MPA
AMERICA

MOTION PICTURE ASSOCIATION AMERICA

July 6, 2021

VIA Electronic Mail: taxlegal@wv.gov

Mr. Mark S. Morton, Esq.
West Virginia Department of Taxation
PO Box 1005
Charleston, WV 25324-1005

RE: Proposed Amendments to Income Tax Apportionment Rule Section 11-24-1-Implementing HB 2026 (2021 Legislative Session)

Dear Mr. Morton:

Thank you very much for the opportunity to provide comments in connection with the regulations governing the recently enacted market sourcing law in HB 2026. The motion picture studios formed the organization now known as the Motion Picture Association to protect and support the nascent film industry in 1922. Since that time, the MPA has served as the voice and advocate of the film and television industry around the world, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide. The MPA member companies and their affiliated entities own the major television broadcast networks and most of the national cable program networks. Its members include: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc. and Netflix.

We are pleased the state has proposed rules to clarify the method of apportioning the income of national broadcast and cable network program companies. However, we respectfully urge the state to adopt an alternative apportionment method for broadcasters ("commercial domicile," as outlined in this letter), which was similarly adopted through rule following enactment of a general market-based sourcing statutes recently in Missouri, Kentucky and Tennessee. We have included proposed amendments to the draft rule for your consideration and incorporation into the final proposed rule.

What are the Broadcasters' Revenue Streams? Broadcasters have two main revenue streams – national advertising and content licensing. They are paid by national advertisers to include ads in their programming, and they are paid license fees by distributors such as local television stations, cable and telecom companies, satellite and internet distributors. In addition, there is a new revenue stream that is growing rapidly – revenues from direct to consumer streaming, "Over the Top" or OTT- like Disney+, HBO Max, Peacock, Paramount +, etc. The MPA proposal would provide clarity and certainty for the calculation of broadcaster's sales receipts from these activities in West Virginia for purposes of the sales factor numerator.

What is Commercial Domicile Apportionment? The commercial domicile apportionment method apportions revenues to West Virginia based on the broadcasters' actual "market," i.e., its West Virginia based customers. The broadcasters' "markets" are their direct customers with whom they have contractual relationships and from whom they receive revenue. These customers are national advertisers and various platform distribution companies. The West Virginia customers of the national broadcast and cable networks include companies that are domiciled in West Virginia and either advertise on these networks or license programming content from them. Additionally, they include revenue from individual subscribers to OTT services based on their billing address.

The MPA's proposed contemporary apportionment formula has been adopted by 12 states over the past 12 years including: Missouri, Iowa, North Carolina, Illinois, Tennessee, Rhode Island, Wisconsin, Michigan, Texas, Louisiana, Kentucky and Florida.

The only other apportionment methodology option, which is proposed in the draft rule is now an obsolete method as it does not look to the broadcasters' true market and incorrectly looks to broadcasters' customers' customers rather than their actual direct customers with whom they have privity of contract. Additionally, the state's proposed audience apportionment was established in some states decades ago when states adopted the "cost of performance" method.

Why Adopt the Commercial Domicile apportionment? Commercial domicile apportionment is the clear market sourcing trend and has been adopted by many states around the country as outlined above primarily because it provides clarity and consistency to both the taxpayer and the Departments of Taxation and Revenue. This apportionment for national broadcasters represents the application of market-based sourcing to the national broadcast industry. It accurately reflects not only the method by which income is earned by the broadcasters, but also from whom it is earned.

Under the commercial domicile apportionment formula, national broadcast and cable program networks recognize an obligation to file tax returns and pay tax in West Virginia, thereby providing a reliable and stable revenue stream to the state. Moreover, it avoids protracted litigation regarding audience measurement, as every company only has one commercial domicile and every individual has only one billing address.

Additionally, content delivery by broadcasters was vastly different a quarter century ago than it is today. (See the attached diagrams illustrating the difference between the old and contemporary methods of content delivery.) The broadcasters' know their customers: who they are, what they have purchased, when and how much they are charged and have paid. A taxpayer's liability should be based on this data not some fictional "audience" market.

Proposed Regulatory Language Attached is a draft of the proposed regulatory language for your review and consideration, which will create a contemporary rule and provide parity between tangible and intangible property. The proposed amendments are **bolded with yellow highlight**.

Finally, attached is the list of states and their citations where the commercial domicile apportionment has been adopted. Thank you in advance and we would be happy to discuss our proposed regulatory language with you at your earliest convenience.

Sincerely,

Angela H Miele

Attachments

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TITLE 110
LEGISLATIVE RULES
DEPARTMENT OF TAX AND REVENUE

SERIES 24
CORPORATION NET INCOME TAX

§110-24-1. General.

1.1. Scope. -- This legislative rule is intended to explain and clarify the West Virginia Corporation Net Income Tax as set forth in W. Va. Code §§11-24-1, *et seq.*

1.2. Authority. -- W. Va. Code §§29A-3-1, et seq., 11-10-5.

1.3. Filing date. -- ~~May 6, 2010.~~

1.4 Effective date. -- ~~May 11, 2010.~~

1.5 ~~Repeal and replace. -- This rule repeals and replaces West Virginia 110CSR24 "Corporation Net Income Tax" filed April 15, 1992. and effective April 15, 1992.~~ Sunset Provision. -- This rule shall terminate and have no further force or effect upon the expiration of five years from its effective date.

§110-24-2. Introductory Statement.

The West Virginia Corporation Net Income Tax became effective July 1, 1967, and is a conformity tax in that it utilizes federal taxable income as a starting point to determine West Virginia taxable income and in that it adopts federal definitions wherever possible.

§110-24-3. Definitions.

3.1. Meaning of terms - general rule. -- Any term used in W. Va. Code §§11-24-1, *et seq.*, and in this rule have the same meaning as when used in a comparable context in the laws of the United States of America, as those laws relate to federal income taxation, unless a different meaning is clearly required by the context or by specific definition in article twenty-four, or in this rule.

3.1.a. Any reference in W. Va. Code §§11-24-1, *et seq.*, and in this rule, to the laws of the United States means the provisions of the Internal Revenue Code, as amended, and any other provisions of the laws of the United States of America as those laws relate to the determination of income for federal income tax purposes. West Virginia Code §11-24-3 contains the most recent updating of terms used in W. Va. Code §§11-24-1, *et seq.*

3.2. Additional Terms Defined.

3.2.a. "Combined group" and "unitary group" are used interchangeably in this rule and mean the group of all persons whose income and apportionment factors are required to be taken into account pursuant to W. Va. Code §§11-24-1, *et seq.* in determining the taxpayer's share of the net business income or loss apportionable to this state.

3.2.b. "Combined report" means a schedule or schedules, as required by W. Va. Code §§11-24-1, *et seq.* and this rule or any other rules or procedures established by the Tax Commissioner, which are to be attached to a taxpayer's annual corporation net income tax return and which report the income and apportionment information of all corporations that are members of the taxpayer's combined group, as well as any supporting information required by the Commissioner.

3.2.c. "Commonly owned" or "Common ownership" mean, in general, that more than 50% of the voting control of one or more corporations or other entities, as applicable in the context, is directly or indirectly owned by one or more common owners, whether corporate or non-corporate, subject to the following specific rules and examples.

3.2.c.1. Direct and Indirect Voting Control, and Tiered Ownership. - If the same person or any related persons holds directly or indirectly more than 50% of the voting control of a corporation *(e.g.,* a parent corporation), that person is considered to hold indirectly any stock or other interest in ownership or control in a lower-tier corporation *(e.g.,* a subsidiary corporation) that is directly or indirectly held by the parent corporation. Accordingly, by way of illustration, a parent corporation and any one or more corporations, whether or not in a direct chain, connected through direct or indirect stock ownership, where more than 50% of the voting control of each subsidiary corporation is directly or indirectly owned by a corporation or any related persons, are treated as commonly owned or under common ownership, and subject to inclusion in a combined group.

Example 1. Corporation A, a widely held publicly-traded corporation, owns 51% of the stock of Corporation B; B owns 51% of Corporation C; and C owns 60% of Corporation D. Corporations A, B, C, and D are all treated as commonly owned or under common ownership, and subject to inclusion in a combined group.

Example 2. Same facts as in Example 1, except Corporation C owns 40% of Corporation D, with another 20% of D being owned by an individual who owns 100% of Corporation A. All of Corporations A, B, C, and D are, again, treated as commonly owned or under common ownership, and subject to inclusion in a combined group. Corporation D is treated as commonly owned through the aggregation of C's 40% ownership in D and the related individual's 20% ownership in D.

3.2.c.2. Related Versus Unrelated Owners.

3.2.c.2.A. Two or more corporations, where stock representing more than 50% of the voting control of each corporation is owned directly or indirectly by the same person or any related persons, whether corporate or non-corporate, are treated as commonly owned or under common ownership, and subject to inclusion in a combined group. A common owner or owners need not be members of the combined group.

Example 3. Individual X owns 51% of Corporation A, 60% of Corporation B, and 100% of Corporation C. Corporations A, B, and C are all treated as commonly owned or under common ownership, and subject to inclusion in a combined group. This same conclusion would be reached if X owned 35% of B and X's wife, a related person, owned 25% of B, so that together X and his wife owned 60% of B.

Example 4. Foreign Corporation F owns 100% of the stock of Corporation A which is organized in the U.S. and of Corporation B which is also organized in the U.S. Corporations A and B each directly or indirectly own various corporate subsidiaries in separate chains leading up to A and B, where the voting control of each subsidiary is more than 50% owned by a higher-tier corporation in the chain. Corporations A and B and all of their respective direct and indirect subsidiaries are treated as commonly owned or under common ownership, and subject to inclusion in a single combined group. Assuming that no worldwide election is made, and that F is not a foreign corporation that would be included in a "water's edge" combined group under W. Va. Code §11-24-13f(a), F itself would not be subject to inclusion in the combined group.

3.2.c.2.B. Two or more corporations are not treated as commonly owned or under common ownership, and subject to inclusion in a combined group, solely because the corporations have one or more

unrelated owners in common, where aggregation of the ownership of the unrelated owners would be necessary in order to represent more than 50% of the voting control of any of the corporations.

Example 5. Individual I-1 owns stock representing 40% of the voting control of Corporation A and stock representing 20% of the voting control of Corporation B. Individual I-2. owns 30% of A and 45% of B. I-1 and I-2. are not related persons, and A and B are not otherwise related persons. A and B are not treated as commonly owned or under common ownership, and thus are not subject to inclusion in a combined group.

3.2.c.3. Stapled entities. -- Two or more corporations that are "stapled entities" are treated as commonly owned or under common ownership, and subject to inclusion in a combined group. Stapled entities are entities where, by reason of their form of ownership, or restrictions on transfer of ownership, or other terms or conditions, whether existing by operation of law, by written contract, or otherwise, in the case of a transfer of one or more ownership interests, require more than 50% of the voting control of each entity to be transferred.

3.2.c.4. Corporations under common ownership. -- A group of corporations under common ownership may be engaged in one or more unitary businesses.

Example 6. Assuming the same facts as in Example 4 of this subdivision, both A and B and all of their direct and indirect subsidiaries are engaged in unitary business X. In addition, A and all of its subsidiaries are engaged in unitary business Y, but B and its subsidiaries are not engaged in unitary business Y. A and B and all of their respective direct and indirect subsidiaries would be included in a combined group with respect to unitary business X, and A and all of its direct and indirect subsidiaries would be included in a combined group with respect to unitary business Y. Corporation A and all of its respective direct and indirect subsidiaries need to divide their respective adjusted federal taxable incomes to properly assign the portion thereof fairly attributable to each unitary business. This example assumes that the corporations have no other business or nonbusiness income.

3.2.c.5. Related Parties; Constructive Ownership. - In determining whether a person is a related person or is considered to hold stock or other ownership or control interests in an entity that is directly held by another person, the constructive ownership rules described in Internal Revenue Code §318 generally apply, except that:

3.2.c.5.A. In applying IRC §318(a)(2), if a partnership, estate, trust, or corporation owns, directly or indirectly, more than 50% of the voting control of a corporation, it is considered to own all of the stock or other ownership or control interests in the corporation; and

3.2.c.5.B. If a person has an option to acquire stock or other ownership interests in an entity, the stock or other ownership interests are treated as owned by that person only to the extent determined by the Tax Commissioner to be necessary to prevent tax avoidance.

3.2.c.6. Common ownership. -- In determining common ownership, the Tax Commissioner may take into account any plan or arrangement, whether existing by operation of law, by contract, or otherwise, for bestowing or shifting ownership or voting control, in addition to the terms of any actual stock ownership or control.

3.2.d. "Combined return" means the annual return filed by a combined group member under W. Va. Code §§11-24-1, *et seq.*, or the single annual return filed by the taxable members of a combined group pursuant to the annual election made under W. Va. Code §11-24-13e.

3.2.e. "Intercompany transaction" means a transaction between corporations which are members of the same combined reporting group immediately after the transaction.

3.2.f. "Principal member" means the member of the combined reporting group whose accounting period is used as a reference period for all members of the combined reporting group to aggregate and apportion combined report business income of the group. A principal member need not be a taxpayer member.

3.2.g. "Unitary business" means a single economic enterprise that is made up either of separate parts of a single business entity or of a commonly controlled group of business entities that are sufficiently interdependent, integrated and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts.

3.2.h. "Water's-edge combined report" means a combined report that includes all of the entities described in W. Va. Code §§11-24-13f(a)(1) through (7) that are members of the combined group.

3.2.i. "Worldwide election" means an election by a taxable member of the combined group on behalf of all of the members of the group engaged in a unitary business to treat as its combined group, for purposes of W. Va. Code §11-24-13f, all members that are engaged in the unitary business, wherever located, on such terms and in keeping with the requirements of the corporation net income tax that are further explained in rules of the Tax Commissioner and any forms and instructions or other notices that are issued by the Tax Commissioner.

§110-24-4. Effect Of Rate Changes During Taxable Year.

4.1. If any rate of tax imposed in W. Va. Code §§11-24-1, *et seq.* changes to become effective before December 31 of a calendar year, and if the taxable year included the effective date for the change of rate, then:

4.1.a. Tentative tax due is computed by applying the rate for the period before the effective date of the change of rate, and the rate for the period on and after that date, to the taxable income of the corporation for the entire taxable year; and

4.1.b. The tax for that taxable year shall be the sum of that proportion of each tentative tax which the number of months in each period bears to the number of months in the entire taxable year.

4.1.c. The procedure in this subsection may only be used when the date of the rate change is other than the first day of the taxable year.

4.2. For purposes of this section:

4.2.a. If the rate changes for taxable years "beginning after" or "ending after" a certain date, the following day shall be considered the effective date of the change; and

4.2.b. If the rate changes for taxable years "beginning on or after" a certain date, that date shall be considered the effective date for the change of rate.

4.2.c. However, if W. Va. Code §11-10-5p applies with relation to the effective date for a corporation net income tax rate change, then the rate change shall first apply to a particular taxpayer for taxable years beginning on or after the effective date of the act of the Legislature containing the rate change amendment.

4.3. Example. -- The West Virginia Legislature enacts a rate change for the corporation net income tax beginning after June 30. West Virginia Code §11-10-5p does not apply. The corporation net income

tax liability for a calendar year taxpayer is computed by applying the former rate for the months January through June, and the new rate for July and succeeding months. A fiscal year taxpayer would use the former rate for those periods of its tax year occurring before June 30.

4.4. Example. -- The West Virginia Legislature enacts a rate change for the corporation net income tax beginning after June 30 of year 1. West Virginia Code §11-10-5p applies. The corporation net income tax liability for a calendar year taxpayer is computed by applying the former rate for the tax year of January 1, year 1 through December 31, year 1, and the new rate for the tax year beginning January 1, year 2. and succeeding years. A fiscal year taxpayer would use the former rate for those periods of its tax year occurring before June 30 and through the end of its fiscal year, and the new rate for the next succeeding fiscal year beginning on or after the effective date of the act of the Legislature containing the rate change amendment.

§110-24-5. Corporations Exempt From Tax.

5.1. Corporations exempt from the corporation net income tax in accordance with the provisions of W. Va. Code §§11-24-1, *et seq.*, including, but not limited to, W. Va. Code §11-24-5, or exempt from the corporation net income tax under any other provision of the W. Va. Code or under any provision of superseding federal code or federal law are exempt from the corporation net income tax. However regulated investment companies and real estate investment trusts subject to the provisions of W. Va. Code §11-24-4b are subject to tax as specified in that section.

5.1.a. Corporations which by reason of their purposes or activities are exempt from federal income tax are exempt from the corporation net income tax. However regulated investment companies and real estate investment trusts subject to the provisions of W. Va. Code §11-24-4b are subject to tax as specified in that section.

5.1.a.1. This exemption shall not apply to the unrelated business income, as defined in the Internal Revenue Code, of any corporation if the income is subject to federal income tax.

5.1.a.1.1. Example. -- A corporation exempt from federal income taxation under IRC 501(c)(3) receives $1,000,000 in cash donations and is bequeathed an unrelated business during the year. The tax-exempt corporation operates the business for the remainder of its tax year. The income from operating this business is considered unrelated business taxable income by the Internal Revenue Service. The income would also be taxed under the West Virginia Corporation Net Income Tax. However, the donations would be exempt.

5.1.a.2. Insurance companies which pay this State a tax upon premiums, and insurance companies that pay the surcharge imposed by W. Va. Code §§23-2C-3(f)(1) or (3) are exempt from the corporation net income tax.

5.1.a.2.1. This exemption is available if an insurance company actually paid an insurance premium tax imposed by West Virginia law or the surcharge imposed by W. Va. Code §§23-2C-3(f)(1) or (3) for any year in which an exemption is claimed or would have paid the premium tax but for the use by the taxpayer of any tax credits allowed or allowable against the premium tax.

5.1.a.3. Corporations otherwise exempted from the corporation net income tax by superseding state or federal law are exempt from the corporation net income tax, (e.g. racing associations, W. Va. Code §19-23-12; hospital service corporations, W. Va. Code §33-24-4; farmer's mutual fire insurance companies, W. Va. Code §33-22-16; and licensed fraternal benefit societies, W. Va. Code §33-23-29).

§110-24-6. ~~Reserved for future use.~~ Allocation And Apportionment for Tax Years beginning on and after January 1, 2022.

6.1. This section heading will apply to all tax years beginning on and after January 1, 2022. C corporations having a fiscal tax year ending after January 1, 2022 and before December 31, 2022, will fall under the transition rules under section heading 6a. Tax Years ending before January 1, 2022, will fall under allocation and apportionment rules under section heading 7.

6.2. "Business activities" include all activities engaged in by the corporation, and includes those activities giving rise to both business income and nonbusiness income.

6.2.1. If the business activities of a taxpayer take place entirely within this state, then the taxpayer does not allocate its nonbusiness income or apportion its business income using the apportionment methodologies prescribed by the statute, and the entire net income of the corporation is subject to the corporation net income tax.

6.2.1.a. The business activities of a taxpayer are considered to have taken place in their entirety within this state if the taxpayer is not taxable in another state.

6.2.1.b. "Not taxable in another state" means the taxpayer is not subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporation stock tax in another state, and another state has no jurisdiction to subject the taxpayer to a net income tax.

6.2.2. A combined group apportions the group's adjusted federal taxable income from unitary business when one or more of the members of the combined group engage in business only within the State of West Virginia, but one or more other members of the combined group engage in business activities partially in West Virginia and partially outside of West Virginia.

6.2.3. If all business activities of all combined group members take place entirely within West Virginia, then the entire net income of each combined group member is subject to the West Virginia corporation net income tax without apportionment.

6.3. Allocation of non-business income – Pursuant to W. Va. Code §11-24-7(d), if the business activities of a taxpayer take place partially within and partially without this state and the taxpayer is also taxable in another state, then rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties shall be allocated to the extent that they constitute nonbusiness income of the taxpayer.

6.3.1. The extent of use of tangible personal property in a state is determined by multiplying the nonbusiness rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is used in the state in which the property was located at the time the rental or royalty payer obtained possession.

6.3.2. If property is in this State for any part of a day, that time shall be counted as a full day.

6.3.3. Examples.

Example 1. Corporation A was formed in Ohio and has its main offices there. Corporation A owns an apartment complex in West Virginia and leases computers to users located in West Virginia. The nonbusiness net rental income from the rental of the apartment complex is allocated to West Virginia for purposes of the West Virginia Corporation Net Income Tax. Likewise, the nonbusiness net rental income received by Corporation A as a lessor of computers in this State is allocated to this State.

Example 2. Corporation Z was formed in State X and has its commercial domicile in the State of West Virginia. Corporation Z leases tangible personal property to customers in State K and derives nonbusiness income from that activity. State K has no corporation net income tax. The net receipts from leasing tangible personal property in State K are allocated entirely to the State of West Virginia.

Example 3. Corporation Alpha, organized and headquartered in California, leases coal mining equipment in West Virginia. Alpha began leasing equipment in West Virginia on April 1 and is a calendar year taxpayer. The coal mining equipment was not in this State until April 1, the date the lease commenced. The property is leased in this State for 275 of the 365 days in the year. If rental income from the coal mining equipment located in the State of West Virginia is nonbusiness income, and if Alpha Corporation netted $15,000 for leasing this equipment for the entire year, Alpha would include in West Virginia income the following amount: 275/365 x $15,000 = $11,301.37.

If Alpha Corporation has adequate records to show the net rental income from the equipment while the equipment was leased in this State, then it may use the actual net rental income and not "apportion" its allocation of net rental income.

6.4. Apportionment -- Business activities partially within and partially without this State.

6.4.1. Where a corporation has business activities partially within and partially without this state, all income of the corporation is apportioned, except nonbusiness income specifically identified in W. Va. Code §11-24-7(d), which is allocated. Where a corporation has business activities that are in West Virginia and other states, its other net nonbusiness income that was not allocated under W. Va. Code §11-24-7(d) and all of its net business income will be apportioned.

6.4.1.a. Where a corporation has income from business activities partially within this State and partially outside of this State, all net income, after deducting those items specifically allocated under W. Va. Code §11-24-7(d), shall be apportioned to this State by multiplying the net income by a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in this State during the taxable year, less returns and allowances attributable to the gross receipts from the West Virginia activity. The denominator of the fraction is the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business during the taxable year and reflected in its gross income reported and as appearing on the taxpayer's Federal Form 1120 and consisting of those certain pertinent portions of the elements of gross income set forth. This fraction is known as the "sales factor." Note that this subdivision does not apply if the corporation is subject to a special apportionment method under W. Va. Code §§11-24-7a or 7b, or is authorized to use a special apportionment method pursuant to W. Va. Code §11-24-7(h).

6.4.1.b. The only sales to be included in the sales factor are those which produce business income.

6.4.1.c. If either the numerator or the denominator includes interest or dividends from obligations of the United States government which are exempt from taxation by this State, the amount of the interest and dividends, if any, shall be subtracted from the numerator or denominator in which it is included.

6.4.2. Sales factor denominator. -- The denominator of the sales factor includes the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, unless otherwise excluded in this rule.

6.4.3. Sales factor numerator. -- The numerator of the sales 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. All interest income, service charges, carrying charges, or time-price differential

changes incidental to the gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

6.4.4. Rules for determining what is included in the gross receipts of a sale in certain circumstances --

6.4.4.a. In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" 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 mean gross sales less returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are reflected in the taxpayer's gross income reported and as appearing on the taxpayer's Federal Form 1120.

6.4.4.b. In the case of cost fixed fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost, plus the fee.

