



MULTISTATE TAX COMMISSION

Maximizing the synergies of multi-state tax cooperation

To: MTC Executive Committee

**From: Wood Miller, Chair
MTC Uniformity Committee**

Date: May 8, 2014

Subject: Uniformity Committee Report on Review of Report of the Hearing Officer Multistate Tax Compact Article IV [UDITPA] Proposed Amendments

The focus of this memo is the MTC's proposed amendments to Article IV [UDITPA] as set forth at Multistate Tax Compact Article IV (the "Model"). The purpose of this memo is to summarize the results of the Uniformity Committee's review of the recommendations of the Hearing Officer that the Commission should make certain revisions to the Model. In addition, the Hearing Officer noted a conflict between two provisions of the Model. Therefore, the Uniformity Committee is proposing a technical change to the Model as previously submitted for public hearing, in order to resolve the conflict.

A. Procedural Background

In September 2006, the Commission (MTC) recommended to the Uniform Law Commission (ULC) that the ULC initiate a project to revise UDITPA.¹ The MTC specifically recommended that the ULC focus on the following five UDITPA provisions:

1. Sales factor numerator sourcing for services and intangibles (market-based sourcing) (Compact Art. IV.17)
2. Sales Definition (Compact Art. IV.1 (g))
3. Factor Weighting (Compact Art. IV.9)
4. Business Income Definition (Compact Art. IV.1 (a))
5. Equitable Apportionment (Compact Art. IV. 18)

¹ The ULC had been responsible for originally drafting UDITPA in 1957.

In August 2007, the ULC determined that it would review and “revise UTITPA in its entirety.” The ULC formed a committee to undertake the review and appointed Prentiss Wilson, currently Of Counsel to Sutherland Asbill & Brennan, and Richard Pomp, Alva P. Loisel Professor of Law at the University of Connecticut Law School, to serve as reporters for the project.² The reporters convened a series of meetings to receive public comment. Some taxpayer representatives and others opposed the ULC effort. In June 2009, the ULC discharged the UDITPA committee and announced that no further action would be undertaken at that time, with the understanding that the ULC might re-open the project at a later date.

The MTC had previously suspended its own efforts to revise Article IV of the Compact (UDITPA) while the ULC studied possible UDITPA revisions. After the ULC decided to drop its efforts, in July 2009 the MTC Executive Committee referred possible revisions to Article IV of the Compact (specifically the five areas that the MTC had suggested as the focus of the ULC’s project) to the MTC Uniformity Committee. The Uniformity Committee completed its work on the Model in March 2012. In December 2012 the Executive Committee approved the proposed Model for public hearing.³

The public hearing was held on March 28, 2013, in Washington, DC following more than 30 days public notice. The hearing was well attended, both in-person and by telephone, with approximately 35 people identifying themselves. Oral comments were received regarding amendments to each of the five provisions. In addition, nine sets of written comments were received and are available on the MTC website at <http://www.mtc.gov/Uniformity.aspx?id=4562>.

Professor Pomp issued his Hearing Officer Report on October 25, 2013. The Hearing Officer made seven specific recommendations for changes to the proposed Model. Those recommendations are:

1. The Commission should consider the Hearing Officer’s redraft of Article IV.1 (a) (definition of apportionable income).
2. The Commission need not explicitly exclude receipts from hedging transactions and the treasury function in the receipts factor under Article IV.1 (g) because they are already excluded under the redraft of Article 17.
3. The Commission should consider the Hearing Officer’s two alternative drafts of Article IV.1 (g) (definition of gross receipts).
4. The Commission should consider adding an explicit provision to Section 18 to require that the party invoking alternative apportionment has the burden of proof that the statutory conditions for alternative

² Professor Pomp subsequently served as Hearing Officer for the Commission in conducting the public hearing on these proposed Article IV (UDITPA) amendments and later authored the Hearing Officer report.

³ A copy of the proposed Model as approved for public hearing on December 6, 2012 is attached as Exhibit 1. In addition, a copy of former MTC General Counsel Shirley Sicilian’s May 3, 2012 report to Cory Fong, then the Chair of the Multistate Tax Commission and to the Executive Committee, summarizing the recommended amendments to MTC Compact Article IV is attached as Exhibit 2. These documents are also available on the MTC website at <http://www.mtc.gov/Uniformity.aspx?id=4562>.

apportionment have been satisfied. In addition, the burden of proof should be the same for either the taxpayer or the tax administrator.

