FINAL PROPOSED RULE # 21-P21

Administrative Procedures – Final Proposed Rule Filing

Instructions:

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the "Rule on Rulemaking" adopted by the Office of the Secretary of State, this filing will be considered complete upon filing and acceptance of these forms with the Office of the Secretary of State, and the Legislative Committee on Administrative Rules.

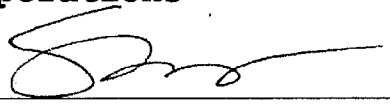
All forms requiring a signature shall be original signatures of the appropriate adopting authority or authorized person, and all filings are to be submitted at the Office of the Secretary of State, no later than 3:30 pm on the last scheduled day of the work week.

The data provided in text areas of these forms will be used to generate a notice of rulemaking in the portal of "Proposed Rule Postings" online, and the newspapers of record if the rule is marked for publication. Publication of notices will be charged back to the promulgating agency.

PLEASE REMOVE ANY COVERSHEET OR FORM NOT REQUIRED WITH THE CURRENT FILING BEFORE DELIVERY!

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I approve the contents of this filing entitled:

Allocation and Apportionment of Vermont Net Income By Corporations



_____ , on 9/29/2021

(signature) (date)

Printed Name and Title:
Susanne Young, Secretary of Administration

RECEIVED BY: _____

- ☐ Coversheet
- ☐ Adopting Page
- ☐ Economic Impact Analysis
- ☐ Environmental Impact Analysis
- ☐ Strategy for Maximizing Public Input
- ☐ Scientific Information Statement (if applicable)
- ☐ Incorporated by Reference Statement (if applicable)
- ☐ Clean text of the rule (Amended text without annotation)
- ☐ Annotated text (Clearly marking changes from previous rule)
- ☐ ICAR Minutes
- ☐ Copy of Comments
- ☐ Responsiveness Summary

Final Proposed Coversheet

1. TITLE OF RULE FILING:
   Allocation and Apportionment of Vermont Net Income By Corporations

2. PROPOSED NUMBER ASSIGNED BY THE SECRETARY OF STATE
   21P-021

3. ADOPTING AGENCY:
   Administration - Department of Taxes

4. PRIMARY CONTACT PERSON:
   (A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE).

   Name: Will Baker

   Agency: Department of Taxes

   Mailing Address: PO Box 429, Montpelier VT 05602

   Telephone: 802 828 - 2506 Fax: 802 828 - 5875

   E-Mail: will.baker@vermont.gov

   Web URL*(WHERE THE RULE WILL BE POSTED)*: tax.vermont.gov

5. SECONDARY CONTACT PERSON:
   (A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON).

   Name: Rebecca Sameroff

   Agency: Administration - Department of Taxes

   Mailing Address: PO Box 429, Montpelier, VT 05602

   Telephone: 802 828 - 3763 Fax: 802 828 - 5875

   E-Mail: rebecca.sameroff@vermont.gov

6. RECORDS EXEMPTION INCLUDED WITHIN RULE:
   (DOES THE RULE CONTAIN ANY PROVISION DESIGNATING INFORMATION AS CONFIDENTIAL; LIMITING ITS PUBLIC RELEASE; OR OTHERWISE EXEMPTING IT FROM INSPECTION AND COPYING?) No

   IF YES, CITE THE STATUTORY AUTHORITY FOR THE EXEMPTION:

   PLEASE SUMMARIZE THE REASON FOR THE EXEMPTION:

7. LEGAL AUTHORITY / ENABLING LEGISLATION:

(THE SPECIFIC STATUTORY OR LEGAL CITATION FROM SESSION LAW INDICATING WHO THE ADOPTING ENTITY IS AND THUS WHO THE SIGNATORY SHOULD BE. THIS SHOULD BE A SPECIFIC CITATION NOT A CHAPTER CITATION).

32 V.S.A. § 3201(a)(1)(general rulemaking authority of the Commissioner of Taxes); 32 V.S.A. § 5833(a)(3)(E)(rulemaking authority of Commissioner with respect to corporate apportionment)

8. EXPLANATION OF HOW THE RULE IS WITHIN THE AUTHORITY OF THE AGENCY:
   The Commissioner is required to promulgate rules under 32 V.S.A. § 5833(a)(3)(E) to apportion a fair and equitable portion of a multi-state business' income to Vermont consist with 32 V.S.A. § 5833.
9. THE FILING HAS CHANGED SINCE THE FILING OF THE PROPOSED RULE.
10. THE AGENCY HAS INCLUDED WITH THIS FILING A LETTER EXPLAINING IN DETAIL WHAT CHANGES WERE MADE, CITING CHAPTER AND SECTION WHERE APPLICABLE.
11. SUBSTANTIAL ARGUMENTS AND CONSIDERATIONS WERE RAISED FOR OR AGAINST THE ORIGINAL PROPOSAL.
12. THE AGENCY HAS NOT INCLUDED COPIES OF ALL WRITTEN SUBMISSIONS AND SYNOPSES OF ORAL COMMENTS RECEIVED.
13. THE AGENCY HAS NOT INCLUDED A LETTER EXPLAINING IN DETAIL THE REASONS FOR THE AGENCY'S DECISION TO REJECT OR ADOPT THEM.
14. CONCISE SUMMARY (**150 WORDS OR LESS**):

    The 1998 Regulation has been superseded by statute in some respects. The amendments adjust the apportionemnt formula to be consistent with current law, and adjust the apportionment method for services and intangibles to accommodate statutory changes. Other changes provide specific definitions and examples, and provide clarity to the Department's interpertation of the tax on corporations.

15. EXPLANATION OF WHY THE RULE IS NECESSARY:
    It is required by 32 V.S.A. § 5833(a)(3)(E). Amendments must be made to conform with current law. Other provisions provide clarity and examples.

16. EXPLANATION OF HOW THE RULE IS NOT ARBITRARY:

The Rule is consistent with 32 V.S.A. § 5833. Further, it adopts several uniform provisions from the Multi-State Tax Commission model rule for apportionment, which has been vetted by that organization and several states.

17. LIST OF PEOPLE, ENTERPRISES AND GOVERNMENT ENTITIES AFFECTED BY THIS RULE:

Corporations which have sales into Vermont, property in Vermont, or employees in Vermont are affected, as they must pay Vermont corporate income tax.

18. BRIEF SUMMARY OF ECONOMIC IMPACT (150 WORDS OR LESS):

The rule is an amendment of the current rule, for a tax that has been in place for many years. There is some clarity for when sales, employees and property are considered in Vermont for purposes of the tax. New legislation in 2019 directed the sourcing of income from services to the location of the market for the service. This rule adopts a uniform regulation for this sourcing. With any changes to tax attributes, some corporations may experience an increase in tax and some may experience a decrease in tax, based on their business and type of sales in Vermont and the extent to which they provide services in Vermont.

19. A HEARING WAS HELD.

20. HEARING INFORMATION

(THE FIRST HEARING SHALL BE NO SOONER THAN 30 DAYS FOLLOWING THE POSTING OF NOTICES ONLINE).

IF THIS FORM IS INSUFFICIENT TO LIST THE INFORMATION FOR EACH HEARING PLEASE ATTACH A SEPARATE SHEET TO COMPLETE THE HEARING INFORMATION.

Date: 8/10/21

Time: 09:00 AM

Street Address: Microsoft Teams See address attached

Zip Code:

Date:

Time: AM

Street Address:

Zip Code:

Date:
Time: AM
Street Address:
Zip Code:

Date:
Time: AM
Street Address:
Zip Code:

21. DEADLINE FOR COMMENT (NO EARLIER THAN 7 DAYS FOLLOWING LAST HEARING):
8/20/2021

KEYWORDS (PLEASE PROVIDE AT LEAST 3 KEYWORDS OR PHRASES TO AID IN THE SEARCHABILITY OF THE RULE NOTICE ONLINE).

Tax
Corporate
Income

State of Vermont
Department of Taxes
133 State Street
Montpelier, VT 05633-1401

Agency of Administration

October 1, 2021

(VIA Email to Charlene Dindo)
Sen. Mark MacDonald, Chair
Legislative Committee on Administrative Rules

Re: Allocation and Apportionment of Vermont Net Income By Corporations
Proposed Rule 21P-021

Dear Sen. MacDonald:

Enclosed is the Department of Taxes' Final Proposed Rule Filing for the above-referenced rule amendment, together with the associated forms, ICAR Minutes, comments received, and annotated text and clean copy versions of the rule.

Please contact me with any questions. Thank you.

Sincerely,

Will S. Baker
Assistant Attorney General
Vermont Department of Taxes

Enc.

CC: Louise Corliss (via E-mail)

State of Vermont
Department of Taxes
133 State Street
Montpelier, VT 05633-1401

Agency of Administration

September 30, 2021

Louise Corliss
Administrative Services / APA Coordinator
Vermont State Archives & Records Administration
1078 U.S. Rte 2 Middlesex
Montpelier, VT 05633-7701

Re: Final Proposed Rule
Vermont Allocation and Apportionment Regulations
Proposed Rule 21P021

Dear Ms. Corliss:

Attached please find the Department of Taxes Final Proposed Rule filing, Adopting Page, and letter summarizing the changes made since the filing of the proposed rule, together with a clean text of the rule and annotated text of the rule.

Please let me know if you have any questions. Thank you.

Sincerely,

Will S. Baker
Assistant Attorney General
Vermont Department of Taxes

State of Vermont
Department of Taxes
133 State Street
Montpelier, VT 05633-1401

Agency of Administration

September 23, 2021

Louise Corliss
Administrative Services / APA Coordinator
Vermont State Archives & Records Administration
1078 U.S. Rte 2 Middlesex
Montpelier, VT 05633-7701

Re: Summary of Changes in Final Proposed Rule
Vermont Allocation and Apportionment Regulations
Proposed Rule 21P021

Dear Ms. Corliss:

This letter is to summarize the changes made in the final proposed rule from the initial filing of the proposed rule for the above-referenced rule. We received a suggestion as to the wording of Section G(4)(A). In this section, the Department describes that there are special rules for calculating the apportionment for financial institutions. The Department also noted that there is a separate tax in Vermont on financial institutions under 32 V.S.A. § 5836, and if the corporation is subject to that tax, then no corporate income tax is due from that financial institution. While that is true, clarification was sought on the connection between that rule and the rule that financial institutions are included in an affiliated group for purposes of unitary combined reporting under Vermont law 32 V.S.A. § 5862(d).

The change inserted into this regulation made clear that for purposes of unitary filing, the special rules for financial institutions in this regulation would be used to calculation for apportionment formula. This is on page 71, at Section G(4)(A).

Sincerely,

Will S. Baker
Assistant Attorney General
Vermont Department of Taxes

Administrative Procedures – Adopting Page

Instructions:

This form must accompany each filing made during the rulemaking process:

Note: To satisfy the requirement for an annotated text, an agency must submit the entire rule in annotated form with proposed and final proposed filings. Filing an annotated paragraph or page of a larger rule is not sufficient. Annotation must clearly show the changes to the rule.

When possible, the agency shall file the annotated text, using the appropriate page or pages from the Code of Vermont Rules as a basis for the annotated version. New rules need not be accompanied by an annotated text.

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1. TITLE OF RULE FILING:
   Allocation and Apportionment of Vermont Net Income By Corporations
2. ADOPTING AGENCY:
   Administration - Department of Taxes
3. TYPE OF FILING (*PLEASE CHOOSE THE TYPE OF FILING FROM THE DROPDOWN MENU BASED ON THE DEFINITIONS PROVIDED BELOW*):

   - **AMENDMENT** - Any change to an already existing rule, even if it is a complete rewrite of the rule, it is considered an amendment as long as the rule is replaced with other text.
   - **NEW RULE** - A rule that did not previously exist even under a different name.
   - **REPEAL** - The removal of a rule in its entirety, without replacing it with other text.

   This filing is **AN AMENDMENT OF AN EXISTING RULE** .

4. LAST ADOPTED (*PLEASE PROVIDE THE SOS LOG#, TITLE AND EFFECTIVE DATE OF THE LAST ADOPTION FOR THE EXISTING RULE*):

   97-P45, Allocation and Apportionment of Vermont Net Income by Corporations, January 1, 1998.

State of Vermont
Agency of Administration
109 State Street
Montpelier, VT 05609-0201
www.aoa.vermont.gov

[phone] 802-828-3322
[fax] 802-828-3320

Office of the Secretary

INTERAGENCY COMMITTEE ON ADMINISTRATIVE RULES (ICAR) MINUTES

Meeting Date/Location: June 14, 2021, Microsoft Teams Virtual Meeting
Members Present: Chair Kristin Clouser, Diane Bothfeld, Jennifer Mojo, Matt Langham, Diane Sherman, Clare O'Shaughnessy and John Kessler
Members Absent: Ashley Berliner, Dirk Anderson
Minutes By: Melissa Mazza-Paquette

- 2:01 p.m. meeting called to order, welcome and introductions.
- Review and approval of minutes from the May 10, 2021 meeting.
- No additions/deletions to agenda. Agenda approved as drafted.
- No public comments made.
- Presentation of Proposed Rules on pages 2-6 to follow:
  1. Allocation and Apportionment of Vermont Net Income By Corporations, Department of Taxes, page 2
  2. Electrical Safety Rules – 2020, Vermont Electricians' Licensing Board, page 3
  3. Rule 8.000: Data Submission, Green Mountain Care Board, page 4
  4. Rule 9.000: Data Release, Green Mountain Care Board, page 5
  5. Vermont Hazardous Waste Management Regulations, Agency of Natural Resources, page 6
- Next scheduled meeting is July 12, 2021 at 2:00 p.m. via Microsoft Teams.
- 3:45 p.m. meeting adjourned.

Proposed Rule: Allocation and Apportionment of Vermont Net Income By Corporations, Department of Taxes

Presented By: Will Baker

Motion made to accept the rule by John Kessler, seconded by Diane Bothfeld, and passed unanimously except for Chair Kristin Clouser who abstained, with the following recommendations:

1. Proposed Rule Coversheet, #6: Add an ending parenthesis.
2. Proposed Rule Coversheet, #12: Include further explanation, which was provided verbally during the introduction and be consistent with #8 of the Economic Impact Analysis. Correct wording of 'clarity' in the second sentence. Change 'an' to 'a' between 'experience' and 'decrease' in the third sentence.
3. Proposed Rule Coversheet, #14 and #15: Correct dates, as the date in #15 cannot be before the date in #14.
4. Adopting Page, #4: Include text title if appropriate.
5. Economic Impact Analysis, #4 and #5: Change 'n/a' to 'none'.
6. Economic Impact Analysis, #6 and #8: Should be clear and consistent on impact.
7. Environmental Impact Analysis, #3-#7: Complete - can say 'none' or 'no impact' if applicable.
8. Environmental Impact Analysis, #9: Expand upon 'their industry's environment impact'.
9. Public Input, #3-4: Include public engagement and the plan for outreach.
10. Proposed Rule: The date needs to change pertaining to 'Beginning on or after November 20, 2020'.

Administrative Procedures – Economic Impact Analysis

Instructions:

In completing the economic impact analysis, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule; estimates the costs and benefits for each category of people enterprises and government entities affected by the rule; compares alternatives to adopting the rule; and explains their analysis concluding that rulemaking is the most appropriate method of achieving the regulatory purpose.

Rules affecting or regulating schools or school districts must include cost implications to local school districts and taxpayers in the impact statement, a clear statement of associated costs, and consideration of alternatives to the rule to reduce or ameliorate costs to local school districts while still achieving the objectives of the rule (see 3 V.S.A. § 832b for details).

Rules affecting small businesses (excluding impacts incidental to the purchase and payment of goods and services by the State or an agency thereof), must include ways that a business can reduce the cost or burden of compliance or an explanation of why the agency determines that such evaluation isn't appropriate, and an evaluation of creative, innovative or flexible methods of compliance that would not significantly impair the effectiveness of the rule or increase the risk to the health, safety, or welfare of the public or those affected by the rule.

1. TITLE OF RULE FILING:

   Allocation and Apportionment of Vermont Net Income By Corporations

2. ADOPTING AGENCY:

   Administration - Department of Taxes

3. CATEGORY OF AFFECTED PARTIES:

   LIST CATEGORIES OF PEOPLE, ENTERPRISES, AND GOVERNMENTAL ENTITIES POTENTIALLY AFFECTED BY THE ADOPTION OF THIS RULE AND THE ESTIMATED COSTS AND BENEFITS ANTICIPATED:

   The changes made to the exisitng regulations are necessary to comply with statutory amendments since 1998, as well as to clarify tax treatment of various types of income for multi-state businesses. The categories of parties affected include corporations operating in Vermont and at least one other state that

sell or provide in Vermont: services, tangible property, and intangible property.

4. IMPACT ON SCHOOLS:
INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON PUBLIC EDUCATION, PUBLIC SCHOOLS, LOCAL SCHOOL DISTRICTS AND/OR TAXPAYERS CLEARLY STATING ANY ASSOCIATED COSTS:

None

5. ALTERNATIVES: *CONSIDERATION OF ALTERNATIVES TO THE RULE TO REDUCE OR AMELIORATE COSTS TO LOCAL SCHOOL DISTRICTS WHILE STILL ACHIEVING THE OBJECTIVE OF THE RULE.*

None

6. IMPACT ON SMALL BUSINESSES:
INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON SMALL BUSINESSES (EXCLUDING IMPACTS INCIDENTAL TO THE PURCHASE AND PAYMENT OF GOODS AND SERVICES BY THE STATE OR AN AGENCY THEREOF):

Since this rule is applicable to businesses operating in more than one state, it mostly affects larger businesses and not very small businesses. However, to the extent small businesses are affected, new legislation and this rule alter the sourcing of income from services and intangibles to source the income to Vermont if the service is delivered in Vermont. The Rule provides clear guidance and examples to comply with statutory requirements.

7. SMALL BUSINESS COMPLIANCE: *EXPLAIN WAYS A BUSINESS CAN REDUCE THE COST/BURDEN OF COMPLIANCE OR AN EXPLANATION OF WHY THE AGENCY DETERMINES THAT SUCH EVALUATION ISN'T APPROPRIATE.*

This rule adopts the Multi-State Tax Commission's uniform rule for sourcing of services. Uniformity tends to ease compliance burdens because taxpayers do not need to learn Vermont-specific rules. Rather, we have adopted a uniform regulation.

8. COMPARISON:
COMPARE THE IMPACT OF THE RULE WITH THE ECONOMIC IMPACT OF OTHER ALTERNATIVES TO THE RULE, INCLUDING NO RULE ON THE SUBJECT OR A RULE HAVING SEPARATE REQUIREMENTS FOR SMALL BUSINESS:
The Department sees little or no economic impact from the rule itself (as distinguished from the statutory changes necessitating such changes) other than the

sourcing of income from services to Vermont, which is required by law. The amendments provide clarity and no alternative rules for small business are permitted in the statutory requirements - all corporations are subject to the same rules under the corporate income tax statute.

9. SUFFICIENCY: *EXPLAIN THE SUFFICIENCY OF THIS ECONOMIC IMPACT ANALYSIS.*
By adopting a uniform rule used by other states and providing illustrative examples in the rule, the Department believes that the rule will aid in administration of the tax by providing clarity and helpful descriptions, and will minimize the economic burden of tax compliance.

Administrative Procedures – Environmental Impact Analysis

Instructions:

In completing the environmental impact analysis, an agency analyzes and evaluates the anticipated environmental impacts (positive or negative) to be expected from adoption of the rule; compares alternatives to adopting the rule; explains the sufficiency of the environmental impact analysis.

Examples of Environmental Impacts include but are not limited to:

- Impacts on the emission of greenhouse gases
- Impacts on the discharge of pollutants to water
- Impacts on the arability of land
- Impacts on the climate
- Impacts on the flow of water
- Impacts on recreation
- Or other environmental impacts

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1. TITLE OF RULE FILING:

   Allocation and Apportionment of Vermont Net Income By Corporations

2. ADOPTING AGENCY:

   Administration - Department of Taxes

3. GREENHOUSE GAS: *EXPLAIN HOW THE RULE IMPACTS THE EMISSION OF GREENHOUSE GASES (E.G. TRANSPORTATION OF PEOPLE OR GOODS; BUILDING INFRASTRUCTURE; LAND USE AND DEVELOPMENT, WASTE GENERATION, ETC.):*
   None

4. WATER: *EXPLAIN HOW THE RULE IMPACTS WATER (E.G. DISCHARGE / ELIMINATION OF POLLUTION INTO VERMONT WATERS, THE FLOW OF WATER IN THE STATE, WATER QUALITY ETC.):*
   None

5. LAND: *EXPLAIN HOW THE RULE IMPACTS LAND (E.G. IMPACTS ON FORESTRY, AGRICULTURE ETC.):*
   None

6. RECREATION: *EXPLAIN HOW THE RULE IMPACT RECREATION IN THE STATE:*
   None

7. CLIMATE: *EXPLAIN HOW THE RULE IMPACTS THE CLIMATE IN THE STATE:*
   None

8. OTHER: *EXPLAIN HOW THE RULE IMPACT OTHER ASPECTS OF VERMONT'S ENVIRONMENT:*
   The statutory basis for the corporate income tax does not allow for alternative tax treatment based on environment impacts. The rule provides broad regulations based on broad types of sales and income a taxpayer earns (sales of products versus services and intangibles) based on the statutory requirements. Beyond these categories, the tax treatment for various industries within those categories are the same under statute. Further, the initial calculation of the income to be taxed is a federal calculation based on federal law and cannot be changed by this regulation.

9. SUFFICIENCY: *EXPLAIN THE SUFFICIENCY OF THIS ENVIRONMENTAL IMPACT ANALYSIS.*
   The tax law generally aims to treat taxpayers in a uniform fashion and is based in large part on federal calculations. This rule operates within those rules and cannot treat taxpayers differently without regard for their or their industry's environmental impact without a statutory basis.

Administrative Procedures – Public Input

Instructions:

In completing the public input statement, an agency describes the strategy prescribed by ICAR to maximize public input, what it did do, or will do to comply with that plan to maximize the involvement of the public in the development of the rule.

This form must accompany each filing made during the rulemaking process:

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1. TITLE OF RULE FILING:

   Allocation and Apportionment of Vermont Net Income By Corporations

2. ADOPTING AGENCY:

   Administration - Department of Taxes

3. PLEASE DESCRIBE THE STRATEGY PRESCRIBED BY ICAR TO MAXIMIZE PUBLIC INVOLVEMENT IN THE DEVELOPMENT OF THE PROPOSED RULE:

   Share proposed rule with affected stakeholders below, and hold public meeting.

4. PLEASE LIST THE STEPS THAT HAVE BEEN OR WILL BE TAKEN TO COMPLY WITH THAT STRATEGY:

   Proposed rule has been shared with affected stakeholders, two industry-specific meetings have been held, and comments have been received. The proposed rule is also shared with the Tax Department's business outreach list, which directs the public to review the rule and submit comments directly on the Tax Department's website.

5. BEYOND GENERAL ADVERTISEMENTS, PLEASE LIST THE PEOPLE AND ORGANIZATIONS THAT HAVE BEEN OR WILL BE INVOLVED IN THE DEVELOPMENT OF THE PROPOSED RULE:

   Vermont Bar Association Tax Section

   Vermont Society of CPAs

   Multi-State Tax Commission

   Financial Institutions State Tax Coalition

Public Input

Motion Picture Association of America

Rath, Young & Pignatelli, PC.

Vermont Bankers Association

Vermont Truck and Bus Association, Inc.

Vermont Association of Broadcasters, Inc.

Vermont Chamber of Commerce

From:	Miele, Angela
To:	Baker, Will
Cc:	Sameroff, Rebecca; Feehan, James
Subject:	Vermont Allocation and Apportionment of Vermont Net Income - MPA Comments
Date:	August 19, 2021 6:11:25 PM
Attachments:	VERMONT MPA Response to Allocation and Apportionment of Vermont Net Income for Broadcasters August 2021.pdf Vermont - MPA Attachment Allocation and Apportionment of Income 8-19 Proposed Amendments.docx
Importance:	High

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Hi Will,

Attached please find the MPA's submission as a follow-up to my 8-10 testimony regarding the regulations governing the Allocation and Apportionment of Vermont Net Income.

Thank you for the opportunity to testify on August 10 and to provide these comments and proposed amendments (in **bold with yellow highlight)**.

Regards,

Angela Miele

Angela H Miele
Vice President, State Government Affairs and Tax Policy
Motion Picture Association - America
O: 908-668-9912 | **M**: 202-669-4862
55 Hill Hollow Road
Watchung, NJ 07069

MOTION PICTURE ASSOCIATION AMERICA

MPA
AMERICA

August 19, 2021

VIA Email will.baker@vermont.gov

Mr. Will Baker
Vermont Department of Taxes
PO Box 429
Montpelier, Vermont 05602

RE: Department of Taxes - Allocation and Apportionment of Vermont Net Income August 10 Hearing MPA Follow-up

Dear Mr. Baker:

I appreciate the opportunity to present our concerns with the proposed income allocation and apportionment regulations before the Department on August 10. The Motion Picture Association [1] ("MPA") looks forward to continuing our discussion and working with you to design a workable market-based sourcing regime for broadcasters in Vermont.

As you are likely aware, the MPA members and their affiliates ("Broadcasters," or "Content Providers") are the leading producers of audiovisual works in the theatrical, television and home entertainment markets. Their programming content is licensed at wholesale to distributors, such as cable television operators (e.g., Comcast, Burlington Telecom, Duncan Cable, Southern VT Cable, Stowe Cable, etc.), direct broadcast satellite systems (e.g., Dish TV, DirecTV), local broadcast television

[1] Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; Netflix, Studios and Warner Bros. Entertainment Inc.

stations (e.g. the local Fox, NBC, CBS, or ABC stations), movie theatres, telecom distributors (e.g., AT&T, Verizon) and Internet content distributors (e.g., Hulu, and Amazon). The original content is uploaded to a satellite by the Broadcasters, where their obligation for their licensing service revenue ends. Distributors take that content to package it and sell to their audience to be viewed on their televisions, mobile phones, tablets, computers, laptops, or other electronic equipment - either in a fixed location or on the move.

Broadcasters generally receive two main sources of income – advertising revenue and licensing fees. The member company networks generate licensing revenue from distributors who pay them fees to license their networks and programming. Additionally, a growing stream of revenues comes from the "direct to consumer" or over the top transactions like Paramount +, Disney +, HBO Max, Peacock, etc.

We respectfully submit the following information regarding our concerns with Vermont's proposed income allocation and apportionment regulation as it relates to broadcasters.

Viewing Audience is Inconsistent with Market Sourcing. The viewing audience method departs from market sourcing principles by requiring broadcasters to ignore their own customers and source their receipts based on the presumed location of third parties (viewers) with whom they have no direct contractual or other relationship.

Viewing Audience is based, in part, on Information Broadcasters Do Not Possess. Viewing audience requires broadcasters to determine their tax liability by reference to incomplete information and is not available, in its entirety, in their books and records. Many distributors (satellite operators and streaming services) do not supply state data to the broadcasters. A

taxpayer should not have to prove tax liability based on estimates or a third party's books and records.

Viewing Audience Leads to Complex Audits and Legal Challenges

Viewing audience apportionment comes with many challenges in its administration. It is clear that requiring a taxpayer to source revenue based on the location of persons with whom it has no direct contact is more difficult and unreliable than requiring the taxpayer to source revenue based on the location of the person that purchases its products or services. It is even more troubling that a taxpayer would be forced to rely on a "reasonable approximation" where it does not have actual data about the location of the viewing audience. We respectfully ask Vermont to avoid selecting an approximate sourcing method, subject to interpretation and ultimately controversy, when a very precise method is readily available.

Further, the so-called "reasonable approximations" are a poor and imprecise way to calculate a taxpayers' liability. It is not the case that the state's population is a reasonable proxy for the share of revenues derived from the state. Fundamentally, population ratios would provide a distorted result as to broadcasters' revenue. Unfortunately, it is common practice for states to default to using population as a proxy of audience regardless of the audience information that the taxpayer is able to provide.

Different networks have different demographic targets. The Lifetime channel, for example, focuses on female viewers ages 18-49, Disney and music channels on younger viewers, and BET on African-American viewers. Certain programming attracts significantly larger audiences in certain geographic regions (e.g., Nashville on ABC drew heavily on southern viewers, as does all programming on Country Music Television). These demographic patterns may not parallel simple population ratios. Also, some networks may have significant international distribution, particularly in

Canada. Domestic population ratios would overstate the share of Vermont's viewers by understating the denominator of the sales factor. Additionally, cable networks may not have 100% coverage for all television households. For example, a cable network may only reach 80% of all cable households in the country.

Finally, changes to technologies and viewing patterns are not happening at a uniform rate throughout the country. The percentage of residents accessing network programming through new media may differ from state to state, as may the extent to which they are doing so on a mobile basis. Younger and more affluent viewers consume content through new media at a greater frequency rate than older or less affluent viewers.

While about 18 of the 50 states (i.e., not just market-based sourcing states) use the viewing audience factor method for Broadcasters, most of these states adopted this method in the 1980s-1990s. In 2 of these states, the audience factor method was adopted many years ago as one of many economic incentives to induce the national broadcasters to invest or retain their investments in the states.

There are only a small handful of states where the audience factor has been adopted with any consequence and not as an economic incentive. The trend is for states to adopt market sourcing using commercial domicile apportionment.

Viewing audience requires broadcasters to rely on incomplete information compiled by third parties, i.e., rating agencies, to calculate tax liability. This third party information, often based on Designated Market Areas (DMAs), is inexact and does not reflect exclusively in-state viewers. Administration of a tax system which uses viewing audience to determine apportionment will only become more complex as technological innovation (portability of

programming) makes determining the identity and location of the viewer more difficult.

In sum, the viewing audience factor approach to sourcing program distribution and advertising fees is based on the false premise that the broadcaster's customers are the viewers watching their programming. In fact, distributors would source their programming revenue to the ultimate viewing audience, since they are their customers. Except in the case of Direct to Consumer programming, (where our customer is the subscriber) there is no direct relationship or "privity of contract" between the broadcasters and the viewing audience. The Broadcasters simply upload their content to a satellite for licensing revenues and do not sell anything to the viewing audience nor do they know where their content is being viewed. In essence, the audience factor approach misattributes a retail market approach to taxpayers selling at wholesale.

As we have discussed, a tire manufacturer Firestone producing tires in Ohio, selling them to GM in Michigan and then GM producing vehicles with tires and parts from other manufacturers/wholesalers and then distributing the vehicles throughout the U.S. Vermont market sourcing rules would not source any of Firestone's tire sales to GM in Michigan but rather source those sales to where the cars are delivered/sold. See Also *Wisconsin Dep't. of Rev. v. Microsoft Corporation*, Appeal No. 2018AP2024 (Wis. Ct. App. October 31, 2019), where the Wisconsin Court of Appeals affirmed decisions of the Wisconsin Circuit Court and Wisconsin Tax Appeals Commission, rejecting the use of the "look-through" approach by the Wisconsin Department of Revenue.

No Need to Follow the MTC Simply Because the State Enacted Boilerplate Multistate Tax Commission (MTC) Language

Vermont does not need to adopt the MTC market sourcing Regulations for broadcasters merely because the State enacted the MTC's boilerplate market sourcing statutory language. The identical MTC boiler plate statutory language was enacted several states and most recently in Tennessee, Kentucky and Missouri (the state's preliminary discussion draft includes Customer Location/Commercial Domicile apportionment for broadcasters) and those MTC member states rejected the MTC's audience apportionment in their market sourcing regulations in favor of the MPA's customer location apportionment. As we discussed, Rhode Island, which previously had the legacy viewing audience apportionment regulation for broadcasters, rejected the continuation of the viewing audience apportionment and the MTC's regulatory language when the state transitioned from a "cost of performance" state to market sourcing in 2015. As we mentioned during our discussion, there are now 12 states, which use the more contemporary commercial domicile apportionment to apportion broadcasters' receipts (FL, IA, IL, KY, LA, MI, MO, NC, RI, TN, TX, WI).

Summary

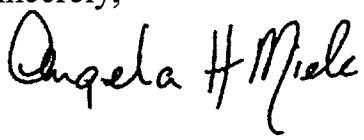
The MPA commercial domicile proposal would ensure stable and predictable revenue for Vermont as technology advances. New viewing platforms are enabling viewers to purchase programming directly from content providers (such as HBO, Disney, Paramount, and NBCUniversal). Viewers using these platforms will become direct customers of the content providers and their revenues will be sourced based on billing address. As this is a growing segment of the broadcasters' businesses, it will likely result in more revenue allocated to Vermont as time goes on. In the direct to consumer context, we support attributing our sale to the location of that consumer because they are the broadcasters' customer and therefore: 1) the

relationship reflects their market in this instance; and 2) the information is based on the taxpayer's actual books and records.

This apportionment methodology is designed to ensure that broadcasters are taxed fairly, based on their customer's location and not the location of their customers' customers. It is easily auditable and cannot be manipulated because a company can only have one commercial domicile. A copy of the MPA's proposed apportionment regulatory language for your review and consideration is attached. As previously mentioned, the proposed amendments are narrowly tailored to address only allocation and apportionment of broadcasters' Vermont net income. The allocation and apportionment of Vermont net income for non-broadcast taxpayers are not affected by the MPA's proposed amendments.

We would be happy to discuss our proposed amendments and thank you for this opportunity.

Sincerely,



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VERMONT DEPARTMENT OF TAXES

ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

October 15, 2021

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VERMONT
DEPARTMENT OF TAXES

ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

Reg. § 1.5833 ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

Section A. Computations of Vermont Apportionment Percentage.

(1) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be apportioned to this state in full. If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and without this state, the amount of the corporation's Vermont Net Income apportioned to this state shall be determined by the arithmetic average of the following factors:

(A) The average of the value of all real and tangible property owned or rented by the taxpayer within Vermont expressed as a percentage of all such property both within and without Vermont.

(B) The total wages, salaries or other personal service compensation paid during the taxable year to employees or agents within Vermont expressed as a percentage of such payments both within and without Vermont.

(C) The gross sales, receipts, or charges for services performed within Vermont expressed as a percentage of such sales or charges both within and without Vermont, double-weighted.

(2) A taxable corporation subject to the taxing jurisdiction of this state shall allocate all of its non-apportionable income or loss within or without this state in accordance Section E.

(3) All apportionable income of each trade or business of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in 32 VSA §5833. The apportionment percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, sales or receipts, and payrolls within Vermont during the period covered by the return, and dividing the total of such percentages by four. The sales factor is double-weighted in this calculation. However, if any one of the factors (for property, receipts or payroll) is missing, the other two percentages are added and the sum is divided by two (or three, where sales or receipts are present and sales or receipts are to be double-weighted), and if two of the factors are missing, the remaining percentage is the apportionment percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator and its denominator are zero).

Example: A taxpayer owns no real or tangible personal property and rents no real property either within or without the state. The property factor being missing, the apportionment percentage may be computed by adding the percentages derived from the apportionment of its sales or receipts (double-weighted) and payrolls, and dividing the total by three.

(4) Apportionment and Allocation. Sections A and E require that every item of income be classified either as apportionable income or non-apportionable income. Income for purposes of classification as apportionable or non-apportionable includes gains and losses. Apportionable income is

apportioned among jurisdictions by use of the formula. Non-apportionable income is specifically assigned or allocated to one or more specific jurisdictions pursuant to express rules. An item of income is classified as apportionable income if it falls within the definition of apportionable income. An item of income is non-apportionable income only if it does not meet the definitional requirements for apportionable income.

(5) Apportionable Income. Apportionable income means all income that is apportionable under the Constitution of the United States and is not allocated under the laws of Vermont, including:

(A) income arising from transactions and activity in the regular course of the taxpayer's trade or business; and

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

(C) any income that would be allocable to this state under the Constitution of the United States, but that is apportioned rather than allocated pursuant to the laws of Vermont.

The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, income derived from accounts receivable, operating income, non-operating income, *etc.*, is not determinative of whether income is apportionable or non-apportionable income.

(6) "Trade or business," as used in the definition of apportionable income and in the application of that definition means the unitary business of the taxpayer, part of which is conducted within Vermont.

(7) Transactional Test. Apportionable income includes income arising from transactions and activity in the regular course of the taxpayer's trade or business.

(A) If the transaction or activity is in the regular course of the taxpayer's trade or business, part of which trade or business is conducted within Vermont, the resulting income of the transaction or activity is apportionable income for Vermont. Income may be apportionable income even though the actual transaction or activity that gives rise to the income does not occur in Vermont.

(B) For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business and will, therefore, satisfy the transactional test. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. However, even if a taxpayer frequently or customarily engages in investment activities, if those activities are for the taxpayer's mere financial betterment rather than for

the operations of the trade or business, such activities do not satisfy the transactional test. The transactional test includes, but is not limited to, income from sales of inventory, property held for sale to customers, and services which are commonly sold by the trade or business. The transactional test also includes, but is not limited to, income from the sale of property used in the production of apportionable income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

(8) Functional Test. Apportionable income also includes income from tangible and intangible property, if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business. "Property" includes any direct or indirect interest in, control over, or use of real property, tangible personal property and intangible property by the taxpayer.

Property that is "related to the operation of the trade or business" refers to property that is or was used to contribute to the production of apportionable income directly or indirectly, without regard to the materiality of the contribution.

Property that is held merely for investment purposes is not related to the operation of the trade or business.

"Acquisition, management, employment, development or disposition" refers to a taxpayer's activities in acquiring property, exercising control and dominion over property and disposing of property, including dispositions by sale, lease or license. Income arising from the disposition or other utilization of property which was acquired or developed in the course of the taxpayer's trade or business constitutes apportionable income, even if the property was not directly employed in the operation of the taxpayer's trade or business.

Income from the disposition or other utilization of property which has been withdrawn from use in the taxpayer's trade or business and is instead held solely for unrelated investment purposes is not apportionable. Property that was related to the operation of the taxpayer's trade or business is not considered converted to investment purposes merely because it is placed for sale, but any property which has been withdrawn from use in the taxpayer's trade or business for five years or more is presumed to be held for investment purposes.

Example (i): Taxpayer purchases a chain of 100 retail stores for the purpose of merging those store operations with its existing business. Five of the retail stores are redundant under the taxpayer's business plan and are sold six months after acquisition. Even though the five stores were never integrated into the taxpayer's trade or business, the income is apportionable because the property's acquisition was related to the taxpayer's trade or business.

Example (ii): Taxpayer is in the business of developing adhesives for industrial and construction uses. In the course of its business, it accidentally creates a weak but non-toxic adhesive and patents the formula, awaiting future applications. Another manufacturer uses the formula to create temporary body tattoos. Taxpayer wins a patent infringement suit

against the other manufacturer. The entire damages award, including interest and punitive damages, constitutes apportionable income.

Example (iii): Taxpayer is engaged in the oil refining business and maintains a cash reserve for buying and selling oil on the spot market as conditions warrant. The reserve is held in overnight "repurchase agreement" accounts of U.S. treasuries with a local bank. The interest on those amounts is apportionable income because the reserves are necessary for the taxpayer's business operations. Over time, the cash in the reserve account grows to the point that it exceeds any reasonably expected requirement for acquisition of oil or other short-term capital needs and is held pending subsequent business investment opportunities. The interest received on the excess amount is non-apportionable income.

Example (iv): A manufacturer decides to sell one of its redundant factories to a real estate developer and transfers the ownership of the factory to a special purpose subsidiary, SaleCo (Taxpayer) immediately prior to its sale to the real estate developer. The parties elect to treat the sale as a disposition of assets under IRC 338(h)(10), resulting in Taxpayer recognizing a capital gain on the sale. The capital gain is apportionable income. Note: although the gain is apportionable, application of the standard apportionment formula in Section A may not fairly reflect the taxpayer's business presence in any state, necessitating resort to equitable apportionment pursuant to Section F.

(A) Under the functional test, income from the disposition or other utilization of property is apportionable if the property is or was related to the operation of the taxpayer's trade or business. This is true even though the transaction or activity from which the income is derived did not occur in the regular course of the taxpayer's trade or business.

(B) Income that is derived from isolated sales, leases, assignments, licenses, and other infrequently occurring dispositions, transfers, or transactions involving property, including transactions made in the full or partial liquidation or the winding-up of any portion of the trade or business, is apportionable income, if the property is or was related to the taxpayer's trade or business. Income from the licensing of an intangible asset, such as a patent, copyright, trademark, service mark, know-how, trade secrets, or the like, that was developed or acquired for use by the taxpayer in its trade or business, constitutes apportionable income whether or not the licensing itself constituted the operation of a trade or business, and whether or not the taxpayer remains in the same trade or business from or for which the intangible asset was developed or acquired.

(C) Under the functional test, income from intangible property is apportionable income when the intangible property serves an operational function as opposed to solely an investment function.

(D) If the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business, then income from that property is apportionable income even though the actual transaction or activity involving the property that gives rise to the income does not occur in Vermont.

(E) Examples.

Example (i): A manufacturer purchases raw materials to be incorporated into the product it offers for sale. The nature of the raw materials is such that the purchase price is subject to extreme price volatility. In order to protect itself from extreme price increases (or decreases), the manufacturer enters into future contracts pursuant to which the manufacturer can either purchase a set amount of the raw materials for a fixed price, within a specified time period, or resell the future contracts. Any gain on the sale of the future contracts would be considered apportionable income, regardless of whether the contracts were either made or resold in Vermont.

Example (ii): A national retailer produces substantial revenue related to the operation of its trade or business. It invests a large portion of the revenue in fixed income securities which are divided into three categories; (a) short-term securities held pending use of the funds in the taxpayer's trade or business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market, and (c) long- term securities held as an investment. Interest income on the short-term securities held pending use of the funds in the taxpayer's trade or business (a) is apportionable because the funds represent working capital necessary to the operations of the taxpayer's trade or business. Interest income derived from the other investment securities ((b) and (c)) is not apportionable as those securities were not held in furtherance of the taxpayer's trade or business.

(F) If, with respect to an item of property, a taxpayer (i) takes a deduction from income that is apportioned to Vermont or (ii) includes the original cost in the property factor, it is presumed that the item or property is or was related to the operation of the taxpayer's trade or business. No presumption arises from the absence of any of these actions.

(G) Application of the functional test is generally unaffected by the form of the property (*e.g.*, tangible or intangible property, real or personal property). Income arising from an intangible interest, as, for example, corporate stock or other intangible interest in an entity or a group of assets, is apportionable income when the intangible itself or the property underlying or associated with the intangible is or was related to the operation of the taxpayer's trade or business. Thus, while apportionment of income derived from transactions involving intangible property may be supported by a finding that the issuer of the intangible property and the taxpayer are engaged in the same trade or business, *i.e.*, the same unitary business, establishment of such a relationship is not the exclusive basis for concluding that the income is subject to apportionment. It is sufficient to support the finding of apportionable income if the holding of the intangible interest served an operational rather than an investment function.

(9) Relationship of transactional and functional tests to U.S. Constitution. The Due Process Clause and the Commerce Clause of the U.S. Constitution restrict states from apportioning income that has no rational relationship with the taxing state. The protection against extra-territorial state taxation afforded by these Clauses is often described as the "unitary business principle." The unitary business principle requires apportionable income to be derived from the same unitary

business that is being conducted at least in part in Vermont. The unitary business that is conducted in Vermont includes both a unitary business that the taxpayer alone may be conducting and a unitary business the taxpayer may conduct with any other person or persons. Satisfaction of either the transactional test or the functional test complies with the unitary business principle, because each test requires that the transaction or activity (in the case of the transactional test) or the property (in the case of the functional test) be tied to the same trade or business that is being conducted within Vermont. Determination of the scope of the unitary business being conducted in Vermont is without regard to extent to which Vermont requires or permits combined reporting.