6.4.4.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, "sales" includes the gross receipts from the performance of the services including fees, commissions, and similar items.

6.4.4.d. In the case of a taxpayer engaged in renting real or tangible personal property, "sales" includes the gross receipts from the rental, lease, or licensing of the use of the property.

6.4.4.e. In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

6.4.5. Example -- General Apportionment Formula:

The following is an example of how the apportionment formula works in the context of the corporation net income tax:

A hypothetical corporation has facilities and operations in Pennsylvania, West Virginia, New York, and California.

The corporation has sales in 47 of the 50 states of the USA.

The apportionment formula is as follows:

$$\frac{\text{Sales in WV}}{\text{Sales in USA}}$$

Federal Taxable Income -- The corporation has $10,000,000 in federal adjusted gross income from all operations in the USA after West Virginia modifications and adjustments. These modifications and adjustments are for certain items that are required to be added to, or subtracted from, federal taxable income before apportionment.

Sales in the USA -- The total sales of the corporation in the entire USA (all of the 47 states in which the corporation has sales) are $435,009,000.

Sales in West Virginia -- The total sales of the corporation in West Virginia are $104,000.

The apportionment formula, using these values, would be as follows:

$$\frac{104{,}000}{435{,}009{,}000}$$

OR

0.000239 -- This is the apportionment factor.

Assuming that the corporation has no allocable West Virginia income, out of all of the operations in the USA, 0.000239 of the operations of the corporation are attributable to West Virginia operations and activity.

Net federal taxable income from all operations in the USA, after WV modifications and adjustments is $10,000,000.

Applying the apportionment formula, West Virginia taxable income is:

Federal Taxable Income (After Adjustments)		Apportionment Factor		WV Taxable Income
$10,000,000	x	0.000239	=	$2,390.00

The final computation of the tax is as follows. The hypothetical corporation has federal taxable income after modifications and adjustments allocated and apportioned to West Virginia in the amount of $2,390.00. The tax rate for the given year is 8.75%.

Tax is .0875 x $2,390.00 = $209.13 (rounded)

Tax is $209.13.

6.4.6. In filing returns with this State, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose that information by attaching a statement, setting forth the nature and effect of the change, to the corporation net income tax return for the current year.

6.4.7. Determining what gross receipts are attributable to this State: Sales from a unitary member that does not have nexus with West Virginia. -- West Virginia is a "*Joyce* State." The *Joyce* case (*Appeal of Joyce, Inc.*, 66 SBE 069, 1966 WL 1411 (Cal. St. Bd. Eq.) (Nov. 23, 1966)) and the *Finnegan* case (*Appeal of Finnigan Corp.*, 88- SBE-022-A, 1990 WL 15164 (Cal. St. Bd. Eq.) (Jan. 24, 1990)) were tax matters brought before the California State Board of Equalization. States that follow the decision in the *Joyce* case are known as "*Joyce* States."

6.4.7.a.. The issue for which these cases have become known relates to the determination of the sales that are included in the numerator of the sales factor.

In synopsis, the basic distinction is as follows:

Joyce -- If a unitary group member has nexus with the state, then "in state" gross receipts of that member are included in the sales factor numerator, but not if the member does not have nexus with the

state, determined on a "stand alone" basis.

Finnigan -- If one or more unitary group members has nexus with the state, then "in state" gross receipts of all unitary group members are included in the sales factor numerator, including "in state" gross receipts of a unitary group member that, itself, does not have nexus with the state, determined on a "stand alone" basis.

6.4.7.b. Because West Virginia is a "*Joyce* State," if the unitary member does not have nexus with West Virginia, or if the unitary member is not taxable under the protections of PL 86-272, then that unitary member's gross receipts derived from transactions and activity in the regular course of its trade or business in West Virginia are not included in the numerator of the sales factor when the tax return is prepared, and for combined group members, when the combined report is prepared.

6.4.8. Determining what gross receipts are attributable to this State: Allocation of sales of tangible personal property. --

6.4.8.a. Sales of tangible personal property are in this State if the property is received in this State by the purchaser, other than the United States government, regardless of the f.o.b. point or other conditions of the sale. In the case of delivery by common carrier or other means of transportation, the place at which the property is ultimately received after all transportation has been completed shall be considered as the place at which the property is received by the purchaser, regardless of where title passes or other conditions of sale. Direct delivery in this State, other than for purposes of transportation, to a person or firm designated by the purchaser, constitutes delivery to the purchaser in this State, and direct delivery outside this State to a person or firm designated by the purchaser does not constitute delivery to the purchaser in this State, regardless of where title passes or other conditions of sale. The sales of tangible personal property are also in this State if the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and the purchaser is the United States government.

6.4.8.b. Where tangible personal property is sold and the terms of the sale require the purchaser to pick up the property or otherwise receive the property in this State, the sale is to be treated as a sale taking place in this State.

6.4.8.c. In the case of sales requiring by their terms the delivery of tangible personal property by common carrier, contract carrier or by other means of transportation excluding pickup by the customer in this State, whether directly or indirectly, the place at which the property is ultimately received after all transportation has been completed shall be considered as the place at which the property is received by the purchaser.

6.4.8.d. Direct delivery in this State, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this State regardless of where title passes, or other conditions of sale.

6.4.8.e. Direct delivery outside this State to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this State, regardless of where title passes, or other conditions of sale.

6.4.8.f. Examples. --

Example 1. Baubles, Inc. is located in Huntington, West Virginia, and makes sales of tangible personal property to an Ohio company. The terms of sale require the Ohio company to pick up the merchandise from the loading dock at Baubles. The sale is to be treated by Baubles as a sale taking place in this State.

Example 2. Alpha Corporation, which manufactures a highly sophisticated device used in mining,

purchases certain tangible personal property from a company located in Virginia. Alpha Corporation, located in Bergoo, West Virginia is required by the terms of the sales contract to pick up the merchandise at the Virginia company's loading dock in Virginia. The sale is to be treated as not occurring in West Virginia by the Virginia company, absent other nexus with West Virginia.

Example 3. RPS, Inc., is located in Morgantown, West Virginia and makes sales of tangible personal property. Some of the sales contracts require RPS to ship the goods to companies located outside of this State via common carrier. The sales of the tangible personal property shipped by the carrier are not included as West Virginia sales.

6.4.8.g. Special rules. --

6.4.8.g.1. Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, the gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory or plant will be excluded.

6.4.8.g.2. Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless the exclusion would materially affect the amount of income apportioned to this State. For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, business automobiles, etc.

6.4.8.g.3. Where the income producing activity of a taxpayer other than a banking or financial institution, in respect to business income from intangible personal property, can be readily identified, the income is included in the denominator of the sales factor and, if the income producing activity occurs in this State, the numerator of the sales factor as well. For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible personal property and income from the sale, licensing, or other use of intangible personal property.

6.4.8.g.4. Where the business income from intangible property cannot readily be attributed to any particular income producing activity of a taxpayer other than a banking or financial institution, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures, or government securities results from the mere holding of the intangible personal property by the taxpayer, the dividends, royalties, and interest shall be excluded from the denominator of the apportionment factor.

6.4.9. No Throw Rule -- All other sales of tangible personal property delivered or shipped to a purchaser within a state in which the taxpayer is not taxed are excluded from the numerator of the sales factor, but remain in the denominator. This is commonly known as the no throw rule.

6.4.9.a. "Not taxed in another state" means that, in another state, the taxpayer is not subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporation stock tax, and another state has no jurisdiction to subject the taxpayer to a net income tax.

6.4.9.b. Application of the no throw rule when computing the unitary group's apportionment factor numerator in the group's combined report. - The use of a combined report does not disregard the separate identities of the taxpayer members of the combined group. Consequently, the no throw rule is applied on a corporation-by-corporation basis and is not applied as if the combined group were a single taxpayer. The separate corporation apportionment factor numerators are then aggregated to determine the numerator of the apportionment factor of the combined group.

6.4.9.c. Examples. --

Example 1. When all sales of tangible personal property produce income from unitary group business activity. -- A combined group engaged in unitary business activity consists of Corporations A, B, and C. The combined group makes sales to customers in West Virginia and in State 1 and 2. But not every member of the combined group makes sales to customers in all of those states and, in some of the states, the member is not subject to an income tax because of Public Law 86-272. When computing the numerator of the combined group's apportionment factor for purposes of the West Virginia combined report, the no throw rule will be applied separately to each member of the combined group and the aggregate adjusted numerator will be the sales factor numerator for the combined group engaged in unitary business activity.

Sales Factor Determination under No Throw Rule						
	Total Sales = Denominator			Numerator		
	WV	State 1	State 2	WV	State 1	State 2
Corporation A	$5 million	$5 million	$6 million	$5 million	N/A	N/A
Corporation B	$10 million, but $5 million not taxable	$ 7 million	No Sales	$5 million	N/A	N/A
Corporation C	$5 million	$ 3 million, but not taxable	$4 million, but $2 million not taxable	$5 million	N/A	N/A
Sub-total:	$20 million	$15 million	$10 million	$15 million	N/A	N/A
Total	$45 million in Denominator			$15 million in Numerator		

Example 2. When some but not all sales of tangible personal property produce income from unitary group business activity. - A combined group engaged in unitary business activity consists of Corporations A, B, C and D. Corporations A and C also have income from business activity that is not unitary business activity. The combined group makes sales to customers in States 1, 2, 3, 4, 5 and 6. But not every member of the combined group makes sales to customers in all of those states and, in some of the states, the member is not subject to an income tax because of Public Law 86-272. Because Corporations A and C have receipts from sales of tangible personal property that produce business income from unitary business activity and receipts from sales of tangible personal property that produces business income from other business activities that are not unity business activities, the apportionment factor numerators and denominators of Corporations A and C shall be further analyzed so that only sales of tangible personal property from unitary business activity are included when apportioning the business income from unitary business activity.

Example 3. -- When a partnership owned in part by a corporation has taxable nexus in one or more states into which the corporation sells tangible personal property, but the corporation does not otherwise have taxable nexus with those states. A combined group engaged in unitary business activity consists of Corporations A, B, C and D. The combined group makes sales to customers in States 1, 2, 3, 4, 5 and 6. However, Corporations A and C do not sell tangible personal property to customers in all of those states or, in some of the states, Corporations A and C are not subject to an income tax because of application of Public Law 86-272. Corporations A and C each own an interest in partnerships engaged in unitary business activity with the combined group. These partnerships have taxable nexus with states into which Corporations A and C sell tangible personal property and in which Corporations A and C do not have taxable nexus if their partnership interests are disregarded. Each corporation's share of sales reflected in the apportionment factors of the partnerships are included in the apportionment factors of Corporation A and C, which are the corporate owners of the partnerships. As a consequence, all members of the combined

group have taxable nexus with all of the states into which they sell tangible personal property, and the no throw does not apply to this combined group.

6.4.10. Determining what gross receipts are attributable to this State: Allocation of sales of intangible property. -- West Virginia uses market-based sourcing to determine if the gross receipts from the sales of intangible property are attributable to West Virginia, as discussed in subsection 6.5 of this rule.

6.5 Market-Based Sourcing. -- Receipts, other than receipts described in W. Va. Code §11-24-7(e)(11) (from sales of tangible personal property) are in West Virginia within the meaning of W.Va. Code §11-24-7(b) and this rule if and to the extent that the taxpayer's market for the sales is in West Virginia. In general, the provisions in this subsection establish uniform rules for (1) determining whether and to what extent the market for a sale other than the sale of tangible personal property is in West Virginia, (2) reasonably approximating the state or states of assignment where the state or states cannot be determined, and (3) excluding receipts from the sale of intangible property from the numerator and denominator of the apportionment factor pursuant to W.Va. Code §11-24-7(e)(13)(B).

6.5.1. Definitions. -- For the purposes of section heading 6 of this Rule:

6.5.1.a. "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.

6.5.1.b . "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.

6.5.1.c"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.

6.5.1.~~b~~ **d.** "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.

6.5.1.e "Commercial domicile" as defined in the West Virginia Tax Code Chapter 11-24-(3)a (5).

6.5.1.~~c~~ **f.** "Individual customer" means a customer that is not a business customer.

6.5.1.~~d~~ **g.** "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 in this rule, computer software.

6.5.1.~~e~~ **h.** "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.

6.5.1.i. "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.

6.5.1.~~f~~j. "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.

6.5.1.~~g~~k. "Related party" means:

6.5.1.~~g~~k.1. A stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Internal Revenue 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;

6.5.1.~~g~~k.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

6.5.1.~~g~~k.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 Internal Revenue 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 Internal Revenue Code apply for purposes of determining whether the ownership requirements of this definition have been met.

6.5.1.~~g~~k.4. The provisions of this rule regarding sales between related parties do not apply to sales that are treated as intercompany transactions between affiliated corporations filing a consolidated West Virginia return which are deferred as provided in section heading 13d of this Rule.

6.5.1.~~f~~l. "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.

6.5.1.m "Platform distribution company" means a cable service provider, or a a direct broadcast satellite system.

6.5.2. General Principles of Application; Contemporaneous Records. -- In order to satisfy the requirements of this rule, a taxpayer's assignment of receipts other than receipts from sales of tangible personal property must be consistent with the following principles:

6.5.2.a. This rule 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.

6.5.2.b. 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 this rule, rather than for tax avoidance purposes. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

6.5.3. Rules of Reasonable Approximation. --

6.5.3.a. In General. In general, this rule 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 West Virginia. This rule 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 this rule. In other cases, the applicable rule permits a taxpayer to reasonably approximate the state or states of assignment using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in this rule.

6.5.3.b. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth in §110-24-6.5.7 (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 must include receipts from those sales which it believes track the geographic distribution of the assigned receipts in its sales 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.

6.5.3.c. Related-Party Transactions. -- Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this rule 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.

6.5.4. Rules with Respect to Exclusion of Receipts from the Sales Factor. --

6.5.4.a. The apportionment factor only includes those amounts defined as sales under W. Va. Code §11-24-7(e) and applicable rules.

6.5.4.b. Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor pursuant to W.Va. Code §11-24-7(e)(13)(B).

6.5.5. Sale, Rental, Lease, or License of Real Property. In the case of a sale, rental, lease, or license of real property, the receipts from the sale are in West Virginia if and to the extent that the property is in West Virginia.

6.5.6. Rental, Lease, or License of Tangible Personal Property. In the case of a rental, lease, or

license of tangible personal property, the receipts from the sale are in West Virginia if and to the extent that the property is in West Virginia .

6.5.6.a. The rental, lease, licensing or other use of tangible personal property in this State is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this State during the rental, lease, or licensing period, gross receipts attributable to this State shall be measured by the ratio which the days the property was physically present or was used in this State bears to the total days of the physical location or use of the property everywhere during that period, including the days it was physically located or used in a state in which the taxpayer is not taxed within the meaning of that term as provided in §110-24-6.4.10 of this rule.

6.5.6.b. Example. -- The taxpayer is the owner of ten railroad cars. During the current tax year, the total of the days each railroad car was present in this State was 60 days. The receipts attributable to the use of each of the railroad cars in this State are a separate item of income and shall be determined as follows:

$$\left(\frac{\text{10 cars X 60 days each}}{\text{365 days in 1 year X 10 cars}} \right) \text{X Total receipts} = \text{Receipts attributable to this State.}$$

6.5.7. Sale of a Service. --

6.5.7.a. *General Rule.* The receipts from a sale of a service are in West Virginia if and to the extent that the service is delivered to a location in West Virginia. 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 in §110-24-6.5.7.b through §110-24-6.5.7.d of this rule.

6.5.7.b. In-Person Services. --

6.5.7.b.1. In General. Except as otherwise provided in §110-24-6.5.7.b of this rule, 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; childcare; 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 §110-24-6.5.7.d of this rule, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of §110-24-6.5.7.b of this rule.

6.5.7.b.2 Assignment of Receipts. --

6.5.7.b.2.A. Rule of Determination. Except as otherwise provided in §110-24-6.5.7.b.2 of this rule, 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 West Virginia if and to the

extent the customer receives the in-person service in West Virginia. 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:

6.5.7.b.2.B. If the service is performed with respect to the body of an individual customer in West Virginia (e.g., hair cutting or x-ray services) or in the physical presence of the customer in West Virginia (e.g., live entertainment or athletic performances), the service is received in West Virginia.

6.5.7.b.2.C. If the service is performed with respect to the customer's real estate in West Virginia 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 West Virginia, the service is received in West Virginia.

6.5.7.b.2.D. 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 West Virginia, the service is received in West Virginia if the property is shipped or delivered to the customer in West Virginia.

6.5.7.b.3. Rule of Reasonable Approximation. -- If the state or states where a service is actually received cannot be determined, the taxpayer must reasonably approximate such state or states.

6.5.7.b.4. Examples. -- For purposes of the examples, it is irrelevant whether the services are performed by an employee of the taxpayer or by an independent contractor acting on the taxpayer's behalf.

Example 1: Salon Corp has retail locations in West Virginia 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 West Virginia. The receipts from sales of services provided at Salon Corp's locations outside West Virginia, even when provided to residents of West Virginia, are not receipts from in-state sales.

Example 2: Landscape Corp provides landscaping and gardening services in West Virginia 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 West Virginia at the time the services are performed. The receipts from sale of services provided at the in-state location are in West Virginia.

Example 3: Same facts as Example 2, except that Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to those locations of Retail Corp that are in West Virginia and in other states. The receipts from the sale of services provided to Retail Corp are in West Virginia to the extent the services are provided in West Virginia.

Example 4: 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 West Virginia.

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

Example 6: Teaching Corp provides seminars in West Virginia 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 West Virginia, the receipts from sales of the services are in West Virginia.

6.5.7.c. Services Delivered to the Customer or on Behalf of the Customer or Delivered Electronically Through the Customer. --

6.5.7.c.1. In General. If the service provided by the taxpayer is not an in-person service within the meaning of §110-24-6.5.7.b of this rule or a professional service within the meaning of §110-24-6.5.7.d of this rule, 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 West Virginia if and to the extent that the service is delivered in West Virginia. For purposes of §110-24-6.5.7.c of this rule, 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 §110-24-6.5.7.c.2.~~A.~~B. of this rule and Example 4 under §110-24-6.5.7.c.2.~~A.~~B 3 of this rule). 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.

6.5.7.c.2. 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 §110-24-6.5.7.c of this rule, a service delivered by an electronic transmission is not a delivery by physical means). If a rule of assignment set forth in §110-24-6.5.7.c of this rule 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 must treat the customer as a business customer.

6.5.7.c.2A. Sourcing of Receipts from Broadcast Advertising Services. receipts from a broadcaster's sale of advertising services to a broadcast customer are assigned to West Virginia if the commercial domicile of the broadcast customer is in West Virginia. For purposes of this provision, "advertising services" means an agreement to include the broadcast customer's advertising content in the broadcaster's film programming.

6.5.7.c.2.~~A.~~ B. 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 §110-24-6.5.7.c.2.A of this rule apply whether the taxpayer's customer is an individual customer or a business customer.

6.5.7.c.2. ~~A.~~ B. 1. 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 must assign the receipts to that state or states.

6.5.7.c.2. ~~A~~ B. 2. Rule of Reasonable Approximation. -- If the taxpayer cannot determine the state or states where the service is actually delivered, it must reasonably approximate the state or states.

6.5.7.c.2. B.3. Examples:

Example 1: Direct Mail Corp, a corporation based outside West Virginia, 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 West Virginia 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 West Virginia to the extent that the services are delivered on behalf of Business Corp to West Virginia customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in West Virginia).

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

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

Example 4: Fulfillment Corp, a corporation based outside West Virginia, provides product delivery fulfillment services in West Virginia and in neighboring states to Sales Corp, a corporation located outside West Virginia 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 West Virginia, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside West Virginia. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to West Virginia to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in West Virginia.

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

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

6.5.7.c.2.B. Delivery to a Customer by Electronic Transmission. Services delivered by electronic transmission include, without limitation, services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases, or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following rules apply.

6.5.7.c.2.B.1. Services Delivered By Electronic Transmission to an Individual Customer.--

6.5.7.c.2.B.1.a. Rule of Determination. -- In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in West Virginia if and to the extent that the taxpayer's customer receives the service in West Virginia. If the taxpayer can determine the state or states where the service is received, it must assign the receipts from that sale to that state or states.

6.5.7.c.2.B.1.b. 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 must 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 must reasonably approximate the state or states using the customer's billing address.

6.5.7.c.2.B.2. Services Delivered By Electronic Transmission to a Business Customer.--

6.5.7.c.2.B.2.a. Rule of Determination. -- In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in West Virginia if and to the extent that the taxpayer's customer receives the service in West Virginia. If the taxpayer can determine the state or states where the service is received, it must assign the receipts from that sale to the state or states. For purposes of §110-24-6.5.7.c.2.B.2 of this rule, 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.

6.5.7.c.2.B.2.b. Rule of Reasonable Approximation. -- If the taxpayer cannot determine the state or states where the customer actually receives the service but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it must reasonably approximate the state or states.

6.5.7.c.2.B.2.c. 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 must reasonably approximate the state or states as set forth in this rule. In these cases, unless the taxpayer can apply the safe harbor set forth in §110-24-6.5.7.c.2.B.2.d of this rule, the taxpayer must 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 five percent 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.

6.5.7.c.2.B.2.d. Safe Harbor. -- In the case of the delivery of a service to a business customer by electronic transmission, a taxpayer may not be able to determine, or reasonably approximate under §110-24-6.5.7.c.2.B.2.b of this rule, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at §110-24-6.5.7.c.2.B.2.c of this rule 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 five percent 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.

6.5.7.c.2.B.2.e. 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 §110-24-6.5.7.c.2.B.2.c of this rule but may use the rule of reasonable approximation in §110-24-6.5.7.c.2.B.2.b of this rule, and the safe harbor in §110-24-6.5.7.c.2.B.2.d of this rule, provided that the department may aggregate sales to related parties in determining whether the sales exceed five percent of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

6.5.7.c.2.B.3. Examples. -- In these examples, unless otherwise stated, assume that the taxpayer is not related to the customer to which the service is delivered. Also, assume if relevant, unless otherwise stated, that the safe harbor set forth at §110-24-6.5.7.c.2.B.2.d of this rule does not apply.

Example 1: Support Corp, a corporation that is based outside West Virginia, 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 West Virginia 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 West Virginia to the extent that Support Corp's services are received in West Virginia.

Example 2: Online Corp, a corporation based outside West Virginia, provides web-based services through the means of the Internet to individual customers who are resident in West Virginia 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 West Virginia 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.

Example 3: Same facts as 2, 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.

Example 4: Net Corp, a corporation based outside West Virginia, provides web-based services to a business customer, Business Corp, a company with offices in West Virginia 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 West Virginia were responsible for 75 percent of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25 percent of Business Corp's use of Net Corp's services. In this case, 75 percent of the receipts from the sales are received in West Virginia. 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 five percent or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under §110-24-6.5.7.c.2.B.2.c of this rule 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 five percent 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 5: Net Corp, a corporation based outside West Virginia, provides web-based services through the means of the Internet to more than 250 individual and business customers in West Virginia 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 five percent of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in §110-24-6.5.7.c.2.B.2.d of this rule and may assign its receipts using each customer's billing address.

6.5.7.c.2.C. 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.

6.5.7.c.2.C.1. Rule of Determination. -- In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in West Virginia if and to the extent that the end users or other third-party recipients are in West Virginia. For example, in the case of **non-broadcast direct or indirect advertising** 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 West Virginia to the extent that the audience for the advertising is in West Virginia. 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 West Virginia to the extent that the end users or other third-party recipients receive the services in West Virginia. 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.

