by reference, with the following modifications for taxable years beginning on and after January 1, 2011:

(A) All references to Revenue and Taxation Code section 25136 and Regulation section 25136 shall refer to Revenue and Taxation Code section 25136 , subdivision (b), and Regulation section 25136 -2 as they are operative beginning on and after January 1, 2011.

(B) Regulation section 25137(c)1(C) [Special Rules. Sales Factor] shall not be applicable.

(C) The provisions in Regulation section 25137-3 [Franchisors] that relate to the taxpayer being, or not being, taxable in a state shall not be applicable.

(D) The provisions in Regulation section 25137-4.2 [Banks and Financials] that relate to income-producing activity and costs of performance, and throwback, shall not be applicable.

(E) The provisions in Regulation section 25137-12 [Print Media] that relate to a taxpayer not being taxable in another state and the sale's inclusion in the sales factor numerator if the property had been shipped from this state, shall not be applicable.

(F) The provisions in Regulation section 25137-14 that relate to the taxpayer not being taxable in a state, and assign the receipts to the location of the income-producing activity that gave rise to the receipts, shall not be applicable.

Note: Authority cited: Section 19503, Revenue and Taxation Code. Reference: Section 25136 , Revenue and Taxation Code.

GEORGIA

GEORGIA STATUTES

§ 48 -7 -31 -- TAXATION OF CORPORATIONS; ALLOCATION AND APPORTIONMENT OF INCOME; FORMULA FOR APPORTIONMENT.

In relevant part only

...

(d)(1) Where the net business income of the corporation is derived principally from the manufacture, production, or sale of tangible personal property, the portion of net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following formula:

(A) Gross receipts factor.

(i) The gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period and the denominator of which is the total gross receipts from business done everywhere during the tax period. For the purposes of this subparagraph, receipts shall be deemed to have been derived from business done within this state only if the receipts are received from products shipped to customers in this state, or from products delivered within this state to customers. In determining the gross receipts within this state, receipts from sales negotiated or effected through offices of the taxpayer outside this state and delivered from storage in this state to customers outside this state shall be excluded;

(ii) Where a taxpayer's gross receipts are also derived from activities described in paragraph (2) of this subsection, gross receipts shall also include the gross receipts from the activities described in paragraph (2) of this subsection and shall be attributed to Georgia based upon division (2)(A)(i) of this subsection;

(B) Apportionment formula. The net income of the corporation shall be apportioned to this state according to the gross receipts factor pursuant to subparagraph (A) of this paragraph;

...

(d)(2.1) (A) Except as otherwise provided in this paragraph, all terms used in this paragraph shall have the same meaning as such terms are defined in 49 U.S.C. Section 1301 and the United States Department of Transportation's Uniform System

of Accounts and Reports for Large Certificated Air Carriers, 14 C.F.R. Part 241, as now or hereafter amended.

(B) Where the net business income of the corporation is derived principally from transporting passengers or cargo in revenue flight, the portion of the net income therefrom attributable to property owned or business done within this state shall be taken to be the portion arrived at by application of the following three factor formula:

(i) Revenue air miles factor. The revenue air miles factor is a fraction, the numerator of which shall be equal to the total, for each flight stage which originates or terminates in this state, of revenue passenger miles by aircraft type flown in this state and revenue cargo ton miles by aircraft type flown in this state and the denominator of which shall be equal to the total, for all flight stages flown everywhere, of total revenue passenger miles by aircraft type and total revenue cargo ton miles by aircraft type;

(ii) Tons handled factor. The tons handled factor is a fraction, the numerator of which shall be equal to the total of revenue passenger tons by aircraft type handled in this state and revenue cargo tons by aircraft type handled in this state and the denominator of which shall be equal to the total of revenue passenger tons by aircraft type flown everywhere and revenue cargo tons by aircraft type flown everywhere. For purposes of this division, the term "handled" means the product of 60 percent multiplied by the revenue passenger tons flown on each flight stage which originates in this state or 60 percent multiplied by the revenue cargo tons flown on each flight stage which originates in this state;

(iii) Originating revenue factor. The originating revenue factor is a fraction, the numerator of which shall be equal to the total of passenger and cargo revenue by aircraft type which is attributable to this state and the denominator of which shall be the total of passenger and cargo revenue by aircraft type everywhere. For purposes of this division, passenger or cargo revenue which is attributable to this state shall be equal to the product of passenger or cargo revenue everywhere by aircraft type multiplied by the ratio of revenue passenger miles or revenue cargo ton miles in this state to total revenue passenger miles everywhere or total revenue cargo ton miles everywhere for each aircraft type as separately determined in division (i) of this subparagraph. If records of total passenger revenue everywhere by aircraft type or total cargo revenue everywhere by aircraft type are not maintained, then for purposes of this division, total passenger revenue everywhere for all aircraft types or total cargo revenue everywhere for all aircraft types shall be allocated to each aircraft type based on the ratio of total revenue passenger miles everywhere for that aircraft type to all aircraft types or total revenue cargo ton miles everywhere for that aircraft type to all aircraft types;

(iv) The revenue air miles factor, the tons handled factor, and the originating revenue factor shall be separately determined and an apportionment fraction shall be calculated using the following formula:

(I) The revenue air miles factor shall represent 25 percent of the fraction;

(II) The tons handled factor shall represent 25 percent of the fraction; and

(III) The originating revenue factor shall represent 50 percent of the fraction.

The net income of the corporation shall be apportioned to this state according to such average fraction;

(2.2) (A) As used in this paragraph, the term:

(i) "Credit card data processing and related services" shall include, but not be limited to, the provision of infrastructure services for bank credit card and private label card issuers, such as new account application processing, international and domestic clearing, statement preparation, point-of-sale authorization processing, card embossing, and other related processing services for managing cardholder accounts.

(ii) "Customer" means the banks and institutions to whom credit card data processing and related services are provided.

(iii) "Gross receipts factor" means a fraction, the numerator of which is the total gross receipts from the taxpayer's customers during the tax period, if the principal office of the customer's credit card operation is in this state or if the principal office of the taxpayer's customer is in this state, and the denominator of which is the total gross receipts from all of the taxpayer's customers during the tax period.

(B) Where more than 60 percent of the total gross receipts of a corporation are derived from the provision of credit card data processing and related services to banks and other institutions, the portion of the net income attributable to business done in this state shall be determined by multiplying the corporation's net income by the gross receipts factor in division (iii) of subparagraph (A) of this paragraph;

(3) For the purposes of this subsection, the term "sale" shall include, but not be limited to, an exchange, and the term "manufacture" shall include, but not be limited to the extraction and recovery of natural resources and all processes of fabricating and curing.

...

GEORGIA REGULATIONS

GA. COMP. R. & REGS. 560-7-7-.03. CORPORATIONS: ALLOCATION AND APPORTIONMENT OF INCOME.

In relevant part only

...

(4)(c) Gross receipts factor.

1. General rule. O.C.G.A. § 48 -7 -31 provides that the gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period, and the denominator of which is the total gross receipts from business done everywhere during the tax period. Except as otherwise provided in subparagraph (4)(c), the term “gross receipts” as used in subparagraph (4)(c) means all gross receipts derived by the taxpayer from products shipped or delivered to customers in the regular course of the taxpayer's trade or business.

2. Gross receipts; manufacturing and resale. In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, all gross receipts from the sale of such goods or products, or other property of a kind which would properly be included in inventory of the taxpayer if on hand at the close of the tax period, and which are held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business, are included in the gross receipts factor. Gross receipts for this purpose means gross sales, less returns and allowances, and includes all service charges or carrying charges incidental to such sales. Federal and state excise taxes, including sales taxes, shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.

3. Where a taxpayer's gross receipts are also derived from activities described in paragraph (5), gross receipts shall also include the gross receipts from the activities described in paragraph (5) and shall be attributed to Georgia based upon subparagraph (5)(c).

4. Lease of tangible personal property. Gross receipts shall include receipts which are received from the lease of tangible personal property where such receipts are from activities which constitute the taxpayer's regular trade or business. The receipts shall be considered Georgia gross receipts if the property is located in this state. The gross receipts of mobile or movable property such as construction equipment, trucks, or leased electronic equipment which is located within and outside this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of the total time within the state during the tax

period or another reasonable method which reflects the use of the property in this state as approved and determined by the Commissioner.

5. Gross receipts; fixed-fee contracts. In the case of cost plus fixed-fee contracts, such as the operation of a government-owned plant for a cost plus a fixed fee, gross receipts shall include only the fixed fee charged for the operation of the plant.

6. Modification of gross receipts. In filing returns with Georgia, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the gross receipts factor used in returns for prior years, the taxpayer shall disclose on the return for the current year the nature and extent of the modification.

7. Denominator. The denominator of the gross receipts factor shall include the total gross receipts as defined or otherwise provided in subparagraph (4)(c).

8. Numerator. The numerator of the gross receipts factor shall include the gross receipts attributable to this state and derived by the taxpayer from products shipped or delivered to customers in this State in the regular course of the taxpayer's trade or business or that are otherwise attributable to Georgia as provided in subparagraph (4)(c).

9. Sales of tangible personal property in this state.

(i) Gross receipts from the sales of tangible personal property are attributable to this state if the property is delivered or shipped to a customer within this state regardless of the f.o.b. point or other conditions of sale. However, when property is picked up by an out-of-state customer at the taxpayer's place of business in Georgia for transport out of the state, the gross receipts from such sales are not attributable to this state. The actual place of transfer and the manner by which the property arrives at its eventual destination is immaterial.

(ii) Property shall be deemed to be delivered or shipped to a customer within this state if the recipient is located in this state, even though the property is ordered from outside this state. Additionally, when property is picked up by a Georgia customer at the taxpayer's out-of-state place of business for transport to this state, the gross receipts from such sales are attributable to this state. The actual place of transfer and the manner by which the property arrives at its eventual destination is immaterial.

(iii) Property is delivered or shipped to a customer within this State if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

(iv) The term “customer within this state” shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the customer, delivers to or has the property shipped to the ultimate recipient within this state.

(v) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, gross receipts from the sales are attributable to this state.

...

4. For tax years beginning on or after January 1, 2008, the Georgia apportionment ratio shall be computed by applying only the gross receipts factor.

(e) Apportionment of income: business joint ventures and business partnerships.

A corporation that is involved in a business joint venture, is a member of a limited liability company or similar nontaxable entity not treated as a corporation for federal income tax purposes, or is a partner in a business partnership, must include its pro rata share of the entity's property, payroll, and gross receipts in its own apportionment formula. In determining its income, the corporation includes its share of the entity's income before the entity apportions and allocates its income.

(5) Apportionment of income; where not principally from tangible personal property. Except as otherwise provided in Chapter 7 of Title 48 of the O.C.G.A., any corporation whose net business income is derived principally from business other than the manufacture, production, or sale of tangible personal property, shall be taxed upon that portion of its net income attributable to this state, determined by use of a three-factor apportionment formula. The three factors in the apportionment formula are the property factor, the payroll factor, and the gross receipts factor. However, for tax years beginning on or after January 1, 2008, the Georgia apportionment ratio shall be computed by applying only the gross receipts factor.

...

(c) Gross receipts factor.

1. General rule. O.C.G.A § 48 -7 -31 provides that the gross receipts factor is a fraction, the numerator of which is the total gross receipts from business done within this state during the tax period, and the denominator of which is the total gross receipts from business done everywhere during the tax period. Gross receipts are in this state if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state's marketplace. This gross receipts factor is designed to measure the marketplace for the taxpayer's goods and services.

2. For purposes of subparagraph (5)(c), the term “gross receipts” means all gross receipts received from activities which constitute the taxpayer's regular trade or business. This shall not include:

- i. Receipts from the sale of assets unless such receipts are from activities which constitute the taxpayer's regular trade or business;
- ii. Apportionable interest and dividends unless the taxpayer's regular trade or business involves the loaning and/or investing of money;
- iii. Gross receipts from the management of working capital;
- iv. Receipts from income that is allocable;
- v. Apportionable rents or royalties unless such receipts are from activities which constitute the taxpayer's regular trade or business; and
- vi. Other similar income;

3. "Customers within this state" as used within this Regulation shall mean:

- (i) A customer that is engaged in a trade or business and maintains a regular place of business within this state; or
- (ii) A customer that is not engaged in a trade or business whose billing address is in this state.

4. "Regular place of business" as used within this Regulation means an office, factory, warehouse, or other business location at which the customer conducts business in a regular and systematic manner and which is continuously maintained, occupied and used by employees, agents or representatives of the customer.

5. "Billing address" as used within this Regulation means the location indicated in the books and records of the taxpayer as the address of record where any notice, statement and/or bill relating to a customer's account is mailed.

6. The following shall be used to determine the amount that is attributable to this state's marketplace for purposes of subparagraph (5)(c):

- (i) Computer software. Gross receipts from the sale, lease, development, or license of custom computer software shall be treated according to subparagraph (5)(c)6.(ii). The gross receipts from the sale, lease, development, or license of prewritten computer software shall be treated pursuant to subparagraph (4)(c). Modification to existing prewritten computer software to meet the customer's needs is custom computer software only to the extent of the modification. The manner in which the computer software is delivered, whether it be in a tangible medium or electronically, is not considered in determining whether the computer software is custom computer software or prewritten computer software. Additionally, documentation related to the software shall be treated in the same manner as the computer software and shall not be considered in

determining whether the computer software is custom computer software or prewritten computer software. For purposes of this regulation the following definitions shall apply:

(I) The term “computer software” means any computer data, program or routine, or any set of one or more programs or routines, which are used or intended for use to cause one or more computers, pieces of computer-related peripheral equipment, automatic processing equipment, or any combination thereof, to perform a task or set of tasks. Without limiting the generality of the foregoing, the term “computer software” shall include operating programs, application programs, system programs, and subdivisions (such as assemblers, compilers, generators, and utility programs).

(II) The term “custom computer software” means computer software, including custom updates, which is designed and developed by the author to the specifications of a specific purchaser. Any subsequent sale of custom software shall be deemed prewritten computer software.

(III) The term “prewritten computer software,” also known as “canned computer software,” means computer software that is designed, prepared, or held for general distribution or repeated use, or software programs developed in-house and subsequently held or offered for repeated sale, lease, license, or use.

(IV) The term “application program” means a set of statements or instructions that when incorporated in a machine-usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result for the end user. Application programs include any other computer software that does not qualify under subparagraph (V) or (VI).

(V) The term “operating program” means a set of statements or instructions that when incorporated into a machine or device having information processing capabilities is an interface between the computer hardware and the application program or system program.

(VI) The term “system program” means a set of statements or instructions that interacts with the operating program that is developed, licensed, and intended to build, test, manage, or maintain application programs.

(ii) Services. Except as otherwise provided, all gross receipts from the performance of services are included in the numerator of the

apportionment factor if the recipient of the service receives all of the benefit of the service in Georgia. If the recipient of the service receives some of the benefit of the service in Georgia, the gross receipts are included in the numerator of the apportionment factor in proportion to the extent the recipient receives benefit of the service in Georgia. The following noninclusive examples illustrate the application of this subparagraph:

(I) A real estate development firm from State A is developing a tract of land in Georgia. The real estate development firm from State A engages a surveying company from State B to survey the tract of land in Georgia. The survey work is completed and the plats are drawn in Georgia. All of the gross receipts from this survey work are attributable to Georgia and are included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Georgia.

(II) A corporation headquartered in State A is building an office complex in Georgia. The corporation from State A contracts with an engineering firm from State B to oversee construction of the buildings on the site. The engineering firm performs some of their service in Georgia at the building site and additional service in State B. All of the gross receipts from the engineering service are attributable to Georgia and are included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Georgia.

(III) A corporation from State A contracts with a computer software company from State B to develop and install custom computer software for a business office located in Georgia of the corporation from State A. The software will only be used by the business office in Georgia. The software development occurs in State B. All of the gross receipts from the software development and installation are attributable to Georgia and are included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Georgia.

(IV) A corporation from State A contracts with a computer software company from State B to develop and install custom computer software for the corporation from State A. The software will be used by the corporation from State A in a business office in Georgia and in a business office in State A. The software development occurs in State B. The gross receipts from the software development and installation are included in the numerator of the apportionment factor in proportion to the extent the software is used in Georgia.

(V) A corporation located in Georgia performs direct mail activities for a customer located in State A. The direct mail activities include the preparation and mailing of materials to households located throughout the United States. The corporation located in Georgia performed some activities related to the direct mail contract in State A. One percent of the direct mailings were sent to addresses within Georgia. One percent of the gross receipts related to this direct mail contract are thus attributable to Georgia and included in the numerator of the apportionment factor because the recipient of the service received 1 percent of the benefit of the service in Georgia.

(VI) A corporation located in State A, who otherwise does business in Georgia, performs direct mail activities for a customer located in State B. The direct mail activities include the preparation and mailing of materials to households throughout the United States. The corporation located in State A printed and mailed the direct mail materials to households on a mailing list prepared by the corporation in State A. Five percent of the direct mailings were sent to addresses within Georgia. Five percent of the gross receipts related to this direct mail contract are thus attributable to Georgia and included in the numerator of the apportionment factor.

(VII) A company which owns apartments in Georgia and State A contracts with a pest control corporation for pest control activities. One contract is entered into which covers 100 apartment units in Georgia and 400 apartment units in State A. Twenty percent (100/500) of the gross receipts from the pest control contract are attributable to Georgia and are included in the numerator of the apportionment factor as 20 percent of the apartment units are located in Georgia and in the absence of more accurate records, it is therefore presumed that the number of apartment units is the best measure of the extent to which the recipient of the service received benefit of the service in Georgia.

(iii) Rental or lease of real property. Gross receipts shall include receipts which are received from the rental or lease of real property where such receipts are from activities which constitute the taxpayer's regular trade or business. Such receipts shall be attributable to this state's marketplace if the property is located in this state.

(iv) Brokerage Services. Gross receipts derived from securities brokerages services attributable to this State are determined by multiplying the total dollar amount of gross receipts from securities brokerage services by a fraction, the numerator of which is the gross receipts from securities brokerage services from customers within this state, and the denominator of which is the gross receipts from securities brokerage services from all

customers. Gross receipts from securities brokerage services include commissions on transactions, the spread earned on principal transactions in which the broker buys or sells from its account, total margin interest paid on behalf of brokerage accounts owned by the broker's customers, and fees and receipts of all kinds from the underwriting of securities. For example, a broker executes a transaction on a stock exchange for a customer within this state, selling 100 shares of Corporation X for \$1,000. The broker earns a \$50 commission on the transaction. Only the commission is included in the numerator and denominator of the broker's gross receipts factor. If gross receipts from brokerage services can be associated with a particular customer, but it is impractical to associate the gross receipts with the address of the customer, then the address of the customer shall be presumed to be the address of the branch office that generates transactions for the customer.

(v) Services to Regulated Investment Companies. Gross receipts from services that are derived directly or indirectly from the sale of management, distribution, administration, or securities brokerages services to, or on behalf of, a regulated investment company or its beneficial owners (including gross receipts derived directly or indirectly from trustees, sponsors, or participants of employee benefit plans that have accounts in a regulated investment company), shall be attributable to this state to the extent that the shareholders of the regulated investment company are domiciled within this state. For purposes of this subparagraph, "domicile" means the shareholder's mailing address on the records of the regulated investment company. If the regulated investment company or the person providing management services to the regulated investment company has actual knowledge that the shareholder's primary residence or principal place of business is different than the shareholder's mailing address, then the shareholder's primary residence or principal place of business is the shareholder's domicile. A separate computation shall be made with respect to the gross receipts derived from each regulated investment company. The total amount of gross receipts attributable to this State shall be equal to the total gross receipts received by each regulated investment company multiplied by a fraction:

(I) The numerator of which is the average of the sum of the beginning-of-year and end-of-year number of shares owned by the regulated investment company shareholders who are domiciled in this state; and

(II) The denominator of which is the average of the sum of the beginning-of-year and end-of-year number of shares owned by all shareholders.

(III) For purposes of the fraction, the year shall be the taxable year of the regulated investment company that ends with or within the taxable year of the taxpayer.

(vi) Print Media. A person in the business of publishing, selling, licensing or distributing newspapers, magazines, periodicals, trade journals or other printed material shall source their receipts pursuant to this subparagraph.

(I) For purposes of subparagraph (5)(c)6.(vi) the following definitions shall apply:

I. The term "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.

II. The terms "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.

(II) 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:

I. Gross receipts derived from the sale of tangible personal property, including printed materials shall be treated pursuant to subparagraph (4)(c).

II. Gross receipts derived from advertising or 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 by the taxpayer for each individual publication 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 the 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.

(vii) Broadcasting Film or Radio Programing. 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, shall source their receipts pursuant to this subparagraph.

(I) For purposes of subparagraph (5)(c)6.(vii) the following definitions shall apply:

I. The term "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. The term "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.

III. The term "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.

IV. The term "Rent" shall include license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.

V. The term "Subscriber" as it relates to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

VI. The term "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.

(II) 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:

I. Gross receipts, including advertising revenue, from television film or radio programming in release to or by a television or radio 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 film 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.

II. 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.

III. 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 subparagraph (4)(c).

(viii) Royalties. Gross receipts shall include royalty or other receipts for the use of, or for the privilege of using, intangible property including patents, know-how, formulas, designs, processes, patterns, copyrights, trade names, service names, franchises, licenses, contracts, customer lists, or similar items where such receipts are from activities which constitute the taxpayer's regular trade or business. Except as otherwise provided in this regulation, such receipts must be attributed to the state in which the property is used by the purchaser. If the property is used in more than one state, then the royalties or other income must be apportioned to Georgia pro rata according to the portion of use in Georgia. Intangible property is used in Georgia if the purchaser uses the intangible property or the rights therein in Georgia.

(ix) The taxpayer must expend a reasonable amount of effort to obtain the information to determine the amount that is attributable to this state's marketplace. If the information is not available, the taxpayer may use another reasonable method to determine the amount attributable to this state's marketplace. Such other method is subject to review, adjustment, or change by the Commissioner.

7. Where a taxpayer's gross receipts are also derived from activities described in paragraph (4), gross receipts shall also include the gross receipts from

the activities described in paragraph (4) and shall be attributed to Georgia based upon subparagraph (4)(c).

...

ILLINOIS

ILLINOIS STATUTES

5/304 -- BUSINESS INCOME OF PERSONS OTHER THAN RESIDENTS.

In relevant part only

...

(a)(3) Sales factor.

(A) The sales factor is a fraction, the numerator of which is the total sales of the person in this State during the taxable year, and the denominator of which is the total sales of the person everywhere during the taxable year.

(B) Sales of tangible personal property are in this State if:

(i) The property is delivered or shipped to a purchaser, other than the United States government, within this State regardless of the f. o. b. point or other conditions of the sale; or

(ii) The property is shipped from an office, store, warehouse, factory or other place of storage in this State and either the purchaser is the United States government or the person is not taxable in the state of the purchaser; provided, however, that premises owned or leased by a person who has independently contracted with the seller for the printing of newspapers, periodicals or books shall not be deemed to be an office, store, warehouse, factory or other place of storage for purposes of this Section. Sales of tangible personal property are not in this State if the seller and purchaser would be members of the same unitary business group but for the fact that either the seller or purchaser is a person with 80% or more of total business activity outside of the United States and the property is purchased for resale.

(B-1) Patents, copyrights, trademarks, and similar items of intangible personal property.

(i) Gross receipts from the licensing, sale, or other disposition of a patent, copyright, trademark, or similar item of intangible personal property, other than gross receipts governed by paragraph (B-7) of this item (3), are in this State to the extent the item is utilized in this State during the year the gross receipts are included in gross income.

(ii) Place of utilization.

(I) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If a patent is utilized in more than one state, the extent to which it is utilized in any one state shall be a fraction equal to the gross receipts of the licensee or purchaser from sales or leases of items produced, fabricated, manufactured, or processed within that state using the patent and of patented items produced within that state, divided by the total of such gross receipts for all states in which the patent is utilized.

(II) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If a copyright is utilized in more than one state, the extent to which it is utilized in any one state shall be a fraction equal to the gross receipts from sales or licenses of materials printed or published in that state divided by the total of such gross receipts for all states in which the copyright is utilized.

(III) Trademarks and other items of intangible personal property governed by this paragraph (B-1) are utilized in the state in which the commercial domicile of the licensee or purchaser is located.

(iii) If the state of utilization of an item of property governed by this paragraph (B-1) cannot be determined from the taxpayer's books and records or from the books and records of any person related to the taxpayer within the meaning of Section 267(b) of the Internal Revenue Code, 26 U.S.C. 267, the gross receipts attributable to that item shall be excluded from both the numerator and the denominator of the sales factor.

(B-2) Gross receipts from the license, sale, or other disposition of patents, copyrights, trademarks, and similar items of intangible personal property, other than gross receipts governed by paragraph (B-7) of this item (3), may be included in the numerator or denominator of the sales factor only if gross receipts from licenses, sales, or other disposition of such items comprise more than 50% of the taxpayer's total gross receipts included in gross income during the tax year and during each of the 2 immediately preceding tax years; provided that, when a taxpayer is a member of a unitary business group, such determination shall be made on the basis of the gross receipts of the entire unitary business group.

(B-5) For taxable years ending on or after December 31, 2008, except as provided in subsections (ii) through (vii), receipts from the sale of telecommunications service or mobile telecommunications service are in this State if the customer's service address is in this State.

(i) For purposes of this subparagraph (B-5), the following terms have the following meanings:

“Ancillary services ” means services that are associated with or incidental to the provision of “telecommunications services ”, including but not limited to “detailed telecommunications billing”, “directory assistance”, “vertical service ”, and “voice mail services ”.

“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.

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

“Communications Channel” means a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.

“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.

“Customer Channel Termination Point” means the location where the customer either inputs or receives the communications.

“Detailed telecommunications billing service ” means an “ancillary service ” of separately stating information pertaining to individual calls on a customer's billing statement.

“Directory assistance” means an “ancillary service ” of providing telephone number information, and/or address information.

“Home service provider” means the facilities based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services .

“Mobile telecommunications service ” means commercial mobile radio service , as defined in Section 20.3 of Title 47 of the Code of Federal Regulations as in effect on June 1, 1999.

“Place of primary use” means the street address representative of where the customer's use of the telecommunications service primarily occurs, which must 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" must be within the licensed service area of the home service provider.

"Post-paid telecommunication 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 telecommunications service, except a prepaid wireless calling service, that would be a prepaid calling service except it is not exclusively a telecommunication service.

"Prepaid telecommunication 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.

"Prepaid Mobile telecommunication service" means a telecommunications service that provides the right to utilize mobile wireless service as well as other non-telecommunication services, including but not limited to ancillary services, which must be paid for in advance that is sold in predetermined units or dollars of which the number declines with use in a known amount.

"Private communication service" means a telecommunication 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.

"Service address" means:

(a) The location of the telecommunications equipment to which a 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 line (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; and

(c) If the locations in line (a) and line (b) are not known, the service address means the location of the customer's place of primary use.

“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.

“Telecommunications service ” does not include:

(a) 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 when such purchaser's primary purpose for the underlying transaction is the processed data or information;

(b) Installation or maintenance of wiring or equipment on a customer's premises;

(c) Tangible personal property;

(d) Advertising, including but not limited to directory advertising.

(e) Billing and collection services provided to third parties;

(f) Internet access service ;

(g) 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;

(h) “Ancillary services ”; or

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

“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 ”.

“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 ”.

(ii) Receipts from the sale of telecommunications service sold on an individual call-by-call basis are in this State if either of the following applies:

(a) The call both originates and terminates in this State.

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

(iii) Receipts from the sale of postpaid telecommunications service at retail are in this State if the origination point of the telecommunication signal, as first identified by the service provider's telecommunication system or as identified by information received by the seller from its service provider if the system used to transport telecommunication signals is not the seller's, is located in this State.

(iv) Receipts from the sale of prepaid telecommunications service or prepaid mobile telecommunications service at retail are in this State if the purchaser obtains the prepaid card or similar means of conveyance at a location in this State. Receipts from recharging a prepaid telecommunications service or mobile telecommunications service is in this State if the purchaser's billing information indicates a location in this State.

(v) Receipts from the sale of private communication services are in this State as follows:

(a) 100% of receipts from charges imposed at each channel termination point in this State.

(b) 100% of receipts from charges for the total channel mileage between each channel termination point in this State.

(c) 50% of the total receipts from charges for service segments when those segments are between 2 customer channel

termination points, 1 of which is located in this State and the other is located outside of this State, which segments are separately charged.

(d) The receipts from charges for service segments with a channel termination point located in this State and in two or more other states, and which segments are not separately billed, are in this State based on a percentage determined by dividing the number of customer channel termination points in this State by the total number of customer channel termination points.