(10) Non-apportionable income.
Non-apportionable income means all income other than apportionable income. *See* Section E.

(11) Application of Definitions. The following applies the foregoing principles for purposes of determining whether particular income is apportionable or non-apportionable income. The examples used throughout these regulations are illustrative only and are limited to the facts they contain.

(A) Rents from real and tangible personal property. Rental income from real and tangible property is apportionable income if the property with respect to which the rental income was received is or was used in the taxpayer's trade or business and therefore is includable in the property factor under Section B.

Example (i): The taxpayer operates a multistate car rental business. The income from car rentals is apportionable income.

Example (ii): The taxpayer is engaged in the heavy construction business in which it uses equipment such as cranes, tractors, and earth-moving vehicles. The taxpayer makes short-term leases of the equipment when particular pieces of equipment are not needed on any particular project. The rental income is apportionable income.

Example (iii): The taxpayer operates a multistate chain of men's clothing stores. The taxpayer purchases a five-story office building for use in connection with its trade or business. It uses the street floor as one of its retail stores and the second and third floors for its general corporate headquarters. The remaining two floors are held for future use in the trade or business and are leased to tenants on a short-term basis in the meantime. The rental income is apportionable income.

Example (iv): The taxpayer operates a multistate chain of grocery stores. It purchases as an investment an office building in another state with surplus funds and leases the entire building to others. The net rental income is not apportionable income of the grocery store trade or business. Therefore, the net rental income is non-apportionable income.

Example (v): The taxpayer operates a multistate chain of men's clothing stores. The taxpayer invests in a 20-story office building and uses the street floor as one of its retail stores and the second floor for its general corporate headquarters. The

remaining 18 floors are leased to others. The rental of the eighteen floors is not done in furtherance of but rather is separate from the operation of the taxpayer's trade or business. The net rental income is not apportionable income of the clothing store trade or business. Therefore, the net rental income is non-apportionable income.

Example (vi): The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later the plant was closed and put up for sale. The plant was rented for a temporary period from the time it was closed by the taxpayer until it was sold 18 months later. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(B) Gains or losses from sales of assets. Gain or loss from the sale, exchange or other disposition of real property or of tangible or intangible personal property constitutes apportionable income if the property while owned by the taxpayer was related to the operation of the taxpayer's trade or business, or was otherwise properly included in the property factor of the taxpayer's trade or business.

Example (i): In conducting its multistate manufacturing business, the taxpayer systematically replaces automobiles, machines, and other equipment used in the trade or business. The gains or losses resulting from those sales constitute apportionable income.

Example (ii): The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later sold the property at a gain while it was in operation by the taxpayer. The gain is apportionable income.

Example (iii): Same as (ii) except that the plant was closed and put up for sale but was not in fact sold until a buyer was found 18 months later. The gain is apportionable income.

Example (iv): Same as (ii) except that the plant was rented while being held for sale. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(C) Interest. Interest income is apportionable income where the intangible with respect to which the interest was received arose out of or was created in the regular course of the taxpayer's trade or business, or the purpose of acquiring and holding the intangible is related to the operation of the taxpayer's trade or business.

Example (i): The taxpayer operates a multistate chain of department stores, selling for cash and on credit. Service charges, interest, or time-price differentials and the like are received with respect to installment sales and revolving charge accounts. These amounts are apportionable income.

Example (ii): The taxpayer conducts a multistate manufacturing business. During the year the taxpayer receives a federal income tax refund pertaining to the taxpayer's

trade or business and collects a judgment against a debtor of the business. Both the tax refund and the judgment bear interest. The interest income is apportionable income.

Example (iii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, rain and storm damage, machinery replacement, etc. The funds in those accounts earned interest. Similarly, the taxpayer temporarily invests funds intended for payment of federal, state and local tax obligations pertaining to the taxpayer's trade or business. The interest income is apportionable income.

Example (iv): The taxpayer is engaged in a multistate money order and traveler's check business. In addition to the fees received in connection with the sale of the money orders and traveler's checks, the taxpayer earns interest income by the investment of the funds pending their redemption. The interest income is apportionable income.

Example (v): The taxpayer is engaged in a multistate manufacturing and selling business. The taxpayer usually has working capital and extra cash totaling $200,000 which it regularly invests in short-term interest bearing securities. The interest income is apportionable income.

Example (vi): In January, the taxpayer sold all of the stock of a subsidiary for $20,000,000. The funds are placed in an interest-bearing account pending a decision by management as to how the funds are to be utilized. The funds are not pledged for use in the business. The interest income for the entire period between the receipt of the funds and their subsequent utilization or distribution to shareholders is non-apportionable income.

(D) Dividends. Dividends are apportionable income where the stock with respect to which the dividends was received arose out of or was acquired in the regular course of the taxpayer's trade or business or where the acquiring and holding the stock is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

Example (i): The taxpayer operates a multistate chain of stock brokerage houses. During the year, the taxpayer receives dividends on stock that it owns. The dividends are apportionable income.

Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are apportionable income.

Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business consists solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing trade or business. The dividends are apportionable income.

Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are apportionable income.

Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are apportionable income.

Example (vi): The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are non-apportionable income.

(E) Patent and copyright royalties. Patent and copyright royalties are apportionable income where the patent or copyright with respect to which the royalties were received arose out of or was created in the regular course of the taxpayer's trade or business or where the acquiring and holding the patent or copyright is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

Example (i): The taxpayer is engaged in the multistate business of manufacturing and selling industrial chemicals. In connection with that business, the taxpayer obtained patents on certain of its products. The taxpayer licensed the production of the chemicals in foreign countries, in return for which the taxpayer receives royalties. The royalties received by the taxpayer are apportionable income.

Example (ii): The taxpayer is engaged in the music publishing trade or business and holds copyrights on numerous songs. The taxpayer acquires the assets of a smaller publishing company, including music copyrights. These acquired copyrights are thereafter used by the taxpayer in its trade or business. Any royalties received on these copyrights are apportionable income.

(12) Proration of Deductions. In most cases, an allowable deduction of a taxpayer will be applicable to only the apportionable income arising from a particular trade or business or to a

particular item of non-apportionable income. In some cases, an allowable deduction may be applicable to the apportionable incomes of more than one trade or business and to items of non-apportionable income. In such cases, the deduction shall be prorated among those trades or businesses and those items of non-apportionable income in a manner which fairly distributes the deduction among the classes of income to which it is applicable.

(A) Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(13) Definitions.

(1) "Taxpayer" means a person obligated to file a return with or pay or remit any amount to this State under 32 VSA §5811(17).

(2) "Apportionment" refers to the division of apportionable income between states by the use of a formula containing apportionment factors.

(3) "Allocation" refers to the assignment of non-apportionable income to a particular state.

(4) "Business activity" refers to the transactions and activities occurring in the regular course of a particular trade or business of a taxpayer and includes the acquisition, employment, development, management, or disposition of property that is or was related to the operation of the taxpayer's trade or business.

(5) "Gross receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction which produces apportionable income in which the income or loss is recognized under the Internal Revenue Code, and, where the income of foreign entities is included in apportionable income, amounts which would have been recognized under the Internal Revenue Code if the relevant transactions or entities were in the United States. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.

(6) "Receipts" means all gross receipts of the taxpayer that are not allocated under Section E, and that are received from transactions and activity in the regular course of the taxpayer's trade or business. The following are additional rules for determining "receipts" in various situations:

(A) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "receipts" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its

trade or business. Gross receipts for this purpose means gross sales less returns and allowances.

(B) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, "receipts" includes the entire reimbursed cost plus the fee.

(C) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "receipts" includes the gross receipts from the performance of such services, including fees, commissions, and similar items.

(D) In the case of a taxpayer engaged in the sale of equipment used in the taxpayer's trade or business, where the taxpayer disposes of the equipment under a regular replacement program, "receipts" includes the gross receipts from the sale of this equipment. For example, a truck express company that owns a fleet of trucks and sells its trucks under a regular replacement program the gross receipts from the sale of the trucks would be included in "receipts."

(E) In the case of a taxpayer with insubstantial amounts of gross receipts arising from sales in the ordinary course of business, the insubstantial amounts may be excluded from the receipts factor unless their exclusion would materially affect the amount of income apportioned to this state.

(F) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded. Receipts arising from a business activity are receipts from hedging if the primary purpose of engaging in the business activity is to reduce the exposure to risk caused by other business activities. Whether events or transactions not involving cash or securities are hedging transactions shall be determined based on the primary purpose of the taxpayer engaging in the activity giving rise to the receipts, including the acquisition or holding of the underlying asset. Receipts from the holding of cash or securities, or maturity, redemption, sale, exchange, loan or other disposition of cash or securities are excluded from the definition of receipts whether or not those events or transactions are engaged in for the purpose of hedging. The taxpayer's treatment of the receipts as hedging receipts for accounting or federal tax purposes may serve as indicia of the taxpayer's primary purpose, but shall not be determinative.

(G) Receipts, even if apportionable income, are presumed not to include such items as, for example:

1) damages and other amounts received as the result of litigation;
2) property acquired by an agent on behalf of another;
3) tax refunds and other tax benefit recoveries;
4) contributions to capital;
5) income from forgiveness of indebtedness;

6) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code; or
7) Amounts realized as a result of factoring accounts receivable recorded on an accrual basis.

Exclusion of an item from the definition of "receipts" is not determinative of its character as apportionable or non-apportionable income. Certain gross receipts that are "receipts" under the definition are excluded from the "receipts factor" under Section E. Nothing in this definition shall be construed to modify, impair or supersede any provision of Sections F or G.

(7) "Security" means any interest or instrument commonly treated as a security as well as other instruments which are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.

(14) Application of Combined Report. If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in these regulations shall preclude the use of a "combined report" whereby the entire apportionable income of such trade or business is apportioned in accordance with 32 VSA §5833.

(15) Consistency and Uniformity in Reporting: Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the manner in which income has been classified as apportionable income or non-apportionable income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(16) Taxable in Another State: In General. Under 32 VSA §5833 the taxpayer is subject to the allocation and apportionment provisions if it has income from business activity that is taxable both within and without this state. A taxpayer's income from business activity is taxable without this state if the taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of these regulations.

(A) Applicable tests. A taxpayer is taxable within another state if it meets either one of two tests: (1) By reason of business activity in another state, the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or (2) By reason of such business activity, another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(1) A taxpayer is "subject to" one of the taxes specified in 32 VSA §5833(a)(3) if it carries on business activities in a state and the state imposes such a tax thereon. Any taxpayer which asserts that it is subject to one of the taxes specified in 32 VSA §5833(a)(3) in another state shall furnish to Commissioner of this state upon his/her

request evidence to support that assertion. Commissioner of this state may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in 32 VSA §5833(a)(3) in the other state.

Voluntary tax payment. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(a) does not actually engage in business activity in that state, or

(b) does actually engage in some business activity not sufficient for nexus and the minimum tax bears no relationship to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of 32 VSA §5833(a)(3)

Example: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the $50 minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.

(2) The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in 32 VSA §5833(a)(3) which may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in 32 VSA §5833(a)(3) in another state.

Example (i): State A requires all nonresident corporations which qualify or register in State A to pay to the Secretary of State an annual license fee or tax for the privilege of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of $50 and a maximum fee of $500. Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not "taxable" in State A.

Example (ii): Same facts as Example (i) except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is "subject to" the net income tax of State A and is "taxable" in State A.

Example (iii): State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of

(1) outstanding capital stock, and

(2) surplus and undivided profits.

The fee or tax base attributable to State B is determined by a three-factor apportionment formula. Nonresident Corporation X which operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is "taxable" in State B.

Example (iv): State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.

(3) The second test, that of Paragraph A of this Subsection, applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. §§ 381-385. In the case of any "state", other than a state of the United States or political subdivision thereof, the determination of whether the "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that "state." If jurisdiction is otherwise present, that "state" is not considered as being without jurisdiction by reason of the provisions of a treaty between that "state" and the United States.

Example: Corporation X is actively engaged in manufacturing farm equipment in State A and in foreign country B. Both State A and foreign country B impose a net income tax but foreign country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and foreign country B.

(B) **Producing non-apportionable income.** A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in that other state pertaining to the production of non-apportionable income or business activities relating to a separate trade or business.

Section B. Property Factor

(1) The property factor of the apportionment formula for each trade or business of the taxpayer shall include all real and tangible personal property owned or rented by the taxpayer and used during the tax period in the regular course of the trade or business. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property but does not include coin or currency. Property used in connection with the production of non-apportionable income shall be excluded from the property factor. Property used both in the regular course of the taxpayer's trade or business and in the production of non-apportionable income shall be included in the factor only to the extent that the property is used in the regular course of the taxpayer's trade or business. The method of determining that portion of the value to be included in the factor will depend upon the facts of each case.

(2) Property Factor: Valuation of Owned Property.

(A) Property owned by the taxpayer shall be valued at its original cost. As a general rule, "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. However, capitalized intangible drilling and development costs shall be included in the property factor whether or not they have been expensed for either federal or state tax purposes.

Example (i): The taxpayer acquired a factory building in this state at a cost of $500,000 and, 18 months later, expended $100,000 for major remodeling of the building. Taxpayer files its return for the current taxable year on the calendar-year basis. Depreciation deduction in the amount of $22,000 was claimed with respect to the building on the return for the current taxable year. The value of the building includable in the numerator and denominator of the property factor is $600,000; the depreciation deduction is not taken into account in determining the value of the building for purposes of the factor.

Example (ii): During the current taxable year, Corporation X merges into Corporation Y in a tax-free reorganization under the Internal Revenue Code. At the time of the merger, Corporation X owns a factory which X built five years earlier at a cost of $1,000,000. X has been depreciating the factory at the rate of two percent per year, and its basis in X's hands at the time of the merger is $900,000. Since the property is acquired by Y in a transaction in which, under the Internal Revenue Code, its basis in Y's hands is the same as its basis in X's hands, Y includes the property in Y's property factor at X's original cost, without adjustment for depreciation, i.e. $1,000,000.

Example (iii): Corporation Y acquires the assets of Corporation X in a liquidation by which Y is entitled to use its stock cost as the basis of the X assets under Section 334(b)(2) of the 1954 Internal Revenue Code (i.e. stock possessing 80 percent control is purchased and liquidated within two years). Under these circumstances, Y's cost of the assets is the purchase price of the X stock, prorated over the X assets.

If the original cost of property is unascertainable, the property is included in the factor at its fair market value as of the date of acquisition by the taxpayer.

(B) Inventory of stock of goods shall be included in the factor in accordance with the valuation method used for federal income tax purposes.

(C) Property acquired by gift or inheritance shall be included in the factor at its basis for determining depreciation for federal income tax purposes.

(3) The property factor is a fraction, the numerator of which is the average value of all real and tangible property within this state based on original cost at the beginning of the taxable year and at the end of the taxable year; and the denominator of which is the average value of property based on original cost both within and without the state at the beginning and at the end of the taxable year. The numerator of the property factor shall include the average value of the real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer.

(4) Tangible personal property is within Vermont if, and so long as, it is physically situated or located here. Property of the taxpayer held in Vermont by an agent, consignee or factor is (and property held outside Vermont by an agent, consignee or factor is not) situated or located within Vermont.

Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by a taxpayer in the denominator of its property factor in accordance with its regular accounting practices shall be included in the numerator according to the state of destination. The value of mobile or movable property such as construction equipment, trucks or leased electronic equipment which are located within and without this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of total time within the state during the tax period. An automobile assigned to a traveling employee shall be included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor or in the numerator of the state in which the automobile is licensed.

(5) Property shall be included in the property factor if it is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor. Property or equipment under construction during the tax period (except inventoriable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of the taxpayer. If the property is partially used in the regular course of the trade or business of the taxpayer while under construction, the value of the property to the extent used shall be included in the property factor. Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event that results in its conversion to the production of non-apportionable income, its sale, or the lapse of

an extended period of time (normally, five years) during which the property is no longer held for use in the trade or business.

Example (i): Taxpayer closed its manufacturing plant in State X and held the property for sale. The property remained vacant until its sale one year later. The value of the manufacturing plant is included in the property factor until the plant is sold.

Example (ii): Same as above except that the property was rented until the plant was sold. The plant is included in the property factor until the plant is sold.

(6) In determining the property factor, real and tangible personal property rented or leased to the taxpayer, as well as real and tangible personal property owned by it must be considered. The value of rented real and tangible personal property both within and without the state is determined by multiplying the gross rent payable during the tax year by eight (8). The net annual rental rate for any item of rented property is the annual rental rate paid by the taxpayer for the property less the aggregate annual subrental rates paid by subtenants of the taxpayer. (See Section G(1) for special rules when the use of such net annual rental rate produces a negative or clearly inaccurate value or when property is used by the taxpayer at no charge or is rented at a nominal rental rate.) Subrents are not deducted when they constitute apportionable income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income. Accordingly there is no reduction in its value.

Example (i): The taxpayer receives subrents from a bakery concession in a food market operated by the taxpayer. Since the subrents are apportionable income, they are not deducted from rent paid by the taxpayer for the food market.

Example (ii): The taxpayer rents a 5-story office building primarily for use in its multistate business, uses three floors for its offices and subleases two floors to various other businesses on a short-term basis because it anticipates it will need those two floors for future expansion of its multistate business. The rental of all five floors is related to the operation of the taxpayer's trade or business. Since the subrents are apportionable income, they are not deducted from the rent paid by the taxpayer.

Example (iii): The taxpayer rents a 20-story office building and uses the lower two stories for its general corporation headquarters. The remaining 18 floors are subleased to others. The rental of the eighteen floors is not incidental to but rather is separate from the operation of the taxpayer's trade or business. Since the subrents are non-apportionable income they are not included in the taxpayer's property factor.

(7) "Annual Rent" as used in this rule, is the actual sum of money payable or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes:

(A) Any amount payable for the use or possession of real or personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

Example: A taxpayer, pursuant to the terms of a lease, pays the lessor $1,000.00 per month and at the end of the year pays the lessor one percent of its gross sales of $400,000.00. Its gross rent is $16,000.00.

(B) Any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement;

Example (i): A taxpayer, pursuant to the terms of a lease, pays the lessor $24,000.00 per annum and also pays real estate taxes in the amount of $4,000.00 and interest on a mortgage in the amount of $2,000.00 Its gross rent is $30,000.00.

Example (ii): A taxpayer stores *part* of its inventory in a public warehouse. The total charge for the year was $1,000 of which $700 was for the use of storage space and $300 for inventory insurance, handling and shipping charges, and C.O.D. collections. The annual rent is $700.

(C) Any other amount required to be paid by the terms of a lease or other arrangement, including the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year of any improvement to real property made by or on behalf of the business organization which reverts to the owner or lessor upon termination of the lease or other arrangement.

Example (i): A taxpayer enters into a 21-year lease of certain premises at a rental of $20,000.00 per annum and after the expiration of one year installs a new store front at a cost of $10,000.00 which reverts to the owner upon expiration of the lease. Its gross rent for the first year is $20,000.00. However, for subsequent years its gross rent is $20,500.00 ($20,000.00 annual rent plus 1/20th of $10,000.00, the cost of the improvement apportioned on the basis of the unexpired term of the lease).

Example (ii): A taxpayer leases a parcel of vacant land for 40 years at an annual rental of $5,000.00 and erects thereon a building which costs $600,000.00. The value of the land is determined by multiplying the annual rent of $5,000.00 by eight, and the value of the building is determined in the same manner as if owned by the taxpayer.

(D) "Annual Rent" does not include:

(1) Intercompany rents if both the lessor and lessee are taxed on a consolidated basis within the Vermont return.

(2) Amounts payable as separate charges for water and electric service furnished by the lessor.

(3) Amounts payable for storage provided no designated space under the control of the taxpayer as a tenant is rented for storage purposes.

(4) Incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.; and

(5) Royalties based on extraction of natural resources, whether represented by delivery or purchase. For this purpose, a royalty includes any consideration conveyed or credited to a holder of an interest in property which constitutes a sharing of current or future production of natural resources from such property, irrespective of the method of payment or how such consideration may be characterized, whether as a royalty, advance royalty, rental or otherwise.

(E) Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the original cost of leasehold improvements shall be included in the factor.

(8) "Annual rental rate" is the amount paid as rental for property for a 12-month period (i.e., the amount of the annual rent). Where property is rented for less than a 12-month period, the rent paid for the actual period of rental shall constitute the "annual rental rate" for the tax period. However, where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months (due, for example, to a reorganization or change of accounting period), the rent paid for the short tax period shall be annualized. If the rental term is for less than 12 months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

Example (i): Taxpayer A, which *ordinarily* files its returns based on a calendar year, is merged into Taxpayer B on April 30. The net rent paid under a lease with 5 years remaining is $2,500 a month. The rent for the tax period January 1 to April 30 is $10,000. After the rent is annualized the net rent is $30,000 ($2,500 x 12).

Example (ii): Same facts as in *Example (i)* except that the lease would have terminated on August 31. In this case, the annualized rent is $20,000 ($2,500 x 8).

(9) In exceptional cases use of the general method outlined above may result in inaccurate valuations. Accordingly, in such cases, any other method which will properly reflect value may be adopted by the Vermont Department of Taxes, either on its own motion or on request of a taxpayer. Such other method of valuation may not be used by a taxpayer until approved in writing by the Department. Any such request shall set forth full information with respect to the property, together with the basis for the valuation proposed by the taxpayer. Such other method once approved by the Department may be used by the taxpayer in its reports for subsequent years until the facts upon which such other method is based are, in the judgment of the Department, materially changed.

(10) Year to year consistency. In filing returns in Vermont, if the taxpayer departs from or modifies the manner of valuing property or of excluding property from or including property in the property

factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

Section C. Payroll Factor

(1) The payroll factor is a fraction, the numerator of which includes the total compensation paid in Vermont during the tax period and the denominator of which includes the total compensation paid everywhere during the tax period. In addition to "normal" salary and wages, compensation shall include payments to employees for board, rent, housing, lodging, and any other benefits paid in exchange for labor. These amounts will be treated as compensation if they are considered as income under the Internal Revenue Code.

(2) The taxpayer's accounting method will determine the actual amounts that are to be included in the factors. If the taxpayer uses the accrual method of accounting, compensation that has been properly accrued and deductible will be considered to have been paid during the taxable period.

> *Example:* The taxpayer uses some of its employees in the construction of a storage building which, upon completion, is used in the regular course of the taxpayer's trade or business. The wages paid to those employees are treated as a capital expenditure by the taxpayer. The amount of those wages is included in the payroll factor.

(3) For purposes of this regulation, an employee is defined to be any person, including an officer of the corporation, who is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the FICA.

(4) The payroll factor shall include only compensation that is related to the production of apportionable income. Compensation that is related to the operation, maintenance, protection or supervision of non-apportionable income is not included in the payroll factor. To the extent that employee services produce both apportionable and non-apportionable income, proration is allowed.

> *Example:* The taxpayer owns various securities which it holds as an investment separate and apart from its trade or business. The management of the taxpayer's investment portfolio is the only duty of Mr. X, an employee. The salary paid to Mr. X is excluded from the payroll factor.

(5) Compensation will be considered to be paid in Vermont and thus includable in the numerator of the payroll factor if:

> (A) the individuals' services are performed entirely within Vermont;
>
> (B) the individuals' services are performed both within and without Vermont, but the out-of-state services are incidental to the Vermont services. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction;

(C) some of the individuals' services are performed within Vermont and the company's base of operation or the place from where the service is controlled is within Vermont; or

(D) some of the individual's services are performed within Vermont, which is his or her state of residence, and there is no base of operation or place from where the service is controlled in any of the other states where part of the individual's services are performed.

The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points.

Section D. Sales and Receipts Factor

(1) General Principles of Application; Definitions

(A) The sales and receipt factor is a fraction, the numerator of which is the gross receipts of the taxpayer in this state during the taxable year. The numerator of the receipts factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under these regulations. The denominator of the receipts factor shall include the gross receipts of the taxpayer derived by the taxpayer from transactions and activity in the regular course of its trade or business within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts which constitute apportionable income and are includable in the apportionable base for the tax year. Receipts from the following are allocable to Vermont:

(a) sales of tangible personal property in Vermont;
(b) services performed in Vermont;
(c) the rentals, sale, lease, or license of property situated in Vermont;
(d) licenses, leases, and sales of intangible property used in Vermont;
(e) all other apportionable receipts earned in Vermont.

All such receipts of the period covered by the return (computed on the cash or accrual basis, in accordance with the method of accounting used in the computation of the taxpayers "Vermont net income") must be taken into account.

(B) Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the receipts factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(C) Exceptions. In some cases certain gross receipts should be disregarded in determining the receipts factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business. See Section G.

(D) Definitions

Terms have the following meaning unless otherwise defined or specified in particular sections.

(1) "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.

(2) "Business customer" means a customer that is a business operating in any form, including a sole proprietorship. Sales to a non-profit organization, to a trust, to the U.S. Government, to a foreign, state or local government, or to an agency or instrumentality of that government are treated as sales to a business customer and must be assigned consistent with the rules for those sales.

(3) "Code" means the Internal Revenue Code as currently written and subsequently amended.

(4) "Individual customer" means a customer that is not a business customer.

(5) "Intangible property" generally means property that is not physical or whose representation by physical means is merely incidental and 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; and, except as otherwise provided, computer software. Receipts from the sale of intangible property may be excluded from the numerator and denominator of the taxpayer's receipts factor pursuant to Section D(1)(G) and 32 V.S.A. §5833(a)(3)(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.

(7) "Population" means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.

(8) "Receipts" means all gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular

course of the taxpayer's trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

(9) "Related party" means:

(1) a stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock;

(2) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; or

(3) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 percent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.

(10) "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 day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

(E) General Principles of Application; Contemporaneous Records.

In order to satisfy the requirements of Section D, a taxpayer's assignment of receipts from sales of other than tangible personal property must be consistent with the following principles:

1. A taxpayer shall apply the rules set forth in Section D 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 shall determine its method of assigning receipts in good faith, and apply it 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 receipts, including its underlying assumptions, and shall provide those records to the Department of Taxes upon request.

2. Section D provides 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 if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.

3. A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the regulatory standards set forth in Section 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.

(F) Rules of Reasonable Approximation.

1. In General. In general, Section D establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Vermont. The regulation also sets forth rules of reasonable approximation, which apply if 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 in Section D. In other cases, the applicable rule in Section 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 Section D.

2. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth in Section D(3)(Sale of a Service), a taxpayer can ascertain the state or states of assignment of a substantial portion of its receipts from sales of substantially similar services ("assigned receipts"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales which it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. 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* Section D(5) and Section D(6).

3. Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this Section D from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

(G) Rules with Respect to Exclusion of Receipts from the Receipts Factor.

1. The receipts factor only includes those amounts defined as receipts under Section D(1)(D)(8) and applicable regulations.

2. Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor. *See* Section D(6)(1)(D).

3. In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Section D (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer's receipts factor.

4. In a case in which a taxpayer can ascertain the state or states to which receipts from a sale are to be assigned pursuant to the applicable rules set forth in Section D, but the taxpayer is not taxable in one or more of those states, the receipts that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded apportioned pursuant to 32 V.S.A. §5833(a)(3)(A) for tangible personal property or apportioned pursuant to 32 V.S.A. §5833(a)(3)(B) for sales other than tangible personal property.

5. Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

(H) Changes in Methodology; Commissioner Review.

1. Nothing in this Regulation is intended to limited the application of 32 V.S.A. §5833(b) or the authority granted to the Commissioner under that Section. If the application of this Regulation results in the attribution of receipts that does not fairly represent the extent of the taxpayer's business activity in Vermont, the taxpayer may petition for or the Commissioner may require the use of a different method for attributing those receipts.

2. 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 receipts using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in Section 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 those 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 those receipts for the taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

3. Commissioner's Authority to Adjust a Taxpayer's Return. The Commissioner's ability to review and adjust a taxpayer's assignment of receipts on a return to more accurately assign receipts consistently with the rules or standards of Section D, includes, but is not limited to, each of the following potential actions:

A. In a case in which a taxpayer fails to properly assign receipts from a sale in accordance with the rules set forth in Section D, including the failure to properly apply a hierarchy of rules consistent with the principles of Section D(3), the Commissioner may adjust the assignment of the receipts in accordance with the applicable rules in Section D.

B. In a case in which a taxpayer uses a method of approximation to assign its receipts 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 receipts from the taxpayer's numerator and denominator, as appropriate.

C. In a 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 a case in which a taxpayer excludes receipts from the denominator of its receipts factor on the theory that the assignment of the receipts cannot be reasonably approximated, the Commissioner may determine that the exclusion of those receipts is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.

E. In a case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, or fails to provide those records to the Commissioner upon request, the Commissioner may treat the taxpayer's assignment of receipts as unsubstantiated, and may adjust the assignment of the receipts in a manner consistent with the applicable rules in Section D.

F. In a case in which the Commissioner concludes that a customer's billing address was selected by the taxpayer for tax avoidance purposes, the Commissioner may adjust the assignment of receipts from sales to that customer in a manner consistent with the applicable rules in Section D.

4. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. A taxpayer that seeks to change its method of assigning its receipts under Section D must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate.

5. Commissioner's Authority to Change a Method of Assignment on a Prospective Basis. The Commissioner may direct a taxpayer to change its method of assigning its receipts 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 the change is appropriate to reflect a more accurate assignment of the taxpayer's receipts within the meaning of Section D, and determines that the change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making the change. In a 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 receipts on those returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

(2) Sales of Tangible Personal Property in Vermont

(A) Gross receipts from sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, who takes possession within this state, regardless of fob point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and:

(1) the purchaser is the United States Government; or
(2) the corporation is not taxable in the state in which the purchaser takes possession.

If a seller in Vermont makes sales of tangible personal property to a purchaser who takes delivery of the property at the seller's shipping dock, the sale is a Vermont sale if the purchaser transports the property to one of its in-state locations. If the purchaser transports the property to one of its out-of-state locations the sale is not a Vermont sale, unless the corporation is not taxable in the state to which the property is transported.

(B) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

Example: The taxpayer, with inventory in State A, sold $100,000 of its products to a purchaser having branch stores in several states, including this state. The order for the purchase was placed by the purchaser's central purchasing department located in State B. $25,000 of the purchase order was shipped directly to purchaser's branch store in this state. The branch store in this state is the purchaser within this state with respect to $25,000 of the taxpayer's sales.

(C) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

Example: The taxpayer makes a sale to a purchaser who maintains a central warehouse in this state at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of the taxpayer's products shipped to the

purchaser's warehouse in this state constitute property delivered or shipped to a purchaser within this state.

(D) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

Example: A taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in this state pursuant to purchaser's instructions. The sale by the taxpayer is in this state.

(E) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.

Example: The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route, the produce is diverted to the purchaser's place of business in this state in which state the taxpayer is subject to tax. The sale by the taxpayer is attributed to this state.

(F) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

Example: The taxpayer has its head office and factory in State A. It maintains a branch office and inventory in this state. Taxpayer's only activity in State B is the solicitation of orders by a resident salesman. All orders by the State B salesman are sent to the branch office in this state for approval and are filled by shipment from the inventory in this state. Since the taxpayer is immune under Public Law 86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to this state, the state from which the merchandise was shipped.

(G) If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(1) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

(2) If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

Example: The taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer is not taxable in State A. Upon direction of the taxpayer, the merchandise was shipped directly to the purchaser by the manufacturer in State B. If the taxpayer is taxable in State B, the sale is in State B. If the taxpayer is not taxable in State B, the sale is in this state.

(3) Compensation for Services.

All amounts received for providing services are apportionable irrespective of whether such services are performed by employees, agents, subcontractors or any other persons.

When receipts from sales of services contribute to the sales factor, the method for calculating receipts shall rely on the principle of market-based sourcing. The receipts from a sale of a service are in Vermont if and to the extent that the service is delivered to a location in Vermont. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. 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 in subsection 1-3 below.

(1) In-Person Services.

(A) In General. Except as otherwise provided in this Subsection 1, 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, 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 similar services as described in Subsection 3, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this Subsection 1.

(B) Assignment of Receipts. Rule of Determination. Except as otherwise provided in this Subsection B, if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Vermont if and to the extent the customer receives the in-person service in Vermont. In assigning its receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received, as follows:

a. If the service is performed with respect to the body of an individual customer in Vermont (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Vermont (e.g. live entertainment or athletic performances), the service is received in Vermont.

b. If the service is performed with respect to the customer's real estate in Vermont or if 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 Vermont, the service is received in Vermont.

c. If 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 within or outside Vermont, the service is received in Vermont if the property is shipped or delivered to the customer in Vermont.

(C) Rule of Reasonable Approximation. In an 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. If the state to which the receipts are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to the state are excluded from the denominator of the taxpayer's receipts factor pursuant to 32 V.S.A. §5833(a)(3)(D).

(D) Examples.

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement that the receipts from the sale or sales be eliminated from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D). 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 (i). Salon Corp has retail locations in Vermont 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 receipts from sales of services provided at Salon Corp's in-state locations are in Vermont. The receipts from sales of services provided at Salon Corp's locations outside Vermont, even when provided to residents of Vermont, are not receipts from in-state sales.

Example (ii). Landscape Corp provides landscaping and gardening services in Vermont and in neighboring states. Landscape Corp provides landscaping services at the in-state vacation home of an individual who is a resident of another state and who is located outside Vermont at the time the services are performed. The receipts from sale of services provided at the in-state location are in Vermont.

Example (iii). Same facts as in Example (ii), 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 those locations of Retail Corp that are in

Vermont and in other states. The receipts from the sale of services provided to Retail Corp are in Vermont to the extent the services are provided in Vermont.

Example (iv). Camera Corp provides camera repair services at an in-state retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its in-state location at a facility that is in another state. In these cases, the repaired camera is then returned to the customer at Camera Corp's in-state location. The receipts from sale of these services are in Vermont.

Example (v). Same facts as in Example (iv), except that a customer located in Vermont mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Vermont by mail. The receipts from sale of the service are in Vermont.

Example (vi). Teaching Corp provides seminars in Vermont 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 Vermont the receipts from sales of the services are in Vermont.

(2) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

(A) In General. If the service provided by the taxpayer is not an in-person service within the meaning of Section D(3)(1)(A) or a professional service within the meaning of Section D(3)(3), and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in Vermont if and to the extent that the service is delivered in Vermont. For purposes of this section, a service that is delivered "to" a customer is a service in which the customer and not a third party is the recipient of the service. A service that is delivered "on behalf of" a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services, ~~**or the direct or indirect delivery of advertising to the customer's intended audience (see Section D(3)(2)(B)(3) and Example (iv) under Section D(3)(2)(B)(1)(c).**~~ A service can be delivered to or on behalf of a customerby physical means or through electronic transmission. A service that is delivered electronically "through" a customer is a service that is 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.

(B) Assignment of Receipts. The assignment of receipts to a state or states in the instance of a sale 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, a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this section 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. If the state to which the receipts from a sale are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D).

1. 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 corporate taxation) where the taxpayer installs the custom software at the customer's site. The rules in this section apply whether the taxpayer's customer is an individual customer or a business customer.

a. Rule of Determination. In assigning the receipts from a 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 the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.

b. Rule of Reasonable Approximation. If 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 the state or states.

c. Examples:

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor.

Example (i). Direct Mail Corp, a corporation based outside Vermont, provides direct mail services to its customer, Business Corp. Business Corp contracts 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 Vermont 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 receipts from the sale of Direct Mail Corp's services to Business Corp are assigned to Vermont to the extent that the services are delivered on behalf of Business Corp to Vermont customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Vermont).

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

Example (iii). Same facts as example (ii), except that the contract is with a business customer that is based outside Vermont. The receipts from the sale of the design services are in Vermont because the services are physically delivered on behalf of the customer to the customer's intended audience in Vermont.

Example (iv). Fulfillment Corp, a corporation based outside Vermont, provides product delivery fulfillment services in Vermont and in neighboring states to Sales Corp, a corporation located outside Vermont 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 Vermont, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Vermont. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to Vermont to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Vermont.

Example (v). Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in Vermont, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside Vermont, and then physically installs the software on Buyer Corp's computer hardware located in Vermont. The development and sale of the custom software is properly

characterized as a service transaction, and the receipts from the sale are assigned to Vermont because the software is physically delivered to the customer in Vermont.

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

2. 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.

a. Services Delivered By Electronic Transmission to an Individual Customer.

~~i.~~ Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the servicein Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.

~~ii.~~ Rules of Reasonable Approximation. If the taxpayer cannot determine thestate 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 the state or states. If 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 reasonably approximate the state or states using the customer's billing address.

b. Services Delivered By Electronic Transmission to a Business Customer.

~~i.~~ Rule of Determination. In the case of the delivery of a service to a businesscustomer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service isreceived, it shall assign the receipts from that sale to the state or states. For purposes of this section, 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.

~~ii.~~ Rule of Reasonable Approximation. If the taxpayer cannot determine thestate 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 the state or states.

~~iii.~~ Secondary Rule of Reasonable 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, the taxpayer shall reasonably approximate the state or states as set forth in this regulation. In these cases, unless the taxpayer can apply the safe harbor set forth below, the taxpayer shall reasonably approximate the state or states in which the service is received as follows: first, by assigning the receipts from the sale to the state where the contract of sale is principally managed bythe customer; second, if the state where the customer principally manages thecontract is not reasonably determinable, by assigning the receipts from 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 receipts from the sale using the customer's billing address; provided, however, if the taxpayer derives more than 5% of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

~~iv.~~ 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 Subsection ii, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated in Subsection iii, apply the safe harbor stated in this Subsection. Underthis safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of services delivered byelectronic transmission to a business customer, and not otherwise.

~~v.~~ Related Party Transactions. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in Subsection iii but may use the rule of reasonable approximation in Subsection ii, and the safe harbor in Subsection iv, provided that the

Commissioner may aggregate salesto related parties in determining whether the sales exceed 5% of receipts

from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

c. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is not related to either the customer to which the service is delivered. Also, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. Further, assume if relevant, unless otherwise stated, that the safe harbor set forth in Subsection iv does not apply.

Example (i). Support Corp, a corporation that is based outside Vermont, 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 Vermont 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 receipts to these locations. The receipts from sales made to Support Corp's individual and business customers are in Vermont to the extent that Support Corp's services are received in Vermont.

Example (ii). Online Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to individual customers who are resident in Vermont 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 receipts from the sale of services, Online Corp can either determine the state or states where the services are received, or, where it cannot determine the state or states, it has sufficient information regarding the place of receipt to reasonably approximate the state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of the sales of its services. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the receipts from 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 Vermont the receipts from sales for which it does not know the customers' location in the same proportion as those receipts for which it has this information. *See* Section D(3)(2)((B)(2)(a)(ii).

Example (iii). Same facts as in Example (ii), except that Online Corp reasonably believes that the geographic distribution of the receipts from 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 receipts from sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. *See* Section D(3)(1)(2)(B)(2)a.

Example (iv). Same facts as in Example (iii), except that Online Corp is not taxable in one state to which some of its receipts from sales would be otherwise assigned. The receipts that would be otherwise assigned to that state are to be excluded from the denominator of Online Corp's receipts factor. *See* Section D(3)(1)(B).

Example (v). Net Corp, a corporation based outside Vermont, provides web-based services to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Vermont 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 this case, 75% of the receipts from the sale are received in Vermont. *See* Section D(3)(2)(B)(2)(b)(i). 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 the location or locations. Under these circumstances, if Net Corp derives 5% or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under Section D(3)(2)(B)(2)(b)(iii) 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 sales of services to 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 (vi). Net Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to more than 250 individual and business customers in Vermont 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 the state or states. Also assume that Net Corp does not derive more than 5% of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv) and may assign its receipts using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service ~~**, such as the direct or indirect deliveryof advertising on behalf of a customer to the customer's intended audience**~~. A service
delivered electronically "through" a customer to third-party recipients is a service that is 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.

a. 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 Vermont if and to the extent that the end users or other third-party recipients are in Vermont~~**. For example, in the case of the direct or indirect delivery of advertising onbehalf of a customer to the customer's intended audience by electronic means, the service is delivered in Vermont to the extent that the audience for the advertising is in Vermont.**~~ **Receipts from a broadcaster's sale of advertising services to a broadcast customer are assigned to Vermont if the commercial domicile of the broadcast customer is in Vermont.** 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 Vermont to the extent that the end users or other third-party recipients receive the services in Vermont. The rules in this
Subsection 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.

b. 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 the state or states.

c. Select Secondary Rules of Reasonable Approximation.

~~**i. If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if thetaxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably 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 that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably 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 isdelivered relative to the total population in that area.~~

~~ii.~~ i.If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that 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 that location, the taxpayer shall reasonably 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 the services, relative to the total population in that area.

~~iii.~~ ii When using the secondary reasonable approximation methods providedabove, the relevant specific geographic area of delivery includes only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areasoutside the United States.

d. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor.

Example (i). Cable TV Corp, a corporation that is based outside of Vermont, 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 Vermont. Second, Cable TV Corp sells monthly subscriptions to individual customers in Vermont and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Vermont. See Section D(3)(2)(B)(2)(a)(i). 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 the location, Cable TV Corp must approximate its Vermont Broadcast Customers audience using the percentage that reflects the ratio of its Vermont subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. See Section (3)(2)(B)(3)(c)(i). To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to Vermont in any case in which the programming is received by a customer in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to Vermont where its customer's billing address is in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 receipts are properly assigned. *See* Section D(5)(E).

Example (ii). Network Corp, a **broadcaster that sells advertising to business customers pursuant to which the business customers' advertisements will run as commercials during Network Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Vermont. Network Corp also licenses rights to its film programming to both platform distribution companies and individual customers. Platform distribution companies are broadcast customers and pay licensing fees to Network Corp for the rights to distribute Network Corp's film programming to the platform distribution companies' customers. Network Corp's individual customers pay access fees to Network Corp for the right to directly access and view Network Corp's film programming. Advertisers are Broadcast Customers and pay fees to Network Corp to run commercials during Network Corp's programming. Network Corp's individual customers pay access fees to Network Corp for the right to directly access and view Network Corp's film programming. Network Corp's receipts from each advertiser or platform distribution company will be assigned to Vermont if the broadcast customer's commercial domicile is in Vermont. Network Corp's receipts from each individual broadcast customer will be assigned to Vermont if the address of the broadcast customer listed in the broadcaster's records is in Vermont.**

~~**corporation that is based outside of Vermont, sellsadvertising 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. The receipts from Network Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 the location, Network Corp must approximate the receipts from sales ofadvertising that constitute Vermont sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(ii) and (iii). In any case in which Network Corp's receipts would beassigned to a state in which Network Corp is not taxable, the receipts must be excluded from the denominator of Network Corp's receipts factor**~~.

Example (iii). Web Corp, a corporation that is based outside Vermont, provides Internet content to viewers in Vermont 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. The receipts from Web Corp's sale of advertising space to its business customers are assigned to Vermont to the extent that the viewers of the Internet content are in Vermont, as measured by viewings or clicks. *See* Section D(3)(2)(B)(3)(a). 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 the location, Web Corp must approximate the amount of its Vermont receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the Vermont population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c). In any case in which Web Corp's receipts would be assigned to a state in which Web Corp is not taxable, those receipts must be excluded from the denominator of Web Corp's receipts factor.

Example (iv). Retail Corp, a corporation that is based outside of Vermont, sells tangible property through its retail stores located in Vermont and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp, and must assign the proceeds from this service to the state or states from which the phone calls are placed by the customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate the locations, Answer Co must approximate the amount of its Vermont receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Vermont population in the specific geographic area from which the calls are placed relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(ii). Answer Co's receipts must also be excluded from the denominator of its receipts factor in any case in which the receipts would be assigned to a state in which Answer Co is not taxable.