6.5.7.c.2.C.2. Rule of Reasonable Approximation. -- If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, it must reasonably approximate the state or states.

6.5.7.c.2.C.3. Select Secondary Rules of Reasonable Approximation. --

6.5.7.c.2.C.3.a. If a taxpayer's service is the direct or indirect electronic delivery of **non broadcast** 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 must reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering **non broadcast** advertising directly or indirectly to a known list of subscribers, the taxpayer must 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 must 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.

6.5.7.c.2.C.3.b. 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, and 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 must 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.

6.5.7.c.2.C.3.c. When using the secondary reasonable approximation methods provided above, with regard to the relevant specific geographic area, include 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.

6.5.7.c.2.C.4. Examples:

Example 1: Cable TV Corp, a corporation that is based outside of West Virginia, 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 West Virginia. Second, Cable TV Corp sells monthly subscriptions to individual customers in West Virginia and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to West Virginia to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in West Virginia.. 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 West Virginia audience using the percentage that reflects the ratio of its West Virginia 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. 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 West Virginia in any case in which the programming is received by a customer in West Virginia. 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 West Virginia where its customer's billing address is in West Virginia. 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..

~~Example 2: Network Corp,~~
~~a corporation that is based outside of West Virginia, 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 West Virginia to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in West Virginia. 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 West Virginia sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the West Virginia population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area.~~

Example 2 - Network Corp, a Broadcaster that is based outside of West Virginia, sells advertising time to Broadcast Customers pursuant to which the customer's advertisements will run as commercials during the Network Corp's televised programming. The receipts from Network Corps' sale of advertising to its Broadcast Customers are assigned to West Virginia to the extent the Broadcast Customer is commercially domiciled in West Virginia.

Example 3: Web Corp, a corporation that is based outside West Virginia, provides Internet content to viewers in West Virginia 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 West Virginia to the extent that the viewers of the Internet content are in West Virginia, as measured by viewings or clicks. 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 West Virginia receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the West Virginia population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area.

Example 4: Retail Corp, a corporation that is based outside of West Virginia, sells tangible personal property through its retail stores located in West Virginia 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 West Virginia receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the West Virginia population in the specific geographic area from which the calls are placed relative to the total population in that area.

Example 5: Web Corp, a corporation that is based outside of West Virginia, sells tangible personal 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 §110-24-6.5.7.c.2.B of this rule. 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 6: Wholesale Corp, a corporation that is based outside West Virginia, develops an Internet-based information database outside West Virginia 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. 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 West Virginia by using a percentage that reflects the ratio of the West Virginia 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.. 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.

6.5.7.d. Professional Services. --

6.5.7.d.1. In General. Except as otherwise provided in §110-24-6.5.7.d.of this rule, 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. Nothing in this rule applies to services provided by a financial institution that must apportion and allocate its income under W. Va. Code §11-24-7b.

6.5.7.d.2. Overlap with Other Categories of Services.

6.5.7.d.2.A. Certain services that fall within the definition of "professional services" set forth in §110-24-6.5.7.d of this rule are nevertheless treated as "in-person services" within the meaning of §110-24-6.5.7.b of this rule and are assigned under the rules of that subdivision. Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services, or childcare 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 "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 §110-24-6.5.7.d of this rule, notwithstanding the fact that these services may involve some amount of in- person contact.

6.5.7.d.2.B. 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 set forth in (4)(d) of this rule, and not those set forth in §110-24-6.5.7.c of this rule, pertaining to services delivered to a customer or through or on behalf of a customer.

6.5.7.d.3. 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 must treat the customer as a business customer. For purposes of assigning the receipts from 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.

6.5.7.d.3.A. General Rule. Receipts from sales of professional services other than those services described in §110-24-6.5.7.d.3.B of this rule (architectural and engineering services) and §110-24-6.5.7.d.3.C of this rule (transactions with related parties) are assigned in accordance with §110-24-6.5.7.d.3.A of this rule.

6.5.7.d.3.A.1.Professional Services Delivered to Individual Customers. -- Except as otherwise provided in §110-24-6.5.7.d of this rule, 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 §110-24-6.5.7.d.3.A.1 of this rule. In particular, the taxpayer must 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 five percent of its receipts from sales of all services from an individual customer, the taxpayer must identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.

6.5.7.d.3.A.2. Professional Services Delivered to Business Customers. -- Except as otherwise provided in §110-24-6.5.7.d of this rule, 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 subparagraph. In particular, unless the taxpayer may use the safe harbor set forth at §110-24-6.5.7.d.3.A.3 of this rule, the taxpayer must 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 five percent 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.

6.5.7.d.3.A.3. Safe Harbor; Large Volume of Transactions.-- Notwithstanding the rules set forth in §110-24-6.5.7.d.3.A.1 and §110-24-6.5.7.d.3.A.2 of this rule, 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 five percent of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of §110-24-6.5.7.d.3.A of this rule and not otherwise.

6.5.7.d.3.B. Architectural and Engineering Services with respect to Real or Tangible Personal Property. -- Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of §110-24-6.5.7.d of this rule. 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 §110-24-6.5.7.d.3.B of this rule, the receipts from a sale of these services must be assigned under the general rule for professional services.

6.5.7.d.3.C. 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 in §110-24-6.5.7.d.3.A.2 of this rule, 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 §110-24-6.5.7.d.3.A.3 of this rule provided that the department may aggregate the receipts from sales to related parties in applying the five percent rule if necessary or appropriate to avoid distortion.

6.5.7.d.3.D. Examples. -- Unless otherwise stated, assume in each of these examples, where relevant, that the customer is not a related party and that the safe harbor set forth at §110-24-6.5.7.d.3.A.3 of this rule does not apply.

Example 1: Broker Corp provides securities brokerage services to individual customers who are resident in West Virginia and in other states. Broker Corp is not a financial institution required to report under W.Va. Code §11-24-7b. 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 five percent 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 must 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 must assign the receipts to that state.

Example 2: Same facts as Example 1, except that Broker Corp has several individual customers from whom it derives, in each instance, more than five percent of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives five percent or less of its receipts from sales of all services must be assigned as described in Example 24. For each customer from whom it derives more than five percent 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 five percent customer's state of primary residence is West Virginia, receipts from a sale made to that customer must be assigned to West Virginia; in any case in which a five percent customer's state of primary residence is not West Virginia, receipts from a sale made to that customer are not assigned to West Virginia.

Example 3: Architecture Corp provides building design services as to buildings located, or expected to be located, in West Virginia to individual customers who are resident in West Virginia and other states, and

to business customers that are based in West Virginia and other states. The receipts from Architecture Corp's sales are assigned to West Virginia because the locations of the buildings to which its design services relate are in West Virginia or are expected to be in West Virginia. 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 West Virginia even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than West Virginia or are electronically delivered to its customer in a state other than West Virginia.

Example 4: Law Corp provides legal services to individual clients who are resident in West Virginia 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 five percent 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 must 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 must 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 5: 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 West Virginia; in the other cases, the agreement is principally managed in a state other than West Virginia. If the agreement for legal services is principally managed by the client in West Virginia, the receipts from sale of the services are assigned to West Virginia; in the other cases, the receipts are not assigned to West Virginia. In the case of receipts that are assigned to West Virginia, 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 6: 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 West Virginia, the receipts from the sale of Consulting Corp's services are assigned to West Virginia. 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.

Example 7: Advisor Corp, a corporation that provides investment advisory services and is not a financial institution required to report under W. Va. Code §11-24-7b, provides investment 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 West Virginia. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in West Virginia, receipts from the sale of Advisor Corp's services are assigned to West Virginia. 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.

Example 8: Advisor Corp, a corporation that provides investment advisory services and is not a financial institution required to report under W. Va. Code §11-24-7b, 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 West Virginia, receipts from the sale of Advisor Corp's services are assigned to West Virginia. Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example 9: Design Corp is a corporation based outside West Virginia that provides graphic design and similar services in West Virginia and in neighboring states. Design Corp enters into a contract at a location outside West Virginia 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 five percent of its receipts from sales of services from the individual customer. All of the design work is performed outside West Virginia. Receipts from the sale are in West Virginia if the customer's billing address is in West Virginia.

6.5.8. License or Lease of Intangible Property. --

6.5.8.a. General Rules. --

6.5.8.a.1. The receipts from the license of intangible property are in West Virginia if and to the extent the intangible is used in West Virginia. 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 at §110-24-6.5.8.b through §110-24-6.5.8.e of this rule. For purposes of the rules set forth in §110-24-6.5.8 of this rule, a lease of intangible property is to be treated the same as a license of intangible property.

6.5.8.a.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 rule. Note, however, that for purposes of §110-24-6.5.8 and §110-24-6.5.9 of this rule, 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.

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

6.5.8.a.4. Nothing in §110-24-6.5.8 of this rule is to be construed to allow or require inclusion of receipts in the sales factor that are not included in the definition of "sales" pursuant to W. Va. Code §11-24-3a or related rules, or that are excluded from the numerator and the denominator of the sales factor pursuant to West Virginia §11-24-7(e)(13)(B)(ii)(III). So, to the extent that the transfer of business "goodwill" or similar intangible property, 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 must be excluded from the numerator and the denominator of the taxpayer's sales factor.

6.5.8.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 West Virginia 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 West Virginia. 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 West Virginia, it must assign that amount or proportion to West Virginia. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from West Virginia consumers, the portion of the licensing fee to be assigned to West Virginia must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the West Virginia 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 West Virginia must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the West Virginia 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.

6.5.8.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 West Virginia to the extent that the use for which the fees are paid takes place in West Virginia. 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 department can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in West Virginia, 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 West Virginia. 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.

6.5.8.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 department will accept that separate statement for purposes of this rule. 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 department can reasonably establish otherwise.

6.5.8.e 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 West Virginia to the extent that the broadcast customer is located in West Virginia. 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.

6.5.8.~~e.~~f. License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services. --

6.5.8.~~e.~~f.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 §110-24-6.5.7.c.2.B and §110-24-6.5.7.c.2.C of this rule, 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 §110-24-6.5.8.e of this rule include, without limitation, the license of database access, the license of access to information, the license of digital goods, 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).

6.5.8.~~e.~~f.2. Sublicenses. -- Pursuant to §110-24-6.5.8.e.1 of this rule, the rules of §110-24-6.5.7.c.2.B of this rule 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 §110-24-6.5.7.c.2.B of this rule 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.

6.5.8.~~e.~~f.3. Examples. -- In these examples, unless otherwise stated, assume that the customer is not a related party.

Example 1: Crayon Corp and Dealer Co enter into a license contract under which Dealer Co as licensee is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Co's sale of certain products to retail customers. Under the contract, Dealer Co is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co of products using the Crayon Corp trademarks. Under the contract, Dealer Co is permitted to sell the products at multiple store locations, including store locations that are both within and without West Virginia. 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 West Virginia are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its West Virginia stores relative to Dealer Co's total receipts.

Example 2: Program Corp, a **Broadcaster** ~~corporation~~ that is based outside West Virginia, licenses programming that it owns to ~~licenseesbusiness~~ **customers**, such as cable networks, that in turn will offer the programming to their customers on television or other media outlets in West Virginia and in all other U.S. states. **License fees received by Program Corp are assigned to West Virginia to the extent that the Business Customer is commercially domiciled in West Virginia.** ~~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 West Virginia, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's West Virginia receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the West Virginia audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. 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.~~

Example 3 Network Corp, a Broadcaster that is based outside of West Virginia, delivers programming that it owns to individual customers, in West Virginia and in other U.S. states. Network Corp's receipts from each individual broadcast customer will be assigned to West Virginia if the address of the broadcast customer listed in the broadcaster's records is in West Virginia.

Example ~~3.~~4 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 West Virginia receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the West Virginia population in the specific geographic region relative to the total population in that region. 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.

Example ~~4.~~5 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 West Virginia 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 department can reasonably establish that the actual use of the intangible property takes place in part in West Virginia, the royalty is assigned based to the location of that use rather than to location of the licensee's commercial domicile, in accordance with §110-24-6.5.8.a of this rule. It is presumed that the entire use is in West Virginia except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside West Virginia. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in West Virginia 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 West Virginia receipts.

Example ~~5.~~6. 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 West Virginia. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co.'s receipts that are derived from West Virginia customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the West Virginia population constitutes 25 percent 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 the department reasonably establishes otherwise. Assuming that neither party establishes otherwise, 25 percent of the licensing fee constitutes West Virginia receipts.

Example ~~6~~ 7. 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 department will: (1) assign no part of the licensing fee paid for the production intangible to West Virginia, and (2) assign 25 percent of the licensing fee paid for the marketing intangible to West Virginia.

Example ~~7~~ 8. Better Burger Corp, which is based outside West Virginia, 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 West Virginia. 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 West Virginia franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute West Virginia receipts because the franchises are for the right to make West Virginia sales. The monthly franchise fees paid by West Virginia 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 West Virginia receipts because in each case the use of the intangibles is to take place in West Virginia. The fees paid for the personal services are to be assigned pursuant to §110-24-6.5.7 of this rule.

Example ~~8~~ 9. Online Corp, a corporation based outside West Virginia, licenses an information database through the means of the Internet to individual customers that are resident in West Virginia 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 §110-24-6.5.8.e of this rule. 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 West Virginia in any case in which the customer's billing address is in West Virginia.

Example ~~9~~ 10. Net Corp, a corporation based outside West Virginia, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in West Virginia 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 §110-24-6.5.8.e of this rule. Assume that Net Corp cannot determine where its database is accessed but reasonably approximates that 75 percent of Business Corp's database access took place in West Virginia, and 25 percent of Business Corp's database access took place in other states. In that case, 75 percent of the receipts from database access is in West Virginia. 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 five percent or less of its receipts from database access from Business Corp, Net Corp must assign the receipts under §110-24-6.5.7.c.2.B.2 of this rule 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 five percent 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 ~~10:~~11. Net Corp, a corporation based outside West Virginia, licenses an information database through the means of the Internet to more than 250 individual and business customers in West Virginia 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 §110-24-6.5.8.e of this rule. 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 five percent of its receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in §110-24-6.5.7.c.2.B.2.d of this rule and may assign its receipts to a state or states using each customer's billing address.

Example ~~11:~~12. Web Corp, a corporation based outside of West Virginia, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in West Virginia 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 §110-24-6.5.7.c.2.B of this rule. 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 West Virginia using a percentage that represents the ratio of the West Virginia population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area.

6.5.9. Sale of Intangible Property; 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 §110-24-6.5.9 of this rule, 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.

6.5.9.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 must assign the receipts from the sale to West Virginia. If the intangible property is used or is authorized to be used in West Virginia and one or more other states, the taxpayer must assign the receipts from the sale to West Virginia to the extent that the intangible property is used in or authorized for use in West Virginia, through the means of a reasonable approximation.

6.5.9.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 §110-24-6.5.8 of this rule (pertaining

to the license or lease of intangible property).

6.5.9.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 §110-24-6.5.8.e. of this rule (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 §110-24-6.5.8.e of this rule.

6.5.9.d. Excluded Receipts. -- Receipts from the sale of intangible property are not included in the sales factor in any case in which the transaction does not give rise to sales within the meaning of W. Va. Code §11-24-3a. In addition, in any case in which the sale of intangible property does result in sales within the meaning of West Virginia §11-24-7(e)(13)(B), those sales are excluded from the numerator and the denominator of the taxpayer's sales factor. The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's sales factor under this provision includes, but is not limited to, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible property.

6.5.9.e. Examples. --

Example 1: Sports League Corp, a corporation that is based outside West Virginia, 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 northwest region of the country, including West Virginia. 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 West Virginia. 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 West Virginia and the other states.

Example 2: Inventor Corp, a corporation that is based outside West Virginia, sells patented technology that it has developed to Buyer Corp, a business customer that is based in West Virginia. 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. Inventor Corp understands that Buyer Corp is likely to use the patented technology in West Virginia, 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 sales factor.

6.5.10. Special Rules. --

6.5.10.a. Software Transactions. -- A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) 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 West Virginia as determined under the rules for the sale of tangible personal property set forth under W. Va. Code §11-24-7(e)(11) and related rules. In all other cases, the receipts from a license or sale of software are to be assigned to West Virginia as determined otherwise under this rule (e.g., depending on the facts, as the development and sale of custom software, *see* §110-24-6.5.7.c of this rule, as a license of a marketing intangible, *see* §110-24-6.5.8.b of this rule, as a license of a production intangible, *see* §110-24-6.5.8.c of this rule, as a license of intangible property where the substance of the transaction resembles a sale of goods or services, *see* §110-24-6.5.8.e of this rule, or as a sale of intangible property, *see* §110-24-6.5.9 of this rule).

6.5.10.b. Sales or Licenses of Digital Goods or Services. -- In general. In the case of a sale or license of digital goods or services, including, among other things, the sale of various video, audio, and software products, or similar transactions, the receipts from the sale or license are assigned by applying the same rules as are set forth in §110-24-6.5.7.c.2.B and §110-24-6.5.7.c.2.C of this rule, 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.

§110-24-6a. Transition Rules for C corporations having a fiscal tax year ending after January 1, 2022 and before December 31, 2022.

6a.1. Amendments to W. Va. Code §11-24-7 enacted by House Bill 2026, during the 2021 Regular Legislative Session, made several changes to the how income is apportioned and sourced:

6a.1.1. For tax years beginning on or after January 1, 2022, income apportionment formula method is changed from the 4-factor formula set forth in section heading 7 to a single sales factor formula set forth in section heading 6.

6a.1.2. For sales made on or after January 1, 2022, HB 2026 voids the "throw out rule" set forth in section heading 7. Sales made after that date are subject to the "no throw rule" set forth in section 6.

6a.1.3. For sales of services and intangible property made on or after January 1, 2022, HB 2026 voids the former "cost of performance" sales allocation rule set forth in section heading 7. Sales made after that date are subject to the market based souring sales allocation rule set forth in section heading 6.

6a. 2. For taxpayers having a fiscal tax year ending after January 1, 2022 and before December 31, 2022, some of these changes straddle that fiscal tax year:

6a.2.1. Sales made during any portion of the fiscal tax year before January 1, 2022 are still subject to the "throw out rule." Sales made after January 1, 2022, of the same fiscal tax year, are subject to the "no throw rule."

6a.2.2. Sales of services and intangible property for the portion of the fiscal tax year before January 1, 2022 are subject to the "cost of performance" rule. Sales after January 1, 2022, of the same fiscal tax year, are subject to the "market-based sourcing" rule.

6a.3. Filing Option Election -- For C corporations having a taxable year ending after January 1, 2022 and before December 31, 2022, the taxpayer may elect one of two filing options:

6a.3.1. Option 1 – The Taxpayer may file its West Virginia corporation net income tax return based upon the above-described changes for throw out rule and market based sourcing becoming effective for the Taxpayer's tax year beginning on or after January 1, 2022.

6a.3.2. Option 2 -- The Taxpayer may file:

6a.3.2.a. A short period West Virginia corporation net income tax return for the period beginning with the beginning date of the Taxpayer's fiscal tax year immediately preceding January 1, 2022, and ending on December 31, 2022, and

6a.3.2.b. A second short period tax return for the period beginning January 1, 2022 and ending on the date that the Taxpayer's fiscal tax year closes.

6a.3.2.c. The Taxpayer would prepare its first short period tax return based on terms, conditions, and requirements of the corporation net income tax statute prior to the effective dates mandated by HB 2026. The Taxpayer would prepare its second short period tax return based on terms, conditions, and requirements of the corporation net income tax statute effective on those dates mandated by HB 2026.

6a.3.3. There is no option regarding the apportionment formula. For taxpayers having a fiscal tax year ending after January 1, 2022 and before December 31, 2022, the taxpayer must use the 4-factor formula set forth in section heading 7 for that fiscal year. The single sales factor formula set forth in section heading 6 would apply in the next fiscal year.

§110-24-7. Allocation and Apportionment for Tax Years Ending prior to January 1, 2022.

7.1. Net rents and royalties from tangible personal property are allocable to this State in accordance with W. Va. Code §11-24-7, if they are nonbusiness income.

7.2. The extent of use of tangible personal property in a state is determined by multiplying the nonbusiness rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is used in the state in which the property was located at the time the rental or royalty payer obtained possession.

7.2.a. If the property is in this State for any part of a day, that time shall be counted as a full day.

Examples.

7.2.b. Corporation A was formed in Ohio and has its main offices there. Corporation A owns an apartment complex in West Virginia and leases computers to users located in West Virginia. The nonbusiness net rental income from the rental of the apartment complex is allocated to West Virginia for purposes of the West Virginia Corporation Net Income Tax. Likewise, the nonbusiness net rental income received by Corporation A as a lessor of computers in this State is allocated to this State.

7.2.c. Corporation Z was formed in State X and has its commercial domicile in the State of West Virginia. Corporation Z leases tangible personal property to customers in State K and derives nonbusiness income from that activity. State K has no corporation net income tax. The net receipts from leasing tangible personal property in State K are allocated entirely to the State of West Virginia.

7.2.d. Corporation Alpha, organized and headquartered in California, leases coal mining equipment in West Virginia. Alpha began leasing equipment in West Virginia on April 1 and is a calendar year taxpayer. The coal mining equipment was not in this State until April 1, the date the lease commenced. The property is leased in this State for 275 of the 365 days in the year. If rental income from the coal mining equipment located in the State of West Virginia is nonbusiness income, and if Alpha Corporation netted $15,000 for leasing this equipment for the entire year, Alpha would include in West Virginia income the following amount: 275/365 x $15,000 = $11,301.37.

7.2.d.1. If Alpha Corporation has adequate records to show the net rental income from the equipment while the equipment was leased in this State, then it may use the actual net rental income and not "apportion" its allocation of net rental income.

7.3. Business activities partially within and partially without this State.

7.3.a. Where a corporation has income from business activities partially within this State and

partially outside of this State, all net income, after deducting those items specifically allocated under W. Va. Code §11-24-7(d), shall be apportioned to this State by multiplying the net income by a fraction, the numerator of which is the property factor plus the payroll factor plus two times the sales factor, and the denominator of which is four, reduced by the number of factors, if any, having no denominator except if the sales factor has a denominator of zero, the denominator of the apportionment fraction shall be reduced by two. Note that this subdivision does not apply if the corporation is subject to a special apportionment method under W. Va. Code §11-24-7a or 7b or is authorized to use a special apportionment method pursuant to W. Va. Code §11-24-7(h).

7.3.a.1. Under W. Va. Code §11-24-7(c), if 100% of the business activities of a corporation take place in West Virginia, then the corporation does not apportion its income using the apportionment methodologies prescribed by the statute, and the entire net income of the corporation is subject to the corporation net income tax.

7.3.a.1.A. A combined group apportions the group's adjusted federal taxable income from unitary business when one or more of the members of the combined group engage in business only within the State of West Virginia, but one or more other members of the combined group engage in business activities partially in West Virginia and partially outside of West Virginia.

7.3.a.1.B. If all business activities of all combined group members take place entirely within West Virginia, then the entire net income of each combined group member is subject to the West Virginia corporation net income tax without apportionment.

7.3.a.2. Example -- General Apportionment Formula:

The following is an example of how the apportionment formula works in the context of the corporation net income tax:

A hypothetical corporation has facilities and operations in Pennsylvania, West Virginia, New York, and California.

The corporation has sales in 47 of the 50 states of the USA.