5. The Commission should consider adding an explicit prohibition in Section 18 that would bar the tax administrator from imposing a penalty on a taxpayer (except in cases where the transactions at issue are the result of tax avoidance such as sham transactions, or lack economic substance, do not reflect arm's length pricing, violate the step transaction doctrine, or otherwise reflect a tax avoidance strategy), when the tax administrator has successfully invoked alternative apportionment but the taxpayer has complied with the general apportionment rules in filing its return.

6. The Commission should include a provision in Section 18 that would prohibit the tax administrator from retroactively revoking his prior approval of a taxpayer's alternative apportionment method, unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the tax administrator reasonably relied.

7. The Hearing Officer recommends that a tax department's position on alternative apportionment that has broad application to an entire industry and that was intended to be applied generally and uniformly to that industry should be published as a regulation. A regulation serves the goals of transparency, notice, and even-handed treatment of similarly situated taxpayers.

At its meeting in New Orleans in December 2013, the Executive Committee received the Hearing Officer Report. Following discussion, the Executive Committee directed the Uniformity Committee to review the Hearing Officer's seven specific recommendations for changes to the proposed Model and to report back to the Executive Committee with its recommendations as to each such recommendation.⁴

In January and February 2014, the Uniformity Committee held a series of teleconferences to review the Hearing Officer's recommended changes to the Model. At its March 2014 meeting in Denver, the Uniformity Committee voted as to whether the MTC should revise the Model as to each of those recommendations.

B. Review of The Hearing Officer's Recommendations

The following references to the Hearing Officer's Report use the pagination found in the Tax Analyst publication "Report of the Hearing Officer Multistate Tax Compact Article IV [UDITPA], Proposed

⁴ In addition to his specific recommendations, the Hearing Officer expressed his opinions on a number of the provisions of the proposed Model. For example, he suggested improvements to the cost of performance approach for states still using that method or for states that may wish to revisit that method after first testing the application of market-based sourcing. However, in these cases the Hearing Officer did not make a specific recommendation for any changes to the Model. The Executive Committee's charge to the Uniformity Committee was limited to reviewing the Hearing Officer's specific recommendations for changes to the Model. Therefore, the Uniformity Committee took no position on any of the Hearing Officer's suggestions that were not reflected in a specific recommendation for a change to the Model. However, the committee found the Hearing Officer's suggestions to be quite thoughtful and appreciates the time he took to make them. His suggestions should help inform the committee's consideration of model Article IV [UDITPA] regulations.

Amendments,” consisting of 84 pages.⁵ A chart that sets forth a comparison between the Hearing Officer’s specific recommendations and the provisions of the Model that relate to those recommendations is attached as Exhibit 3.

1. Definition of Apportionable Income.

The Hearing Officer recommended two changes to the Model’s definition of “apportionable income,” as discussed immediately below.

A. Use of Phrase “regular course” in Transactional Test.

The Hearing Officer generally approved of the proposed changes to the definition but felt that retention of the word “regular” in the transactional test had led to uncertainty and litigation in the past and would do so again, especially since the word “regular” was eliminated in the functional test.⁶ The Hearing Officer recommended removing the word “regular” in the transactional test, and broadened the definition:

Art. IV.1 (a) “Apportionable income” means:

(i) all income that is apportionable under the Constitution of the United States and is not allocated under the laws of this state, including:

(A) income related to the operation of the taxpayer’s trade or business, or

(B) income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business operations.

...

Art. IV.1 (e) "Non-apportionable income" means all income other than apportionable income.

Twelve members of the Uniformity Committee voted in favor of the Model, three in favor of the Hearing Officer recommendation and one member abstained. The committee considered, among other things, that the Model, as proposed, would include an overarching constitutional test for apportionable income, with the transactional and functional tests being relegated to non-exclusive examples of income that would meet that standard. Therefore, the likelihood of litigation probing whether a transaction was in the “regular” course of a taxpayer’s business would be greatly diminished. The Hearing Officer, however, felt that no harm was done by eliminating the word “regular” and that it was better to have a statutory definition that dealt with most situations in order to minimize appeals to the more amorphous constitutional standard. He also felt it was better to minimize appeals to the constitutional standard in

⁵ An additional copy of the Hearing Officer Report is available on the MTC website at <http://www.mtc.gov/Uniformity.aspx?id=4562>. However, the pagination in that version is different than the pagination in the Tax Analyst version.