Example (v). Web Corp, a corporation that is based outside of Vermont, sells tangible property to customers via its Internet website. Design Co. designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co.'s services are delivered to Web Corp, the proceeds from which are assigned pursuant to Section D(3)(2)(B). The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co.'s services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

Example (vi). Wholesale Corp, a corporation that is based outside Vermont, develops an Internet-based information database outside Vermont 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, but for purposes of analysis it does not matter. *See* Section D(5)E. 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 receipts from 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 the location, Wholesale Corp must approximate the extent to which its services are received by end users in Vermont by using a percentage that reflects the ratio of the Vermont population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(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* Section D(5)(E). In any case in which Wholesale Corp's receipts would be assigned to a state in which Wholesale Corp is not taxable, the receipts must be excluded from the denominator of Wholesale Corp's receipts factor.

(3) Professional Services.

(A) In General.

Except as otherwise provided in this Section, professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. These services include the performance of technical services that require the application of specialized knowledge. 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 services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

(B) Overlap with Other Categories of Services.

1. Certain services that fall within the definition of "professional services" set forth in this Section are nevertheless treated as "in-person services" within the meaning of Section D(3)(1), and are assigned under the rules of that subsection. Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services or child care services, where the customer or the customer's real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are "in-person services" and are assigned as such, notwithstanding that they may also be considered to be "professional services." However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial and consulting services, are assigned as professional services under the rules of this Section D(3)(3), notwithstanding the fact that these services may involve some amount of in-person contact.

2. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient

may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment rules that apply are those for professional services, and not those pertaining to services delivered to a customer or through or on behalf of a customer.

(C) Assignment of Receipts.

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, the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from 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 receipts from a sale of a professional service, a taxpayer's customer is the person that contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer's services. In any instance in which the taxpayer is not taxable in the state to which receipts from a sale is assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor.

1. General Rule. Receipts from sales of professional services other than those services described in Subsection 2 (architectural and engineering services), Subsection 3 (transactions with related parties) are assigned in accordance with this general rule.

a. Professional Services Delivered to Individual Customers. Except as otherwise provided, 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 must be reasonably approximated as set forth in this paragraph. In particular, the taxpayer shall assign the receipts from a 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 receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.

b. Professional Services Delivered to Business Customers. Except as otherwise provided in Section D(3), 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 must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth in the next paragraph, taxpayer shall assign the receipts from 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 the place of customer management is not

reasonably determinable, to the customer's place of order; and third, if the 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 receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

c. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in Subsections a and b above, a taxpayer may assign its receipts from 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 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of Section D(3)(3)C)(1) and not otherwise.

2. 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 Section D(3). However, unlike in the case of the general rule that applies to professional services, (1) the receipts from a sale of an architectural service are 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 the state or states; and (2) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the 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 paragraph, the receipts from a sale of these services must be assigned under the general rule for professional services. *See* Section D(3)(C)(1).

3. Related Party Transactions. In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers, the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or (2) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states. The taxpayer may use the safe harbor provided by provided that the Commissioner may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

4. Examples:

Unless otherwise stated, assume in each of these examples, where relevant, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in the examples that the receipts must be excluded from the denominator of the taxpayer's receipts factor. Assume also that the customer is not a related party and that the safe harbor set forth at Subsection D(3)(3)(C)(1)(c) does not apply.

Example (i). Broker Corp provides securities brokerage services to individual customers who are resident in Vermont 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 receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. *See* Section D(3)(3)(C)(1)(a).

Example (ii). Same facts as in Example (i), except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives 5% or less of its receipts from sales of all services must be assigned as described in example 1. For each customer from whom it derives more than 5% of its receipts from sales of all 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 Vermont, receipts from a sale made to that customer must be assigned to Vermont; in any case in which a 5% customer's state of primary residence is not Vermont receipts from a sale made to that customer are not assigned to Vermont. Where receipts from a sale are assigned to a state other than Vermont, 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 must be excluded from the denominator of Broker Corp's receipts factor.

Example (iii). Architecture Corp provides building design services as to buildings located, or expected to be located, in Vermont to individual customers who are resident in Vermont and other states, and to business customers that are based in Vermont and other states. The receipts from Architecture Corp's sales are assigned to Vermont because the locations of the buildings to which its design services relate are in Vermont, or are expected to be in Vermont. For purposes of assigning these receipts, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for the 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 the services. Further, these receipts are assigned to Vermont even if Architecture Corp's designs are either physically

delivered to its customer in paper form in a state other than Vermont or are electronically delivered to its customer in a state other than Vermont. *See* Section D(3)(3)(B)(2) and (C)(2).

Example (iv). Law Corp provides legal services to individual clients who are resident in Vermont 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 receipts from sales of all services from any one individual client. If Law Corp knows its client's state of primary residence, it shall assign the receipts to that state. If Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the receipts 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.

Example (v). Same facts as in Example (iv), 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 are excluded from the denominator of Law Corp's receipts factor even if the billing address of one or more of these clients is in a state in which Law Corp is taxable, including Vermont.

Example (vi). 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 Vermont; in the other cases, the agreement is principally managed in a state other than Vermont. If the agreement for legal services is principally managed by the client in Vermont the receipts from sale of the services are assigned to Vermont; in the other cases, the receipts are not assigned to Vermont. In the case of receipts that are assigned to Vermont, the receipts are 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.

Example (vii). Same facts as in example 6, except that Law Corp is not taxable in one of the states other than Vermont 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 are excluded from the denominator of Law Corp's receipts factor.

Example (viii). 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 Vermont, the receipts from the sale of Consulting Corp's services are assigned to Vermont. 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* Section D(3)(3)(C)(1)(b).

Example (ix). Bank Corp provides financial custodial services to 100 individual customers who are resident in Vermont 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 receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in Section D(3)(3)(C)(1)(c). If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to Vermont 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 Vermont, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Vermont. *See* Section D(3)(3)(C)(1)(a).

Example (x). Same facts as Example (ix), except that Bank Corp has more than 250 customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in D(3)(3)(C)(1)(c), and may assign its receipts from sales to a state or states using each customer's billing address.

Example (xi). Same facts as Example (x), except that Bank Corp derives more than 5% of its receipts from 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* D(3)(3)(C)(1)(a) and (C)(3). Receipts from sales to all other customers are assigned as described in Example (x).

Example (xii). Advisor Corp, a corporation that provides investment advisory services, provides these 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 Vermont. Assuming that Advisor Corp knows that its agreement with

Investment Co is principally managed by Investment Co in Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. 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* D(3)(3)(C)(1)(b).

Example (xiii). 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 Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. *See* D(3)(3)(C)(1)(b). Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example (xiv). Design Corp is a corporation based outside Vermont that provides graphic design and similar services in Vermont and in neighboring states. Design Corp enters into a contract at a location outside Vermont 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 receipts from sales of services from the individual customer. All of the design work is performed outside Vermont. Receipts from the sale are in Vermont if the customer's billing address is in Vermont. *See* D(3)(3)(C)(1)(a).

(4) Rent, Lease, or License of Tangible Personal Property and Real Property, and Sales of Real Property

Receipts from the rental, lease, or license of real or tangible personal property situated in Vermont are apportionable to Vermont.

In the case of a sale of real property, the receipts from the sale are in Vermont if and to the extent that the property is in Vermont.

In the case of a rental, lease or license of tangible personal property, the receipts from the sale are in Vermont if and to the extent that the property is in Vermont. If property is mobile property that is located both within and without Vermont during the period of the lease or other contract, the receipts assigned to Vermont are the receipts from the contract period multiplied by the fraction computed under Section B(4) (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).

Receipts from the rental, lease, or license of real or tangible personal property include all amounts received directly or indirectly by the taxpayer for use of or occupancy of property, whether or not such property is owned by the taxpayers.

(5) License or Lease of Intangible Property

A. General Rules.

1. The receipts from the license of intangible property are in Vermont if and to the extent the intangible is used in Vermont. In general, the term "use" is 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. 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 in Section D(5)(A)(2)-(5). For purposes of the rules set forth in this Section 5, a lease of intangible property is to be treated the same as a license of intangible property.

2. In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of this regulation. *See* D(6). Note, however, that for purposes of Section D(5) and (6), a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.

3. Intangible property licensed as part of the sale or lease of tangible property is treated as the sale or lease of tangible property under this regulation.

4. 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 are excluded from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D).

5. Nothing in this Section D(5) shall be construed to allow or require inclusion of receipts in the receipts factor that are not included in the definition of "receipts" pursuant to Section D(1)(A)(8) or that are excluded from the numerator and the denominator of the receipts factor. To the extent that the transfer of either a security, 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 receipts 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) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Vermont to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Vermont. 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 Vermont, it shall assign that amount or proportion to Vermont.

In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Vermont consumers, the portion of the licensing fee to be assigned to Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont 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 that area. If 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 Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

C. License of a Production Intangible.

If 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 that right are assigned to Vermont to the extent that the use for which the fees are paid takes place in Vermont. 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 that process. In the case of a license of a production intangible to a party other than a related party where the location of actual use is unknown, it is 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). If 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 Vermont, it is presumed that the entire use is in this state except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Vermont. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.

D. D. **License of a Broadcasting Intangible. Where a broadcaster grants a license to a broadcast customer for the right to use film programming, the licensing fees paid by the licensee for such right are assigned to Vermont to the extent that the broadcast customer is located in Vermont. In the case of business customers, the broadcast customer's location shall be determined using the broadcast customer's commercial domicile. In the case of individual customers, the broadcast customer's location shall be determined using the address of the broadcast customer listed in the broadcaster's records.**
~~D~~.E License of a Mixed Intangible.

If 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 that separate statement for purposes of Section D. If 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 is 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.~~F License of Intangible Property where Substance of Transaction Resembles a Sale of Goodsor Services.

1. 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 these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in Section D(3)(2)(B)(2) and (3), 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 Subsection 5 include, without limitation, the license of database access, the license of access to information, the license of digital goods (*see* Section D(7)(2)), 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* Section D(7)(1).

2. Sublicenses.

Pursuant to Section D(5)(1)(A), the rules of Section D(3)(2)(B)(3) 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 Section D(3)(2)(B)(3) 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. For this purpose, 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 that 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 that property is bundled with additional services or items of property.

3. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. Also assume that the customer is not a related party.

Example (i). 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 Vermont. 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 Vermont are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Vermont stores relative to Dealer Co's total receipts. *See* Section D(5)(B).

Example (ii). ~~**Program Corp**~~, **Network Corp**. a corporation that is based outside Vermont, licenses programming that it owns to licensees, such as cable networks, that in turn will offerthe programming to their customers on television or other media outlets in Vermont and in all other U.S. states. Each of these licensing contracts constitutes the license of a ~~**marketing**~~ **broadcast** intangible. For each licensee, **, the receipts from such license will be assigned to Vermont if the broadcast customer's commercial domicile is in Vermont** ~~**assuming that Program Corp lacks evidence of the actual number of viewers of the programming in Vermont, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Vermont receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Vermont audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. See Section D(5)(E)**~~. If ~~**Program Corp**~~, **Network Corp** is not taxable in any state in which the licensee ~~**'s audience**~~ is located, the receipts are excluded from the denominator of Program Corp's receipts factor. Note that the analysis and result as to the state or states to which receipts are properly assigned would be the same to theextent that the substance of ~~**Program Corp's**~~, **Network Corp's** licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. *See* Section D(5)(E).

Example (iii). 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 Vermont receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Vermont population in the specific geographic region relative to the total population in that region. *See* Section D(5)(E). If Moniker Corp is able to reasonably establish that the marketing intangible was materially used throughout a foreign country, then the population of that country will be included in the population ratio calculation.

However, if Moniker Corp is unable to reasonably establish that the marketing intangible was materially used in the foreign country in areas outside a particular

major city; then none of the foreign country's population beyond the population of the major city is include in the population ratio calculation. If Moniker Corp is not taxable in any state (including a foreign country) in which Wholesale Co's ultimate consumers are located, the receipts that would be assigned to that state are excluded from the denominator of Moniker Corp's receipts factor.

Example (iv). 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 Vermont 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 Vermont, the royalty is assigned based to the location of that use rather than to location of the licensee's commercial domicile, in accordance with Section D(5)(A). It is presumed that the entire use is in Vermont except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Vermont. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Vermont using the patent relative to the manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Vermont receipts. *See* Section D(5)(E).

Example (v). 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 the 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 Vermont. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co.'s receipts that are derived from Vermont customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Vermont 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 Vermont receipts. *See* Section D(5)(B),(D).

Example (vi). 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 Vermont, and (2) assign 25% of the licensing fee paid for the marketing intangible to Vermont. *See* Section D(5)(D).

Example (vii). Better Burger Corp, which is based outside Vermont, enters into franchise contracts with franchisees that agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Vermont. 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 Vermont franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Vermont receipts because the franchises are for the right to make Vermont sales. The monthly franchise fees paid by Vermont 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 Vermont receipts because in each case the use of the intangibles is to take place in Vermont. *See* Section D(5)(B),(C). The fees paid for the personal services are to be assigned pursuant to Section D(3).

Example (viii). Online Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to individual customers that are resident in Vermont 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 are assigned in accordance with Section D(5)(E). If Online Corp can determine or reasonably approximate the state or states where its database is accessed, 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 receipts 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 receipts from sales made to its individual customers are in Vermont in any case in which the customer's billing address is in Vermont. *See* Section D(3)(1)(B).

Example (ix). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with Section 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 Vermont, and 25% of Business Corp's database access took place in other states. In that case, 75% of the receipts from database access is in Vermont. Assume alternatively that Net Corp lacks sufficient information regarding the location where its database is accessed to reasonably approximate the 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 receipts 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.

Example (x). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to more than 250 individual and business customers in Vermont and in other states. The license is a license of intangible property that resembles a sale of goods or services and receipts from that license are assigned in accordance with Section D(5)(5). 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 receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv), and may assign its receipts 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 receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

Example (xi). Web Corp, a corporation based outside of Vermont, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in Vermont 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 are assigned by applying the rules set forth in Section D(3)(2)(B)(3). *See* Section D(5)(E). If Web Corp can determine or reasonably approximate the state or states where its database is

accessed by end users, 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 Vermont using a percentage that represents the ratio of the Vermont population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(i).

(6) Sale of Intangible Property.

(1) Assignment of Receipts.

The assignment of receipts 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 6, a sale or exchange of intangible property includes a license of that 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* Section D(5)(A).

(A) 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 receipts from the sale are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state the taxpayer shall assign the receipts from the sale to Vermont. If the intangible property is used or is authorized to be used in Vermont and one or more other states, the taxpayer shall assign the receipts from the sale to Vermont to the extent that the intangible property is used in or authorized for use in Vermont, through the means of a reasonable approximation.

(B) 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 are assigned by applying the rules set forth in Section 5 (pertaining to the license or lease of intangible property).

(C) 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 are assigned by applying the rules set forth in Section D(5)(E)(relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in Section D(5)(E).

(D) Excluded Receipts.

Receipts from the sale of intangible property are not included in the receipts factor in any case in which the sale does not give rise to receipts within the meaning of Section D(1)(D)(8). The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's receipts factor under this provision includes, without limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value. Also, in any instance in which, the state to which the receipts from a sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the receipts that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's receipts factor.

(E) Examples.

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which some of its receipts would be assigned, so that there is no requirement in these examples that the receipts to other states must be excluded from the taxpayer's denominator.

Example (i). Airline Corp, a corporation based outside Vermont, sells its rights to use several gates at an airport located in Vermont to Buyer Corp, a corporation that is based outside Vermont. The contract of sale is negotiated and signed outside of Vermont. The receipts from the sale are in Vermont because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Vermont. *See* Section D(6)(1).

Example (ii). Wireless Corp, a corporation based outside Vermont, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Vermont to Buyer Corp, a corporation that is based outside Vermont. The contract of sale is negotiated and signed outside of Vermont. The receipts from the sale are in Vermont because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Vermont. *See* Section D(6)(1)(A).

Example (iii). 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 Vermont and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Vermont. 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* Section D(6)(1)(A).

Example (iv). 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 denominator of Wireless Corp's receipts factor.

Example (v). Sports League Corp, a corporation that is based outside Vermont, 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 Vermont. 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 may be used in Vermont. 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 Vermont and the other states. *See* Section D(6)(1)(A).

Example (vi). 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 denominator of Sports League Corp's receipts factor.

Example (vii). Inventor Corp, a corporation that is based outside Vermont, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Vermont. 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* Section D(6)(1)(A). Inventor Corp understands that Buyer Corp is likely to use the patented technology in Vermont, 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 receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. *See* Section D(6)(1)(D).

(7) Special Rules.

(1) Software Transactions.

A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) 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 these cases, the receipts are in Vermont as determined under the rules for the sale of tangible personal property set forth under Section D(2) and related regulations. In all other cases, the receipts from a license or sale of software are to be assigned to Vermont as determined otherwise under Section D. (e.g., depending on the facts, as the development and sale of custom software, *see* Section

D(5)(B), as a license of a marketing intangible, *see* Section D(5)(B), as a license of a production intangible, *see* Section D(5)(C), as a license of intangible property where the substance of the transaction resembles a sale of goods or services, *see* Section D(5)(E) or as a sale of intangible property, *see* Section D(6).

(2) Sales or Licenses of Digital Goods or Services.

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 are assigned by applying the same rules as are set forth in Section D(3)(2) or (3), 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 Section D(5)(E) and Section D(6)(1)(C).

Section E. Non-apportionable Income

Non-apportionable income will be allocated to the state in which the income producing assets are located. If the income producing asset has no situs, the income will be allocated to the state of commercial domicile, the principal place from which the business is directed or managed.

Section F. Discretionary Adjustment of Vermont Apportionment Percentage

(A). General. Generally the apportionment formula will result in a fair apportionment of the taxpayer's income within and without Vermont. However, due to the nature of certain businesses the formula may not result in an equitable allocation of income. In such cases, the taxpayer may petition for, or the commissioner may require:

(1) Separate accounting;
(2) the exclusion or modification of any one or more of the factors;
(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
(4) the employment of any other method to effectuate an equitable apportionment of the taxpayer's income.

Section G. Special Rules

(1) Special Rules: Property Factor. The following special rules are established in respect to the property factor of the apportionment formula:

(A) If the subrents taken into account in determining the net annual rental rate under Section B(6) produce a negative or clearly inaccurate value for any item of property, another method

which will properly reflect the value of rented property may be required by the Commissioner or requested by the taxpayer.

In no case, however, shall the value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for the property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

Example: The taxpayer rents a 10-story building at an annual rental rate of $1,000,000. Taxpayer occupies two stories and sublets eight stories for $1,000,000 a year. The net annual rental rate of the taxpayer must not be less than two-tenths of the taxpayer's annual rental rate for the entire year, or $200,000.

(B) If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for the property shall be determined on the basis of a reasonable market rental rate for the property.

(2) Special Rules: Trucking Companies.

The following special rules are established with respect to trucking companies:

(A) In General. As used in this regulation, the term "trucking company" means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking company has income from sources both within and without this state, the amount of apportionable income from sources within this state shall be determined pursuant to this regulation. In such cases, the first step is to determine what portion of the trucking company's income constitutes "apportionable" income and what portion constitutes "non-apportionable" income under 32 VSA §5833 and this regulation. Non-apportionable income is directly allocable to specific states pursuant to the provisions of 32 VSA §5833. Apportionable income is apportioned among the states in which the business is conducted and pursuant to the property, payroll, and sales apportionment factors set forth in this regulation. The sum of (i) the items of non-apportionable income directly allocated to this state and (ii) the amount of apportionable income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax in this state.

(B) Apportionable and Non-apportionable Income. For definitions, rules, and examples for determining apportionable and non-apportionable income, see Section A.

(C) Apportionment of Income

(1) In General. The property factor shall be determined in accordance with Section B, the payroll factor in accordance with Section C, and the sales factor in accordance with Section D, inclusive, except as modified by this Special Rule.

(2) The Property Factor

A. Property Valuation. Owned property shall be valued at its original cost and property rented from others shall be valued at eight (8) times the net annual rental rate in accordance with Section B.

B. General Definitions. The following definitions are applicable to the numerator and denominator of the property factor, as well as other apportionment factor descriptions:

1. "Average value" of property means the amount determined by averaging the values at the beginning and end of the income tax year, but the Commissioner may require the averaging of monthly values during the income year or such averaging as is necessary to reflect properly the average value of the trucking company's property. (Section B).

2. "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property.

3. A "mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.

4. "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments, except for subsequent capital additions, improvements thereto, or partial dispositions); or, if the property has no such basis, the valuation of such property for Interstate Commerce Commission purposes. If the original cost of property is unascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer. (*See* Section B(2).)

5. "Property used during the course of the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

6. The "value" of owned real and tangible personal property means its original cost. (*See* Section B(2).)

7. The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate. (*See* Section B(4).)

C. The Denominator and Numerator of the Property Factor. The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year. In the determination of the numerator of the property factor, all property, except mobile property as defined in this regulation, shall be included in the numerator of the property factor in accordance with Section B.

Mobile property, as defined in this regulation, which is located solely within this state during the income year shall be included in the numerator of the property factor.

Mobile property as defined in this regulation, which is located within and without this state during the income year shall be included in the numerator of the property factor in the ratio which mobile property miles in the state bear to the total mobile property miles.

(3) The Payroll Factor. The denominator of the payroll factor is the compensation paid everywhere by the taxpayer during the income year for the production of apportionable income. The numerator of the payroll factor is the total compensation paid in this state during the income year by the taxpayer. With respect to all personnel, except those performing services within and without this state, compensation paid to such employees shall be included in the numerator as provided in Section C.

With respect to personnel performing services within and without this state, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere based on mobile property miles.

(4) The Sales and Receipts Factor

A. In General. All receipts derived from transactions and activities in the regular course of the taxpayer's trade or business which produce apportionable income shall be included in the denominator of the revenue factor. (*See* Section A.)

The numerator of the sales and receipts factor is the total receipts of the taxpayer in this state during the income year. The total state receipts of the taxpayer, other than receipts from hauling freight, mail, and express, shall be attributable to this state in accordance with Section D.

B. Numerator of the Sales and Receipts Factor From Freight, Mail, and Express. The total receipts of the taxpayer attributable to this state during the income year from hauling freight, mail, and express shall be:

1. Intrastate: All receipts from any shipment which both originates and terminates within this state; and,

2. Interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

(D) Records. The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as

those terms are used in this regulation. Such records are subject to review by the Vermont Department of Taxes or its agents.

(E) De Minimis Nexus Standard. Notwithstanding any provision contained herein, this Section G(2) shall not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:

a. owns nor rents any real or personal property in this state, except mobile property; nor

b. makes any pick-ups or deliveries within this state; nor

c. travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the income tax year do not exceed three percent of the total mobile property miles traveled in all states by the trucking company during that period; nor

d. makes more than twelve trips into this state.

(3) Special Rules: Television and Radio Broadcasting

The following special rules are established with respect to the apportionment of income from television and radio broadcasting by a broadcaster that is taxable both in this state and in one or more other states.

(A) In General. When a person in the business of broadcasting film or radio programming, whetherthrough the public airwaves, by cable, direct or indirect satellite transmission or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of apportionable income from sources withinthis state shall be determined pursuant to 32 VSA §5833 and this Regulation, except as modified bythis Special Rule.

(B) Apportionable and Non-apportionable Income. For definitions, regulations and examples fordetermining whether income shall be classified as "apportionable" or "non-apportionable" income, see Section A.

(C) Definitions. The following definitions are applicable to the terms contained in this regulation,unless the context clearly requires otherwise.

(i) Broadcast customer" means a person, corporation, partnership, limited liability company, or other entity, such as an advertiser or a platform distribution company, that has a direct connection or contractual relationship with the broadcaster under which revenue is derived by a broadcaster.

(ii) "Broadcaster" means a taxpayer that is a television broadcast network, a cable program network, or a television distribution company. The term "broadcaster" does not include a platform distribution company.

(iii) "Commercial domicile" means the principal place from which the trade or business of a business entity is directed or managed.

(iv) "Platform distribution company" means a cable service provider, a direct broadcast satellite system, an Internet content distributor, or any other distributor that directly charges viewers for access to any film programming.

~~(i)~~ **(v)** "Film" or "film programming" means any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium.

Each episode of a series of films produced for television shall constitute a separate "film" notwithstanding that the series relates to the same principal subject and is produced during oneor more tax periods. MPA's definition is: **"Film programming" means one or more performances, events, or productions (or segments of performances, events, or productions) intended to be distributed for visual and auditory perception, including but not limited to news, entertainment, sporting events, plays, stories, or other literary, commercial, educational, or artistic works.**

~~(ii)~~ **(vi)** "Outer-jurisdictional" property means certain types of tangible personal property, such asorbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but which are not physicallylocated in any particular state.

(iii)(vii) "Radio" or "radio programming" means any and all performances, events or productions broadcast on radio, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of an audio tape, disc or any other format or medium.

Each episode of a series of radio programming produced for radio broadcast shall constitute a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

~~(iv)~~ **(vii)** "Release" or "in release" means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience forwhich the program was created. Thus, for example, a film is placed in service when it is first publicly telecast for entertainment, educational, commercial, artistic or other purpose. Each episode of a television or radio series is placed in service when it is first broadcast. A program is not placed in service merely because it is completed and therefore in a condition or state of readiness and availability for broadcast or, merely because it is previewed to prospective sponsors or purchasers.

~~(v)~~ **(vii)** "Rent" shall include license fees or other payments or consideration provided in exchangefor the broadcast or other use of television or radio programming.

~~(vi)~~ **(viii)** A "subscriber" to a cable television system is the individual residence or other outlet whichis the ultimate recipient of the transmission.

~~(vii)~~ **(ix)** "Telecast" or "broadcast" (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radio waves or microwaves or by wires, lines, coaxial cables, waveguides, fiber optics, satellite transmissions directly or indirectly to viewers and listeners or byany other means of communications.

(D) Apportionment of Income.

(i) In General. The property factor shall be determined in accordance with Section B, the payroll factor in accordance with Section C, and the sales factor in accordance with Section D,

except as modified by this Section G(3).

(ii) The Property Factor.

A. In General

1. In the case of rented studios, the net annual rental rate shall include only the amount of the basic or flat rental charge by the studio for the use of a stage or other permanent equipment such as sound recording equipment and the like; except that additional equipment rented from other sources or from the studio not covered in the basic or flat rental charge and used for one week or longer (even though rented on a day-to-day basis) shall be included. Lump-sum net rental payments for a period which encompasses more than a single income year shall be assigned ratably over the rental period.

2. No value or cost attributable to any outer-jurisdictional, film or radio programming property shall be included in the property factor at any time.

B. Property Factor Denominator.

1. All real property and tangible personal property (other than outer-jurisdictional and film or radio programming property), whether owned or rented, which is used in the business shall be included in the denominator of the property factor.

2. Audio or video cassettes, discs or similar medium containing film or radio programming and intended for sale or rental by the taxpayer for home viewing or listening shall be included in the property factor at their original cost. To the extent that the taxpayer licenses or otherwise permits others to manufacture or distribute such cassettes, discs or other medium containing film or radio programming for home viewing or listening, the value of said cassettes, discs or other medium shall include the license, royalty or other fees received by the taxpayer capitalized at a rate of eight times the gross receipts derived therefrom during the income year.

3. Outer-jurisdictional, film and radio programming property shall be excluded from the denominator of the property factor.

C. Property Factor Numerator.

1. With the exception of outer-jurisdictional, film and radio programming property, all real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period shall be included in the numerator of the property factor as provided in Section B.

2. Outer-jurisdictional, film and radio programming property shall be excluded from the numerator of the property factor.

Example: XYZ Television Co. has a total value of all of its property everywhere of $500,000,000, including a satellite valued at $50,000,000 that was used to telecast programming into this state and $150,000,000 in film property of which $1,000,000's worth was located in this state the entire year. The total value of real and tangible personal property, other than film programming property, located in this state for the entire income

year was valued at $2,000,000; and the movable and mobile property described in subparagraph C.1. was determined to be of a value of $4,000,000 and such movable and mobile property was used in this state for 100 days. The total value of property to be attributed to this state would be determined as follows:

Value of property permanently in state: $2,000,000
Value of mobile and movable property: (100/365 or .2739 x $4,000,000): $1,095,600
Total value of property to be included in the state's property factor numerator (outer-jurisdictional and film property excluded): $3,095,600
Total value of property to be used in the denominator ($500,000,000-$200,000,000) $300,000,000
Total property factor ($3,095,600/$300,000,000): .0103

(iii) The Payroll Factor.

A. Payroll Factor Denominator.

The denominator of the payroll factor shall include all compensation, including residual and profit participation payments, paid to employees during the income year, including that paid to directors, actors, newscasters and other talent in their status as employees.

B. Payroll Factor Numerator.

Compensation for all employees shall be attributed to the state or states as may determined by the application of the provisions of Section C.

(iv) The Sales and Receipts Factor.

A. Sales and Receipts Factor Denominator.

The denominator of the sales and receipts factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under these regulations.

B. Sales and Receipts Factor Numerator.

The numerator of the sales and receipts factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to the following:

1. Gross receipts, including advertising revenue, from television film or radio programming in release to or by television and radio stations located in this state.

2. Gross receipts, including advertising revenue, from television film or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter "audience factor") that the audience for such station (or owned and affiliated stations in

the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks).

The audience factor for television or radio programming shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience. Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state.

3. Gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. If the number of subscribers cannot be accurately determined from the books and records maintained by the taxpayer, such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose.

4. Receipts from the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening shall be included in the sales factor as provided in Section D.

(4) Special Rules: Financial Institutions Subject to Net Income Tax

A. The following special rules are established with respect to financial institutions. This section applies to financial institutions as defined in this section not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836 because entities subject to that tax are not subject to tax under 32 V.S.A. § 5832, as described in 32 V.S.A. § 5836(g).

(1) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this Section G(4). All items of nonapportionable income (income which is not includable in the apportionable income tax base) shall be allocated pursuant to the provisions of Section E. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this Section.

(2) All apportionable income (income which is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by Section A of this Regulation.

(3) Each factor shall be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for the taxable year.

(4) If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors,

(c) the inclusion of one or more additional factors which will fairly represent the taxpayers business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

B. Definitions.

As used in this Section G(3) unless the context otherwise requires:

(a) "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year (or on such later date in the taxable year when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) "Borrower or credit card holder located in this state" means:

(1) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or

(2) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state.

(c) "Card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card.

(d) "Commercial domicile" means:

(1) the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(2) if a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile shall be deemed for the purposes of this Section to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It shall be presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees

are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year.

(e) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the Federal Internal Revenue Code. In the case of employees not subject to the Federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the Federal Internal Revenue Code shall be made as though such employees were subject to the Federal Internal Revenue Code.

(f) "Credit card" means a card, or other means of providing information, that entitles the holder to charge the cost of purchases, or a cash advance, against a line of credit.

(g) "Debit card" means a card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card.

(h) "Employee" means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(i) "Financial institution" means any taxable corporation described below not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836:

(1) Any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(2) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§21 et seq.;

(3) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C.§ 1813(b)(1);

(4) Any bank or thrift institution incorporated or organized under the laws of any state;

(5) Any corporation organized under the provisions of 12 U.S.C. §§611 to 631.

(6) Any agency or branch of a foreign depository as defined in 12 U.S.C. §3101;

(7) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;

(8) Any corporation whose voting stock is more than fifty percent (50%) owned, directly or indirectly, by any person or business entity described in subsections (1) through (7) above.

(9) A corporation or other business entity that derives more than fifty percent (50%) of its total gross income for financial accounting purposes from finance leases. For purposes of this subsection, a "finance lease" shall mean any lease transaction which is the functional equivalent of an extension of credit and that transfers substantially all of the benefits and risks incident to the ownership of property. The phrase shall include any "direct financing lease" or "leverage lease" that meets the criteria of Financial Accounting Standards Board Statement No. 13, "Accounting for Leases" or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles.

For this classification to apply,

(a) the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent (50%) requirement; and

(b) gross income from incidental or occasional transactions shall be disregarded; or

(10) Any other person or business entity, other than an insurance company taxed under Title 32, Chapter 211, which derives more than fifty percent (50%) of its gross income from activities that a person described in subsections (1) through (9) above is authorized to transact. For the purpose of this subsection, the computation of gross income shall not include income from non-recurring, extraordinary items.

(11) The Commissioner is authorized to exclude any person from the application of subsection (10) upon such person proving, by clear and convincing evidence, that the income producing activity of such person is not in substantial competition with those persons described in subsections (1) through (9 above.

(j) "Gross rents" means the actual sum of money or other consideration payable for the use or possession of property. "Gross rents" shall include, but not be limited to:

(1) any amount payable for the use or possession of real property or tangible property whether designated as a fixed sum of money or as a percentage of receipts, profits or otherwise,

(2) any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement, and

(3) a proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount

of amortization or depreciation allowed in computing the taxable income base for the taxable year. However, where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer.

(4) The following are not included in the term "gross rents":

(A) reasonable amounts payable as separate charges for water and electric service furnished by the lessor;

(B) reasonable amounts payable as service charges for janitorial services furnished by the lessor;

(C) reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and

(D) that portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it.

(k) "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.

(l) "Loan secured by real property" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

(m) "Merchant discount" means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the card holder, net of any cardholder charge-back and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made its cardholder.

(n) "Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(o) "Person" means an individual, estate, trust, partnership, corporation and any other business entity.

(p) "Principal base of operations" with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly (1) starts his or her work and to which he or she customarily returns in order to receive instructions from his or her employer or (2) communicates with his or her customers or other persons, or (3) performs any other functions necessary to the exercise of his or her trade or profession at some other point or points.

(q) "Real property owned" and "tangible personal property owned" mean real and tangible personal property, respectively, (1) on which the taxpayer may claim depreciation for federal income tax purposes, or (2) property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

(r) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(s) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

(t) "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(u) "Taxable" means either:

(1) that a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any tax which is imposed upon or measured by gross or net income; or

(2) that another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not.

(v) "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

C. Sales and Receipts Factor.

(a) General. The sales receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts

for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts described herein which constitute business income and are included in the computation of the apportionable income base for the taxable year.

(b) Receipts from the lease of real property. The numerator of the receipts factor includes receipts from the lease or rental of real property owned by the taxpayer if the property is located within this state or receipts from the sublease of real property if the property is located within this state.

(c) Receipts from the lease of tangible personal property.

(1) Except as described in paragraph (2) of this subsection, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(2) Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of receipts that is to be included in the numerator of this state's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(d) Interest, fees and penalties imposed in connection with loans secured by real property.

(1) The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the receipts described in this subsection shall be included in the numerator of the receipts factor if the borrower is located in this state.

(2) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(e) Interest, fees, and penalties imposed in connection with loans not secured by real property. The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans not secured by real property if the borrower is located in this state.

(f) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Internal Revenue Code.

(1) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(2) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(g) Receipts from fees, interest, and penalties charged to card holders. The numerator of the receipts factor includes fees, interest and penalties charged to credit, debit or similar card holders, including but not limited to annual fees and overdraft fees, if the billing address of the card holder is in this state.

(h) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(i) Card issuer's reimbursement fees. The numerator of the receipts factor includes:

(1) all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to credit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to credit card holders.

(2) all debit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to debit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to debit card holders.

(3) all other card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to all other card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the

denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to all other card holders .

(j) Receipts from merchant discount.

(1) If the taxpayer can readily determine the location of the merchant and if the merchant is in this state, the numerator of the receipts factor includes receipts from merchant discount.

(2) If the taxpayer cannot readily determine the location of the merchant, the numerator of the receipts factor includes such receipts from the merchant discount multiplied by a fraction:

(A) in the case of a merchant discount related to the use of a credit card, the numerator of which is the amount of fees, interest and penalties charged to credit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to credit card holders, and

(B) in the case of a merchant discount related to the use of a debit card, the numerator of which is the amount of fees, interest and penalties charged to debit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to debit card holders.

(C) in the case of a merchant discount related to the use of all other types of cards, the numerator of which is the amount of fees, interest and penalties charged to all other card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to all other card holders.

(3) The taxpayer's method for sourcing each receipt from a merchant discount must be consistently applied to such receipt in all states that have adopted sourcing methods substantially similar to subsections (1) and (2) of this section and must be used on all subsequent returns for sourcing receipts from such merchant unless the Commissioner permits or requires application of the alternative method.

(k) Receipts from ATM fees. The receipts factor includes all ATM fees that are not forwarded directly to another bank.

(1) The numerator of the receipts factor includes fees charged to a cardholder for the use at an ATM of a card issued by the taxpayer if the cardholder's billing address is in this state.

(2) The numerator of the receipts factor includes fees charged to a cardholder, other than the taxpayer's cardholder, for the use of such card at an ATM owned or rented by the taxpayer, if the ATM is in this state.

(l) Loan servicing fees.

(1) (A)The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(2) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor shall include such fees if the borrower is located in this state.

(m) Receipts from the financial institution's investment assets and activity and trading assets and activity.

(1) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities that are reported on the taxpayer's financial statements, call reports, or similar reports shall be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in subparagraphs (A) and (B) of this paragraph, the receipts factor shall include the amounts described in such subparagraphs.

(A)The receipts factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor shall include the amount by which interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(2) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities described in paragraph (1) of this subsection that are attributable to this state.

(A)The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D)For purposes of this paragraph, average value shall be determined using the rules for determining the average value of tangible personal property set forth in subsections (c) and (d) of Section 4.

(3) In lieu of using the method set forth in paragraph (2) of this subsection, the taxpayer may elect, or the Commissioner may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this subsection.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase

agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(4) If the taxpayer elects or is required by the Commissioner to use the method set forth in subsection (3), it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the Commissioner to use, or the Commissioner requires a different method.

(5) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-today decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established at the commercial domicile of the taxpayer.

(n) All other receipts. The numerator of the receipts factor includes all other receipts pursuant to the rules set forth in Section D of this Regulation unless inconsistent with the Special Rules For Financial Institutions.

(o) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this section to a state in which the taxpayer is not taxable shall be included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

D. Property Factor.

(a) General. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located or used within this

state during the taxable year and the average value of the taxpayer's real and tangible personal property owned that is located or used within this state during the taxable year, and the denominator of which is the average value of all such property located or used within and without this state during the taxable year.

(b) Property included. The property factor shall include only property the income or expenses of which are included (or would have been included if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of the apportionable income base for the taxable year.

(c) Value of property owned by the taxpayer. The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for Federal income tax purposes without regard to depletion, depreciation or amortization.

(d) Average value of property owned by the taxpayer. The average value of property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable year and the value on the last day of the taxable year and dividing the sum by two. If averaging on this basis does not properly reflect average value, the Commissioner may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the Commissioner or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property within and without this state and on all subsequent returns unless the taxpayer receives prior permission from the Commissioner or the Commissioner requires a different method of determining average value.

(e) Average value of real property and tangible personal property rented to the taxpayer.

(1) The average value of real property and tangible personal property that the taxpayer has rented from another and which is not treated as property owned by the taxpayer for Federal income tax purposes, shall be determined annually by multiplying the gross rents payable during the taxable year by eight.

(2) Where the use of the general method described in this subsection results in inaccurate valuations of rented property, any other method which properly reflects the value may be adopted by the Commissioner or by the taxpayer when approved in writing by the Commissioner. Once approved, such other method of valuation must be used on all subsequent returns unless the taxpayer receives prior approval from the Commissioner or the Commissioner requires a different method of valuation.

(f) Location of real property and tangible personal property owned by or rented to the taxpayer.

(1) Except as described in paragraph (2) of this subsection, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated or used within this state.

(2) Transportation property is included in the numerator of the property factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this

state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

E. Payroll Factor.

(a) General. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both within and without this state during the taxable year. The payroll factor shall include only that compensation which is included in the computation of the apportionable income tax base for the taxable year.

(b) Compensation relating to nonbusiness income and independent contractors. The compensation of any employee for services or activities which are connected with the production of nonbusiness income (income which is not includable in the apportionable income base) and payments made to any independent contractor or any other person not properly classifiable as an employee shall be excluded from both the numerator and denominator of the factor.

(c) When compensation paid in this state. Compensation is paid in this state if any one of the following tests, applied consecutively, is met:

(1) The employee's services are performed entirely within this state.

(2) The employee's services are performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The term "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.

(3) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:

(A) if the employee's principal base of operations is within this state; or

(B) if there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this state; or

(C) if the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed but the employee's residence is in this state.

From:	karenjbouchercpa@gmail.com
To:	Baker, Will
Subject:	pls let me know if you have any questions or would like to discuss our comment on the apportionment draft reg.
Date:	September 16, 2020 11:53:28 AM
Attachments:	8-20-20 Comments draft Vermont regs.pdf Attachment to VT draft reg comments.pdf
Importance:	High

From: karenjbouchercpa@gmail.com <karenjbouchercpa@gmail.com>
Sent: Thursday, August 20, 2020 12:16 PM
To: will.baker@vermont.gov
Cc: karenjbouchercpa@gmail.com
Subject: Comments on draft allocation & apportionment regulation
Importance: High

Pls contact me if you have any questions

Best regards,

Karen

Financial Institutions State Tax Coalition

August 20, 2020

Transmitted via email

Vermont Department of Taxes
Will Baker, General Counsel
133 State Street
Montpelier, Vermont 05633-1401

Re: Draft Updated Allocation and Apportionment Regulation

Thank you for the opportunity to provide written comments on behalf of the Financial Institutions State Tax ("FIST") Coalition regarding the draft updated Allocation and Apportionment Regulation.

Section D(1)(A)(8) of the draft defines "receipts" as:

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

That definition is identical to the revised Multistate Tax Compact's ("Compact's") receipts definition included in Article IV.1.g. [1]

The FIST Coalition is NOT supportive of the states adopting the revised Compact's Article IV.1.g narrow definition of "receipts," which excludes from the receipts factor interest from lending, income from investments, and receipts from security and hedging transactions. For financial service organizations, such receipts reflect the contribution of the taxpayers' markets to the earning of income and in many cases are the bulk of the taxpayers' regular trade or business receipts, and thus, should be included in their receipts factor. It also would raise constitutional issues to exclude such large components of the taxpayers' regular trade or business receipts from the receipts factor.

[1] Compact Article IV.1.(g) "Receipts" means all gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer's trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

However, where a state has adopted the revised Compact's narrow definition of receipts the FIST Coalition believes that it is critical for the state to not apply the narrow receipts factor definition to bank holding companies and entities more than 50% owned by such holding companies and to adopt the Multistate Tax Commission's (MTC's) model Reg. IV.18.(k). Receipts Factor – Bank Holding Companies and Subsidiaries, which is attached and can be found at: http://www.mtc.gov/getattachment/Uniformity/Adopted-Uniformity-Recommendations/2018-Commission-Meeting-Proposed-Sec-18(k)-(1).pdf.aspx?lang=en-US.

Essentially, this model regulation provides that bank holding companies and entities more than 50% owned by such holding companies that are subject to an income-based tax determine their receipts factor denominators and assign receipts in the numerator of the factor in the same manner as the receipts would be included in the denominator and assigned to states under the MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute 18 (as adopted July 29, 2015)[2].

The MTC's model financial institution apportionment provisions apply market-based sourcing for receipts and have been widely adopted by the states. The FIST Coalition believes that in light of this wide adoption of that model apportionment provision, without the adoption of MTC's model Reg. IV.18.(k) the segment of the financial services industry with the greatest potential for apportionment incongruity are bank holding companies and their subsidiaries.