The apportionment formula is as follows:

$$\frac{\frac{\text{Average value of property in WV}}{\text{Average value of property in USA}} + \frac{\text{Payroll in WV}}{\text{Payroll in USA}} + \left(2x \left(\frac{\text{Sales in WV}}{\text{Sales in USA}} \right) \right)}{4}$$

Federal Taxable Income -- The corporation has **$10,000,000 federal taxable income from all operations in the USA after West Virginia modifications and adjustments.** These modifications and adjustments are, for certain items that are required to be added to, or subtracted from, federal taxable income before apportionment.

Average value of property in the USA -- The total average value of property owned and leased by the corporation during the tax year in the USA (including property in Pennsylvania, West Virginia, New York, and California) is **$517,050,000.**

Average value of property in the West Virginia -- The total average value of property owned and leased by the corporation during the tax year in West Virginia is **$15,000,000.**

Payroll in the USA -- The total annual payroll paid to all employees of the corporation in the

USA (including payroll paid in Pennsylvania, West Virginia, New York, and California) during the tax year is **$65,628,000.**

Payroll in West Virginia -- The total annual payroll paid to all employees of the corporation in West Virginia is **$2,499,000.**

Sales in the USA -- The total sales of the corporation in the entire USA (all of the 47 states in which the corporation has sales) are **$435,009,000.**
The corporation sells almost all of its production outside of West Virginia.

Sales in West Virginia -- The total sales of the corporation in West Virginia are **$4,000.**

The apportionment formula, using these values, would be as follows:

$$\frac{\dfrac{\text{Avg. property in WV } \$15{,}000{,}000.}{\text{Avg. property in USA } \$517{,}050{,}000} + \dfrac{\text{WV Payroll } \$2{,}499{,}000}{\text{USA Payroll } \$65{,}628{,}000} + \left(2x \left(\dfrac{\text{Sales in WV } \$4{,}000}{\text{Sales in USA } \$435{,}009{,}000} \right) \right)}{4}$$

The math works out as follows:

$$\frac{\text{Property factor } 0.029011 + \text{Payroll factor } 0.038078 + \left(2x \left(\text{Sales factor } 0.000009 \right) \right)}{4}$$

OR

$$\frac{\text{Property factor } 0.029011 + \text{Payroll factor } 0.038078 + \text{Double weighted sales factor } 0.000018}{4}$$

OR

$$\frac{0.067107}{4}$$

OR

0.016777 -- This is the apportionment factor.

Assuming that the corporation has no allocable WV income, out of all of the operations in the USA, slightly over one percent (*i.e.*, 0.016777) of the operations of the corporation are attributable to West Virginia operations and activity.

Net federal taxable income from all operations in the USA, after WV modifications and adjustments is $10,000,000.

Applying the apportionment formula, West Virginia taxable income is:

Federal Taxable Income (After Adjustments)		Apportionment Factor		WV Taxable Income
$10,000,000	**x**	**0.016777**	=	**$167,770.00**

The final computation of the tax is as follows. The hypothetical corporation has federal taxable income after modifications and adjustments allocated and apportioned to West Virginia in the amount of **$167,770.00**. The tax rate for the given year is 8.75%.

Tax is .0875 x $167,770.00 = $14,679.88 (rounded)

Tax is $14,679.88.

7.3.b. Example. -- Pro Inc. is a service corporation doing business in several states, including West Virginia. Pro Inc. owns no property anywhere. In this case, the allocation formula for Pro Inc. will be:

$$\frac{\frac{\text{WV Payroll}}{\text{Total Payroll}} + 2.\ \frac{\text{(WV Sales)}}{\text{(Total Sales)}} + \frac{\text{0 WV Property}}{\text{0 Total Property}}}{3}$$

If, for some unusual reason, a corporation has no sales anywhere, since the sales factor is double weighted, the overall denominator would be reduced by 2.

7.4. "Business activities" include all activities engaged in by the corporation, and includes those activities giving rise to both business income and nonbusiness income.

7.4.a. All income of a corporation, including both business income and nonbusiness income, is apportioned, except nonbusiness income specifically identified in W. Va. Code §11-24-7(d), which is allocated.

7.4.a.1. All other nonbusiness income and all business income shall be apportioned.

7.4.b. Where a corporation has business activities that are in West Virginia and other states, its other net nonbusiness income that was not allocated under W. Va. Code §11-24-7(d) and all of its net business income will be apportioned.

7.5. Property factor.

7.5.a. Property factor. -- The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used by it in this State during the taxable year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used by the taxpayer during the taxable year, which is reported on Schedule L of Federal Form 1120, plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

7.5.a.1. The common law definition of real and personal property shall be used, (*i.e.*, real property is land and all things firmly and permanently attached to the land, and personal property is all

other property).

7.5.a.2. Only real and tangible personal property is counted in the property factor. The common law definition of tangible personal property shall be used. Examples of tangible personal property include, but are not limited to, books, equipment, supplies, inventories and virtually any other form of personalty that can be held or touched. Tangible personal property does not include money, chooses in action, or any other intangibles.

7.5.a.3. The average value of real and tangible personal property means the beginning and ending year balances of the relevant accounts reported on Schedule L of Federal Form 1120, or its successor. However, the Tax Commissioner may require use of a monthly average of the accounts or any other determination of the average value of the property that is appropriate for an accurate determination of the factor.

7.5.b. Value of property.

7.5.b.1. Property owned by the taxpayer shall be valued at its original cost, adjusted by subsequent capital additions or improvements to the property and by partial or total disposition of the property by reason of sale, exchange, abandonment, loss or destruction or other alienation of, or loss of, the property. Where records of original cost are unavailable or cannot be obtained without unreasonable expense, property shall be valued at current market value. Property rented by the taxpayer from others shall be valued at eight times the net annual rental rate. The term "net annual rental rate" is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit in money or other consideration for the use of the property.

7.5.b.1.A. Net annual rental rate includes any amount payable for the use of real or tangible personal property, or any part of the property, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

7.5.b.1.B. Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs, or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services and the like are also included in the term "net annual rental rate." If a payment includes rent and other charges which are not separately set forth, the amount of rent shall be determined by consideration of the relative values of the rent and the other items.

7.5.b.1.C. Real or personal property owned by one corporation which is used in this State by another corporation to which the property is rented is to be included in the property factor by both corporations unless the rental income is nonbusiness income to the receiving corporation.

7.5.b.1.C.1. Example. -- X Corporation owns certain real property located in West Virginia, which is leased by Y Corporation for the entire taxable year of both corporations. Rental income received by X Corporation is allocated to the State of West Virginia and the value of the property is not included in the apportionment factor for X Corporation's apportionable income in either the numerator of the property factor (value of taxpayer's West Virginia real and tangible personal property) and in the denominator of the property factor (value of taxpayer's real and tangible personal property owned or rented by the taxpayer for the taxable year). Eight times the annual rental rate of the property will be included in both the numerator and the denominator of the property factor for Y Corporation.

7.5.c. Movable property.

7.5.c.1. The value of movable tangible personal property used both within and outside of this State shall be included in the numerator to the extent of its use in this State. The extent of use in this State

is determined by multiplying the original cost of the property by a fraction, the numerator of which is the number of days of physical location of the property in this State during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable period. The number of days of physical location of the property may be determined on a statistical basis or by any other reasonable method acceptable to the Tax Commissioner.

7.5.d. Leasehold improvements.

7.5.d.1. For purposes of the property factor, leasehold improvements are treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or whether the improvements revert to the lessor upon expiration of the lease. Leasehold improvements are included in the property factor at their original cost.

7.5.d.1.A. Example. -- Alpha Corporation leases a building to Beta Corporation. The building is located in West Virginia. Beta Corporation makes certain leasehold improvements to the property totaling $100,000 some of which the lease permits Beta Corporation to remove. The entire value of the leasehold improvements is included in Beta Corporation's property factor. The value of the leasehold improvements is also included in Alpha Corporations property factor.

7.5.e. Average value of property.

7.5.e.1. The average value of property is determined by averaging the values of the property at the beginning and the ending of the taxable year.

7.5.e.1.A. If there are substantial fluctuations in the values of property during the taxable year, or where property is acquired or disposed of after the beginning of the taxable year, or where the rental or lease contract ceases before the end of a taxable year, the Tax Commissioner may require the averaging of monthly values of the property during the taxable year or the pertinent part of the taxable year.

7.5.e.1.A.1. If a unitary member does not have nexus with the state of West Virginia, or if the unitary member is not taxable by West Virginia under the protections of Public Law 86-272. (15 U.S.C.A. §381), then that unitary member's income shall be included in the combined report of the combined group. However, that unitary member's factor attributes shall not be included in the numerator of the property factor but shall be included in the denominator of the property factor when the tax return is prepared, and for combined group members, when the combined report is prepared.

7.6. Payroll factor.

7.6.a. The payroll factor is a fraction, the numerator of which is the total compensation paid in this State during the taxable year by the taxpayer for compensation, and the denominator of which is the total compensation paid by the taxpayer during the taxable year, as shown on the taxpayer's federal income tax return filed with the Internal Revenue Service, as reflected in the schedule of wages and salaries and that portion of cost of goods sold which reflects compensation, or as shown on a pro forma return.

7.6.b. Compensation.

7.6.b.1. The term "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or to any other person not properly classified as an employee shall be excluded. Only those amounts paid directly to employees are included in the payroll factor. Amounts considered as paid directly to employees include the value of board, rent, housing, lodging and other benefits or services furnished to employees by the taxpayer in return for personal services, provided the amounts constitute income to the recipient for federal income tax purposes. Compensation for each employee shall be the amount of wages and salary shown on

the Federal Form W-2. for the employee, in accordance with federal income tax law.

7.6.b.2. Employee.

7.6.b.2.A. For purposes of determining the payroll factor, an employee is any officer of a corporation or any individual who, under the usual common-law rule applicable in determining the employer-employee relationship, has the status of an employee.

7.6.b.2.B. An employee is a person in the service of another under any contract of hire, express or implied, oral, or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.

7.6.c. When compensation is paid in this State.

7.6.c.1. Compensation is paid or accrued in this State if an employee's services are performed entirely within this State or if an employee's services are performed both within this State and outside of this State, but the services performed outside of this State are incidental to that employee's services within this State. The converse is not true. In all circumstances, services performed in this State are to be included in the payroll factor as services performed in this State. "Incidental", as used in this paragraph, means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction. Compensation is also paid or accrued in this State if some of the employee's service is performed in this State and the employee's base of operation, or if there is no base of operation, the place from which the service is directed or controlled is in this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the employees residence is within this State.

7.6.c.2. As used in this subdivision, the term "base of operations" is the place of more or less permanent nature from which the employee starts his or her work and to which he or she customarily returns in order to receive instructions from the taxpayer or communications from his or her customers or with other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his or her trade or profession at some other point or points. 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.

7.6.c.3. Example. -- P Corporation has salesmen in several states. West Virginia customers are serviced by a salesman living in Ohio. The salesmen are directed from a regional office located in Pennsylvania. Compensation attributable to the time spent in West Virginia on employer business would be included in the taxpayer's West Virginia payroll factor.

7.6.c.4. If a unitary member does not have nexus with the state of West Virginia, or if the unitary member is not taxable by West Virginia under the protections of Public Law 86-272. (15 U.S.C.A. §381), then that unitary member's income shall be included in the combined report of the combined group. However, that unitary member's factor attributes shall not be included in the numerator of the payroll factor but shall be included in the denominator of the payroll factor when the tax return is prepared, and for combined group members, when the combined report is prepared.

7.7. Sales factor.

7.7.a. The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in this State during the taxable year, less returns, and allowances attributable to the gross receipts from the West Virginia activity. The denominator of the fraction is the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business during the taxable year and reflected in its gross income

reported and as appearing on the taxpayer's Federal Form 1120, and consisting of those certain pertinent portions of the elements of gross income set forth. If either the numerator or the denominator includes interest or dividends from obligations of the United States government which are exempt from taxation by this State, the amount of the interest and dividends, if any, shall be subtracted from the numerator or denominator in which it is included.

7.7.a.1. The only sales to be included in the sales factor are those which produce business income.

7.7.a.2. Rules for determining sales in certain circumstances.

7.7.a.2.A. In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" 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, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are reflected in the taxpayer's gross income reported and as appearing on the taxpayer's Federal Form 1120.

7.7.a.2.B. In the case of cost fixed fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost, plus the fee.

7.7.a.2.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, "sales" includes the gross receipts from the performance of the services including fees, commissions, and similar items.

7.7.a.2.D. In the case of a taxpayer engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease, or licensing of the use of the property.

7.7.a.2.E. In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

7.7.b. In filing returns with this State, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose that information by attaching a statement, setting forth the nature and effect of the change, to the corporation net income tax return for the current year.

7.7.c. Sales factor denominator.

7.7.c.1. The denominator of the sales factor includes the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, unless otherwise excluded in this rule.

7.7.d. Sales factor numerator.

7.7.d.1. The numerator of the sales 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. All interest income, service charges, carrying charges, or time-price differential changes incidental to the gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

7.7.d.2. *Joyce* or *Finnegan.*

The ***Joyce*** case and the ***Finnegan*** case were tax matters brought before the California State Board of Equalization B

Appeal of Joyce, Inc., 66 SBE 069, 1966 WL 1411 (Cal. St. Bd. Eq.) (Nov. 23, 1966).

Appeal of Finnigan Corp., 88- SBE-022-A, 1990 WL 15164 (Cal. St. Bd. Eq.) (Jan. 24, 1990).

The issue for which these cases have become known relates to the determination of the sales that are included in the numerator of the sales factor for purposes of the apportionment formula.

In synopsis, the basic distinction is as follows:

Joyce -- If a unitary group member has nexus with the state, then "in state" gross receipts of that member are included in the sales factor numerator, but **not** if the member does **not** have nexus with the state, determined on a "stand alone" basis.

Finnigan -- If one or more unitary group members has nexus with the state, then "in state" gross receipts of all unitary group members are included in the sales factor numerator, including "in state" gross receipts of a unitary group member that, itself, does not have nexus with the state, determined on a "stand alone" basis.

West Virginia is a "*Joyce* State."

If the unitary member does not have nexus with West Virginia or if the unitary member is not taxable under the protections of PL 86-272, then that unitary member's gross receipts derived from transactions and activity in the regular course of its trade or business in West Virginia are **not** included in the numerator of the sales factor when the tax return is prepared, and for combined group members, when the combined report is prepared.

7.7.e. Dock sales.

7.7.e.1. Where tangible personal property is sold and the terms of the sale require the purchaser to pick up the property or otherwise receive the property in this State, the sale is to be treated as a sale taking place in this State for purposes of the sales factor.

7.7.e.2. In the case of sales requiring by their terms delivery of tangible personal property by common carrier, contract carrier or by other means of transportation excluding pickup by the customer in this State, whether directly or indirectly, the place at which the property is ultimately received after all transportation has been completed shall be considered as the place at which the property is received by the purchaser.

7.7.e.3. Direct delivery in this State, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this State regardless of where title passes or other conditions of sale.

7.7.e.4. Direct delivery outside this State to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this State, regardless of where title passes or other conditions of sale.

7.7.e.5. Examples.

7.7.e.5.A. Baubles, Inc. is located in Huntington, West Virginia, and makes sales of tangible personal property to an Ohio company. The terms of the sale require the Ohio company to pick up the merchandise from the loading dock at Baubles. The sale is to be treated by Baubles as a sale taking place in this State.

7.7.e.5.B. Alpha Corporation, which manufactures a highly sophisticated device used in mining, purchases certain tangible personal property from a company located in Virginia. Alpha Corporation, located in Bergoo, West Virginia is required by the terms of the sales contract to pick up the merchandise at the Virginia company's loading dock in Virginia. The sale is to be treated as not occurring in West Virginia by the Virginia company absent other nexus with West Virginia.

7.7.e.5.C. RPS, Inc., is located in Morgantown, West Virginia and makes sales of tangible personal property. Some of the sales contracts require RPS to ship the goods to companies located outside of this State via common carrier. The sales of the tangible personal property shipped by the carrier are not included as West Virginia sales.

7.7.f. Special rules.

7.7.f.1. Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, the gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory or plant will be excluded.

7.7.f.2. Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless the exclusion would materially affect the amount of income apportioned to this State. For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, business automobiles, etc.

7.7.f.3. Where the income producing activity of a taxpayer other than a banking or financial institution in respect to business income from intangible personal property can be readily identified, the income is included in the denominator of the sales factor and, if the income producing activity occurs in this State, the numerator of the sales factor as well. For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property and income from the sale, licensing, or other use of intangible personal property.

7.7.f.4. Where the business income from intangible property cannot readily be attributed to any particular income producing activity of a taxpayer other than a banking or financial institution, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures, or government securities results from the mere holding of the intangible personal property by the taxpayer, the dividends and interest shall be excluded from the denominator of the sales factor.

7.7.g. Allocation of sales of tangible personal property.

7.7.g.1. Sales of tangible personal property are in this State if the property is received in this State by the purchaser, other than the United States government, regardless of the f.o.b. point or other conditions of the sale. In the case of delivery by common carrier or other means of transportation, the place at which the property is ultimately received after all transportation has been completed shall be considered as the place at which the property is received by the purchaser, regardless of where title passes or other

conditions of sale. Direct delivery in this State, other than for purposes of transportation, to a person or firm designated by the purchaser, constitutes delivery to the purchaser in this State, and direct delivery outside this State to a person or firm designated by the purchaser does not constitute delivery to the purchaser in this State, regardless of where title passes or other conditions of sale. The sales of tangible personal property are also in this State if the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and the purchaser is the United States government.

7.7.g.2. Throw-out rule -- All other sales of tangible personal property delivered or shipped to a purchaser within a state in which the taxpayer is not taxed are excluded from the denominator of the sales factor. This is commonly known as the throw-out rule.

7.7.g.2.A. "Not taxed in another state" means in that state the taxpayer is not subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporation stock tax or that a state has no jurisdiction to subject the taxpayer to a net income tax.

7.7.g.2.B. Application of throw out rule when computing the unitary group's sales factor denominator in the group's combined report. - W. Va. Code §11-24-13a(a) provides that the use of a combined report does not disregard the separate identities of the taxpayer members of the combined group. Consequently, the throw-out rule is applied on a corporation-by-corporation basis and is not applied as if the combined group were a single taxpayer, to determine the denominator of the sales factor for each member of the combined group included in the combined report. The separate corporation sales factor denominators are then aggregated to determine the denominator of the sales factor of the combined group.

7.7.g.2.B.1. Example 1. When all sales of tangible personal property produce income from unitary group business activity. - A combined group engaged in unitary business activity consists of Corporations A, B, C and D. The combined group makes sales to customers in States 1, 2, 3, 4, 5 and 6. But not every member of the combined group makes sales to customers in all of those states and, in some of the states, the member is not subject to an income tax because of Public Law 86-272. When computing the denominator of the combined group's sales factor for purposes of the West Virginia combined report, the throw-out rule will be applied separately to each member of the combined group and the aggregate adjusted denominator will be the sales factor denominator for the combined group engaged in unitary business activity.

Sales Factor Denominator		
	Before Throw-out	**After Throw-out**
Corporation A	$ 5 million	$ 5 million
Corporation B	$ 5 million	$ 4 million
Corporation C	$ 5 million	$ 4.5 million
Corporation D	$ 5 million	$ 3 million
Total	**$20 million**	**$16.5 million**

7.7.g.2.B.2. Example 2. When some but not all sales of tangible personal property produce income from unitary group business activity. - A combined group engaged in unitary business activity consists of Corporations A, B, C and D. Corporations A and C also have income from business activity that is not unitary business activity. The combined group makes sales to customers in States 1, 2, 3, 4, 5 and 6. But not every member of the combined group makes sales to customers in all of those states and, in some of the states, the member is not subject to an income tax because of Public Law 86-272. Because Corporations A and C have receipts from sales of tangible personal property that produce business income from unitary business activity and receipts from sales of tangible personal property that produces business income from other business activities that are not unity business activities, the sales factor numerators and denominators of Corporations A and C shall be further analyzed so that only sales of

tangible personal property from unitary business activity are included when apportioning the business income from unitary business activity. When computing the denominator of the combined group's sales factor for purposes of the West Virginia combined report, the throw-out rule will be applied separately to each member of the combined group and the aggregate adjusted denominator will be the sales factor denominator for the combined group engaged in unitary business activity.

7.7.g.2.B.3. Example 3. - When a partnership owned in part by a corporation has taxable nexus in one or more states into which the corporation sells tangible personal property, but the corporation does not otherwise have taxable nexus with those states. C A combined group engaged in unitary business activity consists of Corporations A, B, C and D. The combined group makes sales to customers in States 1, 2, 3, 4, 5 and 6. However, Corporations A and C do not sell tangible personal property to customers in all of those states or, in some of the states, Corporations A and C are not subject to an income tax because of application of Public Law 86-272. Corporations A and C each own an interest in partnerships engaged in unitary business activity with the combined group. These partnerships do have taxable nexus with states into which Corporations A and C sell tangible personal property and in which Corporations A and C do not have taxable nexus if their partnership interests are disregarded. For taxable years beginning after December 31, 2008, each corporation's share of the property, payroll and sales factors of the partnerships are included in the property, payroll, and sales factors of their corporate owners. As a consequence, all members of the combined group have taxable nexus with all of the states into which they sell tangible personal property, and the throw-out rule does not apply to this combined group.

7.7.h. Allocation of other sales.

7.7.h.1. Sales, other than sales of tangible personal property are in this State if the income-producing activity is performed in this State or the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other state, based on costs of performance, or the sale constitutes business income to the taxpayer, or the taxpayer is a financial organization not having its commercial domicile in this State, and in either case the sale is a receipt described as attributable to this State in W. Va. Code '11-24-7b.

7.7.i. If a unitary member does not have nexus with the State of West Virginia, or if the unitary member is not taxable by West Virginia under the protections of Public Law 86-272. (15 U.S.C.A. §381), then the unitary member's income shall be included in the combined report of the combined group. However, that unitary member's sales factor attributes shall not be included in the numerator of the combined group's sales factor, but subject to the provisions of paragraph 7.7.g.2. of this rule, may be included in the denominator of the payroll sales factor of the combined group. However, if the member has sales of tangible personal property subject to the throw-out rule, then its sales factor attributes for those sales of tangible personal property not taxed in another state are excluded from both the numerator and the denominator of the sales factor of the combined group.

7.7.j. The term "income-producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gain or profit. The activity does not include transactions and activities performed on behalf of the taxpayer, such as those conducted on its behalf by an independent contractor. "Income-producing activity" includes, but is not limited to:

7.7.j.1 Rendering of personal services by employees with use of tangible and intangible property by the taxpayer in performing a service;

7.7.j.1.A. The sale, rental, leasing, licensing, or other use of real property;

7.7.j.1.B. The sale, rental, leasing, licensing, or other use of tangible personal property; or

7.7.j.1.C. The sale, licensing, or other use of intangible personal property. The mere holding of intangible property is not, in itself, an income-producing activity: Provided, That the conduct of the business of a financial organization shall constitute an income-producing activity.

7.7.k. The term "cost of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

7.7.l. Application and special rules.

7.7.l.1. Gross receipts from the sale, lease, rental, or licensing of real property are located in this State if the real property is located in this State.

