

PROPOSED REGULATION 830 CMR 63.38.1

830 CMR: DEPARTMENT OF REVENUE

830 CMR 63:00: TAXATION OF CORPORATIONS

830 CMR 63.38.1 is repealed and replaced with the following:

830 CMR 63.38.1: Apportionment of Income

- (1) *Purpose, General Rule, Sham Transactions, and Outline.*
 - (a) *Purpose.* The purpose of 830 CMR 63.38.1 is to explain the allocation and apportionment of income of business corporations, as provided in M.G.L. c. 63, § 38.
 - (d) *Sham Transactions.* All transactions that determine a taxpayer's ability to apportion or determine the composition of a taxpayer's apportionment percentage are subject to the sham transaction doctrine and the related tax doctrines as set forth in M.G.L. c. 62C, § 3A.
 - (e) *Outline.* 830 CMR 63.38.1, is organized as follows:
 - (1) Purpose, General Rule, Sham Transactions, and Outline
 - (2) Definitions
 - (3) Income Subject to Apportionment
 - (4) Related Business Activities
 - (5) Taxpayer and Taxpayer's Income Taxable in Another State
 - (6) Consistent Accounting Method
 - (7) Property Factor
 - (8) Payroll Factor
 - (9) Sales Factor
 - (10) Section 38 Manufacturers
 - (11) One or More Factors Inapplicable
 - (12) Corporate Partners
 - (13) Alternative Apportionment Methods
 - (14) Effective Date
- (9) *Sales Factor.* The sales factor is a fraction whose numerator is total sales of the taxpayer in Massachusetts during the taxable year and whose denominator is total sales of the taxpayer everywhere during the taxable year. In general, a taxpayer's total sales are its gross receipts. However, certain items, as more particularly referenced in 830 CMR 63.38.1(9)(a), are specifically excluded from this computation. Also, in the case of the sale, exchange or other disposition of a capital asset used in a taxpayer's trade or business the sales to be included are measured by the gain from the transaction and not the gross receipts. In the case of a transaction that is deemed to be a sale or exchange under the provisions of the Code, the sales are the deemed receipts or gain from the transaction under the Code, as the case may be, depending upon whether the deemed transaction is a deemed sale or exchange of a capital asset.
 - (a) *Items Excluded From Sales.* Sales do not include the following items:
 1. Interest.
 2. Dividends.
 3. Gross receipts from the maturity, redemption, sale, exchange, or other disposition of securities as defined at 830 CMR 63.38.1(2).
 4. Gross receipts from the sale of business "good will" or similar intangible value, including, without limitation, "going concern value" or "workforce in place"(i.e., in the case of a sale or deemed sale of a business).
 5. Gross receipts that result in an allocable item of income, irrespective as to

whether that allocable item of income is allocated to Massachusetts.

(b) *Items Included in Sales.* Sales include (but are not limited to) the following items:

1. *Manufacturing and Selling, Purchasing and Reselling, Goods or Products.* Sales include gross sales, less returns and allowances, of goods or products (or other property of a kind which would properly be included in inventory if on hand at the close of the taxable year) which a taxpayer manufactures and sells or purchases and resells. Sales also include all service charges, carrying charges, and other non-interest charges incidental to sales. Federal excises and state excises are included as part of sales if the taxes are passed on to the buyer or included as part of the selling price of the product.
2. *Cost-plus Contracts.* In the case of a cost-plus-fee contract, such as certain contracts for the operation of government-owned plants, sales include the entire reimbursed cost, plus the fee. Receipts or gain attributable to the sale of tangible personal property designed or constructed and sold under a cost-plus-fee or similar arrangement are treated as receipts from the sale of tangible personal property, and may not be treated as receipts from personal services.
3. *Providing Services.* Sales include gross receipts from the performance of services including commissions, fees, management charges, and similar items. (See 830 CMR 63.38.1(9)(b)8. regarding proper amount of service fees in certain intercompany transactions.)
4. *Lease or Rental of Real or Tangible Personal Property.* Sales include the gross receipts from renting, leasing, or licensing the use of real or tangible personal property except in cases in which the lease, rental, or license of the asset in question is treated, for purposes of M.G.L. c. 63, as a sale, exchange, or other disposition of a capital asset used in a taxpayer's trade or business, in which case sales include only the gain from the disposition of the property in question.
5. *Sale, Licensing, or Assignment of Intangible Property other than Securities.* Sales generally include gross receipts from the sale, licensing, or assignment of intangible property other than securities or business "good will" or similar intangible value, see 830 CMR 63.38.1(9)(a), except in cases in which the sale, licensing or assignment of the property in question is treated, for purposes of M.G.L. c. 63, as a sale, exchange, or other disposition of a capital asset used in a taxpayer's trade or business, in which case the sales include the gain (and not the gross receipts) from the disposition of the property in question. For detailed rules pertaining to the sales factor rules that pertain to the license and sale of intangible property see 830 CMR 63.38.1(9)(d)5. and 6.
6. *Capitalized Leases.* Property subject to a capitalized lease for federal income tax purposes is treated as subject to a capitalized lease for purposes of the corporate excise, and sales include income or gain derived from a capitalized lease transaction to the extent that the income or gain from such transaction is included in the federal gross income of the taxpayer.
7. *Sale, Exchange, or Other Disposition of Fixed Assets.* In the case of the sale, exchange or other disposition of a fixed asset used in a taxpayer's trade or business, such as property, plant or equipment, sales are measured by the gain from such transaction. Gain from the disposition of a fixed asset shall include (but is not limited to) deemed gain from a transaction that is treated under the Code as a sale of a taxpayer's assets and that results in the taxpayer's recognition of income for Massachusetts purposes. For example, gain from the deemed sale of assets (other than securities) by a target corporation under Code § 338 is included in a target's sales factor. Similarly, the gain that results from a payment of a dividend (other than securities) by a subsidiary corporation to its

parent that is deemed to be a sale of assets by the subsidiary under Code § 311(b) is included in the subsidiary's sales factor.

8. *Intercompany Sales.* Sales between affiliated corporations, to the extent otherwise includible in the sales factor under M.G.L. c. 63, § 38(f) and 830 CMR 63.38.1(9)(a) and (b), are generally included in the sales factor of the selling corporation except as described in 830 CMR 63.38.1(9)(b)8. In the case of intercompany transactions included in the sales factor under 830 CMR 63.38.1(9)(b)8., the amount of gross receipts included in the sales factor shall reflect the fair market value of the property or services provided in an arms-length transaction, subject to adjustments or rules adopted by the Commissioner pursuant to M.G.L. c. 63, § 39A.
 - a. *Where Corporations are Members of the Same Combined Group.* In general, transactions between affiliates that are members of the same combined group within the meaning of G.L. c. 63, § 32B are not included in the sales factor for purposes of the income measure. See 830 CMR 63.32B.2(7)(g). However, when computing the non-income measure, a taxpayer shall include in its sales factor any sales to affiliates that are members of the same combined group. See 830 CMR 63.32B.2(6)(b)3.
 - b. *Where Corporations are Not Members of the Same Combined Group.* When a taxpayer makes sales to an affiliate and the two corporations are not members of the same combined group within the meaning of G.L. c. 63, § 32B and 830 CMR 63.32B.2, the taxpayer's sales include the gross receipts from such sales transactions, irrespective of whether the two corporations are members of the same federal consolidated group.
 - c. *Exclusion of Dividends.* A payment from a subsidiary corporation to its parent will be excluded from the numerator and denominator of the parent's sales factor if, in substance, the payment represents a dividend, even if the payment would otherwise be included in the parent's sales factor under 830 CMR 63.38.1(9)(b)8.b.

(d) When Sales Other Than Sales of Tangible Personal Property are in Massachusetts.

1. General Rules.
 - a. *Market-Based Sourcing.* Sales, other than sales of tangible personal property, are in Massachusetts within the meaning of this regulation if and to the extent that the corporation's market for the sales is in Massachusetts as more fully set forth in M.G.L. c. 63, § 38(f) and 830 CMR 63.38.1(9)(d). In general, the provisions of 830 CMR 63.38.1(9)(d)4-7 establish uniform rules for (1) determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Massachusetts, (2) approximating the state or states of assignment where such state or states cannot be determined, and (3) excluding the sale where the state or states of assignment cannot be determined or approximated.
 - b. *Outline of topics.* The provisions in this section 830 CMR 63.38.1(9)(d) are organized as follows.
 1. General Rules
 - a. Market-Based Sourcing
 - b. Outline of Topics
 - c. Definitions
 - d. General Principles of Application; Contemporaneous Records

- e. Rules of Reasonable Approximation
 - f. Rules with respect to Exclusion of Sales from the Sales Factor
 - g. Changes in Methodology; Commissioner Review
 - h. Industry-Specific Alternative Apportionment Rules
 - i. Application to Services Provided Directly or Indirectly to a RIC
 - j. Further Guidance
2. Sale, Rental, Lease or License of Real Property
 3. Rental, Lease or License of Tangible Personal Property
 4. Sale of a Service
 - a. General Rule
 - b. In-Person Services
 - c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer
 - d. Professional Services
 5. License or Lease of Intangible Property
 - a. General Rules
 - b. License of a Marketing Intangible
 - c. License of a Production Intangible
 - d. License of a Mixed Intangible
 - e. License of Intangible Property where Substance of the Transaction Resembles a Sale of Goods or Services
 - f. Examples
 6. Sale of Intangible Property
 - a. Assignment of Sales
 - b. Examples
 7. Special Rules
 - a. Software Transactions
 - b. Sales or Licenses of Digital Goods and Services
 - c. Enforcement of Legal Rights
- c. Definitions. For the purposes of 830 CMR 63.38.1(9)(d) the following terms have the following meanings.

“Billing address” means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer’s account as of the time of the transaction as kept in good faith in the normal course of business and not for tax avoidance purposes.

“Business customer” means a customer that is a business operating in any form, including an individual that operates a business through the form of a sole proprietorship. Sales to a non-profit organization, to a trust, to the U.S. Government, to any foreign, state or local government, or to any agency or instrumentality of such government shall be treated as sales to a business customer and shall be assigned consistent with the rules that apply to such sales.

“Individual customer” means any customer that is not a business customer.