⁶ Hearing Officer Report, pages 32 –40.

the case of auditors who might not be lawyers or who would find it difficult to apply a general constitutional standard to specific factual situations during an audit.

B. Hearing Officer's Proposed Amendment to Apportionable Income Definition: Changing "and" to "or" between Transactional and Functional Tests, Art. IV.1 (a)(i).

The Hearing Officer also recommended a change to the definition of "apportionable" income, which would substitute "or" for the Model's use of "and" to connect the list of transactional and functional tests as included examples of apportionable income.⁷ The Hearing Officer suggested the use of "or" would make clear that either the functional or transactional test would support an apportionable income finding. He drew a comparison with Section 61 of the Internal Revenue Code upon which his suggested draft is based. The words "and" and "or" are not synonyms in the federal tax law and are generally interpreted differently under standard rules of statutory construction. The Hearing Officer concluded there is no downside from this modest change that could reduce potential litigation.

The Uniformity Committee voted 12 in favor of the Model, 4 in favor of the Hearing Officer Recommendation and 1 member abstaining. It concluded that the current use of "and" was grammatically appropriate for a list of examples following a broad rule. The committee also concluded that the conjunction "and" reads better and, because the references to the transactional and functional approaches were preceded by the term "including," would not lead to a conclusion that both transactional and functional tests must be met for income to be considered apportionable.

2. Amending Definition of the Receipts Factor.

The Hearing Officer suggested revisions to the Model's definition of "receipts" to be applied for purposes of the receipts factor. The Model's definition of the "receipts" for purposes of the receipts (sales) factor, as set forth in Compact Art. IV.1 (g), excludes all receipts except those which meet the transactional test of business income and also excludes receipts from hedging transactions and transactions involving cash or securities, except in the case of securities dealers. The Model provides:

Receipts means all gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer's trade or business; except that receipts of a taxpayer other than a securities dealer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

The Hearing Officer stated his belief that the apportionment formula is subject to the constitutional mandate that it be fair, reflect a reasonable sense of how income is generated, and be rationally related to values connected with the taxing state. He believed that there should be strong and compelling reasons for excluding from the sales factor the receipts related to income that is included in the preapportionment tax base. He cautioned that the suggested revisions might violate this constitutional standard in the case of receipts generated by transactions satisfying the functional test. He also worried

⁷ Hearing Officer Report, page 33.

that by including only receipts from income satisfying the transactional test the revision was inviting litigation and tax planning. In a digital world, the line between property and services can be blurred, as well as the line between tangible and intangible property. The goal of the revisions should be to reduce pressure on these categories. The Hearing Officer concluded that the revisions do the opposite.⁸

The Hearing Officer also noted that the exclusion of the receipts from hedging or the treasury function is unnecessary and he feared that it would create a dangerous precedent. He felt it is unnecessary because these receipts were already excluded under the revisions to Section 17. He concluded that it is a bad precedent because one could easily imagine taxpayers lobbying a legislature to exclude receipts that were in their particular self-interest. The Hearing Officer also stated that there could be problems under the Model's approach to the sales factor if the bulk of a taxpayer's income is properly treated under the "functional test" for example, the situation where a business sells a large capital asset with a small and unrelated "transactional" revenue stream.

Finally, the Hearing Officer noted a defect in the Model's reference as well as the revision's reference to "gross receipts of the taxpayer not allocated ..." He noted that under the Model (and the revision) receipts are not allocated, rather nonbusiness income (which is called "nonapportionable income" under the revisions) is allocated. His draft corrects that defect.

The Hearing Officer proposed two alternative draft definitions of receipts. The Hearing Officer's Alternative One provides that: "Receipts" means gross receipts of the taxpayer that are received from, or associated with, transactions or activities generating apportionable business [sic] income defined in Article IV.1."

