Proposed Special Apportionment Regulation Based on Workgroup Suggestions on 3/22/16:

~~If application of the definition of "receipts" in Article IV, Section 1.(g) or exclusion of receipts under Article IV, section 17 fails to fairly reflect the business activity of the taxpayer in this state, the following methods shall be employed to the extent that they effectuate an equitable allocation and apportionment of the taxpayer's income (or loss)~~If the denominator of the receipts factor is zero under [REF. STATUTORY PROVISIONS DEFINING/OR EXCLUDING RECEIPTS] then the following rules shall apply to the extent they effectuate an equitable allocation and apportionment of the taxpayer's income (or loss):

1) Use of the taxpayer's property and payroll factors [DRAFTER'S NOTE: For states that use a single receipts factor, omit this provision];

2) If use of the taxpayer's property and payroll factors will not effectuate an equitable allocation, then the following rules would be used for including and sourcing receipts in the receipts factor: ~~and apportionment of the taxpayer's income, then:~~

   a) If [PERCENTAGE] or more of the taxpayer's total receipts ~~If the predominance of the taxpayer's income is derived~~ are from interest and ~~related~~ investment income from the maturity, redemption, sale, exchange or other disposition of [marketable] securities, then ~~by treating that taxpayer as a~~ using~~financial institution under this state's apportionment statutes, regulations or rules applicable to those institutions~~ [financial institution receipts factor rules];

   b) If [PERCENTAGE] or more of taxpayer's total receipts ~~If the predominance of the taxpayer's income is~~ are derived from capital gains or losses from the disposition of a business, business segment or capital asset used in the unitary business, then by apportioning the taxpayer's income as follows:

      i) If the capital gain is recognized in a tax period of six months or less, using the prior tax year's property and payroll factors of the business entity or business segment being disposed of; provided that, if more than 50% of the capital gain represents goodwill or other intangible value, by using the receipts factor of the business entity;

      ii) If the capital gain is recognized in a tax period of longer than six months ~~or longer~~, using the current year's property and payroll factors of the business entity or business segment being disposed of; provided that, if more than 50% of the capital gain represents goodwill or other intangible value, by using the receipts factor of the business entity;

   c) If [PERCENTAGE] or more of taxpayer's total receipts ~~If the predominance of the taxpayer's income is~~ are derived from dividends received, that income may be apportioned:

      i) Using the dividend payor's apportionment factors [or property and payroll factors] for the year prior to the year in which the dividend was paid, or

      ii) If it can be shown that the dividend related to income earned in periods other than the year prior to the year in which the dividend was paid, using of the payor's apportionment factors [or property and payroll factors] from that period;

Comment [HH1]: Should this be the first default rule for all states, only states that have property and payroll, or should it be taken out? The group will discuss further. Right now, many states have a rule that if one factor is zero, the other factors would still apply. But this is not true in every state. Karen raised concerns about whether this will create multiple or nowhere taxation where many states are using single sales factors.

Comment [HH2]: There was discussion about whether there should be some threshold for use of these alternatives, together or separately, or if they could all be used together without any threshold. The draft was modified solely for discussion purposes to combine a threshold and the possibility of using the alternatives together.

Comment [HH3]: Karen B. commented that where she has seen this used (NY) the way in which it is done is that the DOR uses the payor's apportionment to determine the source of dividend receipts. There was some discussion about whether this would be workable otherwise.

d) If paragraphs (a), (b), or (c) do not apply, then:

   i) If the taxpayer is a member of a unitary group of corporations but is filing a return as a separate entity, the taxpayer's income may be apportioned using the factors applicable to that combined group;

   ii) Otherwise, the taxpayer's income may be apportioned using the apportionment factors of the owner of the preponderance of beneficial interests in that taxpayer.

3) If the taxpayer's income cannot be equitably apportioned under paragraphs (1) or (2) above, the taxpayer's income may be apportioned to this state in a manner which reflects the extent to which the taxpayer's income was derived from this state in comparison to other states provided that this method would not result in a substantial portion of the income being apportioned to more than one taxing jurisdiction, or not apportioned to any taxing jurisdiction.

NOTES:

Karen - The use of payor's factors for dividends – in NY where this was taken from a system in which that information is determined by the DOR based on the payor's filings. So it can't be the year of the taxpayer's filing.