“Intangible property,” generally includes, without limitation, copyrights; patents; trademarks; trade names; brand names; franchises; licenses; trade secrets; trade dress; information; know-how; methods; programs; procedures; systems; formulae; processes; technical data; designs; licenses; literary, musical, or artistic compositions; information; ideas; contract rights

including broadcast rights; agreements not to compete; goodwill and going concern value; securities (see 830 CMR 63.38.1(2) (definition of “security”); and, except as otherwise provided in this regulation, 830 CMR 63.38.1, computer software. In the case of a sale of intangible property, such sale may or may not be includable in the numerator and denominator of the taxpayer’s sales factor, depending upon the application of the rules set forth in 830 CMR 63.38.1(9)(d)6.

“Place of order,” means the physical location from which a customer places an order for a sale other than a sale of tangible personal property from a taxpayer, resulting in a contract with the taxpayer.

“State where a contract of sale is principally managed by the customer,” means the primary location at which an employee or other representative of a customer serves as the primary contact person for the taxpayer with respect to the implementation and day-to-day execution of a contract entered into by the taxpayer with the customer.

- d. General Principles of Application; Contemporaneous Records. In order to satisfy the requirements of 830 CMR 63.38.1(9)(d), a taxpayer’s assignment

of sales of other than tangible personal property must be consistent with the following principles:

- i. A taxpayer's application of the rules set forth in this section, 830 CMR 63.38.1(9)(d), shall be based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing including, without limitation, the taxpayer's books and records kept in the normal course of business. A taxpayer's method of assigning its sales shall be determined in good faith, applied in good faith, and applied consistently with respect to similar transactions and year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its sales, including its underlying assumptions, and shall provide such records to the Commissioner upon request.
 - ii. The provisions of 830 CMR 63.38.1(9)(d)4-7 provide for various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy (and must continue to do so with each succeeding rule in the hierarchy, where applicable). For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and where the taxpayer cannot do so, the rule then requires the taxpayer to reasonably approximate such state or states. In such cases, the taxpayer must in good faith and with reasonable effort attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) before it may reasonably approximate such state or states.
 - iii. A taxpayer's method of assigning its sales, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of sales consistent with the regulatory standards set forth in 830 CMR 63.38.1(9)(d), rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.
- e. Rules of Reasonable Approximation.
- i. In General. In general, the provisions of 830 CMR 63.38.1(9)(d)4-7 establish uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Massachusetts. The provisions of the regulation also set forth rules of reasonable approximation, which apply where the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation prescribed by this regulation. See, e.g., 830 CMR 63.38.1(9)(d)4.d (pertaining to professional services). In other cases, the applicable rule in 830 CMR 63.38.1(9)(d) permits a taxpayer to reasonably approximate the state or states of assignment, using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in this section, 830 CMR 63.38.1(9)(d).
 - ii. Approximation Based Upon Known Sales. Except as otherwise provided in this section, 830 CMR 63.38.1(9)(d)1.e.ii., in any instance where,

applying the rules set forth in 830 CMR 63.38.1(9)(d)4, pertaining to sales of services, a taxpayer can determine or can reasonably approximate the state or states of assignment of a substantial portion of its sales of substantially similar services (“assigned sales”), but not all of such sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of such sales generally tracks that of the assigned sales, it shall include those sales which it believes tracks the geographic distribution of the assigned sales in its sales factor in the same proportion as its assigned sales. This rule also applies in the context of licenses and sales of intangible property where the substance of the transaction resembles a sale of goods or services. See 830 CMR 63.38.1(9)(d)5.e. and 830 CMR 63.38.1(9)(d)6.a.v. This rule does not apply in the context of the rules set forth at 830 CMR 63.38.1(9)(d)4.d (pertaining to professional services).

- f. Rules with respect to Exclusion of Sales from the Sales Factor
 - i. In any case in which a taxpayer cannot ascertain the state or states to which a sale is to be assigned pursuant to the applicable rules set forth in 830 CMR 63.38.1(9)(d) (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the sale shall be excluded from the numerator and the denominator of the taxpayer’s sales factor.
 - ii. In any case in which a taxpayer can ascertain the state or states to which a sale is to be assigned pursuant to the applicable rules set forth in 830 CMR 63.38.1(9)(d), but the taxpayer is not taxable in one or more such states, the sales that would otherwise be assigned to such states where the taxpayer is not taxable shall be excluded from the numerator and denominator of the taxpayer’s sales factor. The rules to determine whether a taxpayer is taxable in a state are set forth at 830 CMR 63.38.1(5).
- g. Changes in Methodology; Commissioner Review
 - i. General Rules Applicable to Original Returns. In any case in which a taxpayer files an original return for a taxable year in which it properly assigns its sales using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in 830 CMR 63.38.1(9)(d), the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In such cases, neither the Commissioner nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer’s methodology as applied for assigning such sales for such taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct either factual errors or calculation errors with respect to the taxpayer’s application of its filing methodology.
 - ii. Commissioner Authority to Adjust a Taxpayer’s Return. The Commissioner’s ability to review and adjust a taxpayer’s assignment of sales on a return to more accurately assign such sales consistent with the rules or standards of this section, 830 CMR 63.38.1(9)(d), includes, but is not limited to, each of the following potential actions.

- (A) In any case in which a taxpayer fails to properly assign a sale in accordance with the rules set forth in 830 CMR 63.38.1(9)(d), including the failure to properly apply a hierarchy of rules consistent with the principles of 830 CMR 63.38.1(9)(d)1.d.ii, the Commissioner may assign such sales in accordance with the applicable rules in 830 CMR 63.38.1(9)(d).
 - (B) In any case in which a taxpayer uses a method of approximation to assign its sales and the Commissioner determines that the method of approximation employed by the taxpayer is not reasonable, the Commissioner may substitute a method of approximation that the Commissioner determines is appropriate or may exclude the sales from the taxpayer's numerator and denominator, as appropriate.
 - (C) In any case in which the Commissioner determines that a taxpayer's method of approximation is reasonable, but has not been applied in a consistent manner with respect to similar transactions or year to year, the Commissioner may require that the taxpayer apply its method of approximation in a consistent manner.
 - (D) In any case in which a taxpayer excludes sales from the numerator and denominator of its sales factor on the theory that the assignment of such sales cannot be reasonably approximated, the Commissioner may determine that the exclusion of such sales is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.
 - (E) In any case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its sales, including its underlying assumptions, or fails to provide such records to the Commissioner upon request, the Commissioner may treat the taxpayer's assignment of sales as unsubstantiated, and may assign such sales in the manner that the Commissioner determines is appropriate.
- iii. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. In filing its original return for a tax year, a taxpayer may change its method of assigning its sales under section 830 CMR 63.38.1(9)(d) from the method it used in the preceding year, including changing its method of approximation from that used on previous returns. However, the taxpayer may only make such change for purposes of improving the accuracy of assigning its sales consistent with the rules set forth in 830 CMR 63.38.1(9)(d), including, for example, to address the circumstance where there is a change in the information that is available to the taxpayer as relevant for purposes of complying with such rules. Further, a taxpayer that seeks to change its method of assigning its sales must disclose, in the original return filed for the year of the change, the fact that it has made the change, and must retain and provide to the Commissioner upon request documents that explain the nature and extent of the change, and the reason for the change. If a taxpayer fails to adequately disclose such change or retain and provide such records upon request, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate.

- iv. Commissioner Authority to Change a Method of Assignment on a Prospective Basis. The Commissioner may direct a taxpayer to change its method of assigning its sales in tax returns that have not yet been filed, including changing the taxpayer's method of approximation, if upon reviewing the taxpayer's filing methodology applied for a prior tax year, the Commissioner determines that such change is appropriate to reflect a more accurate assignment of the taxpayer's sales within the meaning of this section, 830 CMR 63.38.1(9)(d), and determines that such change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making such change. In any case in which a taxpayer fails to comply with the Commissioner's direction on subsequently filed returns, the Commissioner may deem the taxpayer's method of assigning its sales on such returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

- h. Industry-Specific Alternative Apportionment Rules. Prior to the enactment of St. 2013, c. 46, § 37, the Commissioner promulgated six industry-specific alternative apportionment regulations to address industries where the application of the provisions of M.G.L. c. 63, § 38 were not reasonably adapted to approximate the net income derived from business carried on within Massachusetts. See M.G.L. c. 63, § 38(j). Following the enactment of St. 2013, c. 46, § 37, the Commissioner reviewed those six industry-specific alternative apportionment regulations, and determined for each industry that the provisions of M.G.L. c. 63, § 38 as a whole continue not to be reasonably adapted to approximate the net income derived from business carried on within Massachusetts. However, in the case of three of the industries, the Commissioner determined that industry-specific alternative sales factor rules were no longer needed in light of St. 2013, c. 46, § 37. In the case of the other three industries, the Commissioner determined that the industry-specific alternative sales factor rules remain necessary.

- i. Industry-Specific Sales Factor Provisions that Remain in Effect. Prior to the enactment of St. 2013, c. 46, § 37 the Commissioner promulgated industry-specific alternative apportionment regulations for pipeline companies, corporations engaged in the electricity industry, and corporations engaged in the telecommunications industry. See 830 CMR 63.38.8 (pipeline companies); 830 CMR 63.38.10 (electricity industry) and 830 CMR 63.38.11 (telecommunications industry). These industry-specific regulations remain fully in effect and are not superseded in whole or in part by the rules of 830 CMR 63.38.1(9)(d), as these regulations continue to address circumstances where the provisions of G.L. c. 63, § 38, including G.L. c. 63, § 38(f), are not reasonably adapted to approximate the net income derived from business carried on within Massachusetts. However, a special rule pertaining to taxpayers that provide telecommunications services that are also engaged in the sale or license of digital goods and services shall apply notwithstanding the rules set forth in 830 CMR 63.38.11. See 830 CMR 63.38.1(9)(d)7.b.ii.

- ii. Industry-Specific Sales Factor now Determined under 830 CMR 63.38.1(9)(d). Prior to the enactment of St. 2013, c. 46, § 37 the Commissioner promulgated industry-specific alternative apportionment regulations for motor carriers, airlines, and courier and package delivery services. See 830 CMR 63.38.2 (airlines); 830 CMR 63.38.3 (motor carriers); 830 CMR 63.38.4 (courier and package delivery services). In each of these cases, the sales factor is now determined pursuant to the

rules of 830 CMR 63.38.1.(9)(d). The industry-specific property and payroll factor rules for those industries remain fully in effect.