(vi) Receipts from charges for ancillary services for telecommunications service sold to customers at retail are in this State if the customer's primary place of use of telecommunications services associated with those ancillary services is in this State. If the seller of those ancillary services cannot determine where the associated telecommunications are located, then the ancillary services shall be based on the location of the purchaser.

(vii) Receipts to access a carrier's network or from the sale of telecommunication services or ancillary services for resale are in this State as follows:

(a) 100% of the receipts from access fees attributable to intrastate telecommunications service that both originates and terminates in this State.

(b) 50% of the receipts from access fees attributable to interstate telecommunications service if the interstate call either originates or terminates in this State.

(c) 100% of the receipts from interstate end user access line charges, if the customer's service address is in this State. As used in this subdivision, "interstate end user access line charges" includes, but is not limited to, the surcharge approved by the federal communications commission and levied pursuant to 47 CFR 69.

(d) Gross receipts from sales of telecommunication services or from ancillary services for telecommunications services sold to other telecommunication service providers for resale shall be sourced to this State using the apportionment concepts used for non-resale receipts of telecommunications services if the information is readily available to make that determination. If the information is not readily available, then the taxpayer may use any other reasonable and consistent method.

(B-7) For taxable years ending on or after December 31, 2008, receipts from the sale of broadcasting services are in this State if the broadcasting services are

received in this State. For purposes of this paragraph (B-7), the following terms have the following meanings:

“Advertising revenue” means consideration received by the taxpayer in exchange for broadcasting services or allowing the broadcasting of commercials or announcements in connection with the broadcasting of film or radio programming, from sponsorships of the programming, or from product placements in the programming.

“Audience factor” means the ratio that the audience or subscribers located in this State of a station, a network, or a cable system bears to the total audience or total subscribers for that station, network, or cable system. The audience factor for film or radio programming shall be determined 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 this purpose and fairly represents the taxpayer's activity in this State.

“Broadcast” or “broadcasting” or “broadcasting services” means the transmission or provision of film or radio programming, whether through the public airwaves, by cable, by direct or indirect satellite transmission, or by any other means of communication, either through a station, a network, or a cable system.

“Film” or “film programming” means the broadcast on television of any and all performances, events, or productions, including but not limited to news, sporting events, plays, stories, or other literary, commercial, educational, or artistic works, either live or 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 separate “film” notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

“Radio” or “radio programming” means the broadcast on radio of any and all performances, events, or productions, including but not limited to news, sporting events, plays, stories, or other literary, commercial, educational, or artistic works, either live or through the use of an audio tape, disc, or any other format or medium. Each episode in 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.

(i) In the case of advertising revenue from broadcasting, the customer is the advertiser and the service is received in this State if the commercial domicile of the advertiser is in this State.

(ii) In the case where film or radio programming is broadcast by a station, a network, or a cable system for a fee or other remuneration received from the recipient of the broadcast, the portion of the service that is received in this State is measured by the portion of the recipients of the broadcast located in this State. Accordingly, the fee or other remuneration

for such service that is included in the Illinois numerator of the sales factor is the total of those fees or other remuneration received from recipients in Illinois. For purposes of this paragraph, a taxpayer may determine the location of the recipients of its broadcast using the address of the recipient shown in its contracts with the recipient or using the billing address of the recipient in the taxpayer's records.

(iii) In the case where film or radio programming is broadcast by a station, a network, or a cable system for a fee or other remuneration from the person providing the programming, the portion of the broadcast service that is received by such station, network, or cable system in this State is measured by the portion of recipients of the broadcast located in this State. Accordingly, the amount of revenue related to such an arrangement that is included in the Illinois numerator of the sales factor is the total fee or other total remuneration from the person providing the programming related to that broadcast multiplied by the Illinois audience factor for that broadcast.

(iv) In the case where film or radio programming is provided by a taxpayer that is a network or station to a customer for broadcast in exchange for a fee or other remuneration from that customer the broadcasting service is received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. Accordingly, in such a case the revenue derived by the taxpayer that is included in the taxpayer's Illinois numerator of the sales factor is the revenue from such customers who receive the broadcasting service in Illinois.

(v) In the case where film or radio programming is provided by a taxpayer that is not a network or station to another person for broadcasting in exchange for a fee or other remuneration from that person, the broadcasting service is received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. Accordingly, in such a case the revenue derived by the taxpayer that is included in the taxpayer's Illinois numerator of the sales factor is the revenue from such customers who receive the broadcasting service in Illinois.

(B-8) CAUTION: Subsection (a)(3)(B-8) is eff. 1-1-2014.

Gross receipts from winnings under the Illinois Lottery Law from the assignment of a prize under Section 13-1 of the Illinois Lottery Law are received in this State. This paragraph (B-8) applies only to taxable years ending on or after December 31, 2013.

...

(C-5) For taxable years ending on or after December 31, 2008, sales, other than sales governed by paragraphs (B), (B-1), (B-2), (B-5), and (B-7), are in this State if any of the following criteria are met:

(i) Sales from the sale or lease of real property are in this State if the property is located in this State.

(ii) Sales from the lease or rental of tangible personal property are in this State if the property is located in this State during the rental period. Sales from the lease or rental of tangible personal property that is characteristically moving property, including, but not limited to, motor vehicles, rolling stock, aircraft, vessels, or mobile equipment are in this State to the extent that the property is used in this State.

(iii) In the case of interest, net gains (but not less than zero) and other items of income from intangible personal property, the sale is in this State if:

(a) in the case of a taxpayer who is a dealer in the item of intangible personal property within the meaning of Section 475 of the Internal Revenue Code, the income or gain is received from a customer in this State. For purposes of this subparagraph, a customer is in this State if the customer is an individual, trust or estate who is a resident of this State and, for all other customers, if the customer's commercial domicile is in this State. Unless the dealer has actual knowledge of the residence or commercial domicile of a customer during a taxable year, the customer shall be deemed to be a customer in this State if the billing address of the customer, as shown in the records of the dealer, is in this State; or

(b) in all other cases, if the income-producing activity of the taxpayer is performed in this State or, if the income-producing activity of the taxpayer is performed both within and without this State, if a greater proportion of the income-producing activity of the taxpayer is performed within this State than in any other state, based on performance costs.

(iv) Sales of services are in this State if the services are received in this State. For the purposes of this section, gross receipts from the performance of services provided to a corporation, partnership, or trust may only be attributed to a state where that corporation, partnership, or trust has a fixed place of business. If the state where the services are received is not readily determinable or is a state where the corporation, partnership, or trust receiving the service does not have a fixed place of business, the services shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the

customer's trade or business. If the ordering office cannot be determined, the services shall be deemed to be received at the office of the customer to which the services are billed. If the taxpayer is not taxable in the state in which the services are received, the sale must be excluded from both the numerator and the denominator of the sales factor. The Department shall adopt rules prescribing where specific types of service are received, including, but not limited to, publishing, and utility service.

(D) For taxable years ending on or after December 31, 1995, the following items of income shall not be included in the numerator or denominator of the sales factor: dividends; amounts included under Section 78 of the Internal Revenue Code; and Subpart F income as defined in Section 952 of the Internal Revenue Code. No inference shall be drawn from the enactment of this paragraph (D) in construing this Section for taxable years ending before December 31, 1995.

(E) Paragraphs (B-1) and (B-2) shall apply to tax years ending on or after December 31, 1999, provided that a taxpayer may elect to apply the provisions of these paragraphs to prior tax years. Such election shall be made in the form and manner prescribed by the Department, shall be irrevocable, and shall apply to all tax years; provided that, if a taxpayer's Illinois income tax liability for any tax year, as assessed under Section 903 prior to January 1, 1999, was computed in a manner contrary to the provisions of paragraphs (B-1) or (B-2), no refund shall be payable to the taxpayer for that tax year to the extent such refund is the result of applying the provisions of paragraph (B-1) or (B-2) retroactively. In the case of a unitary business group, such election shall apply to all members of such group for every tax year such group is in existence, but shall not apply to any taxpayer for any period during which that taxpayer is not a member of such group.

(b) Insurance companies.

(1) In general. Except as otherwise provided by paragraph (2), business income of an insurance company for a taxable year shall be apportioned to this State by multiplying such income by a fraction, the numerator of which is the direct premiums written for insurance upon property or risk in this State, and the denominator of which is the direct premiums written for insurance upon property or risk everywhere. For purposes of this subsection, the term "direct premiums written" means the total amount of direct premiums written, assessments and annuity considerations as reported for the taxable year on the annual statement filed by the company with the Illinois Director of Insurance in the form approved by the National Convention of Insurance Commissioners or such other form as may be prescribed in lieu thereof.

(2) Reinsurance. If the principal source of premiums written by an insurance company consists of premiums for reinsurance accepted by it, the business income of such company shall be apportioned to this State by multiplying such income by a fraction, the numerator of which is the sum of (i) direct premiums written for insurance upon property or risk in this State, plus (ii) premiums written for reinsurance accepted in respect of

property or risk in this State, and the denominator of which is the sum of (iii) direct premiums written for insurance upon property or risk everywhere, plus (iv) premiums written for reinsurance accepted in respect of property or risk everywhere. For purposes of this paragraph, premiums written for reinsurance accepted in respect of property or risk in this State, whether or not otherwise determinable, may, at the election of the company, be determined on the basis of the proportion which premiums written for reinsurance accepted from companies commercially domiciled in Illinois bears to premiums written for reinsurance accepted from all sources, or, alternatively, in the proportion which the sum of the direct premiums written for insurance upon property or risk in this State by each ceding company from which reinsurance is accepted bears to the sum of the total direct premiums written by each such ceding company for the taxable year. The election made by a company under this paragraph for its first taxable year ending on or after December 31, 2011, shall be binding for that company for that taxable year and for all subsequent taxable years, and may be altered only with the written permission of the Department, which shall not be unreasonably withheld.

...

IOWA

IOWA STATUTES

§ 422 .33 -- CORPORATE TAX IMPOSED — CREDIT.

In relevant part only

...

2. a. If the trade or business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income, but if the trade or business is carried on partly within and partly without the state or if income is derived from sources partly within and partly without the state, or if income is derived from trade or business and sources, all of which are not entirely in the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business or sources within the state, with the net income attributable to the state to be determined as follows:

...

(2) Net nonbusiness income of the above class having been separately allocated and deducted as above provided, the remaining net business income of the taxpayer shall be allocated and apportioned as follows:

(a) Business interest, dividends, rents, and royalties shall be reasonably apportioned within and without the state under rules adopted by the director.

(b) Capital gains and losses from the sale or other disposition of assets shall be apportioned to the state based upon the business activity ratio applicable to the year the gain or loss is determined if the corporation determines Iowa taxable income by a sales, gross receipts or other business activity ratio. If the corporation has only allocable income, capital gains and losses from the sale or other disposition of assets shall be allocated in accordance with subparagraph (1), subparagraph division (d).

(c) Where income is derived from business other than the manufacture or sale of tangible personal property, the income shall be specifically allocated or equitably apportioned within and without the state under rules of the director.

(d) Where income is derived from the manufacture or sale of tangible personal property, the part attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.

(e) Where income consists of more than one class of income as provided in subparagraph divisions (a) through (d) of this subparagraph, it shall be reasonably apportioned by the business activity ratio provided in rules adopted by the director.

(f) The gross sales of the corporation within the state shall be taken to be the gross sales from goods delivered or shipped to a purchaser within the state regardless of the F.O.B. point or other conditions of the sale, excluding deliveries for transportation out of the state.

b. For the purpose of this subsection:

(1) "Sale" shall include exchange.

(2) "Manufacture" shall include the extraction and recovery of natural resources and all processes of fabricating and curing.

(3) "Tangible personal property" shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares, and merchandise, and shall not be taken to mean money deposits in banks, shares of stock, bonds, notes, credits, or evidence of an interest in property and evidences of debt.

...

IOWA REGULATIONS

IOWA ADMIN. CODE 701--54.6. (422) APPORTIONMENT OF INCOME DERIVED FROM BUSINESS OTHER THAN THE MANUFACTURE OR SALE OF TANGIBLE PERSONAL PROPERTY.

Income derived from business other than the manufacture or sale of tangible personal property shall be attributed to Iowa in the proportion which the Iowa gross receipts bear to the total gross receipts. Gross receipts are includable in the numerator of the apportionment factor in the proportion which the recipient of the service receives benefit of the service in this state.

(1) Services other than those set forth in subrules 54.6(3) to 54.6(5) and rule 701—54.7(422).

With respect to a specific contract or item of income, all gross receipts from the performance of services are includable in the numerator of the apportionment factor if the recipient of the service receives all of the benefit of the service in Iowa. If the recipient of the service receives some of the benefit of the service in Iowa with respect to a specific contract or item of income, the gross receipts are includable in the numerator of the apportionment factor in proportion to the extent the recipient receives benefit of the service in Iowa.

The following are noninclusive examples of the application of this subrule.

a. A real estate development firm from State A is developing a tract of land in Iowa.

The real estate development firm from State A engages a surveying company from State B to survey the tract of land in Iowa. The survey work is completed and the plats are drawn in Iowa. The gross receipts from this survey work are attributable to Iowa and included in the numerator of the apportionment factor because the recipient of the service received all of the benefits of the service in Iowa.

b. A corporation headquartered in State Y is building an office complex in Iowa.

The corporation from State Y contracts with an engineering firm from State X to oversee construction of the buildings on the site. The engineering firm performs some of their service in Iowa at the building site and also some of their service in State X. The gross receipts from the engineering service are attributable to Iowa and included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Iowa.

c. A corporation from State A contracts with a computer software company from State D to develop and install a custom software application in a business office in Iowa of the company from State A. The software firm does consulting work on the project in State A and in Iowa. The software development is done in State D and in Iowa. The software package is delivered to the corporation from State A in Iowa. The gross receipts from the software development are attributable to Iowa and included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Iowa.

d. A corporation located in Iowa performs direct mail activities for a customer located in State X.

The direct mail activities include the preparation and mailing of materials to households located throughout the United States. The corporation located in Iowa performed some activities related to the direct mail contract in State X. One percent of the direct mailings went to addresses within Iowa. One percent of the gross receipts related to this direct mail contract are attributable to Iowa and included in the numerator of the apportionment factor because the recipient of the service received the 1 percent of the benefit of the service in Iowa.

e. A corporation located in State A performs direct mail activities for a customer located in State X.

The corporation has nexus with Iowa due to other activities of the unitary business. The direct mail activities include the preparation and mailing of materials to households throughout the United States. The corporation located in State A printed and mailed the direct mail materials to households on a mailing list prepared by the direct mailing company in State A. Five percent of the direct mailings went to addresses within Iowa. Five percent of the gross receipts related to this direct mail contract are attributable to Iowa and included in the numerator of the apportionment factor.

f. A company which owns apartments in Iowa and State A contracts with a pest control corporation for pest control activities. One contract is entered into which covers 100 apartment units in Iowa and 400 apartment units in State A. Twenty percent (100/500) of the gross receipts from the pest control contract are attributable to Iowa and are included in the numerator of the apportionment factor as 20 percent of the apartment units are located in Iowa and in the absence of more accurate records, it is presumed that the number of apartment units is the best measure of the extent the recipient of the service received benefit of the service in Iowa.

If a taxpayer does not believe that the method of apportionment set forth in this subrule reasonably attributes income to business activities within Iowa, the taxpayer may request the use of an alternative method of apportionment. The request must be filed at least 60 days before the due date of the return, considering any extensions of time to file, in which the taxpayer wishes to use an alternative method of apportionment. The request should be filed with Taxpayer Services and Policy Division, P.O. Box 10457, Des Moines, Iowa 50306-0457. The taxpayer must set forth in detail the extent of the taxpayer's business operations within and without the state, along with the reasons why the apportionment method set forth in this subrule is inappropriate. In addition, the taxpayer must set forth a proposed method of apportionment and the reasons why the proposed method of apportionment more reasonably attributes income to business activities in Iowa.

If the department agrees that the proposed method of apportionment more reasonably attributes income to business activities in Iowa, the taxpayer may continue to use the proposed method of apportionment until the taxpayer's factual situation changes or the department prospectively informs the taxpayer that the method of apportionment may no longer be used.

If the taxpayer's factual situation changes and under the new factual situation the taxpayer still believes that the method of apportionment set forth in this subrule still is not appropriate, then the taxpayer must submit a new request for the use of an alternative method of apportionment.

If the taxpayer disagrees with the determination of the department, the taxpayer may file a protest within 60 days of the date of the letter setting forth the department's determination and the reasons therefor in accordance with rule 701—7.8(17A). The department's determination letter shall set forth the taxpayer's rights to protest the department's determination.

(2) If the business activity consists of providing services, such as the operation of an advertising agency, or the performance of equipment service contracts, research and development contracts, "sales" includes the gross receipts from the performance of such services including fees, commission, and similar items.

In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, gross receipts include the entire reimbursed cost, plus the fee.

(3) Business income of a financial organization, excepting a financial institution exempted from the corporation income tax under Iowa Code section 422.34(1) attributable to Iowa shall be:

a. In the case of taxable income of a taxpayer whose income-producing activities are confined solely to this state, the entire net income of such taxpayer.

b. In the case of taxable income of a taxpayer who conducts income-producing activities as a financial organization partially within and partially without this state, that portion of its net income as its gross business in this state is to its gross business everywhere during the period covered by its return, which portion shall be determined as the sum of:

(1) Fees, commission or other compensation for financial services rendered for a customer located in this state or an account maintained within this state:

(2) Gross profits from trading in stocks, bonds or other securities rendered for a customer located within this state;

(3) Interest income from a loan on real property located in this state. Interest and other receipts from assets in the nature of loans and installment obligations if the borrower is located within this state. Other fees and other miscellaneous earnings if connected with loans to borrowers within this state;

(4) Interest charged to customers within this state or to accounts maintained within this state for carrying debit balances of margin accounts, without deduction of any costs incurred in carrying such accounts;

(5) Interest, lease payments, or other receipts from financing leases, installment sales contracts, leases or other financing instruments received from customers within this state; and

(6) Any other gross income resulting from the operation as a financial organization within this state.

A "financial organization" means any finance company or investment company doing business in Iowa. A finance company includes any consumer finance company, sales finance company, or commercial finance company making loans to individuals and businesses. An investment company includes a company primarily engaged in the business of investing, reinvesting, owning, holding or trading in securities.

(4) Net business income of construction contractors shall be attributed to Iowa in the proportion which Iowa gross receipts bear to total gross receipts. Iowa gross receipts are those gross receipts from contracts performed in Iowa.

(5) A corporation's distributive share of net income or loss from a joint venture, limited liability company, or partnership is subject to apportionment within and without the state. If the income of the partnership, limited liability company, or joint venture is received in connection with the taxpayer's regular trade or business operations, the partnership, limited liability company, or

joint venture income shall be apportioned within and without Iowa on the basis of the taxpayer's business activity ratio. The corporation's distributive share of the gross receipts of the partnership, limited liability company, or joint venture shall be included in the computation of the business activity ratio in accordance with the provisions of this chapter.

Example 1: A, a corporation with a commercial domicile in State X, is engaged in business within and without Iowa whereby A sells tangible personal property. A also has an interest in a limited partnership whose business is conducted within and without Iowa. Five percent of the limited partnership's gross receipts are derived from the sale of tangible personal property to Iowa purchasers and 95 percent are derived from sales and deliveries to purchasers outside of Iowa. A will include 5 percent of its distributive share of the gross receipts of the partnership in the numerator along with A's destination Iowa sales in calculating its business activity ratio. A will include 100 percent of its distributive share of the gross receipts in the denominator along with A's total sales in calculating its business activity ratio.

Example 2: B, a corporation with a commercial domicile in State X, has no physical presence in the state of Iowa, B's only contact with Iowa is B's interest in a limited partnership whose business is conducted within and without Iowa. Ten percent of the limited partnership's gross receipts are derived from the sale of tangible personal property to Iowa purchasers and 90 percent are derived from sales and deliveries to purchasers outside of Iowa. B will include 10 percent of its distributive share of the gross receipts of the partnership in the numerator in calculating its business activity ratio. B will include 100 percent of its distributive share of the gross receipts in the denominator along with B's total sales in calculating its business activity ratio.

(6) Gross receipts from rent or royalties (or other fees received for the use of real property) are attributable to this state if the real property is located in this state.

Gross receipts from rent, royalties, license fees, or other fees received for the use of tangible personal property are attributable to this state to the extent that the property is utilized in this state. The extent of utilization of tangible personal property in this state is determined by multiplying the rents, royalties, license fees or other fees by a fraction, the numerator of which is number of days or other measure of physical location of the property in the state during the rental period in the taxable year and the denominator of which is the number of days or other measure of physical location of the property everywhere during all rental periods in the taxable year. If the physical location of property during the rental period is unknown or not ascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental payer obtained possession.

An example of another measure of physical location of property is where a lessee of transportation equipment is required to report to the lessor miles traveled by state.

a. A lessee takes possession of a rental car in this state.

Six days later after driving 1,500 miles, the rental car is returned to the lessor in this state. Absent evidence to the contrary, the rental receipts are attributable to this state.

b. A lessee takes possession of a rental car in this state.

Six days later after driving 1,500 miles, the rental car is returned to the lessor in an adjacent state. Absent evidence to the contrary, it is assumed that 50 percent of the rental receipts are attributable to this state.

c. A lessee takes possession of a rental semi-truck in another state.

The lessee is required to maintain mileage records by state for purposes of special fuel tax. The lessee provides copies of these records to the lessor. The lessor must use these records to determine the portion of the rental receipts that are attributable to this state.

This rule is intended to implement Iowa Code Supplement section 422.33(1).

**IOWA ADMIN. CODE 701--54.2 (422) ALLOCATION OR APPORTIONMENT OF
INVESTMENT INCOME.**

In relevant part only

(1) The classification of investment income by the labels customarily given them, such as interest, dividends, rents, and royalties, is of no aid in determining whether that income is business or nonbusiness income. Interest, dividends, rents, and royalties shall be apportioned as business income to the extent the income was earned as a part of a corporation's unitary business, a portion of which is conducted in Iowa. *Mobil Oil Corp. v. Commissioner of Taxes*, 455 U.S. 425 (1980); *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 73 L.Ed.2d 787, 102 S.Ct. 3103 (1982); *F. W. Woolworth Co. v. Taxation and Revenue Dept.*, 458 U.S. 354, 73 L.Ed.2d 819, 102 S.Ct. 3128 (1982); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 77 L.Ed.2d 545, 103 S.Ct. 2933 (1983). Whether investment income is part of a corporation's unitary business income depends upon the facts and circumstances in the particular situation. The burden of proof is upon the taxpayer to show that the treatment of investment income on the return as filed is proper. There is a rebuttable presumption that an affiliated group of corporations in the same line of business have a unitary relationship, although that is not the only element used in determining unitariness.

...

Subrules 54 .2 (1) and 54 . 2 (2) are effective for tax years beginning on or after January 1, 1983.

(3) For tax years beginning on or after January 1, 1995, all investment income that is business income, including capital gains or losses, shall be included in the computation of the denominator of the business activity formula if the investment income is derived from intangible property that has become an integral part of some business activity occurring regularly in or outside of Iowa. See subrule 52.1(4). All other investment business income, including capital gains or losses, may at the taxpayer's election be included in the computation of the denominator of the business activity formula provided, however, that a taxpayer cannot elect to exclude or include investment business income where the election could result in an understatement of net income reasonably attributable to Iowa. A taxpayer cannot elect to include some investment business

income in and exclude other investment business income from the business activity formula. The election applies to all investment income of the taxpayer subject to the election.

For a tax year which begins on or after January 1, 1995, if the taxpayer has investment income subject to an election under the provisions of this rule, a written election shall be made. The election must state whether the taxpayer wishes to include or exclude investment income which is deemed to be business income subject to election under the provisions of this rule in the computation of the business activity formula. The election shall be signed by a duly authorized officer of the corporation. The election is binding on all future tax years unless the taxpayer is granted permission by the director to change the election. If the taxpayer fails to make a written election, the fact that investment income was or was not included in the computation of the business activity formula shall be deemed to be the taxpayer's election for future years.

The computation of the business activity formula associated with investment income is as follows where the investment income is required to be included in the business activity formula or where an election for inclusion has been made:

a. Interest income from accounts receivable.

If an inclusion election is made, accounts receivable interest income is included in the numerator of the business activity formula if the taxpayer receives accounts receivable interest income from customers located in Iowa. Accounts receivable interest income which cannot be segregated by geographical source shall be included in the numerator of the business activity ratio applying the same ratio as gross receipts within Iowa bear to total gross receipts.

Example: The taxpayer operates a multistate chain of gasoline service stations, selling for cash and on credit. Interest is charged on credit sales, but the interest income cannot be segregated by geographical source. During the tax year, the taxpayer had gross receipts within Iowa of \$300,000, total gross receipts everywhere of \$1,000,000 and accounts receivable interest income everywhere of \$10,000. \$10,000 would be included in the denominator of the business activity formula, and 30 percent of \$10,000, or \$3,000, would be included in the numerator of the business activity formula.

b. Interest income other than accounts receivable.

All other interest income determined to be business income, except nontaxable interest income, shall be included in the numerator of the business activity formula to the extent that the interest-bearing asset is an integral part of some business activity occurring regularly in Iowa. If the interest-bearing asset is not an integral part of some business activity occurring regularly in or outside of Iowa and if an election of inclusion is made, the interest therefrom (except nontaxable interest income) shall be included in the numerator of the business activity formula if the taxpayer's commercial domicile is in Iowa.

Example: The taxpayer earns interest income from loans to affiliated corporations, commercial paper, bonds issued by multistate corporations, and federal income tax refunds.

The interest income is business income. None of these interest-bearing assets are an integral part of some business activity occurring regularly within or without Iowa. Accordingly, the interest income produced by such assets is subject to an election of inclusion in or exclusion from the business activity formula.

c. Dividend income.

All dividend income (net of special deductions) determined to be business income shall be included in the numerator of the business activity formula to the extent that the dividend asset is an integral part of some business activity occurring regularly in Iowa. If the dividend asset is not an integral part of some business activity occurring regularly in or outside of Iowa and if an election of inclusion is made, the dividends shall be included in the numerator of the business activity formula if the taxpayer's commercial domicile is in Iowa.

Example: The taxpayer earns dividend income from dividends payable from a mutual fund. The dividend income is business income. The dividends are not an integral part of some business activity occurring regularly within or without Iowa. Assume that the taxpayer had also earned interest income which was business income and which was not an integral part of some business activity occurring regularly within or without Iowa and that the taxpayer had included that interest income in the business activity formula. Under these circumstances, the taxpayer must also include the dividend income in the business activity formula. If no inclusion of investment business income had been made in the business activity formula, the taxpayer would exclude the dividend income from the formula.

d. Rental income.

If an inclusion election is made, all rental income determined to be business income shall be included in the numerator of the business activity formula to the extent that property is utilized in Iowa or in its entirety if the taxpayer's commercial domicile is in Iowa and the taxpayer is not taxable in the state in which the property is utilized. The extent of utilization of tangible personal property in a state is determined by multiplying the rent by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental periods in the taxable year. If the physical location of the property during the rental period is unknown or not ascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental payer obtained possession.

e. Royalty income and licensing fees.

All royalty income and licensing fees from intangible personal property determined to be business income shall be included in the numerator of the business activity formula to the extent that the royalty or licensing asset is an integral part of some business activity occurring regularly in Iowa. If the royalty or licensing asset is not an integral part of some business activity occurring regularly in or outside of Iowa and if an election of inclusion is

made, the royalties or licensing fees shall be included in the numerator of the business activity formula if the taxpayer's commercial domicile is in Iowa.

Example: A, a corporation with a commercial domicile outside of Iowa, derives royalties from a trade name that is used by other corporations doing business in Iowa in their Iowa businesses. Since the royalty asset is an integral part of an Iowa business activity, A must include the royalties associated with Iowa business activity in the numerator of A's business activity formula.

Example: The taxpayer, a corporation with a commercial domicile in Iowa, derives license fees from others who do business solely outside of Iowa. The license fees are business income. The license fees are an integral part of some business activity carried on regularly by the others outside of Iowa. The taxpayer must include the license fees in the business activity formula. If the taxpayer also had other license fees which were business income and which were not an integral part of some business activity occurring regularly within or without Iowa, these other license fees would be subject to an election of inclusion in or exclusion from the business activity formula.

If an inclusion election is made, all royalty income from tangible personal property or real property determined to be business income shall be included in the numerator of the business activity formula if the situs of the tangible personal property or real property is within Iowa.

f. Gains or losses.