Alternative Two provides that: "Receipts" means gross receipts of the taxpayer that are received from, or associated with, transactions or activities generating apportionable business [sic] income defined in Article IV.1 excluding substantial amounts of such gross receipts from an incidental or occasional sale of a fixed asset or other property that was, or is, related to or part of, the operation of the taxpayer's trade or business."

The Uniformity Committee concluded that it did not make sense to vote on either Alternative One or Alternative Two unless the committee determined it agreed with the Hearing Officer's objections to the Model's definition of receipts. The committee concluded that it did not agree with that analysis. In general, the committee concluded that the transactional approach would adequately serve as the apportionment methodology in almost all cases, and in any instance when it did not, resort to Section 18 would be appropriate. The committee also concluded that an inquiry limited to the transactional standard would avoid the most difficult issues that have arisen in litigation

The committee also specifically discussed whether the "carve-out" for securities dealers was inappropriate for a Model statute, and discussed whether the exclusion for hedging, securities and cash transactions could be accomplished with other language. Some committee members expressed the opinion that hedging in particular should be considered an income-producing activity for securities

⁸ Hearing Officer Report, page 74 – 84.

dealers similar to the treatment in general of “retail” or “wholesale” sales. These members expressed general agreement with the Hearing Officer’s conclusion that the definition of sales should encompass all pertinent income-producing activity, especially since so many states have abandoned reliance on property and payroll factors. However, other committee members expressed concerns about difficulties in sourcing a security dealer’s receipts from the treasury function under Section 17 if such receipts are included in the definition of gross receipts. Eventually, the committee voted 14 in favor of the Model as currently written, with two members voting in favor of the Hearing Officer recommendation and one abstention.

3. Burden of proof for alternative apportionment.

The Hearing Officer recommended that Section 18 should contain an explicit provision stating that the party invoking alternative apportionment has the burden of proof that the statutory conditions for alternative apportionment have been satisfied. In addition, the Hearing Officer recommended that the burden of proof should be the same for either the taxpayer or the tax administrator.⁹

The Hearing Officer based his recommendation on general principles of American jurisprudence. As summarized by the Hearing Officer, citing two well-known treatises, those principles are:

First, the party that pleads a fact generally has the burden of proof on that fact.

Second, the burden of proof commonly falls on the party that seeks to change the status quo.

Third, since Section 18 is meant to apply sparingly, general jurisprudential principles of discouraging a disfavored contention would place the burden of proof on the party seeking alternative apportionment.

Fourth, the party with access to particular facts should have the burden of proof.

Finally, the burden of proof is usually placed on the party that contends the more unusual event has occurred.

The Uniformity Committee members who articulated opposition to adopting the Hearing Officer’s recommendation did so for one or more of the following reasons.

First, a number of committee members saw no need for the proposed change since burden of proof is adequately addressed under existing state law which generally places the burden of proof on the party seeking to apply alternative apportionment.

Second, some committee members concluded the issue was more appropriately addressed through regulation or pursuant to caselaw rather than in a uniform statute, especially since changing the burden of proof in a model statute could conflict with state laws that create a presumption of correctness for assessments.

⁹ The Hearing Officer’s discussion of burden of proof is at pages 20 – 22 of the Report.

Third, some committee members concluded that in some cases placing the burden of proof on the state would be inappropriate even if the state is seeking to invoke alternative apportionment. This might be because the industry practice is highly complex or it is the taxpayer that effectively initiates the need for alternative apportionment by changing its long-standing filing methodology. In such cases, the taxpayer would in a better position to defend its filing position than would be the revenue department in its attempt to reject it.

Twelve members voted in favor of the Model and 4 voted in favor of the Hearing Officer recommendation.

4. Imposition of penalty where tax administrator has successfully invoked alternative apportionment but the taxpayer complied with the general apportionment rules.

The Hearing Officer recommended that Section 18 should be amended to make clear that no penalties can be imposed where the tax administrator successfully invokes alternative apportionment but the taxpayer reasonably relied on the statutory allocation and apportionment rules.¹⁰ He did so essentially for tax policy reasons, in that penalties are designed to punish and discourage willful and purposeful conduct. Generally, the Hearing Officer concludes that a taxpayer who complied with the general apportionment rules has not engaged in such conduct and therefore a penalty would be inappropriate as a matter of sound tax policy. Lastly, the Hearing Officer notes that such a taxpayer should not ordinarily be expected to anticipate that the tax department will invoke alternative apportionment.