- i. Application to Services Provided Directly or Indirectly to a RIC. Nothing in 830 CMR 63.38.1(9)(d) shall be construed to supersede or affect the application of the rules set forth in 830 CMR 63.38.7 that apply to mutual fund service corporations. See M.G.L. c. 63, § 38(m). However, rules with respect to mutual fund sales, as defined at 830 CMR 63.38.1(2), as made by a taxpayer that is not a mutual fund service corporation, are set forth at 830 CMR 63.38.1(9)(d)4.d.ii(D).
 - j. Further Guidance. The Commissioner may issue further public written statements with respect to the rules set forth in 830 CMR 63.38.1(9)(d). Such further guidance may, among other things, include guidance with respect to: (1) what constitutes a reasonable method of approximation within the meaning of such rules, and (2) the circumstances in which a filing change with respect to a taxpayer's method of reasonable approximation will be deemed appropriate.
2. Sale, Rental, Lease or License of Real Property. In the case of a sale, rental, lease or license of real property, the sale is in Massachusetts if and to the extent that the property is in Massachusetts.
 3. Rental, Lease or License of Tangible Personal Property. In the case of a rental, lease or license of tangible personal property, the sale is in Massachusetts if and to the extent that the property is in Massachusetts. If property is mobile property that is located both within and without Massachusetts during the period of the lease or other contract, the receipts assigned to Massachusetts shall be the receipts from the contract period multiplied by the fraction used by the taxpayer for property factor purposes under 830 CMR 63.38.1(7)(d) (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).
 4. Sale of a Service.
 - a. General Rule. The sale of a service is in Massachusetts if and to the extent that the service is delivered at a location in Massachusetts. In general, the term "delivered" shall be construed to refer to the location of the taxpayer's market for the service provided and is not to be construed by reference to the location of the property or payroll of the taxpayer as otherwise determined for corporate apportionment purposes pursuant to 830 CMR 63.38.1(7)-(8). The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth at 830 CMR 63.38.1(9)(d)4.b-d.
 - b. In-Person Services.
 - i. In General. Except as otherwise provided in this subsection 830 CMR 63.38.1(9)(d)4.b, in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer's real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry;

construction contractor services; pest control; landscape services; medical and dental services, including medical testing and x-rays and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer's real or tangible personal property. Various professional services, including legal, accounting, financial and consulting services, and other such services as described in 830 CMR 63.38.1(9)(d)4.d, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.b.

ii. Assignment of Sales. Except as otherwise provided in this subsection 830 CMR 63.38.1(9)(d)4.b, where the service provided by the taxpayer is an in-person service, the delivery of the service is at the location where the service is received. Therefore, the sale is in Massachusetts if and to the extent the customer receives the in-person service in Massachusetts. In assigning its sales of in-person services, a taxpayer shall first attempt to determine the location where a service is received, as follows:

- (A) Where the service is performed with respect to the body of an individual customer in Massachusetts (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Massachusetts (e.g. live entertainment or athletic performances), the service is received in Massachusetts.
- (B) Where the service is performed with respect to the customer's real estate in Massachusetts or where the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in Massachusetts, the service is received in Massachusetts.
- (C) Where the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed in Massachusetts or outside Massachusetts, the service is received in Massachusetts if such property is shipped or delivered to the customer in Massachusetts.

In any instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

iii. Transportation and Delivery Services.

- (A) In general. Transportation and delivery services, where a taxpayer physically transports people or freight from one destination to

another, are in-person services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.b. However, special rules of assignment apply to transportation and delivery services. The assignment of such services depends upon whether such services are provided by air or by other means as provided in 830 CMR 63.38.1(9)(d)4.b.iii(B) and (C).

(B) Transportation and Delivery Services Provided by Air.

Transportation and delivery services provided by air are assigned to the state or states of the taxpayer's aircraft departures. Therefore, the amount of flight revenue assigned to Massachusetts shall be determined by multiplying the taxpayer's total flight revenue by the percentage of the taxpayer's aircraft departures occurring in Massachusetts relative to the aircraft departures that take place everywhere. In any case where the taxpayer operates multiple aircraft types, the calculation shall be weighted by the values of the aircraft types operated by the taxpayer as provided in 830 CMR 63.38.2(a). These rules supersede the rules set forth in 830 CMR 63.38.2 to the extent of any inconsistency.

(C) Transportation and Delivery Services Provided by a Means other than by Air. Except as otherwise provided by this section, 830 CMR 63.38.1(9)(d)4.b.iii(C), transportation and delivery services (other than by air) are assigned to the state or states of the taxpayer's departures and arrivals (in the case of the transportation of people), or pickups and deliveries (in the case of the transportation of freight). Therefore, the amount of sales revenue assigned to Massachusetts shall be determined by multiplying the taxpayer's total revenues from such services by the percentage of the taxpayer's total departures (or pickups) and arrivals (or deliveries) that take place in Massachusetts relative to the taxpayer's departures (or pickups) and arrivals (or deliveries) that take place everywhere. Transportation and delivery services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.b.iii(C), include, without limitation, such services as provided by cars, buses, trains, and trucks. These rules supersede the rules set forth in 830 CMR 63.38.3 (motor carriers) and 830 CMR 63.38.4 (courier and package delivery services) to the extent of any inconsistency. The rules set forth in this section, 830 CMR 63.38.1(9)(d)4.b.iii(C), do not apply to transportation and delivery services as provided through the means of air travel or pipelines; transportation and delivery services provided through the means of air travel are governed by 830 CMR 63.38.1(9)(d)4.b.iii(B), and the transportation and delivery services provided through the means of pipelines are governed by the industry-specific alternative apportionment rules in 830 CMR 63.38.8.

- iv. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales be eliminated from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii. Note that for purposes of the examples it is irrelevant whether the services are performed by an

employee of the taxpayer or by an independent contractor acting on the taxpayer's behalf.

Example 1. Salon Corp has retail locations in Massachusetts and in other states where it provides hair cutting services to individual and business customers, the latter of whom are paid for through the means of a company account. The sales of services provided at Salon Corp's Massachusetts locations are in Massachusetts. The sales of services provided at Salon Corp's locations outside Massachusetts, even when provided to Massachusetts residents, are not Massachusetts sales.

Example 2. Landscape Corp provides landscaping and gardening services in Massachusetts and in neighboring states. Landscape Corp provides landscaping services at the Massachusetts vacation home of an individual who is a resident of another state and who is located outside Massachusetts at the time the services are performed. The sale of services provided at the Massachusetts location is in Massachusetts.

Example 3. Same facts as in Example 2, except that Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to such locations of Retail Corp that are in Massachusetts and in other states. The sale of services provided to Retail Corp is in Massachusetts to the extent the services are provided in Massachusetts.

Example 4. Camera Corp provides camera repair services at a Massachusetts retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its Massachusetts location at a facility that is in another state. In such cases, the repaired camera is then returned to the customer at Camera Corp's Massachusetts location. The sale of such services is in Massachusetts.

Example 5. Same facts as in Example 4, except that a customer located in Massachusetts mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Massachusetts by mail. The sale of the service is in Massachusetts.

Example 6. Teaching Corp provides seminars in Massachusetts to individual and business customers. The seminars and the materials used in connection with the seminars are prepared outside the state, the teachers who teach the seminars include teachers that are resident outside the state, and the students who attend the seminars include students that are resident outside the state. Because the seminars are taught in Massachusetts the sales of the services are in Massachusetts.

Example 7. Bus Corp sells bus tickets to individual and business customers at bus depots located in Massachusetts and in other states, and also through phone and Internet sales. The bus tickets are for travel to locations in Massachusetts and to locations in other states. During the taxable year, Bus Corp sells 150,000 bus tickets. Each ticket has a departure location and an arrival location, for a total of 300,000 departure and arrival locations. Of these bus tickets, 25,000 have a departure location in Massachusetts and 20,000 have an arrival location in Massachusetts. The sale of such transportation services shall be

assigned by multiplying Bus Corp's total revenues from such services by the percentage of Bus Corp's total departures and arrivals that take place in Massachusetts relative to Bus Corp's total number of departures and arrivals. Therefore, Bus Corp must determine the amount of its ticket sales that are to be assigned to Massachusetts by multiplying its total such sales by a fraction equal to 45,000 divided by 300,000, or .15. For purposes of the analysis it is irrelevant where and how the bus tickets are sold or whether the customer is an individual or business customer.

- c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.
 - i. In General. Where the service provided by the taxpayer is not an in-person service within the meaning of 830 CMR 63.38.1(9)(d)4.b or a professional service within the meaning of 830 CMR 63.38.1(9)(d)4.d, and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the sale is in Massachusetts if and to the extent that the service is delivered in Massachusetts. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c., a service that is delivered to a customer is a service in which the customer and not a third party is the direct recipient of the service, and a service that is delivered on behalf of a customer is one in which a customer contracts for a service to be delivered to a third party or third parties. Services that are delivered on behalf of a customer include services where the taxpayer's service is the direct or indirect delivery of advertising to the customer's intended audience. Services that are delivered electronically through a customer are services that are delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient. Except in the instance of services that are delivered through a customer (where the services must be delivered electronically), services are included within the meaning of this section 830 CMR 63.38.1(9)(d)4.c, irrespective of the method of delivery, e.g., whether such services are delivered by a physical means or through an electronic transmission.
 - ii. Assignment of Sales. The assignment of a sale to a state or states in the instance of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this section, 830 CMR 63.38.1(9)(d)4.c, a service delivered by an electronic transmission shall not be considered a delivery by a physical means). In any instance where, applying the rules set forth in this section, 830 CMR 63.38.1(9)(d)4.c, the rule of assignment depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

(A) Delivery to or on Behalf of a Customer by Physical Means, Whether to an Individual or Business Customer. Services delivered to a customer or on behalf of a customer through a physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers or other direct mail services; the delivery of advertising or advertising-related services to the customer's intended audience in the form of a physical medium; and the sale of custom software (e.g., where software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of M.G.L. c. 63) where the taxpayer installs the custom software at the customer's site. The rules in this subsection 830 CMR 63.38.1(9)(d)4.c.ii(A) apply whether the taxpayer's customer is an individual customer or a business customer.

1. Rule of Determination. In assigning the sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where such services are delivered. Where the taxpayer is able to determine the state or states where the service is delivered, it shall assign the sale to such state or states.
2. Rule of Reasonable Approximation. Where the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate such state or states.
3. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Direct Mail Corp, a corporation based outside Massachusetts, provides direct mail services to its customer, Business Corp. Business Corp transacts with Direct Mail Corp to deliver printed fliers to a list of customers that is provided to it by Business Corp. Some of Business Corp's customers are in Massachusetts and some of those customers are in other states. Direct Mail Corp will use the postal service to deliver the printed fliers to Business Corp's customers. The sale of Direct Mail Corp's services to Business Corp is assigned to Massachusetts to the extent that the services are delivered on behalf of Business Corp to Massachusetts customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Massachusetts).