Gain or loss from the sale, exchange, or other disposition of real or tangible or intangible personal property, if the property while owned by the taxpayer was operationally related to the taxpayer's trade or business carried on in Iowa, shall be apportioned by the business activity ratio applicable to the return for the year the gain or loss is included in taxable income and shall be included in the computation of the business activity ratio as follows:

(1) Gain or loss from the sale, exchange, or other disposition of real property shall be included in the numerator if the property is located in this state and if an election of inclusion has been made.

(2) Gain or loss from the sale, exchange, or other disposition of tangible personal property shall be included in the numerator if an election of inclusion has been made and if the property has a situs in this state at the time of sale, or the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Gain or loss from the sale, exchange, or other disposition of intangible personal property shall be included in the numerator of the business activity formula to the extent that the intangible personal property is an integral part of some business activity occurring regularly in Iowa in the tax year that gain or loss is recognized. If the intangible personal

property is not an integral part of some business activity occurring regularly in or outside of Iowa in the tax year that gain or loss is recognized and if an election of inclusion has been made, the gain or loss shall be included in the numerator if the taxpayer's commercial domicile is in this state. Example: The taxpayer carries on its trade or business within and without Iowa. The taxpayer has patents which it licenses others to use in activities within and without Iowa. The patents are an integral part of business activity occurring regularly within and without Iowa. The taxpayer receives royalty income for the use of the patents. The taxpayer sells the patents and realizes a capital gain. The capital gain from the sale of the patents cannot be segregated by geographical source. Assume that the taxpayer is on a calendar tax year. Assume that the sale occurred on July 1. From January 1 to July 1, 5 percent of the royalties were attributable to some business activity regularly occurring in Iowa. The taxpayer should include 5 percent of the capital gain in the numerator of the business activity formula.

(4) All gain or loss shall be included in the denominator of the business activity ratio if an election of inclusion has been made or if the gain or loss is required to be included in the business activity ratio. Noninclusive examples of gains or losses from the sale, exchange, or other disposition of real or tangible or intangible property may not be included in the computation of the business activity ratio, because to do so would result in an understatement of net income reasonably attributable to Iowa and would include the gain recognized under an election pursuant to Section 338 of the Internal Revenue Code and the gain recognized under Section 631(a) of the Internal Revenue Code.

g. Other miscellaneous income.

All other miscellaneous income determined to be business income which is not subject to an election or which is the subject of a proper election of inclusion shall be included in the computation of the business activity formula to the extent such income items do not represent a recapture of expense. The miscellaneous income shall be included in the numerator of the business activity formula if the income is from an Iowa source.

h. Other investment income.

All other investment income shall be included in the numerator of the business activity formula to the extent that the intangible personal property which produced that income is an integral part of some business activity occurring regularly in Iowa. If the intangible personal property is not part of some business activity occurring regularly in or outside of Iowa and if an election of inclusion has been made, the other investment income shall be included in the numerator if the taxpayer's commercial domicile is in this state.

i. Activity ratio.

Income which is not subject to Iowa tax shall not be included in the computation of the business activity ratio.

(4) Grossed-up foreign income.

For purposes of administration of the Iowa corporation income tax law, gross-up (Section 78 of the Internal Revenue Code) shall be considered to be nonbusiness income, irrespective of the fact that the income creating the gross-up may be business income, and shall be allocated to the situs of the income payor.

This rule is intended to implement Iowa Code Supplement sections 422.32(2) and 422.33 (1).

MAINE

MAINE STATUTES

ME. REV. STAT. ANN. § 5211 GENERAL.

In relevant part only

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14. Sales factor formula. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period. For purposes of calculating the sales factor, "total sales of the taxpayer" includes sales of the taxpayer and of any member of an affiliated group with which the taxpayer conducts a unitary business. The formula must exclude from both the numerator and the denominator sales of tangible personal property delivered or shipped by the taxpayer, regardless of F.O.B. point or other conditions of the sale, to a purchaser within a state in which the taxpayer is not taxable within the meaning of subsection 2, unless any member of an affiliated group with which the taxpayer conducts a unitary business is taxable in that state in the same manner as a taxpayer is taxable under subsection 2.

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16. (Repealed by L. 2007, c. 240, § V-8, applicable to tax years beginning on or after 1-1-07.)

A. Except as otherwise provided by this subsection, receipts from the performance of services must be attributed to the state where the services are received. If the state where the services are received is not readily determinable, the services are deemed to be received at the home of the customer or, in the case of a business, the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering location cannot be determined, the services are deemed to be received at the home or office of the customer to which the services are billed. In instances in which the purchaser of the service is the Federal Government, the receipts are attributable to this State if a greater proportion of the income-producing activity is performed in this State than in any other state based on costs of performance.

B. Gross receipts from the license, sale or other disposition of patents, copyrights, trademarks or similar items of intangible personal property must be attributed to this State if the intangible property is used in this State by the licensee. If the intangible personal property is used by the licensee in more than one state, the income must be apportioned to this State according to the portion of use in this State. In instances in which the purchaser or licensee of the intangible personal property is the Federal Government, the receipts are

attributable to this State if a greater proportion of the income-producing activity is performed in this State than in any other state based on costs of performance.

C. Receipts from the sale, lease, rental or other use of real property is sourced to this State if the real property is located in this State.

D. Receipts from the lease or rental of tangible personal property must be attributed to this State if the property is located in this State.

E. Receipts from items of income described in section 5206-E, subsection 2, paragraphs C to I must be sourced to this State as provided in those paragraphs. For purposes of this paragraph, section 5206-E, subsection 2, paragraphs G and H must include the related payment processing fees.

F. A sale of a partnership interest must be sourced in accordance with the provisions of section 5142, subsection 3-A.

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MARYLAND

MARYLAND REGULATIONS

MD. REGS. CODE 03.04.03.08 APPORTIONMENT OF INCOME.

In relevant part only

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C. Three-Factor Formula.

(1) Multistate corporations shall generally use a three-factor formula of property, payroll, and twice the sales factor. The apportionment factor is a fraction, the numerator of which is the sum of the property factor, payroll factor, and twice the sales factor, and the denominator is four.

(2) The three-factor formula is set forth in Sec. C(3)--(5) of this regulation.

(3) The sales factor includes the amounts of income reported during the taxable year as gross receipts or sales, or both (less returns and allowances), dividends and interest, gross rents and royalties, capital gains and certain other income as follows:

(a) Gross receipts are generally sales of tangible personal property and shall be included in the numerator if the property is delivered or shipped to a purchaser within this State, regardless of f.o.b. point or other conditions of sale.

(b) Sales of property in transit destined to this State also shall be included in the numerator.

(c) Gross receipts from contracting or service-related activities shall be included in the numerator if the receipts are derived from customers within this State as determined in Sec. D of this regulation.

(d) Gross income from intangible items such as dividends, interest, royalties, and capital gains from the sale of intangible property shall be included in the numerator based upon the average of the property and payroll factors.

(e) Gross receipts from the rental, leasing, or licensing of real or tangible personal property shall be included in the numerator if the property is located within this State.

(f) When tangible personal property is in this State for a portion of the tax year, the income received for that portion shall be included in the numerator.

(g) Capital gains from the sale of real and tangible personal property shall be included in the numerator if the property is located within this State. However,

ordinary net gain or loss derived from the sale of depreciable assets shall be excluded from the factor.

(h) Other income items shall be considered separately, and the actual treatment shall be dependent upon the nature and type of each item.

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D. Customers Within this State.

(1) "Customers within this State" shall be determined as provided in this section.

(2) Domicile.

(a) Individuals. Except as provided in this section, a customer to whom a service is provided shall be considered a customer within this State if the customer is an individual domiciled in this State.

Example 1: An attorney, a partner in law firm A located in the District of Columbia, renders legal advice to a domiciliary of Maryland. Assuming sufficient nexus between the law firm and Maryland so as to require the filing of a Maryland income tax return, the fee earned from the service rendered to the Maryland domiciliary is included in the numerator of A's sales factor.

Example 2: An accountant B, whose firm is located within Maryland, performs accounting services for a resident of Pennsylvania. The fee earned from these services is not included in the numerator of B's sales factor.

Example 2-1: X Company, a subsidiary corporation located in Maryland, administers medical plans on behalf of its parent corporation, which is located in Tennessee. X Company administers these medical plans for individuals that are domiciled in Maryland. The fees paid for these administration services are included in the numerator of X Company's sales factor. This example illustrates that the ultimate customer is determined by the domicile of the individual/business enterprise actually receiving the service.

(b) Business Enterprises.

(i) "Business enterprise" includes a proprietorship, partnership, limited liability partnership, corporation, limited liability company, and any other entity, regardless of how structured or denominated, that is engaged in business.

(ii) A business enterprise shall be considered a customer within this State if the business enterprise is domiciled in this State.

(iii) If the customer is a business enterprise, then the domicile is the state in which is located the office or place of business that provides the

principal impetus for the sale. If an office or place of business cannot be identified as providing the principal impetus for the sale, then the domicile shall be the state in which the headquarters or principal place of business management of the customer is located.

Example 3: Service provider C contracts with corporation D, a multistate enterprise, to redesign the operating software for D's customer billing operation. The principal impetus for this contract is to provide a benefit to the central billing computers. If those computers are located within Maryland, then the revenue earned from these services is included in the numerator of C's sales factor.

Example 4: Service provider E contracts with corporation F, a multistate enterprise, to redesign all the operating software of F's multistate computer network. If no particular office or place of business can be identified as the principal impetus for this contract, then the revenue earned from this contract shall be included in the numerator of E's sales factor only if F's headquarters or principal place of business management is located within Maryland.

(3) Services Related to Real Property. If a person provides a service relating to construction or improvement to real property, then whether the customer is a customer within this State will be determined by the situs of the property.

Example 5: An architect contracts with a nonresident of this State to design a shopping center in this State. The architect shall include in the numerator of the sales factor all revenue received from the customer.

Example 6: A contractor contracts with a resident of Maryland to construct an apartment complex outside of this State. The contractor does not include in the numerator of the sales factor the revenue received from the customer.

(4) Brokerage Services. Receipts derived from securities brokerages services allocable to this State are determined by multiplying the total dollar amount of sales of securities brokerage services by a fraction, the numerator of which is the receipts from securities brokerage services from customers domiciled in this State and the denominator of which is the receipts from securities brokerage services from all customers. Receipts from securities brokerage services include commissions on transactions, the spread earned on principal transactions in which the broker buys or sells from its account, total margin interest paid on behalf of brokerage accounts owned by the broker's customers, and fees and receipts of all kinds from the underwriting of securities. For principal transactions that are part of brokerage receipts, if the income from these transactions can be tied to, or associated with, an identifiable customer that provides the impetus for the transaction, the receipt shall be assigned to the domicile of that customer. If it is impossible to identify or associate a specific customer with a receipt, the receipt shall be excluded from both the numerator and the denominator of the receipts factor. If receipts from brokerage services

can be associated with a particular customer, but it is impractical to associate the receipts with the address of the customer, the customer shall be presumed to have a domicile at the branch office that generates transactions for the customer.

Example 7: Broker A executes a transaction on a stock exchange for Customer B, a Maryland domiciliary, selling 100 shares of Corporation X for \$1,000 and earning a \$50 commission on the transaction. The commission is included in the numerator of A's sales factor.

Example 8: Broker C executes a transaction for Customer E, a domiciliary of Maryland, whereby C sells to E securities from its own account. Broker C's purchase cost is \$1,000 and sales price is \$1,025. The spread of \$25 is included in the numerator of C's sales factor. This example illustrates two principles. First, only net proceeds, not gross proceeds, from principal transactions in which the broker sells from its own account are included in the sales factor. Second, the net amount is included in the sales factor numerator because Customer E, a domiciliary of Maryland, is the principle impetus for the transaction.

(5) Services to Regulated Investment Companies.

(a) Receipts from services that are derived directly or indirectly from the sale of management, distribution, administration, or securities brokerages services to, or on behalf of, a regulated investment company or its beneficial owners (including receipts derived directly or indirectly from trustees, sponsors, or participants of employee benefit plans that have accounts in a regulated investment company) shall be allocated to this State to the extent that shareholders of the regulated investment company are domiciled in this State. A separate computation shall be made with respect to the receipts derived from each regulated investment company. The total amount of receipts derived from each regulated investment company which are allocable to this State shall be equal to the total receipts so derived multiplied by a fraction:

(i) The numerator of which is the average of the sum of the beginning-of-the-year and end-of-the-year number of shares owned by the regulated investment company share-holders domiciled in this State; and

(ii) The denominator of which is the average of the sum of the beginning-of-the-year and end-of-the-year number of shares owned by all shareholders.

(b) For purposes of the fraction, the year shall be the taxable year of the regulated investment company that ends with or within the taxable year of the taxpayer.

(c) "Domicile" means the shareholder's mailing address on the records of the regulated investment company. If the regulated investment company or the person providing management services to the regulated investment company has actual knowledge that the shareholder's primary residence or principal place of

business is different than the shareholder's mailing address, then the shareholder's primary residence or principal place of business is the shareholder's domicile. If the shareholder's address is not known or determinable and it is impracticable to obtain this information, then the domicile of the shareholder will be the location or domicile of the business entity that provides the impetus for the transaction.

Example 9: Mutual Fund X is an investment option in a Sec. 401(k) plan sponsored by Company Z located and domiciled in Ohio, but the mutual fund does not maintain addresses of the plan participants. The "customer" and associated receipts would be domiciled in Ohio. If the Mutual Fund does maintain addresses of the plan participants, the "customer" and associated receipts would be assigned to Maryland if the address of the plan participant is in Maryland.

(6) Broadcast and Print Media. All revenue, including advertising receipts, derived from print and broadcast media shall be included in the numerator of the sales factor based on a reasonable estimate of the Maryland component of the audience for the broadcaster or publisher. In the case of print media, audience shall be measured by circulation.

Example 10: A radio station in the District of Columbia regularly solicits business in Maryland and broadcasts its signal into Maryland. The station subscribes to a ratings service that enables it to demonstrate to its advertisers the location, size, and demographics of its listening audience. The percentage of the audience that represents the Maryland component of the total audience is applied to total revenue to determine the Maryland sales.

Example 11: A newspaper is engaged in business in both Maryland and the District of Columbia. The amount of its total revenue to be included in the Maryland sales factor numerator is determined based on the newspaper's circulation. The percentage of total circulation attributable to Maryland is applied to total revenue to determine the Maryland sales.

(7) Processing or Similar Services to Business Customers. If a business enterprise provides processing or similar services to a customer having a location in more than one state, then the business enterprise's customers within this State are determined by the point of sale between the ultimate consumer and the business enterprise's customer.

Example 12: A credit card processing company contracts with a major multistate retailer. The processor shall include in the numerator of its sales factor all revenue received from the retailer derived from sales by the retailer in this State.

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MASSACHUSETTS

MASSACHUSETTS STATUTES

63 G.L. § 38 -- DETERMINATION OF NET INCOME DERIVED FROM BUSINESS CARRIED ON WITHIN COMMONWEALTH.

In relevant part only

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(f) CAUTION: Subsection (f) below is eff. for tax years beginning on or after 1-1-2014 until 12-31-2018. See next and previous versions.

The sales factor is a fraction, the numerator of which is the total sales of the corporation in the commonwealth during the taxable year, and the denominator of which is the total sales of the corporation everywhere during the taxable year.

As used in this subsection, unless specifically stated otherwise, "sales" shall mean all gross receipts of the corporation, including deemed receipts from transactions treated as sales or exchanges under the Code, except interest, dividends and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities; provided, however, that "sales" shall not include gross receipts from transactions or activities to the extent that a non-domiciliary state would be prohibited from taxing the income from such transactions or activities under the Constitution of the United States. Sales of tangible personal property are in the commonwealth if:-

(1) the property is delivered or shipped to a purchaser within the commonwealth regardless of the f. o. b. point or other conditions of the sale; or

(2) the corporation is not taxable in the state of the purchaser and the property was not sold by an agent or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth. "Purchaser", as used in clauses (1) and (2) shall include the United States government.

Sales, other than sales of tangible personal property, are in the commonwealth if the corporation's market for the sale is in the commonwealth. The corporation's market for a sale is in the commonwealth and the sale is thus assigned to the commonwealth for the purpose of this section:-

(1) in the case of sale, rental, lease or license of real property, if and to the extent the property is located in the commonwealth;

(2) in the case of rental, lease or license of tangible personal property, if and to the extent the property is located in the commonwealth;

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

(4) in the case of lease or license of intangible property, including a sale or exchange of such property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property, if and to the extent the intangible property is used in the commonwealth; and

(5) in the case of the sale of intangible property, other than as provided in clause (4), where the property sold is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, if and to the extent that the intangible property is used in or otherwise associated with the commonwealth; provided, however, that any sale of intangible property, not otherwise described in this clause or clause (4), shall be excluded from the numerator and the denominator of the sales factor.

For the purposes of this subsection:

(1) in the case of sales, other than sales of tangible personal property, if the state or states to which sales should be assigned cannot be determined, it shall be reasonably approximated;

(2) in the case of sales other than sales of tangible personal property if the taxpayer is not taxable in a state to which a sale is assigned, or if the state or states to which such sales should be assigned cannot be determined or reasonably approximated, such sale shall be excluded from the numerator and denominator of the sales factor;

(3) the corporation shall be considered to be taxable in the state of the purchaser if tangible personal property is delivered or shipped to a purchaser in a foreign country;

(4) sales of tangible personal property to the United States government or any agency or instrumentality thereof for purposes of resale to a foreign government or any agency or instrumentality thereof are not sales made in the commonwealth;

(5) in the case of sale, exchange or other disposition of a capital asset, as defined in paragraph (m) of section 1 of chapter 62, used in a taxpayer's trade or business, including a deemed sale or exchange of such asset, "sales" shall be measured by the gain from the transaction;

(6) "security" shall mean 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;

(7) in the case of a sale or deemed sale of a business, the term “sales” shall not include receipts from the sale of the business “goodwill” or similar intangible value, including, without limitation, “going concern value” and “workforce in place”;

(8) to the extent authorized under the life sciences tax incentive program established by section 5 of chapter 23I, a certified life sciences company may be deemed a research and development corporation for purposes of exemptions under chapters 64H and 64I; and

(9) in the case of a business deriving receipts from operating a gaming establishment or otherwise deriving receipts from conducting a wagering business or activity, income-producing activity shall be considered to be performed in the commonwealth to the extent that the location of wagering transactions or activities that generated the receipts is in the commonwealth.

Notwithstanding the foregoing, mutual fund sales as defined in subsection (m), other than the sale of tangible personal property, shall be assigned to the commonwealth to the extent that shareholders of the regulated investment company are domiciled in the commonwealth as follows:

(a) by multiplying the taxpayer's total dollar amount of sales of such services on behalf of each regulated investment company by a fraction, the numerator of which shall be the average of the number of shares owned by the regulated investment company's shareholders domiciled in the commonwealth at the beginning of and at the end of the regulated investment company's taxable year that ends with or within the taxpayer's taxable year and the denominator of which shall be the average of the number of shares owned by the regulated investment company shareholders everywhere at the beginning of and at the end of the regulated investment company's taxable year that ends with or within the taxpayer's taxable year.

(b) A separate computation shall be made to determine the sale for each regulated investment company, the sum of which shall equal the total sales assigned to the commonwealth.

The commissioner shall adopt regulations to implement this subsection. Nothing in this subsection shall limit the commissioner's authority under subsection (j).

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MASSACHUSETTS PROPOSED REGULATIONS

PROPOSED - 830 CMR 63.38.1 IS REPEALED AND REPLACED WITH THE FOLLOWING:

In relevant part only

...

(9) *Sales Factor*. The sales factor is a fraction whose numerator is total sales of the taxpayer in Massachusetts during the taxable year and whose denominator is total sales of the taxpayer everywhere during the taxable year. In general, a taxpayer's total sales are its gross receipts. However, certain items, as more particularly referenced in 830 CMR 63.38.1(9)(a), are specifically excluded from this computation. Also, in the case of the sale, exchange or other disposition of a capital asset used in a taxpayer's trade or business the sales to be included are measured by the gain from the transaction and not the gross receipts. In the case of a transaction that is deemed to be a sale or exchange under the provisions of the Code, the sales are the deemed receipts or gain from the transaction under the Code, as the case may be, depending upon whether the deemed transaction is a deemed sale or exchange of a capital asset.

(a) *Items Excluded From Sales*. Sales do not include the following items:

1. Interest.
2. Dividends.
3. Gross receipts from the maturity, redemption, sale, exchange, or other disposition of securities as defined at 830 CMR 63.38.1(2).
4. Gross receipts from the sale of business "good will" or similar intangible value, including, without limitation, "going concern value" or "workforce in place"(i.e., in the case of a sale or deemed sale of a business).
5. Gross receipts that result in an allocable item of income, irrespective as to whether that allocable item of income is allocated to Massachusetts.

(b) *Items Included in Sales*. Sales include (but are not limited to) the following items:²⁰

1. *Manufacturing and Selling, Purchasing and Reselling, Goods or Products*. Sales include gross sales, less returns and allowances, of goods or products (or other property of a kind which would properly be included in inventory if on hand at the close of the taxable year) which a taxpayer manufactures and sells or purchases and resells. Sales also include all service charges, carrying charges, and other non-interest charges incidental to sales. Federal excises and state excises are included as part of sales if the taxes are passed on to the buyer or included as part of the selling price of the product.
2. *Cost-plus Contracts*. In the case of a cost-plus-fee contract, such as certain contracts for the operation of government-owned plants, sales include the entire reimbursed cost, plus the fee. Receipts or gain attributable to the sale of tangible personal property designed or constructed and sold under a cost-plus-fee or similar arrangement are treated as receipts from the sale of tangible personal property, and may not be treated as receipts from personal services.
3. *Providing Services*. Sales include gross receipts from the performance of services including commissions, fees, management charges, and similar items. (See 830 CMR

63.38.1(9)(b)8. regarding proper amount of service fees in certain intercompany transactions.)

4. *Lease or Rental of Real or Tangible Personal Property.* Sales include the gross receipts from renting, leasing, or licensing the use of real or tangible personal property except in cases in which the lease, rental, or license of the asset in question is treated, for purposes of M.G.L. c. 63, as a sale, exchange, or other disposition of a capital asset used in a taxpayer's trade or business, in which case sales include only the gain from the disposition of the property in question.
5. *Sale, Licensing, or Assignment of Intangible Property other than Securities.* Sales generally include gross receipts from the sale, licensing, or assignment of intangible property other than securities or business "good will" or similar intangible value, *see* 830 CMR 63.38.1(9)(a), except in cases in which the sale, licensing or assignment of the property in question is treated, for purposes of M.G.L. c. 63, as a sale, exchange, or other disposition of a capital asset used in a taxpayer's trade or business, in which case the sales include the gain (and not the gross receipts) from the disposition of the property in question. For detailed rules pertaining to the sales factor rules that pertain to the license and sale of intangible property *see* 830 CMR 63.38.1(9)(d)5. and 6.
6. *Capitalized Leases.* Property subject to a capitalized lease for federal income tax purposes is treated as subject to a capitalized lease for purposes of the corporate excise, and sales include income or gain derived from a capitalized lease transaction to the extent that the income or gain from such transaction is included in the federal gross income of the taxpayer.
7. *Sale, Exchange, or Other Disposition of Fixed Assets.* In the case of the sale, exchange or other disposition of a fixed asset used in a taxpayer's trade or business, such as property, plant or equipment, sales are measured by the gain from such transaction. Gain from the disposition of a fixed asset shall include (but is not limited to) deemed gain from a transaction that is treated under the Code as a sale of a taxpayer's assets and that results in the taxpayer's recognition of income for Massachusetts purposes. For example, gain from the deemed sale of assets (other than securities) by a target corporation under Code § 338 is included in a target's sales factor. Similarly, the gain that results from a payment of a dividend (other than securities) by a subsidiary corporation to its parent that is deemed to be a sale of assets by the subsidiary under Code § 311(b) is included in the subsidiary's sales factor.
8. *Intercompany Sales.* Sales between affiliated corporations, to the extent otherwise includible in the sales factor under M.G.L. c. 63, § 38(f) and 830 CMR 63.38.1(9)(a) and (b), are generally included in the sales factor of the selling corporation except as described in 830 CMR 63.38.1(9)(b)8. In the case of intercompany transactions included in the sales factor under 830 CMR 63.38.1(9)(b)8., the amount of gross receipts included in the sales factor shall reflect the fair market value of the property or services provided in an arms-length transaction, subject to adjustments or rules adopted by the Commissioner pursuant to M.G.L. c. 63, § 39A.

- a. *Where Corporations are Members of the Same Combined Group.* In general, transactions between affiliates that are members of the same combined group within the meaning of G.L. c. 63, § 32B are not included in the sales factor for purposes of the income measure. *See* 830 CMR 63.32B.2(7)(g). However, when computing the non-income measure, a taxpayer shall include in its sales factor any sales to affiliates that are members of the same combined group. *See* 830 CMR 63.32B.2(6)(b)3.
- b. *Where Corporations are Not Members of the Same Combined Group.* When a taxpayer makes sales to an affiliate and the two corporations are not members of the same combined group within the meaning of G.L. c. 63, § 32B and 830 CMR 63.32B.2, the taxpayer's sales include the gross receipts from such sales transactions, irrespective of whether the two corporations are members of the same federal consolidated group.
- c. *Exclusion of Dividends.* A payment from a subsidiary corporation to its parent will be excluded from the numerator and denominator of the parent's sales factor if, in substance, the payment represents a dividend, even if the payment would otherwise be included in the parent's sales factor under 830 CMR 63.38.1(9)(b)8.b.

...

(d) When Sales Other Than Sales of Tangible Personal Property are in Massachusetts.

1. General Rules.

- a. *Market-Based Sourcing.* Sales, other than sales of tangible personal property, are in Massachusetts within the meaning of this regulation if and to the extent that the corporation's market for the sales is in Massachusetts as more fully set forth in M.G.L. c. 63, § 38(f) and 830 CMR 63.38.1(9)(d). In general, the provisions of 830 CMR 63.38.1(9)(d)4-7 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 Massachusetts, (2) approximating the state or states of assignment where such state or states cannot be determined, and (3) excluding the sale where the state or states of assignment cannot be determined or approximated.
- b. *Outline of topics.* The provisions in this section 830 CMR 63.38.1(9)(d) are organized as follows.

1. General Rules

a. Market-Based Sourcing

b. Outline of Topics

c. Definitions

d. General Principles of Application; Contemporaneous Records

- e. Rules of Reasonable Approximation
 - f. Rules with respect to Exclusion of Sales from the Sales Factor
 - g. Changes in Methodology; Commissioner Review
 - h. Industry-Specific Alternative Apportionment Rules
 - i. Application to Services Provided Directly or Indirectly to a RIC
 - j. Further Guidance
- 2. Sale, Rental, Lease or License of Real Property
 - 3. Rental, Lease or License of Tangible Personal Property
 - 4. Sale of a Service
 - a. General Rule
 - b. In-Person Services
 - c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer
 - d. Professional Services
 - 5. License or Lease of Intangible Property
 - a. General Rules
 - b. License of a Marketing Intangible
 - c. License of a Production Intangible
 - d. License of a Mixed Intangible²⁶
 - e. License of Intangible Property where Substance of the Transaction Resembles a Sale of Goods or Services
 - f. Examples
 - 6. Sale of Intangible Property
 - a. Assignment of Sales
 - b. Examples
 - 7. Special Rules
 - a. Software Transactions

b. Sales or Licenses of Digital Goods and Services

c. Enforcement of Legal Rights

c. Definitions. For the purposes of 830 CMR 63.38.1(9)(d) the following terms have the following meanings.

“Billing address” means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer’s account as of the time of the transaction as kept in good faith in the normal course of business and not for tax avoidance purposes.

“Business customer” means a customer that is a business operating in any form, including an individual that operates a business through the form of a sole proprietorship. Sales to a non-profit organization, to a trust, to the U.S. Government, to any foreign, state or local government, or to any agency or instrumentality of such government shall be treated as sales to a business customer and shall be assigned consistent with the rules that apply to such sales.

“Individual customer” means any customer that is not a business customer.

“Intangible property,” generally includes, without limitation, copyrights; patents; trademarks; trade names; brand names; franchises; licenses; trade secrets; trade dress; information; know-how; methods; programs; procedures; systems; formulae; processes; technical data; designs; licenses; literary, musical, or artistic compositions; information; ideas; contract rights including broadcast rights; agreements not to compete; goodwill and going concern value; securities (*see* 830 CMR 63.38.1(2) (definition of “security”)); and, except as otherwise provided in this regulation, 830 CMR 63.38.1, computer software. In the case of a sale of intangible property, such sale may or may not be includable in the numerator and denominator of the taxpayer’s sales factor, depending upon the application of the rules set forth in 830 CMR 63.38.1(9)(d)6.