Without the adoption of the MTC Model Reg. IV.18.(k), Vermont could be apportioning the income of bank holding companies and entities owned by banks and bank holding companies based on a very small percentage of the taxpayer's regular trade or business receipts, while other states would be including 100% of the entity's regular trade or business receipts in the receipts factor. The result of such different apportionment schemes could be bizarre and unconstitutional.

More importantly, the wide adoption of the Model Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute with the broad definition of financial institution that includes bank holding companies and their subsidiaries, indicates that the MTC and many states have concluded that it is proper to use those provisions for the sourcing of receipts for bank holding companies, and subsidiaries of such holding companies.

Conclusion

In order to provide the appropriate factor representation and increase uniformity in the manner that the MTC and the majority of states suggest that bank holding companies and their subsidiaries apportion their income, the FIST Coalition believes that Vermont should not apply the narrow receipts factor definition to bank holding companies and entities more than 50% owned by bank holding companies and instead should adopt (without any modifications) the MTC's model Reg. IV.18.(k) Receipts Factor - Bank Holding Companies and Subsidiaries.

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[2] The MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute 18 (as adopted July 29, 2015) can be found at: http://www.mtc.gov/getattachment/Uniformity/Adopted-Uniformity-Recommendations/Financial-Institutions-Apportionment-Rule-Amended-2015.pdf.aspx.

Please contact me if you have any questions regarding the above comments.

Sincerely,

Karen Boucher

Karen Boucher
Financial Institutions State Tax Coalition LLC
Managing Member

Attachment: MTC's model Reg. IV.18.(k). Receipts Factor – Bank Holding Companies and Subsidiaries

MULTISTATE TAX COMMISSION

Resolution Adopting Recommended Amendments to the Model General Allocation and Apportionment Regulations Reg. IV. 18.(k) REG.IV.18.(k). Receipts Factor – Bank Holding Companies and Subsidiaries

WHEREAS, changes to Article IV of the Compact (UIDTPA) necessitated changes be made in the model General Allocation and Apportionment Regulations; and

WHEREAS, following the Executive Committee's instructions to update those model regulations, the Uniformity Committee has considered changes to regulations under Article IV, Section 18 having to do with the treatment of certain gross receipts when received by bank holding companies and subsidiaries; and

WHEREAS, the Uniformity Committee the referred draft amendments to the Executive Committee, which voted to approve them for public hearing on January 8, 2018; and

WHEREAS, that hearing was duly noticed and was held on February 20, 2018 and the hearing officer's report was submitted to the Executive Committee on April 26, 2018; and

WHEREAS, the Executive Committee approved the draft amendments for bylaw 7 survey; and

WHEREAS, the majority of affected member states have given an affirmative response to that survey;

Now, therefore, be it:

RESOLVED, this day, July 25, 2018, that the Commission hereby adopts the recommended amendments to the model General Allocation and Apportionment Regulations, Reg.IV.18.(k).

This draft regulation would be inserted at Section REG. IV.18.- subsection (k).

REG.IV.18.(k). Receipts Factor – Bank Holding Companies and Subsidiaries.

DRAFTER'S NOTE: THIS REGULATION MAY BE APPROPRIATE FOR USE BY STATES THAT HAVE ADOPTED SPECIAL RULES FOR THE ALLOCATION AND APPORTIONMENT OF FINANCIAL INSTITUTIONS, INCLUDING THE MULTISTATE TAX COMMISSION'S MODEL FORMULA FOR THE APPORTIONMENT AND ALLOCATION OF NET INCOME OF FINANCIAL INSTITUTIONS (AS AMENDED JULY 29, 2015), THAT DO NOT EXPLICITLY INCLUDE BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND MAJORITY-OWNED SUBSIDIARIES OF SUCH ENTITIES IN THE DEFINITION OF "FINANCIAL INSTITUTIONS" SUBJECT TO SUCH SPECIAL RULES. THIS REGULATION MAY ALSO APPLY TO STATES THAT HAVE NO SPECIAL RULES FOR THE ALLOCATION AND APPORTIONMENT OF FINANCIAL INSTITUTIONS. IF YOUR STATE'S DEFINITION OF "FINANCIAL INSTITUTIONS" ALREADY INCLUDES SUCH ENTITIES, THEN THIS REGULATION MAY BE UNNECCESSARY.

(1) For any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended, and any entity more than 50 percent owned [directly or indirectly] by such holding companies, receipts are included in the receipts factor denominator and assigned to the receipts factor numerator in this state to the extent those receipts would be included in the denominator and assigned to this state under the MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute (as adopted July 29, 2015). REG.IV.18.(c) does not apply to a taxpayer that is subject to this REG.IV.18.(d).

(2) Nothing in this Reg.IV.18.(d) shall prohibit the taxpayer from petitioning for, or the [state tax agency or administrator] from applying, an alternative method to calculate the taxpayer's receipts factor in order to fairly represent the extent of the taxpayer's business activity in this state as provided for in [reference to Compact Article IV, Section 18 or similar state law]

From:	karenjbouchercpa@gmail.com
To:	Baker, Will
Cc:	karenjbouchercpa@gmail.com
Subject:	Questions related to draft market-sourcing reg.
Date:	August 02, 2021 5:21:31 PM
Attachments:	Official Material__VT__Vermont Formal Ruling__No__2009 12__12 22 2009.rtf
Importance:	High

Will –

With the upcoming hearing on the proposed Reg. § 1.5833 ALLOCATION AND APPORTIONMENT OF INCOME OF VERMONT NET INCOME BY CORPORATION, we have been looking more closely at the proposal and have a couple of questions/comments:

1. Pls confirm that the Financial Institutions Franchise Tax applies only if the bank has a physical office location in Vermont (some type of office location, regardless of whether deposits are taken at the location). Based on attached Vermont Formal Ruling No. 2009- 12, 12/22/2009, it would appear only a physical office location is required in order for an institution to be considered to be subject to the financial institutions franchise tax -- not the taking of deposits or the actual payment of the franchise tax.

2. What happens in the year that a financial institution would open an office location in Vermont? For example, would its apportionment numerators be included in the combined group corporate income return for the portion of the year in which it does not have a Vermont location and then once it has the location the numerators would no longer be included in the corporate income tax apportionment calculation and it would start filing the monthly deposit tax?

3. If a bank is subject to the financial institution franchise tax, then the bank itself is not subject to the corporate income tax, but the bank's income is still included in the combined group's tax base and the bank's receipts, payroll and property are excluded from the numerators of the apportionment provisions BUT ARE INCLUDED IN THE GROUP'S APPORTIONMENT DENOMINATORS.

   Reg. § 1.5862(d) – 4(b)(4) provides that

   > Except as enumerated above, a corporation that is not subject to Vermont corporate income tax is not excluded from the affiliated group. For example, banks, insurance companies, telephone companies electing to pay gross receipts tax, railroad companies, are part of the affiliated group notwithstanding that the income allocated to them is not subject to Vermont income tax.

   1.5862(d)-8. (a) provides:

   > Factors of corporations not doing business in Vermont and factors of a corporation subject to Vermont tax other than corporate income tax are not included in the Vermont numerator.

The draft reg. proves:

> 4. Special Rules: Financial Institutions Subject to Net Income Tax A. The following special rules are established with respect to financial institutions. This section applies to financial institutions as defined in this section not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836 because entities subject to that tax are not subject to tax under 32 V.S.A. § 5832, as described in 32 V.S.A. § 5836(g).

Initially the above application appeared correct because we had thought that banks subject to the financial institution tax were exempt from the corporate income (meaning not included in the combined return). But since the bank's income is included in the unitary return and it's apportionment factor are included in the group's denominators, the regulation should provide that the special financial institution apportionment provisions apply in determining the denominators of an institution subject to the financial institution tax to be included in a combined/consolidated group's return. Otherwise the majority of the bank's receipts would be excluded from the group's receipts factor denominator which would distort the apportionment percentage.

Are you available this week to discuss the above???

Best regards,
Karen

From: Baker, Will <Will.Baker@vermont.gov>
Sent: Tuesday, April 13, 2021 3:37 PM
To: karenjbouchercpa@gmail.com
Subject: RE: what is status of draft apportionment reg and can we assume it is applicable for the 2020 tax year for extension purposes?

Ms. Boucher: They haven't been filed yet. I'm still waiting for approval from higher levels. But your language is still in there. They are not effective yet, but the MBS law certainly is. I think it is a good statement of the Department's intention. Not across the finish line as far as a promulgated regulation.
Will Baker

From: karenjbouchercpa@gmail.com <karenjbouchercpa@gmail.com>
Sent: April 13, 2021 3:42 PM
To: Baker, Will <Will.Baker@vermont.gov>
Subject: what is status of draft apportionment reg and can we assume it is applicable for the 2020 tax year for extension purposes?
Importance: High

From: karenjbouchercpa@gmail.com <karenjbouchercpa@gmail.com>
Sent: Tuesday, February 16, 2021 10:09 AM
To: 'Baker, Will' <Will.Baker@vermont.gov>
Cc: karenjbouchercpa@gmail.com
Subject: RE: pls let me know if you have any questions or would like to discuss our comment on the apportionment draft reg.

Will –

Thank you for giving us an opportunity to review the revised draft. The inclusion of the MTC rules for financial institutions in section G(4) resolves the issue that we commented on.

We do not have any additional comments or issues with this revised draft.

Best regards,
Karen

From: Baker, Will <Will.Baker@vermont.gov>
Sent: Monday, February 1, 2021 12:14 PM
To: karenjbouchercpa@gmail.com
Subject: RE: pls let me know if you have any questions or would like to discuss our comment on the apportionment draft reg.

Ms. Boucher:
Please review our latest draft of the apportionment regulations. You will see that we now have the specific MTC rules for financial institutions in section G(4). Vermont has a bank franchise tax (see 32 V.S.A. § 5836 - https://legislature.vermont.gov/statutes/chapter/32/151), so I'm not sure how many "financial institutions" as defined, would be subject to our corporate income tax. But, we put it in there.
Please let me know if you have any questions.

Will Baker

Will S. Baker | Assistant Attorney General
Director, Legal Unit
Vermont Department of Taxes
133 State Street | Montpelier, VT 05633-1401
p: (802)828-2506 | www.tax.vermont.gov

From: karenjbouchercpa@gmail.com <karenjbouchercpa@gmail.com>
Sent: September 16, 2020 10:53 AM
To: Baker, Will <Will.Baker@vermont.gov>
Subject: pls let me know if you have any questions or would like to discuss our comment on the apportionment draft reg.
Importance: High

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

From: karenjbouchercpa@gmail.com <karenjbouchercpa@gmail.com>
Sent: Thursday, August 20, 2020 12:16 PM
To: will.baker@vermont.gov
Cc: karenjbouchercpa@gmail.com
Subject: Comments on draft allocation & apportionment regulation
Importance: High

Pls contact me if you have any questions

Best regards,
Karen

Vermont Formal Ruling No. 2009- 12 , 12/22/2009

Date Issued: 12/22/2009

Tax Type(s): Corporate Income Tax

December 22, 2009

Dear

You have requested a ruling as to whether the is subject to the Vermont Corporate Income Tax or Financial Institutions Franchise Tax.

The facts as relayed in your letter of September 30, 2008 are as follows:

The bank is a federally-chartered savings institution headquartered in The Bank provides a variety of financial services to individuals, businesses.and municipalities through its offices located in eastern Connecticut. Its primary products include savings, checking and certificates of deposit accounts, residential and commercial mortgage loans, commercial business loans and consumer loans. In addition, wealth management services are offered to individuals and businesses' through the Bank's Connecticut offices. The Bank also offers third-party outsourcing services through a department of the Bank that does business as maintains a physical office in Vermont but does not collect deposits from customers or lend funds to individuals, businesses or municipalities

located in the State of Vermont. The Bank employs 16 individuals in the department in Vermont. is consolidated for financial reporting purposes with other operations of the Bank.

Further facts as follows were ascertained from review of the Department's records and through telephone conversations with you. The Bank filed Vermont corporate income tax returns for 2005 and 2006 with minimum payments for each year. It filed an extension for 2007 with the minimum payment of $250. These were filed under its own Vermont Business Account Number The Bank is wholly owned by , a holding company created in 2004 to permit a public offering of the Bank's stock. filed a combined corporate income tax return for 2007 which applied the Bank's $250 minimum payment to its liability. Tax was paid with this return. This filing generated a letter from the Vermont Department of Taxes (Department) in October 2008 acknowledging the return and assigning a Vermont Business Account Number . The letter advised of its ongoing responsibility to file corporate income tax returns. The notice stated that a return must be filed even if the tax liability for the period is zero. filed a combined return for 2008 with payment.

Vermont adopted unitary combined filing for tax years beginning on and after January 1, 2006. 2005, No. 152 (Adj. Ses's.). Pursuant to that law a corporation which is part of an affiliated group engaged in a unitary business must file a group return reporting the combined net income of the affiliated group, 32 V.S.A. § 5862a, The combined income of the group is then apportioned in accordance with Reg. § 1.5833,

properly filed a group corporate income tax return with Vermont for 2007 and 2008. It appears that a group return should have been filed for 2006 as well. For purposes of apportionment, because the Bank is subject to Vermont tax other than corporate income tax, the factors (sales, payroll and property) of the Bank are not included in the Vermont numerator and no corporate tax is due from it. Reg. § 1.5862(d)-8(a). To the extent that the holding company or other subsidiaries in the group have factors in Vermont, a Vermont tax liability would be generated.

The Bank is subject to a franchise tax on financial institutions. 32 V.S.A. § 5836. The tax is measured by the average monthly deposits held in Vermont by the corporation. According to your letter, has no deposit activity and therefore will have no franchise tax liability to Vermont for the years in question.

In sum, the affiliated group must file a corporate tax return and the Bank must file a franchise tax return. Whether corporate tax is due or not will depend upon the presence and activity of the non-bank affiliates in Vermont. The tax due on the franchise return will depend upon the deposits in Vermont.

This ruling will be made public after deletion of the parties' names and any information which may identify the parties. A copy of this ruling showing the proposed deletions is attached, and you may request within thirty (30) days that the Commissioner delete any further information that might identify the interested parties. The final discretion as to deletions rests with the Commissioner. This ruling is issued solely to the requester and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department is not be bound by this ruling in the case of any other taxpayer or in the case of any change in relevant statutes or regulations. Section 808 of Title 3 provides that this ruling has the same status as an agency decision or an order in a contested case. You have the right to appeal this ruling within thirty (30) days.

Sincerely,

/s/

Molly Bachman

General Counsel

Approved this 23 day of December, 2009.

/s/

Richard Westman

Commissioner of Taxes

<REQUESTER>

Dear<REQUESTER>:

You have requested a ruling as to whether the <COMPANY> (the "Bank") is subject to the Vermont Corporate Income Tax or Financial Institutions Franchise Tax.

The facts as relayed in your letter of September 30, 2008 are as follows:

The bank is a federally-chartered savings institution headquartered in <CITY, STATE>. The Bank provides a variety of financial services to individuals, businesses and municipalities through its offices located in eastern <STATE>, Its primary products include savings, checking and certificates of deposit accounts, residential and commercial

mortgage loans, commercial business loans and consumer loans. In addition, wealth management services are offered to individuals and businesses through the Bank's <STATE> offices. The Bank also offers third-party outsourcing services through a department of the Bank that does business as <COMPANY >. <COMPANY > maintains a physical office in Vermont but does not collect deposits from customers or lend funds to individuals, businesses or municipalities located in the State of Vermont. The Bank employs <NUMBER> individuals in the <COMPANY > department in Vermont. <COMPANY > is consolidated for financial reporting purposes with other operations.of the Bank.

Further facts as follows were ascertained from review of the Department's records and through telephone conversations with you. The Bank filed Vermont corporate income tax returns for 2005 and 2006 with minimum payments for each year. It filed an extension for 2007 with the minimum payment of $XXX. These were filed under its own Vermont Business Account Number (XXXXXX). The Bank is wholly owned by <COMPANY> a holding company created in 2004 to permit a public offering of the Bank's stock. <COMPANY> filed'a combined corporate income tax return for 2007 which applied the Bank's $XXX minimum payment to its liability. Tax was paid with this return. This filing generated a letter from the Vermont Department of Taxes (Department) in October 2008 acknowledging the return and assigning a Vermont Business Account Number (XXXXXX) to <COMPANY>. The letter advised <COMPANY> of its ongoing responsibility to file corporate income tax returns. The notice stated that a return must be filed even if the tax liability for the period is zero. <COMPANY> filed a combined return for 2008 with payment.

Vermont adopted unitary combined filing for tax years beginning on and after January 1, 2006. 2005, No. 152 (Adj. Sess.). Pursuant to that law a corporation which is part of an affiliated group engaged in a unitary business must file a group return reporting the combined net income of the affiliated group, 32 V.S.A. § 5862a. The combined income of the group is then apportioned in accordance with Reg. § 1.5833.

<COMPANY>. properly filed a group corporate income tax return with Vermont for 2007 and 2008. It appears that a group return should have been filed for 2006 as well, For purposes of apportionment, because the Bank is subject to Vermont tax other than corporate income tax, the factors (sales, payroll and property) of the Bank are not included in the Vermont numerator and no corporate tax is due from it. Reg. § 1.5862(d)-8(a). To'the extent that the holding company or other subsidiaries in the group have factors in Vermont, a Vermont tax liability would be generated.

The Bank is subject to a franchise tax on financial institutions. 32 V.S.A. § 5836. The tax is measured by the

average monthly deposits held in Vermont by the corporation. According to your letter, <COMPANY> has no deposit activity and therefore will have no franchise tax liability to Vermont for the years in question,

In sum, the affiliated group must file a corporate tax return and the Bank must file a franchise tax return. Whether corporate tax is due or not will depend upon the presence and activity, of the non-bank affiliates in Vermont. The tax due on the franchise return will depend upon the deposits in Vermont.

This ruling will be made public after deletion of the parties' names and any information which may identify the parties. A copy of this ruling showing the proposed deletions is attached, and you may request within thirty (30) days that the Commissioner delete any further information that might identify the interested parties. The final discretion as to deletions rests with the Commissioner. This ruling is issued solely to the requester and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department is not be bound by this ruling in the case of any other taxpayer or in the case of any change in relevant statutes or regulations. Section 808 of Title 3 provides that this ruling has the same status as an agency decision or an order in a contested case. You have the right to appeal this ruling within thirty (30) days,

Sincerely,

Molly Bacliman

General Counsel

Approved this _____ day of December, 2009.

_____

Richard Westman

Commissioner of Taxes

Annotat
Text

ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

Section A. Computations of Vermont Apportionment Percentage.

(1) Apportionment Formula.
(2) Allocation.
(3) Computation.
(4) Apportionment and Allocation
(5) Apportionable Income.
(6) Definition of "Trade or Business"
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(8) Functional Test.
(9) Relationship of Transactional and Functional Tests to U.S. Constitution.
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(11) Application of Definitions.
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(B) Assignment of Receipts
(1) Delivery to or on Behalf of a Customer by Physical Means Whether to an Individual or Business Customer.
(2) Delivery to a Customer by Electronic Transmission
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b. Services Delivered by Electronic Transmission to a Business Customer.
i. Rule of Determination
ii. Rule of Reasonable Approximation.
iii. Secondary Rule of Reasonable Approximation.
iv. Safe Harbor
v. Related Party Transactions
c .Examples
(3) Services Delivered Electronically Through or on Behalf of an Individual or Business Customer.
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ii. Taxpayer's service is the delivery of a service to a customer that then actions as the taxpayer's intermediary.
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(D) Property Factor
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Reg. § 1.5833 ALLOCATION AND APPORTIONMENT ~~OF INCOME~~ OF VERMONT NET INCOME BY CORPORATIONS

Effective December 1, 2021

~~Reg. § 1.5833-1 (Effective for tax years beginning on and after January 1, 1998) Allocation and apportionment of "Vermont net income" by corporations~~

Section A. ~~(a)~~ Computations of Vermont Apportionment Percentage.

(1) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be apportioned to this state in full. If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and without this state, the amount of the corporation's Vermont Net Income apportioned to this state shall be determined by the arithmetic average of the following factors:

(A) The average of the value of all real and tangible property owned or rented by the taxpayer within Vermont expressed as a percentage of all such property both within and without Vermont.

(B) The total wages, salaries or other personal service compensation paid during the taxable year to employees or agents within Vermont expressed as a percentage of such payments both within and without Vermont.

(C) The gross sales, receipts, or charges for services performed within Vermont expressed as a percentage of such sales or charges both within and without Vermont, double-weighted.

(2) A taxable corporation subject to the taxing jurisdiction of this state shall allocate all of its non-apportionable income or loss within or without this state in accordance Section E. ~~All items of nonbusiness income (income which is not includable in the apportionable tax base) shall be allocated as provided in Sec. 1.5833(e)(E)(6) of this regulation.~~

(3) All apportionable income of each trade or business of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in 32 VSA §5833. The apportionment percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, sales or receipts, and payrolls within Vermont during the period covered by the return, and dividing the total of such percentages by ~~three~~ four. The sales factor is double-weighted in this calculation. However, if any one of the factors (for property, receipts or payroll) is missing, the other two percentages are added and the sum is divided by two (or three, where sales or receipts are present and sales or receipts are to be double-weighted), and if two of the factors are missing, the remaining percentage is the apportionment percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator and its denominator are zero).

Example: A taxpayer owns no real or tangible personal property and rents no real property either within or without the state. The property factor being missing, the apportionment percentage may be computed by adding the percentages derived from the apportionment of its sales or receipts (double-weighted) and payrolls, and dividing the total by ~~two~~ three.

(4) **Apportionment and Allocation.** Sections A and E require that every item of income be classified either as apportionable income or non-apportionable income. Income for purposes of classification as apportionable or non-apportionable includes gains and losses. Apportionable income is apportioned among jurisdictions by use of the formula. Non-apportionable income is specifically assigned or allocated to one or more specific jurisdictions pursuant to express rules. An item of income is classified as apportionable income if it falls within the definition of apportionable income. An item of income is non-apportionable income only if it does not meet the definitional requirements for apportionable income.

(5) **Apportionable Income.** Apportionable income means all income that is apportionable under the Constitution of the United States and is not allocated under the laws of Vermont, including:

(A) income arising from transactions and activity in the regular course of the taxpayer's trade or business; and

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

(C) any income that would be allocable to this state under the Constitution of the United States, but that is apportioned rather than allocated pursuant to the laws of Vermont.

The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, income derived from accounts receivable, operating income, non-operating income, *etc.*, is not determinative of whether income is apportionable or non-apportionable income.

(6) "Trade or business," as used in the definition of apportionable income and in the application of that definition means the unitary business of the taxpayer, part of which is conducted within Vermont.

(7) **Transactional Test.** Apportionable income includes income arising from transactions and activity in the regular course of the taxpayer's trade or business.

(A) If the transaction or activity is in the regular course of the taxpayer's trade or business, part of which trade or business is conducted within Vermont, the resulting income of the transaction or activity is apportionable income for Vermont. Income may be apportionable income even though the actual transaction or activity that gives rise to the income does not occur in Vermont.

(B) For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business and will, therefore, satisfy the transactional test. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. However, even if a taxpayer frequently or customarily engages in investment activities, if those activities are for the taxpayer's mere financial betterment rather than for the operations of the

trade or business, such activities do not satisfy the transactional test. The transactional test includes, but is not limited to, income from sales of inventory, property held for sale to customers, and services which are commonly sold by the trade or business. The transactional test also includes, but is not limited to, income from the sale of property used in the production of apportionable income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

(8) **Functional test.** Apportionable income also includes income from tangible and intangible property, if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business. "Property" includes any direct or indirect interest in, control over, or use of real property, tangible personal property and intangible property by the taxpayer.

Property that is "related to the operation of the trade or business" refers to property that is or was used to contribute to the production of apportionable income directly or indirectly, without regard to the materiality of the contribution.

Property that is held merely for investment purposes is not related to the operation of the trade or business.

"Acquisition, management, employment, development or disposition" refers to a taxpayer's activities in acquiring property, exercising control and dominion over property and disposing of property, including dispositions by sale, lease or license. Income arising from the disposition or other utilization of property which was acquired or developed in the course of the taxpayer's trade or business constitutes apportionable income, even if the property was not directly employed in the operation of the taxpayer's trade or business.

Income from the disposition or other utilization of property which has been withdrawn from use in the taxpayer's trade or business and is instead held solely for unrelated investment purposes is not apportionable. Property that was related to the operation of the taxpayer's trade or business is not considered converted to investment purposes merely because it is placed for sale, but any property which has been withdrawn from use in the taxpayer's trade or business for five years or more is presumed to be held for investment purposes.

Example (i): Taxpayer purchases a chain of 100 retail stores for the purpose of merging those store operations with its existing business. Five of the retail stores are redundant under the taxpayer's business plan and are sold six months after acquisition. Even though the five stores were never integrated into the taxpayer's trade or business, the income is apportionable because the property's acquisition was related to the taxpayer's trade or business.

Example (ii): Taxpayer is in the business of developing adhesives for industrial and construction uses. In the course of its business, it accidentally creates a weak but non-toxic adhesive and patents the formula, awaiting future applications. Another manufacturer uses the formula to create temporary body tattoos. Taxpayer wins a patent infringement suit against the other manufacturer. The entire damages award, including interest and punitive damages, constitutes apportionable income.

Example (iii): Taxpayer is engaged in the oil refining business and maintains a cash reserve for buying and selling oil on the spot market as conditions warrant. The reserve is held in

overnight "repurchase agreement" accounts of U.S. treasuries with a local bank. The interest on those amounts is apportionable income because the reserves are necessary for the taxpayer's business operations. Over time, the cash in the reserve account grows to the point that it exceeds any reasonably expected requirement for acquisition of oil or other short-term capital needs and is held pending subsequent business investment opportunities. The interest received on the excess amount is non-apportionable income.

Example (iv): A manufacturer decides to sell one of its redundant factories to a real estate developer and transfers the ownership of the factory to a special purpose subsidiary, SaleCo (Taxpayer) immediately prior to its sale to the real estate developer. The parties elect to treat the sale as a disposition of assets under IRC 338(h)(10), resulting in Taxpayer recognizing a capital gain on the sale. The capital gain is apportionable income. Note: although the gain is apportionable, application of the standard apportionment formula in Section A may not fairly reflect the taxpayer's business presence in any state, necessitating resort to equitable apportionment pursuant to Section F.

(A) Under the functional test, income from the disposition or other utilization of property is apportionable if the property is or was related to the operation of the taxpayer's trade or business. This is true even though the transaction or activity from which the income is derived did not occur in the regular course of the taxpayer's trade or business.

(B) Income that is derived from isolated sales, leases, assignments, licenses, and other infrequently occurring dispositions, transfers, or transactions involving property, including transactions made in the full or partial liquidation or the winding-up of any portion of the trade or business, is apportionable income, if the property is or was related to the taxpayer's trade or business. Income from the licensing of an intangible asset, such as a patent, copyright, trademark, service mark, know-how, trade secrets, or the like, that was developed or acquired for use by the taxpayer in its trade or business, constitutes apportionable income whether or not the licensing itself constituted the operation of a trade or business, and whether or not the taxpayer remains in the same trade or business from or for which the intangible asset was developed or acquired.

(C) Under the functional test, income from intangible property is apportionable income when the intangible property serves an operational function as opposed to solely an investment function.

(D) If the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business, then income from that property is apportionable income even though the actual transaction or activity involving the property that gives rise to the income does not occur in Vermont.

(E) Examples.

Example (i): A manufacturer purchases raw materials to be incorporated into the product it offers for sale. The nature of the raw materials is such that the purchase price is subject to extreme price volatility. In order to protect itself from extreme price increases (or decreases), the manufacturer enters into future contracts pursuant to which the manufacturer can either purchase a set amount of the raw materials for a fixed price, within a specified time period, or resell the future contracts. Any gain on

the sale of the future contracts would be considered apportionable income, regardless of whether the contracts were either made or resold in Vermont.

Example (ii): A national retailer produces substantial revenue related to the operation of its trade or business. It invests a large portion of the revenue in fixed income securities which are divided into three categories; (a) short-term securities held pending use of the funds in the taxpayer's trade or business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market, and (c) long- term securities held as an investment. Interest income on the short-term securities held pending use of the funds in the taxpayer's trade or business (a) is apportionable because the funds represent working capital necessary to the operations of the taxpayer's trade or business. Interest income derived from the other investment securities ((b) and (c)) is not apportionable as those securities were not held in furtherance of the taxpayer's trade or business.

(F) If, with respect to an item of property, a taxpayer (i) takes a deduction from income that is apportioned to Vermont or (ii) includes the original cost in the property factor, it is presumed that the item or property is or was related to the operation of the taxpayer's trade or business. No presumption arises from the absence of any of these actions.

(G) Application of the functional test is generally unaffected by the form of the property (*e.g.*, tangible or intangible property, real or personal property). Income arising from an intangible interest, as, for example, corporate stock or other intangible interest in an entity or a group of assets, is apportionable income when the intangible itself or the property underlying or associated with the intangible is or was related to the operation of the taxpayer's trade or business. Thus, while apportionment of income derived from transactions involving intangible property may be supported by a finding that the issuer of the intangible property and the taxpayer are engaged in the same trade or business, *i.e.*, the same unitary business, establishment of such a relationship is not the exclusive basis for concluding that the income is subject to apportionment. It is sufficient to support the finding of apportionable income if the holding of the intangible interest served an operational rather than an investment function.

(9) **Relationship of transactional and functional tests to U.S. Constitution.** The Due Process Clause and the Commerce Clause of the U.S. Constitution restrict states from apportioning income that has no rational relationship with the taxing state. The protection against extra-territorial state taxation afforded by these Clauses is often described as the "unitary business principle." The unitary business principle requires apportionable income to be derived from the same unitary business that is being conducted at least in part in Vermont. The unitary business that is conducted in Vermont includes both a unitary business that the taxpayer alone may be conducting and a unitary business the taxpayer may conduct with any other person or persons. Satisfaction of either the transactional test or the functional test complies with the unitary business principle, because each test requires that the transaction or activity (in the case of the transactional test) or the property (in the case of the functional test) be tied to the same trade or business that is being conducted within Vermont. Determination of the scope of the unitary business being conducted in Vermont is without regard to extent to which Vermont requires or permits combined reporting.

(10) **Non-apportionable income.**
Non-apportionable income means all income other than apportionable income. *See* Section E.

(11) **Application of Definitions.** The following applies the foregoing principles for purposes of determining whether particular income is apportionable or non-apportionable income. The examples used throughout these regulations are illustrative only and are limited to the facts they contain.

(A) Rents from real and tangible personal property. Rental income from real and tangible property is apportionable income if the property with respect to which the rental income was received is or was used in the taxpayer's trade or business and therefore is includable in the property factor under Section B.

Example (i): The taxpayer operates a multistate car rental business. The income from car rentals is apportionable income.

Example (ii): The taxpayer is engaged in the heavy construction business in which it uses equipment such as cranes, tractors, and earth-moving vehicles. The taxpayer makes short-term leases of the equipment when particular pieces of equipment are not needed on any particular project. The rental income is apportionable income.

Example (iii): The taxpayer operates a multistate chain of men's clothing stores. The taxpayer purchases a five-story office building for use in connection with its trade or business. It uses the street floor as one of its retail stores and the second and third floors for its general corporate headquarters. The remaining two floors are held for future use in the trade or business and are leased to tenants on a short-term basis in the meantime. The rental income is apportionable income.

Example (iv): The taxpayer operates a multistate chain of grocery stores. It purchases as an investment an office building in another state with surplus funds and leases the entire building to others. The net rental income is not apportionable income of the grocery store trade or business. Therefore, the net rental income is non-apportionable income.

Example (v): The taxpayer operates a multistate chain of men's clothing stores. The taxpayer invests in a 20-story office building and uses the street floor as one of its retail stores and the second floor for its general corporate headquarters. The remaining 18 floors are leased to others. The rental of the eighteen floors is not done in furtherance of but rather is separate from the operation of the taxpayer's trade or business. The net rental income is not apportionable income of the clothing store trade or business. Therefore, the net rental income is non-apportionable income.

Example (vi): The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later the plant was closed and put up for sale. The plant was rented for a temporary period from the time it was closed by the taxpayer until it was sold 18 months later. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(B) Gains or losses from sales of assets. Gain or loss from the sale, exchange or other disposition of real property or of tangible or intangible personal property constitutes apportionable income if the property while owned by the taxpayer was related to the

operation of the taxpayer's trade or business, or was otherwise properly included in the property factor of the taxpayer's trade or business.

Example (i): In conducting its multistate manufacturing business, the taxpayer systematically replaces automobiles, machines, and other equipment used in the trade or business. The gains or losses resulting from those sales constitute apportionable income.

Example (ii): The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later sold the property at a gain while it was in operation by the taxpayer. The gain is apportionable income.

Example (iii): Same as (ii) except that the plant was closed and put up for sale but was not in fact sold until a buyer was found 18 months later. The gain is apportionable income.

Example (iv): Same as (ii) except that the plant was rented while being held for sale. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(C) Interest. Interest income is apportionable income where the intangible with respect to which the interest was received arose out of or was created in the regular course of the taxpayer's trade or business, or the purpose of acquiring and holding the intangible is related to the operation of the taxpayer's trade or business.

Example (i): The taxpayer operates a multistate chain of department stores, selling for cash and on credit. Service charges, interest, or time-price differentials and the like are received with respect to installment sales and revolving charge accounts. These amounts are apportionable income.

Example (ii): The taxpayer conducts a multistate manufacturing business. During the year the taxpayer receives a federal income tax refund pertaining to the taxpayer's trade or business and collects a judgment against a debtor of the business. Both the tax refund and the judgment bear interest. The interest income is apportionable income.

Example (iii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, rain and storm damage, machinery replacement, etc. The funds in those accounts earned interest. Similarly, the taxpayer temporarily invests funds intended for payment of federal, state and local tax obligations pertaining to the taxpayer's trade or business. The interest income is apportionable income.

Example (iv): The taxpayer is engaged in a multistate money order and traveler's check business. In addition to the fees received in connection with the sale of the money orders and traveler's checks, the taxpayer earns interest income by the investment of the funds pending their redemption. The interest income is apportionable income.

Example (v): The taxpayer is engaged in a multistate manufacturing and selling business. The taxpayer usually has working capital and extra cash totaling $200,000 which it regularly invests in short-term interest bearing securities. The interest income is apportionable income.

Example (vi): In January, the taxpayer sold all of the stock of a subsidiary for $20,000,000. The funds are placed in an interest-bearing account pending a decision by management as to how the funds are to be utilized. The funds are not pledged for use in the business. The interest income for the entire period between the receipt of the funds and their subsequent utilization or distribution to shareholders is non-apportionable income.

(D) Dividends. Dividends are apportionable income where the stock with respect to which the dividends was received arose out of or was acquired in the regular course of the taxpayer's trade or business or where the acquiring and holding the stock is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

Example (i): The taxpayer operates a multistate chain of stock brokerage houses. During the year, the taxpayer receives dividends on stock that it owns. The dividends are apportionable income.

Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are apportionable income.

Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business consists solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing trade or business. The dividends are apportionable income.

Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are apportionable income.

Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are apportionable income.

Example (vi): The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are non-apportionable income.

(E) Patent and copyright royalties. Patent and copyright royalties are apportionable income where the patent or copyright with respect to which the royalties were received arose out of or was created in the regular course of the taxpayer's trade or business or where the acquiring and holding the patent or copyright is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

Example (i): The taxpayer is engaged in the multistate business of manufacturing and selling industrial chemicals. In connection with that business, the taxpayer obtained patents on certain of its products. The taxpayer licensed the production of the chemicals in foreign countries, in return for which the taxpayer receives royalties. The royalties received by the taxpayer are apportionable income.

Example (ii): The taxpayer is engaged in the music publishing trade or business and holds copyrights on numerous songs. The taxpayer acquires the assets of a smaller publishing company, including music copyrights. These acquired copyrights are thereafter used by the taxpayer in its trade or business. Any royalties received on these copyrights are apportionable income.

(12) Proration of Deductions. In most cases, an allowable deduction of a taxpayer will be applicable to only the apportionable income arising from a particular trade or business or to a particular item of non-apportionable income. In some cases, an allowable deduction may be applicable to the apportionable incomes of more than one trade or business and to items of non-apportionable income. In such cases, the deduction shall be prorated among those trades or businesses and those items of non-apportionable income in a manner which fairly distributes the deduction among the classes of income to which it is applicable.

(A) Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(13) Definitions.

(1) "Taxpayer" means a person obligated to file a return with or pay or remit any amount to this State under 32 VSA §5811(17).

(2) "Apportionment" refers to the division of apportionable income between states by the use of a formula containing apportionment factors.

(3) "Allocation" refers to the assignment of non-apportionable income to a particular state.

(4) "Business activity" refers to the transactions and activities occurring in the regular course of a particular trade or business of a taxpayer and includes the acquisition, employment,

development, management, or disposition of property that is or was related to the operation of the taxpayer's trade or business.

(5) "Gross receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction which produces apportionable income in which the income or loss is recognized under the Internal Revenue Code, and, where the income of foreign entities is included in apportionable income, amounts which would have been recognized under the Internal Revenue Code if the relevant transactions or entities were in the United States. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.

(6) "Receipts" means all gross receipts of the taxpayer that are not allocated under Section E, and that are received from transactions and activity in the regular course of the taxpayer's trade or business. The following are additional rules for determining "receipts" in various situations:

(A) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "receipts" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances.

(B) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, "receipts" includes the entire reimbursed cost plus the fee.

(C) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "receipts" includes the gross receipts from the performance of such services, including fees, commissions, and similar items.

(D) In the case of a taxpayer engaged in the sale of equipment used in the taxpayer's trade or business, where the taxpayer disposes of the equipment under a regular replacement program, "receipts" includes the gross receipts from the sale of this equipment. For example, a truck express company that owns a fleet of trucks and sells its trucks under a regular replacement program the gross receipts from the sale of the trucks would be included in "receipts."

(E) In the case of a taxpayer with insubstantial amounts of gross receipts arising from sales in the ordinary course of business, the insubstantial amounts may be excluded from the receipts factor unless their exclusion would materially affect the amount of income apportioned to this state.

(F) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded. Receipts arising from a business activity are receipts from hedging if the primary purpose of engaging in the business activity is to

reduce the exposure to risk caused by other business activities. Whether events or transactions not involving cash or securities are hedging transactions shall be determined based on the primary purpose of the taxpayer engaging in the activity giving rise to the receipts, including the acquisition or holding of the underlying asset. Receipts from the holding of cash or securities, or maturity, redemption, sale, exchange, loan or other disposition of cash or securities are excluded from the definition of receipts whether or not those events or transactions are engaged in for the purpose of hedging. The taxpayer's treatment of the receipts as hedging receipts for accounting or federal tax purposes may serve as indicia of the taxpayer's primary purpose, but shall not be determinative.

(G) Receipts, even if apportionable income, are presumed not to include such items as, for example:

1) damages and other amounts received as the result of litigation;
2) property acquired by an agent on behalf of another;
3) tax refunds and other tax benefit recoveries;
4) contributions to capital;
5) income from forgiveness of indebtedness;
6) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code; or
7) Amounts realized as a result of factoring accounts receivable recorded on an accrual basis.

Exclusion of an item from the definition of "receipts" is not determinative of its character as apportionable or non-apportionable income. Certain gross receipts that are "receipts" under the definition are excluded from the "receipts factor" under Section E. Nothing in this definition shall be construed to modify, impair or supersede any provision of Sections F or G.

(7) "Security" means any interest or instrument commonly treated as a security as well as other instruments which are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.

(14) Application of Combined Report. If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in these regulations shall preclude the use of a "combined report" whereby the entire apportionable income of such trade or business is apportioned in accordance with 32 VSA §5833.

(15) Consistency and Uniformity in Reporting: Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the manner in which income has been classified as apportionable income or non-apportionable income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(16) Taxable in Another State: In General. Under 32 VSA §5833 the taxpayer is subject to the allocation and apportionment provisions if it has income from business activity that is taxable both

within and without this state. A taxpayer's income from business activity is taxable without this state if the taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of these regulations.

(A) Applicable tests. A taxpayer is taxable within another state if it meets either one of two tests: (1) By reason of business activity in another state, the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or (2) By reason of such business activity, another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(1) A taxpayer is "subject to" one of the taxes specified in 32 VSA §5833(a)(3) if it carries on business activities in a state and the state imposes such a tax thereon. Any taxpayer which asserts that it is subject to one of the taxes specified in 32 VSA §5833(a)(3) in another state shall furnish to Commissioner of this state upon his/her request evidence to support that assertion. Commissioner of this state may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in 32 VSA §5833(a)(3) in the other state.

Voluntary tax payment. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(a) does not actually engage in business activity in that state, or

(b) does actually engage in some business activity not sufficient for nexus and the minimum tax bears no relationship to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of 32 VSA §5833(a)(3)

Example: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the $50 minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.

(2) The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in 32 VSA §5833(a)(3) which may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in 32 VSA §5833(a)(3) in another state.

Example (i): State A requires all nonresident corporations which qualify or register in State A to pay to the Secretary of State an annual license fee or tax for the privilege of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of $50 and a maximum fee of $500. Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not "taxable" in State A.

Example (ii): Same facts as Example (i) except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is "subject to" the net income tax of State A and is "taxable" in State A.

Example (iii): State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of

(1) outstanding capital stock, and
(2) surplus and undivided profits.

The fee or tax base attributable to State B is determined by a three-factor apportionment formula. Nonresident Corporation X which operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is "taxable" in State B.

Example (iv): State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.

(3) The second test, that of Paragraph A of this Subsection, applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. §§ 381-385. In the case of any "state", other than a state of the United States or political subdivision thereof, the determination of whether the "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that "state." If jurisdiction is otherwise present, that "state" is not considered as being without jurisdiction by reason of the provisions of a treaty between that "state" and the United States.

Example: Corporation X is actively engaged in manufacturing farm equipment in State A and in foreign country B. Both State A and foreign

country B impose a net income tax but foreign country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and foreign country B.

(B) **Producing non-apportionable income.** A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in that other state pertaining to the production of non-apportionable income or business activities relating to a separate trade or business.

Section B.~~(b)~~ Property Factor

(1) The property factor of the apportionment formula for each trade or business of the taxpayer shall include all real and tangible personal property owned or rented by the taxpayer and used during the tax period in the regular course of the trade or business. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property but does not include coin or currency. Property used in connection with the production of non-apportionable income shall be excluded from the property factor. Property used both in the regular course of the taxpayer's trade or business and in the production of non-apportionable income shall be included in the factor only to the extent that the property is used in the regular course of the taxpayer's trade or business. The method of determining that portion of the value to be included in the factor will depend upon the facts of each case.

(2) **Property Factor: Valuation of Owned Property.**

(A) Property owned by the taxpayer shall be valued at its original cost. As a general rule, "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. However, capitalized intangible drilling and development costs shall be included in the property factor whether or not they have been expensed for either federal or state tax purposes.

Example (i): The taxpayer acquired a factory building in this state at a cost of $500,000 and, 18 months later, expended $100,000 for major remodeling of the building. Taxpayer files its return for the current taxable year on the calendar-year basis. Depreciation deduction in the amount of $22,000 was claimed with respect to the building on the return for the current taxable year. The value of the building includable in the numerator and denominator of the property factor is $600,000; the depreciation deduction is not taken into account in determining the value of the building for purposes of the factor.