Example 2. Ad Corp is a corporation based outside Massachusetts that provides advertising and advertising-related services in Massachusetts and in neighboring states. Ad Corp enters into a contract at a location outside Massachusetts with an individual customer who is not a Massachusetts resident to design advertisements for billboards to be displayed in Massachusetts, and to design fliers to be mailed to Massachusetts residents. All of the design work is performed outside Massachusetts. The sale of the design services is in Massachusetts because the service is physically delivered on behalf of the customer to the customer's intended audience in Massachusetts.

Example 3. Same facts as example 2, except that the contract is with a business customer that is based outside Massachusetts. The sale of the design services is in Massachusetts because the services are physically delivered on behalf of the customer to the customer's intended audience in Massachusetts.

Example 4. Fulfillment Corp, a corporation based outside Massachusetts, provides product delivery fulfillment services in Massachusetts and in neighboring states to Sales Corp, a corporation located outside Massachusetts that sells tangible personal property through a mail order catalog and over the Internet to customers. In some cases when a customer purchases tangible personal property from Sales Corp to be delivered in Massachusetts, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Massachusetts. The sale of the fulfillment services of Fulfillment Corp to Sales Corp is assigned to Massachusetts to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Massachusetts.

Example 5. Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in Massachusetts, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside Massachusetts, and then physically installs the software on Buyer Corp's computer hardware located in Massachusetts. The development and sale of the custom software is properly characterized as a service transaction, and the sale is assigned to Massachusetts because the software is physically delivered to the customer in Massachusetts.

Example 6. Same facts as Example 5, except that Buyer Corp has offices in Massachusetts and several other states, but is commercially domiciled outside Massachusetts and orders the software from a location outside Massachusetts. The receipts from the development and sale of the custom software service are assigned to Massachusetts because the software is physically delivered to the customer in Massachusetts.

- (B) Delivery to a Customer by Electronic Transmission. Services delivered by electronic transmission include, without limitation,

services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following rules apply.

1. Services Delivered By Electronic Transmission to an Individual Customer.
 - a. Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Massachusetts if and to the extent that the taxpayer's customer receives the service in Massachusetts. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states.
 - b. Rules of Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states. Where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall approximate such state or states using the customer's billing address.
2. Services Delivered By Electronic Transmission to a Business Customer
 - a. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Massachusetts if and to the extent that the taxpayer's customer receives the service in Massachusetts. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2, it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.
 - b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states.
 - c. Secondary Rule of Approximation. In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably

approximate the state or states in which the service is received, such state or states shall be approximated as set forth in this section. In such cases, unless the taxpayer can apply the safe harbor set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d the taxpayer shall approximate the state or states in which the service is received as follows: first, by assigning the sale to the state where the contract of sale is principally managed by the customer; second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the sale to the customer's place of order; and third, if the customer's place of order is not reasonably determinable, by assigning the sale using the customer's billing address; provided, however, that in any instance in which the taxpayer derives more than 5% of its sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

d. Safe Harbor. In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate under 830 CMR 63.38.1(9)(d)4.c.ii(B)2.b, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.c, apply the safe harbor stated in this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d. Under this safe harbor, a taxpayer may assign its sales to a particular customer based upon the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than a thousand customers, whether business or individual, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 830 CMR 63.38.1(9)(d)4.c.ii(B)2, to services delivered by electronic transmission to a business customer, and not otherwise.

3. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii. Further, assume where relevant, unless otherwise stated, that the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d, does not apply.

Example 1. Support Corp, a corporation that is based outside Massachusetts, provides software support and diagnostic services to individual and business customers that have previously purchased certain software from third-party vendors. These individual and business customers are located in Massachusetts and other states. Support Corp supplies its

services on a case by case basis when directly contacted by its customer. Support Corp generally provides these services through the Internet but sometimes provides these services by phone. In all cases, Support Corp verifies the customer's account information before providing any service. Using the information that Support Corp verifies before performing a service, Support Corp can determine where its services are received, and therefore must assign its sales to these locations. The sales made to Support Corp's individual and business customers are in Massachusetts to the extent that Support Corp's services are received in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1 and 2.

Example 2. Online Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to individual customers who are resident in Massachusetts and in other states. These customers access Online Corp's web services primarily in their states of residence, and sometimes, while traveling, in other states. For a substantial portion of its sales, either Online Corp can determine the state or states where such services are received, or, where it cannot determine such state or states, it has sufficient information regarding the place of receipt to reasonably approximate such state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of such sales. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Massachusetts the sales for which it does not know the customers' location in the same proportion as those sales for which it has this information. See 830 CMR 63.38.1(9)(d)1.e.ii.

Example 3. Same facts as in Example 2, except that Online Corp reasonably believes that the geographic distribution of the sales for which it cannot determine or reasonably approximate the location of the receipt of its web-based services do not generally track the sales for which it does have this information. Online Corp must assign the sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1.b.

Example 4. Same facts as in Example 3, except that Online Corp is not taxable in one state to which some of its sales would be otherwise assigned. The sales that would be otherwise assigned to that state are to be excluded from the numerator and denominator of Online Corp's sales factor. See 830 CMR 63.38.1(9)(d)4.c.ii(B); 830 CMR 63.38.1(9)(d)1.f.ii.

Example 5. Net Corp, a corporation based outside Massachusetts, provides web-based services to a business customer, Business Corp, a company with offices in Massachusetts and two neighboring states. Particular

employees of Business Corp access the services from computers in each Net Corp office. Assume that Net Corp determines that Business Corp employees in Massachusetts were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In such case, 75% of the sale is received in Massachusetts, and therefore 75% of the sale is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)2.a. Assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate such location or locations. Under these circumstances, if Net Corp derives 5% or less of its sales from Business Corp, Net Corp must assign the sale under 830 CMR 63.38.1(9)(d)4.c.ii(B)2.c to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its sales of services from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state.

Example 6. Net Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to more than a thousand individual and business customers in Massachusetts and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate such state or states. Also assume that Net Corp does not derive more than 5% of its sales of services from any single customer. Net Corp may apply the safe harbor stated in CMR 830 63.38.1(9)(d)4.c.ii(B)2.d, and may assign its sales using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its sales would be otherwise assigned, it must exclude those sales from the numerator and denominator of its sales factor. 830 CMR 63.38.1(9)(d)1.f.ii.

- (C) Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. Services delivered electronically to third-party recipients "on behalf of" the customer include the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. Services delivered electronically "through" a customer to third-party recipients are services that are delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.
 - 1. Rule of Determination. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in

Massachusetts if and to the extent that the end users or other third-party recipients are in Massachusetts. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in Massachusetts to the extent that the audience for such advertising is in Massachusetts. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in Massachusetts to the extent that the end users or other third-party recipients receive such services in Massachusetts. The rules in this subsection 830 CMR 63.38.1(9)(d)4.c.ii(C) apply whether the taxpayer's customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.

2. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate such state or states.
3. Secondary Rules of Approximation.
 - i. Where a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate such location, the taxpayer shall approximate the audience in a state for such advertising using the following secondary rules of approximation. Where a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in such area. For a taxpayer with less information about its audience, the taxpayer shall approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in such area.
 - ii. Where a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling such service to end users or other third-party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third-party recipients from which it can determine or reasonably approximate such location, the taxpayer shall approximate the extent to which the service is received in a state by using

the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells such services, relative to the total population in such area.

4. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Cable TV Corp, a corporation that is based outside of Massachusetts, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Massachusetts. Second, Cable TV Corp sells monthly subscriptions to individual customers in Massachusetts and in other states. Cable TV Corp's sale of advertising time to its business customers is assigned to Massachusetts to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(C)1. If Cable TV Corp is unable to determine the actual location of its audience for the programming, and lacks sufficient information regarding audience location to reasonably approximate such location, Cable TV Corp must approximate its Massachusetts audience using the percentage that reflects the ratio of its Massachusetts subscribers in the geographic area in which Cable TV Corp's televised programming featuring such advertisements is delivered relative to its total number of subscribers in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, such sales are properly assigned to Massachusetts in any case in which the programming is received by a customer in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1. In any case in which Cable TV Corp cannot determine the actual location where the programming is received, and lacks sufficient information regarding the location of receipt to reasonably approximate such location, such sales of Cable TV Corp's monthly subscriptions are assigned to Massachusetts where its customer's billing address is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1.b. Note that whether and to the extent that the monthly subscription fee represents a fee for a service or for a license of intangible property does not affect the analysis or result as to the state or states to which the sales are properly assigned. See 830 CMR 63.38.1(9)(d)5.e.

Example 2. Network Corp, a corporation that is based outside of Massachusetts, sells advertising time to business customers

pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming as distributed by unrelated cable television and satellite television transmission companies. Network Corp's sale of advertising time to its business customers is assigned to Massachusetts to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(C)1. If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding audience location to reasonably approximate such location, Network Corp must approximate the amount of the sales that constitutes Massachusetts sales by multiplying the amount of such sales by a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. In any case in which Network Corp's sales would be assigned to a state in which Network Corp is not taxable, such sales shall be excluded from the numerator and denominator of Network Corp's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 3. Web Corp, a corporation that is based outside Massachusetts, provides Internet content to viewers in Massachusetts and other states. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. Web Corp's sale of advertising space to its business customers is assigned to Massachusetts to the extent that the viewers of the Internet content are in Massachusetts, as measured by viewings or clicks. See 830 CMR 63.38.1(9)(d)4.c.ii(C)1. If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of its viewers to reasonably approximate such location, Web Corp must approximate the amount of its Massachusetts sales by multiplying the amount of such sales by a percentage that reflects the Massachusetts population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. In any case in which Web Corp's sales would be assigned to a state in which Web Corp is not taxable, such sales shall be excluded from the numerator and denominator of Web Corp's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 4. Wholesale Corp, a corporation that is based outside Massachusetts, develops an Internet-based information database outside Massachusetts and enters into a contract with Retail Corp whereby Retail Corp will market and sell access to this database to end users. Depending on the facts, the provision of database access may be either the sale of a

service or the license of intangible property or may have elements of both. Assume that on the particular facts applicable in this example Wholesale Corp is selling database access in transactions properly characterized as involving the performance of a service. When an end user purchases access to Wholesale Corp's database from Retail Corp, Retail Corp in turn compensates Wholesale Corp in connection with that transaction. In this case, Wholesale Corp's services are being delivered through Retail Corp to the end user. Wholesale Corp must assign its sales to Retail Corp to the state or states in which the end users receive access to Wholesale Corp's database. If Wholesale Corp cannot determine the state or states where the end users actually receive access to Wholesale Corp's database, and lacks sufficient information regarding the location from which the end users access the database to reasonably approximate such location, Wholesale Corp must approximate the extent to which its services are received by end users in Massachusetts by using a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.ii. Note that it does not matter for purposes of the analysis whether Wholesale Corp's sale of database access constitutes a service or a license of intangible property, or some combination of both. See 830 CMR 63.38.1(9)(d)5.e. In any case in which Wholesale Corp's sales would be assigned to a state in which Wholesale Corp is not taxable, such sales shall be excluded from the numerator and denominator of Wholesale Corp's sales factor. See 830 CMR 63.38.1(9)(d).1.f.ii.

d. Professional Services.