“Place of order,” means the physical location from which a customer places an order for a sale other than a sale of tangible personal property from a taxpayer, resulting in a contract with the taxpayer.

“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 implementation and day-to-day execution of a contract entered into by the taxpayer with the customer.

d. General Principles of Application; Contemporaneous Records. In order to satisfy the requirements of 830 CMR 63.38.1(9)(d), a taxpayer’s assignment of sales of other than tangible personal property must be consistent with the following principles:

- i. A taxpayer's application of the rules set forth in this section, 830 CMR 63.38.1(9)(d), shall be 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's method of assigning its sales shall be determined in good faith, applied in good faith, and applied 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 sales, including its underlying assumptions, and shall provide such records to the Commissioner upon request.
 - ii. The provisions of 830 CMR 63.38.1(9)(d)4-7 provide for various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy (and must continue to do so with each succeeding rule in the hierarchy, where applicable). For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and where the taxpayer cannot do so, the rule then requires the taxpayer to reasonably approximate such state or states. In such cases, the taxpayer must in good faith and with reasonable effort attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) before it may reasonably approximate such state or states.
 - iii. A taxpayer's method of assigning its sales, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of sales consistent with the regulatory standards set forth in 830 CMR 63.38.1(9)(d), 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.
- e. Rules of Reasonable Approximation.
- i. In General. In general, the provisions of 830 CMR 63.38.1(9)(d)4-7 establish uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Massachusetts. The provisions of the regulation also set forth rules of reasonable approximation, which apply where the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation prescribed by this regulation. *See, e.g.*, 830 CMR 63.38.1(9)(d)4.d (pertaining to professional services). In other cases, the applicable rule in 830 CMR 63.38.1(9)(d) permits a taxpayer to reasonably approximate the state or states of assignment, using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in this section, 830 CMR 63.38.1(9)(d).

ii. Approximation Based Upon Known Sales. Except as otherwise provided in this section, 830 CMR 63.38.1(9)(d)1.e.ii., in any instance where, applying the rules set forth in 830 CMR 63.38.1(9)(d)4, pertaining to sales of services, a taxpayer can determine or can reasonably approximate the state or states of assignment of a substantial portion of its sales of substantially similar services (“assigned sales”), but not all of such sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of such sales generally tracks that of the assigned sales, it shall include those sales which it believes tracks the geographic distribution of the assigned sales in its sales factor in the same proportion as its assigned sales. 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* 830 CMR 63.38.1(9)(d)5.e. and 830 CMR 63.38.1(9)(d)6.a.v. This rule does not apply in the context of the rules set forth at 830 CMR 63.38.1(9)(d)4.d (pertaining to professional services).

f. Rules with respect to Exclusion of Sales from the Sales Factor

- i. In any case in which a taxpayer cannot ascertain the state or states to which a sale is to be assigned pursuant to the applicable rules set forth in 830 CMR 63.38.1(9)(d) (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the sale shall be excluded from the numerator and the denominator of the taxpayer’s sales factor.
- ii. In any case in which a taxpayer can ascertain the state or states to which a sale is to be assigned pursuant to the applicable rules set forth in 830 CMR 63.38.1(9)(d), but the taxpayer is not taxable in one or more such states, the sales that would otherwise be assigned to such states where the taxpayer is not taxable shall be excluded from the numerator and denominator of the taxpayer’s sales factor. The rules to determine whether a taxpayer is taxable in a state are set forth at 830 CMR 63.38.1(5).

g. Changes in Methodology; Commissioner Review

- i. General Rules Applicable to Original Returns. In any case in which a taxpayer files an original return for a taxable year in which it properly assigns its sales using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in 830 CMR 63.38.1(9)(d), the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In such cases, neither the Commissioner nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer’s methodology as applied for assigning such sales for such taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct

either factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

- ii. Commissioner Authority to Adjust a Taxpayer's Return. The Commissioner's ability to review and adjust a taxpayer's assignment of sales on a return to more accurately assign such sales consistent with the rules or standards of this section, 830 CMR 63.38.1(9)(d), includes, but is not limited to, each of the following potential actions.
 - (A) In any case in which a taxpayer fails to properly assign a sale in accordance with the rules set forth in 830 CMR 63.38.1(9)(d), including the failure to properly apply a hierarchy of rules consistent with the principles of 830 CMR 63.38.1(9)(d)1.d.ii, the Commissioner may assign such sales in accordance with the applicable rules in 830 CMR 63.38.1(9)(d).
 - (B) In any case in which a taxpayer uses a method of approximation to assign its sales and the Commissioner determines that the method of approximation employed by the taxpayer is not reasonable, the Commissioner may substitute a method of approximation that the Commissioner determines is appropriate or may exclude the sales from the taxpayer's numerator and denominator, as appropriate.
 - (C) In any case in which the Commissioner determines that a taxpayer's method of approximation is reasonable, but has not been applied in a consistent manner with respect to similar transactions or year to year, the Commissioner may require that the taxpayer apply its method of approximation in a consistent manner.
 - (D) In any case in which a taxpayer excludes sales from the numerator and denominator of its sales factor on the theory that the assignment of such sales cannot be reasonably approximated, the Commissioner may determine that the exclusion of such sales is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.
 - (E) In any case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its sales, including its underlying assumptions, or fails to provide such records to the Commissioner upon request, the Commissioner may treat the taxpayer's assignment of sales as unsubstantiated, and may assign such sales in the manner that the Commissioner determines is appropriate.
- iii. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. In filing its original return for a tax year, a taxpayer may change its method of assigning its sales under section 830 CMR 63.38.1(9)(d) from the method it used in the preceding year, including changing its method of approximation from that used on previous returns. However, the taxpayer may only make such change

for purposes of improving the accuracy of assigning its sales consistent with the rules set forth in 830 CMR 63.38.1(9)(d), including, for example, to address the circumstance where there is a change in the information that is available to the taxpayer as relevant for purposes of complying with such rules. Further, a taxpayer that seeks to change its method of assigning its sales must disclose, in the original return filed for the year of the change, the fact that it has made the change, and must retain and provide to the Commissioner upon request documents that explain the nature and extent of the change, and the reason for the change. If a taxpayer fails to adequately disclose such change or retain and provide such records upon request, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate.

iv. Commissioner Authority to Change a Method of Assignment on a Prospective Basis. The Commissioner may direct a taxpayer to change its method of assigning its sales in tax returns that have not yet been filed, including changing the taxpayer's method of approximation, if upon reviewing the taxpayer's filing methodology applied for a prior tax year, the Commissioner determines that such change is appropriate to reflect a more accurate assignment of the taxpayer's sales within the meaning of this section, 830 CMR 63.38.1(9)(d), and determines that such change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making such change. In any case in which a taxpayer fails to comply with the Commissioner's direction on subsequently filed returns, the Commissioner may deem the taxpayer's method of assigning its sales on such returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

...

j. Further Guidance. The Commissioner may issue further public written statements with respect to the rules set forth in 830 CMR 63.38.1(9)(d). Such further guidance may, among other things, include guidance with respect to: (1) what constitutes a reasonable method of approximation within the meaning of such rules, and (2) the circumstances in which a filing change with respect to a taxpayer's method of reasonable approximation will be deemed appropriate.

2. Sale, Rental, Lease or License of Real Property. In the case of a sale, rental, lease or license of real property, the sale is in Massachusetts if and to the extent that the property is in Massachusetts.

3. Rental, Lease or License of Tangible Personal Property. In the case of a rental, lease or license of tangible personal property, the sale is in Massachusetts if and to the extent that the property is in Massachusetts. If property is mobile property that is located both within and without Massachusetts during the period of the lease or other contract, the receipts assigned to Massachusetts shall be the receipts from the contract period

multiplied by the fraction used by the taxpayer for property factor purposes under 830 CMR 63.38.1(7)(d) (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).

4. Sale of a Service.

a. General Rule. The sale of a service is in Massachusetts if and to the extent that the service is delivered at a location in Massachusetts. In general, the term “delivered” shall be construed to refer to the location of the taxpayer’s market for the service provided and is not to be construed by reference to the location of the property or payroll of the taxpayer as otherwise determined for corporate apportionment purposes pursuant to 830 CMR 63.38.1(7)-(8). 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 830 CMR 63.38.1(9)(d)4.b-d.

b. In-Person Services.

i. In General. Except as otherwise provided in this subsection 830 CMR 63.38.1(9)(d)4.b, 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 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 and 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 such services as described in 830 CMR 63.38.1(9)(d)4.d, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.b.

ii. Assignment of Sales. Except as otherwise provided in this subsection 830 CMR 63.38.1(9)(d)4.b, where the service provided by the taxpayer is an in-person service, the delivery of the service is at the location where the service is received. Therefore, the sale is in Massachusetts if and to the extent the customer receives the in-person service in Massachusetts. In assigning its sales of in-person services, a taxpayer shall first attempt to determine the location where a service is received, as follows:

- (A) Where the service is performed with respect to the body of an individual customer in Massachusetts (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Massachusetts (e.g. live entertainment or athletic performances), the service is received in Massachusetts.
- (B) Where the service is performed with respect to the customer's real estate in Massachusetts or where the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in Massachusetts, the service is received in Massachusetts.
- (C) Where the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed in Massachusetts or outside Massachusetts, the service is received in Massachusetts if such property is shipped or delivered to the customer in Massachusetts.

In any instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

...

- iv. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales be eliminated from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii. Note that for purposes of the examples it is irrelevant whether the services are performed by an employee of the taxpayer or by an independent contractor acting on the taxpayer's behalf.

Example 1. Salon Corp has retail locations in Massachusetts and in other states where it provides hair cutting services to individual and business customers, the latter of whom are paid for through the means of a company account. The sales of services provided at Salon Corp's Massachusetts

locations are in Massachusetts. The sales of services provided at Salon Corp's locations outside Massachusetts, even when provided to Massachusetts residents, are not Massachusetts sales.

Example 2. Landscape Corp provides landscaping and gardening services in Massachusetts and in neighboring states. Landscape Corp provides landscaping services at the Massachusetts vacation home of an individual who is a resident of another state and who is located outside Massachusetts at the time the services are performed. The sale of services provided at the Massachusetts location is in Massachusetts.

Example 3. Same facts as in Example 2, except that Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to such locations of Retail Corp that are in Massachusetts and in other states. The sale of services provided to Retail Corp is in Massachusetts to the extent the services are provided in Massachusetts.

Example 4. Camera Corp provides camera repair services at a Massachusetts retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its Massachusetts location at a facility that is in another state. In such cases, the repaired camera is then returned to the customer at Camera Corp's Massachusetts location. The sale of such services is in Massachusetts.

Example 5. Same facts as in Example 4, except that a customer located in Massachusetts mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Massachusetts by mail. The sale of the service is in Massachusetts.

Example 6. Teaching Corp provides seminars in Massachusetts to individual and business customers. The seminars and the materials used in connection with the seminars are prepared outside the state, the teachers who teach the seminars include teachers that are resident outside the state, and the students who attend the seminars include students that are resident outside the state. Because the seminars are taught in Massachusetts the sales of the services are in Massachusetts.

...

c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

- i. In General. Where the service provided by the taxpayer is not an in-person service within the meaning of 830 CMR 63.38.1(9)(d)4.b or a professional service within the meaning of 830 CMR 63.38.1(9)(d)4.d, and the service is delivered to or on behalf of the customer, or delivered electronically through the customer,

the sale is in Massachusetts if and to the extent that the service is delivered in Massachusetts. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c., a service that is delivered to a customer is a service in which the customer and not a third party is the direct recipient of the service, and a service that is delivered on behalf of a customer is one in which a customer contracts for a service to be delivered to a third party or third parties. Services that are delivered on behalf of a customer include services where the taxpayer's service is the direct or indirect delivery of advertising to the customer's intended audience. Services that are delivered electronically through a customer are services that are 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. Except in the instance of services that are delivered through a customer (where the services must be delivered electronically), services are included within the meaning of this section 830 CMR 63.38.1(9)(d)4.c, irrespective of the method of delivery, e.g., whether such services are delivered by a physical means or through an electronic transmission.

- ii. Assignment of Sales. The assignment of a sale to a state or states in the instance 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 section, 830 CMR 63.38.1(9)(d)4.c, a service delivered by an electronic transmission shall not be considered a delivery by a physical means). In any instance where, applying the rules set forth in this section, 830 CMR 63.38.1(9)(d)4.c, the rule of assignment 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. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii. 36

(A) 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 M.G.L. c. 63) where the taxpayer installs

the custom software at the customer's site. The rules in this subsection 830 CMR 63.38.1(9)(d)4.c.ii(A) apply whether the taxpayer's customer is an individual customer or a business customer.

1. Rule of Determination. In assigning the 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 such services are delivered. Where the taxpayer is able to determine the state or states where the service is delivered, it shall assign the sale to such state or states.
2. Rule of Reasonable Approximation. Where 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 such state or states.
3. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Direct Mail Corp, a corporation based outside Massachusetts, provides direct mail services to its customer, Business Corp. Business Corp transacts 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 Massachusetts 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 sale of Direct Mail Corp's services to Business Corp is assigned to Massachusetts to the extent that the services are delivered on behalf of Business Corp to Massachusetts customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Massachusetts). 37

Example 2. Ad Corp is a corporation based outside Massachusetts that provides advertising and advertising-related services in Massachusetts and in neighboring states. Ad Corp enters into a contract at a location outside Massachusetts with an

individual customer who is not a Massachusetts resident to design advertisements for billboards to be displayed in Massachusetts, and to design fliers to be mailed to Massachusetts residents. All of the design work is performed outside Massachusetts. The sale of the design services is in Massachusetts because the service is physically delivered on behalf of the customer to the customer's intended audience in Massachusetts.

Example 3. Same facts as example 2, except that the contract is with a business customer that is based outside Massachusetts. The sale of the design services is in Massachusetts because the services are physically delivered on behalf of the customer to the customer's intended audience in Massachusetts.

Example 4. Fulfillment Corp, a corporation based outside Massachusetts, provides product delivery fulfillment services in Massachusetts and in neighboring states to Sales Corp, a corporation located outside Massachusetts 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 Corp to be delivered in Massachusetts, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Massachusetts. The sale of the fulfillment services of Fulfillment Corp to Sales Corp is assigned to Massachusetts to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Massachusetts.

Example 5. Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in Massachusetts, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside Massachusetts, and then physically installs the software on Buyer Corp's computer hardware located in Massachusetts. The development and sale of the custom software is properly characterized as a service transaction, and the sale is assigned to Massachusetts because the software is physically delivered to the customer in Massachusetts.

Example 6. Same facts as Example 5, except that Buyer Corp has offices in Massachusetts and several other states, but is commercially domiciled outside Massachusetts and orders the software from a location outside Massachusetts. The receipts from the development and sale of the custom software service

are assigned to Massachusetts because the software is physically delivered to the customer in Massachusetts.

(B) 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.

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

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

b. Rules of 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 such state or states. 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, it shall approximate such state or states using the customer's billing address.

2. Services Delivered By Electronic Transmission to a Business Customer

a. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Massachusetts if and to the extent that the taxpayer's customer receives the service in Massachusetts. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2, 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.

- b. 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 such state or states.
- c. Secondary Rule of 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, such state or states shall be approximated as set forth in this section. In such cases, unless the taxpayer can apply the safe harbor set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d the taxpayer shall approximate the state or states in which the service is received as follows: first, by assigning 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 sale to the customer's place of order; and third, if the customer's place of order is not reasonably determinable, by assigning the sale using the customer's billing address; provided, however, that in any instance in which the taxpayer derives more than 5% of its sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.
- d. 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 830 CMR 63.38.1(9)(d)4.c.ii(B)2.b, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.c, apply the safe harbor stated in this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d. Under this safe harbor, a taxpayer may assign its sales to a particular customer based upon the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than a thousand customers, whether business or individual, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 830 CMR 63.38.1(9)(d)4.c.ii(B)2, to services delivered by

electronic transmission to a business customer, and not otherwise.

3. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii. Further, assume where relevant, unless otherwise stated, that the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d, does not apply.

Example 1. Support Corp, a corporation that is based outside Massachusetts, provides software support and diagnostic services to individual and business customers that have previously purchased certain software from third-party vendors. These individual and business customers are located in Massachusetts and other states. Support Corp supplies its services on a case by case basis when directly contacted by its customer. Support Corp generally provides these services through the Internet but sometimes provides these services by phone. In all cases, Support Corp verifies the customer's account information before providing any service. Using the information that Support Corp verifies before performing a service, Support Corp can determine where its services are received, and therefore must assign its sales to these locations. The sales made to Support Corp's individual and business customers are in Massachusetts to the extent that Support Corp's services are received in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.c.ii(B)1 and 2.

Example 2. Online Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to individual customers who are resident in Massachusetts and in other states. These customers access Online Corp's web services primarily in their states of residence, and sometimes, while traveling, in other states. For a substantial portion of its sales, either Online Corp can determine the state or states where such services are received, or, where it cannot determine such state or states, it has sufficient information regarding the place of receipt to reasonably approximate such state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of

such sales. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Massachusetts the sales for which it does not know the customers' location in the same proportion as those sales for which it has this information. *See* 830 CMR 63.38.1(9)(d)1.e.ii.

Example 3. Same facts as in Example 2, except that Online Corp reasonably believes that the geographic distribution of the sales for which it cannot determine or reasonably approximate the location of the receipt of its web-based services do not generally track the sales for which it does have this information. Online Corp must assign the sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. *See* 830 CMR 63.38.1(9)(d)4.c.ii(B)1.b.

Example 4. Same facts as in Example 3, except that Online Corp is not taxable in one state to which some of its sales would be otherwise assigned. The sales that would be otherwise assigned to that state are to be excluded from the numerator and denominator of Online Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)4.c.ii(B); 830 CMR 63.38.1(9)(d)1.f.ii.

Example 5. Net Corp, a corporation based outside Massachusetts, provides web-based services to a business customer, Business Corp, a company with offices in Massachusetts and two neighboring states. Particular employees of Business Corp access the services from computers in each Net Corp office. Assume that Net Corp determines that Business Corp employees in Massachusetts were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In such case, 75% of the sale is received in Massachusetts, and therefore 75% of the sale is in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.c.ii(B)2.a. Assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate such location or locations. Under these circumstances, if Net Corp derives 5% or less of its sales from Business Corp, Net Corp must assign the sale under 830 CMR 63.38.1(9)(d)4.c.ii(B)2.c to the state where Business Corp principally managed the contract, or if

that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its sales of services from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state.

Example 6. Net Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to more than a thousand individual and business customers in Massachusetts and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate such state or states. Also assume that Net Corp does not derive more than 5% of its sales of services from any single customer. Net Corp may apply the safe harbor stated in CMR 830 63.38.1(9)(d)4.c.ii(B)2.d, and may assign its sales using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its sales would be otherwise assigned, it must exclude those sales from the numerator and denominator of its sales factor. 830 CMR 63.38.1(9)(d)1.f.ii.

(C) Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. Services delivered electronically to third-party recipients "on behalf of" the customer include the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. Services delivered electronically "through" a customer to third-party recipients are services that are 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.

1. 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 Massachusetts if and to the extent that the end users or other third-party recipients are in Massachusetts. 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 Massachusetts to the extent that the audience for such advertising is in Massachusetts. 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 Massachusetts to the extent that the end users or other

third-party recipients receive such services in Massachusetts. The rules in this subsection 830 CMR 63.38.1(9)(d)4.c.ii(C) 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.

2. 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 such state or states.

3. Secondary Rules of Approximation.

i. Where a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate such location, the taxpayer shall approximate the audience in a state for such advertising using the following secondary rules of approximation. Where a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall 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 such area. For a taxpayer with less information about its audience, the taxpayer shall 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 such area.

ii. Where a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling such 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 such location, the taxpayer shall 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 such services, relative to the total population in such area.

4. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Cable TV Corp, a corporation that is based outside of Massachusetts, 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 Massachusetts. Second, Cable TV Corp sells monthly subscriptions to individual customers in Massachusetts and in other states. Cable TV Corp's sale of advertising time to its business customers is assigned to Massachusetts to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)1. 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 such location, Cable TV Corp must approximate its Massachusetts audience using the percentage that reflects the ratio of its Massachusetts subscribers in the geographic area in which Cable TV Corp's televised programming featuring such advertisements is delivered relative to its total number of subscribers in such area. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, such sales are properly assigned to Massachusetts in any case in which the programming

is received by a customer in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.c.ii(B)1. 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 such location, such sales of Cable TV Corp's monthly subscriptions are assigned to Massachusetts where its customer's billing address is in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.c.ii(B)1.b. 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 sales are properly assigned. *See* 830 CMR 63.38.1(9)(d)5.e.

Example 2. Network Corp, a corporation that is based outside of Massachusetts, 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. Network Corp's sale of advertising time to its business customers is assigned to Massachusetts to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)1. 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 such location, Network Corp must approximate the amount of the sales that constitutes Massachusetts sales by multiplying the amount of such sales by a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in such area. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. In any case in which Network Corp's sales would be assigned to a state in which Network Corp is not taxable, such sales shall be excluded from the numerator and denominator of

Network Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 3. Web Corp, a corporation that is based outside Massachusetts, provides Internet content to viewers in Massachusetts 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. Web Corp's sale of advertising space to its business customers is assigned to Massachusetts to the extent that the viewers of the Internet content are in Massachusetts, as measured by viewings or clicks. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)1. 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 such location, Web Corp must approximate the amount of its Massachusetts sales by multiplying the amount of such sales by a percentage that reflects the Massachusetts population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in such area. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. In any case in which Web Corp's sales would be assigned to a state in which Web Corp is not taxable, such sales shall be excluded from the numerator and denominator of Web Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 4. Wholesale Corp, a corporation that is based outside Massachusetts, develops an Internet-based information database outside Massachusetts 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. 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 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 such location, Wholesale Corp must approximate the extent to which its services are received by end users in Massachusetts by using a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in such area. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)3.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* 830 CMR 63.38.1(9)(d)5.e. In any case in which Wholesale Corp's sales would be assigned to a state in which Wholesale Corp is not taxable, such sales shall be excluded from the numerator and denominator of Wholesale Corp's sales factor. *See* 830 CMR 63.38.1(9)(d).1.f.ii.

d. Professional Services.

- i. In General. Professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. 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 and credit card services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services. Whether the sale of a professional service is in Massachusetts is determined pursuant to this section, 830 CMR 63.38.1(9)(d)4.d, provided, however, that professional services, such as carpentry, medical and dental services or child care services, that

significantly involve or require in-person contact are “in-person services” within the meaning of 830 CMR 63.38.1(9)(d)4.b, and are assigned under the rules of 830 CMR 63.38.1(9)(d)4.b. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. However, in such cases, despite this transmission, the assignment rules that apply are those set forth in this section, 830 CMR 63.38.1(9)(d)4.d, and not those set forth in 830 CMR 63.38.1(9)(d)4.c, pertaining to services delivered to a customer or through or on behalf of a customer.

- ii. Assignment of Sales. 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, for purposes of consistent application of the market sourcing rule stated in G.L. c. 63, § 38(f), the Commissioner has concluded that the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be approximated. The assignment of 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 sale of a professional service, a taxpayer’s customer is the person who contracts for such service, irrespective of whether another person pays for or also benefits from the taxpayer’s services. Except as provided in 830 CMR 63.38.1(9)(d)4.d.ii(D) (mutual fund sales), in any instance in which the taxpayer is not taxable in the state to which a sale shall be assigned, the sale shall be excluded from the numerator and denominator of the taxpayer’s sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

(A) General Rule. Sales of professional services other than those services described in CMR 63.38.1(9)(d)4.d.ii(B) (architectural and engineering services), 830 CMR 63.38.1(9)(d)4.d.ii(C) (services provided by a financial institution) and 830 CMR 63.38.1(9)(d)4.d. ii(D) (certain services provided to RICs)), are assigned in accordance with this section 830 CMR 63.38.1(9)(d)4.d.ii(A).

- 1. Professional Services Delivered to Individual Customers. Except as otherwise provided in this section, 830 CMR 63.38.1(9)(d)4.d, 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 shall be approximated as set forth in this section, 830 CMR 63.38.1(9)(d)4.d.ii(A)1. In particular, the taxpayer shall assign the 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 sales of services from an individual customer, the taxpayer is

required to identify the customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state.

2. Professional Services Delivered to Business Customers. Except as otherwise provided in this section, 830 CMR 63.38.1(9)(d)4.d, 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 shall be approximated as set forth in this section, 830 CMR 63.38.1(9)(d)4.d.ii(A)2. In particular, unless the taxpayer may use the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.d.ii(A)3, the taxpayer shall assign 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 such place of customer management is not reasonably determinable, to the customer's place of order; and third, if such 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 sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

3. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in 830 CMR 63.38.1(9)(d)4.d.ii(A)1 and 2, a taxpayer may assign its 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 a thousand customers, whether individual or business, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 830 CMR 63.38.1(9)(d)4.d.ii(A), and not otherwise.

(B) 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 section, 830 CMR 63.38.1(9)(d)4.d. However, unlike in the case of the general rule that applies to professional services, (1) the sale of such an architectural service is 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 such state or states; and (2) the sale of such an engineering service is assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in such state or states, including real estate improvements located in, or expected to be located in, such 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 this section 830 CMR 63.38.1(9)(d)4.d.ii(B), the sale of such services shall be assigned

under the general rule for professional services. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A).

(C) Services provided by a Financial Institution. The apportionment rules that apply to financial institutions are set forth at M.G.L. c. 63, § 2A. That section includes specific rules to determine a financial institution's sales factor. *See* M.G.L. c. 63, § 2A(d). However, M.G.L. c. 63, § 2A also provides that receipts from sales, other than sales of tangible personal property, including service transactions, that are not otherwise apportioned under M.G.L. c. 63, § 2A(d), are to be assigned pursuant to the rules of M.G.L. c. 63, § 38(f). *See* M.G.L. c. 63, § 2A(d)(xi). In any instance in which a financial institution performs services that are to be assigned pursuant to M.G.L. c. 63, § 38(f), including, for example, financial custodial services, those services shall be considered professional services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.d, and shall be assigned according to the general rule for professional service transactions as set forth at 830 CMR 63.38.1(9)(d)4.d.ii(A).

(D) Mutual Fund Sales. Mutual fund sales within the meaning of this regulation, 830 CMR 63.38.1, generally are sales of professional services for purposes of 830 CMR 63.38.1(9)(d)4.d. *See* 830 CMR 63.38.1(2) (definition of mutual fund sales). However, the rules to assign mutual fund sales made by a mutual fund service corporation are those set forth in 830 CMR 63.38.7, and not those set forth in this regulation, 830 CMR 63.38.1. Also, in the case of mutual fund sales made by a taxpayer that is not a mutual fund service corporation, such mutual fund sales shall be assigned to Massachusetts to the extent that the shareholders of the RIC to whom the mutual fund sales are made are domiciled in Massachusetts, in a manner consistent with the sourcing methodology described in 830 CMR 63.38.7(4)(c)4. In these cases, consistent with the rules of M.G.L. c. 63, § 38(f) and 830 CMR 63.38.7, the mutual fund sales made by the taxpayer directly or indirectly to the RIC are included in the numerator and denominator of the taxpayer's sales factor irrespective as to whether the taxpayer is taxable in one or more of the states in which the RIC's shareholders are domiciled.

iii. Examples. Unless otherwise stated, assume in each of these examples, where relevant: (a) that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38; (b) that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be excluded from the numerator and denominator of the taxpayer's sales factor, *see* 830 CMR 63.38.1(9)(d)1.f.ii; (c) that the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.ii(A)3 does not apply; and (d) that the taxpayer's service at issue is not provided directly or indirectly to a RIC, *see* 830 CMR 63.38.1(9)(d)4.d.ii(D).

Example 1. Broker Corp provides securities brokerage services to individual customers who are resident in Massachusetts 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 sales of services from any one individual customer. Where Broker Corp knows its customer's state of primary residence, it shall assign the sale to that state. Where Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the sale to that state. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)1.

Example 2. Same facts as in Example 1, except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its sales of services. Sales to customers from whom Broker Corp derives 5% or less of its sales of services shall be assigned as described in example 1. For each customer from whom it derives more than 5% of its sales of 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 Massachusetts, a sale made to that customer must be assigned to Massachusetts; in any case in which a 5% customer's state of primary residence is not Massachusetts a sale made to that customer is not assigned to Massachusetts. Where a sale is assigned to a state other than Massachusetts, 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 shall be excluded from the numerator and denominator of Broker Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A); 830 CMR 63.38.1(9)(d)1.f.ii.