7.7.l.2. Gross receipts from the sale, rental, lease, or licensing of tangible personal property are in this State if the property is located within this State. The rental, lease, licensing or other use of tangible personal property in this State is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this State during the rental, lease, or licensing period, gross receipts attributable to this State shall be measured by the ratio which the days the property was physically present or was used in this State bears to the total days of the physical location or use of the property everywhere during that period, including the days it was physically located or used in a state in which the taxpayer is not taxed within the meaning of that term as provided in subparagraph 7.7.g.2.A of this rule.

7.7.l.3. Example. -- The taxpayer is the owner of ten railroad cars. During the current tax year, the total of the days each railroad car was present in this State was 60 days. The receipts attributable to the use of each of the railroad cars in this State are a separate item of income and shall be determined as follows:

$$\left(\frac{\text{10 cars X 60 days each}}{\text{365 days in 1 year X 10 cars}} \right) \text{X Total receipts} = \text{Receipts attributable to this State.}$$

7.7.l.4. Gross receipts for the performance of personal services are attributable to this State to the extent the services are performed in this State. If services relating to a single item of income are performed partly within and partly outside of this State, the gross receipts for the performance of the services shall be attributable to this State only if a greater proportion of the services was performed in this State, based upon costs of performance. Usually, where services are performed partly within and partly outside of this State, the services performed in each state constitute a separate income producing activity; in that case the gross receipts for the performance of services attributable to this State shall be measured by the ratio which the time spent in performing the services in this State bears to the total time spent in performing such services everywhere, including the time spent in performing the services in a state in which the taxpayer was not taxed within the meaning of that term as provided in subparagraph 7.7.g.2.A. of this rule.

7.7.l.5. Example. -- Taxpayer, a road show, gave theatrical performances at various locations in State X and in this State during the tax period. All gross receipts from performances given in this State are attributable to this State as each performance is a separate income producing activity.

7.7.l.6. Example. -- Taxpayer, a public opinion survey corporation, conducted a poll by its employees in State F and in this State for the sum of $10,000. The project required 800-man hours to obtain the basic data and to prepare the survey report. Three hundred of the 800-man hours were expended in this State. The receipts attributable to this State are: 300/800 X $10,000 = $3,750.

7.7.1.7. Example. -- Boil Laboratories, Inc. performs certain medical tests. Boil Laboratories is located in Virginia, where all analysis is performed. Boil Labs also has a location in this State where tissue specimens are collected, as well as a truck and routeman in this State who collects samples from various doctor's offices and hospitals. Boil Labs has a similar set-up in Virginia. It costs Boil Labs $18 to analyze each specimen. All but $5 of the $18 of these costs are incurred in the State of Virginia. Each sample or specimen is a separate income-producing activity and is not the sale of tangible personal property. Since the income-producing activity is performed both in and outside of this State, and a greater proportion of the income producing activity is not performed in this State, then none of the charges for the analysis of samples or specimens drawn in this State will be included as sales in this State for purposes of the sales factor.

7.8. Termination Date. – This section heading 7 will terminate and have no force or effect for tax years on or after January 1, 2022, except for those taxpayers using the transition rules set forth in section heading 6a.

§110-24-7a. Special Apportionment Rules.

7a.1. For purposes of this rule, any member of a unitary group that is required or permitted to use an apportionment formula or apportionment method other than an apportionment formula or apportionment method prescribed by W. Va. Code §11-24-7 is a "special apportionment member."

7a.1.a. Unitary groups which include some members which are required to use the ~~four-factor~~ apportionment formula set forth in W. Va. Code §11-24-7 and other members which are required to use a special apportionment method are subject to apportionment as described in the following paragraph.

7a.1.a.1. In the absence of a method otherwise authorized or required by the Tax Commissioner, as described in subdivision 7a.1.b of this rule, a special apportionment member shall report and file its tax based on designation of a combined reporting group limited to unitary group members who are required or permitted to use a special apportionment formula or method, and who do in fact use the same special apportionment formula or method as the special apportionment member. The income and the factors of a special apportionment member shall not be included in the combined reporting group comprised of the remainder of the unitary group that are not special apportionment members that use an apportionment formula other than the apportionment formula of the particular special apportionment member.

7a.1.b. In lieu of the method described in paragraph 7a.1.a.1 of this rule, a special apportionment member may seek authorization of the Tax Commissioner to report and file its tax on a separate return basis, pursuant to accounting and allocation and apportionment requirements prescribed by the Tax Commissioner on a case-by-case basis.

7a.1.c. Motor carriers -- Motor carries required to use the apportionment formula or apportionment method specified in W. Va. Code §11-24-7a(b) are special apportionment members.

7a.1.d. Financial organizations -- Financial organizations required to use the apportionment formula or apportionment method specified in W. Va. Code §11-24-7b are special apportionment members.

7a.1.e. The Tax Commissioner may designate a Taxpayer that is using allocation methods and an apportionment formula or apportionment methods required by the Tax Commissioner pursuant to the provisions of W. Va. Code §11-24-7(h) to be a special apportionment member. However, unless specifically designated by the Tax Commissioner to be a special apportionment member, a corporation using an allocation method and an apportionment formula or apportionment methods required by the Tax Commissioner pursuant to the provisions of W. Va. Code §11-24-7(h) is considered to be a Taxpayer which uses an allocation method and an apportionment formula or apportionment methods prescribed by W. Va. Code §11-24-7, and shall not be designated or considered to be a special apportionment member.

§110-24-8. Accounting Periods And Methods Of Accounting.

8.1. Period of computation of West Virginia taxable income.

8.1.a. For purposes of the tax imposed by this article, a taxpayer's taxable year shall be the same as the taxpayer's taxable year for federal income tax purposes.

8.2. Change of taxable year.

8.2.a. If a taxpayer's year is changed for federal income tax purposes, the taxpayer's taxable year for purposes of this rule shall be similarly changed.

8.3. Methods of accounting.

8.3.a. Same as federal.

8.3.a.1. A taxpayer's method of accounting under this rule shall be the same as the taxpayer's method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, West Virginia taxable income for purposes of this rule shall be computed under a method that in the opinion of the Tax Commissioner clearly reflects the income.

8.3.b. Change of accounting methods.

8.3.b.1. If a taxpayer's method of accounting is changed for federal income tax purposes, his or her method of accounting for purposes of this rule shall be changed so that it conforms to the method used for federal income tax purposes.

8.4. Adjustments.

8.4.a. In computing a taxpayer's West Virginia taxable income for any taxable year under a method of accounting different from the method under which the taxpayer's West Virginia taxable income for the previous year was computed, there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted.

8.5. Limitation on additional tax.

8.5.a. Change other than to installment method.

8.5.a.1. If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if the adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of two, during which the taxpayer used the method of accounting from which the change is made.

8.5.a.2. The procedures for determining tax liability under the provisions of W. Va. Code §11-24-8(e) are as follows:

8.5.a.2.A. Compute the tax for the current year using the regular method, including determination of the effective tax rate.

8.5.a.2.B. Multiply the dollar amount of the income adjustment included in the West Virginia taxable income by the current year effective tax rate.

8.5.a.2.C. Prorate the adjustments over the current tax year and over no more than two of the preceding tax years.

8.5.a.2.D. Multiply the dollar amount of the adjustments allocated to each of the years, to the extent the adjustments were included in West Virginia taxable income, by the effective tax rate applicable to each of the years.

8.6. Change from accrual to installment method.

8.6.a. If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of the change of method and for any subsequent year which is attributable to the receipts of installment payments properly accrued in a prior year shall be reduced by the portion of tax for any prior taxable year attributable to the accrual of the installment payments.

8.7. Coordination of reporting year among combined reporting unitary group members having diverse tax years.

8.7.a. Principal member. For purposes of this rule, "Principal member" is the member of the combined reporting group whose accounting period is used as a reference period for all members of the combined reporting group to aggregate and apportion combined report business income of the group. A principal member need not be a taxpayer member.

8.7.a.1. Corporations Described. Once a principal member has been determined under this subsection, that member shall remain the principal member for all succeeding periods that it is a member of the combined reporting group. However, the Tax Commissioner may authorize designation of a different principal member. Except as otherwise provided, the "principal member" is the corporation first described in subparagraphs 8.7.a.1.A, 8.7.a.1.B, 8.7.a.1.C and 8.7.a.1.D of this paragraph:

8.7.a.1.A. The parent corporation to all members of the combined reporting group. For purposes of this determination, a corporation which owns on average during the taxable year more than fifty percent of the stock of all classes of another corporation is defined to be the "parent corporation" of the corporation which is so owned.

8.7.a.1.B. If the group does not have a parent corporation which is a member of the combined reporting group, as so defined, the "principal member" is a corporation which is a lower tier parent to all members of the combined report. A "lower tier parent" is the first corporation, down the chain of corporations, which is a member of the combined reporting group and which would have constituted a "parent corporation" to all members of the combined group if all corporations which own or constructively own that corporation were disregarded.

8.7.a.1.C. If the group does not have a "lower tier parent" corporation which is a member of the combined reporting group, the "principal member" is the taxpayer member of the combined reporting group expected to have, on a recurring basis, the largest amount, by value, of real and tangible personal property in West Virginia. The value of real and tangible personal property shall be determined pursuant to the property factor provisions of W. Va. Code §§11-24-1, *et seq.* and this rule.

8.7.a.1.D. Election to Designate Principal Member. Notwithstanding the provisions of paragraph 8.7.a.1, in the first income year in which a combined report is required, the taxpayer members of the combined reporting group may elect to treat any other member of the combined reporting group as the "principal member," so long as it is consistently treated as such for the year of the election and thereafter. Thereafter, the taxpayer members may change their principal member only with consent of the Tax Commissioner.

8.7.b. Inconsistent Principal Member. In the event that members of a combined reporting group have filed with inconsistent principal members (including cases where two or more groups of corporations erroneously filed as distinct combined reporting groups) the determination of the appropriate principal member shall be made in accordance with the provisions of subdivision 8.7.a. of this section, unless, in the discretion of the Tax Commissioner, selection of another principal member is authorized or mandated by the Tax Commissioner.

8.8. Fiscalization to Principal Member's Year. "Fiscalization" is the process under which a member of a combined reporting group aligns the income and apportionment data from its accounting period to the accounting period of the principal member. If the accounting period of the principal member and one or more of the other members of the combined reporting group do not begin and end on the same dates, adjustments shall be made to fiscalize the other members' combined report business income and apportionment data in order to assign an appropriate amount of those values to the accounting period of the principal member.

8.8.a. Combined report business income of a taxpayer member, determined under W. Va. Code §§11-24-1, *et seq.* and this rule, is proportionately assigned to the applicable portion of that member's income year, based on the number of months falling within the common accounting period of the principal member. The resulting income from those portions is then aggregated (or netted) together for the member's income year to determine that member's business income attributable to the combined reporting group.

8.8.a.1. If the accounting period of a principal member and one of the other members of a combined reporting group do not begin and end on the same dates, adjustments shall be made to the other members' combined report business income and apportionment data to assign an appropriate amount of those values to the accounting period of the principal member in order for total group combined report business income to be apportioned. Each member of the group should generally use combined report business income and apportionment data from its books of account earned during the accounting period of the principal member. This will require an interim closing of the books for members whose normal accounting period differs from the principal member. However, a pro rata method of converting income to the principal member's accounting period will be accepted as long as the method does not produce a material misstatement of income apportioned to this state. Unless otherwise permitted or required by the Tax Commissioner, the treatment of both the income and the apportionment data of any particular member shall use the same method. If one method was used to account for a member's income and apportionment data in the combined report for the principal member's preceding accounting period and another method will be used in the combined report for the principal member's next accounting period, adjustments to income and apportionment data of the member shall be made to prevent income and apportionment data from being omitted or duplicated.

8.8.a.2. Interim closing method.

8.8.a.2.A. The combined report business income and expense of a member of the combined reporting group is determined by reference to the sum (or net) of that income from the actual books and records of that member for each of the partial accounting periods of the member shared with the principal member. For example, if the principal member has an accounting period ending on December 31, 2010, and another member has an accounting period ended March 31, 2011, the other member determines its income from its actual books and records for the partial accounting periods beginning January 1, 2010, and ending March 31, 2010, and from April 1, 2010 and ending December 31, 2010.

8.8.a.2.B. The apportionment data ~~property, payroll, and sales in~~ for West Virginia, and everywhere shall also be determined by reference to the member's books and records, W. Va. Code §§11-24-1 *et seq.* and this rule, for the appropriate partial accounting year. Under the interim method, if the tax years fall under the apportionment formula set forth in section heading 7, the property factor computation

should reflect the actual, not prorated, property owned and rented during the principal member's accounting period. For tax years on or after January 1, 2022, income is apportioned as set forth in section heading 6 of this rule and property is no longer a factor in the apportionment formula.

8.8.a.2.B.1. Example. If the principal member has an accounting period ending on December 31, 2010, and another member has an accounting period ended March 31, 2011, the other member will determine its total property and its West Virginia property from its actual books and records on the basis of the period from January 1, 2010 to December 31, 2010.

8.8.a.2.C. Interim combined report business income and apportionment data from the respective partial periods is then combined with the income and apportionment data of the accounting period of the principal member, along with business income and apportionment data of other members of the combined reporting group for the same period, using, if applicable, the methods prescribed in W. Va. Code §§11-24-1, *et seq.* and this rule.

8.8.b. Pro rata method.

8.8.b.1. At the election of the members of a combined reporting group and with the express authorization of the Tax Commissioner, fiscalization of combined report business income of one or more members of the group to the accounting period of the principal member may be determined by use of a pro rata method. However, the election is not available if that method produces a material misstatement of income. Under the pro rata method, the apportionment data and combined report business income from the member's adjusted separate books of account (*i.e.*, adjusted to reflect the determination of income under W. Va. Code §§11-24-1, *et seq.* and this rule) is assigned to the respective portion of the principal member's accounting period based on the ratio of months in common with that member. For example, if the principal member's accounting period ends on December 31, 2010, a member whose income year ends on March 31 will reflect 3/12ths of its adjusted separate combined report business income and its property, payroll and sales for its income year ended March 31, 2010 in the December 31, 2010 accounting period of the principal member. That member will then reflect 9/12ths of its adjusted separate combined report business income and its ~~property, payroll and sales~~ apportionment data for its income year ended March 31, 2011 in the December 31, 2010 accounting period of the principal member.

8.8.b.2. The combined report business income and apportionment data from the respective partial periods is then combined with the income and apportionment data of the accounting period of the principal member, along with business income and apportionment data of other members of the combined reporting group for the same period, using, if applicable, the methods prescribed in W. Va. Code §§11-24-1, *et seq.* and this rule. The combined business income is then apportioned to each of the taxpayer members of the group.

8.8.b.3. In the event that the pro rata method requires the determination of income and apportionment data of a corporation whose accounting period has not yet closed, and the information cannot be obtained in time for the other members to file an accurate return, the income and apportionment data for that period shall be estimated based on available information. If the use of actual income and apportionment data results in a material change in the tax liabilities of the taxpayer members of the group, the taxpayer members shall file an amended return to reflect the change.

8.8.c. After the combined reporting group's income is apportioned to West Virginia, West Virginia combined report business income of a taxpayer member is then proportionately assigned to the applicable portion of that member's income year, based on the number of months falling within the common accounting period of the principal member. For example, if the principal member's accounting period year ends on December 31, 2010, a taxpayer member whose income year ends on March 31 will reflect 3/12ths of its share of apportioned income from the principal member's December 31, 2010 accounting period in its income year ended March 31, 2010, and 9/12ths of its share of that income in its income year ended

March 31, 2011. The resulting income from the segments is then aggregated (or netted) together for the member's income year to determine that member's West Virginia business income attributable to the combined reporting group.

8.9. Partial Combined Reporting Periods.

8.9.a. If a member of a combined reporting group is not a member of the combined reporting group during the entire accounting period of the principal member (*e.g.*, because of lack of a unitary relationship, or termination of a unitary relationship), modified combined reporting procedures apply as provided in this rule. Business income and apportionment data of a member is included in the combined report of the remaining members only for the period (or partial period) for which all of the members are in the combined reporting group. Thus, if a member of a combined reporting group enters or leaves the group at a time during the middle of the accounting period of the principal member, a separate combined report determination is required to be made only for the partial period of combination. The partial period combination is made using the same combined reporting procedures for a 12-month period, except that income, ~~payroll, property and sales~~ and apportionment data will reflect only the amounts applicable to the partial period. With express permission of the Tax Commissioner, a pro rata method may be used to determine each member's income and apportionment data for the partial period, unless it results in a material misstatement of income. If so, the interim closing method shall be used. Establishment or termination of a combined reporting relationship will not, by itself, cause a short period filing requirement.

8.9.a.1. Example: Corporations A, B, and C are members of a combined reporting group. Corporation A is the principal member and has a calendar year accounting period. On May 1, Corporation A acquires Corporation D. Because of substantial preexisting business relationships, Corporation D immediately becomes a member of the combined reporting group on that date. Only Corporations B and C are West Virginia taxpayers. As provided in this paragraph, two combined report calculations are required. The first combined report calculation includes the combined report business income and apportionment data of Corporations A, B, and C from January 1 through April 30. The combined report business income for that period is then apportioned to West Virginia taxpayer members B and C, for the period January 1 through April 30. The second combined report calculation includes the combined report business income and apportionment data of Corporations A, B, C, and D from May 1 through December 31. The combined report business income for that period is then apportioned to West Virginia taxpayer members B and C for the period May 1 through December 31.

8.9.b. If a taxpayer member's income year does not begin and end on the same dates as the partial period combination (*e.g.*, a short-period return is not required), the taxpayer member's West Virginia income earned during that portion of the income year before and after the partial period combination is aggregated (or netted) with the taxpayer member's West Virginia combined report income from the partial period combination. On occasion, the West Virginia income described will include income from two or more partial period combinations.

8.9.b.1. Example: Corporation P owns all of the stock of Corporation S for the 12. month period ended December 31, 2011. Corporations P and S are unitary and are obligated to file a combined report for the entire period. Corporation P acquires 51% of the stock possessing voting power of Corporation A on March 7, 2011. The acquisition does not compel the filing of a short period return by Corporation A. All of the Corporations have a calendar year accounting period. Corporation A becomes unitary with Corporations P and S on July 1, 2011 and is obligated to file a combined report with Corporations P and S for the partial period beginning on July 1, 2011. The income and apportionment data of Corporation A for the period prior to July 1, 2011, cannot be included in a combined report with Corporations P and S. Under W. Va. Code §§11-24-1, *et seq.* and this rule, two separate partial period combined report calculations are required. One is for the P-S group for the partial period ended June 30, 2011, and the other is for the P-S-A group for the partial period from July 1, 2011, to December 31, 2011.

If Corporation P's West Virginia combined report income is $ 250,000 for the partial period ended June 30, 2011 and P has a $ 60,000 West Virginia net operating loss for the partial period ended December 31, 2011, Corporation P's West Virginia combined reporting income for its income year ended December 31, 2011, is $ 190,000. If Corporation A has West Virginia income from its unaffiliated and non-unitary partial period (or from another combined reporting group, if applicable) of $ 50,000 and A has a West Virginia net operating loss of $ 30,000 for the combined report partial period after it joined the combined reporting group, Corporation A's West Virginia income for its income year that ended December 31, 2011, is $ 20,000.

8.9.c. In lieu of partial period combination method described by subdivisions 8.9.a and 8.9.b of this rule, the taxpayer members of the commonly controlled group may elect to use the method provided in this subdivision. The election shall be consistently used by all taxpayer members. The election may not be used if the results of that method, compared with the provisions of subdivisions 8.9.a and 8.9.b of this rule, results in a material misstatement of the taxpayer member's West Virginia income. Under the method described in this subdivision, the partial period combined reporting income of a member, which is not in a combined reporting relationship with the principal member for the entire accounting period of the principal member, is considered to be reflected by the relative weighting of the apportionment data of the partial period member to the apportionment data of the rest of the combined reporting group for the accounting period of the principal member. The method applies as follows:

8.9.c.1. The principal member's income and apportionment data are determined for its entire accounting period (usually a 12. month period). All other members which were members of the combined reporting group during the entire period of the principal member shall also include their income and apportionment data for that period, using fiscalization methods, if appropriate.

8.9.c.2. Members who were not members of the combined reporting group for the entire accounting period of the principal member shall include in the combined report only their income for the partial period during which they were a member. Normally this income will be determined by an interim closing of the member's books of account. Similarly, the apportionment data of that member is included only for that same partial period.

8.9.c.3. Property factor data for the partial period member (both West Virginia property and total property) shall be adjusted to reflect the fact that the property was not used in the combined reporting group for the entire period of the principal member. For example, if the partial period member was in the combined reporting group for only 7 months of the 12-month accounting period of the principal member, only 7/12's of the member's average West Virginia and total property for the period shall be reflected in the combined report. For tax years on or after January 1, 2022, income is apportioned as set forth in section heading 6 of this rule and property is no longer a factor in the apportionment formula

8.9.c.4. Apportionment shall be computed using the amounts included in paragraphs 8.9.c.1 through 8.9.c.3 of this rule, as if the partial period members were members for the entire accounting period of the principal member. The amounts apportioned to the individual taxpayer members then reflects the member's West Virginia combined reporting income for the partial period. That member then shall aggregate (or nets) West Virginia combined reporting income with its West Virginia income from other activity to compute income subject to taxation for the entire income year.

8.9.c.4.A. Example: ~~Using~~ For tax year 2011, using the same facts as provided in paragraph 8.9.a.1. of this subsection, except that the members of the group elect to report under subdivision 8.9.c. of this rule, Corporation A, B, and C determine their income and apportionment data for the entire 12 months of the calendar year. Corporation D determines its income and apportionment data for the period May 1 - December 31. However, because Corporation D was not a member of the combined reporting group for the entire calendar year, the property factor values for the combined reporting period shall be multiplied by 8/12ths to reflect a weighted average value of that property in the principal member's

accounting period. The West Virginia combined report income of Corporations B and C are then determined as if Corporation D's income and apportionment data were entirely earned in the principal member's accounting period.

8.9.c.4.B. Example: For tax year 2022, using the same facts as provided in paragraph 8.9.a.1 of this subsection, except that the members of the group elect to report under subdivision 8.9.c of this rule, Corporation A, B, and C determine their income and apportionment data for the entire 12 months of the calendar year. Corporation D determines its income and apportionment data for the period May 1 - December 31. The West Virginia combined report income of Corporations B and C are then determined as if Corporation D's income and apportionment data were entirely earned in the principal member's accounting period.

~~8.9.c.4.B~~. 8.9.c.4.C. Example: Using the same facts provided in subparagraph 8.9.c.4.A. of this rule, except that Corporation D is a calendar year West Virginia taxpayer, and its addition to the combined reporting group did not cause a short period filing requirement, Corporation D's West Virginia combined report income, determined under this subdivision, would be treated as earned for the period May 1 through December 31. That West Virginia income would be aggregated (or netted) with its other West Virginia income for the entire calendar year, as provided in subdivision 8.9.b of this rule.

§§110-24-9 through 13. Reserved for Future Use.

§110-24-13a. Combined Reporting.

13a.1. For tax years beginning on and after the January 1, 2009, any taxpayer engaged in a unitary business with one or more other corporations shall file a combined report which includes the income, determined under W. Va. Code §§11-24-13c or 13d, and the allocation and apportionment of income provisions of W. Va. Code §§11-24-1, *et seq.*, of all corporations that are members of the unitary business.

13a.1.a. The income of an insurance company shall not be included in a combined report filed under W. Va. Code §§11-24-1, *et seq.* and the allocation or apportionment of income related to the insurance company shall not be included in and the apportionment factors of an insurance company shall not be included in the combined report, unless specifically required to be included by the Tax Commissioner.