Example (ii): During the current taxable year, Corporation X merges into Corporation Y in a tax-free reorganization under the Internal Revenue Code. At the time of the merger, Corporation X owns a factory which X built five years earlier at a cost of $1,000,000. X has been depreciating the factory at the rate of two percent per year, and its basis in X's hands at the time of the merger is $900,000. Since the property is acquired by Y in a transaction in which, under the Internal Revenue Code, its basis in Y's hands is the same as its basis in X's hands, Y includes the property in Y's property factor at X's original cost, without adjustment for depreciation, i.e. $1,000,000.

Example (iii): Corporation Y acquires the assets of Corporation X in a liquidation by which Y is entitled to use its stock cost as the basis of the X assets under Section 334(b)(2) of the 1954 Internal Revenue Code (i.e. stock possessing 80 percent control is purchased and liquidated within two years). Under these circumstances, Y's cost of the assets is the purchase price of the X stock, prorated over the X assets.

If the original cost of property is unascertainable, the property is included in the factor at its fair market value as of the date of acquisition by the taxpayer.

(B) Inventory of stock of goods shall be included in the factor in accordance with the valuation method used for federal income tax purposes.

(C) Property acquired by gift or inheritance shall be included in the factor at its basis for determining depreciation for federal income tax purposes.

(3) The property factor is a fraction, the numerator of which is the average value of all real and tangible property within this state based on original cost at the beginning of the taxable year and at the end of the taxable year; and the denominator of which is the average value of property based on original cost both within and without the state at the beginning and at the end of the taxable year. The numerator of the property factor shall include the average value of the real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer.

(~~4~~2) Tangible personal property is within Vermont if, and so long as, it is physically situated or located here. Property of the taxpayer held in Vermont by an agent, consignee or factor is (and property held outside Vermont by an agent, consignee or factor is not) situated or located within Vermont.

Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by a taxpayer in the denominator of its property factor in accordance with its regular accounting practices shall be included in the numerator according to the state of destination. The value of mobile or movable property such as construction equipment, trucks or leased electronic equipment which are located within and without this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of total time within the state during the tax period. An automobile assigned to a traveling employee shall be included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor or in the numerator of the state in which the automobile is licensed.

(5~~3~~) ~~Construction in progress will not be included in the factors until the asset constructed is placed in service.~~ Property shall be included in the property factor if it is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor. Property or equipment under construction during the tax period (except inventoriable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of the taxpayer. If the property is partially used in the regular course of the trade or business of the taxpayer while under construction, the value of the property to the extent used shall be included in the property factor. Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event that results in its conversion to the production of non-apportionable income, its sale, or the lapse of an extended period of time (normally, five years) during which the property is no longer held for use in the trade or business.

Example (i): Taxpayer closed its manufacturing plant in State X and held the property for sale. The property remained vacant until its sale one year later. The value of the manufacturing plant is included in the property factor until the plant is sold.

Example (ii): Same as above except that the property was rented until the plant was sold. The plant is included in the property factor until the plant is sold.

(6~~4~~) In determining the property factor, real and tangible personal property rented or leased to the taxpayer, as well as real and tangible personal property owned by it must be considered. The value of rented real and tangible personal property both within and without the state is determined by multiplying the gross rent payable during the tax year by eight (8). The net annual rental rate for any item of rented property is the annual rental rate paid by the taxpayer for the property less the aggregate annual subrental rates paid by subtenants of the taxpayer. (See Section G(1) for special rules when the use of such net annual rental rate produces a negative or clearly inaccurate value or when property is used by the taxpayer at no charge or is rented at a nominal rental rate.) Subrents are not deducted when they constitute apportionable income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income. Accordingly there is no reduction in its value.

Example (i): The taxpayer receives subrents from a bakery concession in a food market operated by the taxpayer. Since the subrents are apportionable income, they are not deducted from rent paid by the taxpayer for the food market.

Example (ii): The taxpayer rents a 5-story office building primarily for use in its multistate business, uses three floors for its offices and subleases two floors to various other businesses on a short-term basis because it anticipates it will need those two floors for future expansion of its multistate business. The rental of all five floors is related to the operation of the taxpayer's trade or business. Since the subrents are apportionable income, they are not deducted from the rent paid by the taxpayer.

Example (iii): The taxpayer rents a 20-story office building and uses the lower two stories for its general corporation headquarters. The remaining 18 floors are subleased to others. The rental of the eighteen floors is not incidental to but rather is separate from the operation of the taxpayer's trade or business. Since the subrents are non-apportionable income they are not included in the taxpayer's property factor.

(7)"~~Gross~~ Annual Rent" as used in this rule, is the actual sum of money payable or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes:

(A) Any amount payable for the use or possession of real or personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

Example: A taxpayer, pursuant to the terms of a lease, pays the lessor $1,000.00 per month and at the end of the year pays the lessor one percent of its gross sales of $400,000.00. Its gross rent is $16,000.00.

(B) Any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement;

Example (i): A taxpayer, pursuant to the terms of a lease, pays the lessor $24,000.00 per annum and also pays real estate taxes in the amount of $4,000.00 and interest on a mortgage in the amount of $2,000.00 Its gross rent is $30,000.00.

Example (ii): A taxpayer stores *part* of its inventory in a public warehouse. The total charge for the year was $1,000 of which $700 was for the use of storage space and $300 for inventory insurance, handling and shipping charges, and C.O.D. collections. The annual rent is $700.

(C) Any other amount required to be paid by the terms of a lease or other arrangement, including the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year of any improvement to real property made by or on behalf of the business organization which reverts to the owner or lessor upon termination of the lease or other arrangement.

Example (i): A taxpayer enters into a 21-year lease of certain premises at a rental of $20,000.00 per annum and after the expiration of one year installs a new store front at a cost of $10,000.00 which reverts to the owner upon expiration of the lease. Its gross rent for the first year is $20,000.00. However, for subsequent years its gross rent is $20,500.00 ($20,000.00 annual rent plus 1/20th of $10,000.00, the cost of the improvement apportioned on the basis of the unexpired term of the lease).

Example (ii): A taxpayer leases a parcel of vacant land for 40 years at an annual rental of $5,000.00 and erects thereon a building which costs $600,000.00. The value of the land is determined by multiplying the annual rent of $5,000.00 by eight, and the value of the building is determined in the same manner as if owned by the taxpayer.

(D) "~~Gross~~Annual Rent" does not include:

(~~A~~ 1) Intercompany rents if both the lessor and lessee are taxed on a consolidated basis within the Vermont return.

(~~B~~ 2) Amounts payable as separate charges for water and electric service furnished by the lessor.

(~~C~~3) Amounts payable for storage provided no designated space under the control of the taxpayer as a tenant is rented for storage purposes.

(4) Incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.; and

(5) Royalties based on extraction of natural resources, whether represented by delivery or purchase. For this purpose, a royalty includes any consideration conveyed or credited to a holder of an interest in property which constitutes a sharing of current or future production of natural resources from such property, irrespective of the

method of payment or how such consideration may be characterized, whether as a royalty, advance royalty, rental or otherwise.

(E) Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the original cost of leasehold improvements shall be included in the factor.

(8) "Annual rental rate" is the amount paid as rental for property for a 12-month period (i.e., the amount of the annual rent). Where property is rented for less than a 12-month period, the rent paid for the actual period of rental shall constitute the "annual rental rate" for the tax period. However, where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months (due, for example, to a reorganization or change of accounting period), the rent paid for the short tax period shall be annualized. If the rental term is for less than 12 months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

Example (i): Taxpayer A, which *ordinarily* files its returns based on a calendar year, is merged into Taxpayer B on April 30. The net rent paid under a lease with 5 years remaining is $2,500 a month. The rent for the tax period January 1 to April 30 is $10,000. After the rent is annualized the net rent is $30,000 ($2,500 x 12).

Example (ii): Same facts as in *Example (i)* except that the lease would have terminated on August 31. In this case, the annualized rent is $20,000 ($2,500 x 8).

(9~~5~~) In exceptional cases use of the general method outlined above may result in inaccurate valuations. Accordingly, in such cases, any other method which will properly reflect value may be adopted by the Vermont Department of Taxes, either on its own motion or on request of a taxpayer. Such other method of valuation may not be used by a taxpayer until approved in writing by the Department. Any such request shall set forth full information with respect to the property, together with the basis for the valuation proposed by the taxpayer. Such other method once approved by the Department may be used by the taxpayer in its reports for subsequent years until the facts upon which such other method is based are, in the judgment of the Department, materially changed.

(10) Year to year consistency. In filing returns in Vermont, if the taxpayer departs from or modifies the manner of valuing property or of excluding property from or including property in the property factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

Section C.~~(c)~~ Payroll Factor

(1) The payroll factor is a fraction, the numerator of which includes the total compensation paid in Vermont during the tax period and the denominator of which includes the total compensation paid everywhere during the tax period. In addition to "normal" salary and wages, compensation shall include payments to employees for board, rent, housing, lodging, and any other benefits paid in exchange for labor. These amounts will be treated as compensation if they are considered as income under the Internal Revenue Code.

(2) The taxpayer's accounting method will determine the actual amounts that are to be included in the factors. If the taxpayer uses the accrual method of accounting, compensation that has been properly accrued and deductible will be considered to have been paid during the taxable period.

> *Example:* The taxpayer uses some of its employees in the construction of a storage building which, upon completion, is used in the regular course of the taxpayer's trade or business. The wages paid to those employees are treated as a capital expenditure by the taxpayer. The amount of those wages is included in the payroll factor.

(3) For purposes of this regulation, an employee is defined to be any person, including an officer of the corporation, who is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the FICA.

(4) The payroll factor shall include only compensation that is related to the production of apportionable income. Compensation that is related to the operation, maintenance, protection or supervision of ~~nonbusiness~~ non-apportionable income is not included in the payroll factor. To the extent that employee services produce both ~~business~~ apportionable and ~~nonbusiness~~ non-apportionable income, proration is allowed.

> *Example:* The taxpayer owns various securities which it holds as an investment separate and apart from its trade or business. The management of the taxpayer's investment portfolio is the only duty of Mr. X, an employee. The salary paid to Mr. X is excluded from the payroll factor.

(5) Compensation will be considered to be paid in Vermont and thus includable in the numerator of the payroll factor if:

> (A) the individuals' services are performed entirely within Vermont;
>
> (B) the individuals' services are performed both within and without Vermont, but the out-of-state services are incidental to the Vermont services. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction;
>
> (C) some of the individuals' services are performed within Vermont and the company's base of operation or the place from where the service is controlled is within Vermont; or

(D) some of the individual's services are performed within Vermont, which is his or her state of residence, and there is no base of operation or place from where the service is controlled in any of the other states where part of the individual's services are performed.

The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points.

Section D. ~~(d)~~ **Sales and Receipts Factor**

(1) General Principles of Application; Definitions

(A) The sales and receipt factor is a fraction, the numerator of which is the gross receipts of the taxpayer in this state during the taxable year. The numerator of the receipts factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under these regulations. The ~~and the~~ denominator of the receipts factor shall include the gross ~~which is the~~ receipts of the taxpayer derived by the taxpayer from transactions and activity in the regular course of its trade or business within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts which constitute ~~business~~ apportionable income and are includable in the apportionable base for the tax year. Receipts from the following are allocable to Vermont:

(a) sales of tangible personal property in Vermont;
(b) services performed in Vermont;
(c) the rentals, sale, lease, or license of ~~from~~ property situated in Vermont;
(d) licenses, leases, and sales of intangible property ~~royalties from the~~ used in Vermont ~~of patents and copyrights~~;
(e) all other ~~business~~ apportionable receipts earned in Vermont.

All such receipts of the period covered by the return (computed on the cash or accrual basis, in accordance with the method of accounting used in the computation of the taxpayers "Vermont net income") must be taken into account.

(B) **Year to year consistency.** In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the receipts factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(C) **Exceptions.** In some cases certain gross receipts should be disregarded in determining the receipts factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business. See Section G.

(D) Definitions

Terms have the following meaning unless otherwise defined or specified in particular sections.

(1) "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.

(2) "Business customer" means a customer that is a business operating in any form, including a sole proprietorship. Sales to a non-profit organization, to a trust, to the U.S. Government, to

a foreign, state or local government, or to an agency or instrumentality of that government are treated as sales to a business customer and must be assigned consistent with the rules for those sales.

(3) "Code" means the Internal Revenue Code as currently written and subsequently amended.

(4) "Individual customer" means a customer that is not a business customer.

(5) "Intangible property" generally means property that is not physical or whose representation by physical means is merely incidental and 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; and, except as otherwise provided, computer software. Receipts from the sale of intangible property may be excluded from the numerator and denominator of the taxpayer's receipts factor pursuant to Section D(1)(G) and 32 V.S.A. §5833(a)(3)(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.

(7) "Population" means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.

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

(9) "Related party" means:

(1) a stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock;

(2) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; or

(3) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 percent of the value of the

corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.

(10) "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 day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

(E) General Principles of Application; Contemporaneous Records.

In order to satisfy the requirements of Section D, a taxpayer's assignment of receipts from sales of other than tangible personal property must be consistent with the following principles:

1. A taxpayer shall apply the rules set forth in Section D 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 shall determine its method of assigning receipts in good faith, and apply it 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 receipts, including its underlying assumptions, and shall provide those records to the Department of Taxes upon request.

2. Section D provides 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 if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.

3. A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the regulatory standards set forth in Section 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.

(F) Rules of Reasonable Approximation.

1. In General. In general, Section D establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Vermont. The regulation also sets forth rules of reasonable approximation, which apply if 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

in Section D. In other cases, the applicable rule in Section 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 Section D.

2. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth in Section D(3)(Sale of a Service), a taxpayer can ascertain the state or states of assignment of a substantial portion of its receipts from sales of substantially similar services ("assigned receipts"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales which it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. 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* Section D(5) and Section D(6).

3. Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this Section D from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

(G) Rules with Respect to Exclusion of Receipts from the Receipts Factor.

1. The receipts factor only includes those amounts defined as receipts under Section D(1)(D)(8) and applicable regulations.

2. Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor. *See* Section D(6)(1)(D).

3. In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Section D (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer's receipts factor.

4. In a case in which a taxpayer can ascertain the state or states to which receipts from a sale are to be assigned pursuant to the applicable rules set forth in Section D, but the taxpayer is not taxable in one or more of those states, the receipts that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded apportioned pursuant to 32 V.S.A. §5833(a)(3)(A) for tangible personal property or apportioned pursuant to 32 V.S.A. §5833(a)(3)(B) for sales other than tangible personal property.

5. Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

(H) Changes in Methodology; Commissioner Review.

1. Nothing in this Regulation is intended to limited the application of 32 V.S.A. §5833(b) or the authority granted to the Commissioner under that Section. If the application of this Regulation results in the attribution of receipts that does not fairly represent the extent of the taxpayer's business activity in Vermont, the taxpayer may petition for or the Commissioner may require the use of a different method for attributing those receipts.

2. 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 receipts using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in Section 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 those 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 those receipts for the taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

3. Commissioner Authority to Adjust a Taxpayer's Return. The Commissioner's ability to review and adjust a taxpayer's assignment of receipts on a return to more accurately assign receipts consistently with the rules or standards of Section D, includes, but is not limited to, each of the following potential actions:

A. In a case in which a taxpayer fails to properly assign receipts from a sale in accordance with the rules set forth in Section D, including the failure to properly apply a hierarchy of rules consistent with the principles of Section D(3), the Commissioner may adjust the assignment of the receipts in accordance with the applicable rules in Section D.

B. In a case in which a taxpayer uses a method of approximation to assign its receipts 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 receipts from the taxpayer's numerator and denominator, as appropriate.

C. In a 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 a case in which a taxpayer excludes receipts from the denominator of its receipts factor on the theory that the assignment of the receipts cannot be reasonably approximated, the Commissioner may determine that the exclusion of those receipts is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.

E. In a case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, or fails to provide those records to the Commissioner upon

request, the Commissioner may treat the taxpayer's assignment of receipts as unsubstantiated, and may adjust the assignment of the receipts in a manner consistent with the applicable rules in Section D.

F. In a case in which the Commissioner concludes that a customer's billing address was selected by the taxpayer for tax avoidance purposes, the Commissioner may adjust the assignment of receipts from sales to that customer in a manner consistent with the applicable rules in Section D.

4. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. A taxpayer that seeks to change its method of assigning its receipts under Section D must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate.

5. 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 receipts 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 the change is appropriate to reflect a more accurate assignment of the taxpayer's receipts within the meaning of Section D, and determines that the change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making the change. In a 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 receipts on those returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

(2) Sales of Tangible Personal Property in Vermont

(A) Gross receipts from ~~S~~sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, who takes possession within this state, regardless of fob point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and:

(1~~A~~) the purchaser is the United States Government; or
(2~~B~~) the corporation is not taxable in the state in which the purchaser takes possession.

If a seller in Vermont makes sales of tangible personal property to a purchaser who takes delivery of the property at the seller's shipping dock, the sale is a Vermont sale if the purchaser transports the property to one of its in-state locations. If the purchaser transports the property to one of its out-of-state locations the sale is not a Vermont sale, unless the corporation is not taxable in the state to which the property is transported.

(B) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

Example: The taxpayer, with inventory in State A, sold $100,000 of its products to a purchaser having branch stores in several states, including this state. The order for the

purchase was placed by the purchaser's central purchasing department located in State B. $25,000 of the purchase order was shipped directly to purchaser's branch store in this state. The branch store in this state is the purchaser within this state with respect to $25,000 of the taxpayer's sales.

(C) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

Example: The taxpayer makes a sale to a purchaser who maintains a central warehouse in this state at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of the taxpayer's products shipped to the purchaser's warehouse in this state constitute property delivered or shipped to a purchaser within this state.

(D) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

Example: A taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in this state pursuant to purchaser's instructions. The sale by the taxpayer is in this state.

(E) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.

Example: The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route, the produce is diverted to the purchaser's place of business in this state in which state the taxpayer is subject to tax. The sale by the taxpayer is attributed to this state.

(F) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

Example: The taxpayer has its head office and factory in State A. It maintains a branch office and inventory in this state. Taxpayer's only activity in State B is the solicitation of orders by a resident salesman. All orders by the State B salesman are sent to the branch office in this state for approval and are filled by shipment from the inventory in this state. Since the taxpayer is immune under Public Law 86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to this state, the state from which the merchandise was shipped.

(G) If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(1) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

(2) If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

Example: The taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer is not taxable in State A. Upon direction of the taxpayer, the merchandise was shipped directly to the purchaser by the manufacturer in State B. If the taxpayer is taxable in State B, the sale is in State B. If the taxpayer is not taxable in State B, the sale is in this state

(3) Compensation for Services.

~~Receipts for services are apportioned to Vermont if the services are performed in Vermont.~~ All amounts received for providing ~~such~~ services are apportionable irrespective of whether such services are performed by employees, agents, subcontractors or any other persons.

~~When compensation for services are in payment of services performed both within and without Vermont, sales are apportioned to this state if a greater proportion of the income producing activity is performed in Vermont. If this rule causes an inequitable apportionment of income, the amount attributable to Vermont shall be determined based on the cost of performance.~~

When receipts from sales of services contribute to the sales factor, the method for calculating receipts shall rely on the principle of market-based sourcing. The receipts from a sale of a service are in Vermont if and to the extent that the service is delivered to a location in Vermont. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. 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 in subsection 1-3 below.

(1) In-Person Services.

(A) In General. Except as otherwise provided in this Subsection 1, 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, 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 similar services as described in Subsection 3, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this Subsection 1.

(B) Assignment of Receipts. Rule of Determination. Except as otherwise provided in this Subsection B, if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Vermont if and to the extent the customer receives the in-person service in Vermont. In assigning its receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received, as follows:

a. If the service is performed with respect to the body of an individual customer in Vermont (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Vermont (e.g. live entertainment or athletic performances), the service is received in Vermont.

b. If the service is performed with respect to the customer's real estate in Vermont or if 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 Vermont, the service is received in Vermont.

c. If 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 within or outside Vermont, the service is received in Vermont if the property is shipped or delivered to the customer in Vermont.

(C) Rule of Reasonable Approximation. In an 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. If the state to which the receipts are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to the state are excluded from the denominator of the taxpayer's receipts factor pursuant to 32 V.S.A. §5833(a)(3)(D).

(D) Examples.

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement that the receipts from the sale or sales be eliminated from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D). 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 (i). Salon Corp has retail locations in Vermont 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 receipts from sales of services provided at Salon Corp's in-state locations are in Vermont. The receipts from sales of services provided at Salon Corp's locations outside Vermont, even when provided to residents of Vermont, are not receipts from in-state sales.

Example (ii). Landscape Corp provides landscaping and gardening services in Vermont and in neighboring states. Landscape Corp provides landscaping services at the in-state vacation home of an individual who is a resident of another state and who is located outside Vermont at the time the services are performed. The receipts from sale of services provided at the in-state location are in Vermont.

Example (iii). Same facts as in Example (ii), 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 those locations of Retail Corp that are in Vermont and in other states. The receipts from the sale of services provided to Retail Corp are in Vermont to the extent the services are provided in Vermont.

Example (iv). Camera Corp provides camera repair services at an in-state retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its in-state location at a facility that is in another state. In these cases, the repaired camera is then returned to the customer at Camera Corp's in-state location. The receipts from sale of these services are in Vermont.

Example (v). Same facts as in Example (iv), except that a customer located in Vermont mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Vermont by mail. The receipts from sale of the service are in Vermont.

Example (vi). Teaching Corp provides seminars in Vermont 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 Vermont the receipts from sales of the services are in Vermont.

(2) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

(A) In General. If the service provided by the taxpayer is not an in-person service within the meaning of Section D(3)(1)(A) or a professional service within the meaning of Section D(3)(3), and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in Vermont if and to the extent that the service is delivered in Vermont. For purposes of this section, a service that is delivered "to" a customer is a service in which the customer and not a third party is the recipient of the service. A service that is delivered "on behalf of" a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services, or the direct or indirect delivery of advertising to the customer's intended audience (see Section D(3)(2)(B)(3) and Example (iv) under Section D(3)(2)(B)(1)(c). A service can be delivered to or on behalf of a customer by physical means or through electronic transmission. A service that is delivered electronically "through" a customer is a service that is 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.

(B) Assignment of Receipts. The assignment of receipts to a state or states in the instance of a sale 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, a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this section 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. If the state to which the receipts from a sale are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D).

1. 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 corporate taxation) where the taxpayer installs the custom software at the customer's site. The rules in this section apply whether the taxpayer's customer is an individual customer or a business customer.

a. Rule of Determination. In assigning the receipts from a 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 the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.

b. Rule of Reasonable Approximation. If 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 the state or states.

c. Examples:

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor.

Example (i). Direct Mail Corp, a corporation based outside Vermont, provides direct mail services to its customer, Business Corp. Business

Corp contracts 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 Vermont 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 receipts from the sale of Direct Mail Corp's services to Business Corp are assigned to Vermont to the extent that the services are delivered on behalf of Business Corp to Vermont customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Vermont).

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

Example (iii). Same facts as example (ii), except that the contract is with a business customer that is based outside Vermont. The receipts from the sale of the design services are in Vermont because the services are physically delivered on behalf of the customer to the customer's intended audience in Vermont.

Example (iv). Fulfillment Corp, a corporation based outside Vermont, provides product delivery fulfillment services in Vermont and in neighboring states to Sales Corp, a corporation located outside Vermont 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 Vermont, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Vermont. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to Vermont to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Vermont.

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

are assigned to Vermont because the software is physically delivered to the customer in Vermont.

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

2. 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.

a. Services Delivered By Electronic Transmission to an Individual Customer.

i. Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.

ii. Rules 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 the state or states. If 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 reasonably approximate the state or states using the customer's billing address.

b. Services Delivered By Electronic Transmission to a Business Customer.

i. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this section, 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.

ii. 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 the state or states.

iii. Secondary Rule of Reasonable 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, the taxpayer shall reasonably approximate the state or states as set forth in this regulation. In these cases, unless the taxpayer can apply the safe harbor set forth below, the taxpayer shall reasonably approximate the state or states in which the service is received as follows: first, by assigning the receipts from 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 receipts from 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 receipts from the sale using the customer's billing address; provided, however, if the taxpayer derives more than 5% of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

iv. 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 Subsection ii, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated in Subsection iii, apply the safe harbor stated in this Subsection. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of services delivered by electronic transmission to a business customer, and not otherwise.

v. Related Party Transactions. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in Subsection iii but may use the rule of reasonable approximation in Subsection ii, and the safe harbor in Subsection iv, provided that the Commissioner may aggregate sales to related parties in determining whether the sales exceed 5% of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

c. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is not related to either the customer to which the service is delivered. Also, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be

eliminated from the denominator of the taxpayer's receipts factor. Further, assume if relevant, unless otherwise stated, that the safe harbor set forth in Subsection iv does not apply.

Example (i). Support Corp, a corporation that is based outside Vermont, 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 Vermont 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 receipts to these locations. The receipts from sales made to Support Corp's individual and business customers are in Vermont to the extent that Support Corp's services are received in Vermont.

Example (ii). Online Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to individual customers who are resident in Vermont 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 receipts from the sale of services, Online Corp can either determine the state or states where the services are received, or, where it cannot determine the state or states, it has sufficient information regarding the place of receipt to reasonably approximate the state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of the sales of its services. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the receipts from 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 Vermont the receipts from sales for which it does not know the customers' location in the same proportion as those receipts for which it has this information. *See* Section D(3)(2)((B)(2)(a)(ii).

Example (iii). Same facts as in Example (ii), except that Online Corp reasonably believes that the geographic distribution of the receipts from 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 receipts from sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. *See* Section D(3)(1)(2)(B)(2)a.

Example (iv). Same facts as in Example (iii), except that Online Corp is not taxable in one state to which some of its receipts from sales would be otherwise assigned. The receipts that would be otherwise assigned to that state are to be excluded from the denominator of Online Corp's receipts factor. *See* Section D(3)(1)(B).

Example (v). Net Corp, a corporation based outside Vermont, provides web-based services to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Vermont 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 this case, 75% of the receipts from the sale are received in Vermont. *See* Section D(3)(2)(B)(2)(b)(i). 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 the location or locations. Under these circumstances, if Net Corp derives 5% or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under Section D(3)(2)(B)(2)(b)(iii) 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 sales of services to 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 (vi). Net Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to more than 250 individual and business customers in Vermont 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 the state or states. Also assume that Net Corp does not derive more than 5% of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv) and may assign its receipts using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is 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.

a. 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 Vermont if and to the extent that the end users or other third-party recipients are in Vermont. 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 Vermont to the extent that the audience for the advertising is in

Vermont. 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 Vermont to the extent that the end users or other third-party recipients receive the services in Vermont. The rules in this Subsection 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.

b. 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 the state or states.

c. Select Secondary Rules of Reasonable Approximation.

i. If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably 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 that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably 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 that area.

ii. If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that 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 that location, the taxpayer shall reasonably 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 the services, relative to the total population in that area.

iii. When using the secondary reasonable approximation methods provided above, the relevant specific geographic area of delivery includes only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

d. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor.

Example (i). Cable TV Corp, a corporation that is based outside of Vermont, 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 Vermont. Second, Cable TV Corp sells monthly subscriptions to individual customers in Vermont and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Vermont. *See* Section D(3)(2)(B)(2)(a)(i). 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 the location, Cable TV Corp must approximate its Vermont audience using the percentage that reflects the ratio of its Vermont subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. *See* Section D(3)(2)(B)(3)(c)(i). To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to Vermont in any case in which the programming is received by a customer in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to Vermont where its customer's billing address is in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 receipts are properly assigned. *See* Section D(5)(E).

Example (ii). Network Corp, a corporation that is based outside of Vermont, 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. The receipts from Network Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 the location, Network Corp must approximate the receipts from sales of advertising that constitute Vermont sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the televised programming containing the

advertising is run relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(ii) and (iii). In any case in which Network Corp's receipts would be assigned to a state in which Network Corp is not taxable, the receipts must be excluded from the denominator of Network Corp's receipts factor.

Example (iii). Web Corp, a corporation that is based outside Vermont, provides Internet content to viewers in Vermont 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. The receipts from Web Corp's sale of advertising space to its business customers are assigned to Vermont to the extent that the viewers of the Internet content are in Vermont, as measured by viewings or clicks. *See* Section D(3)(2)(B)(3)(a). 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 the location, Web Corp must approximate the amount of its Vermont receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the Vermont population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c). In any case in which Web Corp's receipts would be assigned to a state in which Web Corp is not taxable, those receipts must be excluded from the denominator of Web Corp's receipts factor.

Example (iv). Retail Corp, a corporation that is based outside of Vermont, sells tangible property through its retail stores located in Vermont and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp, and must assign the proceeds from this service to the state or states from which the phone calls are placed by the customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate the locations, Answer Co must approximate the amount of its Vermont receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Vermont population in the specific geographic area from which the calls are placed relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(ii). Answer Co's receipts must also be excluded from the denominator of its receipts factor in any case in which the receipts would be assigned to a state in which Answer Co is not taxable.

Example (v). Web Corp, a corporation that is based outside of Vermont, sells tangible property to customers via its Internet website. Design Co. designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co.'s services are delivered to Web Corp, the proceeds from which are assigned pursuant to Section D(3)(2)(B). The fact that Web Corp's customers and prospective customers incidentally benefit from Design

Co.'s services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

Example (vi). Wholesale Corp, a corporation that is based outside Vermont, develops an Internet-based information database outside Vermont 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, but for purposes of analysis it does not matter. *See* Section D(5)E. 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 receipts from 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 the location, Wholesale Corp must approximate the extent to which its services are received by end users in Vermont by using a percentage that reflects the ratio of the Vermont population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(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* Section D(5)(E). In any case in which Wholesale Corp's receipts would be assigned to a state in which Wholesale Corp is not taxable, the receipts must be excluded from the denominator of Wholesale Corp's receipts factor.

(3) Professional Services.

(A) In General.

Except as otherwise provided in this Section, professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. These services include the performance of technical services that require the application of specialized knowledge. 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 services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

(B) Overlap with Other Categories of Services.

1. Certain services that fall within the definition of "professional services" set forth in this Section are nevertheless treated as "in-person services" within the meaning of Section D(3)(1), and are assigned under the rules of that subsection. Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services or child care services, where the customer or the customer's real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are "in-person services" and are assigned as such, notwithstanding that they may also be considered to be "professional services." However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial and consulting services, are assigned as professional services under the rules of this Section D(3)(3), notwithstanding the fact that these services may involve some amount of in-person contact.

2. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment rules that apply are those for professional services, and not those pertaining to services delivered to a customer or through or on behalf of a customer.

(C) Assignment of Receipts.

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, the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from 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 receipts from a sale of a professional service, a taxpayer's customer is the person that contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer's services. In any instance in which the taxpayer is not taxable in the state to which receipts from a sale is assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor.

1. General Rule. Receipts from sales of professional services other than those services described in Subsection 2 (architectural and engineering services), Subsection 3 (transactions with related parties) are assigned in accordance with this general rule.

a. Professional Services Delivered to Individual Customers. Except as otherwise provided, 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 must be reasonably approximated as set forth in this paragraph. In particular, the taxpayer shall assign the receipts from a 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 receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.

b. Professional Services Delivered to Business Customers. Except as otherwise provided in Section D(3), 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 must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth in the next paragraph, taxpayer shall assign the receipts from 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 the place of customer management is not reasonably determinable, to the customer's place of order; and third, if the 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 receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

c. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in Subsections a and b above, a taxpayer may assign its receipts from 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 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of Section D(3)(3)C)(1) and not otherwise.

2. 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 Section D(3). However, unlike in the case of the general rule that applies to professional services, (1) the receipts from a sale of an architectural service are 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 the state or states; and (2) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the 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 paragraph, the receipts from a sale of these services must be assigned under the general rule for professional services. *See* Section D(3)(C)(1).

3. Related Party Transactions. In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers, the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the

state or states; or (2) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states. The taxpayer may use the safe harbor provided by provided that the Commissioner may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

4. Examples:

Unless otherwise stated, assume in each of these examples, where relevant, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in the examples that the receipts must be excluded from the denominator of the taxpayer's receipts factor. Assume also that the customer is not a related party and that the safe harbor set forth at Subsection D(3)(3)(C)(1)(c) does not apply.

Example (i). Broker Corp provides securities brokerage services to individual customers who are resident in Vermont 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 receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. *See* Section D(3)(3)(C)(1)(a).

Example (ii). Same facts as in Example (i), except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives 5% or less of its receipts from sales of all services must be assigned as described in example 1. For each customer from whom it derives more than 5% of its receipts from sales of all 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 Vermont, receipts from a sale made to that customer must be assigned to Vermont; in any case in which a 5% customer's state of primary residence is not Vermont receipts from a sale made to that customer are not assigned to Vermont. Where receipts from a sale are assigned to a state other than Vermont, 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 must be excluded from the denominator of Broker Corp's receipts factor.

Example (iii). Architecture Corp provides building design services as to buildings located, or expected to be located, in Vermont to individual customers who are resident in Vermont and other states, and to business customers that are based in Vermont and other states. The receipts from Architecture Corp's sales are assigned to Vermont because the locations of the buildings to which its design services relate are in Vermont, or are expected to be in Vermont. For purposes of assigning these receipts, it is not relevant where, in the case of an individual customer, the customer

primarily resides or is billed for the 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 the services. Further, these receipts are assigned to Vermont even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than Vermont or are electronically delivered to its customer in a state other than Vermont. *See* Section D(3)(3)(B)(2) and (C)(2).

Example (iv). Law Corp provides legal services to individual clients who are resident in Vermont 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 receipts from sales of all services from any one individual client. If Law Corp knows its client's state of primary residence, it shall assign the receipts to that state. If Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the receipts 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.

Example (v). Same facts as in Example (iv), 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 are excluded from the denominator of Law Corp's receipts factor even if the billing address of one or more of these clients is in a state in which Law Corp is taxable, including Vermont.

Example (vi). 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 Vermont; in the other cases, the agreement is principally managed in a state other than Vermont. If the agreement for legal services is principally managed by the client in Vermont the receipts from sale of the services are assigned to Vermont; in the other cases, the receipts are not assigned to Vermont. In the case of receipts that are assigned to Vermont, the receipts are 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.

Example (vii). Same facts as in example 6, except that Law Corp is not taxable in one of the states other than Vermont 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 are excluded from the denominator of Law Corp's receipts factor.

Example (viii). 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 Vermont, the receipts from the sale of Consulting Corp's services are assigned to Vermont. 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* Section D(3)(3)(C)(1)(b).

Example (ix). Bank Corp provides financial custodial services to 100 individual customers who are resident in Vermont 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 receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in Section D(3)(3)(C)(1)(c). If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to Vermont 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 Vermont, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Vermont. *See* Section D(3)(3)(C)(1)(a).

Example (x). Same facts as Example (ix), except that Bank Corp has more than 250 customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in D(3)(3)(C)(1)(c), and may assign its receipts from sales to a state or states using each customer's billing address.

Example (xi). Same facts as Example (x), except that Bank Corp derives more than 5% of its receipts from 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* D(3)(3)(C)(1)(a) and (C)(3). Receipts from sales to all other customers are assigned as described in Example (x).

Example (xii). Advisor Corp, a corporation that provides investment advisory services, provides these 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 Vermont. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. 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* D(3)(3)(C)(1)(b).

Example (xiii). 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 Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. *See* D(3)(3)(C)(1)(b). Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example (xiv). Design Corp is a corporation based outside Vermont that provides graphic design and similar services in Vermont and in neighboring states. Design Corp enters into a contract at a location outside Vermont 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 receipts from sales of services from the individual customer. All of the design work is performed outside Vermont. Receipts from the sale are in Vermont if the customer's billing address is in Vermont. *See* D(3)(3)(C)(1)(a).

(4) Rent~~s~~, Lease, or License of Tangible Personal Property and Real Property, and Sales of Real Property ~~and Royalties~~

Receipts from the rental~~s~~, lease, or license of real ~~and~~ or tangible personal property situated in Vermont~~, royalties from the use in Vermont of patents or copyrights and receipts from the licensing of computer software used in Vermont and similar transactions~~ are apportionable to Vermont.

In the case of a sale of real property, the receipts from the sale are in Vermont if and to the extent that the property is in Vermont.

In the case of a rental, lease or license of tangible personal property, the receipts from the sale are in Vermont if and to the extent that the property is in Vermont. If property is mobile property that is located both within and without Vermont during the period of the lease or other contract, the receipts assigned to Vermont are the receipts from the contract period multiplied by the fraction computed under Section B(4) (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).

Receipts from the rental~~s~~, lease, or license of real or tangible personal property include all amounts received directly or indirectly by the taxpayer for use of or occupancy of property, whether or not such property is owned by the taxpayers.

~~Receipts from royalties include all amounts received by the taxpayer for the use of patents or copyrights whether or not such patents or copyrights were originally issued to or are owned by the taxpayer.~~

~~A patent or copyright is used in Vermont to the extent that activities thereunder are carried on in Vermont.~~

(5) License or Lease of Intangible Property

A. General Rules.

1. The receipts from the license of intangible property are in Vermont if and to the extent the intangible is used in Vermont. In general, the term "use" is 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. 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 in Section D(5)(A)(2)-(5). For purposes of the rules set forth in this Section 5, a lease of intangible property is to be treated the same as a license of intangible property.

2. In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of this regulation. *See* D(6). Note, however, that for purposes of Section D(5) and (6), a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.

3. Intangible property licensed as part of the sale or lease of tangible property is treated as the sale or lease of tangible property under this regulation.

4. 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 are excluded from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D).

5. Nothing in this Section D(5) shall be construed to allow or require inclusion of receipts in the receipts factor that are not included in the definition of "receipts" pursuant to Section D(1)(A)(8) or that are excluded from the numerator and the denominator of the receipts factor. To the extent that the transfer of either a security, 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 receipts 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) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Vermont to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Vermont. 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 Vermont, it shall assign that amount or proportion to Vermont.

In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Vermont consumers, the portion of the licensing fee to be assigned to Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont 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 that area. If 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 Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

C. License of a Production Intangible.

If 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 that right are assigned to Vermont to the extent that the use for which the fees are paid takes place in Vermont. 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 that process. In the case of a license of a production intangible to a party other than a related party where the location of actual use is unknown, it is 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). If 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 Vermont, it is presumed that the entire use is in this state except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Vermont. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.

D. License of a Mixed Intangible.

If 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 that separate statement for purposes of Section D. If 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 is 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.

1. 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 these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in Section D(3)(2)(B)(2) and (3), 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 Subsection 5 include, without limitation, the license of database access, the license of access to information, the license of digital goods (*see* Section D(7)(2)), 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* Section D(7)(1).

2. Sublicenses.

Pursuant to Section D(5)(1)(A), the rules of Section D(3)(2)(B)(3) 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 Section D(3)(2)(B)(3) 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. For this purpose, 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 that 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 that property is bundled with additional services or items of property.

3. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. Also assume that the customer is not a related party.

> *Example (i)*. 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 Vermont. 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 Vermont are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Vermont stores relative to Dealer Co's total receipts. *See* Section D(5)(B).

Example (ii). Program Corp, a corporation that is based outside Vermont, 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 Vermont 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 Vermont, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Vermont receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Vermont audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. *See* Section D(5)(E). If Program Corp is not taxable in any state in which the licensee's audience is located, the receipts are excluded from the denominator of Program Corp's receipts factor. Note that the analysis and result as to the state or states to which receipts 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* Section D(5)(E).

Example (iii). 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 Vermont receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Vermont population in the specific geographic region relative to the total population in that region. *See* Section D(5)(E). If Moniker Corp is able to reasonably establish that the marketing intangible was materially used throughout a foreign country, then the population of that country will be included in the population ratio calculation. However, if Moniker Corp is unable to reasonably establish that the marketing intangible was materially used in the foreign country in areas outside a particular major city; then none of the foreign country's population beyond the population of the major city is include in the population ratio calculation. If Moniker Corp is not taxable in any state (including a foreign country) in which Wholesale Co's ultimate consumers are located, the receipts that would be assigned to that state are excluded from the denominator of Moniker Corp's receipts factor.

Example (iv). 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 Vermont 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 Vermont, the royalty is assigned based to the location of that use rather than to location of the licensee's commercial domicile, in accordance with Section D(5)(A). It is presumed that the entire use is in Vermont except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Vermont. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Vermont using the patent relative to the manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Vermont receipts. *See* Section D(5)(E).

Example (v). 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 the 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 Vermont. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co.'s receipts that are derived from Vermont customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Vermont 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 Vermont receipts. *See* Section D(5)(B),(D).

Example (vi). 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 Vermont, and (2) assign 25% of the licensing fee paid for the marketing intangible to Vermont. *See* Section D(5)(D).

Example (vii). Better Burger Corp, which is based outside Vermont, enters into franchise contracts with franchisees that agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Vermont. 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 Vermont franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Vermont receipts because the franchises are for the right to make Vermont sales. The monthly franchise fees paid by Vermont 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 Vermont receipts because in each case the use of the intangibles is to take place in Vermont. *See* Section D(5)(B),(C). The fees paid for the personal services are to be assigned pursuant to Section D(3).

Example (viii). Online Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to individual customers that are resident in Vermont 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 are assigned in accordance with Section D(5)(E). If Online Corp can determine or reasonably approximate the state or states where its database is accessed, 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 receipts 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 receipts from sales made to its individual customers are in Vermont in any case in which the customer's billing address is in Vermont. *See* Section D(3)(1)(B).

Example (ix). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with Section 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 Vermont, and 25% of Business Corp's database access took place in other states. In that case, 75% of the receipts from database access is in Vermont. Assume alternatively that Net Corp lacks sufficient information regarding the location where its database is accessed to reasonably approximate the 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 receipts 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.

Example (x). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to more than 250 individual and business customers in Vermont and in other states. The license is a license of intangible

property that resembles a sale of goods or services and receipts from that license are assigned in accordance with Section D(5)(5). 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 receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv), and may assign its receipts 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 receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

Example (xi). Web Corp, a corporation based outside of Vermont, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in Vermont 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 are assigned by applying the rules set forth in Section D(3)(2)(B)(3). *See* Section D(5)(E). If Web Corp can determine or reasonably approximate the state or states where its database is accessed by end users, 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 Vermont using a percentage that represents the ratio of the Vermont population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(i).

(6) Sale of Intangible Property.

(1) Assignment of Receipts.

The assignment of receipts 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 6, a sale or exchange of intangible property includes a license of that 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* Section D(5)(A).

(A) 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 receipts from the sale

are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state the taxpayer shall assign the receipts from the sale to Vermont. If the intangible property is used or is authorized to be used in Vermont and one or more other states, the taxpayer shall assign the receipts from the sale to Vermont to the extent that the intangible property is used in or authorized for use in Vermont, through the means of a reasonable approximation.

(B) 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 are assigned by applying the rules set forth in Section 5 (pertaining to the license or lease of intangible property).

(C) 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 are assigned by applying the rules set forth in Section D(5)(E)(relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in Section D(5)(E).

(D) Excluded Receipts.

Receipts from the sale of intangible property are not included in the receipts factor in any case in which the sale does not give rise to receipts within the meaning of Section D(1)(D)(8). The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's receipts factor under this provision includes, without limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value. Also, in any instance in which, the state to which the receipts from a sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the receipts that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's receipts factor.

(E) Examples.

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which some of its receipts would be assigned, so that there is no requirement in these examples that the receipts to other states must be excluded from the taxpayer's denominator.

Example (i). Airline Corp, a corporation based outside Vermont, sells its rights to use several gates at an airport located in Vermont to Buyer Corp, a corporation that is based outside Vermont. The contract of sale is negotiated and signed outside of Vermont. The receipts from the sale are in Vermont because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Vermont. *See* Section D(6)(1).