Example 3. Architecture Corp provides building design services as to buildings located, or expected to be located, in Massachusetts to individual customers who are resident in Massachusetts and other states, and to business customers that are based in Massachusetts and other states. Architecture Corp's sales are assigned to Massachusetts because the locations of the buildings to which its design services relate are in Massachusetts, or are expected to be in Massachusetts. For purposes of assigning these sales, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for such services, and it is not relevant where, in the case of a business customer, the customer principally manages the contract, placed the order for the services or is billed for such services. Further, such sales are assigned to Massachusetts even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than Massachusetts or are electronically delivered to its

customer in a state other than Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.d.ii(B).

Example 4. Law Corp provides legal services to individual clients who are resident in Massachusetts and in other states. In some cases, Law Corp may prepare one or more legal documents for its client as a result of these services and/or the legal work may be related to litigation or a legal matter that is ongoing in a state other than where the client is resident. Assume that Law Corp knows the state of primary residence for many of its clients, and where it does not know this state of primary residence, it knows the client's billing address. Also assume that Law Corp does not derive more than 5% of its sales of services from any one individual client. Where Law Corp knows its client's state of primary residence, it shall assign the sale to that state. Where Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the sale to that state. For purposes of the analysis it is irrelevant whether the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or the litigation or other legal matter that is the underlying predicate for the services is in another state. *See* 830 CMR 63.38.1(9)(d)4.d.i and ii(A)1.

Example 5. Same facts as in Example 4, except that Law Corp provides legal services to several individual clients who it knows have a primary residence in a state where Law Corp is not taxable. Receipts from these services shall be excluded from the numerator and denominator of Law Corp's sales factor even if the billing address of one or more of these clients is in a state in which Law Corp is taxable, including Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)1; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 6. Law Corp provides legal services to several multistate business clients. In each case, Law Corp knows the state in which the agreement for legal services that governs the client relationship is principally managed by the client. In one case, the agreement is principally managed in Massachusetts; in the other cases, the agreement is principally managed in a state other than Massachusetts. Where the agreement for legal services is principally managed by the client in Massachusetts the sale of the services shall be assigned to Massachusetts; in the other cases, the sale is not assigned to Massachusetts. In the case of the sale that is assigned to Massachusetts, the sale shall be so assigned even if (1) the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or (2) the litigation or other legal matter that is the underlying predicate for the services is in another state. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)2.

Example 7. Same facts as in example 6, except that Law Corp is not taxable in one of the states other than Massachusetts in which Law Corp's agreement

for legal services that governs the client relationship is principally managed by the business client. Receipts from these latter services shall be excluded from the numerator and denominator of Law Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)4.d.ii and ii(A)2; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 8. Consulting Corp, a company that provides consulting services to law firms and other customers, is hired by Law Corp in connection with legal representation that Law Corp provides to Client Co. Specifically, Consulting Corp is hired to provide expert testimony at a trial being conducted by Law Corp on behalf of Client Co. Client Co pays for Consulting Corp's services directly. Assuming that Consulting Corp knows that its agreement with Law Co is principally managed by Law Corp in Massachusetts, the sale of Consulting Corp's services shall be assigned to Massachusetts. It is not relevant for purposes of the analysis that Client Co is the ultimate beneficiary of Consulting Corp's services, or that Client Co pays for Consulting Corp's services directly. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)2.

Example 9. Bank Corp provides financial custodial services to 500 individual customers who are resident in Massachusetts 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 sales of all of its services from any single customer. Note that because Bank Corp does not have more than 1000 customers, it may not apply the safe harbor for professional services stated in 830 CMR 63.38.1(9)(d)4.d.ii(A)3. Where Bank Corp knows its customer's state of primary residence, it must assign the sale to that state. Where Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the sale to that state. Applying these rules, Bank Corp's sales are assigned to Massachusetts 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 Massachusetts, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)1, (C).51

Example 10. Same facts as Example 9, except that Bank Corp has more than a thousand customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in 830 CMR 63.38.1(9)(d)4.d.ii(A)3, and may assign its sales to a state or states using each customer's billing address. If Bank Corp is not taxable in one or more states to which some of its sales would be assigned, it must exclude the sales that would be assigned to those states from the numerator and denominator of its sales factor. *See* 830 CMR 63.38.1(9)(d)4.d.ii, ii(C); 830 CMR 63.38.1(9)(d)1.f.ii.

Example 11. Same facts as Example 10, except that Bank Corp derives more than 5% of its 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* 830 CMR 63.38.1(9)(d)4.d.ii(A)1, ii(C). Sales to all other customers are assigned as described in example 10.

Example 12. Advisor Corp, a corporation that provides investment advisory services, provides such 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 Massachusetts. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in Massachusetts, the sale of Advisor Corp's services shall be assigned to Massachusetts. 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* 830 CMR 63.38.1(9)(d)4.d.ii(A)2.

Example 13. Same facts as Example 12, except that in addition to providing investment advisory services to Investment Co, Advisor Corp also provides its advisory services to Mutual Fund Co, a regulated investment company with shareholders that are resident in numerous states, including Massachusetts. Advisor Corp is not a mutual fund service corporation; however Advisor Corp's services provided to Mutual Fund Co. constitute mutual fund sales within the meaning of this regulation, 830 CMR 63.38.1. *See* 830 CMR 63.38.1(2). Advisor Corp's mutual fund sales to Mutual Fund Co shall be assigned to Massachusetts to the extent that Mutual Fund Co's shareholders of record are domiciled in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.d.ii(D). However, unlike in the rule set forth generally in this section, 830 CMR 63.38.1(9)(d), there shall be no exclusion of such sales from the numerator and denominator of Advisor Corp's sales factor in any case in which such shareholders of record are domiciled in a state in which Advisor Corp is not taxable. *See id.* In contrast to its mutual fund sales made to Mutual Fund Co, Advisor Corp's advisory services provided to Investment Co are assigned as stated in Example 12, and its sales to Investment Co shall be excluded from the numerator and denominator of Advisor Corp's sales factor if such sales would be assigned to a state in which Advisor Corp is not taxable. *See* 830 CMR 63.38.1(9)(d)4.d.ii and ii(A)2.52

Example 14. 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 Massachusetts, the sale of Advisor Corp's services shall be assigned to Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)2. Note that, unlike in the case of mutual fund sales (*see* 830 CMR 63.38.1(9)(d)4.d.ii(D)), it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example 15. Design Corp is a corporation based outside Massachusetts that provides graphic design and similar services in Massachusetts and in neighboring states. Design Corp enters into a contract at a location outside Massachusetts 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 sales of services from the individual customer. All of the design work is performed outside Massachusetts. The sale is in Massachusetts if the customer's billing address is in Massachusetts. *See* 830 CMR 63.38.1(9)(d)4.d.ii(A)1.

5. License or Lease of Intangible Property.

a. General Rules.

- i. The receipts from the license of intangible property are in Massachusetts if and to the extent the intangible is used in Massachusetts. In general, the term "use" shall be 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 as otherwise determined for corporate apportionment purposes pursuant to 830 CMR 63.38.1(7)-(8). 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 830 CMR 63.38.1(9)(d)5.b-e. For purposes of the rules set forth in this section, 830 CMR 63.38.1(9)(d)5, a lease of intangible property is to be treated the same as a license of intangible property.
- ii. In general, a license of intangible property that conveys all substantial rights in such property is treated as a sale of intangible property for tax purposes. *See* 830 CMR 63.38.1(9)(d)6. Note, however, that for purposes of 830 CMR 63.38.1(9)(d)5 and 6, a sale or exchange of intangible property is treated as a license of such property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.
- iii. Intangible property licensed as part of the sale or lease of tangible property is treated under 830 CMR 63.38.1(9) as the sale or lease of tangible property.
- iv. 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 shall

be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

- v. To the extent that the transfer of either a security, as defined in 830 CMR 63.38.1(2), 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 sales factor.
- b. 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), the royalties or other licensing fees paid by the licensee for such right are assigned to Massachusetts to the extent that the fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by customers in Massachusetts. 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 Massachusetts, it shall assign such amount or proportion to Massachusetts. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Massachusetts customers, the portion of the licensing fee to be assigned to Massachusetts shall be approximated by multiplying the total fee by a percentage that reflects the ratio of the Massachusetts 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 such area. Where 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 Massachusetts shall be approximated by multiplying the total fee by a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which the licensee's goods, services, or other items are ultimately marketed using the intangible property relative to the total population of such area.
- c. License of a Production Intangible. Where 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 such right are assigned to Massachusetts to the extent that the use for which the fees are paid takes place in Massachusetts. 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 such process. In the case of a license of a production intangible, it shall be 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) unless the taxpayer or the Commissioner can reasonably establish the location(s) of actual use. Where the Commissioner can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in Massachusetts, it shall be presumed that the entire use is in Massachusetts except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Massachusetts.

- d. License of a Mixed Intangible. Where 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 Commissioner will accept such separate statement for purposes of this section if it is reasonable. Where 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 shall be presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the Commissioner can reasonably establish otherwise.
- e. License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services.
 - i. 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 such cases, the receipts from the licensing transaction shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B) and (C), 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 section 830 CMR 63.38.1(9)(d)5.e include, without limitation, the license of database access, the license of access to information, the license of digital goods (*see* 830 CMR 63.38.1(9)(d)7.b.), 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* 830 CMR 63.38.1(9)(d)7.a).
 - ii. Sublicenses. Pursuant to 830 CMR 63.38.1(9)(d)5.e.i, the rules of 830 CMR 63.38.1(9)(d)4.c.ii(C) 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 830 CMR 63.38.1(9)(d)4.c.ii(C) 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, provided that for this purposes. 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 such 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 such property is bundled with additional services or items of property.

- f. Examples. Assume in each of these examples that the taxpayer that licenses the intangible property is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. 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 Massachusetts. 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 Massachusetts shall be determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Massachusetts stores relative to Dealer Co's total receipts. *See* 830 CMR 63.38.1(9)(d)5.b.

Example 2. Program Corp, a corporation that is based outside Massachusetts, 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 Massachusetts 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 Massachusetts, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Massachusetts sales is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Massachusetts audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. *See* 830 CMR 63.38.1(9)(d)5.b. If Program Corp is not taxable in any state in which the licensee's audience is located, the sales that would be assigned to such state shall be excluded from the numerator and denominator of Program Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Note that the analysis and result as to the state or states to which sales are properly assigned would be the 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* 830 CMR 63.38.1(9)(d)5.e.

Example 3. Moniker Corp enters into a license contract with Wholesale Co. Pursuant to the contract Wholesale Co is granted the right to use trademarks owned by Moniker Corp to brand sports equipment that is to be manufactured by Wholesale Co or an unrelated entity, and to sell the manufactured equipment to unrelated companies that will ultimately market the equipment to consumers in a specific geographic region, including a foreign country. The license agreement confers a license of a marketing intangible, even though the trademarks in question will be affixed to property to be manufactured. In addition, the license of the marketing intangible is for the right to use the intangible property in connection with sales to be made at wholesale rather than directly to retail customers. The component of the licensing fee that constitutes the Massachusetts sales of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Massachusetts population in the specific geographic region relative to the total population in such region. *See* 830 CMR 63.38.1(9)(d)5.b. If Moniker Corp is not taxable in any state (including a foreign country, *see* 830 CMR 63.38.1(2)) in which the licensee's audience is located, the sales that would be assigned to such state shall be excluded from the numerator and denominator of Moniker Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 4. Formula, Inc and Appliance Co enter into a license contract under which Appliance Co is permitted to use a patent owned by Formula, Inc to manufacture appliances. The license contract specifies that Appliance Co is to pay Formula, Inc a royalty that is a fixed percentage of the gross receipts from the products that are later sold. The contract does not specify any other fees. The appliances are both manufactured and sold in Massachusetts and several other states. Assume the licensing fees are paid for the license of a production intangible, even though the royalty is to be paid based upon the sales of a manufactured product (i.e., the license is not one that includes a marketing intangible). Because the Commissioner can reasonably establish that the actual use of the intangible property takes place in part in Massachusetts, the royalty is assigned based to the location of such use rather than to location of the licensee's commercial domicile, in accordance with 830 CMR 63.38.1(9)(d)5.c. It is presumed that the entire use is in Massachusetts except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Massachusetts. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Massachusetts using the patent relative to such manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Massachusetts sales. *See* 830 CMR 63.38.1(9)(d)5.c.

Example 5. Axel Corp enters into a license agreement with Biker Co in which Biker Co is granted the right to produce motor scooters using patented technology owned

by Axel Corp, and also to sell such scooters by marketing the fact that the scooters were manufactured using the special technology. The contract is a license of both a marketing and production intangible, i.e., a mixed intangible. The scooters are manufactured outside Massachusetts. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co's receipts that are derived from Massachusetts customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Massachusetts population constitutes 25% of the total population during the period in question. The licensing contract requires an upfront licensing fee to be paid by Biker Co to Axel Corp and does not specify what percentage of the fee derives from Biker Co's right to use Axel Corp's patented technology. Because the fees for the license of the marketing and production intangible are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible, unless either the taxpayer or Commissioner reasonably establishes otherwise. Assuming that neither party establishes otherwise, 25% of the licensing fee constitutes Massachusetts sales. *See* 830 CMR 63.38.1(9)(d)5.b and d.

Example 6. Same facts as Example 5, except that the license contract specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing contract constitutes both the license of a marketing intangible and the license of a production intangible. Assuming that the separately stated fees are reasonable, the Commissioner will: (1) assign no part of the licensing fee paid for the production intangible to Massachusetts, and (2) assign 25% of the licensing fee paid for the marketing intangible to Massachusetts. *See* 830 CMR 63.38.1(9)(d)5.d.

Example 7. Better Burger Corp, which is based outside Massachusetts, enters into franchise contracts with franchisees who agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Massachusetts. In each case, the franchise contract between the individual and Better Burger provides that the franchisee is to pay Better Burger Corp an upfront fee for the receipt of the franchise and monthly franchise fees, which cover, among other things, the right to use the Better Burger name and service marks, food processes and cooking know-how, as well as fees for management services. The upfront fees for the receipt of the Massachusetts franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Massachusetts sales because the franchises are for the right to make Massachusetts sales. The monthly franchise fees paid by Massachusetts franchisees constitute fees paid for (1) the license of marketing intangibles (the Better Burger name and service marks), (2) the license of production intangibles (food processes and know-how) and (3) personal services (management fees). The fees paid for the license of the marketing intangibles and the production intangibles constitute Massachusetts sales because in each case the use of the intangibles is to take place in Massachusetts. *See* 830 CMR

63.38.1(9)(d)5.b-c. The fees paid for the personal services are to be assigned pursuant to 830 CMR 63.38.1(9)(d)4.

Example 8. Online Corp, a corporation based outside Massachusetts, licenses an information database through the means of the Internet to individual customers that are resident in Massachusetts and in other states. These customers access Online Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned in accordance with 830 CMR 63.38.1(9)(d)5.e. If Online Corp can determine or reasonably approximate the state or states where its database is accessed, then it must do so. Assuming that Online Corp cannot determine or reasonably approximate the location where its database is accessed, Online Corp must assign the sales made to the individual customers using the customers' billing addresses to the extent known. Assume for purposes of this example that Online Corp knows the billing address for each of its customers. In this case, Online Corp's sales made to its individual customers are in Massachusetts in any case in which the customer's billing address is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1.

Example 9. Net Corp, a corporation based outside Massachusetts, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in Massachusetts and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned in accordance with 830 CMR 63.38.1(9)(d)5.e. Assume that Net Corp cannot determine where its database is accessed but reasonably approximates that 75% of Business Corp's database access took place in Massachusetts, and 25% of Business Corp's database access took place in other states. In such case, 75% of the receipts from database access is in Massachusetts. Assume alternatively that Net Corp lacks sufficient information regarding the location where its database is accessed to reasonably approximate such location. Under these circumstances, if Net Corp derives 5% or less of its receipts from database access from Business Corp, Net Corp must assign the sale under 830 CMR 63.38.1(9)(d)4.c.ii(B)2 to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from database access from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state. See 830 CMR 63.38.1(9)(d)4.c.ii(B)2.

Example 10. Net Corp, a corporation based outside Massachusetts, licenses an information database through the means of the Internet to more than a thousand individual and business customers in Massachusetts and in other states. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned in accordance with 830 CMR 63.38.1(9)(d)5.e. Assume that Net Corp cannot determine or reasonably approximate the location where its

information database is accessed. Also assume that Net Corp does not derive more than 5% of its sales of database access from any single customer. Net Corp may apply the safe harbor stated in 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d, and may assign its sales to a state or states using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its sales would be otherwise assigned, it must exclude those sales from the numerator and denominator of its sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 11. Web Corp, a corporation based outside of Massachusetts, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in Massachusetts and in other states. These end users access Web Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. Web Corp's license of the database to its customers includes the right to sublicense the database to end users, while the sublicenses provide that the rights to access and use the database are limited to the end users' own use and prohibit the individual end users from further sublicensing the database. Web Corp receives a fee from each customer based upon the number of sublicenses issued to end users. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)4.c.ii(C). *See* 830 CMR 63.38.1(9)(d)5.e. If Web Corp can determine or reasonably approximate the state or states where its database is accessed by end users, then it must do so. Assuming that Web Corp lacks sufficient information from which it can determine or reasonably approximate the location where its database is accessed by end users, Web Corp must approximate the extent to which its database is accessed in Massachusetts using a percentage that represents the ratio of the Massachusetts population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in such area. *See* 830 CMR 63.38.1(9)(d)4.c.ii(C)3.ii.

6. Sale of Intangible Property.

- a. Assignment of Sales. The assignment of a sale 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 section, 830 CMR 63.38.1(9)(d)6, a sale or exchange of intangible property includes a license of such 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* 830 CMR 63.38.1(9)(d)5.a. and 6.a.iv.
- i. 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 sale is assigned to a state if and to the extent that the intangible property is used or otherwise associated with the state. Where the intangible property is used in, or otherwise associated with, only Massachusetts the taxpayer shall assign the sale to Massachusetts. Where the intangible property is used in or is otherwise associated with Massachusetts and one or more other states, the taxpayer shall assign the sale to Massachusetts to the extent that the intangible property is used in, or associated with, Massachusetts, through the means of a reasonable approximation.

- ii. Agreement Not to Compete. An agreement or covenant not to compete in a specified geographic area requires the contract party to refrain from conducting certain business activity in that specified area. In the case of an agreement or covenant not to compete the receipts are to be assigned to a state based upon the percentage that reflects the state's population in the U.S. geographic area specified in the contract relative to the total population in such area.
- iii. Taxpayer Not Taxable in State of Assignment. In any instance in which, pursuant to 830 CMR 63.38.1(9)(d)6.a.i and ii, the state to which the sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.
- iv. 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 shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)5 (pertaining to the license or lease of intangible property).
- v. 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 shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)5.e (relating to licenses of intangible property that resemble sales of goods and services). Examples of such transactions include those that are analogous to the license transactions cited as examples in 830 CMR 63.38.1(9)(d)5.e.
- vi. Excluded Sales. The sale of a security as defined at 830 CMR 63.38.1(2) and the sale of business "goodwill" or similar intangible value, including, without limitation, "going concern value" and "workforce in place," shall be excluded from the numerator and denominator of a taxpayer's sales factor. *See* M.G.L. c. 63, § 38(f). Also, except as otherwise provided in this section 830 CMR 63.38.1(9)(d), the sale of intangible property that is not referenced in 830 CMR

63.38.1(9)(d)6.a.i, ii, iv, or v, shall be excluded from the numerator and the denominator of the taxpayer's sales factor. The sale of intangible property that is not referenced in 830 CMR 63.38.1(9)(d)6.a.i, ii, iv, or v, and that therefore is excluded from the numerator and denominator of the taxpayer's sales factor includes, without limitation, the sale of a partnership interest that is not otherwise a security within the meaning of 830 CMR 63.38.1(2).

- b. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which some of its sales would be assigned, so that there is no requirement in such examples that such sales to other states must be excluded from the taxpayer's numerator and denominator. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Airline Corp, a corporation based outside Massachusetts, sells its rights to use several gates at an airport located in Massachusetts to Buyer Corp, a corporation that is based outside Massachusetts. The contract of sale is negotiated and signed outside of Massachusetts. The sale is in Massachusetts because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Massachusetts. *See* 830 CMR 63.38.1(9)(d)6.a.i.

Example 2. Wireless Corp, a corporation based outside Massachusetts, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Massachusetts to Buyer Corp, a corporation that is based outside Massachusetts. The contract of sale is negotiated and signed outside of Massachusetts. The sale is in Massachusetts because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Massachusetts. *See id.*

Example 3. 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 Massachusetts and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or associated with Massachusetts. 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 id.*

Example 4. 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 numerator and denominator of Wireless Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)6.a.i.; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 5. Sports League Corp, a corporation that is based outside Massachusetts, 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 Massachusetts. 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 associated with Massachusetts. 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 Massachusetts and the other states. *See* 830 CMR 63.38.1(9)(d)6.a.i.

Example 6. 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 numerator and denominator of Sports League Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)6.a.i.; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 7. Business Corp, a corporation based outside Massachusetts engaged in business activities in Massachusetts and other states, enters into a covenant not to compete with Competition Corp, a corporation that is based outside Massachusetts, in exchange for a fee. The agreement requires Business Corp to refrain from engaging in certain business activity in Massachusetts and other states. The component of the fee that constitutes a Massachusetts sale is determined by multiplying the amount of the fee by a fraction represented by the percentage of the Massachusetts population over the total population in the specified geographic region. *See* 830 CMR 63.38.1(9)(d)6.a.ii. In any case in which a portion of the fee would be assigned to a state in which Business Corp is not taxable, such portion shall be excluded from the numerator and denominator of Business Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)1.f.ii.

Example 8. Business Corp, a corporation that is commercially domiciled in Massachusetts, sells all of its assets including its business goodwill, to a business customer that is based in Massachusetts. The sale of the goodwill shall be excluded from the numerator and denominator of Business Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)6.a.vi.

Example 9. Inventor Corp, a corporation that is based outside Massachusetts, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Massachusetts. 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* 830 CMR 63.38.1(9)(d)6.a.iv. Inventor Corp understands that Buyer Corp is likely to use the patented technology in Massachusetts, 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 sale of the patented technology shall be excluded from the numerator and denominator of Inventor Corp's sales factor. *See* 830 CMR 63.38.1(9)(d)6.a.vi.

7. Special Rules.

- a. Software Transactions. A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights), when 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 such cases, the receipts are in Massachusetts as determined under the rules for the sale of tangible personal property set forth at 830 CMR 63.38.1(9)(c). In all other cases, the receipts from a license or sale of software are to be assigned to Massachusetts as determined otherwise under this regulation (e.g., depending on the facts, as the development and sale of custom software, *see* 830 CMR 63.38.1(9)(d)4.c, as a license of a marketing intangible, *see* 830 CMR 63.38.1(9)(d)5.b, as a license of a production intangible, *see* 830 CMR 63.38.1(9)(d)5.c, as a license of intangible property where the substance of the transaction resembles a sale of goods or services, *see* 830 CMR 63.38.1(9)(d)5.e, or as a sale of intangible property, *see* 830 CMR 63.38.1(9)(d)6).
- b. Sales or Licenses of Digital Goods or Services.
 - i. 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 shall be assigned by applying the same rules as are set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B) or (C), 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* 830 CMR 63.38.1(9)(d)5.e. and 830 CMR 63.38.1(9)(d)(6)a.v.
 - ii Telecommunications Companies. In the case of a taxpayer that provides telecommunications or ancillary services and that is thereby subject to the provisions of 830 CMR 63.38.11, the sale or license of digital goods or services not otherwise assigned for apportionment purposes pursuant to that regulation shall be assigned pursuant to this section, 830 CMR 63.38.1(9)(d)7.b.ii, by applying the rules set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B) or (C) 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. *See* 830 CMR 63.38.11(3). However, in applying such 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 830 CMR 63.38.11.

...

MICHIGAN

MICHIGAN STATUTES

§ 206.665 -- SALES WITHIN STATE, DETERMINATION

In relevant part only

(1)

...

(e) Royalties and other income received for the use of or for the privilege of using intangible property, including patents, know-how, formulas, designs, processes, patterns, copyrights, trade names, service names, franchises, licenses, contracts, customer lists, custom computer software, or similar items, are attributed to the state in which the property is used by the purchaser. If the property is used in more than 1 state, the royalties or other income shall be apportioned to this state pro rata according to the portion of use in this state. If the portion of use in this state cannot be determined, the royalties or other income shall be excluded from both the numerator and the denominator. Intangible property is used in this state if the purchaser uses the intangible property or the rights to the intangible property in the regular course of its business operations in this state, regardless of the location of the purchaser's customers.

(2) Sales from the performance of services are in this state and attributable to this state as follows:

(a) Except as otherwise provided in this section, all receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the services receives all of the benefit of the services in this state. If the recipient of the services receives some of the benefit of the services in this state, the receipts are included in the numerator of the apportionment factor in proportion to the extent that the recipient receives benefit of the services in this state.

(b) Sales derived from securities brokerage services attributable to this state are determined by multiplying the total dollar amount of receipts from securities brokerage services by a fraction, the numerator of which is the sales of securities brokerage services to customers within this state, and the denominator of which is the sales of securities brokerage services to all customers. Receipts from securities brokerage services include commissions on transactions, the spread earned on principal transactions in which the broker buys or sells from its account, total margin interest paid on behalf of brokerage accounts owned by the broker's customers, and fees and receipts of all kinds from the underwriting of securities. If receipts from brokerage services can be associated with a particular customer, but it is impractical to associate the receipts with the address of the

customer, then the address of the customer shall be presumed to be the address of the branch office that generates the transactions for the customer.

(c) Sales of services that are derived directly or indirectly from the sale of management, distribution, administration, or securities brokerage services to, or on behalf of, a regulated investment company or its beneficial owners, including receipts derived directly or indirectly from trustees, sponsors, or participants of employee benefit plans that have accounts in a regulated investment company, shall be attributable to this state to the extent that the shareholders of the regulated investment company are domiciled within this state. For purposes of this subdivision, "domicile" means the shareholder's mailing address on the records of the regulated investment company. If the regulated investment company or the person providing management services to the regulated investment company has actual knowledge that the shareholder's primary residence or principal place of business is different than the shareholder's mailing address, then the shareholder's primary residence or principal place of business is the shareholder's domicile. A separate computation shall be made with respect to the receipts derived from each regulated investment company. The total amount of sales attributable to this state shall be equal to the total receipts received by each regulated investment company multiplied by a fraction determined as follows:

(i) The numerator of the fraction is the average of the sum of the beginning-of-year and end-of-year number of shares owned by the regulated investment company shareholders who have their domicile in this state.

(ii) The denominator of the fraction is the average of the sum of the beginning-of-year and end-of-year number of shares owned by all shareholders.

(iii) For purposes of the fraction, the year shall be the tax year of the regulated investment company that ends with or within the tax year of the taxpayer.

...

(13) Except as provided in subsections (14) through (19), receipts from the sale of telecommunications service or mobile telecommunications service are in this state if the customer's place of primary use of the service is in this state. As used in this subsection, "place of primary use" means the customer's residential street address or primary business street address where the customer's use of the telecommunications service primarily occurs. For mobile telecommunications service, the customer's residential street address or primary business street address is the place of primary use only if it is within the licensed service area of the customer's home service provider.

(14) Receipts from the sale of telecommunications service sold on an individual call-by-call basis are in this state if either of the following applies:

(a) The call both originates and terminates in this state.

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

(15) Receipts from the sale of postpaid telecommunications service are in this state if the origination point of the telecommunication signal, as first identified by the service provider's telecommunication system or as identified by information received by the seller from its service provider if the system used to transport telecommunication signals is not the seller's, is located in this state.

(16) Receipts from the sale of prepaid telecommunications service or prepaid mobile telecommunications service are in this state if the purchaser obtains the prepaid card or similar means of conveyance at a location in this state. Receipts from recharging a prepaid telecommunications service or mobile telecommunications service are in this state if the purchaser's billing information indicates a location in this state.

(17) Receipts from the sale of private communication services are in this state as follows:

(a) 100% of the receipts from the sale of each channel termination point within this state.

(b) 100% of the receipts from the sale of the total channel mileage between each termination point within this state.

(c) 50% of the receipts from the sale of service segments for a channel between 2 customer channel termination points, 1 of which is located in this state and the other is located outside of this state, which segments are separately charged.

(d) The receipts from the sale of service for segments with a channel termination point located in this state and in 2 or more other states or equivalent jurisdictions, and which segments are not separately billed, are in this state based on a percentage determined by dividing the number of customer channel termination points in this state by the total number of customer channel termination points.

(18) Receipts from the sale of billing services and ancillary services for telecommunications service are in this state based on the location of the purchaser's customers. If the location of the purchaser's customers is not known or cannot be determined, the sale of billing services and ancillary services for telecommunications service is in this state based on the location of the purchaser.

