The income and franchise tax uniformity subcommittee met on November 18, 2008 in San Antonio, Texas and extensively discussed the various proposals for amendment of Regulation IV.18.(a). Only the bolded text set forth in the current regulation, below, would be amended.

The subcommittee voted on five different proposals which imposed varying restrictions on the use of alternative apportionment methods. The first proposal essentially re-stated the statute and was considered the least restrictive form of regulation. The second proposal contained no explicit restrictions beyond those found in Article IV, Section 18 of the Compact, but implied that some reference to the particular nature of the taxpayer’s “business, operation or structure” as creating unfair apportionment would be necessary before a taxpayer or the tax agency could resort to use of equitable apportionment. Proposals three and four were also more restrictive but received no support from the subcommittee. The final proposal, five, mirrored the existing regulation’s language limiting application to “limited and specific cases” producing “incongruous results” but removed the parenthetical phrase suggesting those cases must be “unique and non-recurring.” Option one received 7 votes, option two 9 votes and option five received 5 votes. The subcommittee also voted against including burden of proof requirements in the regulation and voted in favor of including optional language on taxpayer procedures for claiming Section 18 relief.

Those three proposals, with the optional language on procedure, are set forth below.

**Current Model Regulation:**

**Reg. IV.18.(a). Special Rules: In General.** Article IV.18. provides that if the allocation and apportionment provisions of Article IV do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
(1) separate accounting;
(2) the exclusion of any one or more of the factors;
(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article IV.18, permits a departure from the allocation and apportionment provisions of Article IV only in limited and specific cases. Article IV.18. may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and non recurring) produce incongruous results under the apportionment and allocation provisions contained in Article IV.

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 do 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.

Proposals for Amendment:

1. Article IV.18 permits a departure from the allocation and apportionment provisions of Article IV sections 4 through 17 where the extent of the taxpayer’s business activity within the state would not be fairly represented under the allocation and apportionment provisions of those sections.

2. Article IV.18 permits a departure from the allocation and apportionment provisions of Article IV sections 4 through 17 where the extent of the taxpayer’s business activity within the state would not be fairly represented under the allocation and apportionment provisions of those sections due to the nature of the taxpayer’s business, operations or structure.

5. Article IV.18 permits a departure from the allocation and apportionment provisions of Article IV sections 4 though 17 only in limited and specific cases where unusual factual situations produce incongruous results under the apportionment and allocation provisions contained in those sections.

Optional Procedural Requirement:

[A Taxpayer seeking to invoke the provisions of [Section 18] must file a petition with the [Department] contemporaneously with the filing or an original or amended return, identifying the relief sought and the factual basis under which relief is sought, and must identify the differences in apportionment calculations should the relief be granted.]