Example (ii). Wireless Corp, a corporation based outside Vermont, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Vermont to Buyer Corp, a corporation that is based outside Vermont. The contract of sale is negotiated and signed outside of Vermont. The receipts from the sale are in Vermont because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Vermont. *See* Section D(6)(1)(A).

Example (iii). 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 Vermont and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Vermont. 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* Section D(6)(1)(A).

Example (iv). 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 denominator of Wireless Corp's receipts factor.

Example (v). Sports League Corp, a corporation that is based outside Vermont, 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 Vermont. 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 may be used in Vermont. 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 Vermont and the other states. *See* Section D(6)(1)(A).

Example (vi). 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 denominator of Sports League Corp's receipts factor.

Example (vii). Inventor Corp, a corporation that is based outside Vermont, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Vermont. 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* Section D(6)(1)(A). Inventor Corp understands that Buyer Corp is likely to use the patented technology in Vermont, 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 receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. *See* Section D(6)(1)(D).

(7) Special Rules.

(1) Software Transactions.

A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) 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 these cases, the receipts are in Vermont as determined under the rules for the sale of tangible personal property set forth under Section D(2) and related regulations. In all other cases, the receipts from a license or sale of software are to be assigned to Vermont as determined otherwise under Section D. (e.g., depending on the facts, as the development and sale of custom software, *see* Section D(5)(B), as a license of a marketing intangible, *see* Section D(5)(B), as a license of a production intangible, *see* Section D(5)(C), as a license of intangible property where the substance of the transaction resembles a sale of goods or services, *see* Section D(5)(E) or as a sale of intangible property, *see* Section D(6).

(2) Sales or Licenses of Digital Goods or Services.

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 are assigned by applying the same rules as are set forth in Section D(3)(2) or (3), 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 Section D(5)(E) and Section D(6)(1)(C).

~~8. Other Business Receipts All business receipts earned by the taxpayer within Vermont are apportionable to Vermont. Business receipts are not considered to have been earned in Vermont solely by reason of the fact that they were payable in Vermont or were received in Vermont. Business receipts include all income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible or intangible property if the acquisition, management and or disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.~~

~~9. Nonbusiness Receipts Nonbusiness receipts are all receipts other than business receipts resulting from operations unrelated to its regular business operations. Typically nonbusiness receipts are comprised of passive or portfolio income. Income from dividends, interest and capital gains will be considered nonbusiness income unless the acquisition, management, and or disposition of the underlying property generating the income constitute an integral part of the taxpayer's regular business operations.~~

Section E. ~~(e)~~ Non-apportionable Income

~~(e) Nonbusiness~~ Non-apportionable income will be allocated to the state in which the income producing assets are located. If the income producing asset has no situs, the income will be allocated to the state of commercial domicile, the ~~principle~~ principal place from which the business is directed or managed.

Section F. ~~(f)~~ Discretionary Adjustment of Vermont Apportionment Percentage

(A). General. Generally the apportionment formula will result in a fair apportionment of the taxpayer's income within and without Vermont. However, due to the nature of certain businesses the formula may not result in an equitable allocation of income. In such cases, the taxpayer may petition for, or the commissioner may require:

(1) Separate accounting;
(2) the exclusion or modification of any one or more ~~or all~~ of the factors;
(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
(4) the employment of any other method to effectuate an equitable apportionment of the taxpayer's income.

Section G. Special Rules

(1) Special Rules: Property Factor. The following special rules are established in respect to the property factor of the apportionment formula:

(A) If the subrents taken into account in determining the net annual rental rate under Section B(6) produce a negative or clearly inaccurate value for any item of property, another method which will properly reflect the value of rented property may be required by the Commissioner or requested by the taxpayer.

In no case, however, shall the value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for the property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

Example: The taxpayer rents a 10-story building at an annual rental rate of $1,000,000. Taxpayer occupies two stories and sublets eight stories for $1,000,000 a year. The net annual rental rate of the taxpayer must not be less than two-tenths of the taxpayer's annual rental rate for the entire year, or $200,000.

(B) If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for the property shall be determined on the basis of a reasonable market rental rate for the property.

(2). Special Rules: Trucking Companies.

The following special rules are established with respect to trucking companies:

(A) In General. As used in this regulation, the term "trucking company" means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking

company has income from sources both within and without this state, the amount of apportionable income from sources within this state shall be determined pursuant to this regulation. In such cases, the first step is to determine what portion of the trucking company's income constitutes "apportionable" income and what portion constitutes "non-apportionable" income under 32 VSA §5833 and Regulation §1.5833(A) thereunder. Non-apportionable income is directly allocable to specific states pursuant to the provisions of 32 VSA §5833. Apportionable income is apportioned among the states in which the business is conducted and pursuant to the property, payroll, and sales apportionment factors set forth in this regulation. The sum of (i) the items of non-apportionable income directly allocated to this state and (ii) the amount of apportionable income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax in this state.

(B) Apportionable and Non-apportionable Income. For definitions, rules, and examples for determining apportionable and non-apportionable income, see Section A.

(C) Apportionment of Income

(1) In General. The property factor shall be determined in accordance with Section B, the payroll factor in accordance with Section C, and the sales factor in accordance with Section D, inclusive, except as modified by this regulation.

(2) The Property Factor

A. Property Valuation. Owned property shall be valued at its original cost and property rented from others shall be valued at eight (8) times the net annual rental rate in accordance with Section B.

B. General Definitions. The following definitions are applicable to the numerator and denominator of the property factor, as well as other apportionment factor descriptions:

1. "Average value" of property means the amount determined by averaging the values at the beginning and end of the income tax year, but the Commissioner may require the averaging of monthly values during the income year or such averaging as is necessary to reflect properly the average value of the trucking company's property. (Section B).

2. "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property.

3. A "mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.

4. "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments, except for subsequent capital additions, improvements thereto, or partial dispositions); or, if the property has no such basis, the valuation of such property for Interstate Commerce Commission purposes. If the original cost of property is unascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer. (*See* Section B(2).)

5. "Property used during the course of the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

6. The "value" of owned real and tangible personal property means its original cost. (*See* Section B(2).)

7. The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate. (*See* Section B(4).)

C. The Denominator and Numerator of the Property Factor. The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year. In the determination of the numerator of the property factor, all property, except mobile property as defined in this regulation, shall be included in the numerator of the property factor in accordance with Section B.

Mobile property, as defined in this regulation, which is located solely within this state during the income year shall be included in the numerator of the property factor.

Mobile property as defined in this regulation, which is located within and without this state during the income year shall be included in the numerator of the property factor in the ratio which mobile property miles in the state bear to the total mobile property miles.

(3) The Payroll Factor. The denominator of the payroll factor is the compensation paid everywhere by the taxpayer during the income year for the production of apportionable income. The numerator of the payroll factor is the total compensation paid in this state during the income year by the taxpayer. With respect to all personnel, except those performing services within and without this state, compensation paid to such employees shall be included in the numerator as provided in Section C.

With respect to personnel performing services within and without this state, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere based on mobile property miles.

(4) The Sales (Revenue) Factor

A. In General. All revenue derived from transactions and activities in the regular course of the taxpayer's trade or business which produce apportionable income shall be included in the denominator of the revenue factor. (*See* Section A.)

The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total state revenue of the taxpayer, other than revenue from hauling freight, mail, and express, shall be attributable to this state in accordance with Section D.

B. Numerator of the Sales (Revenue) Factor From Freight, Mail, and Express. The total revenue of the taxpayer attributable to this state during the income year from hauling freight, mail, and express shall be:

1. Intrastate: All receipts from any shipment which both originates and terminates within this state; and,

2. Interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

(D) Records. The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as those terms are used in this regulation. Such records are subject to review by the Vermont Department of Taxes or its agents.

(E) De Minimis Nexus Standard. Notwithstanding any provision contained herein, this Section G(2) shall not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:

a. owns nor rents any real or personal property in this state, except mobile property; nor

b. makes any pick-ups or deliveries within this state; nor

c. travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the income tax year do not exceed three percent of the total mobile property miles traveled in all states by the trucking company during that period; nor

d. makes more than twelve trips into this state.

(3) Special Rules: Television and Radio Broadcasting

The following special rules are established with respect to the apportionment of income from television and radio broadcasting by a broadcaster that is taxable both in this state and in one or more other states.

(A) In General. When a person in the business of broadcasting film or radio programming, whether through the public airwaves, by cable, direct or indirect satellite transmission or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of apportionable income from sources within this state shall be determined pursuant to 32 VSA §5833 and the regulations issued thereunder by this state, except as modified by this regulation.

(B) Apportionable and Non-apportionable Income. For definitions, regulations and examples for determining whether income shall be classified as "apportionable" or "non-apportionable" income, see Reg. §1.5833 Section A.

(C) Definitions. The following definitions are applicable to the terms contained in this regulation, unless the context clearly requires otherwise.

(i) "Film" or "film programming" means any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium.

Each episode of a series of films produced for television shall constitute a separate "film" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(ii) "Outer-jurisdictional" property means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but which are not physically located in any particular state.

(iii) "Radio" or "radio programming" means any and all performances, events or productions broadcast on radio, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of an audio tape, disc or any other format or medium.

Each episode of a series of radio programming produced for radio broadcast shall constitute a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(iv) "Release" or "in release" means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience for which the program was created. Thus, for example, a film is placed in service when it is first publicly telecast for entertainment, educational, commercial, artistic or other purpose. Each episode of a television or radio series is placed in service when it is first broadcast. A program is not placed in service merely because it is completed and therefore in a condition or state of readiness and availability for broadcast or, merely because it is previewed to prospective sponsors or purchasers.

(v) "Rent" shall include license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.

(vi) A "subscriber" to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

(vii) "Telecast" or "broadcast" (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radio waves or microwaves or by wires, lines, coaxial cables, wave guides, fiber

optics, satellite transmissions directly or indirectly to viewers and listeners or by any other means of communications.

(D) Apportionment of Income.

(i) In General. The property factor shall be determined in accordance with Section B, the payroll factor in accordance with Section C, and the sales factor in accordance with Section D, except as modified by this Section G(3).

(ii) The Property Factor.

A. In General

1. In the case of rented studios, the net annual rental rate shall include only the amount of the basic or flat rental charge by the studio for the use of a stage or other permanent equipment such as sound recording equipment and the like; except that additional equipment rented from other sources or from the studio not covered in the basic or flat rental charge and used for one week or longer (even though rented on a day-to-day basis) shall be included. Lump-sum net rental payments for a period which encompasses more than a single income year shall be assigned ratably over the rental period.

2. No value or cost attributable to any outer-jurisdictional, film or radio programming property shall be included in the property factor at any time.

B. Property Factor Denominator.

1. All real property and tangible personal property (other than outer-jurisdictional and film or radio programming property), whether owned or rented, which is used in the business shall be included in the denominator of the property factor.

2. Audio or video cassettes, discs or similar medium containing film or radio programming and intended for sale or rental by the taxpayer for home viewing or listening shall be included in the property factor at their original cost. To the extent that the taxpayer licenses or otherwise permits others to manufacture or distribute such cassettes, discs or other medium containing film or radio programming for home viewing or listening, the value of said cassettes, discs or other medium shall include the license, royalty or other fees received by the taxpayer capitalized at a rate of eight times the gross receipts derived therefrom during the income year.

3. Outer-jurisdictional, film and radio programming property shall be excluded from the denominator of the property factor.

C. Property Factor Numerator.

1. With the exception of outer-jurisdictional, film and radio programming property, all real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period shall be included in the numerator of the property factor as provided in Section B.

2. Outer-jurisdictional, film and radio programming property shall be excluded from the numerator of the property factor.

Example: XYZ Television Co. has a total value of all of its property everywhere of $500,000,000, including a satellite valued at $50,000,000 that was used to telecast programming into this state and $150,000,000 in film property of which $1,000,000's worth was located in this state the entire year. The total value of real and tangible personal property, other than film programming property, located in this state for the entire income year was valued at $2,000,000; and the movable and mobile property described in subparagraph C.1. was determined to be of a value of $4,000,000 and such movable and mobile property was used in this state for 100 days. The total value of property to be attributed to this state would be determined as follows:

Value of property permanently in state: $2,000,000
Value of mobile and movable property: (100/365 or .2739 x $4,000,000): $1,095,600
Total value of property to be included in the state's property factor numerator (outer-jurisdictional and film property excluded): $3,095,600
Total value of property to be used in the denominator ($500,000,000-$200,000,000) $300,000,000
Total property factor ($3,095,600/$300,000,000): .0103

(iii) The Payroll Factor.

A. Payroll Factor Denominator.

The denominator of the payroll factor shall include all compensation, including residual and profit participation payments, paid to employees during the income year, including that paid to directors, actors, newscasters and other talent in their status as employees.

B. Payroll Factor Numerator.

Compensation for all employees shall be attributed to the state or states as may determined by the application of the provisions of Section C.

(iv) The Sales Factor.

A. Sales Factor Denominator.

The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under these regulations.

B. Sales Factor Numerator.

The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to the following:

1. Gross receipts, including advertising revenue, from television film or radio programming in release to or by television and radio stations located in this state.

2. Gross receipts, including advertising revenue, from television film or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter "audience factor") that the audience for such station (or owned and affiliated stations in the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks).

   The audience factor for television or radio programming shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience. Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state.

3. Gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. If the number of subscribers cannot be accurately determined from the books and records maintained by the taxpayer, such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose.

4. Receipts from the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening shall be included in the sales factor as provided in Section D.

4. Special Rules: Financial Institutions Subject to Net Income Tax

A. The following special rules are established with respect to financial institutions. This section applies to financial institutions as defined in this section not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836 because entities subject to that tax are not subject to tax under 32 V.S.A. § 5832, as described in 32 V.S.A. § 5836(g). However, even financial institutions subject to tax under 32 V.S.A. § 5836(g) must be included in affiliated groups for unitary combined reporting, but the factors of these financial institutions are not included in the Vermont numerator. For purposes of calculating the denominator, these special rules for financial institutions shall be used.

(1) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this Section G(4). All items of nonapportionable income (income which is not includable in the apportionable income tax base) shall be allocated pursuant to the provisions of Section E. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both within this state and within

another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this Section.

(2) All apportionable income (income which is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by Section A of this Regulation.

(3) Each factor shall be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for the taxable year.

(4) If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors,

(c) the inclusion of one or more additional factors which will fairly represent the taxpayers business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

B. Definitions.

As used in this Section G(3) unless the context otherwise requires:

(a) "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year (or on such later date in the taxable year when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) "Borrower or credit card holder located in this state" means:

(1) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or

(2) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state.

(c) "Card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card.

(d) "Commercial domicile" means:

(1) the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(2) if a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile shall be deemed for the purposes of this [Act] to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It shall be presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year.

(e) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the Federal Internal Revenue Code. In the case of employees not subject to the Federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the Federal Internal Revenue Code shall be made as though such employees were subject to the Federal Internal Revenue Code.

(f) "Credit card" means a card, or other means of providing information, that entitles the holder to charge the cost of purchases, or a cash advance, against a line of credit.

(g) "Debit card" means a card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card.

(h) "Employee" means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(i) "Financial institution" means any taxable corporation described below not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836:

(1) Any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(2) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§21 et seq.;

(3) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C.§ 1813(b)(1);

(4) Any bank or thrift institution incorporated or organized under the laws of any state;

(5) Any corporation organized under the provisions of 12 U.S.C. §§611 to 631.

(6) Any agency or branch of a foreign depository as defined in 12 U.S.C. §3101;

(7) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;

(8) Any corporation whose voting stock is more than fifty percent (50%) owned, directly or indirectly, by any person or business entity described in subsections (1) through (7) above.

(9) A corporation or other business entity that derives more than fifty percent (50%) of its total gross income for financial accounting purposes from finance leases. For purposes of this subsection, a "finance lease" shall mean any lease transaction which is the functional equivalent of an extension of credit and that transfers substantially all of the benefits and risks incident to the ownership of property. The phrase shall include any "direct financing lease" or "leverage lease" that meets the criteria of Financial Accounting Standards Board Statement No. 13, "Accounting for Leases" or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles.

For this classification to apply,

(a) the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent (50%) requirement; and

(b) gross income from incidental or occasional transactions shall be disregarded; or

(10) Any other person or business entity, other than an insurance company taxed under Title 32, Chapter 211, which derives more than fifty percent (50%) of its gross income from activities that a person described in subsections (1) through (9) above is authorized to transact. For the purpose of this subsection, the computation of gross income shall not include income from non-recurring, extraordinary items.

(11) The Commissioner is authorized to exclude any person from the application of subsection (10) upon such person proving, by clear and convincing evidence, that the income producing activity of such person is not in substantial competition with those persons described in subsections (1) through (9 above.

(j) "Gross rents" means the actual sum of money or other consideration payable for the use or possession of property. "Gross rents" shall include, but not be limited to:

(1) any amount payable for the use or possession of real property or tangible property whether designated as a fixed sum of money or as a percentage of receipts, profits or otherwise,

(2) any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement, and

(3) a proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year. However, where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer.

(4) The following are not included in the term "gross rents":

(A) reasonable amounts payable as separate charges for water and electric service furnished by the lessor;

(B) reasonable amounts payable as service charges for janitorial services furnished by the lessor;

(C) reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and

(D) that portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it.

(k) "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.

(l) "Loan secured by real property" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

(m) "Merchant discount" means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the card holder, net of any cardholder charge-back and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made its cardholder.

(n)"Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(o) "Person" means an individual, estate, trust, partnership, corporation and any other business entity.

(p) "Principal base of operations" with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly (1) starts his or her work and to which he or she customarily returns in order to receive instructions from his or her employer or (2) communicates with his or her customers or other persons, or (3) performs any other functions necessary to the exercise of his or her trade or profession at some other point or points.

(q) "Real property owned" and "tangible personal property owned" mean real and tangible personal property, respectively, (1) on which the taxpayer may claim depreciation for federal income tax purposes, or (2) property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

(r) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(s) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

(t) "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(u) "Taxable" means either:

(1) that a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any tax which is imposed upon or measured by gross or net income; or

(2) that another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not.

(v) "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

Section C. Receipts Factor.

(a) General. The receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts described herein which constitute business income and are included in the computation of the apportionable income base for the taxable year.

(b) Receipts from the lease of real property. The numerator of the receipts factor includes receipts from the lease or rental of real property owned by the taxpayer if the property is located within this state or receipts from the sublease of real property if the property is located within this state.

(c) Receipts from the lease of tangible personal property.

(1) Except as described in paragraph (2) of this subsection, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(2) Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of receipts that is to be included in the numerator of this state's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(d) Interest, fees and penalties imposed in connection with loans secured by real property.

(1) The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the receipts described in this subsection shall be included in the numerator of the receipts factor if the borrower is located in this state.

(2) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(e) Interest, fees, and penalties imposed in connection with loans not secured by real property. The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans not secured by real property if the borrower is located in this state.

(f) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Internal Revenue Code.

(1) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(2) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(g) Receipts from fees, interest, and penalties charged to card holders. The numerator of the receipts factor includes fees, interest and penalties charged to credit, debit or similar card holders, including but not limited to annual fees and overdraft fees, if the billing address of the card holder is in this state.

(h) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total

amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(i) Card issuer's reimbursement fees. The numerator of the receipts factor includes:

(1) all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to credit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to credit card holders.

(2) all debit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to debit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to debit card holders.

(3) all other card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to all other card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to all other card holders .

(j) Receipts from merchant discount.

(1) If the taxpayer can readily determine the location of the merchant and if the merchant is in this state, the numerator of the receipts factor includes receipts from merchant discount.

(2) If the taxpayer cannot readily determine the location of the merchant, the numerator of the receipts factor includes such receipts from the merchant discount multiplied by a fraction:

(A) in the case of a merchant discount related to the use of a credit card, the numerator of which is the amount of fees, interest and penalties charged to credit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to credit card holders, and

(B) in the case of a merchant discount related to the use of a debit card, the numerator of which is the amount of fees, interest and penalties charged to debit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to debit card holders.

(C) in the case of a merchant discount related to the use of all other types of cards, the numerator of which is the amount of fees, interest and penalties charged to all other card holders that is included in the numerator of the receipts factor pursuant

to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to all other card holders.

(3) The taxpayer's method for sourcing each receipt from a merchant discount must be consistently applied to such receipt in all states that have adopted sourcing methods substantially similar to subsections (1) and (2) of this section and must be used on all subsequent returns for sourcing receipts from such merchant unless the Commissioner permits or requires application of the alternative method.

(k) Receipts from ATM fees. The receipts factor includes all ATM fees that are not forwarded directly to another bank.

(1) The numerator of the receipts factor includes fees charged to a cardholder for the use at an ATM of a card issued by the taxpayer if the cardholder's billing address is in this state.

(2) The numerator of the receipts factor includes fees charged to a cardholder, other than the taxpayer's cardholder, for the use of such card at an ATM owned or rented by the taxpayer, if the ATM is in this state.

(l) Loan servicing fees.

(1) (A)The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(2) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor shall include such fees if the borrower is located in this state.

(m) Receipts from the financial institution's investment assets and activity and trading assets and activity.

(1) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities that are reported on the taxpayer's financial statements, call reports, or similar reports shall be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and

foreign currency transactions. With respect to the investment and trading assets and activities described in subparagraphs (A) and (B) of this paragraph, the receipts factor shall include the amounts described in such subparagraphs.

(A)The receipts factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor shall include the amount by which interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(2) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities described in paragraph (1) of this subsection that are attributable to this state.

(A)The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are

properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D)For purposes of this paragraph, average value shall be determined using the rules for determining the average value of tangible personal property set forth in subsections (c) and (d) of Section 4.

(3) In lieu of using the method set forth in paragraph (2) of this subsection, the taxpayer may elect, or the Commissioner may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this subsection.

(A)The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(4) If the taxpayer elects or is required by the Commissioner to use the method set forth in subsection (3), it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the Commissioner to use, or the Commissioner requires a different method.

(5) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of

this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-today decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established at the commercial domicile of the taxpayer.

(n) All other receipts. The numerator of the receipts factor includes all other receipts pursuant to the rules set forth in Section D of this Regulation unless inconsistent with the Special Rules For Financial Institutions.

(o) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this section to a state in which the taxpayer is not taxable shall be included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

Section D. Property Factor.

(a) General. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located or used within this state during the taxable year and the average value of the taxpayer's real and tangible personal property owned that is located or used within this state during the taxable year, and the denominator of which is the average value of all such property located or used within and without this state during the taxable year.

(b) Property included. The property factor shall include only property the income or expenses of which are included (or would have been included if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of the apportionable income base for the taxable year.

(c) Value of property owned by the taxpayer. The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for Federal income tax purposes without regard to depletion, depreciation or amortization.

(d) Average value of property owned by the taxpayer. The average value of property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable year and the value on the last day of the taxable year and dividing the sum by two. If averaging on this basis does not properly reflect average value, the Commissioner may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the Commissioner or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property within and without this state and on all subsequent returns unless the taxpayer receives

prior permission from the Commissioner or the Commissioner requires a different method of determining average value.

(e) Average value of real property and tangible personal property rented to the taxpayer.

(1) The average value of real property and tangible personal property that the taxpayer has rented from another and which is not treated as property owned by the taxpayer for Federal income tax purposes, shall be determined annually by multiplying the gross rents payable during the taxable year by eight.

(2) Where the use of the general method described in this subsection results in inaccurate valuations of rented property, any other method which properly reflects the value may be adopted by the Commissioner or by the taxpayer when approved in writing by the Commissioner. Once approved, such other method of valuation must be used on all subsequent returns unless the taxpayer receives prior approval from the Commissioner or the Commissioner requires a different method of valuation.

(f) Location of real property and tangible personal property owned by or rented to the taxpayer.

(1) Except as described in paragraph (2) of this subsection, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated or used within this state.

(2) Transportation property is included in the numerator of the property factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

Section 5. Payroll Factor.

(a) General. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both within and without this state during the taxable year. The payroll factor shall include only that compensation which is included in the computation of the apportionable income tax base for the taxable year.

(b) Compensation relating to nonbusiness income and independent contractors. The compensation of any employee for services or activities which are connected with the production of nonbusiness income (income which is not includable in the apportionable income base) and payments made to any independent contractor or any other person not properly classifiable as an employee shall be excluded from both the numerator and denominator of the factor.

(c) When compensation paid in this state. Compensation is paid in this state if any one of the following tests, applied consecutively, is met:

(1) The employee's services are performed entirely within this state.

(2) The employee's services are performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The term "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.

(3) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:

(A)if the employee's principal base of operations is within this state; or

(B) if there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this state; or

(C) if the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed but the employee's residence is in this state.

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VERMONT DEPARTMENT OF TAXES

ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

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VERMONT
DEPARTMENT OF TAXES

ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

Reg. § 1.5833 ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

Section A. Computations of Vermont Apportionment Percentage.

(1) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be apportioned to this state in full. If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and without this state, the amount of the corporation's Vermont Net Income apportioned to this state shall be determined by the arithmetic average of the following factors:

(A) The average of the value of all real and tangible property owned or rented by the taxpayer within Vermont expressed as a percentage of all such property both within and without Vermont.

(B) The total wages, salaries or other personal service compensation paid during the taxable year to employees or agents within Vermont expressed as a percentage of such payments both within and without Vermont.

(C) The gross sales, receipts, or charges for services performed within Vermont expressed as a percentage of such sales or charges both within and without Vermont, double-weighted.

(2) A taxable corporation subject to the taxing jurisdiction of this state shall allocate all of its non-apportionable income or loss within or without this state in accordance Section E.

(3) All apportionable income of each trade or business of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in 32 VSA §5833. The apportionment percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, sales or receipts, and payrolls within Vermont during the period covered by the return, and dividing the total of such percentages by four. The sales factor is double-weighted in this calculation. However, if any one of the factors (for property, receipts or payroll) is missing, the other two percentages are added and the sum is divided by two (or three, where sales or receipts are present and sales or receipts are to be double-weighted), and if two of the factors are missing, the remaining percentage is the apportionment percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator and its denominator are zero).

Example: A taxpayer owns no real or tangible personal property and rents no real property either within or without the state. The property factor being missing, the apportionment percentage may be computed by adding the percentages derived from the apportionment of its sales or receipts (double-weighted) and payrolls, and dividing the total by three.

(4) Apportionment and Allocation. Sections A and E require that every item of income be classified either as apportionable income or non-apportionable income. Income for purposes of classification as apportionable or non-apportionable includes gains and losses. Apportionable income is

apportioned among jurisdictions by use of the formula. Non-apportionable income is specifically assigned or allocated to one or more specific jurisdictions pursuant to express rules. An item of income is classified as apportionable income if it falls within the definition of apportionable income. An item of income is non-apportionable income only if it does not meet the definitional requirements for apportionable income.

(5) Apportionable Income. Apportionable income means all income that is apportionable under the Constitution of the United States and is not allocated under the laws of Vermont, including:

(A) income arising from transactions and activity in the regular course of the taxpayer's trade or business; and

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

(C) any income that would be allocable to this state under the Constitution of the United States, but that is apportioned rather than allocated pursuant to the laws of Vermont.

The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, income derived from accounts receivable, operating income, non-operating income, *etc.*, is not determinative of whether income is apportionable or non-apportionable income.

(6) "Trade or business," as used in the definition of apportionable income and in the application of that definition means the unitary business of the taxpayer, part of which is conducted within Vermont.

(7) Transactional Test. Apportionable income includes income arising from transactions and activity in the regular course of the taxpayer's trade or business.

(A) If the transaction or activity is in the regular course of the taxpayer's trade or business, part of which trade or business is conducted within Vermont, the resulting income of the transaction or activity is apportionable income for Vermont. Income may be apportionable income even though the actual transaction or activity that gives rise to the income does not occur in Vermont.

(B) For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business and will, therefore, satisfy the transactional test. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. However, even if a taxpayer frequently or customarily engages in investment activities, if those activities are for the taxpayer's mere financial betterment rather than for

the operations of the trade or business, such activities do not satisfy the transactional test. The transactional test includes, but is not limited to, income from sales of inventory, property held for sale to customers, and services which are commonly sold by the trade or business. The transactional test also includes, but is not limited to, income from the sale of property used in the production of apportionable income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

(8) Functional Test. Apportionable income also includes income from tangible and intangible property, if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business. "Property" includes any direct or indirect interest in, control over, or use of real property, tangible personal property and intangible property by the taxpayer.

Property that is "related to the operation of the trade or business" refers to property that is or was used to contribute to the production of apportionable income directly or indirectly, without regard to the materiality of the contribution.

Property that is held merely for investment purposes is not related to the operation of the trade or business.

"Acquisition, management, employment, development or disposition" refers to a taxpayer's activities in acquiring property, exercising control and dominion over property and disposing of property, including dispositions by sale, lease or license. Income arising from the disposition or other utilization of property which was acquired or developed in the course of the taxpayer's trade or business constitutes apportionable income, even if the property was not directly employed in the operation of the taxpayer's trade or business.

Income from the disposition or other utilization of property which has been withdrawn from use in the taxpayer's trade or business and is instead held solely for unrelated investment purposes is not apportionable. Property that was related to the operation of the taxpayer's trade or business is not considered converted to investment purposes merely because it is placed for sale, but any property which has been withdrawn from use in the taxpayer's trade or business for five years or more is presumed to be held for investment purposes.

Example (i): Taxpayer purchases a chain of 100 retail stores for the purpose of merging those store operations with its existing business. Five of the retail stores are redundant under the taxpayer's business plan and are sold six months after acquisition. Even though the five stores were never integrated into the taxpayer's trade or business, the income is apportionable because the property's acquisition was related to the taxpayer's trade or business.

Example (ii): Taxpayer is in the business of developing adhesives for industrial and construction uses. In the course of its business, it accidentally creates a weak but non-toxic adhesive and patents the formula, awaiting future applications. Another manufacturer uses the formula to create temporary body tattoos. Taxpayer wins a patent infringement suit

against the other manufacturer. The entire damages award, including interest and punitive damages, constitutes apportionable income.

Example (iii): Taxpayer is engaged in the oil refining business and maintains a cash reserve for buying and selling oil on the spot market as conditions warrant. The reserve is held in overnight "repurchase agreement" accounts of U.S. treasuries with a local bank. The interest on those amounts is apportionable income because the reserves are necessary for the taxpayer's business operations. Over time, the cash in the reserve account grows to the point that it exceeds any reasonably expected requirement for acquisition of oil or other short-term capital needs and is held pending subsequent business investment opportunities. The interest received on the excess amount is non-apportionable income.

Example (iv): A manufacturer decides to sell one of its redundant factories to a real estate developer and transfers the ownership of the factory to a special purpose subsidiary, SaleCo (Taxpayer) immediately prior to its sale to the real estate developer. The parties elect to treat the sale as a disposition of assets under IRC 338(h)(10), resulting in Taxpayer recognizing a capital gain on the sale. The capital gain is apportionable income. Note: although the gain is apportionable, application of the standard apportionment formula in Section A may not fairly reflect the taxpayer's business presence in any state, necessitating resort to equitable apportionment pursuant to Section F.

(A) Under the functional test, income from the disposition or other utilization of property is apportionable if the property is or was related to the operation of the taxpayer's trade or business. This is true even though the transaction or activity from which the income is derived did not occur in the regular course of the taxpayer's trade or business.

(B) Income that is derived from isolated sales, leases, assignments, licenses, and other infrequently occurring dispositions, transfers, or transactions involving property, including transactions made in the full or partial liquidation or the winding-up of any portion of the trade or business, is apportionable income, if the property is or was related to the taxpayer's trade or business. Income from the licensing of an intangible asset, such as a patent, copyright, trademark, service mark, know-how, trade secrets, or the like, that was developed or acquired for use by the taxpayer in its trade or business, constitutes apportionable income whether or not the licensing itself constituted the operation of a trade or business, and whether or not the taxpayer remains in the same trade or business from or for which the intangible asset was developed or acquired.

(C) Under the functional test, income from intangible property is apportionable income when the intangible property serves an operational function as opposed to solely an investment function.

(D) If the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business, then income from that property is apportionable income even though the actual transaction or activity involving the property that gives rise to the income does not occur in Vermont.

(E) Examples.

Example (i): A manufacturer purchases raw materials to be incorporated into the product it offers for sale. The nature of the raw materials is such that the purchase price is subject to extreme price volatility. In order to protect itself from extreme price increases (or decreases), the manufacturer enters into future contracts pursuant to which the manufacturer can either purchase a set amount of the raw materials for a fixed price, within a specified time period, or resell the future contracts. Any gain on the sale of the future contracts would be considered apportionable income, regardless of whether the contracts were either made or resold in Vermont.

Example (ii): A national retailer produces substantial revenue related to the operation of its trade or business. It invests a large portion of the revenue in fixed income securities which are divided into three categories; (a) short-term securities held pending use of the funds in the taxpayer's trade or business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market, and (c) long- term securities held as an investment. Interest income on the short-term securities held pending use of the funds in the taxpayer's trade or business (a) is apportionable because the funds represent working capital necessary to the operations of the taxpayer's trade or business. Interest income derived from the other investment securities ((b) and (c)) is not apportionable as those securities were not held in furtherance of the taxpayer's trade or business.

(F) If, with respect to an item of property, a taxpayer (i) takes a deduction from income that is apportioned to Vermont or (ii) includes the original cost in the property factor, it is presumed that the item or property is or was related to the operation of the taxpayer's trade or business. No presumption arises from the absence of any of these actions.

(G) Application of the functional test is generally unaffected by the form of the property (*e.g.*, tangible or intangible property, real or personal property). Income arising from an intangible interest, as, for example, corporate stock or other intangible interest in an entity or a group of assets, is apportionable income when the intangible itself or the property underlying or associated with the intangible is or was related to the operation of the taxpayer's trade or business. Thus, while apportionment of income derived from transactions involving intangible property may be supported by a finding that the issuer of the intangible property and the taxpayer are engaged in the same trade or business, *i.e.*, the same unitary business, establishment of such a relationship is not the exclusive basis for concluding that the income is subject to apportionment. It is sufficient to support the finding of apportionable income if the holding of the intangible interest served an operational rather than an investment function.

(9) Relationship of transactional and functional tests to U.S. Constitution. The Due Process Clause and the Commerce Clause of the U.S. Constitution restrict states from apportioning income that has no rational relationship with the taxing state. The protection against extra-territorial state taxation afforded by these Clauses is often described as the "unitary business principle." The unitary business principle requires apportionable income to be derived from the same unitary

business that is being conducted at least in part in Vermont. The unitary business that is conducted in Vermont includes both a unitary business that the taxpayer alone may be conducting and a unitary business the taxpayer may conduct with any other person or persons. Satisfaction of either the transactional test or the functional test complies with the unitary business principle, because each test requires that the transaction or activity (in the case of the transactional test) or the property (in the case of the functional test) be tied to the same trade or business that is being conducted within Vermont. Determination of the scope of the unitary business being conducted in Vermont is without regard to extent to which Vermont requires or permits combined reporting.

(10) Non-apportionable income.
Non-apportionable income means all income other than apportionable income. *See* Section E.

(11) Application of Definitions. The following applies the foregoing principles for purposes of determining whether particular income is apportionable or non-apportionable income. The examples used throughout these regulations are illustrative only and are limited to the facts they contain.

(A) Rents from real and tangible personal property. Rental income from real and tangible property is apportionable income if the property with respect to which the rental income was received is or was used in the taxpayer's trade or business and therefore is includable in the property factor under Section B.

Example (i): The taxpayer operates a multistate car rental business. The income from car rentals is apportionable income.

Example (ii): The taxpayer is engaged in the heavy construction business in which it uses equipment such as cranes, tractors, and earth-moving vehicles. The taxpayer makes short-term leases of the equipment when particular pieces of equipment are not needed on any particular project. The rental income is apportionable income.

Example (iii): The taxpayer operates a multistate chain of men's clothing stores. The taxpayer purchases a five-story office building for use in connection with its trade or business. It uses the street floor as one of its retail stores and the second and third floors for its general corporate headquarters. The remaining two floors are held for future use in the trade or business and are leased to tenants on a short-term basis in the meantime. The rental income is apportionable income.

Example (iv): The taxpayer operates a multistate chain of grocery stores. It purchases as an investment an office building in another state with surplus funds and leases the entire building to others. The net rental income is not apportionable income of the grocery store trade or business. Therefore, the net rental income is non-apportionable income.

Example (v): The taxpayer operates a multistate chain of men's clothing stores. The taxpayer invests in a 20-story office building and uses the street floor as one of its retail stores and the second floor for its general corporate headquarters. The

remaining 18 floors are leased to others. The rental of the eighteen floors is not done in furtherance of but rather is separate from the operation of the taxpayer's trade or business. The net rental income is not apportionable income of the clothing store trade or business. Therefore, the net rental income is non-apportionable income.

Example (vi): The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later the plant was closed and put up for sale. The plant was rented for a temporary period from the time it was closed by the taxpayer until it was sold 18 months later. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(B) Gains or losses from sales of assets. Gain or loss from the sale, exchange or other disposition of real property or of tangible or intangible personal property constitutes apportionable income if the property while owned by the taxpayer was related to the operation of the taxpayer's trade or business, or was otherwise properly included in the property factor of the taxpayer's trade or business.

Example (i): In conducting its multistate manufacturing business, the taxpayer systematically replaces automobiles, machines, and other equipment used in the trade or business. The gains or losses resulting from those sales constitute apportionable income.

Example (ii): The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later sold the property at a gain while it was in operation by the taxpayer. The gain is apportionable income.

Example (iii): Same as (ii) except that the plant was closed and put up for sale but was not in fact sold until a buyer was found 18 months later. The gain is apportionable income.

Example (iv): Same as (ii) except that the plant was rented while being held for sale. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(C) Interest. Interest income is apportionable income where the intangible with respect to which the interest was received arose out of or was created in the regular course of the taxpayer's trade or business, or the purpose of acquiring and holding the intangible is related to the operation of the taxpayer's trade or business.

Example (i): The taxpayer operates a multistate chain of department stores, selling for cash and on credit. Service charges, interest, or time-price differentials and the like are received with respect to installment sales and revolving charge accounts. These amounts are apportionable income.

Example (ii): The taxpayer conducts a multistate manufacturing business. During the year the taxpayer receives a federal income tax refund pertaining to the taxpayer's

trade or business and collects a judgment against a debtor of the business. Both the tax refund and the judgment bear interest. The interest income is apportionable income.

Example (iii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, rain and storm damage, machinery replacement, etc. The funds in those accounts earned interest. Similarly, the taxpayer temporarily invests funds intended for payment of federal, state and local tax obligations pertaining to the taxpayer's trade or business. The interest income is apportionable income.

Example (iv): The taxpayer is engaged in a multistate money order and traveler's check business. In addition to the fees received in connection with the sale of the money orders and traveler's checks, the taxpayer earns interest income by the investment of the funds pending their redemption. The interest income is apportionable income.

Example (v): The taxpayer is engaged in a multistate manufacturing and selling business. The taxpayer usually has working capital and extra cash totaling $200,000 which it regularly invests in short-term interest bearing securities. The interest income is apportionable income.

Example (vi): In January, the taxpayer sold all of the stock of a subsidiary for $20,000,000. The funds are placed in an interest-bearing account pending a decision by management as to how the funds are to be utilized. The funds are not pledged for use in the business. The interest income for the entire period between the receipt of the funds and their subsequent utilization or distribution to shareholders is non-apportionable income.

(D) Dividends. Dividends are apportionable income where the stock with respect to which the dividends was received arose out of or was acquired in the regular course of the taxpayer's trade or business or where the acquiring and holding the stock is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

Example (i): The taxpayer operates a multistate chain of stock brokerage houses. During the year, the taxpayer receives dividends on stock that it owns. The dividends are apportionable income.

Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are apportionable income.

Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business consists solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing trade or business. The dividends are apportionable income.

Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are apportionable income.

Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are apportionable income.

Example (vi): The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are non-apportionable income.

(E) Patent and copyright royalties. Patent and copyright royalties are apportionable income where the patent or copyright with respect to which the royalties were received arose out of or was created in the regular course of the taxpayer's trade or business or where the acquiring and holding the patent or copyright is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

Example (i): The taxpayer is engaged in the multistate business of manufacturing and selling industrial chemicals. In connection with that business, the taxpayer obtained patents on certain of its products. The taxpayer licensed the production of the chemicals in foreign countries, in return for which the taxpayer receives royalties. The royalties received by the taxpayer are apportionable income.

Example (ii): The taxpayer is engaged in the music publishing trade or business and holds copyrights on numerous songs. The taxpayer acquires the assets of a smaller publishing company, including music copyrights. These acquired copyrights are thereafter used by the taxpayer in its trade or business. Any royalties received on these copyrights are apportionable income.

(12) Proration of Deductions. In most cases, an allowable deduction of a taxpayer will be applicable to only the apportionable income arising from a particular trade or business or to a

particular item of non-apportionable income. In some cases, an allowable deduction may be applicable to the apportionable incomes of more than one trade or business and to items of non-apportionable income. In such cases, the deduction shall be prorated among those trades or businesses and those items of non-apportionable income in a manner which fairly distributes the deduction among the classes of income to which it is applicable.

(A) Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(13) Definitions.

(1) "Taxpayer" means a person obligated to file a return with or pay or remit any amount to this State under 32 VSA §5811(17).

(2) "Apportionment" refers to the division of apportionable income between states by the use of a formula containing apportionment factors.

(3) "Allocation" refers to the assignment of non-apportionable income to a particular state.

(4) "Business activity" refers to the transactions and activities occurring in the regular course of a particular trade or business of a taxpayer and includes the acquisition, employment, development, management, or disposition of property that is or was related to the operation of the taxpayer's trade or business.

(5) "Gross receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction which produces apportionable income in which the income or loss is recognized under the Internal Revenue Code, and, where the income of foreign entities is included in apportionable income, amounts which would have been recognized under the Internal Revenue Code if the relevant transactions or entities were in the United States. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.

(6) "Receipts" means all gross receipts of the taxpayer that are not allocated under Section E, and that are received from transactions and activity in the regular course of the taxpayer's trade or business. The following are additional rules for determining "receipts" in various situations:

(A) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "receipts" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its

trade or business. Gross receipts for this purpose means gross sales less returns and allowances.

(B) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, "receipts" includes the entire reimbursed cost plus the fee.

(C) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "receipts" includes the gross receipts from the performance of such services, including fees, commissions, and similar items.

(D) In the case of a taxpayer engaged in the sale of equipment used in the taxpayer's trade or business, where the taxpayer disposes of the equipment under a regular replacement program, "receipts" includes the gross receipts from the sale of this equipment. For example, a truck express company that owns a fleet of trucks and sells its trucks under a regular replacement program the gross receipts from the sale of the trucks would be included in "receipts."

(E) In the case of a taxpayer with insubstantial amounts of gross receipts arising from sales in the ordinary course of business, the insubstantial amounts may be excluded from the receipts factor unless their exclusion would materially affect the amount of income apportioned to this state.

(F) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded. Receipts arising from a business activity are receipts from hedging if the primary purpose of engaging in the business activity is to reduce the exposure to risk caused by other business activities. Whether events or transactions not involving cash or securities are hedging transactions shall be determined based on the primary purpose of the taxpayer engaging in the activity giving rise to the receipts, including the acquisition or holding of the underlying asset. Receipts from the holding of cash or securities, or maturity, redemption, sale, exchange, loan or other disposition of cash or securities are excluded from the definition of receipts whether or not those events or transactions are engaged in for the purpose of hedging. The taxpayer's treatment of the receipts as hedging receipts for accounting or federal tax purposes may serve as indicia of the taxpayer's primary purpose, but shall not be determinative.