(19) Receipts to access a carrier's network or from the sale of telecommunications services for resale are in this state as follows:

(a) 100% of the receipts from access fees attributable to intrastate telecommunications service that both originates and terminates in this state.

(b) 50% of the receipts from access fees attributable to interstate telecommunications service if the interstate call either originates or terminates in this state.

(c) 100% of the receipts from interstate end user access line charges, if the customer's service address is in this state. As used in this subdivision, "interstate end user

access line charges” includes, but is not limited to, the surcharge approved by the federal communications commission and levied pursuant to 47 CFR 69.

(d) Gross receipts from sales of telecommunications services to other telecommunication service providers for resale shall be sourced to this state using the apportionment concepts used for non-resale receipts of telecommunications services if the information is readily available to make that determination. If the information is not readily available, then the taxpayer may use any other reasonable and consistent method.

(20) Except as otherwise provided under this subsection, for a taxpayer whose business activities include live radio or television programming as described in subsector code 7922 of industry group 792 under the standard industrial classification code as compiled by the United States department of labor or are included in industry groups 483, 484, 781, or 782 under the standard industrial classification code as compiled by the United States department of labor, or any combination of the business activities included in those groups, media receipts are in this state and attributable to this state only if the commercial domicile of the customer is in this state and the customer has a direct connection or relationship with the taxpayer pursuant to a contract under which the media receipts are derived. For media receipts from the sale of advertising, if the customer of that advertising is commercially domiciled in this state and receives some of the benefit of the sale of that advertising in this state, the media receipts from the advertising to that customer are included in the numerator of the apportionment factor in proportion to the extent that the customer receives the benefit of the advertising in this state. For purposes of this subsection, if the taxpayer is a broadcaster and if the customer receives some of the benefit of the advertising in this state, the media receipts for that sale of advertising from that customer shall be proportioned based on the ratio that the broadcaster's viewing or listening audience in this state bears to its total viewing or listening audience everywhere. As used in this subsection:

(a) “Media property” means motion pictures, television programs, internet programs and websites, other audiovisual works, and any other similar property embodying words, ideas, concepts, images, or sound without regard to the means or methods of distribution or the medium in which the property is embodied.

(b) “Media receipts” means receipts from the sale, license, broadcast, transmission, distribution, exhibition, or other use of media property and receipts from the sale of media services. Media receipts do not include receipts from the sale of media property that is a consumer product that is ultimately sold at retail.

(c) “Media services” means services in which the use of the media property is integral to the performance of those services.

(21) Terms used in subsections (13) through (20) have the same meaning as those terms defined in the streamlined sales and use tax agreement administered under the streamlined sales and use tax administration act, 2004 PA 174, MCL 205.801 to 205.833.

(22) For purposes of this section, a borrower is considered located in this state if the borrower's billing address is in this state.

MINNESOTA

MINNESOTA STATUTES

§ 290.191 -- APPORTIONMENT OF NET INCOME.

In relevant part only

...

Subd. 5. Determination of sales factor .

For purposes of this section, the following rules apply in determining the sales factor .

(a) The sales factor includes all sales, gross earnings, or receipts received in the ordinary course of the business, except that the following types of income are not included in the sales factor :

(1) interest;

(2) dividends;

(3) sales of capital assets as defined in section 1221 of the Internal Revenue Code;

(4) sales of property used in the trade or business, except sales of leased property of a type which is regularly sold as well as leased; and

(5) sales of debt instruments as defined in section 1275(a)(1) of the Internal Revenue Code or sales of stock.

(b) CAUTION: Subd. 5(b) below is eff. 5-21-2014. See also next version.

Sales of tangible personal property are made within this state if the property is received by a purchaser at a point within this state, regardless of the f.o.b. point, other conditions of the sale, or the ultimate destination of the property.

(b) CAUTION: Subd. 5(b) below is eff. until 5-21-2014. See also previous version.

Sales of tangible personal property are made within this state if the property is received by a purchaser at a point within this state, and the taxpayer is taxable in this state, regardless of the f.o.b. point, other conditions of the sale, or the ultimate destination of the property.

(c) Tangible personal property delivered to a common or contract carrier or foreign vessel for delivery to a purchaser in another state or nation is a sale in that state or nation, regardless of f.o.b. point or other conditions of the sale.

(d) Notwithstanding paragraphs (b) and (c), when intoxicating liquor, wine, fermented malt beverages, cigarettes, or tobacco products are sold to a purchaser who is registered by a state or political subdivision to resell this property only within the state of ultimate destination, the sale is made in that state.

(e) Sales made by or through a corporation that is qualified as a domestic international sales corporation under section 992 of the Internal Revenue Code are not considered to have been made within this state.

(f) Sales, rents, royalties, and other income in connection with real property is attributed to the state in which the property is located.

(g) Receipts from the lease or rental of tangible personal property, including finance leases and true leases, must be attributed to this state if the property is located in this state and to other states if the property is not located in this state. Receipts from the lease or rental of moving property including, but not limited to, motor vehicles, rolling stock, aircraft, vessels, or mobile equipment are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent of the use of moving property is determined as follows:

(1) A motor vehicle is used entirely within the state in which it is registered.

(2) The extent that rolling stock is used in this state is determined by multiplying the receipts from the lease or rental of the rolling stock by a fraction, the numerator of which is the miles traveled within this state by the leased or rented rolling stock and the denominator of which is the total miles traveled by the leased or rented rolling stock.

(3) The extent that an aircraft in this state is determined by multiplying 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 the state and the denominator of which is the total number of landings of the aircraft.

(4) The extent that a vessel, mobile equipment, or other mobile property is used in this state is determined by multiplying the receipts from the lease or rental of the property by a fraction, the numerator of which is the number of days during the taxable year the property was in this state and the denominator of which is the total days in the taxable year.

(h) Royalties and other income received for the use of or for the privilege of using intangible property, including patents, know-how, formulas, designs, processes, patterns, copyrights, trade names, service names, franchises, registrations, contracts, customer lists, or similar items, must be attributed to the state in which the property is used by the purchaser. If the property is used in more than one state, the royalties or other income must be apportioned to this state pro rata according to the portion of use in this state. If the portion of use in this state cannot be determined, the royalties or other income must be excluded from both the numerator and the denominator. Intangible property is used in this state if the purchaser uses the intangible property or the rights therein in the regular course of its business operations in this state, regardless of the location of the purchaser's customers.

(i) Sales of intangible property are made within the state in which the property is used by the purchaser. If the property is used in more than one state, the sales must be apportioned to this state pro rata according to the portion of use in this state. If the portion of use in this state cannot be determined, the sale must be excluded from both the numerator and the denominator of the sales factor. Intangible property is used in this state if the purchaser used the intangible property in the regular course of its business operations in this state.

(j) Receipts from the performance of services must be attributed to the state where the services are received. For the purposes of this section, receipts from the performance of services provided to a corporation, partnership, or trust may only be attributed to a state where it has a fixed place of doing business. If the state where the services are received is not readily determinable or is a state where the corporation, partnership, or trust receiving the service does not have a fixed place of doing business, the services shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering office cannot be determined, the services shall be deemed to be received at the office of the customer to which the services are billed.

(k) For the purposes of this subdivision and subdivision 6, paragraph (l), receipts from management, distribution, or administrative services performed by a corporation or trust for a fund of a corporation or trust regulated under United States Code, title 15, sections 80a-1 through 80a-64, must be attributed to the state where the shareholder of the fund resides. Under this paragraph, receipts for services attributed to shareholders are determined on the basis of the ratio of:

(1) the average of the outstanding shares in the fund owned by shareholders residing within Minnesota at the beginning and end of each year; and

(2) the average of the total number of outstanding shares in the fund at the beginning and end of each year.

Residence of the shareholder, in the case of an individual, is determined by the mailing address furnished by the shareholder to the fund. Residence of the shareholder, when the shares are held by an insurance company as a depositor for the insurance company policyholders, is the mailing address of the policyholders. In the case of an insurance company holding the shares as a depositor for the insurance company policyholders, if the mailing address of the policyholders cannot be determined by the taxpayer, the receipts must be excluded from both the numerator and denominator. Residence of other shareholders is the mailing address of the shareholder.

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NEBRASKA

NEBRASKA STATUTES

§ 77-2734.14 -- INCOME TAX—SALES FACTOR —HOW DETERMINED.

(1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales everywhere during the tax period.

(2) Sales of tangible personal property in this state include:

(a) Property delivered or shipped to a purchaser, other than the United States Government, within this state, regardless of the f.o.b. point or other conditions of the sale;

(b) Property shipped from an office, store, warehouse, factory, or other place of storage in this state if (i) the purchaser is the United States Government or (ii) for all taxable years beginning or deemed to begin before January 1, 1995, under the Internal Revenue Code of 1986, as amended, the taxpayer is not taxable in the state of the purchaser ;

(c) For all taxable years beginning or deemed to begin on or after January 1, 1995, and before January 1, 1996, under the Internal Revenue Code of 1986, as amended, two-thirds of the property shipped from an office, store, warehouse, factory, or other place of storage in this state if the taxpayer is not taxable in the state of the purchaser; or

(d) For all taxable years beginning or deemed to begin on or after January 1, 1996, but before January 1, 1997, under the Internal Revenue Code of 1986, as amended, one-third of the property shipped from an office, store, warehouse, factory, or other place of storage in this state if the taxpayer is not taxable in the state of the purchaser.

(3) CAUTION: Subsection (3) below is operative for taxable years beginning on or after 1-1-2014. See also next version.

For sales other than sales of tangible personal property, except for sales as described in subsection (4) of this section:

(a) Sales of a service are in this state if the sales are derived from a buyer within this state. Sales of a service are derived from a buyer within this state if:

(i) The service, when rendered, relates to real property located in this state;

(ii) The service, when rendered, relates to tangible personal property located in this state at the time the service is received;

(iii) The service, when rendered, is provided to an individual physically present in this state at the time the service is received; or

(iv) The service, when rendered, is provided to a buyer engaged in a trade or business in this state and relates to that part of the trade or business then operated in this state. For services described in this subdivision, if the buyer uses the service within and without this state, calculated using any reasonable method, the sales are apportioned between the use in this state in proportion to the use of the service in this state and the other states;

(b) Sales of an application service are in this state if the buyer uses the application service in this state. The application service is used in this state if, the buyer, from a location in this state:

(i) Uses it in the regular course of business in this state; or

(ii) If the buyer is an individual, his or her billing address is in this state.

If the buyer is not an individual and uses the application service within and without this state, calculated using any reasonable method, the sales are apportioned between the use in this state in proportion to the use of the application service in this state and the other states. If the location of a sale cannot be determined, the sale of an application service is in the state from which the order was placed in the regular course of the customer's business. If that office cannot be determined, the sales are considered received at the customer's billing address;

(c) Sales of intangible property are in this state if the buyer uses the intangible property at a location in this state. If the buyer uses the intangible property within and without this state, the sales are apportioned between this state in proportion to the use of the intangible property in this state and the other states. If the location of a sale cannot be determined, the sale of intangible property is in this state if the buyer's billing address is in this state;

(d) Interest, dividends, investment income, and other net gains from transactions in intangible assets held in connection with a treasury function, other than net gains from the sale or redemption of marketable securities, are in this state to the extent that it is included in taxable income and to the extent the investment, management, and record-keeping activities associated with corporate investments occur in this state;

(e) Gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, secured by real property or tangible personal property are in this state if the property securing the loan is located in this state. If the real or tangible personal property securing the loan is located within and without this state, the gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, are based upon the ratio of the annual average amortized

loan balance of a loan secured by the real property or tangible personal property located in this state to the annual average amortized loan balance of a loan secured by the real property or tangible personal property located within and without this state;

(f) Gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, that are not secured by real or tangible personal property are in this state if the borrower is located in this state, which location shall be presumed to be the borrower's billing address;

(g) Gross interest, fees, points, charges, and penalties from credit card receivables and gross receipts from annual fees and other fees charged to credit card holders are in this state if the billing address of the credit card holder is in this state;

(h) Net gains, but not less than zero, from the sale of credit card receivables are in this state if the billing address of the credit card holder is in this state;

(i) Gross receipts from the lease, rental, or licensing of tangible personal property are in this state to the extent the property is located in this state;

(j) Gross receipts from the sale, lease, rental, or licensing of real property are in this state if the real property is located in this state; and

(k) Sales other than sales of tangible personal property not specifically addressed in this subsection must be sourced so as to fairly represent the extent of the taxpayer's business activity in this state. This requirement will be considered met in the following situations: (i) If the buyer is an individual, a sale is deemed to have occurred at the buyer's billing address; and (ii) if the buyer is not an individual and the sale is from an order placed in the regular course of the customer's business, the sale is deemed to have occurred in the state from which the order was placed and, if that place cannot be readily determined, the sale is deemed to have occurred at the customer's billing address.

(3) CAUTION: Subsection (3) below is operative for taxable years beginning before 1-1-2014. See also previous version.

Sales, other than sales of tangible personal property, are in this state if:

(a) The income-producing activity is performed in this state; or

(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(4) CAUTION: Subsection (4) below is operative for taxable years beginning on or after 1-1-2014.

To continue the tax policy of this state which enhances the deployment of broadband in rural and underserved areas of this state, sales, other than sales of tangible personal property, of a

communications company are in this state if: (a) The income-producing activity is performed in this state; or (b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

NEW YORK

NEW YORK STATUTES

210-A -- APPORTIONMENT.

In relevant part only

CAUTION: Sec. 210-A is eff. 1-1-2015 and shall apply to taxable years commencing on or after that date.

1. General. Business income and capital shall be apportioned to the state by the apportionment factor determined pursuant to this section. The apportionment factor is a fraction, determined by including only those receipts, net income, net gains, and other items described in this section that are included in the computation of the taxpayer's business income for the taxable year. The numerator of the apportionment fraction shall be equal to the sum of all the amounts required to be included in the numerator pursuant to the provisions of this section and the denominator of the apportionment fraction shall be equal to the sum of all the amounts required to be included in the denominator pursuant to the provisions of this section.

...

3. Rentals and royalties.

(a) Receipts from rentals of real and tangible personal property located within the state are included in the numerator of the apportionment fraction. Receipts from rentals of real and tangible personal property located within and without the state shall be included in the denominator of the apportionment fraction.

(b) Receipts of royalties from the use of patents, copyrights, trademarks, and similar intangible personal property within the state are included in the numerator of the apportionment fraction. Receipts of royalties from the use of patents, copyrights, trademarks and similar intangibles within and without the state are included in the denominator of the apportionment fraction. A patent, copyright, trademark or similar intangible property is used in the state to the extent that the activities thereunder are carried on in the state.

(c) Receipts from the sales of rights for closed-circuit and cable television transmissions of an event (other than events occurring on a regularly scheduled basis) taking place within the state as a result of the rendition of services by employees of the corporation, as athletes, entertainers or performing artists are included in the numerator of the apportionment fraction to the extent that such receipts are attributable to such transmissions received or exhibited within the state. Receipts from all sales of rights for closed-circuit and cable television transmissions of an event are included in the denominator of the apportionment fraction.

4. Digital products.

(a) For purposes of determining the apportionment fraction under this section, the term “digital product” means any property or service, or combination thereof, of whatever nature delivered to the purchaser through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media, or any combination thereof. Digital product includes, but is not limited to, an audio work, audiovisual work, visual work, book or literary work, graphic work, game, information or entertainment service, storage of digital products and computer software by whatever means delivered. The term “delivered to” includes furnished or provided to or accessed by. A digital product does not include legal, medical, accounting, architectural, research, analytical, engineering or consulting services provided by the taxpayer.

(b) Receipts from the sale of, license to use, or granting of remote access to digital products within the state, determined according to the hierarchy of methods set forth in subparagraphs one through four of paragraph (c) of this subdivision, shall be included in the numerator of the apportionment fraction. Receipts from the sale of, license to use, or granting of remote access to digital products within and without the state shall be included in the denominator of the apportionment fraction. The taxpayer must exercise due diligence under each method described in paragraph (c) of this subdivision before rejecting it and proceeding to the next method in the hierarchy, and must base its determination on information known to the taxpayer or information that would be known to the taxpayer upon reasonable inquiry. If the receipt for a digital product is comprised of a combination of property and services, it cannot be divided into separate components and is considered to be one receipt regardless of whether it is separately stated for billing purposes. The entire receipt must be allocated by this hierarchy.

(c) Hierarchy of sourcing methods.

(1) The customer's primary use location of the digital product;

(2) The location where the digital product is received by the customer, or is received by a person designated for receipt by the customer;

(3) The apportionment fraction determined pursuant to this subdivision for the preceding taxable year for such digital product; or

(4) The apportionment fraction in the current taxable year for those digital products that can be sourced using the hierarchy of sourcing methods in subparagraphs one and two of this paragraph.

...

10.

(a) Receipts from other services and other business receipts. Receipts from services not addressed in subdivisions one through nine of this section and other business receipts

not addressed in such subdivisions shall be included in the numerator of the apportionment fraction if the location of the customer is within the state. Such receipts from customers within and without the state are included in the denominator of the apportionment fraction. Whether the receipts are included in the numerator of the apportionment fraction is determined according to the hierarchy of method set forth in paragraph (b) of this subdivision. The taxpayer must exercise due diligence under each method described in such paragraph (b) before rejecting it and proceeding to the next method in the hierarchy, and must base its determination on information known to the taxpayer or information that would be known to the taxpayer upon reasonable inquiry.

(b) Hierarchy of methods.

(1) The benefit is received in this state;

(2) Delivery destination;

(3) The apportionment fraction for such receipts within the state determined pursuant to this subdivision for the preceding taxable year; or

(4) The apportionment fraction in the current taxable year determined pursuant to this subdivision for those receipts that can be sourced using the hierarchy of sourcing methods in subparagraphs one and two of this paragraph.

11. If it shall appear that the apportionment fraction determined pursuant to this section does not result in a proper reflection of the taxpayer's business income or capital within the state, the commissioner is authorized in his or her discretion to adjust it, or the taxpayer may request that the commissioner adjust it, by (a) excluding one or more items in such determination, (b) including one or more other items in such determination, or (c) any other similar or different method calculated to effect a fair and proper apportionment of the business income and capital reasonably attributed to the state. The party seeking the adjustment shall bear the burden of proof to demonstrate that the apportionment fraction determined pursuant to this section does not result in a proper reflection of the taxpayer's business income or capital within the state and that the proposed adjustment is appropriate.

OHIO

OHIO STATUTES

§ 5733.05 -- DETERMINATION OF THE VALUE OF CAPITAL, SURPLUS, UNDIVIDED PROFITS, AND RESERVES; DETERMINATION OF THE NET INCOME OF THE CORPORATION.

In relevant part only

...

(c) The sales factor is a fraction computed as follows:

Except as provided in this section, the numerator of the fraction is the total sales in this state by the corporation during the taxable year or part thereof, and the denominator of the fraction is the total sales by the corporation everywhere during such year or part thereof. In computing the numerator and denominator of the fraction, the following shall be eliminated from the fraction: receipts and any related gains or losses from the sale or other disposal of excluded assets; dividends or distributions; and interest or other similar amounts received for the use of, or for the forbearance of the use of, money. Also, in computing the numerator and denominator of the sales factor, in the case of a corporation owning at least eighty per cent of the issued and outstanding common stock of one or more insurance companies or public utilities, except an electric company and a combined company, and, for tax years 2005 and thereafter, a telephone company, or owning at least twenty-five per cent of the issued and outstanding common stock of one or more financial institutions, receipts received by the corporation from such utilities, insurance companies and financial institutions shall be eliminated. As used in this division, "excluded assets" means property that is either: intangible property, other than trademarks, trade names, patents, copyrights, and similar intellectual property; or tangible personal property or real property where that property is a capital asset or an asset described in section 1231 of the Internal Revenue Code, without regard to the holding period specified therein.

(i) For the purpose of this section and section 5733.03 of the Revised Code, receipts not eliminated or excluded from the fraction shall be situated as follows:

Receipts from rents and royalties from real property located in this state shall be situated to this state.

Receipts from rents and royalties of tangible personal property, to the extent the tangible personal property is used in this state, shall be situated to this state.

Receipts from the sale of electricity and of electric transmission and distribution services shall be situated to this state in the manner provided under section 5733.059 of the Revised Code.

Receipts from the sale of real property located in this state shall be situated to this state.

Receipts from the sale of tangible property shall be situated to this state if such property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered as the place at which such property is received by the purchaser. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

(ii) Receipts from all other sales not eliminated or excluded from the fraction shall be situated to this state as follows:

Receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be situated to this state to the extent that the receipts are based on the amount of use of that property in this state. If the receipts are not based on the amount of use of that property, but rather on the right to use the property and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be situated to this state to the extent the receipts are based on the right to use the property in this state.

Receipts from the sale of services , and receipts from any other sales not eliminated or excluded from the sales factor and not otherwise situated under division (B)(2)(c) of this section, shall be situated to this state in the proportion to the purchaser's benefit, with respect to the sale, in this state to the purchaser's benefit, with respect to the sale, everywhere. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere.

(iii) Income from receipts eliminated or excluded from the sales factor under division (B)(2)(c) of this section shall not be presumed to be nonbusiness income.

...

OKLAHOMA

OKLAHOMA REGULATIONS

710 :50 -17 -71 . APPORTIONMENT FORMULA FACTORS.

In relevant part only

(1) Sales factor.

(A) Sales factor.

The sales factor shall include only sales and does not include sales or revenue which are separately allocated. [See: 68 O.S. §2358(A)(5)(c)]

(i) Oklahoma does not allow receipts from items other than sales to be included in the formula even though other types of income (royalties, interest, capital gains, and other income) are included in the apportioned income.

(ii) Receipts from the performance of services shall be included in the numerator of the fraction if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state's marketplace. [See 68 O.S. § 2358(A)(5)]. A "customer within Oklahoma" means

(I) a customer that is engaged in a trade or business and maintains a regular place of business in Oklahoma, or

(II) a customer that is not engaged in a trade or business whose billing address is in Oklahoma. A "billing address" means the location indicated in the books and records of the taxpayer as the address of record where the bill relating to the customer's account is mailed.

(iii) The provisions of (A), (A)(i), and (A)(ii) of this paragraph apply to the sales factor for most corporations, with the exception of gross receipts being used as a basis for a financial organization or other organizations whose sales do not represent their principal activity.

(B) Throwback of Oklahoma sales.

If taxpayer is not doing business in the destination state of the shipment, then those sales of tangible personal property are considered to have a situs in Oklahoma if the property is shipped from an office, warehouse, factory or other place of storage in Oklahoma.

...

(F) Telephone or telegraph or other communication enterprise.

The numerator of the fraction shall include both income attributable to interstate operations, and income from intrastate operations. The determination of gross revenues are to be as prescribed by accounting systems and procedures promulgated by the Federal Communications Commission. [See: 68 O.S. § 2358(A)(5)(c)(5)]

PENNSYLVANIA

PENNSYLVANIA STATUTES

7401 -- DEFINITIONS.

In relevant part only

...

2. In case the entire business of any corporation, other than a corporation engaged in doing business as a regulated investment company as defined by the Internal Revenue Code of 1986, is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, as defined in subclause 1 hereof, and may be determined as follows:

(a) Division of Income.

...

(15) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(16) Sales of tangible personal property are in this State if the property is delivered or shipped to a purchaser, within this State regardless of the f.o.b. point or other conditions of the sale.

(16.1) CAUTION: Subsection (3)2(a)(16.1) is applicable to tax year beginning after 12-31-2013.

(A) Sales from the sale, lease, rental or other use of real property, if the real property is located in this State. If a single parcel of real property is located both in and outside this State, the sale is in this State based upon the percentage of original cost of the real property located in this State.

(B) (I) Sales from the rental, lease or licensing of tangible personal property, if the customer first obtained possession of the tangible personal property in this State.

(II) If the tangible personal property is subsequently taken out of this State, the taxpayer may use a reasonably determined estimate of usage in this State to determine the extent of sale in this State.

(C) (I) Sales from the sale of service, if the service is delivered to a location in this State. If the service is delivered both to a location in and outside this State, the sale is in this State based upon the percentage of total value of the service delivered to a location in this State.

(II) If the state or states of assignment under subparagraph (I) cannot be determined for a customer who is an individual that is not a sole proprietor, a service is deemed to be delivered at the customer's billing address.

(III) If the state or states of assignment under subparagraph (I) cannot be determined for a customer, except for a customer under subparagraph (II), a service is deemed to be delivered at the location from which the services were ordered in the customer's regular course of operations. If the location from which the services were ordered in the customer's regular course of operations cannot be determined, a service is deemed to be delivered at the customer's billing address.

...

UTAH

UTAH STATUTES

§ 59-7-319 -- CIRCUMSTANCES UNDER WHICH A RECEIPT, RENT, ROYALTY, OR SALE IS CONSIDERED TO BE IN THIS STATE.

In relevant part only

(2) The following are considered to be in this state:

(a) a rent in connection with:

(i) real property if the real property is in this state; or

(ii) tangible personal property if the tangible personal property is in this state;

(b) A royalty in connection with real property if the real property is in this state;

(c) A sale in connection with real property if the real property is in this state; or

(d) Other income in connection with real property or tangible personal property if the real property or tangible personal property is in this state.

(3)

(a) Subject to Subsection (3)(b), a receipt from the performance of a service is considered to be in this state if the purchaser of the service receives a greater benefit of the service in this state than in any other state.

(b) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission may by rule prescribe the circumstances under which a purchaser of a service receives a greater benefit of the service in this state than in any other state.

(4)

(a) Subject to Subsection (4)(b), a receipt in connection with intangible property is considered to be in this state if the intangible property is used in this state.

(b) If the intangible property described in Subsection (4)(a) is used in this state and outside this state, a receipt in connection with the intangible property shall be apportioned to this state in accordance with Subsection (4)(c).

(c) For purposes of Subsection (4)(b), for a taxable year the percentage of a receipt in connection with intangible property that is considered to be in this state is the percentage of the use of the intangible property that occurs in this state during the taxable year.

(5)

(a) Notwithstanding Subsections (2) through (4), a sale, other than a sale of tangible personal property, derived, directly or indirectly, from the sale of management, distribution, or administration services to, or on behalf of a regulated investment company, is considered to be in this state:

(i) to the extent that shareholders of the regulated investment company are domiciled in the state; and

(ii) as provided in this Subsection (5).

(b) For purposes of Subsection (5)(a), the amount of a sale, other than a sale of tangible personal property, that is considered to be in this state is calculated by determining the product of:

(i) the taxpayer's total dollar amount of sales of the services; and

(ii) a fraction, the numerator of which is the average of the sum of the beginning of the year and the end of year balance of shares owned by the investment company shareholders domiciled in this state and the denominator of which is the average of the sum of the beginning of the year and end of year balance of shares owned by the investment company shareholders.

(c) A separate computation shall be made to determine the sales for each investment company.

(6)

(a) Notwithstanding Subsections (2) through (4) and subject to Subsection (6)(b), the following sales are considered to be in this state to the extent that customers of a securities brokerage business are domiciled in the state:

(i) a sale, other than a sale of tangible personal property, derived, directly or indirectly, from the sale of a securities brokerage service by a taxpayer if that taxpayer is primarily engaged in providing a service in this state to a regulated investment company; or

(ii) a sale, other than a sale of tangible personal property, derived, directly or indirectly, from the sale of a securities brokerage service by a taxpayer that is an

affiliate of a taxpayer that provides a service in this state to a regulated investment company.

(b) For purposes of Subsection (6)(a), the amount of a sale, other than a sale of tangible personal property, that is considered to be in this state is calculated by determining the product of:

(i) the taxpayer's total dollar amount of sales of securities brokerage services; and

(ii) a fraction, the numerator of which is the receipts from securities brokerage services from customers of the taxpayer domiciled in this state, and the denominator of which is the receipts from securities brokerage services from all customers of the taxpayer.

(7) Whether sales by an airline, other than sales of tangible personal property, are in this state is determined as provided in this section, subject to the calculation required by Subsection 59-7-317(2).

UTAH REGULATIONS

R865-6F-8. ALLOCATION AND APPORTIONMENT OF NET INCOME (UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT) PURSUANT TO UTAH CODE ANN. SECTIONS 59-7-302 THROUGH 59-7-321.

In relevant part only

(1) . . .

(h) "Gross receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, royalties, interest and dividends) in a transaction that produces business income, in which the income or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.

(i) Gross receipts, even if business income, do not include such items as, for example:

(A) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

(B) the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;

(C) proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;

(D) damages and other amounts received as the result of litigation;

(E) property acquired by an agent on behalf of another;

(F) tax refunds and other tax benefit recoveries;

(G) pension reversions;

(H) contributions to capital (except for sales of securities by securities dealers);

(I) income from forgiveness of indebtedness; or

(J) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code.