13a.1.b. An insurance company, unless otherwise exempt from or excluded from tax under W. Va. Code §§11-24-1, *et seq.* or other provisions of the W. Va. Code, shall file a separate corporation net income tax return.

13a.2. Determination of unitary business. The term "unitary business" is defined in W. Va. Code §§11-24-1, *et seq.* as a single economic enterprise that is made up either of separate parts of a single business entity or of a commonly controlled group of business entities that are sufficiently interdependent, integrated and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts.

13a.2.a. For purposes of W. Va. Code §§11-24-1, *et seq.* and W. Va. Code §§11-23-1, *et seq.* a partnership shall be treated as conducted by its partners, whether directly held or indirectly held through a series of partnerships, to the extent of the partner's distributive share of the partnership's income, regardless of the percentage of the partner's ownership interest or the percentage of its distributive or any other share of partnership income. A business conducted directly or indirectly by one corporation through its direct or indirect interest in a partnership is unitary with that portion of a business conducted by one or more other corporations through their direct or indirect interest in a partnership if there is a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts and the corporations are members of the same commonly controlled group.

13a.2.b. More than fifty percent ownership rule -- For purposes of this rule, the term commonly controlled group, with reference to any Taxpayer, means and includes all related entities as defined in this rule, in the aggregate.

13a.2.b.1. The term "related entity" means:

13a.2.b.1.1. An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof controlled by the taxpayer;

13a.2.b.1.2. An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof that is in control of the taxpayer;

13a.2.b.1.3. An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof controlled by an individual, corporation, partnership, affiliate, association or trust or any combination or group thereof that is in control of the taxpayer; or

13a.2.b.1.4. A member of the same controlled group as the taxpayer, as the term "controlled group" is defined in Section 267 of the Internal Revenue Code of 1986, as amended.

13a.2.b.2. For purposes of this section, "control," with respect to a corporation, means ownership, directly or indirectly, of stock possessing more than fifty percent of the total combined voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of more than fifty percent of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in Section 267(c) of the United States Internal Revenue Code of 1954, as amended, other than paragraph (3) of that section.

13a.3. Unitary business.

13a.3.a. Determination of a unitary or separate Business.

13a.3.a.1. A corporation subject to taxation may be engaged in more than one "trade or business." In those cases, it is necessary to determine the business income attributable to each separate trade or business. The income of each business is then apportioned by a formula which takes into consideration the in-state and out-of-state factors which relate to the respective trade or business subject to apportionment.

13a.3.a.2. In addition, a corporation may be engaged in a single trade or business in combination with another commonly owned and controlled corporation or corporations. In those cases, it is necessary to determine the total business income of all corporations attributable to the single trade or business. The combined income of the single trade or business shall be apportioned by formula which takes into consideration the in-state and out-of-state factors of each corporation which relate to that single trade or business.

13a.3.a.3. When business segments of a single corporation or the business activities of more than one corporation constitute a single trade or business, the single trade or business is said to constitute a "unitary business."

13a.3.a.4. A unitary business exists when the operations of the business segments of a corporation or group of commonly owned and controlled corporations contribute to or depend on each other in such a way as to result in functional integration between the segments. Functional integration refers to transfers between or pooling among business segments of such items as products or services, technical

information, marketing information, distribution systems, purchasing and intangibles (such as patents, copyrights, formulas, processes, trade secrets, and the like) in a manner which substantially affects the segments' business operations related to such activities as development, manufacture, production, extraction, distribution or sale of its products or services.

13a.3.a.5. Evidence of functionally integrating factors. -- The determination of whether or not the operations of business segments are functionally integrated will turn on the facts and circumstances of the case. Several factors may evidence that the operations of business segments are functionally integrated. A non-exclusive list of those factors is found in subparagraph 13a.3.a.6.A. Generally, several functionally integrating factors will exist in a unitary business, although a unitary business may exist as a result of few factors or even one factor if the factor or factors involved are particularly significant. In determining whether a unitary business exists, factors should not be examined in isolation. Instead, it should be determined whether the factors which are present, in combination, result in a functionally integrated business. In addition, the presence or absence of any one factor or any particular factors is not necessarily determinative as to whether a unitary business exists, although absence of all of the factors described in this subsection will generally result in a finding that a unitary business does not exist.

13a.3.a.6. Functionally integrating factors. -- A non-exclusive listing of factors to be considered in determining whether business segments are functionally integrated appears in subparagraph 13a.3.a.6.A.

13a.3.a.6.A. The existence or non-existence of the following factors will assist in the determination of whether "unity of operations" exits with respect to an affiliated group. The existence or non-existence of any one factor, by itself, is normally not determinative of whether the element has or has not been satisfied. Nor is this list a limitation on the factors that may be considered in determining whether unity of operations exists:

13a.3.a.6.A.1. Common or centralized purchasing;

13a.3.a.6.A.2. Common or centralized advertising;

13a.3.a.6.A.3. Common or centralized employees, including sales force;

13a.3.a.6.A.4. Common or centralized accounting;

13a.3.a.6.A.5. Common or centralized legal support;

13a.3.a.6.A.6. Common or centralized retirement plan;

13a.3.a.6.A.7. Common or centralized insurance coverage;

13a.3.a.6.A.8. Common or centralized marketing;

13a.3.a.6.A.9. Common or centralized cash management;

13a.3.a.6.A.10. Common or centralized research and development;

13a.3.a.6.A.11. Common or centralized offices;

13a.3.a.6.A.12. Common or centralized manufacturing facilities;

13a.3.a.6.A.13. Common, centralized, or intercompany financing;

13a.3.a.6.A.14. Common or centralized computer systems and support;

13a.3.a.6.A.15. Common or centralized management;

13a.3.a.6.A.16. Common or centralized labor relations;

13a.3.a.6.A.17. Common or centralized pension plans;

13a.3.a.6.A.18. Common or centralized personnel recruitment;

13a.3.a.6.A.19. Intercompany sales, exchanges, or transfers;

13a.3.a.6.A.20. Common, centralized, or intercompany transfer or pooling of technical information;

13a.3.a.6.A.21. Common or centralized distribution system, including but not limited to common or centralized transportation facilities, or common or centralized warehousing facilities, or common or centralized order fulfillment systems, inventory control systems or other distribution systems or subsystems, or any combination thereof.

13a.3.a.7. Intercompany sales, exchanges, or transfers.

13a.3.a.7.A. Sales, exchanges, or transfers (hereinafter "sales") of products, services, intangibles, or the like between business segments are important indicia of functional integration. The significance of intercompany sales will be a function of both the character of the items sold and percentage of total sales or purchases represented by the intercompany sales. Intercompany sales at a given level take on greater significance if there is a limited sales or purchasing market for the items or if valuable trade name or other intangibles are associated with the sales, or both.

13a.3.a.7.B. The fact that intercompany sales are at a readily determinable market price does not negate the importance of the sales as a functionally integrating factor, because the sales generally represent an assured market for the seller and a guaranteed source of supply for the purchaser.

13a.3.a.7.C. As the percentage of intercompany sales to the total sales of the selling segment increases or as the percentage of intercompany purchases of the purchasing segment's total purchases increases, the more important the purchases and sales become as a unitary factor.

13a.3.a.7.C.1. For purposes of this rule, where goods, services, or intangibles are transferred without charge, percentages of cost (or cost of goods sold) may be used in lieu of percentage of sales or purchases. For purposes of this rule, management stewardship activities are not considered an intercompany sale or transfer of services. Generally, intercompany sales or purchases in excess of 10% will be considered a significant, although not necessarily determinative, unitary factor. Sales of less than 10% become relatively less significant as the percentage of sales declines, but a small percentage of sales may nevertheless be considered significant if the sales represent goods or services which are particularly important to the purchaser's operations.

13a.3.a.7.C.2. Example. - Business segments A and B are commonly owned and controlled. Segment A grows citrus and other fruit. Segment B manufactures soft drinks. A sells to B oils extracted from the skin of a special variety of fruit for use in B's soft drinks. This oil is not significantly available from other sources. The sales represent only a small portion of A's total sales and B's total purchases. The unusual flavor produced by the oil is a major factor in the character of the soft drink. Consumer taste tests demonstrate a strong preference for the soft drink with this oil as an ingredient. The intercompany sales between A and B would be considered a significant unitary factor.

13a.3.a.7.D. Sales, exchanges, or transfers between business segments may be disregarded where intercompany sales are used as a device to assert unitary combination for tax avoidance purposes.

13a.3.a.7.D.1. Example: Company A is a West Virginia corporation with operations in West Virginia and other states. These operations are non-unitary with sister Corporations B and D, which operate entirely outside of West Virginia. B and C have had significant net operating losses for many years.

13a.3.a.7.D.1.(a). A's ~~property, payroll and sales factors apportion~~ apportionment factors cause 90% of A's net income to be apportioned to West Virginia.

13a.3.a.7.D.1.(b). A enters into a fraudulent collusive tax avoidance scheme with its sister corporations to cause A to sell to B and C office supplies valued at less than $500 that are simply purchased and resold by A. A, B and C are not in the office supply business, and office supplies have nothing to do with A, B or C's regular business operations, except as simple consumable items used in their respective offices.

13a.3.a.7.D.1.(c). B and C each sell two used office computers to A which would have otherwise been sold for salvage value. A, B and C are not in the computer business, and computers have nothing to do with A, B or C's regular business operations, except as simple consumable items used in their respective offices. A does not use the computers and sells them less than one week after receiving them for salvage value.

13a.3.a.7.D.1.(d). A, B and C falsely assert that they are unitary businesses by reason of the intercompany sales. Because B and C have no operations in West Virginia and no nexus with West Virginia, and because of the dilutive effect of the inclusion of B's and C's denominator numbers in A's ~~property, payroll and sales~~ apportionment factors for A's combined unitary tax return, A now apportions less than 30% of A's income to West Virginia, thereby decreasing taxable income for West Virginia tax purposes.

13a.3.a.8. Common marketing.

13a.3.a.8.A. When business segments share substantial common marketing features, the features can be an important characteristic of functional integration when the marketing results in significant mutual advantage. For this purpose, common marketing exists when a substantial portion of the business segments' products, services, intangibles, or the like are distributed or sold to a common customer, or the business segments use a common trade name or other common identification, and the common identification is a significant factor in purchasers' decisions to purchase the respective products or services.

13a.3.a.8.A.1. Example. - Business segments A and B are commonly owned and controlled. A manufactures small tools and garden implements. B manufactures auto replacement parts and accessories. Both A and B jointly sell a substantial portion of both segment's total production to various hardware store chains, which then sell both product lines to the public. As a result of the common sales, both segments are able to obtain preference on shelf space and greater merchant participation in product promotion of each segment. The common sales would be considered a functionally integrating factor.

13a.3.a.8.A.2. Example. - Commonly owned and controlled segments A, B, and C manufacture furniture, carpeting, and household appliances, respectively. All three product lines are sold under the name "Alpha" which is a nationally recognized trade name. A, B and C jointly participate in advertising to portray the "Alpha" name as a symbol of quality and value. Based on consumer studies, the "Alpha" name is a significant factor in the consumer's decision to purchase the respective products. The common use of the trade name "Alpha" would be considered a functionally integrating factor.

13a.3.a.8.B. Common use of an advertising agency does not constitute common marketing, absent circumstances described in paragraph 13a.3.a.8.A. In addition, shared use of a commonly owned and controlled business segment which provides advertising services is not common marketing described by this subparagraph, absent circumstances described in paragraph 13a.3.a.8.A.

13a.3.a.9. Common, centralized, or intercompany transfer or pooling of technical information. -- Evidence of functional integration may be indicated by transfers or pooling of technical information, know-how, or research and development, if the transfer or pooling represents a significant economy of scale or the information shared is particularly important to the segments' operations.

13a.3.a.10. Common distribution system. -- Business segments may demonstrate evidence of functional integration by use of a common distribution system, under which inventory control and accounting, storage, trafficking, and transportation are controlled through a common network.

13a.3.a.11. Common purchasing. -- Evidence of functional integration may be indicated by common purchasing of substantial quantities of products, services intangibles, or the like from the same source, where the purchasing results in a significant economy of scale, or where the products, services, intangibles, or the like are not readily available from other sources and are particularly important to each segment's operations or sales.

13a.3.a.12. Centralized management.

13a.3.a.12.A. Centralization of management exists when directors, officers or management employees jointly participate in management decisions which significantly affect the respective business segments. Transfer of officers or management employees between business segments may also provide evidence of centralization of management.

13a.3.a.12.B. The presence of centralized management may support a finding that the operations of commonly owned and controlled business segments are unitary.

13a.3.a.12.C. Centralization of management is more significant as a unitary factor when business segments are engaged in the same general line of business or constitute steps in a vertically integrated enterprise than in other business contexts, because of the opportunity the respective segments have in making use through the central management of readily transferable knowledge and expertise of the operations of the other segment and developing coordination between the business segments.

13a.3.a.12.D. Factors accorded little weight. -- Factors such as common legal services, accounting, tax administration, and financial reporting will generally be accorded little weight in the determination of whether business segments are functionally integrated.

13a.3.a.12.E. The presence of a unitary business will be presumptively shown by the presence of the following:

13a.3.a.12.E.1. Same general line of business: There is a strong presumption that a corporation or a commonly owned and controlled group of corporations is engaged in a unitary business when its activities are in the same general line. For example, a corporation which operates a chain of retail grocery stores will almost always be engaged in a unitary business.

13a.3.a.12.E.2. Steps in a vertical process: A corporation or a commonly owned or controlled group of corporations is almost always engaged in a unitary business when its various divisions or segments are engaged in different steps in a vertically structured enterprise. For example, a corporation which explores for and mines copper ores; concentrates, smelts, and refines the copper ores; fabricates the refined copper into consumer products and distributes the products (whether by intercompany fee or

purchase, or without charge) is engaged in a unitary business, regardless of the fact that the various steps in the process are operated substantially independently of each other with only general supervision from the corporation's executive offices.

13a.3.a.12.F. Business segments which are neither in the same general line of business nor steps in a vertical process are presumptively engaged in separate businesses, absent a determination that the respective segments are functionally integrated.

13a.3.a.12.F.1. In the event that a business segment is functionally integrated with a second business segment and the second business segment is functionally integrated with a third business segment, the first, second and third business segments constitute a unitary business notwithstanding the fact that the first and third business segments are not functionally integrated with each other. In the event a second business segment's functional integration is not substantially viewed from the perspective of either a first or third business segment, the first, second and third business segments shall not constitute a unitary business.

13a.3.a.12.F.1.(a). Example. -- Business segments A, B, and C are commonly owned and controlled. A is an architectural firm. B is a construction company which builds office and apartment buildings. C is a manufacturer of finished steel. A provides architectural services to B, representing half of the total architectural services it provides. C designs, fabricates, and sells the superstructures used in the construction of B's office and apartment buildings. The steel superstructures constitute 20% of B's construction purchases. A and C have no intercompany sales, common marketing, pooling of technical knowledge, common distribution system or common purchases. Nevertheless, A, B, and C constitute a unitary business because B is functionally integrated with both A and C.

13a.3.a.12.F.1.(b). Example. -- Business segments A, B, and C are commonly owned and controlled. A is in the business of oil exploration, extraction, and refining. B is a charter air transportation company. C produces motion pictures. A and C have no intercompany sales, common marketing, pooling of technical knowledge, or common distribution system. A uses B's service for transporting oil executives, engineers and geologists to remote oil exploration and drilling sites. C uses B's services for flying movie executives and actors to movie locations and business meetings. A and C's common purchases are limited to the transportation services provided by B. A's use of B's service constitutes 20% of B's total charter sales. C's use of B's service constitutes 40% of B's total charter sales. However, B's service represents less than a hundredth of a percent of A's total purchases and only two tenths of a percent of C's total purchases. Despite the fact that B is functionally integrated with both A and C, A, B, and C do not constitute a unitary business.

13a.3.a.12.G. Where the taxpayer asserts that business segments are or are not unitary, the taxpayer has the burden of proof. Failure by the taxpayer to produce requested evidence which lies within the control of the taxpayer gives rise to a presumption that the evidence would be unfavorable if provided.

13a.3.a.12.H. No divisional segregation or separation for purposes of determining unitary group member status, income, or attributes. The determining factor in designation of a unitary activity is the character of the activity engaged in and not the organizational structure of the business components engaging in the activity. If a corporation or other entity is organized into divisions or other functional units or business segments not constituting separate legal entities, the corporation or entity so organized shall, as a whole, be presumed to be the unitary member if it is engaged in unitary business activity. However, if the corporation is engaged in more than one trade or business, then the determination of income attributable to each separate trade or business, authorized under paragraph 13a.3.a.1. of this rule shall be made, and the determination of income attributable to each separate trade or business engaged in with another commonly owned and controlled corporation or corporations, authorized under paragraph 13a.3.a.2. of this rule shall be made. No operations, income, or apportionment factor attributes of any such division, functional unit or business segment shall otherwise be subtracted, segregated or separated from those of the combined

group.

13a.3.b. Establishment of unity for acquired entities and newly formed entities.

13a.3.b.1. Newly Acquired Corporations. When a corporation that is a member of a unitary group acquires another corporation, a presumption exists against a finding of a unitary relationship during the first reporting period unless a unitary relationship already existed at the time of the acquisition. The presumption may be rebutted by proving that the corporations are unitary. If the presumption is rebutted, then the corporations shall be considered unitary as of the date of acquisition, unless the evidence shows that unity was established as of another date.

13a.3.b.1.A. In the next succeeding reporting period after the first reporting period subsequent to an acquisition whereby a corporation that is a member of a unitary group acquires another corporation, and for all reporting periods thereafter, a presumption of a unitary relationship exists. The presumption may be rebutted by proving that the corporations are not unitary.

13a.3.b.2. Newly Formed Corporations or entities. When a corporation that is a member of a unitary group forms another corporation, a presumption exists in favor of finding unity between the two corporations or entities as of the date of formation. Any party may rebut the presumption by proving that the corporations or entities are not unitary or became unitary at a later date

13a.3.b.2.A. For purposes of this rule, a newly formed corporation or entity includes but is not limited to: a corporate reorganization whereby a corporate divestiture, split-up or split off occurs, or one or more new subsidiaries is formed, or one or more new subsidiaries is acquired and substantially all of the assets and operations of an existing division or operation are placed into or under the administrative or operational responsibility of the acquired entity, or a partnership is created or formed, or an existing corporation changes its form of doing business from one organizational structure to one or more new organizational structures or merges several subsidiary entities into an existing or newly formed entity.

13a.3.b.3. Unitary members compute their liability relating to a year when a member is added to or departs from the unitary group as follows:

13a.3.b.3.A. If a corporation becomes a member of a unitary group during the group's common accounting period, or ceases to be a member during that period, the other members shall take into account the appropriate portion of the part year member's income and the ~~property, payroll, sales attributes~~ apportionment data of the part-year member in computing their tax liabilities.

13a.3.b.3.A.1. A part-year unitary member shall compute its liability as follows:

13a.3.b.3.A.1.(a). Business income attributable to the portion of the year during which the part-year unitary member was a unitary group member is combined with business income of the other unitary group members for the same portion of the year, and the total income is apportioned to West Virginia on a combined apportionment basis; and

13a.3.b.3.A.1.(b). Business income attributable to the portion of the year during which the part-year unitary member was not a unitary member is apportioned to West Virginia on the basis of the part year member's separate ~~property, payroll, and sales attributes~~ apportionment data for the part of the year during which the part-year unitary member was not a unitary member. The corporation shall file a separate return for this portion of its income.

13a.3.c. Holding Companies. A passive parent holding company that directly or indirectly controls one or more operating company subsidiaries engaged in a unitary business shall be considered to be engaged in a unitary business and includable in a combined report with the subsidiary or subsidiaries. An

intermediate passive holding company shall be considered to be engaged in a unitary business with the parent and subsidiary or subsidiaries and includable in a combined report with them.

13a.3.d. Statute of limitations. If the statute of limitations applicable to refund claims and assessments is open with respect to a particular member of the combined group, the statute of limitations is open with respect to that particular Taxpayer notwithstanding the fact that the statute of limitations may have expired for one or more other members of the combined group.

13a.3.d.1. The statute of limitations applicable to refund claims and assessments for members of a combined reporting group which have filed their tax return based on a fiscalized reporting period matched to the accounting period of a principal member shall be the statute of limitations determined and computed based on the fiscalized accounting period.

13a.3.d.2. If a return is filed pursuant to a combined report, the Tax Commissioner may examine and audit that return, and collect any deficiency from a combined group member for whom the statute of limitations for assessments has not expired, even if the statute of limitations for other members which filed pursuant to the same combined report has expired. Any deficiency assessed pursuant to the audit or examination will not cause a reopening of the statute of limitations for those other members for which the statute of limitations has expired who filed pursuant to the same combined report.

§§110-24-13b. Reserved for Future Use.

§110-24-13c. Net operating loss (NOL) carryovers earned during a year in which the Taxpayer filed a consolidated tax return.

13c.1. West Virginia computes net operating losses on a post-apportionment basis, including business and non-business income adjustments. NOLs can only be carried forward (or backwards) to be applied against West-Virginia source income of the combined group member to which it is attributable. NOLs cannot be used by other members of the combined group. There is an exception for NOLs earned when the Taxpayer was filing on a consolidated basis for West Virginia corporation net income tax purposes for a taxable year that began before January 1, 2009. Those NOLs can be carried over and applied against the income of any former member of the consolidated (controlled) group.

13c.1.a. West Virginia Code §11-24-13c(b)(1)(G) reads in relevant part as follows:

§11-24-13c. Determination of taxable income or loss using combined report.

(a) . . . .

(b) Components of income subject to tax in this State; application of tax credits and post-apportionment deductions.

(1) Each taxpayer member is responsible for tax based on its taxable income or loss apportioned or allocated to this State, which shall include:

. . . .

(F) Its income or loss allocated or apportioned in an earlier year, required to be taken into account as state source income during the income year, other than a net operating loss; and

(G) Its net operating loss carryover. If the taxable income computed pursuant to this section and section thirteen-d of this article results in a loss for a taxpayer member of the combined group, that taxpayer member has a West Virginia net operating loss, subject to the net operating loss limitations, and carryover provisions of this article. This West Virginia net operating loss is applied as a deduction in a prior or

subsequent year only if that taxpayer has West Virginia source positive net income, whether or not the taxpayer is or was a member of a combined reporting group in the prior or subsequent year: Provided, That net operating loss carryovers that were earned during a tax year in which the taxpayer filed a consolidated return under this article may be applied as a deduction from the West Virginia taxable income of any member of the taxpayer's controlled group until the net operating loss carryover is used or expires pursuant to the net operating loss provisions of this article.

~~Emphasis added.~~

13c.1.a.1. West Virginia Code §11-24-13c(b)(1)(G) specifies that there is an exception for NOLs earned when the Taxpayer filed its annual West Virginia corporation net income tax return on a consolidated basis.

13c.1.a.2. An attempt to amend a pre-2009 separate return and file a consolidated return for that year, and to use an NOL on that return that was earned in a year when the Taxpayer was filing separately will be disallowed. And the Taxpayer cannot claim those NOLs on the 2009 and forward combined return.

13c.2. Economic Development Tax Credits.