In general, the committee members concluded that penalty issues should be left to state procedural rules and noted that those rules currently reflect a general policy to not invoke penalties in “innocent” taxpayer situations. One member of the public noted that in some cases, the department may have issued a ruling or interpretation that the general apportionment rule should not apply in certain situations. That person observed that, in such cases, the department should be potentially allowed to apply a penalty if such a taxpayer nevertheless applies the general rule. At least one state noted that it would not apply a penalty the first time the taxpayer applied the general apportionment rule. However, that state noted that if the taxpayer persisted in applying the general apportionment rule, the department would want to retain the ability to apply a penalty.

The committee voted with 13 members in favor of the Model and 3 in favor of the Hearing Officer recommendation.

5. Retroactive revocation of a tax administrator’s prior approval of alternative apportionment.

The Hearing Officer recommended that Section 18 should bar the tax department from retroactively revoking its prior approval of alternative apportionment, in the absence of a material change in, or material misrepresentation of, the facts provided by the taxpayer in support of alternative

¹⁰ The Hearing Officer would allow such penalties in tax avoidance situations. The Hearing Officer’s discussion of the penalty is at pages 22 – 23 of the Report.

apportionment.¹¹ He explains his recommendation as being a response to the reliance interests of taxpayers who file returns based on the tax administrator's prior approval.

A number of committee members felt that existing law in their states already generally barred retroactive revocation of a prior approved alternative apportionment method. One member cautioned against possible unexpected consequences of explicitly barring retroactive revocation. That person pointed out that, for example, a taxpayer might seek to file returns based on the tax administrator's prior approval but in a manner that violates state principles that returns must be filed using consistent methodology from year to year.

Thirteen members voted in favor of the Model and 3 in favor of the Hearing Officer recommendation.

6. Under certain conditions, the department should issue a regulation rather than making an adjustment under equitable apportionment.

The Hearing Officer noted that some persons contend that an ad hoc application of alternative apportionment rather than a regulation is improper when the problem being addressed is widespread. The Hearing Officer noted that situations are becoming common, involving advertising, financial services, and broadcasting where a tax department is using alternative apportionment to address the interaction of various elements in a state's tax regime. As an example, he offered the consequences of a state's adoption of a single-sales factor with a cost of performance (COP) rule, (or a rule that used the percentage of days spent in the taxing state) for assigning receipts from services. An out-of-state provider with numerous in-state customers may never spend any time in the state and accordingly would assign no sales to the state under COP (or under the percentage of days spent) method. Consequently, the taxpayer would apportion no income to the state.

The Hearing Officer noted that this result is entirely predictable. It is hardly an isolated, limited, or non-recurring situation as the taxpayer is representative of a common pattern. There is nothing unique about the taxpayer's facts. The Hearing Officer states that some might conclude that under these facts alternative apportionment is inappropriate at all. Nonetheless, the Hearing Officer concluded that if a tax department decides to invoke alternative apportionment and applies some version of market-based sourcing, that approach should be adopted in the form of a regulation because of the broad application to all out-of-state providers. The Hearing Officer believes that a regulation under these circumstances serves the goals of transparency, notice, and even-handed treatment of similarly situated taxpayers.

A number of committee members concluded that the line drawn by the Hearing Officer was arbitrary, unfair and unworkable. Those members noted that two or more similarly situated taxpayers will often adopt the same apportionment stance due to the receipt of similar tax advice. These members felt it would be inappropriate to require the department to issue regulations merely because a number of cases present the same issue at the same time.

The committee voted unanimously in favor of the Model.¹²

¹¹ The Hearing Officer's discussion of retroactive revocation is at page 23 of the Report.

C. Proposed Technical Correction to Proposed Model As Previously Submitted to the Hearing Officer

At this point, this memo has addressed the specific charge from the Executive Committee to the Uniformity Committee to review the Hearing Officer Report and report the committee's recommendations as a result of that review. However, the Hearing Officer Report disclosed a technical issue in the Model that the Executive Committee might want to address.