(ii) Exclusion of an item from the definition of "gross receipts" is not determinative of its character as business or nonbusiness income. Nothing in this definition shall be construed to modify, impair or supersede any provision of Subsection (11).

...

(10) Sales Factor. In General.

(a) Section 59-7-302 defines the term "sales" to mean all gross receipts of the taxpayer not allocated under Section 59-7-306 through 59-7-310. Thus, for purposes of the sales factor of the apportionment formula for the trade or business of the taxpayer, the term sales means all gross receipts derived by the taxpayer from transactions and activity in the regular course of the trade or business. The following are rules determining sales in various situations.

(i) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, sales includes all gross receipts from the sales of goods or products (or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales, less returns and allowances and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to sales. Federal and state excise taxes (including sales taxes) shall be included as part of receipts if taxes are passed on to the buyer or included as part of the selling price of the product.

(ii) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, sales includes the entire reimbursed cost, plus the fee.

(iii) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency, or the performance of equipment service contracts, or research and development contracts, sales includes the gross receipts from the performance of services including fees, commissions, and similar items.

(iv) In the case of a taxpayer engaged in renting real or tangible property, sales includes the gross receipts from the rental, lease or licensing of the use of the property.

(v) In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, sales includes the gross receipts therefrom.

(vi) If a taxpayer derives receipts from the sale of equipment used in its business, those receipts constitute sales. For example, a truck express company owns a fleet of trucks and sells its trucks under a regular replacement program. The gross receipts from the sales of the trucks are included in the sales factor.

(vii) In some cases certain gross receipts should be disregarded in determining the sales factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business. See Subsection (11)(c).

(viii) In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(ix) If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under UDITPA are not uniform in the inclusion or exclusion of gross receipts, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

(b) 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 Subsection (11)(d).

(c) Numerator.

The numerator of the sales factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

(d) Sales of Tangible Personal Property in this State.

(i) Gross receipts from the sales of tangible personal property (except sales to the United States government; see Subsection (10)(e)) are in this state:

(A) if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale; or

(B) if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.

(ii) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

(iii) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

(iv) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

(v) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.

(vi) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

(vii) If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(A) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

(B) If the taxpayer is not taxable in the state from which the property is shipped, the sale is in this state.

(e) (i) Sales of Tangible Personal Property to United States Government in this state.

(ii) Gross receipts from the sales of tangible personal property to the United States government are in this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. For purposes of this rule, only sales for which the United States government makes direct payment to the seller pursuant to the terms of a contract constitute sales to the United States government. Thus, as a general rule, sales by a subcontractor to the prime contractor, the party to the contract with the United States government, do not constitute sales to the United States government.

(f) (i) Sales Other than Sales of Tangible Personal Property in this State.

(ii) In general, Subsections 59-7-319(2) through (7) provide for the inclusion in the numerator of the sales factor of gross receipts from transactions other than sales of tangible personal property (including transactions with the United States government).

(g) Receipts from the Performance of Services.

(i) Under Subsection 59-7-319(3), gross receipts from the performance of a service are considered to be in this state if the purchaser of the service receives a greater benefit of the service in this state than in any other state. In general, the "benefit of the service" approach under the statute reflects a market based approach, and the greater benefit of the service is typically received in the state in which the market for the service exists and where the purchaser is located.

(ii) For businesses engaged in certain industries, specific sourcing rules and guidelines that address the attribution of gross receipts from the performance of a service have been adopted. See Subsection (11)(b).

(iii) The benefit from performance of a service is in this state if any of the following conditions are met:

(A) The service relates to tangible personal property and is performed at a purchaser's location in this state.

(B) The service relates to tangible personal property that the service provider delivers directly or indirectly to a purchaser in this state after the service is performed.

(C) The service is provided to an individual who is physically present in this state at the time the service is received.

(D) The service is provided to a purchaser exclusively engaged in a trade or business in this state and relates to that purchaser's business in this state.

(E) The service is provided to a purchaser that is present in this state and the service relates to that purchaser's activities in this state.

(iv) If the benefit of the service is received in more than one state, the gross receipts from the service are to be sourced using reasonable and consistent methods of analysis to determine in which state the greater benefit of the service is received. Such methods must be supported by the service provider's business records at the time the service was provided. If the benefit of a service is received in Utah and one or more other states and the state where the greater benefit of the service is received cannot otherwise be readily determined through the provisions of this rule, the following sourcing rules are applied in sequential order:

(A) The receipt is sourced to this state if the office from which the purchaser placed the order for the service is in this state.

(B) If the office from which the order was placed cannot be determined, the receipt is sourced to this state if the purchaser's billing address is in this state.

(C) If the state of the purchaser's billing address cannot be determined, the receipt shall be included in the sales factor in this state.

(v) The term, "gross receipt from the performance of a service" applies to each individual sales transaction, and each sales transaction is considered a discrete transaction for purposes of determining whether the purchaser of the service receives a greater benefit of the service in this state than in any other state.

(vi) In determining whether the greater benefit from the performance of a service is received in this state, the benefit of the service in this state must be compared to the benefit of the service received in each individual state in which any benefit of the service is received, i.e., the benefit of the service received in Utah is not compared to the benefit of the service received in all other states combined.

(vii) In the context of a combined report, the sale of services between members of a unitary group included in a combined report shall be excluded from the combined report sales factor.

(viii) The following examples are provided to illustrate the application of Utah law in regard to receipts from the performance of a service:

(A) A company headquartered and primarily conducting business in Utah contracts for general accounting services with an accounting firm located in another state. The receipts for the accounting service are sourced to Utah regardless of where the services are performed, since the greater benefit of the services is received in this state.

(B) A Utah retailer hires a California agency to develop an advertising campaign targeting its Utah customers. The receipts for the advertising services are sourced to Utah regardless of where the services are actually performed.

(C) A multistate company hires a Colorado firm to perform an appraisal of its business properties in Utah and Colorado. The company has several locations in Utah. However, the headquarters of the company is in Colorado and the value of its properties located in Colorado exceed the value of its properties in Utah. The appraisal fee is not broken down by location of the assets or properties of the company. Use of the property values for each state to determine where the greater benefit of the appraisal services occurred is a reasonable method to determine where the appraisal service fees should be sourced and the service would be sourced to Colorado. However, if the appraisal fees are broken out separately for Colorado and Utah properties or the billing information by state is known, the appraisal fees pertaining to the Utah properties are sourced to Utah and the appraisal fees pertaining to the Colorado properties are sourced to Colorado.

(D) An Internet/cable television service provider provides services to purchasers in Utah as well as other surrounding states. As all of the benefit from the services provided to Utah purchasers is received at residences or business locations in Utah, the receipts from the services provided to Utah purchasers are sourced to Utah.

(E) Data processing services are performed for a company conducting interstate business. The services relate to computer systems that are mainly located in Utah although a few terminals are spread over several other states. Since the data processing services relate to the computer systems that are mainly located in Utah, the greater benefit of the service is considered to be received in Utah and the receipts from the services are sourced to Utah regardless of where the services are actually performed. The location of data processing equipment associated with the data processing services is a reasonable method of sourcing receipts from those services.

(F) Engineering services are performed in connection with a property being constructed in Utah. Since all of the benefit of the service is received in Utah where the construction takes place, the receipts from the engineering services are sourced to Utah regardless of where the actual engineering services are performed.

(G) A California law firm is retained to represent multiple plaintiffs in a class action lawsuit filed against a Utah corporation in a Utah court. Receipts received by the firm for the legal services are sourced to Utah notwithstanding the fact that some of the services were performed outside Utah. The greater benefit of the services is received in Utah since the lawsuit was filed against a Utah corporation in a Utah court.

(H) A moving company performs a moving service for an individual that has been transferred from New Jersey to Utah. The charges for services in connection with the move and unpacking services are sourced to Utah

because the greater benefit of the moving services is received by the purchaser in the state to which the property is moved. However, any charges for specific services such as storage or packing that are performed outside of Utah, and that are separately stated, are not sourced to Utah.

(I) A car rental agency rents a vehicle that is picked up from and returned to one of its business locations in Utah. The receipts from the rental are sourced to Utah regardless of whether the vehicle leaves this state for the duration of the rental period.

(11) Special Rules:

...

(d) Sales Factors.

The following special rules are established in respect to the sales factor of the apportionment formula:

(i) Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, those gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory or plant will be excluded.

(ii) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless exclusion would materially affect the amount of income apportioned to this state. For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, and business automobiles.

(iii) Where intangible property generates business income and the state in which that intangible property is being used can be determined, that income is included in the denominator of the sales factor and, if and to the extent that property is used in this state, in the numerator of the sales factor as well. For example, usually the state in which the intangible property is being used can be readily identified in respect to interest income received on deferred payments on sales of tangible property, see Subsection (10)(a)(i), and income from the sale, licensing or other use of intangible personal property.

(A) Where intangible property generates business income and the state in which that intangible property is being used cannot be determined, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the

intangible personal property by the taxpayer, such dividends and interest shall be excluded from the denominator of the sales factor.

(B) Exclude from the denominator of the sales factor, receipts from the sales of securities unless the taxpayer is a dealer therein.

(iv) Where gains and losses on the sale of liquid assets are not excluded from the sales factor by other provisions under Subsections (11)(d)(i) through (iii), such gains or losses shall be treated as provided in this Subsection (11)(d)(iv). This Subsection (11)(d)(iv) does not provide rules relating to the treatment of other receipts produced from holding or managing such assets.

(A) If a taxpayer holds liquid assets in connection with one or more treasury functions of the taxpayer, and the liquid assets produce business income when sold, exchanged or otherwise disposed, the overall net gain from those transactions for each treasury function for the tax period is included in the sales factor. For purposes of this Subsection (11)(d)(iv), each treasury function will be considered separately.

(B) For purposes of this Subsection (11)(d)(iv), a liquid asset is an asset (other than functional currency or funds held in bank accounts) held to provide a relatively immediate source of funds to satisfy the liquidity needs of the trade or business. Liquid assets include:

(I) foreign currency (and trading positions therein) other than functional currency used in the regular course of the taxpayer's trade or business;

(II) marketable instruments (including stocks, bonds, debentures, options, warrants, futures contracts, etc.); and

(III) mutual funds which hold such liquid assets.

(C) An instrument is considered marketable if it is traded in an established stock or securities market and is regularly quoted by brokers or dealers in making a market. Stock in a corporation which is unitary with the taxpayer, or which has a substantial business relationship with the taxpayer, is not considered marketable stock.

(D) For purposes of this Subsection (11)(d)(iv)(D), a treasury function is the pooling and management of liquid assets for the purpose of satisfying the cash flow needs of the trade or business, such as providing liquidity for a taxpayer's business cycle, providing a reserve for business contingencies, business acquisitions, etc. A taxpayer principally engaged in the trade or business of purchasing and selling instruments or other items included in the definition of liquid assets set forth herein is not performing a treasury function with respect to income so produced.

(E) Overall net gain refers to the total net gain from all transactions incurred at each treasury function for the entire tax period, not the net gain from a specific transaction.

...

WASHINGTON

WASHINGTON STATUTES

§ 82.04.462 -- APPORTIONABLE INCOME.

(1) The apportionable income of a person within the scope of RCW 82.04.460(1) is apportioned to Washington by multiplying its apportionable income by the receipts factor. Persons who are subject to tax under more than one of the tax classifications enumerated in RCW 82.04.460(4)(a) (i) through (x) must calculate a separate receipts factor for each tax classification that the person is taxable under.

(2) For purposes of subsection (1) of this section, the receipts factor is a fraction and is calculated as provided in subsections (3) and (4) of this section and, for financial institutions, as provided in the rule adopted by the department under the authority of RCW 82.04.460(2).

(3) (a) The numerator of the receipts factor is the total gross income of the business of the taxpayer attributable to this state during the tax year from engaging in an apportionable activity. The denominator of the receipts factor is the total gross income of the business of the taxpayer from engaging in an apportionable activity everywhere in the world during the tax year.

(b) Except as otherwise provided in this section, for purposes of computing the receipts factor, gross income of the business generated from each apportionable activity is attributable to the state:

(i) CAUTION: Subsection (3)(b)(i) is eff. 6-12-2014. See also next version.

Where the customer received the benefit of the taxpayer's service or, in the case of gross income from royalties, where the customer used the taxpayer's intangible property. When a customer receives the benefit of the taxpayer's services or uses the taxpayer's intangible property in this and one or more other states and the amount of gross income of the business that was received by the taxpayer in return for the services received or intangible property used by the customer in this state can be reasonably determined by the taxpayer, such amount of gross income must be attributed to this state.

(i) CAUTION: Subsection (3)(b)(i) is eff. until 6-12-2014. See also previous version.

Where the customer received the benefit of the taxpayer's service or, in the case of gross income from royalties, where the customer used the taxpayer's intangible property.

(ii) CAUTION: Subsection (3)(b)(ii) is eff. 6-12-2014. See also next version.

If the customer received the benefit of the service or used the intangible property in more than one state and if the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i) of this subsection (3), gross income of the business must be attributed to the state in which the benefit of the service was primarily received or in which the intangible property was primarily used.

(ii) CAUTION: Subsection (3)(b)(ii) is eff. until 6-12-2014. See also previous version.

If the customer received the benefit of the service or used the intangible property in more than one state, gross income of the business must be attributed to the state in which the benefit of the service was primarily received or in which the intangible property was primarily used.

(iii) If the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i) or (ii) of this subsection (3), gross income of the business must be attributed to the state from which the customer ordered the service or, in the case of royalties, the office of the customer from which the royalty agreement with the taxpayer was negotiated.

(iv) If the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i), (ii), or (iii) of this subsection (3), gross income of the business must be attributed to the state to which the billing statements or invoices are sent to the customer by the taxpayer.

(v) If the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i), (ii), (iii), or (iv) of this subsection (3), gross income of the business must be attributed to the state from which the customer sends payment to the taxpayer.

(vi) If the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i), (ii), (iii), (iv), or (v) of this subsection (3), gross income of the business must be attributed to the state where the customer is located as indicated by the customer's address: (A) Shown in the taxpayer's business records maintained in the regular course of business; or (B) obtained during consummation of the sale or the negotiation of the contract for services or for the use of the taxpayer's intangible property, including any address of a customer's payment instrument when readily available to the taxpayer and no other address is available.

(vii) If the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i), (ii), (iii), (iv), (v), or (vi) of this subsection (3), gross income of the business must be attributed to the commercial domicile of the taxpayer.

(viii) For purposes of this subsection (3)(b), "customer" means a person or entity to whom the taxpayer makes a sale or renders services or from whom the

taxpayer otherwise receives gross income of the business. "Customer" includes anyone who pays royalties or charges in the nature of royalties for the use of the taxpayer's intangible property.

(c) Gross income of the business from engaging in an apportionable activity must be excluded from the denominator of the receipts factor if, in respect to such activity, at least some of the activity is performed in this state, and the gross income is attributable under (b) of this subsection (3) to a state in which the taxpayer is not taxable. For purposes of this subsection (3)(c), "not taxable" means that the taxpayer is not subject to a business activities tax by that state, except that a taxpayer is taxable in a state in which it would be deemed to have a substantial nexus with that state under the standards in RCW 82.04.067(1) regardless of whether that state imposes such a tax. "Business activities tax" means a tax measured by the amount of, or economic results of, business activity conducted in a state. The term includes taxes measured in whole or in part on net income or gross income or receipts. "Business activities tax" does not include a sales tax, use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a gross receipts tax or a tax imposed on the privilege of doing business.

(d) This subsection (3) does not apply to financial institutions with respect to apportionable income taxable under RCW 82.04.290. Financial institutions must calculate the receipts factor as provided in subsection (4) of this section and the rule adopted by the department under the authority of RCW 82.04.460(2) with respect to apportionable income taxable under RCW 82.04.290. Financial institutions that are subject to tax under any other tax classification enumerated in RCW 82.04.460(4)(a) (i) through (v) and (vii) through (x) must calculate a separate receipts factor, as provided in this section, for each of the other tax classifications that the financial institution is taxable under.

(4) CAUTION: Subsection (4) below is eff. 6-12-2014. See also next version.

A taxpayer may calculate the receipts factor for the current tax year based on the most recent calendar year for which information is available for the full calendar year. If a taxpayer does not calculate the receipts factor for the current tax year based on previous calendar year information as authorized in this subsection, the business must use current year information to calculate the receipts factor for the current tax year. In either case, a taxpayer must correct the reporting for the current tax year when complete information is available to calculate the receipts factor for that year, but not later than October 31st of the following tax year. Interest will apply to any additional tax due on a corrected tax return. Interest must be computed and assessed as provided in RCW 82.32.050 and accrues until the additional taxes are paid. Penalties as provided in RCW 82.32.090 will apply to any such additional tax due only if the current tax year reporting is not corrected and the additional tax is not paid by October 31st of the following tax year. Interest as provided in RCW 82.32.060 will apply to any tax paid in excess of that properly due on a return as a result of a taxpayer using previous calendar year data or incomplete current-year data to calculate the receipts factor.

(4) CAUTION: Subsection (4) below is eff. until 6-12-2014. See also previous version.

A taxpayer may calculate the receipts factor for the current tax year based on the most recent calendar year for which information is available for the full calendar year. If a taxpayer does not calculate the receipts factor for the current tax year based on previous calendar year information as authorized in this subsection, the business must use current year information to calculate the receipts factor for the current tax year. In either case, a taxpayer must correct the reporting for the current tax year when complete information is available to calculate the receipts factor for that year, but not later than October 31st of the following tax year. Interest will apply to any additional tax due on a corrected tax return. Interest must be assessed at the rate provided for delinquent excise taxes under chapter 82.32 RCW, retroactively to the date the original return was due, and will accrue until the additional taxes are paid. Penalties as provided in RCW 82.32.090 will apply to any such additional tax due only if the current tax year reporting is not corrected and the additional tax is not paid by October 31st of the following tax year. Interest as provided in RCW 82.32.060 will apply to any tax paid in excess of that properly due on a return as a result of a taxpayer using previous calendar year data or incomplete current-year data to calculate the receipts factor.

(5) Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this section.

(a) “Apportionable activities” and “apportionable income” have the same meaning as in RCW 82.04.460.

(b) “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 or political subdivision of a foreign country.

WASHINGTON REGULATIONS

WASH. ADMIN. CODE 458-20-19402. SINGLE FACTOR RECEIPTS APPORTIONMENT— GENERALLY.

In relevant part only

...

(106) Definitions. The following definitions apply to this rule:

(a) “Apportionable activities” has the same meaning as used in WAC 458-20-19401 Minimum nexus thresholds for apportionable activities.

(b) “Apportionable income” means apportionable receipts less the deductions allowable under chapter 82.04 RCW.

(c) “Apportionable receipts” means gross income of the business from engaging in apportionable activities, including income received from apportionable activities attributed to locations outside this state.

(d) “Business activities tax” means a tax measured by the amount of, or economic results of, business activity conducted in a state. The term includes taxes measured in whole or in part on net income or gross income or receipts. In the case of sole proprietorships and pass-through entities, the term includes personal income taxes if the gross income from apportionable activities is included in the gross income subject to the personal income tax. The term “business activities tax” does not include retail sales, use, or similar transaction taxes, imposed on the sale or acquisition of goods or services, whether or not named a gross receipts tax or a tax imposed on the privilege of doing business.

(e) “Customer” means a person or entity to whom the taxpayer makes a sale, grants the right to use intangible property, or renders services or from whom the taxpayer otherwise directly or indirectly receives gross income of the business. If the taxpayer performs apportionable services for the benefit of a third party, the term “customer” means the third party beneficiary.

Example 1: Assume a parent purchases apportionable services for their child. The child is the customer for the purpose of determining where the benefit is received.

(f) “Reasonable method of proportionally attributing” means a method of determining where the benefit of an activity is received and where the receipts are attributed that is uniform, consistent, and accurately reflects the market, and does not distort the taxpayer's market.

(g) “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 or political subdivision of a foreign country.

(h)

(i) “Taxable in another state” means either:

(A) The taxpayer is subject to a business activities tax by another state on the taxpayer's income received from engaging in apportionable activity; or

(B) The taxpayer is not subject to a business activities tax by another state on the taxpayer's income received from engaging in apportionable activity, but the taxpayer meets the substantial nexus thresholds described in WAC 458-20-19401 for that state.

(ii) The determination of whether a taxpayer is taxable in a foreign country or political subdivision of a foreign country is made at the country or political subdivision level.

Example 2: Assume Taxpayer A is subject to a business activity tax in State X of Mexico (e.g., Taxpayer pays tax to State X), but nowhere else in Mexico. Also, assume that Taxpayer A is not subject to any national business activity tax in Mexico and does not meet the substantial nexus thresholds described in WAC 458-20-

19401 for Mexico as a whole. In this case, Taxpayer is taxable in State X, but not taxable in any other portion or any other State of Mexico.

Example 3: Assume Taxpayer B is not subject to any business activity taxes in Mexico, but satisfies the substantial nexus thresholds described in WAC 458-20-19401 for Mexico as a whole. Taxpayer B is taxable in all of Mexico.

...

(301) Attribution of receipts generally. Except as specifically provided for in WAC 458-20-19403 for the attribution of apportionable royalty receipts, this Part 3 explains how to attribute apportionable receipts. Receipts are attributed to states based on a cascading method or series of steps. The department expects that most taxpayers will attribute apportionable receipts based on (a)(i) of this subsection because the department believes that either the taxpayer will know where the benefit is actually received or a “reasonable method of proportionally attributing receipts” will generally be available. These steps are:

(a) Where the customer received the benefit of the taxpayer's service (see subsection (302) of this rule for an explanation and examples of the benefit of the service);

(i) If a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the services received in a state, that apportionable receipt is attributable to the state in which the benefit is received. This may be shown by application of a reasonable method of proportionally attributing the benefit among states. The result determines the receipts attributed to each state. Under certain situations, the use of data based on an attribution method specified in (b) through (f) of this subsection may also be a reasonable method of proportionally attributing receipts among states (see Examples 4 and 5 below).

(ii) If a taxpayer is unable to separately determine or use a reasonable method of proportionally attributing the benefit of the services in specific states under (a)(i) of this subsection, and the customer received the benefit of the service in multiple states, the apportionable receipt is attributed to the state in which the benefit of the service was primarily received. Primarily means, in this case, more than fifty percent.

(b) If the taxpayer is unable to attribute an apportionable receipt under (a) of this subsection, the apportionable receipt must be attributed to the state from which the customer ordered the service.

(c) If the taxpayer is unable to attribute an apportionable receipt under (a) or (b) of this subsection, the apportionable receipt must be attributed to the state to which the billing statements or invoices are sent to the customer by the taxpayer.

(d) If the taxpayer is unable to attribute an apportionable receipt under (a), (b), or (c) of this subsection, the apportionable receipt must be attributed to the state from which the customer sends payment to the taxpayer.

(e) If the taxpayer is unable to attribute an apportionable receipt under (a), (b), (c), or (d) of this subsection, the apportionable receipt must be attributed to the state where the customer is located as indicated by the customer's address:

(i) Shown in the taxpayer's business records maintained in the regular course of business; or

(ii) Obtained during consummation of the sale or the negotiation of the contract, including any address of a customer's payment instrument when readily available to the taxpayer and no other address is available.

(f) If the taxpayer is unable to attribute an apportionable receipt under (a), (b), (c), (d), or (e) of this subsection, the apportionable receipt must be attributed to the commercial domicile of the taxpayer.

(g) The taxpayer may not use an attribution method that distorts the apportionment of the taxpayer's apportionable receipts.

(302) Examples. Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances. The examples in this rule assume all gross income received by the taxpayer is from engaging in apportionable activities. Unless otherwise stated, the examples do not apply to tax liability prior to June 1, 2010.

When an example states that a particular attribution method is a reasonable method of proportionally attributing the benefit of a service, this does not preclude the existence of other reasonable methods of proportionally attributing the benefit depending on the specific facts and circumstances of a taxpayer's situation.

Example 4: Assume Law Firm has thousands of charges to clients. It is not commercially reasonable for Law Firm to track each charge to each client to determine where the benefit related to each service is received. Assume the scope of Law Firm's practice is such that it is reasonable to assume that the benefits of Law Firm's services are received at the location of the customer as reflected by the customer's billing address. Under these circumstances, Law Firm can use the billing addresses of each client as a reasonable method of proportionally attributing the benefit of its services.

Example 5: Same facts as Example 4 except, Law Firm has a single client that represents a statistically significant portion of its revenue and whose billing address is unrelated to any of the services provided. In this case, using the billing address of this client would not relate to the benefit of the services. Using the billing address for this client to determine where the benefit is received would significantly distort the apportionment of Law Firm's receipts. Therefore, Law Firm would need to evaluate the specific services provided to that client to determine where the benefits of those services are received and may use billing address to attribute the income received from other clients.

Example 6: Assume Taxpayer R attributes an apportionable receipt based on its customer's billing address, using (c) of this subsection, and the billing address is a P.O. Box

located in another state. Taxpayer R also knows that mail delivered to this P.O. Box is automatically forwarded to the customer's actual location. In this case, use of the billing address is not allowed because it would distort the apportionment of Taxpayer R's receipts.

(303) Benefit of the service explained. The first two steps (subsection (301)(a)(i) and (ii) of this rule) used to attribute apportionable receipts to a state are based on where the taxpayer's customer receives the benefit of the service. This subsection explains the framework for determining where the benefit of a service is received.

(a) If the taxpayer's service relates to real property, then the benefit is received where the real property is located. The following is a nonexclusive list of services that relate to real property:

- (i) Architectural;
- (ii) Surveying;
- (iii) Janitorial;
- (iv) Security;
- (v) Appraisals; and
- (vi) Real estate brokerage.

(b) If the taxpayer's service relates to tangible personal property, then the benefit is received where the tangible personal property is located or intended/expected to be located.

(i) Tangible personal property is generally treated as located where the place of principal use occurs. If the tangible personal property is subject to state licensing (e.g., motor vehicles), the principal place of use is presumed to be where the property is licensed; or

(ii) If the tangible personal property will be created or delivered in the future, the principal place of use is where it is expected to be used or delivered.

(iii) The following is a nonexclusive list of services that relate to tangible personal property:

- (A) Designing specific/unique tangible personal property;
- (B) Appraisals;
- (C) Inspections of the tangible personal property;
- (D) Testing of the tangible personal property;

(E) Veterinary services; and

(F) Commission sales of tangible personal property.

(c) If the taxpayer's service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities, then the benefit is received where the customer's related business activities occur. The following is a nonexclusive list of business related services:

(i) Developing a business management plan;

(ii) Commission sales (other than sales of real or tangible personal property);

(iii) Debt collection services;

(iv) Legal and accounting services not specific to real or tangible personal property;

(v) Advertising services; and

(vi) Theatre presentations.

(d) If the taxpayer's service does not relate to real or tangible personal property, is either provided to a customer not engaged in business or unrelated to the customer's business activities, and:

(i) The service requires the customer to be physically present, then the benefit is received where the customer is located when the service is performed. The following is a nonexclusive list of services that require the customer to be physically present:

(A) Medical examinations;

(B) Hospital stays;

(C) Haircuts; and

(D) Massage services.

(ii) The taxpayer's service relates to a specific, known location(s), then the benefit is received at those location(s). The following is a nonexclusive list of services related to specific, known location(s):

(A) Wedding planning;

(B) Receptions;

- (C) Party planning;
- (D) Travel agent and tour operator services; and
- (E) Preparing and/or filing state and local tax returns.

(iii) If (d)(i) and (ii) of this subsection do not apply, the benefit of the service is received where the customer resides. The following is a nonexclusive list of services whose benefit is received at the customer's residence:

- (A) Drafting a will;
- (B) Preparing and/or filing federal tax returns;
- (C) Selling investments; and
- (D) Blood tests (not blood drawing).

(e) Special rule for extension of credit. See subsection (305) of this rule for special rules attributing income related to loans (secured and unsecured) and credit cards that is received by persons who are not financial institutions as defined in WAC 458-20-19404.

(304) Examples of the application of the benefit of service analysis and reasonable methods of proportionally attributing receipts.

(a) Services related to real property:

Example 7: Architect drafts plans for a building to be built in Washington. Architect's services relate to real property which is located in Washington, therefore the customer receives the benefit of that service in Washington at the location of the real property. Architect's receipts for this service are solely attributed to Washington because the entire benefit is received in Washington.

Example 8: Franchisor hires Taxpayer, an architect, to create a design of a standardized building that will be used at four locations in Washington and two locations in Oregon. Taxpayer's services relate to real property at those six locations, therefore the customer receives the benefit of the service at the four Washington locations and the two Oregon locations. Taxpayer will attribute $\frac{2}{3}$ (4 of 6 sites) of the receipts for this service to Washington and $\frac{1}{3}$ (2 of 6 sites) of the receipts to Oregon.

