

Compact Art. IV.18 (Distortion Relief)
FOR DRAFTING GROUP DISCUSSION PURPOSES ONLY
Draft as Discussed by the Subcommittee in November, 2011

February 13, 2012

Current Draft Amendment:

Sec. 18. (a) If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

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

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

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

Excerpt from Current MTC Regulation IV.18(a) for Comparison:

.... In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula may not set forth appropriate procedures for determining the apportionment factors. Nothing in Article IV.18. or in this Regulation IV.18. shall preclude [the tax administrator] from establishing appropriate procedures under Article IV.10. to 17. for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

Policy Questions Discussed in November 2011:

1. Should the draft language of (b)(1) reference "regulations" or should it reference "procedures"? These terms may have been intended to be somewhat interchangeable. Note that the current regulation speaks in terms of "regulations ... set[ting] forth appropriate procedures." Also note, one benefit we've identified from using the term

“regulation” is that it brings with it the safeguards of state administrative procedures acts. But the term “procedures” may do so as well, only more broadly (as in “administrative *procedures act*”).

2. Should “separate accounting” be deleted from the list in (a), or be limited to allocable income? Note that states have occasionally addressed distortion by applying separate accounting in lieu of formulary apportionment - e.g., separately accounting for the income of a real estate investment firm by attributing the gain from each real estate sale to the state where the real estate is located, rather than apportioning the sum of the gains based on the 3-factor formula.
3. Should “combined reporting” be added to the list in (a)? Note, the executive committee explicitly determined it did NOT want to address combined reporting. The concern was that dealing with combined reporting in the context of this UDITPA project would jeopardize completion of our work on critical provisions such as §17. Also note, several state courts have found combined reporting to be inherent in UDITPA apportionment itself, not limited to a method of distortion relief under UDITPA § 18(a)(4).