West Virginia Code §11-24-13c(b)(2) reads as follows:

(2) Except where otherwise provided, no tax credit or post-apportionment deduction earned by one member of the group, but not fully used by or allowed to that member, may be used, in whole or in part, by another member of the group or applied, in whole or in part, against the total income of the combined group; and a post-apportionment deduction carried over into a subsequent year as to the member that incurred it, and available as a deduction to that member in a subsequent year, will be considered in the computation of the income of that member in the subsequent year regardless of the composition of that income as apportioned, allocated or wholly within this state: Provided, That unused and unexpired economic development tax credits that were earned during a tax year in which the taxpayer filed a consolidated return under this article may, if otherwise allowed within the statutory limitations applicable to the tax credit, be used, in whole or in part, against taxes imposed by this article on any member of the taxpayer's combined group to the extent the credits would have been allowed had the taxpayer continued to file a consolidated return. For purposes of this section, the term "economic development tax credit" means, and is limited to, a tax credit asserted on a tax return under article thirteen-c [§§11-13C-1, et seq.], thirteen-d [§§11-13D-1, et seq.], thirteen-e [§§11-13E-1, et seq.], thirteen-f [§§11-13F-1, et seq.], thirteen-g [§§11-13G-1, et seq.], thirteen-j [§§11-13J-1, et seq.], thirteen-q [§§11-13Q-1, et seq.], thirteen-r [§§11-13R-1, et seq.] or thirteen-s [§§11-13S-1, et seq.] of this chapter or under article one [§§5E-1-1, et seq.], chapter five-e of this code.

Emphasis added.

13c.2.a. General; No Sharing of Credits Within a Combined Group; Exception C In general, an economic development tax credit generated by a taxpayer belongs to that taxpayer and can be applied against the corporation net income tax and business franchise tax liabilities of that taxpayer subject to the rules that govern the use of the particular credit.

13c.2.b. Possible Sharing of Credits Within a Combined Group. - For tax years beginning after December 31, 2008, an economic development tax credit that may be validly claimed by a taxable member of a combined group and that is attributable to the combined group's unitary business may not be shared with the other taxable members of the combined group. However, where entitlement to the credit arose prior to any taxable year beginning after December 31, 2008, and was taken on a consolidated West Virginia corporation net income tax return for a taxable year that began before January 1, 2009, the amount of the annual credit allowable may be claimed, in whole or in part, by any member of the combined group that was included in the consolidated West Virginia corporation net income tax return for the taxable year in

which the investment was made giving rise to the credit, subject to the rules that govern use of the credit. West Virginia Code §11-24-13c(b)(2).

13c.2.c. "Economic development tax credit defined." - For purposes of this section, the term "economic development tax credit" means, and is limited to, a tax credit asserted on a tax return under W. Va. Code §§11-13C-1, *et seq.* (business investment and jobs expansion tax credit), W. Va. Code §§11-13D-1, *et seq.* (credit for industrial expansion and revitalization), W. Va. Code §§11-13E-1, *et seq.* (credit for coal loading facilities), W. Va. Code §§11-13F-1. *et seq.* (credit for reducing electric and natural gas rates for low-income residential customers), W. Va. Code §§11-13G-1, et seq. (credit for reducing telephone utility rates for certain low-income residential customers), W. Va. Code §§11-13J-1, *et seq.* (neighborhood investment program), W. Va. Code §§11-13Q-1, *et seq.* (economic opportunity credit), W. Va. Code §§11-13R-1, *et seq.* (strategic research and development tax credit), W. Va. Code §§11-13S-1, *et seq.* (manufacturing investment tax credit) or W. Va. Code §§5E-1-1, *et seq.* (capital company credit).

13c.2.d. Application of current year credits. - In any case where a taxpayer's credit can be shared among the taxable members of the taxpayer's combined group, the credit shall first be applied against the taxes of the taxpayer that generated the credit consistent with the requirements and limitations that apply to the credit. If the taxpayer has more credit than it may use against its own taxes, the excess credit may be applied against the taxes of the other taxable members that are eligible to share the credit, again consistent with the requirements and limitations that apply to the credit.

13c.2.e. Economic development tax credit and recapture: recapture in general. - Where a taxpayer generates an economic development tax credit, as defined in subdivision 13c.2.c, for a taxable year and then subsequently disposes of the property, or where the property otherwise ceases to be in qualified use within the meaning of the applicable tax credit statute, recapture of the credit is determined pursuant to the article of the Code governing the tax credit, based upon the total credit previously taken by the taxpayer, and its consolidated group when the credit was first claimed on a consolidated West Virginia corporation net income tax return for a taxable year that began before January 1, 2009. This rule applies even if the taxpayer first leaves the combined group, then in a subsequent year disposes of the qualified property or otherwise causes recapture, and therefore in the subsequent tax year is no longer included in a combined group with the corporations whose use of the credit shall be considered for purposes of recapture.

§110-24-13d. Intercompany Transactions

13d.1. In general.

13d.1.a. Purpose. This section provides rules for reporting intercompany transactions of members of a combined reporting group in order to clearly reflect the taxable income (and tax liability) of the taxpayer members that is allocated or apportioned to West Virginia. The general rule is that business income from intercompany transactions (composed of both gains or losses) will be deferred in order to produce the effect of transactions between divisions of a single corporation in a manner similar to Title 26, Code of Federal Regulations, section 1.1502-13 (26 C. F. R. 1.1502-13 or Treasury Regulation section 1.1502-13). West Virginia Code §11-24-13d(e)

13d.1.b. Conformity to Treasury Regulation section 1.1502-13. Intercompany transactions. Except as otherwise provided, this section incorporates Treasury Regulation section 1.1502-13, as amended through June 30, 2009, to the extent possible consistent with combined reporting principles to enable ease of administration and compliance. This section does not restate all the provisions of the federal regulation in full. However, the methodology adopted under the federal regulation applies except as otherwise provided in this section. Exceptions will arise due to the differences between the composition of the federal consolidated group and the combined reporting group, the requirements of West Virginia's allocation and apportionment provisions, jurisdictional limitations, and treatment of members of a combined reporting group as separate entities for many purposes under the W. Va. Code. Exceptions may also arise in those

instances when Treasury Regulation section 1.1502-13 incorporates by reference provisions of the Internal Revenue Code to which West Virginia has not conformed. Unless explicitly provided otherwise, conformity to Treasury Regulation section 1.1502-13 in no way implies conformity to any other regulation under section 1502. of the Internal Revenue Code.

13d.1.c. Timing rules as a method of accounting. This section applies the provisions of Treasury Regulation section 1.1502-13(a)(3), except for the reference to Treasury Regulation section 1.1502-17. The rules apply to all members of the combined reporting group.

13d.1.d. Other Law. Other applicable law (including nonstatutory authorities) ~~apply~~ applies in addition to this section to the extent that this section does not exclude the application.

13d.1.d.1. Non-applicability of section 304 of the Internal Revenue Code. As provided in Treasury Regulation section 1.1502-80, section 304 of the Internal Revenue Code, to which West Virginia conforms pursuant to W. Va. Code §11-24-3, does not apply to any acquisition of stock of a corporation in an intercompany transaction occurring on or after January 1, 2009.

13d.1.d.2. Non-applicability of section 163(e)(5) of the Internal Revenue Code. As provided in Treasury Regulation section 1.1502-80, section 163(e)(5) of the Internal Revenue Code, to which West Virginia conforms pursuant to W. Va. Code §11-24-3, does not apply to any intercompany obligation within the meaning of subsection 13d.7. issued in a tax year beginning on or after January 1, 2009.

13d.1.d.3. Non-applicability of section 1031. of the Internal Revenue Code. As provided in Treasury Regulation section 1.1502-80, section 1031. of the Internal Revenue Code, to which West Virginia conforms pursuant to W. Va. Code §11-24-3, does not apply to any intercompany transaction occurring in income years beginning on or after January 1, 2009.

13d.1.e. Sourcing. In the income year that intercompany items are taken into account, their source shall be determined as if the selling member (S) and the buying member (B) are divisions of a single corporation. Therefore, the intercompany items are treated as current apportionable business income and are apportioned to West Virginia in accordance with W. Va. Code §§11-24-1, *et seq*. West Virginia law does not conform to the federal sourcing rules provided or referenced in Treasury Regulation section 1.1502-13, with relation to worldwide unitary reporting and with relation to activity in a tax haven, as specified in W. Va. Code §§11-24-1, *et seq.*

13d.1.e.1. Sales Factor.

13d.1.e.1.A. Sales attributable to intercompany items are not included in S's sales factor either in the year of the transaction or in the years in which the intercompany items are taken into account.

13d.1.e.1.B. Gross receipts from the sale generating B's corresponding item will be included in B's sales factor in the year of the sale if otherwise included under W. Va. Code §§11-24-1, *et seq.*, unless the gross receipts are excluded under an "other method of allocation and apportionment," as authorized by W. Va. Code §11-24-7(h).

13d.1.e.1.C. Considered sales under Treasury Regulation section 1.1502-13(d)(1)(ii) will be disregarded for purposes of the sales factor.

13d.1.e.2. Property factor.

13d.1.e.2.A. On the date of the intercompany transaction, the property transferred from S to B will be included in B's property factor at the original cost to S.

13d.1.e.2.B. Intercompany rent expense is not included in the property factor.

13d.1.e.2.C. Intercompany obligations shall not be included in the property factor.

13d.1.e.2.D. If S's intercompany item is accelerated as a result of S or B no longer being members of the same combined reporting group, the value of B's property acquired from S in an intercompany transaction will be adjusted immediately after the acceleration event to reflect B's original cost (the purchase price paid by B to S).

13d.1.e.2.E. Paragraphs 13d.1.e.2.A through 13d.1.e.2.D. of this rule relating to the property factor apply regardless of whether an election is made under this section to treat an intercompany transaction on a separate entity basis.

13d.1.f. Overview. The principal provisions of this section that implement single entity treatment are the matching rule of subsection 13d.3. and the acceleration rule of subsection 13d.4. Under the matching rule, Seller (S) and Buyer (B) are generally treated as divisions of a single corporation for purposes of taking into account their items from intercompany transactions. The acceleration rule provides rules for taking the items into account if the effect of treating S and B as divisions cannot be achieved (for example, if S or B leave the combined reporting group or if the asset transferred in the intercompany transaction is converted to nonbusiness use). Intercompany items will be treated as current apportionable business income for the years) in which the item is taken into account. Subsection 13d.2. provides definitions used in the application of this section. Subsection 13d.5. provides simplifying rules for certain transactions. Subsections 13d.6. and 13d.7. provide additional rules for stock and obligations of members. Subsections 13d.8 and 13d.9 provide anti-avoidance rules and miscellaneous operating rules.

13d.2. Definitions. For purposes of this rule:

13d.2.a. Intercompany transactions.

13d.2.a.1. Except as provided in paragraph 13d.2.a.2. of this rule, the term "intercompany transaction" means a transaction between corporations which are members of the same combined reporting group immediately after the transaction. "S" is the member transferring property or providing services, and "B" is the member receiving the property or services. Intercompany transactions include, but are not limited to --

13d.2.a.1.A. S's sale of property (or other transfer, such as an exchange or contribution) to B;

13d.2.a.1.B. S's performance of services for B, and B's payment or accrual of its expenditures for S's performance;

13d.2.a.1.C. S's licensing of technology, rental of property, or loan of money to B, and B's payment or accrual of its expenditures; and

13d.2.a.1.D. S's distribution to B with respect to S stock.

13d.2.a.2. The term intercompany transaction does not include transactions which produce nonbusiness income or loss to the selling member or income attributable to a separate business activity of the selling member. The term intercompany transaction also does not apply when the asset transferred in the transaction is acquired for the buyer's non-business use or for the use of a separate business activity of the buyer. For purposes of this section, the transactions shall be considered as if between corporations that are not members of a combined reporting group.

13d.2.b. "Combined reporting group" means a group of corporations, that is permitted or required to be included in a particular combined report under W. Va. Code §§11-24-1, *et seq.* and any non-corporate entities permitted or required to be included. For purposes of this rule, the members of the combined reporting group include:

13d.2.b.1. Both S and B, when the income and apportionment factors of those corporations are properly included in the same combined report for the income year of the intercompany transaction; and

13d.2.b.2. Any affiliated corporation (or portion thereof) whose income and apportionment factors are properly included in the same combined report in combination with the income and apportionment factors of S and B for that income year.

13d.2.c. "Combined reporting group member" means any corporation or entity that is permitted or required to be included in a particular combined report under W. Va. Code §§11-24-1, *et seq.*

13d.2.d. Intercompany items.

13d.2.d.1. In general. S's income, gain, deduction, and loss from an intercompany transaction are its intercompany items. For example, S's gain from the sale of property to B is an intercompany gain. An item is an intercompany item whether it arises directly or indirectly from an intercompany transaction.

13d.2.d.2. Related costs or expenses. S's costs or expenses related to an intercompany transaction are included in determining its intercompany items.

13d.2.d.3. Amounts not yet recognized or incurred. S's intercompany items include amounts from an intercompany transaction that are not yet taken into account in computing its net income under its separate entity method of accounting.

13d.2.e. Corresponding items. B's income, gain, deduction, and loss from an intercompany transaction, or from property acquired in an intercompany transaction, are its corresponding items. If B buys property from S and sells it to a nonmember, B's gain or loss from the sale to the nonmember is a corresponding gain or loss. An item is a corresponding item whether it is directly or indirectly from an intercompany transaction (or from property acquired in an intercompany transaction).

13d.2.f. Recomputed corresponding items. The recomputed corresponding item is the corresponding item that B would take into account if S and B were divisions of a single corporation and the intercompany transaction was between those divisions. For example, if S sells property with a $ 70 basis to B for $ 100, and B later sells the property to a nonmember for $ 90, B's corresponding item is its $ 10 loss, and the recomputed corresponding item is $ 20 of gain (determined by comparing the $ 90 sales price with the $ 70 basis the property would have had if S and B were divisions of a single corporation).

13d.2.g. Treatment as a separate entity. Treatment as a separate entity means treatment without application of the provisions of this section (other than the provisions of subdivision 13d.1.d.), but with the application of the other provisions of this rule. "Treatment as a separate entity" does not operate to prevent the income or loss taken into account under applicable rules for separate entity treatment from being properly characterized as combined report business income of the combined reporting group.

13d.2.h. Divisions of a single corporation. When S and B are treated as divisions of a single corporation for purposes of this section, the divisional treatment applies only to the unitary, apportionable trade or business operations included in the combined report. For example, neither nonbusiness income of S or B, nor income from activities of S or B that are excluded from a water's-edge combined report, will be considered for purposes of treating S and B as divisions of a single corporation.

13d.2.i. Deferred Intercompany Stock Account ("DISA"). DISA is the accounting mechanism that a distributee corporation, which is a member of the combined reporting group, shall use to report and track non-dividend distributions in excess of its adjusted basis in the stock of the distributing subsidiary corporation, which is a member of the same combined reporting group, until this intercompany item is required to be taken into account pursuant to this section. The balance of each DISA account shall be disclosed annually on the taxpayer's return.

13d.2.j. Attributes. The attributes of an intercompany item or corresponding item are all of the item's characteristics, except amount, location, and timing, necessary to determine the item's effect on taxable income (and tax liability). For purposes of this section, "location" does not refer to geographical location, but instead refers to location within the combined reporting group, i.e., which member of the combined reporting group realizes the item.

13d.3. Matching rule. S shall take its intercompany items into account in any year where there is a difference between B's corresponding item and the recomputed corresponding item. The separate entity attributes of S's intercompany items and B's corresponding items are redetermined to the extent necessary to produce the same effect on total group combined report business income as if S and B were divisions of a single corporation, and the intercompany transaction was a transaction between divisions. Unless otherwise provided, this section applies the matching rule provisions of Treasury Regulation section 1.1502-13(c). Exceptions will arise due to the reasons stated in subdivision 13d.1.b of this rule.

13d.3.a. Redetermination of separate entity attributes does not apply to the sourcing of the combined report business income. Sourcing of income is described in subdivision 13d.1.e of this rule.

13d.3.b. Examples: For purposes of the examples in this subdivision, 13d.3.b, unless otherwise stated, P, S and B are members of a combined reporting group. P owns all of the stock of S and B. Y is a person (as defined in W. Va. Code §11-24-3a) unrelated to any member of the combined reporting group. The income year of all persons is the calendar year.

Example 1: Intercompany sale of land followed by sale to a nonmember.

Treasury Regulation §1.1502-13(c)(7)(ii), example 1. provides a similar example.

Facts. S holds land with a basis of $ 70 for use in the trade or business of the combined reporting group. On January 1. of Year 1, S sells the land to B for $ 100. B also holds the land for use in the trade or business of the combined reporting group. On July 1 of Year 3, B sells the land to Y for $ 110.

Definitions. S's sale of the land to B is an intercompany transaction. S's $ 30 gain from the sale to B is its intercompany item, and B's $ 10 gain from its sale to Y is its corresponding item. The total gain of $ 40 is the recomputed corresponding item.

Timing. Under the matching rule, S takes its intercompany item into account in the income years in which there is a difference between B's corresponding item and the recomputed corresponding item. If S and B were unitary divisions of a single corporation and the intercompany sale was a transfer between the divisions, B would succeed to S's $ 70 basis in the land and would have a $ 40 gain from the sale to Y in Year 3, instead of a $ 10 gain. Consequently, S takes no gain into account in Years 1 and 2, and takes the entire $ 30 gain into account in Year 3, to reflect the $ 30 difference in that year between the $ 10 gain B takes into account and the $ 40 recomputed gain (the recomputed corresponding item). In accordance with subdivision 13d.9.d. of this rule, the earnings and profits of S will not reflect S's $ 30 gain until the gain is taken into account in Year 3.

Apportionment. As would be the case if S and B were unitary divisions of a single corporation and the intercompany sale was a transfer between the divisions, that transfer will not be reflected in the sales

factor in Year 1. In Year 3, the $ 110 gross receipts from B's sale of the land to Y will be included in B's sales factor unless the receipts are excluded pursuant to W. Va. Code §11-24-7(h). The land is attributable to B after the intercompany sale, and it will be reflected in B's property factor at S's $ 70 original cost basis until it is sold outside the combined reporting group in Year 3. This is the result that would have occurred had the intercompany transaction been a transfer between unitary divisions. Both S's $ 30 gain and B's $ 10 gain will be treated as current apportionable business income in Year 3.

Example 2: Intercompany sale of depreciable property.

Treasury Regulation §1.1502-13(c)(7)(ii), example 4 provides a similar example.

Facts. On January 1. of Year 1, S buys property with a 10-year useful life for $ 100 and begins to depreciate it under the straightline method. On January 1. of Year 3, S sells the property to B for $ 130. B determines that the useful life of the property is 10 years from the date of B's acquisition, and also uses the straightline method. Both S and B used the property in their unitary trade or business.

Depreciation through Year 3; intercompany gain. S claims $ 10 of depreciation for each of Years 1. and 2. and has an $ 80 basis at the time of the sale to B. Thus, S has a $ 50 intercompany gain from its sale to B ($ 130 sales price - $ 80 adjusted basis). For Year 3, B has $ 13 of depreciation with respect to its $ 130 basis.

Timing. If S and B were divisions of a single entity, that entity would modify its useful life of the property based upon the same change in facts and circumstances that caused B to determine that the useful life would exceed the original 10-year period. Therefore, the recomputed depreciation for Years 3 through 12. would be $ 8 per year ($ 80 remaining basis/redetermined 10-year life). S's $ 50 gain is taken into account to reflect the difference for each income year between B's $ 13 depreciation (B's corresponding item) and the $ 8 recomputed depreciation. Thus, S takes $ 5 of gain into account in each of Years 3 through 12.

Apportionment. As would be the case if the intercompany sale was a transfer between unitary divisions of a single corporation, the transfer will not be reflected in the sales factor. The property will be included in B's property factor at S's $ 100 original cost basis regardless of the subsequent depreciation or intercompany gain taken into account. In each year, S's intercompany gain and B's depreciation deduction will be included in the computation of combined report business income and apportioned using the current apportionment percentage for that year.

Example 3: Intercompany sale followed by installment sale.

Treasury Regulation §1.1502-13(c)(7)(ii), example 5 provides a similar example.

Facts. S holds land with a basis of $ 70 for use in the trade or business of the combined reporting group. On January 1 of Year 1, S sells the land to B for $ 100. B also holds the land for use in the trade or business of the combined reporting group. On July 1 of Year 3, B sells the land to Y in exchange for Y's $ 110 note. The note provides for 24 monthly interest payments beginning August 1. of Year 3, and for principal payments of $ 55 in Year 4 and $ 55 in Year 5. The West Virginia apportionment percentage for the combined reporting group was 10% in Year 3, 90% in Year 4, and 93% in Year 5. The amount of the installment note is substantial in relation to the business activities of the combined reporting group. Therefore, because the deferral of gain recognition under the installment sale provisions should not substantially change the ultimate amount of income apportioned to West Virginia, the installment income shall be apportioned using the apportionment percentage from the year in which the installment sale occurred.

Timing and attributes. Under section 453 of the Internal Revenue Code, B's corresponding items

are its $ 5 gain in Year 4, and its $ 5 gain in Year 5. B's recomputed gain, computed as if the intercompany sale were a transfer between unitary divisions, would be $ 20 in Year 4 and $ 20 in Year 5. Thus, S takes $ 15 of intercompany gain into account in each of Years 4 and 5 to reflect the difference between B's $ 5 corresponding gain and $ 20 recomputed gain. B's interest income on the installment note is not a corresponding item, and is taken into account when accrued in Years 3 through 5.

Apportionment. As would be the case if the intercompany sale was a transfer between divisions, there will be no effect on the sales factor in Year 1, and the $ 110 gross receipts from the sale to Y will be included in B's sales factor in Year 3 (assuming that the receipts were not excluded pursuant to W. Va. Code §11-24-7(h). Because the installment sale income is being apportioned to West Virginia using the apportionment percentage from the year of the sale to Y under section 453 of the Internal Revenue Code, both S's $ 15 intercompany gain and B's $ 5 corresponding gain for each of Years 4 and 5 will be apportioned to West Virginia using the 10% apportionment percentage from Year 3. The property will be included in B's property factor at S's $ 70 cost basis until it is sold to Y in Year 3. B's interest income accrued in Years 3, 4 and 5 is current period income and will be apportioned using the current apportionment percentages for those years (10%, 90% and 93%, respectively).

Example 4: Intercompany sale of installment obligation.

Treasury Regulation §1.1502-13(c)(7)(ii), example 6 provides a similar example.

Facts. S holds land with a basis of $ 70. On January 1 of Year 1, S sells the land to Y in exchange for Y's $ 100 note, and S reports its gain on the installment method under section 453 of the Internal Revenue Code. Y's note bears interest at a market rate of interest in excess of the applicable federal rate and provides for principal payments of $ 50 in Year 5 and $ 50 in Year 6. On July 1 of Year 3, S sells Y's note to B for $ 100, resulting in a $ 30 gain from S's prior sale of the land to Y. Both S's and B's income would be considered business income. The West Virginia apportionment percentage for the combined reporting group was 8% in Year 1, 15% in Year 3, and 90% in Years 5 and 6. The amount of the installment note is substantial in relation to the business activities of the combined reporting group. Therefore, because the deferral of gain recognition under the installment sale provisions should not substantially change the ultimate amount of income apportioned to West Virginia, the installment income will be apportioned pursuant to W. Va. Code §11-24-7(h) using the apportionment percentage from the year in which the installment sale occurred.