In his Report, the Hearing Officer noted a conflict in the proposed Model between proposed Art. IV.1 (g) and Art.IV.17 (a) (4) (ii) (C). Although the Hearing Officer merely noted the conflict and did not propose a resolution, the committee nevertheless concluded that it is necessary for the Commission to resolve the conflict before the Model is submitted to the states. The conflict requires a technical correction only; it does not require a substantive revision to the Model.

The conflict between proposed Art. IV.1 (g) and proposed Art.IV.17 (a) (4) (ii) (C) is reflected in the highlighted language that follows.

Proposed Art. IV.1 (g) provides;

Receipts means all gross receipts of the taxpayer that are not allocated under Sections 4 through 8 of paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer's trade or business; except that receipts of a taxpayer **other than a securities dealer** from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

Proposed Art.IV.17 (a) (4) (ii) (C) provides:

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

(4) in the case of intangible property,

...

(ii) that is sold, if and to the extent the property is used in this state, provided that;

...

(C) all other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the sales factor.

The highlighted language in the two subsections conflict. Under Art.IV.1 (g), gross receipts of a securities dealer are to be included in the receipts factor. But those receipts would be thrown out under proposed Art.IV.17 (a) (4) (ii) (C). If both provisions were to be adopted as written, there could be an

¹² For the most part, COST expressed its support for the Hearing Officer's Section 18 recommendations, on the ground that incorporating some of those recommendations in the Model would add balance to the Model and might facilitate taxpayer acceptance of the Model.

interpretative question in some cases as to which provision was intended to apply. This could lead to conflicting decisions regarding the proper treatment of the gross receipts of a securities dealer.

Subsequent to the Denver meeting, the committee conducted a teleconference to decide what option it wanted to recommend to the Executive Committee to resolve this conflict, which is a result of the interaction of two different policies. First, overall the Model seeks to use a transactional approach to sourcing sales, largely to avoid the issues that are implicated by the functional approach. Excluding securities transactions, hedging transactions and the treasury function from the definition of gross receipts under Proposed Art. IV.1 (g) reflects that policy. However, in order to recognize that the receipts of a securities dealer do constitute gross receipts under the transactional approach, Proposed Art. IV.1 (g) specifically includes those receipts within the definition of gross receipts.

Second, Section 17 reflects a different policy goal. One intention of proposed Section 17 is to avoid attempting to source transactions that cannot be readily sourced. While the goal in both provisions is to make the rules simple and administrable, the difference in the policies led to the present conflict.

If the Executive Committee decides the treatment of gross receipts of a securities dealer is not appropriately addressed in Article IV, the solution is simply to strike out the highlighted language “other than a securities dealer” in Article IV.1 (g). If the Executive Committee decides instead that it does wish to address this issue in Article IV, one possible solution is to add a new subsection (d) to Art. IV. 17, to the following effect: “Section 17(a) (4) (ii) (C) shall not apply in the instance of a securities dealer to the extent that such person acts as a security dealer with respect to the buying and selling of securities.” In that event, the receipts would be included under Article IV. 1 (g) and would not be thrown out under Article IV. 17. If this approach is adopted, other correlative edits may also be necessary.¹³

The Uniformity Committee voted unanimously to recommend to the Executive Committee that the highlighted language in Article IV.1 (g) “other than a securities dealer” be stricken from the text of the proposed Model. The committee concluded that this edit would be appropriate because in many instances it will be possible to constitute a sales factor for “securities dealers” even in the absence of any specific reference in Article IV.(g),¹⁴ and also because “securities dealers” as a group could be addressed through an industry-specific apportionment regulation.¹⁵

¹³ Ben Miller suggested an alternative that is similar in result to the second possible solution described in the text. Again, receipts of a securities dealer would be included under Article IV.(1)(g). But a new Section 17(a)(4)(ii)(C) would be added that would read “Receipts of a taxpayer that is a securities dealer are in this state if the customer is in this state.” This is the way California addressed this issue.

The current throwout rule for other intangibles would then be retitled as 17(a)(4)(ii)(D).

¹⁴ For example, a member of the public expressed the view that a security dealer’s commissions would generally provide a sufficient basis on which to source a security dealer’s total receipts.

¹⁵ The Hearing Officer generally suggested the continued use of such regulations in his Report, in addition to any proposed changes that are made to Section 17 and otherwise.