Example 9: Assume the same facts as Example 8 except Franchisor will use the same design in all 50 states for all its franchisee's locations. Taxpayer and Franchisor do not know at the time the service is provided (and cannot reasonably estimate) how many franchise locations will exist in each state. Therefore, there is no reasonable means of proportionally attributing receipts at the time the services are performed and it is clear that no state will have a majority of the franchise locations. Accordingly, the apportionable receipts must be attributed following the steps in subsection (301)(b) through (f) of this rule.

Example 10: Real estate broker located in Florida receives a commission for arranging the sale of real property located in Washington. The real estate broker's service is related to the real property, therefore the benefit is received in Washington, where the real property is located, and the commission income is attributed to Washington.

(b) Services related to tangible personal property.

Example 11: Big Manufacturing hires an engineer to design a tool that will only be used in a factory located in Brewster, Washington. Big Manufacturing receives the benefit of the engineer's services at a single location in Washington where the tool is intended to be used. Therefore, 100% of engineer's receipts from this service must be attributed to Washington.

Example 12: The same facts as in Example 11, except Big Manufacturing will use the tool equally in factories located in Brewster and in Kapa'a, Hawai'i. Therefore, Big Manufacturer receives the benefit of the service equally in two states. Because the benefit of the service is received equally in both states, a reasonable method of proportionally attributing receipts would be to attribute 1/2 of the receipts to each state.

Example 13: Taxpayer, a commissioned salesperson, sells tangible personal property (100 widgets) for Distributor to XYZ Company for delivery to Spokane. Distributor receives the benefit of Taxpayer's service where the tangible personal property will be delivered. Therefore, Taxpayer will attribute the commission from this sale to Washington.

Example 14: Same facts as in Example 13, but the widgets are to be delivered 50 to Spokane, 25 to Idaho, and 25 to Oregon. In this case, the benefit is received in all three states. Taxpayer shall attribute the receipts (commission) from this sale 50% to Washington, 25% to Idaho, and 25% to Oregon where the tangible personal property is delivered to the buyer.

Example 15: Training Company provides training to Customer's employees on how to operate a specific piece of equipment used solely in Washington. Customer receives the benefit of the service where the equipment is used, which is in Washington. Therefore, Training Company will attribute 100% of its receipts received from Customer to Washington.

(c) Services related to customer's business activities. The examples in this subsection assume that the customer is engaged in business and the services relate to the customer's business activities.

Example 16: Manufacturer hires Law Firm to defend Manufacturer in a class action product liability lawsuit involving Manufacturer's Widgets. The benefit of Law Firm's services relates to Manufacturer's widget selling activity in various states. A reasonable method of proportionally attributing receipts in this case would be to attribute the receipts to the locations where the Manufacturer's Widgets were delivered, which relates to Manufacturer's business activities.

Example 17: Debt Collector provides debt collection services to ABC. The benefit of Debt Collector's services relates to ABC's selling activity in various states. It is reasonable to assume that where the debtors are located is the same as where ABC's business activity occurred. If Debt Collector is able to attribute specific receipts to a specific debtor, then the receipt is attributed to where the debtor is located.

Example 18: Same facts as Example 17, except Debt Collector is unable to attribute specific benefits with specific debtors. In this case, a reasonable method of proportionally attributing benefits/receipts should be employed. Depending on Debt Collector's specific facts and circumstances, a reasonable method of proportionally attributing benefits/receipts could be: Relative number of debtors in each state; relative debt actually collected from debtors in each state; the relative amount of debt owed by debtors in each state; or another method that does not distort the apportionment of Debt Collector's receipts.

Example 19: Training Company provides training to Customer's employees who are all located in State A. The training is provided in State B. The training relates to the employees' ethical behavior within Customer's organization. Customer receives the benefit of Training Company's service in State A, where Customer's office is located and the employees presumably practice their ethical behavior. Training Company must attribute the apportionable receipts to State A where the benefit is solely received.

Example 20: Same facts as Example 19, except the training is provided for employees from several states and Training Company knows where each employee works. The benefit of the Training Company's services is received in those several states. Attributing receipts from the training based on where the employees work is a reasonable method of proportionally attributing the receipts income.

Example 21: Call Center provides "customer service" services to Retailer who has customers in all 50 states. Call Center's services relate to Retailer's selling activity in all 50 states, therefore Retailer receives the benefit of Call Center's services in all 50 states. Call Center has offices in Iowa and Alabama that answer questions about Retailer's products. Call Center records Retailer's customer's calls by area code. Call Center may attribute receipts received from Retailer based on the number of calls from area codes assigned to each state. This would be a reasonable method of proportionally attributing receipts notwithstanding the fact that mobile phone numbers and related area codes may not exactly reflect the physical location of the customer in all cases.

Example 22: Taxpayer provides internet advertising services to national retail chains, regional businesses, businesses with a single location, and businesses that operate solely over the Internet. Generally, the benefit of the advertising services is received where the customer's related business activities occur. Depending on what products or services are being provided by Taxpayer's customers, the use of relative population in the customer's market may be a reasonable method of proportionally attributing the benefit of Taxpayer's services.

Example 23: Oregon Newspaper sells newspaper advertising to Merlin's Potion Shop. Merlin's only makes over-the-counter sales from its single location in Vancouver, Washington. Merlin's Potion Shop receives the benefit of the Oregon Newspaper's advertising services in Washington where it makes sales to its customers. In this case Oregon Newspaper will report 100% of its receipts received from Merlin's to Washington.

Example 24: Company A provides human resources services to Racko, Inc. which has three offices that use those services in Washington, Oregon, and Idaho. Racko sells widgets and has customers for its widgets in all 50 states. The benefit of the service performed by Company A is received at Racko's locations in Washington, Oregon, and Idaho. Assuming that each office is approximately the same size and uses the services to approximately the same extent, then attributing 1/3 of the receipts to each of the states in which Racko has locations using the services is a reasonable method of proportionally attributing Company A's receipts from Racko.

Example 25: Director serves on the board of directors for DEF, Inc. Director's services relate to the general management of DEF, Inc. DEF, Inc. is Director's customer and receives the benefit of Director's services at its corporate domicile. Therefore, Director must attribute the receipts earned from Director's services to DEF to DEF's corporate domicile.

(d) Services not related to real or tangible personal property and either provided to customers not engaged in business or unrelated to the customer's business activities.

Example 26: A Washington resident travels to California for a medical procedure. Because the Washington resident must be physically in California, the Washington resident receives the benefit of the service in California. Therefore, the service provider must attribute its income from the procedure to California.

Example 27: Washington accountant prepares a Nevada couple's Arizona and Oregon state income tax returns as well as their federal income tax return. The benefit of the accountant's service associated with the state income tax returns is attributed to Arizona and Oregon because these returns relate to specific locations (states). The benefit associated with the federal income tax return is attributed to the couple's residence. The fees for the state tax returns are attributed to Arizona and Oregon, respectively, and the fee for the federal income tax return is attributed to Nevada.

Example 28: Tour Operator provides cruises through Washington's San Juan Islands for four days and Victoria, British Columbia for one day. The benefit of the tour is received where the tour occurs. Tour Operator may use a reasonable method of proportionally attributing the benefit to determine that its customers receive 80% of the benefit in Washington and 20% outside of Washington. Therefore, Tour Operator must attribute 80% of apportionable receipts to Washington and 20% to British Columbia.

Example 29: A Washington couple hires a Washington attorney to prepare a last will and testament for Daughter who lives in California. Daughter is a third-party beneficiary and receives the benefit of the attorney's services in California because that is where Daughter lives. Washington Attorney must attribute the fee to California.

Example 30: A Washington couple hires a California accountant to prepare their joint federal income tax return. Because the couple does not have to be physically present for the accountant to perform services and services are not related to a specific location, the Washington couple receives the benefit of the accountant's services at their residence in Washington. California accountant must attribute its fee for this service to Washington.

Example 31: An Arizona resident retains a Washington stock broker to handle its investments. The stock broker receives orders from the client and executes trades of securities on the New York Stock Exchange. Because (a) the Arizona resident is not investing as part of a business; (b) the activity does not relate to real or tangible personal property; (c) and the client does not need to be physically present for the stock broker to perform its services; and (d) the services are not related to a specific location, the client receives the benefit of the services at client's place of residence. Washington stockbroker must attribute the fee to Arizona.

Example 32: Investment Manager manages a mutual fund. Investment Manager receives a fee for managing the fund based on the value of the assets in the fund on particular days. Investment Manager knows or should know the identity of the investors in the fund and their mailing addresses. The fees received by Investment Manager (whether from the mutual fund or from individual investor's accounts) are for the services provided to the investors. Investment Manager's services do not relate to real or tangible personal property and do not require that the client be physically present, therefore, the benefit of Investment Manager's services is received where the investors are located and Investment Manager's apportionable receipts must be attributed to those locations.

(305) Special rules related to extending credit performed by nonfinancial institutions. Businesses not included in the definition of a financial institution under WAC 458-20-19404 that provide services related to the extension of credit must attribute their income from such activities as follows:

(a) Activities related to extending credit where real property secures the debt. Such activities include, but are not limited to, servicing loans, making loans subject to deeds of trust or mortgages (including any fees in the nature of interest related to the loan), and buying and selling loans. Apportionable receipts from these activities are attributed in the same manner as a financial institution attributes these apportionable receipts under WAC 458-20-19404.

(b) Activities related to credit cards. Such activities include, but are not limited to, issuing credit cards, servicing, and billing. Apportionable receipts from these activities are attributed to the billing address of the card holder.

(c) Other activities related to extending credit where real property does not secure the debt. Such activities include, but are not limited to, servicing loans, making loans (including any fees related to such loans), and buying and selling loans. Apportionable receipts from these activities are attributed in the same manner a financial institution attributes income under WAC 458-20-19404.

(d) All other apportionable receipts from such businesses are attributed using subsections (301) through (304) of this rule or WAC 458-20-19403.

(306) What does “unable to attribute” mean? A taxpayer is “unable to attribute” apportionable receipts when the taxpayer has no commercially reasonable means to acquire the information necessary to attribute the apportionable receipts. Cost and time may be considered to determine whether a taxpayer has no commercially reasonable means to acquire the information necessary to attribute apportionable receipts.

Example 33: One office of ZYX LLC has information that can easily be used to determine a reasonable proportional attribution of receipts, but does not provide this information to the office preparing the tax returns. ZYX LLC must use the information maintained by the marketing office to attribute its receipts.

Example 34: CBA, Inc. is entitled to receive information from an affiliate or unrelated third party which it could use to determine where the benefit of its services is received but chooses not to obtain that information. CBA, Inc. must use the information maintained by the affiliate or unrelated third party to attribute its apportionable receipts.

Example 35: Same facts as Example 34, except that the information is raw data that must be formatted and otherwise processed at a cost that exceeds a reasonable estimate of the possible difference in the amount of tax CBA, Inc. would owe if used another attribution method authorized in subsection 301(b) through (f). In this case, it is not commercially reasonable for CBA, Inc. to use this data to determine where to attribute its income.

...

(403) Throw-out income. Throw-out income includes all apportionable receipts attributed to states where the taxpayer:

(a) Is not taxable (see subsection (107) of this rule); and

(b) At least part of the activity of the taxpayer related to the throw-out income is performed in Washington.

Example 37: XYZ Corp. performs all services in Washington and has apportionable receipts attributed using the criteria listed in subsections (301) through (305) of this rule or WAC 458-20-19403 as follows: Washington \$500,000; Idaho \$200,000; Oregon \$100,000; and California \$300,000. XYZ Corp. is subject to Oregon and Idaho corporate income tax, but does not owe any California business activities taxes. XYZ does not have any throw-out income because Oregon and Idaho impose a business activities tax on its activities and it is deemed to be taxable in California because it satisfies the minimum nexus standards explained in WAC 458-20-19401 (more than \$250,000 in receipts). XYZ's receipts factor is: $500,000/1,100,000$ or 45.45%.

Example 38: Same facts as Example 37 except Idaho does not impose any tax on XYZ Corp. The \$200,000 attributed to Idaho is throw-out income that is excluded from the denominator because: XYZ Corp. is not subject to Idaho business activities taxes; does not have substantial nexus

with Idaho under Washington standards; and performs in Washington at least part of the activities related to the receipts attributed to Idaho. The receipts factor is 500,000/900,000 or 55.56%.

Example 39: The same facts as Example 38 except XYZ Corp. performs no activities in Washington related to the \$200,000 attributed to Idaho. In this situation, the \$200,000 is not throw-out income and remains in the denominator. The receipts factor is: 500,000/1,100,000 or 45.45%.

**WASH. ADMIN. CODE 458 -20 -19403 . APPORTIONABLE ROYALTY RECEIPTS
ATTRIBUTION.**

In relevant part only

458-20-19403(101) (101) General. Effective June 1, 2010, Washington changed its method of apportioning royalty receipts. This rule only addresses how apportionable royalty receipts must be attributed for the purposes of economic nexus and single factor receipts apportionment. This rule is limited to the attribution of apportionable royalty receipts for periods after May 31, 2010.

...

(106)

(a) "Apportionable royalty receipts" means all compensation for the use of intangible property, including charges in the nature of royalties, regardless of where the intangible property will be used. Apportionable royalty receipts does not include:

(i) Compensation for any natural resources;

(ii) The licensing of prewritten computer software to an end user;

(iii) The licensing of digital goods, digital codes, or digital automated services to an end user as defined in RCW 82.04.190(11); or

(iv) Receipts from the outright sale of intangible property.

(b) "Intangible property" includes: Copyrights, patents, licenses, franchises, trademarks, trade names, and other similar intangible property/rights.

(c) "Reasonable method of proportionally attributing" means a method of determining where the use occurs, and thus where receipts are attributed that is uniform, consistent, accurately reflects the market, and is not distortive.

(201) Attribution of income. Apportionable royalty receipts are attributed to states based on a cascading method or series of steps. The department expects that most taxpayers will attribute apportionable royalty receipts based on (a)(i) of this subsection because the department believes that either taxpayers will know the place of use or a "reasonable method of proportionally attributing" receipts will generally be available. These steps are:

(a) Where the customer uses the intangible property.

(i) If a taxpayer can reasonably determine the amount of a specific apportionable royalty receipt that relates to a specific use in a state, that royalty receipt is attributable to that state. This may be shown by application of a reasonable method of proportionally attributing use, and thus receipts, among the states. The result determines the apportionable royalty receipts attributed to each state. Under certain situations, the use of data based on an attribution method specified in (b) and (c) of this subsection may also be a reasonable method of proportionally attributing receipts among states.

(ii) If a taxpayer is unable to separately determine, or use a reasonable method of proportionally attributing, the use and receipts in specific states under (a)(i) of this subsection, and the customer used the intangible property in multiple states, the apportionable royalty receipts are attributed to the state in which the intangible property was primarily used. Primarily means, in this case, more than fifty percent.

(b) Office of negotiation. If the taxpayer is unable to attribute apportionable royalty receipts to a location under (a) of this subsection, then apportionable royalty receipts must be attributed to the office of the customer from which the royalty agreement with the taxpayer was negotiated.

(c) If the taxpayer is unable to attribute apportionable royalty receipts to a location under (a) and (b) of this subsection, then the steps specified in WAC 458-20-19402 (301)(c) through (g) shall apply to apportionable royalty receipts.

(202) Framework for analysis of the “use of intangible property.” The use of intangible property and therefore the attribution of apportionable royalty receipts from the use of intangible property will generally fall into one of the following three categories:

(a) Marketing use means the intangible property is used by the taxpayer’s customer for purposes that include, but are not limited to, marketing, displaying, selling, and exhibiting. The use of the intangible property is connected to the sale of goods or services. Typically, this category includes trademarks, copyrights, trade names, logos, or other intangibles with promotional value. Receipts from the marketing use of intangible property are generally attributed to the location of the consumer of the goods or services promoted using the intangible property.

Example 1: SportsCo licenses to AthleticCo the right to use its trademark on a basketball that AthleticCo manufactures, markets, and sells at retail on its web site. This is a marketing use. SportsCo is paid a fee based on AthleticCo's basketball sales in multiple states. SportsCo knows that sales from the AthleticCo web site delivered to Washington represent 10% of AthleticCo's total sales. Pursuant to subsection (201)(a)(i) of this section, SportsCo will attribute 10% of its apportionable royalty receipts received from AthleticCo to Washington. The remaining 90% will be attributed to other states.

Example 2: Same facts as Example 1, except that AthleticCo sells its basketballs at wholesale to MiddleCo, a distributor with its receiving warehouse located in Idaho. MiddleCo then sells the basketballs to RetailW, a retailer with stores in Washington, Oregon, and California. SportsCo would generally attribute its apportionable royalty receipts to the location of RetailW's customers. However, SportsCo does not have any data, and cannot reasonably obtain any data, relating to RetailW's customer locations. Pursuant to subsection (201)(a)(i) of this section, SportsCo may reasonably attribute receipts to Washington based on the percentage of RetailW's store locations in Washington as long as such attribution does not distort the number of customers in each state. SportsCo knows that 15% of RetailW's store locations are in Washington therefore it is reasonable for SportsCo to attribute 15% of its apportionable royalty receipts to Washington. The remaining 85% will be attributed to other states.

Example 3: MusicCo licenses to RetailCo the right to make copies of a digital song and sell those copies at retail on the internet for the U.S. market only. This is a marketing use. RetailCo has a single copy of the song on its server in Virginia. Each time a customer comes to RetailCo's web site and makes a purchase of the song, RetailCo creates a copy of the song (e.g., a new file) that is then available for sale to the customer. MusicCo would usually attribute its apportionable royalty receipts to the location of RetailCo's customers. However, MusicCo does not have any data, and cannot reasonably obtain any specific data, relating to RetailCo's customers' locations. Pursuant to subsection (201)(a)(i) of this section, MusicCo may reasonably attribute receipts to each state based on the percentage that each state's population represents in relation to the total market population, which in this case is the U.S. population, as long as such attribution does not distort the number of customers in each state.

Example 4: A local baseball star, Joe Ball, plays for a professional athletic franchise located in Washington. Joe Ball licenses to T-ShirtCo the right to put his image on t-shirts and sell them on the internet in the U.S. market. This is a marketing use limited to the U.S. by license. Joe Ball does not know where T-ShirtCo's customers are located and cannot reasonably obtain data to reasonably attribute receipts. In the absence of actual sales data from T-ShirtCo, Joe Ball cannot use relative population data to attribute receipts to the states as was done in Example 3 above. This is because Joe Ball is an overwhelmingly "local" celebrity in Washington. Joe Ball does not have a "national appeal" such that t-shirt sales by TShirtCo would be significant outside Washington. In this case, Joe Ball is unable to separately determine the use of the intangible property in specific states pursuant to subsection (201)(a)(i) of this section. However, it is reasonable for Joe Ball to assume that sales by T-ShirtCo of Joe Ball shirts are primarily delivered to customers in Washington. Accordingly, Joe Ball should assign all receipts received from T-ShirtCo to Washington, pursuant to subsection (201)(a)(ii) of this section.

Example 5: MegaComputer ("Mega") manufactures and sells computers. SoftwareCo licenses to MegaComputer the right to copy and install the software on Mega's computers, which are then offered for sale to consumers. This is a marketing use by Mega. Mega sells its computers to DistributorX that in turn sells the computers to RetailerY. Mega uses the intangible property at the location of the consumer. If SoftwareCo can attribute its receipts to the location of the consumer (e.g., through the use of software registration data obtained

from consumer), SoftwareCo should do so. In the absence of that more precise information, and pursuant to subsection (201)(a)(i) of this section, it would be “reasonable” for SoftwareCo to attribute its receipts in proportion to the number of RetailerY stores in each state.

(b) Nonmarketing use means the intangible property is used for purposes other than marketing, displaying, selling, and exhibiting. This use of the intangible property is often connected to manufacturing, research and development, or other similar nonmarketing uses. Typically, this category includes patents, know-how, designs, processes, models, and similar intangibles. Receipts from the nonmarketing use of intangible property are generally attributed to a specific location or locations where the manufacturing, research and development, or other similar nonmarketing use occurs.

Example 6: RideCo licenses the right to use its patented scooter brake to FunRide for the purpose of manufacturing scooters. FunRide will market the scooter under its own brand. This is a nonmarketing use. RideCo knows that FunRide will manufacture scooters in Michigan and Washington and that the scooter design is used equally in Michigan and Washington. Pursuant to subsection (201)(a)(i) of this section, RideCo will attribute its receipts from the license of its patent equally to Michigan and Washington.

Example 7: BurgerZ licenses to JoeHam the right to use its jumbo hamburger making process and know-how. This is a nonmarketing use. JoeHam markets the jumbo hamburgers under its own brand. JoeHam has two restaurant locations, one in Washington and one in Oregon. BurgerZ's fee for the intangible rights is based on a percentage of sales at each location. Pursuant to subsection (201)(a)(i) of this section, BurgerZ will attribute receipts from its license with JoeHam to each location based on sales at those locations.

Example 8: WidgetCo licenses the use of its patent to ManuCo, to manufacture widgets. ManuCo has three manufacturing plants located in Michigan where it will use the patent for manufacturing widgets. ManuCo also has a single research and development (R&D) facility in Washington where it will use the patented technology to develop the next generation of its widgets. These are nonmarketing uses. WidgetCo charges ManuCo a single price for the use of the patent in manufacturing and R&D. In the absence of information to the contrary, it is reasonable for WidgetCo to assume ManuCo's use of the patent is equal at all of ManuCo's relevant locations. Pursuant to subsection (201)(a)(i) of this section, because there are four locations where the patent is used equally, WidgetCo will attribute 25% of its apportionable royalty receipts to each of the four locations. Accordingly, 75% of the apportionable royalty receipts will be attributed to Michigan to reflect the use of the patent at the three manufacturing locations, and 25% of the apportionable royalty receipts will be attributable to Washington to reflect the use of the patent at the single R&D location.

(c) Mixed use means licensing the use of intangible property for both marketing and nonmarketing uses. Mixed use licenses may be sold for a single fee or more than one fee.

(i) Single fee. Where a single fee is charged for the mixed use license, it will be presumed that receipts were earned for a “marketing use” pursuant to the guidelines provided in (a) of this subsection, except to the extent that the taxpayer

can reasonably establish otherwise or the department of revenue determines otherwise.

Example 9: ProcessCo licenses to KimchiCo, for a single fee, the right to use its patent and trademark for manufacturing and marketing a food processing device. KimchiCo has a single manufacturing plant in Washington and markets the finished product solely in Korea. This mixed use license for a single fee is presumed to be for a marketing use. Accordingly, ProcessCo must attribute receipts under the guidelines established for marketing uses. Pursuant to subsection (201)(a)(i) of this section, KimchiCo is marketing and selling the device only in Korea; therefore, all receipts will be attributed to Korea.

Example 10: FranchiseCo operates a restaurant franchising business and licenses the right to use its trademark, patent, and know-how to EatQuick for a single fee. EatQuick will use the intangibles to create and market its food product. This is a mixed use license for a single fee and will be presumed to be for a marketing use. EatQuick has a single restaurant location in Washington, where all sales are made. Pursuant to subsection (201)(a)(i) of this section, the intangible property is used by EatQuick in Washington at its restaurant location. Taxpayer will attribute 100% of its apportionable royalty receipts earned under the EatQuick license to Washington.

Example 11: Same facts as Example 10, except that EatQuick has five restaurant locations, one each in: Washington, California, Oregon, Idaho, and Montana. EatQuick pays an annual lump sum to FoodCo. This is a mixed use license for a single fee and will be presumed to be for marketing use. Further, FranchiseCo knows that EatQuick's use of the intangible property is equal at all locations. The intangible property is used equally by EatQuick in five states including Washington. Accordingly, pursuant to subsection (201)(a)(i) of this section, FoodCo will attribute 20% of its apportionable royalty receipts to each location, including Washington.

(ii) More than one fee. Where the mixed use license involves separate fees for each type of use and separate itemization is reasonable, then each fee will receive separate attribution treatment pursuant to (a) and (b) of this subsection. If the department determines that the separate itemization is not reasonable, the department may provide for more accurate attribution using the guidelines in (a) and (b) of this subsection.

Example 12: Same as Example 9, except the license agreement states that the nonmarketing use of the patent is valued at \$450,000, and the marketing use of the trademark is valued at \$550,000. This is a mixed use license with more than one fee. The stated values for the separate uses are reasonable. Pursuant to subsection (201)(a)(i) of this section, the receipts associated with the nonmarketing use are \$450,000 and attributable to Washington where the patent is used in manufacturing. The receipts associated with the marketing use are \$550,000 and attributed to Korea where the trademark is used for marketing and selling the finished product.

WISCONSIN

WISCONSIN STATUTES

§ 71.25 -- SITUS OF INCOME; ALLOCATION AND APPORTIONMENT.

In relevant part only

For purposes of determining the situs of income under this section and Section 71.255(5)(a)1. and 2.:

...

(9) Sales factor . For purposes of sub. (5):

(a) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period. For sales of tangible personal property, the numerator of the sales factor is the sales of the taxpayer during the tax period under par. (b) 1 and 2 plus 100 percent of the sales of the taxpayer during the tax period under pars. (b)2m and 3 and (c). For purposes of applying pars. (b) 2m. and 3. and (c), if a taxpayer is within another state's jurisdiction for income or franchise tax purposes for any part of the taxable year, it is considered to be within that state's jurisdiction for income or franchise tax purposes for the entire taxable year.

(b) Sales of tangible personal property are in this state if any of the following occur:

1. The property is delivered or shipped to a purchaser, other than the federal government, within this state regardless of the f.o.b. point or other conditions of the sale.

2. The property is shipped from an office, store, warehouse, factory or other place of storage in this state and delivered to the federal government within this state regardless of the f.o.b. point or other conditions of sale.

2m. The property is shipped from an office, store, warehouse, factory or other place of storage in this state and delivered to the federal government outside this state and the taxpayer is not within the jurisdiction, for income or franchise tax purposes, of the destination state.

3. The property is shipped from an office, store, warehouse, factory or other place of storage in this state to a purchaser other than the federal government and the taxpayer is not within the jurisdiction, for income or franchise tax purposes, of the destination state.

(c) Sales of tangible personal property by an office in this state to a purchaser in another state and not shipped or delivered from this state are in this state if the taxpayer is not within the jurisdiction for income tax purposes of either the state from which the property is delivered or shipped or of the destination state.

(df)

1. Gross receipts from the use of computer software are in this state if the purchaser or licensee uses the computer software at a location in this state.

2. Computer software is used at a location in this state if the purchaser or licensee uses the computer software in the regular course of business operations in this state, for personal use in this state, or if the purchaser or licensee is an individual whose domicile is in this state. If the purchaser or licensee uses the computer software in more than one state, the gross receipts shall be divided among those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the computer software in those states. To determine computer software use in this state, the department may consider the number of users in each state where the computer software is used, the number of site licenses or workstations in this state, and any other factors that reflect the use of computer software in this state.

(dh)

1. Gross receipts from services are in this state if the purchaser of the service received the benefit of the service in this state.

2. The benefit of a service is received in this state if any of the following applies:

a. The service relates to real property that is located in this state.

b. The service relates to tangible personal property that is located in this state at the time that the service is received or tangible personal property that is delivered directly or indirectly to customers in this state.

c. The service is provided to an individual who is physically present in this state at the time that the service is received.

d. The service is provided to a person engaged in a trade or business in this state and relates to that person's business in this state.

3. If the purchaser of a service receives the benefit of a service in more than one state, the gross receipts from the performance of the service are included in the numerator of the sales factor according to the portion of the service received in this state.

(dj) Except as provided in par. (df), gross royalties and other gross receipts received for the use or license of intangible property, including patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customer lists, are sales in this state if any of the following applies:

a. The purchaser or licensee uses the intangible property in the operation of a trade or business at a location in this state. If the purchaser or licensee uses the intangible property in the operation of a trade or business in more than one state, the gross royalties and other gross receipts from the use of the intangible property shall be divided between those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the intangible property in those states.

b. The purchaser or licensee is billed for the purchase or license of the use of the intangible property at a location in this state.

c. The purchaser or licensee of the use of the intangible property has its commercial domicile in this state.

(dk) Sales of intangible property, excluding securities, are sales in this state if any of the following applies:

a. The purchaser uses the intangible property in the regular course of business operations in this state or for personal use in this state. If the purchaser uses the intangible property in more than one state, the sales shall be divided between those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the intangible property in those states.

b. The purchaser of the intangible property has its commercial domicile in this state.

c. The purchaser is billed for the purchase of the intangible property at a location in this state.

...