(G) Receipts, even if apportionable income, are presumed not to include such items as, for example:

1) damages and other amounts received as the result of litigation;
2) property acquired by an agent on behalf of another;
3) tax refunds and other tax benefit recoveries;
4) contributions to capital;
5) income from forgiveness of indebtedness;

6) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code; or
7) Amounts realized as a result of factoring accounts receivable recorded on an accrual basis.

Exclusion of an item from the definition of "receipts" is not determinative of its character as apportionable or non-apportionable income. Certain gross receipts that are "receipts" under the definition are excluded from the "receipts factor" under Section E. Nothing in this definition shall be construed to modify, impair or supersede any provision of Sections F or G.

(7) "Security" means any interest or instrument commonly treated as a security as well as other instruments which are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.

(14) Application of Combined Report. If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in these regulations shall preclude the use of a "combined report" whereby the entire apportionable income of such trade or business is apportioned in accordance with 32 VSA §5833.

(15) Consistency and Uniformity in Reporting: Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the manner in which income has been classified as apportionable income or non-apportionable income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(16) Taxable in Another State: In General. Under 32 VSA §5833 the taxpayer is subject to the allocation and apportionment provisions if it has income from business activity that is taxable both within and without this state. A taxpayer's income from business activity is taxable without this state if the taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of these regulations.

(A) Applicable tests. A taxpayer is taxable within another state if it meets either one of two tests: (1) By reason of business activity in another state, the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or (2) By reason of such business activity, another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(1) A taxpayer is "subject to" one of the taxes specified in 32 VSA §5833(a)(3) if it carries on business activities in a state and the state imposes such a tax thereon. Any taxpayer which asserts that it is subject to one of the taxes specified in 32 VSA §5833(a)(3) in another state shall furnish to Commissioner of this state upon his/her

request evidence to support that assertion. Commissioner of this state may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in 32 VSA §5833(a)(3) in the other state.

Voluntary tax payment. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(a) does not actually engage in business activity in that state, or

(b) does actually engage in some business activity not sufficient for nexus and the minimum tax bears no relationship to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of 32 VSA §5833(a)(3)

Example: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the $50 minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.

(2) The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in 32 VSA §5833(a)(3) which may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in 32 VSA §5833(a)(3) in another state.

Example (i): State A requires all nonresident corporations which qualify or register in State A to pay to the Secretary of State an annual license fee or tax for the privilege of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of $50 and a maximum fee of $500. Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not "taxable" in State A.

Example (ii): Same facts as Example (i) except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is "subject to" the net income tax of State A and is "taxable" in State A.

Example (iii): State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of

(1) outstanding capital stock, and

(2) surplus and undivided profits.

The fee or tax base attributable to State B is determined by a three-factor apportionment formula. Nonresident Corporation X which operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is "taxable" in State B.

Example (iv): State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.

(3) The second test, that of Paragraph A of this Subsection, applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. §§ 381-385. In the case of any "state", other than a state of the United States or political subdivision thereof, the determination of whether the "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that "state." If jurisdiction is otherwise present, that "state" is not considered as being without jurisdiction by reason of the provisions of a treaty between that "state" and the United States.

Example: Corporation X is actively engaged in manufacturing farm equipment in State A and in foreign country B. Both State A and foreign country B impose a net income tax but foreign country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and foreign country B.

(B) **Producing non-apportionable income.** A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in that other state pertaining to the production of non-apportionable income or business activities relating to a separate trade or business.

Section B. Property Factor

(1) The property factor of the apportionment formula for each trade or business of the taxpayer shall include all real and tangible personal property owned or rented by the taxpayer and used during the tax period in the regular course of the trade or business. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property but does not include coin or currency. Property used in connection with the production of non-apportionable income shall be excluded from the property factor. Property used both in the regular course of the taxpayer's trade or business and in the production of non-apportionable income shall be included in the factor only to the extent that the property is used in the regular course of the taxpayer's trade or business. The method of determining that portion of the value to be included in the factor will depend upon the facts of each case.

(2) Property Factor: Valuation of Owned Property.

(A) Property owned by the taxpayer shall be valued at its original cost. As a general rule, "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. However, capitalized intangible drilling and development costs shall be included in the property factor whether or not they have been expensed for either federal or state tax purposes.

Example (i): The taxpayer acquired a factory building in this state at a cost of $500,000 and, 18 months later, expended $100,000 for major remodeling of the building. Taxpayer files its return for the current taxable year on the calendar-year basis. Depreciation deduction in the amount of $22,000 was claimed with respect to the building on the return for the current taxable year. The value of the building includable in the numerator and denominator of the property factor is $600,000; the depreciation deduction is not taken into account in determining the value of the building for purposes of the factor.

Example (ii): During the current taxable year, Corporation X merges into Corporation Y in a tax-free reorganization under the Internal Revenue Code. At the time of the merger, Corporation X owns a factory which X built five years earlier at a cost of $1,000,000. X has been depreciating the factory at the rate of two percent per year, and its basis in X's hands at the time of the merger is $900,000. Since the property is acquired by Y in a transaction in which, under the Internal Revenue Code, its basis in Y's hands is the same as its basis in X's hands, Y includes the property in Y's property factor at X's original cost, without adjustment for depreciation, i.e. $1,000,000.

Example (iii): Corporation Y acquires the assets of Corporation X in a liquidation by which Y is entitled to use its stock cost as the basis of the X assets under Section 334(b)(2) of the 1954 Internal Revenue Code (i.e. stock possessing 80 percent control is purchased and liquidated within two years). Under these circumstances, Y's cost of the assets is the purchase price of the X stock, prorated over the X assets.

If the original cost of property is unascertainable, the property is included in the factor at its fair market value as of the date of acquisition by the taxpayer.

(B) Inventory of stock of goods shall be included in the factor in accordance with the valuation method used for federal income tax purposes.

(C) Property acquired by gift or inheritance shall be included in the factor at its basis for determining depreciation for federal income tax purposes.

(3) The property factor is a fraction, the numerator of which is the average value of all real and tangible property within this state based on original cost at the beginning of the taxable year and at the end of the taxable year; and the denominator of which is the average value of property based on original cost both within and without the state at the beginning and at the end of the taxable year. The numerator of the property factor shall include the average value of the real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer.

(4) Tangible personal property is within Vermont if, and so long as, it is physically situated or located here. Property of the taxpayer held in Vermont by an agent, consignee or factor is (and property held outside Vermont by an agent, consignee or factor is not) situated or located within Vermont.

Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by a taxpayer in the denominator of its property factor in accordance with its regular accounting practices shall be included in the numerator according to the state of destination. The value of mobile or movable property such as construction equipment, trucks or leased electronic equipment which are located within and without this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of total time within the state during the tax period. An automobile assigned to a traveling employee shall be included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor or in the numerator of the state in which the automobile is licensed.

(5) Property shall be included in the property factor if it is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor. Property or equipment under construction during the tax period (except inventoriable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of the taxpayer. If the property is partially used in the regular course of the trade or business of the taxpayer while under construction, the value of the property to the extent used shall be included in the property factor. Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event that results in its conversion to the production of non-apportionable income, its sale, or the lapse of

an extended period of time (normally, five years) during which the property is no longer held for use in the trade or business.

Example (i): Taxpayer closed its manufacturing plant in State X and held the property for sale. The property remained vacant until its sale one year later. The value of the manufacturing plant is included in the property factor until the plant is sold.

Example (ii): Same as above except that the property was rented until the plant was sold. The plant is included in the property factor until the plant is sold.

(6) In determining the property factor, real and tangible personal property rented or leased to the taxpayer, as well as real and tangible personal property owned by it must be considered. The value of rented real and tangible personal property both within and without the state is determined by multiplying the gross rent payable during the tax year by eight (8). The net annual rental rate for any item of rented property is the annual rental rate paid by the taxpayer for the property less the aggregate annual subrental rates paid by subtenants of the taxpayer. (See Section G(1) for special rules when the use of such net annual rental rate produces a negative or clearly inaccurate value or when property is used by the taxpayer at no charge or is rented at a nominal rental rate.) Subrents are not deducted when they constitute apportionable income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income. Accordingly there is no reduction in its value.

Example (i): The taxpayer receives subrents from a bakery concession in a food market operated by the taxpayer. Since the subrents are apportionable income, they are not deducted from rent paid by the taxpayer for the food market.

Example (ii): The taxpayer rents a 5-story office building primarily for use in its multistate business, uses three floors for its offices and subleases two floors to various other businesses on a short-term basis because it anticipates it will need those two floors for future expansion of its multistate business. The rental of all five floors is related to the operation of the taxpayer's trade or business. Since the subrents are apportionable income, they are not deducted from the rent paid by the taxpayer.

Example (iii): The taxpayer rents a 20-story office building and uses the lower two stories for its general corporation headquarters. The remaining 18 floors are subleased to others. The rental of the eighteen floors is not incidental to but rather is separate from the operation of the taxpayer's trade or business. Since the subrents are non-apportionable income they are not included in the taxpayer's property factor.

(7)"Annual Rent" as used in this rule, is the actual sum of money payable or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes:

(A) Any amount payable for the use or possession of real or personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

Example: A taxpayer, pursuant to the terms of a lease, pays the lessor $1,000.00 per month and at the end of the year pays the lessor one percent of its gross sales of $400,000.00. Its gross rent is $16,000.00.

(B) Any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement;

Example (i): A taxpayer, pursuant to the terms of a lease, pays the lessor $24,000.00 per annum and also pays real estate taxes in the amount of $4,000.00 and interest on a mortgage in the amount of $2,000.00 Its gross rent is $30,000.00.

Example (ii): A taxpayer stores *part* of its inventory in a public warehouse. The total charge for the year was $1,000 of which $700 was for the use of storage space and $300 for inventory insurance, handling and shipping charges, and C.O.D. collections. The annual rent is $700.

(C) Any other amount required to be paid by the terms of a lease or other arrangement, including the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year of any improvement to real property made by or on behalf of the business organization which reverts to the owner or lessor upon termination of the lease or other arrangement.

Example (i): A taxpayer enters into a 21-year lease of certain premises at a rental of $20,000.00 per annum and after the expiration of one year installs a new store front at a cost of $10,000.00 which reverts to the owner upon expiration of the lease. Its gross rent for the first year is $20,000.00. However, for subsequent years its gross rent is $20,500.00 ($20,000.00 annual rent plus 1/20th of $10,000.00, the cost of the improvement apportioned on the basis of the unexpired term of the lease).

Example (ii): A taxpayer leases a parcel of vacant land for 40 years at an annual rental of $5,000.00 and erects thereon a building which costs $600,000.00. The value of the land is determined by multiplying the annual rent of $5,000.00 by eight, and the value of the building is determined in the same manner as if owned by the taxpayer.

(D) "Annual Rent" does not include:

(1) Intercompany rents if both the lessor and lessee are taxed on a consolidated basis within the Vermont return.

(2) Amounts payable as separate charges for water and electric service furnished by the lessor.

(3) Amounts payable for storage provided no designated space under the control of the taxpayer as a tenant is rented for storage purposes.

(4) Incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.; and

(5) Royalties based on extraction of natural resources, whether represented by delivery or purchase. For this purpose, a royalty includes any consideration conveyed or credited to a holder of an interest in property which constitutes a sharing of current or future production of natural resources from such property, irrespective of the method of payment or how such consideration may be characterized, whether as a royalty, advance royalty, rental or otherwise.

(E) Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the original cost of leasehold improvements shall be included in the factor.

(8) "Annual rental rate" is the amount paid as rental for property for a 12-month period (i.e., the amount of the annual rent). Where property is rented for less than a 12-month period, the rent paid for the actual period of rental shall constitute the "annual rental rate" for the tax period. However, where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months (due, for example, to a reorganization or change of accounting period), the rent paid for the short tax period shall be annualized. If the rental term is for less than 12 months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

Example (i): Taxpayer A, which *ordinarily* files its returns based on a calendar year, is merged into Taxpayer B on April 30. The net rent paid under a lease with 5 years remaining is $2,500 a month. The rent for the tax period January 1 to April 30 is $10,000. After the rent is annualized the net rent is $30,000 ($2,500 x 12).

Example (ii): Same facts as in *Example (i)* except that the lease would have terminated on August 31. In this case, the annualized rent is $20,000 ($2,500 x 8).

(9) In exceptional cases use of the general method outlined above may result in inaccurate valuations. Accordingly, in such cases, any other method which will properly reflect value may be adopted by the Vermont Department of Taxes, either on its own motion or on request of a taxpayer. Such other method of valuation may not be used by a taxpayer until approved in writing by the Department. Any such request shall set forth full information with respect to the property, together with the basis for the valuation proposed by the taxpayer. Such other method once approved by the Department may be used by the taxpayer in its reports for subsequent years until the facts upon which such other method is based are, in the judgment of the Department, materially changed.

(10) Year to year consistency. In filing returns in Vermont, if the taxpayer departs from or modifies the manner of valuing property or of excluding property from or including property in the property

factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

Section C. Payroll Factor

(1) The payroll factor is a fraction, the numerator of which includes the total compensation paid in Vermont during the tax period and the denominator of which includes the total compensation paid everywhere during the tax period. In addition to "normal" salary and wages, compensation shall include payments to employees for board, rent, housing, lodging, and any other benefits paid in exchange for labor. These amounts will be treated as compensation if they are considered as income under the Internal Revenue Code.

(2) The taxpayer's accounting method will determine the actual amounts that are to be included in the factors. If the taxpayer uses the accrual method of accounting, compensation that has been properly accrued and deductible will be considered to have been paid during the taxable period.

> *Example:* The taxpayer uses some of its employees in the construction of a storage building which, upon completion, is used in the regular course of the taxpayer's trade or business. The wages paid to those employees are treated as a capital expenditure by the taxpayer. The amount of those wages is included in the payroll factor.

(3) For purposes of this regulation, an employee is defined to be any person, including an officer of the corporation, who is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the FICA.

(4) The payroll factor shall include only compensation that is related to the production of apportionable income. Compensation that is related to the operation, maintenance, protection or supervision of non-apportionable income is not included in the payroll factor. To the extent that employee services produce both apportionable and non-apportionable income, proration is allowed.

> *Example:* The taxpayer owns various securities which it holds as an investment separate and apart from its trade or business. The management of the taxpayer's investment portfolio is the only duty of Mr. X, an employee. The salary paid to Mr. X is excluded from the payroll factor.

(5) Compensation will be considered to be paid in Vermont and thus includable in the numerator of the payroll factor if:

> (A) the individuals' services are performed entirely within Vermont;
>
> (B) the individuals' services are performed both within and without Vermont, but the out-of-state services are incidental to the Vermont services. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction;

(C) some of the individuals' services are performed within Vermont and the company's base of operation or the place from where the service is controlled is within Vermont; or

(D) some of the individual's services are performed within Vermont, which is his or her state of residence, and there is no base of operation or place from where the service is controlled in any of the other states where part of the individual's services are performed.

The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points.

Section D. Sales and Receipts Factor

(1) General Principles of Application; Definitions

(A) The sales and receipt factor is a fraction, the numerator of which is the gross receipts of the taxpayer in this state during the taxable year. The numerator of the receipts factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under these regulations. The denominator of the receipts factor shall include the gross receipts of the taxpayer derived by the taxpayer from transactions and activity in the regular course of its trade or business within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts which constitute apportionable income and are includable in the apportionable base for the tax year. Receipts from the following are allocable to Vermont:

(a) sales of tangible personal property in Vermont;
(b) services performed in Vermont;
(c) the rentals, sale, lease, or license of property situated in Vermont;
(d) licenses, leases, and sales of intangible property used in Vermont;
(e) all other apportionable receipts earned in Vermont.

All such receipts of the period covered by the return (computed on the cash or accrual basis, in accordance with the method of accounting used in the computation of the taxpayers "Vermont net income") must be taken into account.

(B) Year to year consistency. In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the receipts factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(C) Exceptions. In some cases certain gross receipts should be disregarded in determining the receipts factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business. See Section G.

(D) Definitions

Terms have the following meaning unless otherwise defined or specified in particular sections.

(1) "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.

(2) "Business customer" means a customer that is a business operating in any form, including a sole proprietorship. Sales to a non-profit organization, to a trust, to the U.S. Government, to a foreign, state or local government, or to an agency or instrumentality of that government are treated as sales to a business customer and must be assigned consistent with the rules for those sales.

(3) "Code" means the Internal Revenue Code as currently written and subsequently amended.

(4) "Individual customer" means a customer that is not a business customer.

(5) "Intangible property" generally means property that is not physical or whose representation by physical means is merely incidental and 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; and, except as otherwise provided, computer software. Receipts from the sale of intangible property may be excluded from the numerator and denominator of the taxpayer's receipts factor pursuant to Section D(1)(G) and 32 V.S.A. §5833(a)(3)(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.

(7) "Population" means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.

(8) "Receipts" means all gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular

course of the taxpayer's trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

(9) "Related party" means:

(1) a stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock;

(2) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; or

(3) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 percent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.

(10) "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 day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

(E) General Principles of Application; Contemporaneous Records.

In order to satisfy the requirements of Section D, a taxpayer's assignment of receipts from sales of other than tangible personal property must be consistent with the following principles:

1. A taxpayer shall apply the rules set forth in Section D 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 shall determine its method of assigning receipts in good faith, and apply it 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 receipts, including its underlying assumptions, and shall provide those records to the Department of Taxes upon request.

2. Section D provides 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 if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.

3. A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the regulatory standards set forth in Section 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.

(F) Rules of Reasonable Approximation.

1. In General. In general, Section D establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Vermont. The regulation also sets forth rules of reasonable approximation, which apply if 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 in Section D. In other cases, the applicable rule in Section 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 Section D.

2. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth in Section D(3)(Sale of a Service), a taxpayer can ascertain the state or states of assignment of a substantial portion of its receipts from sales of substantially similar services ("assigned receipts"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales which it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. 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* Section D(5) and Section D(6).

3. Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this Section D from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

(G) Rules with Respect to Exclusion of Receipts from the Receipts Factor.

1. The receipts factor only includes those amounts defined as receipts under Section D(1)(D)(8) and applicable regulations.

2. Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor. *See* Section D(6)(1)(D).

3. In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Section D (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer's receipts factor.

4. In a case in which a taxpayer can ascertain the state or states to which receipts from a sale are to be assigned pursuant to the applicable rules set forth in Section D, but the taxpayer is not taxable in one or more of those states, the receipts that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded apportioned pursuant to 32 V.S.A. §5833(a)(3)(A) for tangible personal property or apportioned pursuant to 32 V.S.A. §5833(a)(3)(B) for sales other than tangible personal property.

5. Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

(H) Changes in Methodology; Commissioner Review.

1. Nothing in this Regulation is intended to limited the application of 32 V.S.A. §5833(b) or the authority granted to the Commissioner under that Section. If the application of this Regulation results in the attribution of receipts that does not fairly represent the extent of the taxpayer's business activity in Vermont, the taxpayer may petition for or the Commissioner may require the use of a different method for attributing those receipts.

2. 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 receipts using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in Section 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 those 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 those receipts for the taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

3. Commissioner's Authority to Adjust a Taxpayer's Return. The Commissioner's ability to review and adjust a taxpayer's assignment of receipts on a return to more accurately assign receipts consistently with the rules or standards of Section D, includes, but is not limited to, each of the following potential actions:

A. In a case in which a taxpayer fails to properly assign receipts from a sale in accordance with the rules set forth in Section D, including the failure to properly apply a hierarchy of rules consistent with the principles of Section D(3), the Commissioner may adjust the assignment of the receipts in accordance with the applicable rules in Section D.

B. In a case in which a taxpayer uses a method of approximation to assign its receipts 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 receipts from the taxpayer's numerator and denominator, as appropriate.

C. In a 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 a case in which a taxpayer excludes receipts from the denominator of its receipts factor on the theory that the assignment of the receipts cannot be reasonably approximated, the Commissioner may determine that the exclusion of those receipts is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.

E. In a case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, or fails to provide those records to the Commissioner upon request, the Commissioner may treat the taxpayer's assignment of receipts as unsubstantiated, and may adjust the assignment of the receipts in a manner consistent with the applicable rules in Section D.

F. In a case in which the Commissioner concludes that a customer's billing address was selected by the taxpayer for tax avoidance purposes, the Commissioner may adjust the assignment of receipts from sales to that customer in a manner consistent with the applicable rules in Section D.

4. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. A taxpayer that seeks to change its method of assigning its receipts under Section D must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate.

5. Commissioner's Authority to Change a Method of Assignment on a Prospective Basis. The Commissioner may direct a taxpayer to change its method of assigning its receipts 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 the change is appropriate to reflect a more accurate assignment of the taxpayer's receipts within the meaning of Section D, and determines that the change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making the change. In a 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 receipts on those returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

(2) Sales of Tangible Personal Property in Vermont

(A) Gross receipts from sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, who takes possession within this state, regardless of fob point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and:

(1) the purchaser is the United States Government; or
(2) the corporation is not taxable in the state in which the purchaser takes possession.

If a seller in Vermont makes sales of tangible personal property to a purchaser who takes delivery of the property at the seller's shipping dock, the sale is a Vermont sale if the purchaser transports the property to one of its in-state locations. If the purchaser transports the property to one of its out-of-state locations the sale is not a Vermont sale, unless the corporation is not taxable in the state to which the property is transported.

(B) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

Example: The taxpayer, with inventory in State A, sold $100,000 of its products to a purchaser having branch stores in several states, including this state. The order for the purchase was placed by the purchaser's central purchasing department located in State B. $25,000 of the purchase order was shipped directly to purchaser's branch store in this state. The branch store in this state is the purchaser within this state with respect to $25,000 of the taxpayer's sales.

(C) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

Example: The taxpayer makes a sale to a purchaser who maintains a central warehouse in this state at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of the taxpayer's products shipped to the

purchaser's warehouse in this state constitute property delivered or shipped to a purchaser within this state.

(D) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

Example: A taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in this state pursuant to purchaser's instructions. The sale by the taxpayer is in this state.

(E) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.

Example: The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route, the produce is diverted to the purchaser's place of business in this state in which state the taxpayer is subject to tax. The sale by the taxpayer is attributed to this state.

(F) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

Example: The taxpayer has its head office and factory in State A. It maintains a branch office and inventory in this state. Taxpayer's only activity in State B is the solicitation of orders by a resident salesman. All orders by the State B salesman are sent to the branch office in this state for approval and are filled by shipment from the inventory in this state. Since the taxpayer is immune under Public Law 86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to this state, the state from which the merchandise was shipped.

(G) If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(1) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

(2) If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

Example: The taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer is not taxable in State A. Upon direction of the taxpayer, the merchandise was shipped directly to the purchaser by the manufacturer in State B. If the taxpayer is taxable in State B, the sale is in State B. If the taxpayer is not taxable in State B, the sale is in this state.

(3) Compensation for Services.

All amounts received for providing services are apportionable irrespective of whether such services are performed by employees, agents, subcontractors or any other persons.

When receipts from sales of services contribute to the sales factor, the method for calculating receipts shall rely on the principle of market-based sourcing. The receipts from a sale of a service are in Vermont if and to the extent that the service is delivered to a location in Vermont. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. 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 in subsection 1-3 below.

(1) In-Person Services.

(A) In General. Except as otherwise provided in this Subsection 1, 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, 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 similar services as described in Subsection 3, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this Subsection 1.

(B) Assignment of Receipts. Rule of Determination. Except as otherwise provided in this Subsection B, if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Vermont if and to the extent the customer receives the in-person service in Vermont. In assigning its receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received, as follows:

a. If the service is performed with respect to the body of an individual customer in Vermont (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Vermont (e.g. live entertainment or athletic performances), the service is received in Vermont.

b. If the service is performed with respect to the customer's real estate in Vermont or if 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 Vermont, the service is received in Vermont.

c. If 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 within or outside Vermont, the service is received in Vermont if the property is shipped or delivered to the customer in Vermont.

(C) Rule of Reasonable Approximation. In an 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. If the state to which the receipts are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to the state are excluded from the denominator of the taxpayer's receipts factor pursuant to 32 V.S.A. §5833(a)(3)(D).

(D) Examples.

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement that the receipts from the sale or sales be eliminated from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D). 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 (i). Salon Corp has retail locations in Vermont 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 receipts from sales of services provided at Salon Corp's in-state locations are in Vermont. The receipts from sales of services provided at Salon Corp's locations outside Vermont, even when provided to residents of Vermont, are not receipts from in-state sales.

Example (ii). Landscape Corp provides landscaping and gardening services in Vermont and in neighboring states. Landscape Corp provides landscaping services at the in-state vacation home of an individual who is a resident of another state and who is located outside Vermont at the time the services are performed. The receipts from sale of services provided at the in-state location are in Vermont.

Example (iii). Same facts as in Example (ii), 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 those locations of Retail Corp that are in

Vermont and in other states. The receipts from the sale of services provided to Retail Corp are in Vermont to the extent the services are provided in Vermont.

Example (iv). Camera Corp provides camera repair services at an in-state retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its in-state location at a facility that is in another state. In these cases, the repaired camera is then returned to the customer at Camera Corp's in-state location. The receipts from sale of these services are in Vermont.

Example (v). Same facts as in Example (iv), except that a customer located in Vermont mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Vermont by mail. The receipts from sale of the service are in Vermont.

Example (vi). Teaching Corp provides seminars in Vermont 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 Vermont the receipts from sales of the services are in Vermont.

(2) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

(A) In General. If the service provided by the taxpayer is not an in-person service within the meaning of Section D(3)(1)(A) or a professional service within the meaning of Section D(3)(3), and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in Vermont if and to the extent that the service is delivered in Vermont. For purposes of this section, a service that is delivered "to" a customer is a service in which the customer and not a third party is the recipient of the service. A service that is delivered "on behalf of" a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services, or the direct or indirect delivery of advertising to the customer's intended audience (see Section D(3)(2)(B)(3) and Example (iv) under Section D(3)(2)(B)(1)(c). A service can be delivered to or on behalf of a customer by physical means or through electronic transmission. A service that is delivered electronically "through" a customer is a service that is 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.

(B) Assignment of Receipts. The assignment of receipts to a state or states in the instance of a sale 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, a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this section 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. If the state to which the receipts from a sale are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D).

1. 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 corporate taxation) where the taxpayer installs the custom software at the customer's site. The rules in this section apply whether the taxpayer's customer is an individual customer or a business customer.

a. Rule of Determination. In assigning the receipts from a 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 the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.

b. Rule of Reasonable Approximation. If 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 the state or states.

c. Examples:

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor.

Example (i). Direct Mail Corp, a corporation based outside Vermont, provides direct mail services to its customer, Business Corp. Business Corp contracts 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 Vermont 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 receipts from the sale of Direct Mail Corp's services to Business Corp are assigned to Vermont to the extent that the services are delivered on behalf of Business Corp to Vermont customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Vermont).

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

Example (iii). Same facts as example (ii), except that the contract is with a business customer that is based outside Vermont. The receipts from the sale of the design services are in Vermont because the services are physically delivered on behalf of the customer to the customer's intended audience in Vermont.

Example (iv). Fulfillment Corp, a corporation based outside Vermont, provides product delivery fulfillment services in Vermont and in neighboring states to Sales Corp, a corporation located outside Vermont 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 Vermont, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Vermont. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to Vermont to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Vermont.

Example (v). Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in Vermont, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside Vermont, and then physically installs the software on Buyer Corp's computer hardware located in Vermont. The development and sale of the custom software is properly

characterized as a service transaction, and the receipts from the sale are assigned to Vermont because the software is physically delivered to the customer in Vermont.

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

2. 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.

a. Services Delivered By Electronic Transmission to an Individual Customer.

i. Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.

ii. Rules 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 the state or states. If 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 reasonably approximate the state or states using the customer's billing address.

b. Services Delivered By Electronic Transmission to a Business Customer.

i. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this section, 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.

ii. 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 the state or states.

iii. Secondary Rule of Reasonable 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, the taxpayer shall reasonably approximate the state or states as set forth in this regulation. In these cases, unless the taxpayer can apply the safe harbor set forth below, the taxpayer shall reasonably approximate the state or states in which the service is received as follows: first, by assigning the receipts from 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 receipts from 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 receipts from the sale using the customer's billing address; provided, however, if the taxpayer derives more than 5% of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

iv. 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 Subsection ii, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated in Subsection iii, apply the safe harbor stated in this Subsection. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of services delivered by electronic transmission to a business customer, and not otherwise.

v. Related Party Transactions. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in Subsection iii but may use the rule of reasonable approximation in Subsection ii, and the safe harbor in Subsection iv, provided that the Commissioner may aggregate sales to related parties in determining whether the sales exceed 5% of receipts

from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

c. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is not related to either the customer to which the service is delivered. Also, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. Further, assume if relevant, unless otherwise stated, that the safe harbor set forth in Subsection iv does not apply.

Example (i). Support Corp, a corporation that is based outside Vermont, 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 Vermont 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 receipts to these locations. The receipts from sales made to Support Corp's individual and business customers are in Vermont to the extent that Support Corp's services are received in Vermont.

Example (ii). Online Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to individual customers who are resident in Vermont 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 receipts from the sale of services, Online Corp can either determine the state or states where the services are received, or, where it cannot determine the state or states, it has sufficient information regarding the place of receipt to reasonably approximate the state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of the sales of its services. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the receipts from 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 Vermont the receipts from sales for which it does not know the customers' location in the same proportion as those receipts for which it has this information. *See* Section D(3)(2)((B)(2)(a)(ii).

Example (iii). Same facts as in Example (ii), except that Online Corp reasonably believes that the geographic distribution of the receipts from 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 receipts from sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. *See* Section D(3)(1)(2)(B)(2)a.

Example (iv). Same facts as in Example (iii), except that Online Corp is not taxable in one state to which some of its receipts from sales would be otherwise assigned. The receipts that would be otherwise assigned to that state are to be excluded from the denominator of Online Corp's receipts factor. *See* Section D(3)(1)(B).

Example (v). Net Corp, a corporation based outside Vermont, provides web-based services to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Vermont 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 this case, 75% of the receipts from the sale are received in Vermont. *See* Section D(3)(2)(B)(2)(b)(i). 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 the location or locations. Under these circumstances, if Net Corp derives 5% or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under Section D(3)(2)(B)(2)(b)(iii) 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 sales of services to 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 (vi). Net Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to more than 250 individual and business customers in Vermont 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 the state or states. Also assume that Net Corp does not derive more than 5% of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv) and may assign its receipts using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is 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.

a. 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 Vermont if and to the extent that the end users or other third-party recipients are in Vermont. 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 Vermont to the extent that the audience for the advertising is in Vermont. 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 Vermont to the extent that the end users or other third-party recipients receive the services in Vermont. The rules in this Subsection 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.

b. 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 the state or states.

c. Select Secondary Rules of Reasonable Approximation.

i. If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably 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 that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably 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 that area.

ii. If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that 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 that location, the taxpayer shall reasonably 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 the services, relative to the total population in that area.

iii. When using the secondary reasonable approximation methods provided above, the relevant specific geographic area of delivery includes only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

d. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor.

Example (i). Cable TV Corp, a corporation that is based outside of Vermont, 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 Vermont. Second, Cable TV Corp sells monthly subscriptions to individual customers in Vermont and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Vermont. *See* Section D(3)(2)(B)(2)(a)(i). 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 the location, Cable TV Corp must approximate its Vermont audience using the percentage that reflects the ratio of its Vermont subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. *See* Section D(3)(2)(B)(3)(c)(i). To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to Vermont in any case in which the programming is received by a customer in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to Vermont where its customer's billing address is in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 receipts are properly assigned. *See* Section D(5)(E).

Example (ii). Network Corp, a corporation that is based outside of Vermont, 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. The receipts from Network Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Vermont. *See* Section D(3)(2)(B)(3)(a). 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 the location, Network Corp must approximate the receipts from sales of advertising that constitute Vermont sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(ii) and (iii). In any case in which Network Corp's receipts would be assigned to a state in which Network Corp is not taxable, the receipts must be excluded from the denominator of Network Corp's receipts factor.

Example (iii). Web Corp, a corporation that is based outside Vermont, provides Internet content to viewers in Vermont 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. The receipts from Web Corp's sale of advertising space to its business customers are assigned to Vermont to the extent that the viewers of the Internet content are in Vermont, as measured by viewings or clicks. *See* Section D(3)(2)(B)(3)(a). 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 the location, Web Corp must approximate the amount of its Vermont receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the Vermont population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c). In any case in which Web Corp's receipts would be assigned to a state in which Web Corp is not taxable, those receipts must be excluded from the denominator of Web Corp's receipts factor.

Example (iv). Retail Corp, a corporation that is based outside of Vermont, sells tangible property through its retail stores located in Vermont and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp, and must assign the proceeds from this service to the state or states from which the phone calls are placed by the customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate the locations, Answer Co must approximate the amount of its Vermont receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Vermont population in the specific geographic area from which the calls are placed relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(ii). Answer Co's receipts must also be excluded from the denominator of its receipts factor in any case in which the receipts would be assigned to a state in which Answer Co is not taxable.

Example (v). Web Corp, a corporation that is based outside of Vermont, sells tangible property to customers via its Internet website. Design Co. designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co.'s services are delivered to Web Corp, the proceeds from which are assigned pursuant to Section D(3)(2)(B). The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co.'s services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

Example (vi). Wholesale Corp, a corporation that is based outside Vermont, develops an Internet-based information database outside Vermont 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, but for purposes of analysis it does not matter. *See* Section D(5)E. 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 receipts from 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 the location, Wholesale Corp must approximate the extent to which its services are received by end users in Vermont by using a percentage that reflects the ratio of the Vermont population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(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* Section D(5)(E). In any case in which Wholesale Corp's receipts would be assigned to a state in which Wholesale Corp is not taxable, the receipts must be excluded from the denominator of Wholesale Corp's receipts factor.

(3) Professional Services.

(A) In General.

Except as otherwise provided in this Section, professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. These services include the performance of technical services that require the application of specialized knowledge. 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 services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

(B) Overlap with Other Categories of Services.

1. Certain services that fall within the definition of "professional services" set forth in this Section are nevertheless treated as "in-person services" within the meaning of Section D(3)(1), and are assigned under the rules of that subsection. Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services or child care services, where the customer or the customer's real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are "in-person services" and are assigned as such, notwithstanding that they may also be considered to be "professional services." However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial and consulting services, are assigned as professional services under the rules of this Section D(3)(3), notwithstanding the fact that these services may involve some amount of in-person contact.

2. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient

may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment rules that apply are those for professional services, and not those pertaining to services delivered to a customer or through or on behalf of a customer.

(C) Assignment of Receipts.

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, the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from 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 receipts from a sale of a professional service, a taxpayer's customer is the person that contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer's services. In any instance in which the taxpayer is not taxable in the state to which receipts from a sale is assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor.

1. General Rule. Receipts from sales of professional services other than those services described in Subsection 2 (architectural and engineering services), Subsection 3 (transactions with related parties) are assigned in accordance with this general rule.

a. Professional Services Delivered to Individual Customers. Except as otherwise provided, 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 must be reasonably approximated as set forth in this paragraph. In particular, the taxpayer shall assign the receipts from a 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 receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.

b. Professional Services Delivered to Business Customers. Except as otherwise provided in Section D(3), 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 must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth in the next paragraph, taxpayer shall assign the receipts from 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 the place of customer management is not

reasonably determinable, to the customer's place of order; and third, if the 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 receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

c. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in Subsections a and b above, a taxpayer may assign its receipts from 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 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of Section D(3)(3)C)(1) and not otherwise.

2. 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 Section D(3). However, unlike in the case of the general rule that applies to professional services, (1) the receipts from a sale of an architectural service are 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 the state or states; and (2) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the 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 paragraph, the receipts from a sale of these services must be assigned under the general rule for professional services. *See* Section D(3)(C)(1).

3. Related Party Transactions. In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers, the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or (2) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states. The taxpayer may use the safe harbor provided by provided that the Commissioner may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

4. Examples:

Unless otherwise stated, assume in each of these examples, where relevant, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in the examples that the receipts must be excluded from the denominator of the taxpayer's receipts factor. Assume also that the customer is not a related party and that the safe harbor set forth at Subsection D(3)(3)(C)(1)(c) does not apply.

Example (i). Broker Corp provides securities brokerage services to individual customers who are resident in Vermont 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 receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. *See* Section D(3)(3)(C)(1)(a).

Example (ii). Same facts as in Example (i), except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives 5% or less of its receipts from sales of all services must be assigned as described in example 1. For each customer from whom it derives more than 5% of its receipts from sales of all 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 Vermont, receipts from a sale made to that customer must be assigned to Vermont; in any case in which a 5% customer's state of primary residence is not Vermont receipts from a sale made to that customer are not assigned to Vermont. Where receipts from a sale are assigned to a state other than Vermont, 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 must be excluded from the denominator of Broker Corp's receipts factor.

Example (iii). Architecture Corp provides building design services as to buildings located, or expected to be located, in Vermont to individual customers who are resident in Vermont and other states, and to business customers that are based in Vermont and other states. The receipts from Architecture Corp's sales are assigned to Vermont because the locations of the buildings to which its design services relate are in Vermont, or are expected to be in Vermont. For purposes of assigning these receipts, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for the 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 the services. Further, these receipts are assigned to Vermont even if Architecture Corp's designs are either physically

delivered to its customer in paper form in a state other than Vermont or are electronically delivered to its customer in a state other than Vermont. *See* Section D(3)(3)(B)(2) and (C)(2).

Example (iv). Law Corp provides legal services to individual clients who are resident in Vermont 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 receipts from sales of all services from any one individual client. If Law Corp knows its client's state of primary residence, it shall assign the receipts to that state. If Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the receipts 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.

Example (v). Same facts as in Example (iv), 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 are excluded from the denominator of Law Corp's receipts factor even if the billing address of one or more of these clients is in a state in which Law Corp is taxable, including Vermont.

Example (vi). 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 Vermont; in the other cases, the agreement is principally managed in a state other than Vermont. If the agreement for legal services is principally managed by the client in Vermont the receipts from sale of the services are assigned to Vermont; in the other cases, the receipts are not assigned to Vermont. In the case of receipts that are assigned to Vermont, the receipts are 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.

Example (vii). Same facts as in example 6, except that Law Corp is not taxable in one of the states other than Vermont 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 are excluded from the denominator of Law Corp's receipts factor.

Example (viii). 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 Vermont, the receipts from the sale of Consulting Corp's services are assigned to Vermont. 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* Section D(3)(3)(C)(1)(b).

Example (ix). Bank Corp provides financial custodial services to 100 individual customers who are resident in Vermont 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 receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in Section D(3)(3)(C)(1)(c). If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to Vermont 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 Vermont, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Vermont. *See* Section D(3)(3)(C)(1)(a).

Example (x). Same facts as Example (ix), except that Bank Corp has more than 250 customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in D(3)(3)(C)(1)(c), and may assign its receipts from sales to a state or states using each customer's billing address.

Example (xi). Same facts as Example (x), except that Bank Corp derives more than 5% of its receipts from 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* D(3)(3)(C)(1)(a) and (C)(3). Receipts from sales to all other customers are assigned as described in Example (x).

Example (xii). Advisor Corp, a corporation that provides investment advisory services, provides these 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 Vermont. Assuming that Advisor Corp knows that its agreement with

Investment Co is principally managed by Investment Co in Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. 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* D(3)(3)(C)(1)(b).

Example (xiii). 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 Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. *See* D(3)(3)(C)(1)(b). Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example (xiv). Design Corp is a corporation based outside Vermont that provides graphic design and similar services in Vermont and in neighboring states. Design Corp enters into a contract at a location outside Vermont 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 receipts from sales of services from the individual customer. All of the design work is performed outside Vermont. Receipts from the sale are in Vermont if the customer's billing address is in Vermont. *See* D(3)(3)(C)(1)(a).

(4) Rent, Lease, or License of Tangible Personal Property and Real Property, and Sales of Real Property

Receipts from the rental, lease, or license of real or tangible personal property situated in Vermont are apportionable to Vermont.

In the case of a sale of real property, the receipts from the sale are in Vermont if and to the extent that the property is in Vermont.

In the case of a rental, lease or license of tangible personal property, the receipts from the sale are in Vermont if and to the extent that the property is in Vermont. If property is mobile property that is located both within and without Vermont during the period of the lease or other contract, the receipts assigned to Vermont are the receipts from the contract period multiplied by the fraction computed under Section B(4) (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).

Receipts from the rental, lease, or license of real or tangible personal property include all amounts received directly or indirectly by the taxpayer for use of or occupancy of property, whether or not such property is owned by the taxpayers.

(5) License or Lease of Intangible Property

A. General Rules.

1. The receipts from the license of intangible property are in Vermont if and to the extent the intangible is used in Vermont. In general, the term "use" is 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. 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 in Section D(5)(A)(2)-(5). For purposes of the rules set forth in this Section 5, a lease of intangible property is to be treated the same as a license of intangible property.

2. In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of this regulation. *See* D(6). Note, however, that for purposes of Section D(5) and (6), a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.

3. Intangible property licensed as part of the sale or lease of tangible property is treated as the sale or lease of tangible property under this regulation.

4. 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 are excluded from the denominator of the taxpayer's receipts factor. *See* 32 V.S.A. §5833(a)(3)(D).

5. Nothing in this Section D(5) shall be construed to allow or require inclusion of receipts in the receipts factor that are not included in the definition of "receipts" pursuant to Section D(1)(A)(8) or that are excluded from the numerator and the denominator of the receipts factor. To the extent that the transfer of either a security, 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 receipts 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) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Vermont to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Vermont. 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 Vermont, it shall assign that amount or proportion to Vermont.

In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Vermont consumers, the portion of the licensing fee to be assigned to Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont 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 that area. If 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 Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

C. License of a Production Intangible.

If 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 that right are assigned to Vermont to the extent that the use for which the fees are paid takes place in Vermont. 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 that process. In the case of a license of a production intangible to a party other than a related party where the location of actual use is unknown, it is 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). If 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 Vermont, it is presumed that the entire use is in this state except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Vermont. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.

D. License of a Mixed Intangible.

If 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 that separate statement for purposes of Section D. If 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 is 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.

1. 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 these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in Section D(3)(2)(B)(2) and (3), 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 Subsection 5 include, without limitation, the license of database access, the license of access to information, the license of digital goods (*see* Section D(7)(2)), 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* Section D(7)(1).

2. Sublicenses.

Pursuant to Section D(5)(1)(A), the rules of Section D(3)(2)(B)(3) 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 Section D(3)(2)(B)(3) 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. For this purpose, 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 that 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 that property is bundled with additional services or items of property.

3. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. Also assume that the customer is not a related party.

> *Example (i).* 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 Vermont. 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 Vermont are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Vermont stores relative to Dealer Co's total receipts. *See* Section D(5)(B).

Example (ii). Program Corp, a corporation that is based outside Vermont, 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 Vermont 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 Vermont, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Vermont receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Vermont audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. *See* Section D(5)(E). If Program Corp is not taxable in any state in which the licensee's audience is located, the receipts are excluded from the denominator of Program Corp's receipts factor. Note that the analysis and result as to the state or states to which receipts 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* Section D(5)(E).

Example (iii). 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 Vermont receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Vermont population in the specific geographic region relative to the total population in that region. *See* Section D(5)(E). If Moniker Corp is able to reasonably establish that the marketing intangible was materially used throughout a foreign country, then the population of that country will be included in the population ratio calculation. However, if Moniker Corp is unable to reasonably establish that the marketing intangible was materially used in the foreign country in areas outside a particular

major city; then none of the foreign country's population beyond the population of the major city is include in the population ratio calculation. If Moniker Corp is not taxable in any state (including a foreign country) in which Wholesale Co's ultimate consumers are located, the receipts that would be assigned to that state are excluded from the denominator of Moniker Corp's receipts factor.