- i. In General. Professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending and credit card services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services. Whether the sale of a professional service is in Massachusetts is determined pursuant to this section, 830 CMR 63.38.1(9)(d)4.d, provided, however, that professional services, such as carpentry, medical and dental services or child care services, that significantly involve or require in-person contact are "in-person services" within the meaning of 830 CMR 63.38.1(9)(d)4.b, and are assigned under the rules of 830 CMR 63.38.1(9)(d)4.b. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. However, in such cases, despite this transmission, the assignment rules that apply are those set forth in this section, 830 CMR 63.38.1(9)(d)4.d, and not those set forth in 830 CMR 63.38.1(9)(d)4.c, pertaining to services delivered to a customer or through or on behalf of a customer.

ii. Assignment of Sales. In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, for purposes of consistent application of the market sourcing rule stated in G.L. c. 63, § 38(f), the Commissioner has concluded that the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be approximated. The assignment of a sale of a professional service depends in many cases upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the sale of a professional service, a taxpayer's customer is the person who contracts for such service, irrespective of whether another person pays for or also benefits from the taxpayer's services. Except as provided in 830 CMR 63.38.1(9)(d)4.d.ii(D) (mutual fund sales), in any instance in which the taxpayer is not taxable in the state to which a sale shall be assigned, the sale shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

(A) General Rule. Sales of professional services other than those services described in CMR 63.38.1(9)(d)4.d.ii(B) (architectural and engineering services), 830 CMR 63.38.1(9)(d)4.d.ii(C) (services provided by a financial institution) and 830 CMR 63.38.1(9)(d)4.d.ii(D) (certain services provided to RICs)), are assigned in accordance with this section 830 CMR 63.38.1(9)(d)4.d.ii(A).

1. Professional Services Delivered to Individual Customers.

Except as otherwise provided in this section, 830 CMR 63.38.1(9)(d)4.d, in any instance in which the service provided is a professional service and the taxpayer's customer is an individual customer, the state or states in which the service is delivered shall be approximated as set forth in this section, 830 CMR 63.38.1(9)(d)4.d.ii(A)1. In particular, the taxpayer shall assign the sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its sales of services from an individual customer, the taxpayer is required to identify the customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state.

2. Professional Services Delivered to Business Customers.

Except as otherwise provided in this section, 830 CMR 63.38.1(9)(d)4.d, in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered shall be approximated as set forth in this section, 830 CMR 63.38.1(9)(d)4.d.ii(A)2. In particular, unless the taxpayer may use the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.d.ii(A)3, the taxpayer shall assign the sale as follows: first, by assigning the receipts to the state where the

contract of sale is principally managed by the customer; second, if such place of customer management is not reasonably determinable, to the customer's place of order; and third, if such customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

3. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in 830 CMR 63.38.1(9)(d)4.d.ii(A)1 and 2, a taxpayer may assign its sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than a thousand customers, whether individual or business, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 830 CMR 63.38.1(9)(d)4.d.ii(A), and not otherwise.
- (B) Architectural and Engineering Services with respect to Real or Tangible Personal Property. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.d. However, unlike in the case of the general rule that applies to professional services, (1) the sale of such an architectural service is assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in such state or states; and (2) the sale of such an engineering service is assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in such state or states, including real estate improvements located in, or expected to be located in, such state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in this section 830 CMR 63.38.1(9)(d)4.d.ii(B), the sale of such services shall be assigned under the general rule for professional services. See 830 CMR 63.38.1(9)(d)4.d.ii(A).
- (C) Services provided by a Financial Institution. The apportionment rules that apply to financial institutions are set forth at M.G.L. c. 63, § 2A. That section includes specific rules to determine a financial institution's sales factor. See M.G.L. c. 63, § 2A(d). However, M.G.L. c. 63, § 2A also provides that receipts from sales, other than sales of tangible personal property, including service transactions, that are not otherwise apportioned under M.G.L. c. 63, § 2A(d), are to be assigned pursuant to the rules of M.G.L. c. 63, § 38(f). See M.G.L. c. 63, § 2A(d)(xi). In any instance in which a financial institution performs services that are to be assigned pursuant to M.G.L. c. 63, § 38(f), including, for example, financial custodial services, those services shall be considered professional services within the meaning of this section, 830 CMR 63.38.1(9)(d)4.d, and shall be assigned according to the general rule for professional service transactions as set forth at 830 CMR 63.38.1(9)(d)4.d.ii(A).

(D) Mutual Fund Sales. Mutual fund sales within the meaning of this regulation, 830 CMR 63.38.1, generally are sales of professional services for purposes of 830 CMR 63.38.1(9)(d)4.d. See 830 CMR 63.38.1(2) (definition of mutual fund sales). However, the rules to assign mutual fund sales made by a mutual fund service corporation are those set forth in 830 CMR 63.38.7, and not those set forth in this regulation, 830 CMR 63.38.1. Also, in the case of mutual fund sales made by a taxpayer that is not a mutual fund service corporation, such mutual fund sales shall be assigned to Massachusetts to the extent that the shareholders of the RIC to whom the mutual fund sales are made are domiciled in Massachusetts, in a manner consistent with the sourcing methodology described in 830 CMR 63.38.7(4)(c)4. In these cases, consistent with the rules of M.G.L. c. 63, § 38(f) and 830 CMR 63.38.7, the mutual fund sales made by the taxpayer directly or indirectly to the RIC are included in the numerator and denominator of the taxpayer's sales factor irrespective as to whether the taxpayer is taxable in one or more of the states in which the RIC's shareholders are domiciled.

- iii. Examples. Unless otherwise stated, assume in each of these examples, where relevant: (a) that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38; (b) that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be excluded from the numerator and denominator of the taxpayer's sales factor, see 830 CMR 63.38.1(9)(d)1.f.ii; (c) that the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.ii(A)3 does not apply; and (d) that the taxpayer's service at issue is not provided directly or indirectly to a RIC, see 830 CMR 63.38.1(9)(d)4.d.ii(D).

Example 1. Broker Corp provides securities brokerage services to individual customers who are resident in Massachusetts and in other states. Assume that Broker Corp knows the state of primary residence for many of its customers, and where it does not know this state of primary residence, it knows the customer's billing address. Also assume that Broker Corp does not derive more than 5% of its sales of services from any one individual customer. Where Broker Corp knows its customer's state of primary residence, it shall assign the sale to that state. Where Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the sale to that state. See 830 CMR 63.38.1(9)(d)4.d.ii(A)1.

Example 2. Same facts as in Example 1, except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its sales of services. Sales to customers from whom Broker Corp derives 5% or less of its sales of services shall be assigned as described in example 1. For each customer from whom it derives more than 5% of its sales of services, Broker Corp is required to determine the customer's state of primary residence and must assign the receipts from the services provided to that customer to that state. In any case in which a 5% customer's state of primary residence is Massachusetts, a sale made to that customer must be assigned to Massachusetts; in any case in which a 5% customer's state of primary

residence is not Massachusetts a sale made to that customer is not assigned to Massachusetts. Where a sale is assigned to a state other than Massachusetts, if the state of assignment (i.e., the state of primary residence of the individual customer) is a state in which Broker Corp is not taxable, receipts from the sales shall be excluded from the numerator and denominator of Broker Corp's sales factor. See 830 CMR 63.38.1(9)(d)4.d.ii(A); 830 CMR 63.38.1(9)(d)1.f.ii.

Example 3. Architecture Corp provides building design services as to buildings located, or expected to be located, in Massachusetts to individual customers who are resident in Massachusetts and other states, and to business customers that are based in Massachusetts and other states. Architecture Corp's sales are assigned to Massachusetts because the locations of the buildings to which its design services relate are in Massachusetts, or are expected to be in Massachusetts. For purposes of assigning these sales, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for such services, and it is not relevant where, in the case of a business customer, the customer principally manages the contract, placed the order for the services or is billed for such services. Further, such sales are assigned to Massachusetts even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than Massachusetts or are electronically delivered to its customer in a state other than Massachusetts. See 830 CMR 63.38.1(9)(d)4.d.ii(B).

Example 4. Law Corp provides legal services to individual clients who are resident in Massachusetts and in other states. In some cases, Law Corp may prepare one or more legal documents for its client as a result of these services and/or the legal work may be related to litigation or a legal matter that is ongoing in a state other than where the client is resident. Assume that Law Corp knows the state of primary residence for many of its clients, and where it does not know this state of primary residence, it knows the client's billing address. Also assume that Law Corp does not derive more than 5% of its sales of services from any one individual client. Where Law Corp knows its client's state of primary residence, it shall assign the sale to that state. Where Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the sale to that state. For purposes of the analysis it is irrelevant whether the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or the litigation or other legal matter that is the underlying predicate for the services is in another state. See 830 CMR 63.38.1(9)(d)4.d.i and ii(A)1.

Example 5. Same facts as in Example 4, except that Law Corp provides legal services to several individual clients who it knows have a primary residence in a state where Law Corp is not taxable. Receipts from these services shall be excluded from the numerator and denominator of Law Corp's sales factor even if the billing address of one or more of these clients is in a state in which Law Corp is taxable, including Massachusetts. See 830 CMR 63.38.1(9)(d)4.d.ii(A)1; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 6. Law Corp provides legal services to several multistate business clients. In each case, Law Corp knows the state in which the agreement for legal services that governs the client relationship is

principally managed by the client. In one case, the agreement is principally managed in Massachusetts; in the other cases, the agreement is principally managed in a state other than Massachusetts. Where the agreement for legal services is principally managed by the client in Massachusetts the sale of the services shall be assigned to Massachusetts; in the other cases, the sale is not assigned to Massachusetts. In the case of the sale that is assigned to Massachusetts, the sale shall be so assigned even if (1) the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or (2) the litigation or other legal matter that is the underlying predicate for the services is in another state. See 830 CMR 63.38.1(9)(d)4.d.ii(A)2.

