

THIS IS A DRAFT FOR DISCUSSION PURPOSES AND DOES NOT NECESSARILY REPRESENT THE POSITION OF THE FRANCHISE TAX BOARD BUT ONLY REFLECTS THE OPINION OF THE AUTHOR.

(g) Location of loans

~~(1) (A) A loan is considered to be located within this state if it is properly assigned to a regular place of business of the taxpayer within this state.~~

~~(B) A loan is properly assigned to the regular place of business with which it has a preponderance of substantive contacts. A loan assigned by the taxpayer to a regular place of business without the state shall be presumed to have been properly assigned if—~~

~~(i) the taxpayer has assigned, in the regular course of its business, such loan on its records to a regular place of business consistent with Federal or state regulatory requirements;~~

~~(ii) such assignment on its records is based upon substantive contacts of the loan to such regular place of business; and~~

~~(iii) the taxpayer uses said records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.~~

~~(C) The presumption of proper assignment of a loan provided in subparagraph (B) of paragraph (1) of this subsection may be rebutted upon a showing by the [State Tax Administrator], supported by a preponderance of the evidence, that the preponderance of substantive contacts regarding such loan did not occur at the regular place of business to which it was assigned on the taxpayer's records. When such presumption has been rebutted, the loan shall then be located within this state if (i) the taxpayer had a regular place of business within this state at the time the loan was made; and (ii) the taxpayer fails to show, by a preponderance of the evidence, that the preponderance of substantive contacts regarding such loan did not occur within this state.~~

~~(2) In the case of a loan which is assigned by the taxpayer to a place without this state which is not a regular place of business, it shall be presumed, subject to rebuttal by the taxpayer on a showing supported by the preponderance of evidence, that the preponderance of substantive contacts regarding the loan occurred within this state if, at the time the loan was made the taxpayer's commercial domicile, as defined by subsection (c) of Section 2, was within this state.~~

~~(3) (1) Loans shall be assigned to the state in which the preponderance of substantive contacts related to the loan occurred.~~

(A) To determine the preponderance of substantive contacts related to loans, loans may be grouped by classes of like instruments. For example, loans could be grouped as consumer loans, real property loans and commercial loans. The method of grouping should be consistent with the method of tracking loans within the taxpayer's own books and records. If a taxpayer cannot group loans together into classes, the preponderance of substantive contacts shall be determined on a loan by loan basis.

(B) To determine the state in which the preponderance of substantive contacts relating to a loan have occurred, the facts and circumstances regarding the loans at issue shall be reviewed on a case by case basis and consideration shall be given to such activities as the solicitation, investigation, negotiation, approval and administration of the loans.

(C) The determination of "preponderance of substantive contacts" shall be made by determining the costs associated with each activity for the loan or group of loans, by state. The state with the highest costs incurred will be the state to which the loans are assigned.

- a. Example: Taxpayer makes commercial loans in states A,B, and C. The taxpayer has employees who solicit customers and negotiate loans with customers in all three states but the investigation, approval and administration of the loans all occurs in state A. The taxpayer determines that for the class of loans, it incurs costs of \$5,000 for solicitation in each state, \$3,000 for negotiations in each state and \$10,000 in State A due to the approval and administration of the loans. The class of loans shall be assigned in full to State A as State A has the preponderance of substantive contacts as demonstrated by incurred costs of \$18,000.

The terms "solicitation", "investigation", "negotiation", "approval" and "administration" are defined as follows:

(A) *Solicitation*. Solicitation is either active or passive. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. Such activity is located at the regular place of business which the taxpayer's employee is regularly connected with or working out of, regardless of where the services of such employee were actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

(B) *Investigation*. Investigation is the procedure whereby employees of the taxpayer determine the credit-worthiness of the customer as well as the degree of risk involved in making a particular agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(C) *Negotiation*. Negotiation is the procedure whereby employees of the taxpayer and its customer determine the terms of the agreement (e.g., the amount, duration, interest rate, frequency of repayment, currency denomination and security required). Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(D) *Approval*. Approval is the procedure whereby employees or the board of directors of the taxpayer make the final determination whether to enter into the agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed. If the board of directors makes the final determination, such activity is located at the commercial domicile of the taxpayer.

(E) *Administration*. Administration is the process of managing the account. This process includes bookkeeping, collecting the payments, corresponding with the customer, reporting to management regarding the status of the agreement and proceeding against the borrower or the security interest if the borrower is in default. Such activity is located at the regular place of business which oversees this activity.

(h) Special Rule for automated loans programs

If the substantive contacts are performed primarily through the use of automated systems, such as computerized investigation and approval processes, the loans shall be assigned to the location where these activities are undertaken by the bank.

1. Example. Taxpayer makes credit card loans to consumers in all 50 states. The process by which these cards are solicited is through the mail and the Internet. The process of approving the applications for the cards and administering the accounts all takes place utilizing a centralized computer system in State A. The loans will all be assigned to State A.
2. Example. Customers in State A pick up applications for the loans at their local branches and submit them back to local branches in State A. All substantive decisions regarding approval, investigation and administration of the loans are performed in State B. The loans are assigned to State B as the preponderance of substantive contacts occur in State B.

~~(h)~~ **(i) Location of credit card receivables.** For purposes of determining the location of credit card receivables, credit card receivables shall be treated as loans and shall be subject to the provisions of subsections (g) and (h) of this section.

~~(i)~~ **(j) Period for which properly assigned loan remains assigned.** A loan that has been properly assigned to a state shall, absent any change of material fact, remain assigned to said state for the length of the original term of the loan. Thereafter, said loan may be properly assigned to another state if said loan has a preponderance of substantive contacts to a regular place of business there.

(1) The sale of a loan, or a pool of loans, to another entity that is within the same controlled group of corporations, as the seller shall not be considered as a material change of fact.

(2) For purposes of this subsection, “controlled group of corporations” means “controlled group of corporations” as defined in Section 1563(a) of the Internal Revenue Code, except that:

(a) “More than 50 percent” shall be substituted for “at least 80 percent” each place it appears in Section 1563(a)(1) of the Internal Revenue Code.

(b) The determination shall be made without regard to subsections (a)(4) and (e)(3)(C) of Section 1563 of the Internal Revenue Code.