Example (iv). 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 Vermont 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 Vermont, the royalty is assigned based to the location of that use rather than to location of the licensee's commercial domicile, in accordance with Section D(5)(A). It is presumed that the entire use is in Vermont except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Vermont. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Vermont using the patent relative to the manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Vermont receipts. *See* Section D(5)(E).

Example (v). 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 the 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 Vermont. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co.'s receipts that are derived from Vermont customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Vermont 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 Vermont receipts. *See* Section D(5)(B),(D).

Example (vi). 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 Vermont, and (2) assign 25% of the licensing fee paid for the marketing intangible to Vermont. *See* Section D(5)(D).

Example (vii). Better Burger Corp, which is based outside Vermont, enters into franchise contracts with franchisees that agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Vermont. 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 Vermont franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Vermont receipts because the franchises are for the right to make Vermont sales. The monthly franchise fees paid by Vermont 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 Vermont receipts because in each case the use of the intangibles is to take place in Vermont. *See* Section D(5)(B),(C). The fees paid for the personal services are to be assigned pursuant to Section D(3).

Example (viii). Online Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to individual customers that are resident in Vermont 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 are assigned in accordance with Section D(5)(E). If Online Corp can determine or reasonably approximate the state or states where its database is accessed, 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 receipts 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 receipts from sales made to its individual customers are in Vermont in any case in which the customer's billing address is in Vermont. *See* Section D(3)(1)(B).

Example (ix). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with Section 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 Vermont, and 25% of Business Corp's database access took place in other states. In that case, 75% of the receipts from database access is in Vermont. Assume alternatively that Net Corp lacks sufficient information regarding the location where its database is accessed to reasonably approximate the 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 receipts 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.

Example (x). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to more than 250 individual and business customers in Vermont and in other states. The license is a license of intangible property that resembles a sale of goods or services and receipts from that license are assigned in accordance with Section D(5)(5). 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 receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv), and may assign its receipts 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 receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

Example (xi). Web Corp, a corporation based outside of Vermont, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in Vermont 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 are assigned by applying the rules set forth in Section D(3)(2)(B)(3). *See* Section D(5)(E). If Web Corp can determine or reasonably approximate the state or states where its database is

accessed by end users, 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 Vermont using a percentage that represents the ratio of the Vermont population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area. *See* Section D(3)(2)(B)(3)(c)(i).

(6) Sale of Intangible Property.

(1) Assignment of Receipts.

The assignment of receipts 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 6, a sale or exchange of intangible property includes a license of that 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* Section D(5)(A).

(A) 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 receipts from the sale are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state the taxpayer shall assign the receipts from the sale to Vermont. If the intangible property is used or is authorized to be used in Vermont and one or more other states, the taxpayer shall assign the receipts from the sale to Vermont to the extent that the intangible property is used in or authorized for use in Vermont, through the means of a reasonable approximation.

(B) 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 are assigned by applying the rules set forth in Section 5 (pertaining to the license or lease of intangible property).

(C) 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 are assigned by applying the rules set forth in Section D(5)(E)(relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in Section D(5)(E).

(D) Excluded Receipts.

Receipts from the sale of intangible property are not included in the receipts factor in any case in which the sale does not give rise to receipts within the meaning of Section D(1)(D)(8). The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's receipts factor under this provision includes, without limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value. Also, in any instance in which, the state to which the receipts from a sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the receipts that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's receipts factor.

(E) Examples.

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which some of its receipts would be assigned, so that there is no requirement in these examples that the receipts to other states must be excluded from the taxpayer's denominator.

Example (i). Airline Corp, a corporation based outside Vermont, sells its rights to use several gates at an airport located in Vermont to Buyer Corp, a corporation that is based outside Vermont. The contract of sale is negotiated and signed outside of Vermont. The receipts from the sale are in Vermont because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Vermont. *See* Section D(6)(1).

Example (ii). Wireless Corp, a corporation based outside Vermont, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Vermont to Buyer Corp, a corporation that is based outside Vermont. The contract of sale is negotiated and signed outside of Vermont. The receipts from the sale are in Vermont because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Vermont. *See* Section D(6)(1)(A).

Example (iii). 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 Vermont and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Vermont. 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* Section D(6)(1)(A).

Example (iv). 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 denominator of Wireless Corp's receipts factor.

Example (v). Sports League Corp, a corporation that is based outside Vermont, 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 Vermont. 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 may be used in Vermont. 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 Vermont and the other states. *See* Section D(6)(1)(A).

Example (vi). 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 denominator of Sports League Corp's receipts factor.

Example (vii). Inventor Corp, a corporation that is based outside Vermont, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Vermont. 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* Section D(6)(1)(A). Inventor Corp understands that Buyer Corp is likely to use the patented technology in Vermont, 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 receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. *See* Section D(6)(1)(D).

(7) Special Rules.

(1) Software Transactions.

A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) 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 these cases, the receipts are in Vermont as determined under the rules for the sale of tangible personal property set forth under Section D(2) and related regulations. In all other cases, the receipts from a license or sale of software are to be assigned to Vermont as determined otherwise under Section D. (e.g., depending on the facts, as the development and sale of custom software, *see* Section

D(5)(B), as a license of a marketing intangible, *see* Section D(5)(B), as a license of a production intangible, *see* Section D(5)(C), as a license of intangible property where the substance of the transaction resembles a sale of goods or services, *see* Section D(5)(E) or as a sale of intangible property, *see* Section D(6).

(2) Sales or Licenses of Digital Goods or Services.

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 are assigned by applying the same rules as are set forth in Section D(3)(2) or (3), 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 Section D(5)(E) and Section D(6)(1)(C).

Section E. Non-apportionable Income

Non-apportionable income will be allocated to the state in which the income producing assets are located. If the income producing asset has no situs, the income will be allocated to the state of commercial domicile, the principal place from which the business is directed or managed.

Section F. Discretionary Adjustment of Vermont Apportionment Percentage

(A). General. Generally the apportionment formula will result in a fair apportionment of the taxpayer's income within and without Vermont. However, due to the nature of certain businesses the formula may not result in an equitable allocation of income. In such cases, the taxpayer may petition for, or the commissioner may require:

(1) Separate accounting;
(2) the exclusion or modification of any one or more of the factors;
(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
(4) the employment of any other method to effectuate an equitable apportionment of the taxpayer's income.

Section G. Special Rules

(1) Special Rules: Property Factor. The following special rules are established in respect to the property factor of the apportionment formula:

(A) If the subrents taken into account in determining the net annual rental rate under Section B(6) produce a negative or clearly inaccurate value for any item of property, another method

which will properly reflect the value of rented property may be required by the Commissioner or requested by the taxpayer.

In no case, however, shall the value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for the property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

Example: The taxpayer rents a 10-story building at an annual rental rate of $1,000,000. Taxpayer occupies two stories and sublets eight stories for $1,000,000 a year. The net annual rental rate of the taxpayer must not be less than two-tenths of the taxpayer's annual rental rate for the entire year, or $200,000.

(B) If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for the property shall be determined on the basis of a reasonable market rental rate for the property.

(2) Special Rules: Trucking Companies.

The following special rules are established with respect to trucking companies:

(A) In General. As used in this regulation, the term "trucking company" means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking company has income from sources both within and without this state, the amount of apportionable income from sources within this state shall be determined pursuant to this regulation. In such cases, the first step is to determine what portion of the trucking company's income constitutes "apportionable" income and what portion constitutes "non-apportionable" income under 32 VSA §5833 and this regulation. Non-apportionable income is directly allocable to specific states pursuant to the provisions of 32 VSA §5833. Apportionable income is apportioned among the states in which the business is conducted and pursuant to the property, payroll, and sales apportionment factors set forth in this regulation. The sum of (i) the items of non-apportionable income directly allocated to this state and (ii) the amount of apportionable income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax in this state.

(B) Apportionable and Non-apportionable Income. For definitions, rules, and examples for determining apportionable and non-apportionable income, see Section A.

(C) Apportionment of Income

(1) In General. The property factor shall be determined in accordance with Section B, the payroll factor in accordance with Section C, and the sales factor in accordance with Section D, inclusive, except as modified by this Special Rule.

(2) The Property Factor

A. Property Valuation. Owned property shall be valued at its original cost and property rented from others shall be valued at eight (8) times the net annual rental rate in accordance with Section B.

B. General Definitions. The following definitions are applicable to the numerator and denominator of the property factor, as well as other apportionment factor descriptions:

1. "Average value" of property means the amount determined by averaging the values at the beginning and end of the income tax year, but the Commissioner may require the averaging of monthly values during the income year or such averaging as is necessary to reflect properly the average value of the trucking company's property. (Section B).

2. "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property.

3. A "mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.

4. "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments, except for subsequent capital additions, improvements thereto, or partial dispositions); or, if the property has no such basis, the valuation of such property for Interstate Commerce Commission purposes. If the original cost of property is unascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer. (*See* Section B(2).)

5. "Property used during the course of the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

6. The "value" of owned real and tangible personal property means its original cost. (*See* Section B(2).)

7. The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate. (*See* Section B(4).)

C. The Denominator and Numerator of the Property Factor. The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year. In the determination of the numerator of the property factor, all property, except mobile property as defined in this regulation, shall be included in the numerator of the property factor in accordance with Section B.

Mobile property, as defined in this regulation, which is located solely within this state during the income year shall be included in the numerator of the property factor.

Mobile property as defined in this regulation, which is located within and without this state during the income year shall be included in the numerator of the property factor in the ratio which mobile property miles in the state bear to the total mobile property miles.

(3) The Payroll Factor. The denominator of the payroll factor is the compensation paid everywhere by the taxpayer during the income year for the production of apportionable income. The numerator of the payroll factor is the total compensation paid in this state during the income year by the taxpayer. With respect to all personnel, except those performing services within and without this state, compensation paid to such employees shall be included in the numerator as provided in Section C.

With respect to personnel performing services within and without this state, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere based on mobile property miles.

(4) The Sales and Receipts Factor

A. In General. All receipts derived from transactions and activities in the regular course of the taxpayer's trade or business which produce apportionable income shall be included in the denominator of the revenue factor. (*See* Section A.)

The numerator of the sales and receipts factor is the total receipts of the taxpayer in this state during the income year. The total state receipts of the taxpayer, other than receipts from hauling freight, mail, and express, shall be attributable to this state in accordance with Section D.

B. Numerator of the Sales and Receipts Factor From Freight, Mail, and Express. The total receipts of the taxpayer attributable to this state during the income year from hauling freight, mail, and express shall be:

1. Intrastate: All receipts from any shipment which both originates and terminates within this state; and,

2. Interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

(D) Records. The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as

those terms are used in this regulation. Such records are subject to review by the Vermont Department of Taxes or its agents.

(E) De Minimis Nexus Standard. Notwithstanding any provision contained herein, this Section G(2) shall not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:

a. owns nor rents any real or personal property in this state, except mobile property; nor

b. makes any pick-ups or deliveries within this state; nor

c. travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the income tax year do not exceed three percent of the total mobile property miles traveled in all states by the trucking company during that period; nor

d. makes more than twelve trips into this state.

(3) Special Rules: Television and Radio Broadcasting

The following special rules are established with respect to the apportionment of income from television and radio broadcasting by a broadcaster that is taxable both in this state and in one or more other states.

(A) In General. When a person in the business of broadcasting film or radio programming, whether through the public airwaves, by cable, direct or indirect satellite transmission or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of apportionable income from sources within this state shall be determined pursuant to 32 VSA §5833 and this Regulation, except as modified by this Special Rule.

(B) Apportionable and Non-apportionable Income. For definitions, regulations and examples for determining whether income shall be classified as "apportionable" or "non-apportionable" income, see Section A.

(C) Definitions. The following definitions are applicable to the terms contained in this regulation, unless the context clearly requires otherwise.

(i) "Film" or "film programming" means any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium.

Each episode of a series of films produced for television shall constitute a separate "film" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(ii) "Outer-jurisdictional" property means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but which are not physically located in any particular state.

(iii) "Radio" or "radio programming" means any and all performances, events or productions broadcast on radio, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of an audio tape, disc or any other format or medium.

Each episode of a series of radio programming produced for radio broadcast shall constitute a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(iv) "Release" or "in release" means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience for which the program was created. Thus, for example, a film is placed in service when it is first publicly telecast for entertainment, educational, commercial, artistic or other purpose. Each episode of a television or radio series is placed in service when it is first broadcast. A program is not placed in service merely because it is completed and therefore in a condition or state of readiness and availability for broadcast or, merely because it is previewed to prospective sponsors or purchasers.

(v) "Rent" shall include license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.

(vi) A "subscriber" to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

(vii) "Telecast" or "broadcast" (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radio waves or microwaves or by wires, lines, coaxial cables, wave guides, fiber optics, satellite transmissions directly or indirectly to viewers and listeners or by any other means of communications.

(D) Apportionment of Income.

(i) In General. The property factor shall be determined in accordance with Section B, the payroll factor in accordance with Section C, and the sales factor in accordance with Section D, except as modified by this Section G(3).

(ii) The Property Factor.

A. In General

1. In the case of rented studios, the net annual rental rate shall include only the amount of the basic or flat rental charge by the studio for the use of a stage or other permanent equipment such as sound recording equipment and the like; except that additional equipment rented from other sources or from the studio not covered in the basic or flat rental charge and used for one week or longer (even though rented on a day-to-day basis) shall be included. Lump-sum net rental payments for a period which encompasses more than a single income year shall be assigned ratably over the rental period.

2. No value or cost attributable to any outer-jurisdictional, film or radio programming property shall be included in the property factor at any time.

B. Property Factor Denominator.

1. All real property and tangible personal property (other than outer-jurisdictional and film or radio programming property), whether owned or rented, which is used in the business shall be included in the denominator of the property factor.

2. Audio or video cassettes, discs or similar medium containing film or radio programming and intended for sale or rental by the taxpayer for home viewing or listening shall be included in the property factor at their original cost. To the extent that the taxpayer licenses or otherwise permits others to manufacture or distribute such cassettes, discs or other medium containing film or radio programming for home viewing or listening, the value of said cassettes, discs or other medium shall include the license, royalty or other fees received by the taxpayer capitalized at a rate of eight times the gross receipts derived therefrom during the income year.

3. Outer-jurisdictional, film and radio programming property shall be excluded from the denominator of the property factor.

C. Property Factor Numerator.

1. With the exception of outer-jurisdictional, film and radio programming property, all real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period shall be included in the numerator of the property factor as provided in Section B.

2. Outer-jurisdictional, film and radio programming property shall be excluded from the numerator of the property factor.

Example: XYZ Television Co. has a total value of all of its property everywhere of $500,000,000, including a satellite valued at $50,000,000 that was used to telecast programming into this state and $150,000,000 in film property of which $1,000,000's worth was located in this state the entire year. The total value of real and tangible personal property, other than film programming property, located in this state for the entire income

year was valued at $2,000,000; and the movable and mobile property described in subparagraph C.1. was determined to be of a value of $4,000,000 and such movable and mobile property was used in this state for 100 days. The total value of property to be attributed to this state would be determined as follows:

Value of property permanently in state: $2,000,000
Value of mobile and movable property: (100/365 or .2739 x $4,000,000): $1,095,600
Total value of property to be included in the state's property factor numerator (outer-jurisdictional and film property excluded): $3,095,600
Total value of property to be used in the denominator ($500,000,000-$200,000,000) $300,000,000
Total property factor ($3,095,600/$300,000,000): .0103

(iii) The Payroll Factor.

A. Payroll Factor Denominator.

The denominator of the payroll factor shall include all compensation, including residual and profit participation payments, paid to employees during the income year, including that paid to directors, actors, newscasters and other talent in their status as employees.

B. Payroll Factor Numerator.

Compensation for all employees shall be attributed to the state or states as may determined by the application of the provisions of Section C.

(iv) The Sales and Receipts Factor.

A. Sales and Receipts Factor Denominator.

The denominator of the sales and receipts factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under these regulations.

B. Sales and Receipts Factor Numerator.

The numerator of the sales and receipts factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to the following:

1. Gross receipts, including advertising revenue, from television film or radio programming in release to or by television and radio stations located in this state.

2. Gross receipts, including advertising revenue, from television film or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter "audience factor") that the audience for such station (or owned and affiliated stations in

the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks).

The audience factor for television or radio programming shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience. Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state.

3. Gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. If the number of subscribers cannot be accurately determined from the books and records maintained by the taxpayer, such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose.

4. Receipts from the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening shall be included in the sales factor as provided in Section D.

(4) Special Rules: Financial Institutions Subject to Net Income Tax

A. The following special rules are established with respect to financial institutions. This section applies to financial institutions as defined in this section not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836 because entities subject to that tax are not subject to tax under 32 V.S.A. § 5832, as described in 32 V.S.A. § 5836(g). However, even financial institutions subject to tax under 32 V.S.A. § 5836(g) must be included in affiliated groups for unitary combined reporting, but the factors of these financial institutions are not included in the Vermont numerator. For purposes of calculating the denominator, these special rules for financial institutions shall be used.

(1) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this Section G(4). All items of nonapportionable income (income which is not includable in the apportionable income tax base) shall be allocated pursuant to the provisions of Section E. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this Section.

(2) All apportionable income (income which is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by Section A of this Regulation.

(3) Each factor shall be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for the taxable year.

(4) If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors,

(c) the inclusion of one or more additional factors which will fairly represent the taxpayers business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

B. Definitions.

As used in this Section G(3) unless the context otherwise requires:

(a) "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year (or on such later date in the taxable year when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) "Borrower or credit card holder located in this state" means:

(1) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or

(2) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state.

(c) "Card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card.

(d) "Commercial domicile" means:

(1) the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(2) if a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States,

such taxpayer's commercial domicile shall be deemed for the purposes of this Section to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It shall be presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year.

(e) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the Federal Internal Revenue Code. In the case of employees not subject to the Federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the Federal Internal Revenue Code shall be made as though such employees were subject to the Federal Internal Revenue Code.

(f) "Credit card" means a card, or other means of providing information, that entitles the holder to charge the cost of purchases, or a cash advance, against a line of credit.

(g) "Debit card" means a card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card.

(h) "Employee" means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(i) "Financial institution" means any taxable corporation described below not subject to the Franchise Tax on Financial Institutions under 32 V.S.A. § 5836:

(1) Any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(2) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§21 et seq.;

(3) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C.§ 1813(b)(1);

(4) Any bank or thrift institution incorporated or organized under the laws of any state;

(5) Any corporation organized under the provisions of 12 U.S.C. §§611 to 631.

(6) Any agency or branch of a foreign depository as defined in 12 U.S.C. §3101;

(7) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;

(8) Any corporation whose voting stock is more than fifty percent (50%) owned, directly or indirectly, by any person or business entity described in subsections (1) through (7) above.

(9) A corporation or other business entity that derives more than fifty percent (50%) of its total gross income for financial accounting purposes from finance leases. For purposes of this subsection, a "finance lease" shall mean any lease transaction which is the functional equivalent of an extension of credit and that transfers substantially all of the benefits and risks incident to the ownership of property. The phrase shall include any "direct financing lease" or "leverage lease" that meets the criteria of Financial Accounting Standards Board Statement No. 13, "Accounting for Leases" or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles.

For this classification to apply,

(a) the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent (50%) requirement; and

(b) gross income from incidental or occasional transactions shall be disregarded; or

(10) Any other person or business entity, other than an insurance company taxed under Title 32, Chapter 211, which derives more than fifty percent (50%) of its gross income from activities that a person described in subsections (1) through (9) above is authorized to transact. For the purpose of this subsection, the computation of gross income shall not include income from non-recurring, extraordinary items.

(11) The Commissioner is authorized to exclude any person from the application of subsection (10) upon such person proving, by clear and convincing evidence, that the income producing activity of such person is not in substantial competition with those persons described in subsections (1) through (9 above.

(j) "Gross rents" means the actual sum of money or other consideration payable for the use or possession of property. "Gross rents" shall include, but not be limited to:

(1) any amount payable for the use or possession of real property or tangible property whether designated as a fixed sum of money or as a percentage of receipts, profits or otherwise,

(2) any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement, and

(3) a proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year. However, where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer.

(4) The following are not included in the term "gross rents":

(A) reasonable amounts payable as separate charges for water and electric service furnished by the lessor;

(B) reasonable amounts payable as service charges for janitorial services furnished by the lessor;

(C) reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and

(D) that portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it.

(k) "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.

(l) "Loan secured by real property" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

(m) "Merchant discount" means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the card holder, net of any cardholder charge-back and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made its cardholder.

(n) "Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all

or a portion of it to other lenders. The participation may or may not be known to the borrower.

(o) "Person" means an individual, estate, trust, partnership, corporation and any other business entity.

(p) "Principal base of operations" with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly (1) starts his or her work and to which he or she customarily returns in order to receive instructions from his or her employer or (2) communicates with his or her customers or other persons, or (3) performs any other functions necessary to the exercise of his or her trade or profession at some other point or points.

(q) "Real property owned" and "tangible personal property owned" mean real and tangible personal property, respectively, (1) on which the taxpayer may claim depreciation for federal income tax purposes, or (2) property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

(r) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(s) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

(t) "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(u) "Taxable" means either:

(1) that a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any tax which is imposed upon or measured by gross or net income; or

(2) that another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not.

(v) "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

C. Sales and Receipts Factor.

(a) General. The sales receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts described herein which constitute business income and are included in the computation of the apportionable income base for the taxable year.

(b) Receipts from the lease of real property. The numerator of the receipts factor includes receipts from the lease or rental of real property owned by the taxpayer if the property is located within this state or receipts from the sublease of real property if the property is located within this state.

(c) Receipts from the lease of tangible personal property.

(1) Except as described in paragraph (2) of this subsection, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(2) Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of receipts that is to be included in the numerator of this state's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(d) Interest, fees and penalties imposed in connection with loans secured by real property.

(1) The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the receipts described in this subsection shall be included in the numerator of the receipts factor if the borrower is located in this state.

(2) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(e) Interest, fees, and penalties imposed in connection with loans not secured by real property. The numerator of the receipts factor includes interest, fees, and penalties imposed in connection with loans not secured by real property if the borrower is located in this state.

(f) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Internal Revenue Code.

(1) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(2) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(g) Receipts from fees, interest, and penalties charged to card holders. The numerator of the receipts factor includes fees, interest and penalties charged to credit, debit or similar card holders, including but not limited to annual fees and overdraft fees, if the billing address of the card holder is in this state.

(h) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(i) Card issuer's reimbursement fees. The numerator of the receipts factor includes:

(1) all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to credit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to credit card holders.

(2) all debit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to debit card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to debit card holders.

(3) all other card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount of fees, interest, and penalties charged to all other card holders included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to all other card holders .

(j) Receipts from merchant discount.

(1) If the taxpayer can readily determine the location of the merchant and if the merchant is in this state, the numerator of the receipts factor includes receipts from merchant discount.

(2) If the taxpayer cannot readily determine the location of the merchant, the numerator of the receipts factor includes such receipts from the merchant discount multiplied by a fraction:

(A) in the case of a merchant discount related to the use of a credit card, the numerator of which is the amount of fees, interest and penalties charged to credit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to credit card holders, and

(B) in the case of a merchant discount related to the use of a debit card, the numerator of which is the amount of fees, interest and penalties charged to debit card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to debit card holders.

(C) in the case of a merchant discount related to the use of all other types of cards, the numerator of which is the amount of fees, interest and penalties charged to all other card holders that is included in the numerator of the receipts factor pursuant to subsection (g) of this section, and the denominator of which is the taxpayer's total amount of fees, interest and penalties charged to all other card holders.

(3) The taxpayer's method for sourcing each receipt from a merchant discount must be consistently applied to such receipt in all states that have adopted sourcing methods substantially similar to subsections (1) and (2) of this section and must be used on all subsequent returns for sourcing receipts from such merchant unless the Commissioner permits or requires application of the alternative method.

(k) Receipts from ATM fees. The receipts factor includes all ATM fees that are not forwarded directly to another bank.

(1) The numerator of the receipts factor includes fees charged to a cardholder for the use at an ATM of a card issued by the taxpayer if the cardholder's billing address is in this state.

(2) The numerator of the receipts factor includes fees charged to a cardholder, other than the taxpayer's cardholder, for the use of such card at an ATM owned or rented by the taxpayer, if the ATM is in this state.

(l) Loan servicing fees.

(1) (A)The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(2) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor shall include such fees if the borrower is located in this state.

(m) Receipts from the financial institution's investment assets and activity and trading assets and activity.

(1) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities that are reported on the taxpayer's financial statements, call reports, or similar reports shall be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in subparagraphs (A) and (B) of this paragraph, the receipts factor shall include the amounts described in such subparagraphs.

(A)The receipts factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor shall include the amount by which interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(2) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities described in paragraph (1) of this subsection that are attributable to this state.

(A)The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D)For purposes of this paragraph, average value shall be determined using the rules for determining the average value of tangible personal property set forth in subsections (c) and (d) of Section 4.

(3) In lieu of using the method set forth in paragraph (2) of this subsection, the taxpayer may elect, or the Commissioner may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this subsection.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase

agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (A) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (A) or (B) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (B) of paragraph (1) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(4) If the taxpayer elects or is required by the Commissioner to use the method set forth in subsection (3), it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the Commissioner to use, or the Commissioner requires a different method.

(5) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-today decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established at the commercial domicile of the taxpayer.

(n) All other receipts. The numerator of the receipts factor includes all other receipts pursuant to the rules set forth in Section D of this Regulation unless inconsistent with the Special Rules For Financial Institutions.

(o) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this section to a state in which the taxpayer is not taxable shall be included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

D. Property Factor.

(a) General. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located or used within this

state during the taxable year and the average value of the taxpayer's real and tangible personal property owned that is located or used within this state during the taxable year, and the denominator of which is the average value of all such property located or used within and without this state during the taxable year.

(b) Property included. The property factor shall include only property the income or expenses of which are included (or would have been included if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of the apportionable income base for the taxable year.

(c) Value of property owned by the taxpayer. The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for Federal income tax purposes without regard to depletion, depreciation or amortization.

(d) Average value of property owned by the taxpayer. The average value of property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable year and the value on the last day of the taxable year and dividing the sum by two. If averaging on this basis does not properly reflect average value, the Commissioner may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the Commissioner or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property within and without this state and on all subsequent returns unless the taxpayer receives prior permission from the Commissioner or the Commissioner requires a different method of determining average value.

(e) Average value of real property and tangible personal property rented to the taxpayer.

(1) The average value of real property and tangible personal property that the taxpayer has rented from another and which is not treated as property owned by the taxpayer for Federal income tax purposes, shall be determined annually by multiplying the gross rents payable during the taxable year by eight.

(2) Where the use of the general method described in this subsection results in inaccurate valuations of rented property, any other method which properly reflects the value may be adopted by the Commissioner or by the taxpayer when approved in writing by the Commissioner. Once approved, such other method of valuation must be used on all subsequent returns unless the taxpayer receives prior approval from the Commissioner or the Commissioner requires a different method of valuation.

(f) Location of real property and tangible personal property owned by or rented to the taxpayer.

(1) Except as described in paragraph (2) of this subsection, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated or used within this state.

(2) Transportation property is included in the numerator of the property factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this

state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

E. Payroll Factor.

(a) General. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both within and without this state during the taxable year. The payroll factor shall include only that compensation which is included in the computation of the apportionable income tax base for the taxable year.

(b) Compensation relating to nonbusiness income and independent contractors. The compensation of any employee for services or activities which are connected with the production of nonbusiness income (income which is not includable in the apportionable income base) and payments made to any independent contractor or any other person not properly classifiable as an employee shall be excluded from both the numerator and denominator of the factor.

(c) When compensation paid in this state. Compensation is paid in this state if any one of the following tests, applied consecutively, is met:

(1) The employee's services are performed entirely within this state.

(2) The employee's services are performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The term "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.

(3) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:

(A)if the employee's principal base of operations is within this state; or

(B) if there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this state; or

(C) if the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed but the employee's residence is in this state.

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 32 : Taxation And Finance

Chapter 103 : Department Of Taxes; Commissioner Of Taxes

Subchapter 002 : Administration

(Cite as: 32 V.S.A. § 3201)

§ 3201. Administration of taxes

(a) Commissioner authority. In the administration of taxes, the Commissioner may:

(1) Adopt, amend, and enforce reasonable rules, orders, and regulations in administering the taxes within the Commissioner's jurisdiction.

(2) Delegate to any officer or employee in the Department powers the Commissioner deems necessary to carry out efficiently the tax provisions within the Commissioner's jurisdiction.

(3) Hold hearings, administer oaths, and examine under oath any person relating to his or her business or relating to any matter within the Commissioner's jurisdiction.

(4) For the purpose of ascertaining the correctness of any return or making a determination of the tax liability of any taxpayer, examine or cause to be examined by any agent or representative designated by him or her for that purpose, any books, papers, records, or memoranda of the taxpayer bearing upon the matters required to be included in any return. The Commissioner or such designated officers may require the attendance of the taxpayer or of any other person having knowledge in the premises, at any place in the county where the taxpayer or person resides or has a place of business, or in Washington County if the taxpayer is a nonresident individual, estate, trust, or is a corporation or business entity not having a place of business in this State, and may take testimony and require proof material and may administer oaths or take acknowledgment in respect of any return or other information required by this title or the rules, regulations, and decisions of the Commissioner. If an individual, estate, trust, corporation, or other business entity fails after request to provide books, records, or memoranda at either its place of business within the State or Washington County, the Commissioner may charge the person a reasonable per diem fee and expenses for the auditor making the examination out of state. The charges shall be payable within 30 days of the date billed and may be collected in the manner provided for the collection of taxes in this title.

(5) Upon making a record of the reasons therefor, waive, reduce, or compromise any of the taxes, penalties, interest, or other charges or fees within his or her jurisdiction.

(6) Determine the form in which returns and reports shall be filed and what shall

constitute a signature on such returns and reports, including those filed in other than paper form, such as electronically or over telephone lines.

(7) Assess, determine, revise, and readjust the taxes imposed in this title.

(8) In cases in which payment of taxes is allowed or required by electronic funds transfer, allow up to six additional days for payment.

(9) Attach property pursuant to section 3207 of this title for payment of an amount collectible by the Commissioner under this title any time after 90 days have run from the end of any applicable administrative appeal period on the underlying tax liability.

(10) Garnish earnings pursuant to section 3208 of this title for payment of an amount collectible by the Commissioner under this title any time after 90 days have run from the end of any applicable administrative appeal period on the underlying tax liability.

(b) Reciprocal enforcement.

(1) At the request of the Commissioner, the Attorney General may bring suit, in the name of this State, in the appropriate court of any other state to collect any tax legally due this State.

(2) The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by any other state which extends a like comity to this State, and the duly authorized officer of that state may sue for the collection of such a tax in the courts of this State. A certificate by the Secretary of State of the other state that an officer suing for collection of such a tax is duly authorized to collect it shall be conclusive proof of this authority.

(3) As used in this section, the words "tax" and "taxes" include interest, fees, and penalties due under any taxing statute, and liability for the interest, fees, and penalties due under a taxing statute of another state shall be recognized and enforced by the courts of this State to the same extent that the laws of the other state permit the enforcement in its courts of liability for the interest, fees, and penalties due under a taxing statute of this State.

(c) Reciprocal tax agreements. The Commissioner may enter into reciprocal agreements with the taxing authorities of other states, territories, provinces of Canada, countries, or the District of Columbia regarding the administration of taxes.

(d) Tax return due dates. When the due date for the filing of a return falls on a federal or State holiday, the due date shall be the next business day after such holiday. A return that is filed by mail shall be accepted as timely filed if:

(1) it is received by the Department within three business days after the due date; or

(2) the taxpayer provides proof satisfactory to the Commissioner that the return was mailed by the due date.

(e) Agreements with certified service providers. The Commissioner may enter into agreements with certified service providers, sellers using certified automated systems, and voluntary sellers for monetary allowances. The tax required to be paid to the shall be net of monetary allowances.

(1) The allowance for a certified service provider shall be funded entirely from money collected by the provider and shall be either a base rate applied to taxable transactions processed by the provider or, for a period not to exceed 24 months following a voluntary seller's registration through the streamlined sales tax agreement central registration process, a percentage of tax revenue generated for the State for which the seller does not have a requirement to register to collect the tax, or both.

(2) The allowance for a seller using a certified automated system shall be for a period not to exceed 24 months following a seller's voluntary registration and may include a base rate applied to taxable transactions and a percentage of tax revenue generated for the State for which the seller does not have a requirement to register to collect the tax.

(3) The allowance for a voluntary seller shall be for a period not to exceed 24 months following a seller's voluntary registration and shall be based on a percentage of tax revenue generated for the State for which the seller does not have a requirement to register to collect the tax. (Added 1991, No. 186 (Adj. Sess.), § 7, eff. May 7, 1992; amended 1993, No. 49, § 2, eff. May 28, 1993; 1995, No. 169 (Adj. Sess.), §§ 1, 2, eff. May 15, 1996; 1999, No. 49, §§ 41, 43, eff. June 2, 1999; 2003, No. 152 (Adj. Sess.), § 21, eff. date, see note below; 2007, No. 81, § 3, eff. July 1, 2008; 2009, No. 160 (Adj. Sess.), § 4, eff. June 4, 2010; 2015, No. 57, § 41; 2019, No. 14, § 76, eff. April 30, 2019.)

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 32 : Taxation And Finance

Chapter 151 : Income Taxes

Subchapter 003 : Taxation Of Corporations

(Cite as: 32 V.S.A. § 5833)

§ 5833. Allocation and apportionment of income

(a) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this State, the Vermont net income of the corporation shall be allocated to this State in full. If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and outside this State, the amount of the corporation's Vermont net income that shall be apportioned to this State, so as to allocate to this State a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors, with the sales factor described in subdivision (3) of this subsection double-weighted:

(1) The average of the value of all the real and tangible property within this State (A) at the beginning of the taxable year and (B) at the end of the taxable year (but the Commissioner may require the use of the average of such value on the 15th or other day of each month, in cases where he or she determines that such computation is necessary to more accurately reflect the average value of property within Vermont during the taxable year), expressed as a percentage of all such property both within and outside this State;

(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this State, expressed as a percentage of all such compensation paid whether within or outside this State;

(3) The gross sales, or charges for services performed, within this State, expressed as a percentage of such sales or charges whether within or outside this State.

(A) Sales of tangible personal property are made in this State if:

(i) the property is delivered or shipped to a purchaser, other than the U.S. government, who takes possession within this State, regardless of f.o.b. point or other conditions of sale; or

(ii) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State; and

(I) the purchaser is the U.S. government; or

(II) the corporation is not taxable in the State in which the purchaser takes possession.

(B) Sales, other than the sale of tangible personal property, are in this State if the taxpayer's market for the sales is in this State. The taxpayer's market for sales is in this State:

(i) in the case of sale, rental, lease, or license of real property, if and to the extent the property is located in this State;

(ii) in the case of rental, lease, or license of tangible personal property, if and to the extent the property is located in this State;

(iii) in the case of sale of a service, if and to the extent the service is delivered to a location in this State; and

(iv) in the case of intangible property:

(I) that is rented, leased, or licensed, if and to the extent the property is used in this State, provided that intangible property utilized in marketing a good or service to a consumer is "used in this State" if that good or service is purchased by a consumer who is in this State; and

(II) that is sold, if and to the extent the property is used in this State, provided that:

(aa) a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area is "used in this State" if the geographic area includes all or part of this State;

(bb) receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease, or licensing of such intangible property under subdivision (iv)(I) of this subdivision (B); and

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

(C) If the state or states of assignment under subdivision (B) of this subsection cannot be determined, the state or states of assignment shall be reasonably approximated.

(D) If the taxpayer is not taxable in a state to which a receipt is assigned under subdivision (B) or (C) of this subsection, or if the state of assignment cannot be determined under subdivision (B) of this subsection or reasonably approximated under subdivision (C) of this subsection, such receipt shall be excluded from the denominator

of the receipts factor.

(E) The Commissioner of Taxes shall adopt regulations as necessary to carry out the purposes of this section.

(b) If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this State, the corporation may petition for, or the Commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable:

(1) separate accounting;

(2) the exclusion or modification of any or all of the factors;

(3) the inclusion of one or more additional factors that will fairly represent the corporation's business activity in this State; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income. (Added 1966, No. 61 (Sp. Sess.), § 1, eff. Jan. 1, 1966; amended 1971, No. 73, §§ 15, 16, eff. April 16, 1971; 1987, No. 82, § 6, eff. June 9, 1987; 2003, No. 152 (Adj. Sess.), § 5, eff. June 7, 2004; amended 2019, No. 51, § 8, eff. Jan. 1, 2020.)

VERMONT

Proposed Rules Postings
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Search Rules

Deadline For Public Comment

Deadline: Aug 20, 2021

Please submit comments to the agency or primary contact person listed below, before the deadline.

Rule Details

Rule Number:	21P021
Title:	Allocation and Apportionment of Vermont Net Income By Corporations.
Type:	Standard
Status:	Proposed
Agency:	Department of Taxes; Agency of Administration
Legal Authority:	32 V.S.A. § 3201(a)(1); 32 V.S.A. §5833(a)(3)(E).
Summary:	The 1998 Regulation has been superseded by statute in some respects. The amendments adjust the apportionment formula to be consistent with current law, and adjust the apportionment method for services and intangibles to accommodate statutory changes. Other changes provide specific definitions

	and examples, and provide clarity to the Department's interpretation of the tax on corporations.
Persons Affected:	Corporations which have sales into Vermont, property in Vermont, or employees in Vermont are affected, as they must pay Vermont corporate income tax.
Economic Impact:	The rule is an amendment of the current rule, for a tax that has been in place for many years. There is some clarity for when sales, employees and property are considered in Vermont for purposes of the tax. New legislation in 2019 directed the sourcing of income from services to the location of the market for the service. This rule adopts a uniform regulation for this sourcing. With any changes to tax attributes, some corporations may experience an increase in tax and some may experience a decrease in tax, based on their business and type of sales in Vermont and the extent to which they provide services in Vermont.
Posting date:	Jul 07,2021

Hearing Information

Information for Hearing # 1

Hearing date:	08-10-2021 09:00 AM [redacted]
Location:	Microsoft Teams
Address:	https://teams.microsoft.com/l/meetup-join/193ameeting_MjZmNjk5OGEtNTNiZS00YzdlLTlhNDltOTl3OTEwMn/0?context7b22Tid223a2220b4933b-baad-433c-9c02-70edcc7559c6222c22O73c7-4047-b309-1822a94f2ce7227d
City:	n/a
State:	VT
Zip:	n/a
Hearing Notes:	

Contact Information

Information for Contact # 1

Level:	Primary
Name:	Will Baker
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Keyword Information

Keywords:

tax
corporate
income

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	The Islander (islander@vermontislander.com)	Tel: 802-372-5600 FAX: 802-372-3025
	Vermont Lawyer (hunter.press.vermont@gmail.com)	Attn: Will Hunter

FROM: APA Coordinator, VSARA **Date of Fax:** July 6, 2021

RE: The "Proposed State Rules " ad copy to run on **July 15, 2021**

PAGES INCLUDING THIS COVER MEMO: **3**

NOTE **8-pt font in body. 12-pt font max. for headings - single space body. Please include dashed lines where they appear in ad copy. Otherwise minimize the use of white space. Exceptions require written approval.**

If you have questions, or if the printing schedule of your paper is disrupted by holiday etc. please contact VSARA at 802-828-3700, or E-Mail sos.statutoryfilings@vermont.gov, Thanks.

PROPOSED STATE RULES

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By law, public notice of proposed rules must be given by publication in newspapers of record. The purpose of these notices is to give the public a chance to respond to the proposals. The public notices for administrative rules are now also available online at https://secure.vermont.gov/SOS/rules/ . The law requires an agency to hold a public hearing on a proposed rule, if requested to do so in writing by 25 persons or an association having at least 25 members.

To make special arrangements for individuals with disabilities or special needs please call or write the contact person listed below as soon as possible.

To obtain further information concerning any scheduled hearing(s), obtain copies of proposed rule(s) or submit comments regarding proposed rule(s), please call or write the contact person listed below. You may also submit comments in writing to the Legislative Committee on Administrative Rules, State House, Montpelier, Vermont 05602 (802-828-2231).

Interim Rules for Clinical Pharmacy.

Vermont Proposed Rule: 21E09

AGENCY: Secretary of State, Office of Professional Regulation

CONCISE SUMMARY: This rule provides regulatory structure for the implementation of certain clinical pharmacy services set out in 26 V.S.A. § 2023.

FOR FURTHER INFORMATION, CONTACT: Gabriel Gilman, Office of Professional Regulation, 89 Main Street - 3rd Floor, Montpelier, VT 05620-3402 Tel: 802-828-2492 Email: gabriel.gilman@vermont.gov URL: https://sos.vermont.gov/pharmacy/statutes-rules-resources/.

FOR COPIES: Jennifer Rotblatt, Office of Professional Regulation, 89 Main Street - 3rd Floor, Montpelier, VT 05620-3402 Tel: 802-828-2191 Email: jennifer.rotblatt@vermont.gov

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Allocation and Apportionment of Vermont Net Income By Corporations.

Vermont Proposed Rule: 21P021

AGENCY: Agency of Administration, Department of Taxes

CONCISE SUMMARY: The 1998 Regulation has been superseded by statute in some respects. The amendments adjust the apportionment formula to be consistent with current law, and adjust the apportionment method for services and intangibles to accommodate statutory changes. Other changes provide specific definitions and examples, and provide clarity to the Department's interpretation of the tax on corporations.

FOR FURTHER INFORMATION, CONTACT: Will Baker, Department of Taxes, PO Box 429, Montpelier VT 05602 Tel: 802-828-2506 Fax: 802-828-5875 Email: will.baker@vermont.gov URL: https://tax.vermont.gov.

FOR COPIES: Rebecca Sameroff, Administration - Department of Taxes, PO Box 429 Montpelier VT 05602 Tel: 802-828-3763 Fax: 802-828-5875 Email: rebecca.sameroff@vermont.gov.

Vermont Hazardous Waste Management Regulations.

Vermont Proposed Rule: 21P022

AGENCY: Agency of Natural Resources

CONCISE SUMMARY: Vermont has maintained Hazardous Waste Management Regulations since 1980. This rule, which has been revised routinely since 1980 to remain equivalent to the federal RCRA subtitle C hazardous waste regulations, provides a regulatory framework for managing hazardous waste by identifying wastes subject to regulation as hazardous and establishing management standards for businesses that generate, transport, treat, store or dispose of them. In general, the rule is being revised to incorporate required new federal rules, clarify existing requirements, and address non-federal deficiencies identified in the current version (e.g., limiting the scope of the VT06 listing for pesticides, clarifying generator closure requirements, correcting typos). Changes include: adoption of the federal Generator Improvement, Electronic Manifest, and Hazardous Waste Pharmaceutical rules; revisions to hazardous waste import/export requirements; addition of new universal wastes; and revision of the used oil management standards.

FOR FURTHER INFORMATION, CONTACT: Anna Bourakovsky, Agency of Natural Resources, 1 National Life Drive, Davis 1, Montpelier VT 05620-3704 Tel: 802-477-2981 Email: anna.bourakovsky@vermont.gov URL: https://dec.vermont.gov/waste-management/hazardous/regulations.

FOR COPIES: Jordan Gonda, Agency of Natural Resources, 1 National Life Drive, Davis 1, Montpelier VT 05620-3704 Tel: 802-338-7522 Email: jordan.gonda@vermont.gov.