Example 7. Same facts as in example 6, except that Law Corp is not taxable in one of the states other than Massachusetts in which Law Corp's agreement for legal services that governs the client relationship is principally managed by the business client. Receipts from these latter services shall be excluded from the numerator and denominator of Law Corp's sales factor. See 830 CMR 63.38.1(9)(d)4.d.ii and ii(A)2; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 8. Consulting Corp, a company that provides consulting services to law firms and other customers, is hired by Law Corp in connection with legal representation that Law Corp provides to Client Co. Specifically, Consulting Corp is hired to provide expert testimony at a trial being conducted by Law Corp on behalf of Client Co. Client Co pays for Consulting Corp's services directly. Assuming that Consulting Corp knows that its agreement with Law Co is principally managed by Law Corp in Massachusetts, the sale of Consulting Corp's services shall be assigned to Massachusetts. It is not relevant for purposes of the analysis that Client Co is the ultimate beneficiary of Consulting Corp's services, or that Client Co pays for Consulting Corp's services directly. See 830 CMR 63.38.1(9)(d)4.d.ii(A)2.

Example 9. Bank Corp provides financial custodial services to 500 individual customers who are resident in Massachusetts and in other states, including the safekeeping of some of its customers' financial assets. Assume for purposes of this example that Bank Corp knows the state of primary residence for many of its customers, and where it does not know this state of primary residence, it knows the customer's billing address. Also assume that Bank Corp does not derive more than 5% of its sales of all of its services from any single customer. Note that because Bank Corp does not have more than 1000 customers, it may not apply the safe harbor for professional services stated in 830 CMR 63.38.1(9)(d)4.d.ii(A)3. Where Bank Corp knows its customer's state of primary residence, it must assign the sale to that state. Where Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the sale to that state. Applying these rules, Bank Corp's sales are assigned to Massachusetts if the customer's state of primary residence (or billing address, in cases where it does not know the customer's state of primary residence) is in Massachusetts, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Massachusetts. See 830 CMR 63.38.1(9)(d)4.d.ii(A)1, (C).

Example 10. Same facts as Example 9, except that Bank Corp has more than a thousand customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in 830 CMR 63.38.1(9)(d)4.d.ii(A)3, and may assign its sales to a state or states using each customer's billing address. If Bank Corp is not taxable in one or more states to which some of its sales would be assigned, it must exclude the sales that would be assigned to those states from the numerator and denominator of its sales factor. See 830 CMR 63.38.1(9)(d)4.d.ii, ii(C); 830 CMR 63.38.1(9)(d)1.f.ii.

Example 11. Same facts as Example 10, except that Bank Corp derives more than 5% of its sales from a single individual customer. As to the sales made to this customer, Bank Corp is required to determine the individual customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state. See 830 CMR 63.38.1(9)(d)4.d.ii(A)1, ii(C). Sales to all other customers are assigned as described in example 10.

Example 12. Advisor Corp, a corporation that provides investment advisory services, provides such advisory services to Investment Co. Investment Co is a multistate business client of Advisor Corp that uses Advisor Corp's services in connection with investment accounts that it manages for individual clients, who are the ultimate beneficiaries of Advisor Corp's services. Assume that Investment Co's individual clients are persons that are resident in numerous states, which may or may not include Massachusetts. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in Massachusetts, the sale of Advisor Corp's services shall be assigned to Massachusetts. It is not relevant for purposes of the analysis that the ultimate beneficiaries of Advisor Corp's services may be Investment Co's clients, who are residents of numerous states. See 830 CMR 63.38.1(9)(d)4.d.ii(A)2.

Example 13. Same facts as Example 12, except that in addition to providing investment advisory services to Investment Co, Advisor Corp also provides its advisory services to Mutual Fund Co, a regulated investment company with shareholders that are resident in numerous states, including Massachusetts. Advisor Corp is not a mutual fund service corporation; however Advisor Corp's services provided to Mutual Fund Co. constitute mutual fund sales within the meaning of this regulation, 830 CMR 63.38.1. See 830 CMR 63.38.1(2). Advisor Corp's mutual fund sales to Mutual Fund Co shall be assigned to Massachusetts to the extent that Mutual Fund Co's shareholders of record are domiciled in Massachusetts. See 830 CMR 63.38.1(9)(d)4.d.ii(D). However, unlike in the rule set forth generally in this section, 830 CMR 63.38.1(9)(d), there shall be no exclusion of such sales from the numerator and denominator of Advisor Corp's sales factor in any case in which such shareholders of record are domiciled in a state in which Advisor Corp is not taxable. See *id.* In contrast to its mutual fund sales made to Mutual Fund Co, Advisor Corp's advisory services provided to Investment Co are assigned as stated in Example 12, and its sales to Investment Co shall be excluded from the numerator and denominator of Advisor Corp's sales factor if such sales would be assigned to a state in which Advisor Corp is not taxable. See 830 CMR 63.38.1(9)(d)4.d.ii and ii(A)2.

Example 14. Advisor Corp provides investment advisory services to Investment Fund LP, a partnership that invests in securities and other assets. Assuming that Advisor Corp knows that its agreement with Investment Fund LP is principally managed by Investment Fund LP in Massachusetts, the sale of Advisor Corp's services shall be assigned to Massachusetts. See 830 CMR 63.38.1(9)(d)4.d.ii(A)2. Note that, unlike in the case of mutual fund sales (see 830 CMR 63.38.1(9)(d)4.d.ii(D)), it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example 15. Design Corp is a corporation based outside Massachusetts that provides graphic design and similar services in Massachusetts and in neighboring states. Design Corp enters into a contract at a location outside Massachusetts with an individual customer to design fliers for the customer. Assume that Design Corp does not know the individual customer's state of primary residence and does not derive more than 5% of its sales of services from the individual customer. All of the design work is performed outside Massachusetts. The sale is in Massachusetts if the customer's billing address is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.d.ii(A)1.

5. License or Lease of Intangible Property.
 - a. General Rules.
 - i. The receipts from the license of intangible property are in Massachusetts if and to the extent the intangible is used in Massachusetts. In general, the term "use" shall be construed to refer to the location of the taxpayer's market for the use of the intangible property that is being licensed and is not to be construed to refer to the location of the property or payroll of the taxpayer as otherwise determined for corporate apportionment purposes pursuant to 830 CMR 63.38.1(7)-(8). The rules that apply to determine the location of the use of intangible property in the context of several specific types of licensing transactions are set forth at 830 CMR 63.38.1(9)(d)5.b-e. For purposes of the rules set forth in this section, 830 CMR 63.38.1(9)(d)5, a lease of intangible property is to be treated the same as a license of intangible property.
 - ii. In general, a license of intangible property that conveys all substantial rights in such property is treated as a sale of intangible property for tax purposes. See 830 CMR 63.38.1(9)(d)6. Note, however, that for purposes of 830 CMR 63.38.1(9)(d)5 and 6, a sale or exchange of intangible property is treated as a license of such property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.
 - iii. Intangible property licensed as part of the sale or lease of tangible property is treated under 830 CMR 63.38.1(9) as the sale or lease of tangible property.
 - iv. In any instance in which the taxpayer is not taxable in the state to which the receipts from the license of intangible property are assigned, the receipts shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

- v. To the extent that the transfer of either a security, as defined in 830 CMR 63.38.1(2), or business “goodwill” or similar intangible value, including, without limitation, “going concern value” or “workforce in place,” may be characterized as a license or lease of intangible property, receipts from such transaction shall be excluded from the numerator and the denominator of the taxpayer’s sales factor.

- b. License of a Marketing Intangible. Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items (i.e., a marketing intangible), the royalties or other licensing fees paid by the licensee for such right are assigned to Massachusetts to the extent that the fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by customers in Massachusetts. Examples of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or trade name; certain copyrights; the license of a film, television or multimedia production or event for commercial distribution; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales. In the case of the license of a marketing intangible, where a taxpayer has actual evidence of the amount or proportion of its receipts that is attributable to Massachusetts, it shall assign such amount or proportion to Massachusetts. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Massachusetts customers, the portion of the licensing fee to be assigned to Massachusetts shall be approximated by multiplying the total fee by a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which the licensee makes material use of the intangible property to regularly market its goods, services or other items relative to the total population in such area. Where the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the portion of the licensing fee to be assigned to Massachusetts shall be approximated by multiplying the total fee by a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which the licensee's goods, services, or other items are ultimately marketed using the intangible property relative to the total population of such area.

- c. License of a Production Intangible. Where a license is granted for the right to use intangible property other than in connection with the sale, lease, license, or other marketing of goods, services, or other items, and the license is to be used in a production capacity (a “production intangible”), the licensing fees paid by the licensee for such right are assigned to Massachusetts to the extent that the use for which the fees are paid takes place in Massachusetts. Examples of a license of a production intangible include, without limitation, the license of a patent, a copyright, or trade secrets to be used in a manufacturing process, where the value of the intangible lies predominately in its use in such process. In the case of a license of a production intangible, it shall be presumed that the use of the intangible property takes place in the state of the licensee's commercial domicile (where the licensee is a business) or the licensee's state of primary residence (where the licensee is an individual) unless the taxpayer or the Commissioner can reasonably establish the location(s) of actual use. Where the Commissioner can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in Massachusetts, it shall be presumed that the entire use is in Massachusetts except to the

extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Massachusetts.

