

Proposed Special Apportionment Regulation Based on Workgroup Suggestions Updated 10/30/16:

Where the taxpayer's receipts, as defined by [Compact Article IV.1.g] are less than 3.33% of the taxpayer's gross receipts [as defined by Model Allocation and Apportionment Regulation IV.2.(a)(5),] the rules set forth herein shall be applied in calculating the taxpayer's receipts factor. These rules for calculating the receipts factor may also apply, in the discretion of the tax commissioner, in other circumstances in which the apportionment formula does not fairly represent the extent of the taxpayer's business activity in the state.

1) In the case of any taxpayer with gross receipts consisting of interest, investment income, dividends from related parties, or proceeds from the disposition of a business or business segment ~~or capital asset~~, those gross receipts shall be assigned as follows:

- (a) ~~Gross receipts consisting of~~ Dividends paid by a related party [as defined in Sec. 17 or other state law], to the extent included in the taxable base, shall be included in the receipts factor ~~sales factor~~ denominator and included in the receipts factor numerator of this state by use of the following percentages:
 - i) The percentage of the dividend payor's average apportionment factor [or property and payroll factors] for [this state] for the year in which the dividend was paid, if that information is available, or if not, the most recent year available, or
 - ii) Where dividends are paid from earnings in a year other than the year in which the dividend was paid, the percentage of dividend payor's average apportionment factor [or property or payroll factors] in this state for the year(s) in which those earnings were generated;
- (b) ~~Gross receipts consisting of~~ capital gains [but not capital losses] arising from the disposition of a business, business segment ~~or the capital assets thereof~~ shall be included in the denominator and shall be attributed to the numerator in [this state] in the same percentage as the [taxpayer's] business or [unitary] business segment's average apportionment factor [or property and payroll factors] for [this state] for the year preceding the disposition sale; provided that, if more than 50% of the value of the assets being disposed of ~~sold~~ represents goodwill or other intangible value, using the same percentage of the receipts factor in this state of the business entity or business segment being disposed of.
- (c) ~~Gross receipts consisting of~~ interest from lending activities shall be included in numerator of the receipts factor for this state to the extent those receipts would be sourced to this state under Sections 3(d) through 3(h) ~~only~~ of the MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute (as adopted July 29, 2015) [or this state's financial institution receipts factor rules];
- (d) All other gross receipts [but not less than zero] arising from investment activities, including the holding of or the maturity, redemption, sale, exchange or other disposition of [marketable] securities or cash, shall be included in numerator of the receipts factor for this state to the extent those receipts would be sourced to this state under [this state's financial

Comment [BJF1]: There has been a suggestion that "capital asset" is unduly broad and may encompass dividends, investments, etc., specifically addressed in other sections. Alternative: "or the capital assets thereof..."

Comment [BJF2]: There has been a suggestion that this lead-in is redundant with Section 1 language.

Comment [BJF3]: Mike Fatale has suggested this could be more specific as to which years' apportionment factors would be used...

Comment [BJF4]: Is this necessary?

Comment [BJF5]: Matt Peryl suggested using the "taxpayer's" prior year apportionment factor, not the factor applicable to the particular business or segment being sold.

Comment [BJF6]: Some people suggested "unitary business" would be a good alternative to "taxpayer" alone.

Comment [BJF7]: To clarify that throw-back to commercial domicile would not apply (Section 3(p))

institution receipts factor rules] or [under the MTC Model Financial Institutions Statute, Sections 3(n) & (3)(p) if this state has not adopted a special apportionment rule or statute for financial institutions];

Comment [BJF8]: Hopefully eliminates throw-back to commercial domicile...

2) If the taxpayer has gross receipts that are not included in the receipts factor pursuant to Section (1), and the state requires the use of multiple factor apportionment formulas, those gross receipts shall be included in the denominator of the receipts factor and included in the numerator of the receipts factor of this state by using the remaining apportionment factors and percentages applicable to that taxpayer. ~~same apportionment ratio the same ratio as the taxpayer's other apportionment average property and payroll factors in this state.~~

Comment [BJF9]: Group seem comfortable this provides guidance that Section 2, 3 and 4 applicable only to "other" gross receipts.

Comment [BJF10]: New proposed language to conform to factors and percentages used by state.

3) If the taxpayer has gross receipts that are not apportioned pursuant to Section (1), and if the state apportions income pursuant to the receipts factor only, the taxpayer shall include those receipts in the denominator and shall include those receipts in the numerator for this state in the same ratio as:

- (a) the receipts factor of the remainder of the combined or consolidated group if the taxpayer's income and factors are included on a combined or consolidated return filed in this state; or
- (b) the receipts factor applicable to the owner of a preponderance of beneficial interests in that taxpayer, if the taxpayer is filing as a separate entity in this state.

4) To the extent application of sections (1)-(3) fails to result in an equitable apportionment of the taxpayer's gross receipts, the taxpayer's receipts factor shall be calculated in a manner which reflects the extent of the taxpayer's business presence in this state in comparison to other states.

Comment [BJF11]: Some committee members questioned the utility of the "in comparison" language as including a test not addressed in Section 18. The "in comparison to" language would arguably further full apportionment policies.

Alternative Catch-alls:

[references cost of performance]

4 (a) To the extent application of the [preceding subsections] fails to result in an equitable apportionment of the taxpayer's gross receipts, the taxpayer's receipts factor shall be calculated in a manner which reflects the extent of the taxpayer's business presence in this state as determined by the percentage of income-producing activity in this state as measured by the costs of performance for that activity.

[references income derived from state, not business presence]

4 (b) To the extent application of the [preceding subsections] fails to result in an equitable apportionment of the taxpayer's gross receipts, the taxpayer's receipts factor shall be calculated in a manner which reflects the extent to which the taxpayer's income (or loss) was derived from this state in comparison to other states, provided that this method would not result in a substantial portion of the income (or loss) being apportioned to more than one taxing jurisdiction, or not apportioned to any taxing jurisdiction.