- d. License of a Mixed Intangible. Where a license of intangible property includes both a license of a marketing intangible and a license of a production intangible (a “mixed intangible”) and the fees to be paid in each instance are separately and reasonably stated in the licensing contract, the Commissioner will accept such separate statement for purposes of this section if it is reasonable. Where a license of intangible property includes both a license of a marketing intangible and a license of a production intangible and the fees to be paid in each instance are not separately and reasonably stated in the contract, it shall be presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the Commissioner can reasonably establish otherwise.
- e. License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services.
 - i. In general. In some cases, the license of intangible property will resemble the sale of an electronically-delivered good or service rather than the license of a marketing intangible or a production intangible. In such cases, the receipts from the licensing transaction shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B) and (C), as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this section 830 CMR 63.38.1(9)(d)5.e include, without limitation, the license of database access, the license of access to information, the license of digital goods (see 830 CMR 63.38.1(9)(d)7.b.), and the license of certain software (e.g., where the transaction is not the license of pre-written software that is treated as the sale of tangible personal property, see 830 CMR 63.38.1(9)(d)7.a).
 - ii. Sublicenses. Pursuant to 830 CMR 63.38.1(9)(d)5.e.i, the rules of 830 CMR 63.38.1(9)(d)4.c.ii(C) may apply where a taxpayer licenses intangible property to a customer that in turn sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the rules set forth at 830 CMR 63.38.1(9)(d)4.c.ii(C) that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users, provided that for this purposes. the intangible property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to such property (e.g., because the sublicensee’s rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because such property is bundled with additional services or items of property.
- f. Examples. Assume in each of these examples that the taxpayer that licenses the intangible property is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state

other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Crayon Corp and Dealer Co enter into a license contract under which Dealer Co as licensee is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Co's sale of certain products to retail customers. Under the contract, Dealer Co is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co of products using the Crayon Corp trademarks. Under the contract, Dealer Co is permitted to sell the products at multiple store locations, including store locations that are both within and without Massachusetts. Further, the licensing fees that are paid by Dealer Co are broken out on a per-store basis. The licensing fees paid to Crayon Corp by Dealer Co represent fees from the license of a marketing intangible. The portion of the fees to be assigned to Massachusetts shall be determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Massachusetts stores relative to Dealer Co's total receipts. See 830 CMR 63.38.1(9)(d)5.b.

Example 2. Program Corp, a corporation that is based outside Massachusetts, licenses programming that it owns to licensees, such as cable networks, that in turn will offer the programming to their customers on television or other media outlets in Massachusetts and in all other U.S. states. Each of these licensing contracts constitutes the license of a marketing intangible. For each licensee, assuming that Program Corp lacks evidence of the actual number of viewers of the programming in Massachusetts, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Massachusetts sales is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Massachusetts audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. See 830 CMR 63.38.1(9)(d)5.b. If Program Corp is not taxable in any state in which the licensee's audience is located, the sales that would be assigned to such state shall be excluded from the numerator and denominator of Program Corp's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii. Note that the analysis and result as to the state or states to which sales are properly assigned would be the same to the extent that the substance of Program Corp's licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. See 830 CMR 63.38.1(9)(d)5.e.

Example 3. Moniker Corp enters into a license contract with Wholesale Co. Pursuant to the contract Wholesale Co is granted the right to use trademarks owned by Moniker Corp to brand sports equipment that is to be manufactured by Wholesale Co or an unrelated entity, and to sell the manufactured equipment to unrelated companies that will ultimately market the equipment to consumers in a specific geographic region, including a foreign country. The license agreement confers a license of a marketing intangible, even though the trademarks in question will be affixed to property to be manufactured. In addition, the license of the marketing intangible is for the right to use the intangible property in connection with sales to be made at wholesale rather than directly to retail customers. The component of the licensing fee that constitutes the Massachusetts sales of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects

the ratio of the Massachusetts population in the specific geographic region relative to the total population in such region. See 830 CMR 63.38.1(9)(d)5.b. If Moniker Corp is not taxable in any state (including a foreign country, see 830 CMR 63.38.1(2)) in which the licensee's audience is located, the sales that would be assigned to such state shall be excluded from the numerator and denominator of Moniker Corp's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 4. Formula, Inc and Appliance Co enter into a license contract under which Appliance Co is permitted to use a patent owned by Formula, Inc to manufacture appliances. The license contract specifies that Appliance Co is to pay Formula, Inc a royalty that is a fixed percentage of the gross receipts from the products that are later sold. The contract does not specify any other fees. The appliances are both manufactured and sold in Massachusetts and several other states. Assume the licensing fees are paid for the license of a production intangible, even though the royalty is to be paid based upon the sales of a manufactured product (i.e., the license is not one that includes a marketing intangible). Because the Commissioner can reasonably establish that the actual use of the intangible property takes place in part in Massachusetts, the royalty is assigned based to the location of such use rather than to location of the licensee's commercial domicile, in accordance with 830 CMR 63.38.1(9)(d)5.c. It is presumed that the entire use is in Massachusetts except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Massachusetts. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Massachusetts using the patent relative to such manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Massachusetts sales. See 830 CMR 63.38.1(9)(d)5.c.

Example 5. Axel Corp enters into a license agreement with Biker Co in which Biker Co is granted the right to produce motor scooters using patented technology owned by Axel Corp, and also to sell such scooters by marketing the fact that the scooters were manufactured using the special technology. The contract is a license of both a marketing and production intangible, i.e., a mixed intangible. The scooters are manufactured outside Massachusetts. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co's receipts that are derived from Massachusetts customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Massachusetts population constitutes 25% of the total population during the period in question. The licensing contract requires an upfront licensing fee to be paid by Biker Co to Axel Corp and does not specify what percentage of the fee derives from Biker Co's right to use Axel Corp's patented technology. Because the fees for the license of the marketing and production intangible are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible, unless either the taxpayer or Commissioner reasonably establishes otherwise. Assuming that neither party establishes otherwise, 25% of the licensing fee constitutes Massachusetts sales. See 830 CMR 63.38.1(9)(d)5.b and d.

Example 6. Same facts as Example 5, except that the license contract specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing contract constitutes both the license of a marketing intangible and the license of a

production intangible. Assuming that the separately stated fees are reasonable, the Commissioner will: (1) assign no part of the licensing fee paid for the production intangible to Massachusetts, and (2) assign 25% of the licensing fee paid for the marketing intangible to Massachusetts. See 830 CMR 63.38.1(9)(d)5.d.

Example 7. Better Burger Corp, which is based outside Massachusetts, enters into franchise contracts with franchisees who agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Massachusetts. In each case, the franchise contract between the individual and Better Burger provides that the franchisee is to pay Better Burger Corp an upfront fee for the receipt of the franchise and monthly franchise fees, which cover, among other things, the right to use the Better Burger name and service marks, food processes and cooking know-how, as well as fees for management services. The upfront fees for the receipt of the Massachusetts franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Massachusetts sales because the franchises are for the right to make Massachusetts sales. The monthly franchise fees paid by Massachusetts franchisees constitute fees paid for (1) the license of marketing intangibles (the Better Burger name and service marks), (2) the license of production intangibles (food processes and know-how) and (3) personal services (management fees). The fees paid for the license of the marketing intangibles and the production intangibles constitute Massachusetts sales because in each case the use of the intangibles is to take place in Massachusetts. See 830 CMR 63.38.1(9)(d)5.b-c. The fees paid for the personal services are to be assigned pursuant to 830 CMR 63.38.1(9)(d)4.

Example 8. Online Corp, a corporation based outside Massachusetts, licenses an information database through the means of the Internet to individual customers that are resident in Massachusetts and in other states. These customers access Online Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned in accordance with 830 CMR 63.38.1(9)(d)5.e. If Online Corp can determine or reasonably approximate the state or states where its database is accessed, then it must do so. Assuming that Online Corp cannot determine or reasonably approximate the location where its database is accessed, Online Corp must assign the sales made to the individual customers using the customers' billing addresses to the extent known. Assume for purposes of this example that Online Corp knows the billing address for each of its customers. In this case, Online Corp's sales made to its individual customers are in Massachusetts in any case in which the customer's billing address is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1.

Example 9. Net Corp, a corporation based outside Massachusetts, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in Massachusetts and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned in accordance with 830 CMR 63.38.1(9)(d)5.e. Assume that Net Corp cannot determine where its database is accessed but reasonably approximates that 75% of Business Corp's database access took place in Massachusetts, and 25% of Business Corp's database access took place in other states. In such case, 75% of the receipts from database access is in Massachusetts. Assume

alternatively that Net Corp lacks sufficient information regarding the location where its database is accessed to reasonably approximate such location. Under these circumstances, if Net Corp derives 5% or less of its receipts from database access from Business Corp, Net Corp must assign the sale under 830 CMR 63.38.1(9)(d)4.c.ii(B)2 to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from database access from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state. See 830 CMR 63.38.1(9)(d)4.c.ii(B)2.

Example 10. Net Corp, a corporation based outside Massachusetts, licenses an information database through the means of the Internet to more than a thousand individual and business customers in Massachusetts and in other states. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned in accordance with 830 CMR 63.38.1(9)(d)5.e. Assume that Net Corp cannot determine or reasonably approximate the location where its information database is accessed. Also assume that Net Corp does not derive more than 5% of its sales of database access from any single customer. Net Corp may apply the safe harbor stated in 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d, and may assign its sales to a state or states using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its sales would be otherwise assigned, it must exclude those sales from the numerator and denominator of its sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 11. Web Corp, a corporation based outside of Massachusetts, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in Massachusetts and in other states. These end users access Web Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. Web Corp's license of the database to its customers includes the right to sublicense the database to end users, while the sublicenses provide that the rights to access and use the database are limited to the end users' own use and prohibit the individual end users from further sublicensing the database. Web Corp receives a fee from each customer based upon the number of sublicenses issued to end users. The license is a license of intangible property that resembles a sale of goods or services and shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)4.c.ii(C). See 830 CMR 63.38.1(9)(d)5.e. If Web Corp can determine or reasonably approximate the state or states where its database is accessed by end users, then it must do so. Assuming that Web Corp lacks sufficient information from which it can determine or reasonably approximate the location where its database is accessed by end users, Web Corp must approximate the extent to which its database is accessed in Massachusetts using a percentage that represents the ratio of the Massachusetts population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.ii.

6. Sale of Intangible Property.

- a. **Assignment of Sales.** The assignment of a sale to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold. For purposes of this section, 830 CMR 63.38.1(9)(d)6, a sale or exchange of intangible property includes a license of such property where the transaction is treated for tax purposes as a sale of all substantial rights in the property and the receipts from transaction are not contingent on the productivity, use or disposition of the property. For the rules that apply where the consideration for the transfer of rights is contingent on the productivity, use or disposition of the property, see 830 CMR 63.38.1(9)(d)5.a. and 6.a.iv.
- i. **Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area.** In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the sale is assigned to a state if and to the extent that the intangible property is used or otherwise associated with the state. Where the intangible property is used in, or otherwise associated with, only Massachusetts the taxpayer shall assign the sale to Massachusetts. Where the intangible property is used in or is otherwise associated with Massachusetts and one or more other states, the taxpayer shall assign the sale to Massachusetts to the extent that the intangible property is used in, or associated with, Massachusetts, through the means of a reasonable approximation.
- ii. **Agreement Not to Compete.** An agreement or covenant not to compete in a specified geographic area requires the contract party to refrain from conducting certain business activity in that specified area. In the case of an agreement or covenant not to compete the receipts are to be assigned to a state based upon the percentage that reflects the state's population in the U.S. geographic area specified in the contract relative to the total population in such area.
- iii. **Taxpayer Not Taxable in State of Assignment.** In any instance in which, pursuant to 830 CMR 63.38.1(9)(d)6.a.i and ii, the state to which the sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.
- iv. **Sale that Resembles a License (Receipts are Contingent on Productivity, Use or Disposition of the Intangible Property).** In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use or disposition of the property, the receipts from the sale shall be assigned by applying the rules set forth in 830 CMR 63.38.1(9)(d)5 (pertaining to the license or lease of intangible property).
- v. **Sale that Resembles a Sale of Goods and Services.** In the case of a sale or exchange of intangible property where the substance of the transaction resembles a sale of goods or services and where the receipts from the sale or exchange do not derive from payments contingent on the productivity, use or disposition of the property, the receipts from the sale shall be assigned by applying the rules set forth in 830 CMR

63.38.1(9)(d)5.e (relating to licenses of intangible property that resemble sales of goods and services). Examples of such transactions include those that are analogous to the license transactions cited as examples in 830 CMR 63.38.1(9)(d)5.e.

- vi. Excluded Sales. The sale of a security as defined at 830 CMR 63.38.1(2) and the sale of business “goodwill” or similar intangible value, including, without limitation, “going concern value” and “workforce in place,” shall be excluded from the numerator and denominator of a taxpayer’s sales factor. See M.G.L. c. 63, § 38(f). Also, except as otherwise provided in this section 830 CMR 63.38.1(9)(d), the sale of intangible property that is not referenced in 830 CMR 63.38.1(9)(d)6.a.i, ii, iv, or v, shall be excluded from the numerator and the denominator of the taxpayer’s sales factor. The sale of intangible property that is not referenced in 830 CMR 63.38.1(9)(d)6.a.i, ii, iv, or v, and that therefore is excluded from the numerator and denominator of the taxpayer’s sales factor includes, without limitation, the sale of a partnership interest that is not otherwise a security within the meaning of 830 CMR 63.38.1(2).
- b. Examples. Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to M.G.L. c. 63, § 38. Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which some of its sales would be assigned, so that there is no requirement in such examples that such sales to other states must be excluded from the taxpayer’s numerator and denominator. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 1. Airline Corp, a corporation based outside Massachusetts, sells its rights to use several gates at an airport located in Massachusetts to Buyer Corp, a corporation that is based outside Massachusetts. The contract of sale is negotiated and signed outside of Massachusetts. The sale is in Massachusetts because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Massachusetts. See 830 CMR 63.38.1(9)(d)6.a.i.

Example 2. Wireless Corp, a corporation based outside Massachusetts, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Massachusetts to Buyer Corp, a corporation that is based outside Massachusetts. The contract of sale is negotiated and signed outside of Massachusetts. The sale is in Massachusetts because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Massachusetts. See *id.*

Example 3. Same facts as in Example 2 except that Wireless Corp sells to Buyer Corp an FCC license to operate wireless telecommunications services in a designated area in Massachusetts and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or associated with Massachusetts. For purposes of making this reasonable approximation, Wireless Corp may rely upon credible data that identifies the percentage of persons that use wireless telecommunications in the two states covered by the license. See *id.*

Example 4. Same facts as in Example 3 except that Wireless Corp is not taxable in the adjacent state in which the FCC license authorizes it to operate

wireless telecommunications services. The receipts paid to Wireless Corp that would be assigned to the adjacent state must be excluded from the numerator and denominator of Wireless Corp's sales factor. See 830 CMR 63.38.1(9)(d)6.a.i.; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 5. Sports League Corp, a corporation that is based outside Massachusetts, sells the rights to broadcast the sporting events played by the teams in its league in all 50 U.S. states to Network Corp. Although the games played by Sports League Corp will be broadcast in all 50 states, the games are of greater interest in the northeast region of the country, including Massachusetts. Because the intangible property sold is a contract right that authorizes the holder to conduct a business activity in a specified geographic area, Sports League Corp must attempt to reasonably approximate the extent to which the intangible property is used in or associated with Massachusetts. For purposes of making this reasonable approximation, Sports League Corp may rely upon audience measurement information that identifies the percentage of the audience for its sporting events in Massachusetts and the other states. See 830 CMR 63.38.1(9)(d)6.a.i.

Example 6. Same facts as in Example 5, except that Sports League Corp is not taxable in one state. The receipts paid to Sports League Corp that would be assigned to that state must be excluded from the numerator and denominator of Sports League Corp's sales factor. See 830 CMR 63.38.1(9)(d)6.a.i.; 830 CMR 63.38.1(9)(d)1.f.ii.

Example 7. Business Corp, a corporation based outside Massachusetts engaged in business activities in Massachusetts and other states, enters into a covenant not to compete with Competition Corp, a corporation that is based outside Massachusetts, in exchange for a fee. The agreement requires Business Corp to refrain from engaging in certain business activity in Massachusetts and other states. The component of the fee that constitutes a Massachusetts sale is determined by multiplying the amount of the fee by a fraction represented by the percentage of the Massachusetts population over the total population in the specified geographic region. See 830 CMR 63.38.1(9)(d)6.a.ii. In any case in which a portion of the fee would be assigned to a state in which Business Corp is not taxable, such portion shall be excluded from the numerator and denominator of Business Corp's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

Example 8. Business Corp, a corporation that is commercially domiciled in Massachusetts, sells all of its assets including its business goodwill, to a business customer that is based in Massachusetts. The sale of the goodwill shall be excluded from the numerator and denominator of Business Corp's sales factor. See 830 CMR 63.38.1(9)(d)6.a.vi.

Example 9. Inventor Corp, a corporation that is based outside Massachusetts, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Massachusetts. Assume that the sale is not one in which the receipts derive from payments that are contingent on the productivity, use or disposition of the property. See 830 CMR 63.38.1(9)(d)6.a.iv. Inventor Corp understands that Buyer Corp is likely to use the patented technology in Massachusetts, but the patented technology can be used anywhere (i.e., the rights sold are not rights that authorize the holder to conduct a business activity in a specific geographic area). The sale of the patented technology shall be excluded from the

numerator and denominator of Inventor Corp's sales factor. See 830 CMR 63.38.1(9)(d)6.a.vi.

7. Special Rules.

- a. Software Transactions. A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights), when transferred on a tangible medium, is treated as the sale of tangible personal property, rather than as either the license or sale of intangible property or the performance of a service. In such cases, the receipts are in Massachusetts as determined under the rules for the sale of tangible personal property set forth at 830 CMR 63.38.1(9)(c). In all other cases, the receipts from a license or sale of software are to be assigned to Massachusetts as determined otherwise under this regulation (e.g., depending on the facts, as the development and sale of custom software, see 830 CMR 63.38.1(9)(d)4.c, as a license of a marketing intangible, see 830 CMR 63.38.1(9)(d)5.b, as a license of a production intangible, see 830 CMR 63.38.1(9)(d)5.c, as a license of intangible property where the substance of the transaction resembles a sale of goods or services, see 830 CMR 63.38.1(9)(d)5.e, or as a sale of intangible property, see 830 CMR 63.38.1(9)(d)6).
- b. Sales or Licenses of Digital Goods or Services.
 - i. In general. In the case of a sale or license of digital goods or services, including, among other things, the sale of various video, audio and software products or similar transactions, the receipts from the sale or license shall be assigned by applying the same rules as are set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B) or (C), as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. For purposes of the analysis, it is not relevant what the terms of the contractual relationship are or whether the sale or license might be characterized, depending upon the particular facts, as, for example, the sale or license of intangible property or the performance of a service. See 830 CMR 63.38.1(9)(d)5.e. and 830 CMR 63.38.1(9)(d)(6)a.v.
 - ii Telecommunications Companies. In the case of a taxpayer that provides telecommunications or ancillary services and that is thereby subject to the provisions of 830 CMR 63.38.11, the sale or license of digital goods or services not otherwise assigned for apportionment purposes pursuant to that regulation shall be assigned pursuant to this section, 830 CMR 63.38.1(9)(d)7.b.ii, by applying the rules set forth in 830 CMR 63.38.1(9)(d)4.c.ii(B) or (C) as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. See 830 CMR 63.38.11(3). However, in applying such rules, if the taxpayer cannot determine the state or states where a customer receives the purchased product it may reasonably approximate this location using the customer's place of "primary use" of the purchased product, applying the definition of "primary use" set forth in 830 CMR 63.38.11.
- c. Enforcement of Legal Rights. Receipts attributable to the protection or enforcement of legal rights of a taxpayer through litigation, arbitration, or settlement of legal disputes or claims, including the filing and pursuit of claims under insurance contracts, shall be excluded from the numerator and

denominator of the taxpayer's sales factor. For purposes of this rule, in the case of a settlement agreement, it shall not be relevant how the parties to the agreement characterize the payment made under the agreement.

- (f) *Sales Factor Consistency.* A taxpayer must use the same rules for excluding or including gross receipts in both the numerator and the denominator of the sales factor. If the taxpayer changes its method of excluding or including gross receipts in the sales factor from the method used in its return in the prior year, the taxpayer must disclose in the return for the current year the fact of such change, the nature and extent of the change, and the reason for the change. The Commissioner may disregard changes in the current year or in future tax years if they have not been adequately disclosed. See also 830 CMR 63.38.1(9)(d)1.g.

(13) *Alternative Apportionment Methods.*

- (a) If a taxpayer claims that the allocation or apportionment provisions of 830 CMR 63.38.1 are not reasonably adapted to approximate the net income derived from business carried on in Massachusetts, a taxpayer may apply to the Commissioner to have such income determined by an alternative apportionment method pursuant to the provisions of M.G.L. c. 63, § 42 and 830 CMR 63.42.1.
- (b) The provisions of 830 CMR 63.38.1(13)(a), above, notwithstanding, if the Commissioner determines that the apportionment provisions of 830 CMR 63.38.1 are not reasonably adapted to approximate the net income derived from business carried on in Massachusetts by certain industries, the Commissioner may, by regulation, adopt alternative apportionment provisions for such industries. To the extent the Commissioner adopts alternative apportionment regulations for certain industries, the rules contained in the alternative apportionment regulations will supersede the provisions of 830 CMR 63.38.1.

(14) *Effective Dates.* The provisions in this regulation generally shall apply to tax years beginning on or after the promulgation of the regulation....