Timing and attributes. S's sale of Y's note to B is an intercompany transaction, and S's $ 30 gain is an intercompany gain. S takes $ 15 of the gain into account in each of Years 5 and 6 to reflect the difference between B's $ 0 corresponding gain and B's $ 15 recomputed gain. S's gain continues to be treated as its gain from the sale to Y, and the deferred tax liability of each taxpayer member remains subject to the interest charge under section 453A(c) of the Internal Revenue Code.

Apportionment. The $ 100 gross receipts from the sale of the land to Y will be included in S's sales factor in Year 1. When S's gain is taken into account in Years 5 and 6, it should be apportioned to West Virginia using the 8% apportionment percentage from Year 1. This is the same result that would have occurred had the intercompany sale of the installment note been a transfer between unitary divisions.

Worthlessness. Assume that Y's note becomes worthless on December 1. of Year 3 and B has a $ 100 loss on a separate entity basis (a $ 100 corresponding loss). S takes its $ 30 gain into account in Year 3 to reflect the difference between B's $ 100 corresponding loss and B's $ 70 recomputed loss. On a separate entity basis, S's $ 30 gain would be an installment gain. However, there would be no net installment income if S and B were divisions of a single corporation. Therefore, when the separate entity attributes of S's intercompany items and B's corresponding items are redetermined under Treasury Regulation section 1.1502-13(c)(1)(I) to produce the same effect as if S and B were divisions of a single corporation, both S's $ 30 gain and B's $ 100 loss will be apportioned to West Virginia using the 15%

apportionment percentage from Year 3.

Example 5: Performance of services by a member for a member.

Treasury Regulation §1.1502-13(c)(7)(ii), example 7 provides a similar example.

Facts. S is a driller of water wells. B operates a ranch and requires water to maintain its cattle. During Year 1, B pays S $ 100 to drill an artesian well on B's ranch, and S incurs $ 80 of expenses related to drilling the well. B capitalizes its $ 100 cost for the well and takes into account $ 10 of depreciation deductions in each of Years 2. through 11. If S and B were divisions of a single corporation, the $ 80 costs incurred in drilling the well would be capitalized and the depreciation deduction would be $ 8 in each of Years 2. through 11.

Timing. S has intercompany income of $ 20 ($ 100 receipts less $ 80 expenses). In each of Years 2. through 11, S takes $ 2. of its intercompany income into account to reflect the annual difference between B's $ 10 corresponding depreciation deduction and the $ 8 recomputed depreciation deduction.

Apportionment. As would be the case if the services were performed between unitary divisions of a single corporation, the transaction will not be reflected in the sales factor. If S's expenses related to drilling the well included payroll expenses, those expenses would be included in the payroll factor in Year 1. When the well is placed in service, it will be included in B's property factor at its capitalized cost to S of $ 80. In each year, S's $ 2. intercompany income and B's $ 10 depreciation deduction will be included in current apportionable business income for that year.

Example 6: Intercompany rental of property.

Treasury Regulation §1.1502-13(c)(7)(ii), example 8 provides a similar example.

B operates a ranch that requires grazing land for cattle. S owns land adjoining B's ranch. On January 1 of Year 1, S leases grazing rights for one year to B for $ 100. S takes its $ 100 rental income into account in Year 1. to reflect the $ 100 difference between B's $ 100 corresponding rental deduction and the $ 0 recomputed rental deduction. To achieve the effect of the rental transaction occurring between unitary divisions of a single corporation, the intercompany rental income will not be included in S's sales factor. The land will continue to be included in S's property factor at its original cost, and B's property factor will not reflect B's rent expense related to the land.

Example 7: Source of income subject to section 863 of the Internal Revenue Code.

Treasury Regulation §1.1502-13(c)(7)(ii), example 14 provides a similar example.

Facts. S manufactures inventory in the United States and recognizes $ 75 of income on sales to B in Year 1. B resells the inventory in Country F and recognizes $ 25 of income on sales to Y, also in Year 1.

Timing. Under the matching rule, S's $ 75 intercompany income and B's $ 25 corresponding income are taken into account in Year 1.

Apportionment. West Virginia law does not conform to the federal sourcing rules under section 863 of the Internal Revenue Code except that section 863 of the Internal Revenue Code is adopted pursuant to this rule for purposes of determining the extent to which a corporation's income and apportionment factors are included in a combined report. Furthermore, subdivision 13d.3.a. of this rule provides that the redetermination of attributes described in Treasury Regulation section 1.1502-13(c)(1)(I) does not apply to the sourcing of West Virginia combined report business income. In order to achieve the results that would

occur if S and B were divisions of a single corporation, B's receipts from its sales to Y will be reflected in B's sales factor in Year 1. Both S's $ 75 intercompany income and B's $ 25 corresponding item will be treated as current apportionable business income in Year 1.

13d.4. Acceleration rule. S's intercompany items and B's corresponding items are taken into account to the extent they cannot be taken into account to produce the effect of treating S and B as divisions of a single corporation. For example, except as provided in paragraph 13d.4.a.2. of this rule, such effect cannot be produced if S and B are no longer in the same combined reporting group. Unless otherwise provided, this section applies the acceleration rule provisions of Treasury Regulation section 1.1502-13(d). Exceptions will arise due to the reasons stated in subdivision 13d.1.b. of this rule.

13d.4.a. Additional circumstances which will cause the acceleration rule to be applied include:

13d.4.a.1. the asset which was transferred in the intercompany transaction is converted to nonbusiness use; or

13d.4.a.2. see subdivision 13d.9.c. for additional acceleration rules applicable for corporations partially included in a water's-edge combined reporting group.

13d.4.b. Circumstances not known by end of year. In the event that circumstances which would cause the acceleration rule to be triggered during an income year are not known or have not occurred in time for the taxpayer members to file an accurate return, it may be necessary to make an estimate based on available information and amend the return at a later date.

13d.4.c. Examples. The acceleration rule of this subsection is illustrated by the following examples.

Example 1: Becoming a nonmember.

Treasury Regulation §1.1502-13(d)(3), example 1. provides a similar example.

Facts. S owns land with a basis of $ 70, which it uses in the trade or business of the combined reporting group. On January 1 of Year 1, S sells the land to B for $ 100. B also uses the land for unitary business purposes. On July 1 of Year 3, P sells 60% of S's stock to Y and, as a result, S becomes a nonmember of the combined reporting group.

Matching rule. Under the matching rule, none of S's $ 30 intercompany gain is taken into account in Years 1. through 3 because there is no difference between B's $ 0 gain or loss taken into account and the recomputed gain or loss.

Acceleration of S's intercompany items. Once the stock of S is sold, S is no longer a member of the combined reporting group and the effect of treating the unitary operations of S and B as divisions of a single corporation cannot be produced. Therefore, under the acceleration rule of this subsection, S's $ 30 gain is taken into account in Year 3 immediately before S becomes a nonmember.

West Virginia does not conform to the stock basis adjustments required for federal consolidated filing purposes by Treasury Regulation section 1.1502-32. P's basis in S's stock will be P's original cost, increased by any capital contributions and decreased by any returns of capital.

Apportionment. The intercompany sale is not reflected in the sales factor in Year 1. In Year 3, P's receipts from the sale of S stock may be included in the sales factor if not otherwise excluded under W. Va. Code §§11-24-1, *et seq.* or this rule. The land will be included in B's property factor at S's $ 70 original cost until S's intercompany gain is accelerated. Immediately after S's gain is taken into account, the $ 70

value of the land in B's property factor will be stepped up to reflect B's $ 100 cost. S's intercompany gain will be treated as current apportionable business income in Year 3.

Example 2: Conversion to nonbusiness use.

Facts. S owns land with a basis of $ 70 which it holds for use in the trade or business of the combined reporting group. On January 1 of Year 1, S sells the land to B for $ 100. B also uses the land in its trade or business. On July 1 of Year 3, B converts the land to a nonbusiness use.

Acceleration of S's intercompany items. Because the effect of treating the unitary operations of S and B as divisions of a single corporation cannot be achieved once the land is removed from the unitary trade or business, the acceleration rule causes S to take its $ 30 gain into account immediately before the conversion to non-business use takes place.

Apportionment. If the land had been transferred between divisions of a single corporation and then converted to nonbusiness use, those transactions would have no effect on the sales factor. Thus, neither the intercompany sale in Year 1 nor the acceleration of S's intercompany gain in Year 3 will be reflected in the sales factor. The land will be included in B's property factor at S's $ 70 original cost until it is converted to nonbusiness use, at which time it will be removed from the property factor. S's accelerated intercompany gain will be treated as current apportionable business income in Year 3.

13d.5. Simplifying rules.

13d.5.a. Unless otherwise provided, this section applies the simplifying rules of Treasury Regulation section 1.1502-13(e), unless differences occur due to non-conformity of W. Va. Code §§11-24-1, *et seq.* with federal treatment.

13d.5.b. Election to treat intercompany transactions on a separate entity basis.

13d.5.b.1. If members of the combined reporting group make a federal election to treat intercompany transactions on a separate entity basis under Treasury Regulation section 1.1502-13(e)(3), the taxpayer members will be treated as having made a similar election for West Virginia purposes, unless an election to the contrary is made for West Virginia purposes. A separate West Virginia election shall be made by the taxpayer members to prevent the federal election from applying for West Virginia purposes. The election shall be subject to the approval of the Tax Commissioner, and approval or disapproval of an election is within the sole discretion of the Tax Commissioner. A taxpayer which is qualified to request federal consent to treat intercompany transactions on a separate entity basis under Treasury Regulation section 1.1502-13(e)(3) but does not so request or is not granted consent by the Internal Revenue Service, may not elect such treatment for West Virginia purposes.

13d.5.b.2. If the members of the combined reporting group properly report transactions on a separate entity basis for federal or foreign national tax purposes and paragraph 13d.5.b.1. of this rule does not apply, the taxpayer members may elect to treat those transactions on a separate entity basis for West Virginia purposes. The election is subject to the approval of the Tax Commissioner, and approval or disapproval of an election is within the sole discretion of the Tax Commissioner. The election may be made for all items, or for items from a class or classes of transactions. For example, intercompany sales of inventory to a controlled foreign corporation included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f may be considered a class of transactions for which a separate state election may be made.

13d.5.b.3. Elections described by subdivision 13d.5.b. of this rule are made by reporting the intercompany transactions in the manner required by the election on a timely filed original tax return (not an amended return) for the first year to which the election is to apply. An election under this subsection

shall be treated as an accounting method and shall be effective for all intercompany transactions occurring in the year to which the election is first applied, and for each year thereafter. The election is subject to the approval of the Tax Commissioner, and approval or disapproval of an election is within the sole discretion of the Tax Commissioner.

13d.5.b.4. An election made under subdivision 13d.5.b of this rule does not apply for purposes of taking into account:

13d.5.b.4.A. Losses and deductions deferred under section 267(f) of the Internal Revenue Code; or

13d.5.b.4.B. Items from intercompany transactions with respect to stock or obligations of members.

13d.6. Stock of members.

13d.6.a. Unless otherwise provided, this section applies the provisions of Treasury Regulation section 1.1502-13(f) relating to stock of members; however, the provisions of subsection (f)(6) of that section shall not apply.

13d.6.a.1. Exception for distributee member. Treasury Regulation section 1.1502-13(f)(2)(ii) shall not apply to exclude intercompany distributions from the gross income of the distributee member. Intercompany dividend distributions described by section 301(c)(1) of the Internal Revenue Code are included in the income of the distributee member unless subject to elimination or deduction under other applicable federal law or West Virginia law. The treatment of intercompany distributions described by section 301(c)(3) of the Internal Revenue Code is provided by paragraph 13d.6.a.2. of this rule.

13d.6.a.2. Deferred intercompany stock account (DISA). That portion of an intercompany distribution which exceeds West Virginia earnings and profits and P's basis in S's stock (the portion of a distribution described by section 301(c)(3) of the Internal Revenue Code) will create a DISA. In this subsection, P is treated like the Buyer (B) for purposes of calculating corresponding and recomputed items.

The DISA will be treated as deferred income. To the extent of a sale, liquidation, or any other disposition of shares of the stock, the balance of the DISA with respect to the shares will be taken into account as income or gain to P even if S and P remain members of the same combined reporting group. The disposition shall be treated as a sale or exchange for purposes of determining the character of the DISA income or gain. The DISA is held by the distributee.

13d.6.a.2.A. A disposition of all the shares shall be considered to have occurred if either S or P becomes a non-member of the combined reporting group or if the stock of S becomes worthless.

13d.6.a.2.B. Because P's DISA is deferred income and not negative basis, the DISA is taken into account upon liquidation, including complete liquidation into the parent. The deferred income restored as a result of the liquidation will be taken into account ratably over 60 months unless the taxpayer elects to take the income into account in full in the year of liquidation. For example, if S liquidates and the exchange of P's S stock is subject to section 332. of the Internal Revenue Code, P's DISA income taken into account under paragraph 13d.6.a.2. of this rule is recognized over 60 months unless an election is made to recognize the deferred income in the year of liquidation. Nonrecognition or deferral shall not apply to DISA income or gain taken into account as a result of an event described in subparagraph 13d.6.a.2.A. of this rule

13d.6.a.2.C. If P transfers the stock of S to another member of the combined reporting group, P's DISA income will be an intercompany item and deferred under the provisions of this section.

13d.6.b. Examples. The application of this section to intercompany transactions with respect to stock of members is illustrated by the following examples.

Example 1: Dividend exclusion and property distribution.

Treasury Regulation §1.1502-13(f)(7), example 1. provides a similar example.

Facts. S owns land that is used in the trade or business of the combined reporting group with a $ 70 basis and $ 100 value. On January 1 of Year 1, P's basis in S's stock is $ 100, and S has accumulated earnings and profits of $ 500 from prior years' combined reports of S and P.

During Year 1, S declares and makes a dividend distribution of the land to P. P also uses the land in the unitary business. Under section 311(b) of the Internal Revenue Code, S has a $ 30 gain. Under section 301(d) of the Internal Revenue Code, P's basis in the land is $ 100. West Virginia law generally conforms to Internal Revenue Code sections 301-385. On July 1 of Year 3, P sells the land to Y for $ 110.

Dividend treatment. S's distribution of the land is an intercompany distribution to P in the amount of $ 100. Because the distribution is paid out of earnings and profits of S, which have been included in a combined report of S and P, it will be eliminated from P's income pursuant to W. Va. Code §11-24-13d. The payment of the dividend has no effect on P's basis in the stock of S.

Matching rule. Under the matching rule (treating P as the buying member and S as the selling member), S takes its $ 30 intercompany gain into account in Year 3 to reflect the $ 30 difference between P's $ 10 corresponding gain ($ 110-$ 100 basis in the land) and the $ 40 recomputed gain ($ 110-$ 70 basis that the land would have had if S and P were divisions).

Apportionment. The intercompany distribution is not reflected in the sales factor in Year 1. In Year 3, unless otherwise excluded, the $ 110 gross receipts from P's sale of the land will be included in P's sales factor. After the distribution in Year 1, the land will be included in P's property factor at S's $ 70 original cost basis. Both S's $ 30 gain and P's $ 10 gain relative to the distributed land will be treated as current apportionable business income in Year 3.

Example 2: Dividends paid from pre-unitary earnings and profits.

Facts. The facts are the same as in Example 1. except that S's earnings and profits from prior combined reports of S and P is only $ 10. S also has $ 490 of earnings and profits that arose in years before a unitary relationship existed between S and P.

Dividend treatment. Because only $ 10 of S's distribution was paid from earnings and profits attributable to business income included in a combined report of S and P, only $ 10 is eliminated under W. Va. Code §11-24-13d. The remaining $ 90 of the dividend will be taken into account by P in Year 1, subject to any applicable deductions under W. Va. Code §§11-24-1, *et seq.*

Matching rule. P's corresponding item is not its dividend income, but its income, gain, deduction, or loss from the property acquired in the intercompany distribution. Therefore, none of S's intercompany gain will be taken into account in Year 1. As in Example 1, S will take its $ 30 intercompany gain into account in Year 3 to reflect the $ 30 difference between P's $ 10 corresponding gain and the $ 40 recomputed gain.

Apportionment. The apportionment results are the same as in Example 1, except that to the extent that the Year 1. dividend is not eliminated under W. Va. Code §11-24-13d or deducted for purposes of W. Va. Code §§11-24-1, *et seq.*, P's dividend income will be treated as current apportionable business income

in Year 1. The intercompany distribution is not included in the sales factor in Year 1.

Example 3: Deferred intercompany stock accounts.

Treasury Regulation §1.1502-13(f)(7), example 2. provides a similar example.

Facts. S owns all of T's stock with a $ 10 basis and $ 100 value. S has substantial earnings and profits which are attributable to business income included in a combined report of S, T and P. T has $ 10 of accumulated earnings and profits, all of which are attributable to business income included in a combined report of S, T and P. On January 1 of Year 1, S declares and distributes a dividend of all of the T stock to P. Under section 311(b) of the Internal Revenue Code, S has a $ 90 gain. Under section 301(d) of the Internal Revenue Code, P's basis in the T stock is $ 100. During Year 3, T borrows $ 90 from an unrelated party and declares and makes a $ 90 distribution to P to which section 301. of the Internal Revenue Code applies. During Year 6, T has $ 5 of current earnings which is attributable to business income included in the combined report of S, T and P. On December 1. of Year 9, T issues additional stock to Y and, as a result, T becomes a nonmember.

Dividend elimination. P's $ 100 of dividend income from S's distribution of the T stock, and its $ 10 dividend income from T's $ 90 distribution, are eliminated from income under W. Va. Code §11-24-13d.

Matching and acceleration rules. P has no deferred intercompany stock account (DISA) with respect to T stock because T's $ 90 distribution did not exceed T's $ 10 of earnings and profits and $ 100 stock basis. Therefore, P's corresponding item in Year 9 when T becomes a nonmember is $ 0. Treating S and P as divisions of a single corporation, the T stock would continue to have a $ 10 basis after the distribution from S to P. T's $ 90 distribution in Year 3 would first reduce T's $ 10 earnings and profits to zero, then reduce the $ 10 recomputed basis in T stock to zero and create a $ 70 recomputed DISA. T's $ 5 of earnings in Year 6 does not affect the amount of the DISA. Because the recomputed DISA would be taken into account upon T becoming a nonmember in Year 9, P will have a $ 70 recomputed corresponding item. Under the matching rule, S takes $ 70 of its intercompany gain into account in Year 9 to reflect the difference between P's $ 0 corresponding gain and the $ 70 recomputed gain. S's remaining $ 20 of gain will be taken into account under the matching and acceleration rules based on subsequent events (for example, under the matching rule if P subsequently sells its T stock, or under the acceleration rule if S becomes a nonmember or if the stock of T becomes a nonbusiness asset.)

Apportionment. Neither the distributions in Years 1. and 3, nor T becoming a nonmember in Year 9, have any effect on the sales factor. S's $ 70 intercompany gain will be treated as current apportionable business income in Year 9.

Example 4: Deferred intercompany stock accounts, reverse sequence.

Treasury Regulation §1.1502-13(f)(7), example 2(d) provides a similar example.

Facts. The facts are the same as in Example 3, except that T borrows the $ 90 and makes its $ 90 distribution to S before S distributes T's stock to P. To the extent of T's $ 10 earnings and profits, T's distribution to S is a dividend and is eliminated under section 25106 of the Revenue and Taxation Code. The remaining distribution reduces S's $ 10 basis in T stock to $ 0 and creates a $ 70 DISA. The fair market value of T's stock after T incurs the $ 90 debt and distributes the proceeds is $ 10. Under section 311(b) of the Internal Revenue Code and the provisions of this section, S has an $ 80 gain from the distribution of T stock to P ($ 10 value less $ 0 basis, plus $ 70 DISA recaptured). Under section 301(d) of the Internal Revenue Code, P's initial basis in the T stock is the $ 10 fair market value of the stock. T's $ 5 of earnings in Year 6 has no effect on P's basis in the T stock.

Matching and acceleration rule. P's corresponding item in Year 9, when T becomes a nonmember, is $ 0. Treating S and P as divisions of a single corporation, the T stock would continue to have a $ 0 basis after the distribution from S to P, and a $ 70 balance would remain in the DISA. When T becomes a nonmember in Year 9, P shall include the amount of its DISA in recomputed income, and therefore has a $ 70 recomputed corresponding item. Under the matching rule, S takes $ 70 of its intercompany gain into account in Year 9 to reflect the difference between P's $ 0 corresponding gain and the $ 70 recomputed gain. S's remaining $ 10 of gain will be taken into account under the matching and acceleration rules based on subsequent events.

Apportionment. Neither the distributions in Year 1. nor T becoming a nonmember in Year 9 have any effect on the sales factor. S's $ 70 intercompany gain taken into account in Year 9 is treated as current apportionable business income in Year 9.

Example 5: Partial stock sale.

Treasury Regulation §1.1502-13(f)(7), example 2(e) provides a similar example.

Facts. The facts are the same as in Example 3, except that P sells 10% of T's stock to Y on December 1. of Year 9 for $ 1.50 (rather than T issuing additional stock and becoming a nonmember). T's $ 90 distribution to P in Year 3 reduced T's $ 10 of earnings and profits to $ 0, then reduced P's $ 100 basis in T stock to $ 20. Under the matching rule, S takes $ 9 of its gain into account in Year 9 to reflect the difference between P's $ .50 loss taken into account ($ 1.50 sale proceeds minus $ 2. basis) and the $ 8.50 recomputed gain ($ 1.50 sales proceeds minus $ 0 basis plus $ 7 recomputed DISA).

Apportionment. If not excluded pursuant to W. Va. Code §11-24-7(h), the $ 1.50 gross receipts from P's sale of the T stock to Y is included in P's sales factor in Year 9. Both S's $ 9 gain and P's $ .50 loss are treated as current apportionable business income in Year 9.

Example 6: Loss, rather than cash distribution.

Treasury Regulation §1.1502-13(f)(7), example 2(f) provides a similar example.

Facts. The facts are the same as in Example 3, except that T retains the loan proceeds and incurs a $ 90 operating loss in Year 3. The loss results in an earnings and profits deficit of $ 80 for T, but has no effect on P's basis in T's stock. Therefore, no DISA is created. T's $ 5 of earnings in Year 6 reduces its earnings and profits deficit to $ 75, but also has no effect on the stock basis. Because there is no DISA balance to take into account when T becomes a nonmember in Year 9, P's corresponding item and the recomputed item are both $ 0. Consequently, S's entire $ 90 intercompany gain continues to be deferred pending subsequent events.

Example 7: Intercompany reorganization.

Treasury Regulation §1.1502-13(f)(7), example 3 provides a similar example.

Facts. P forms S and B by contributing $ 200 to the capital of each. During Years 1. through 4, S and B each accumulate earnings and profits of $ 50, which is attributable to business income included in the combined reports of S, B and P. On January 1 of Year 5, the fair market value of S's assets and its stock is $ 500, and S merges into B in a tax-free reorganization. Pursuant to the plan of reorganization, P receives new B stock with a; fair market value of $ 350 and $ 150 cash.

Treatment as a distribution under section 301. of the Internal Revenue Code. Under Treasury Regulation section 1.1502-13(f)(3), P is treated as receiving additional B stock with a fair market value of $ 500. Under section 358 of the Internal Revenue Code, P's basis of the additional B stock is $ 200 (P's

basis in the relinquished S stock). Immediately after the merger, $ 150 of the stock received is treated as redeemed, and the redemption is treated under section 302(d) of the Internal Revenue Code as a distribution to which section 301. applies. Under section 381(c)(2) of the Internal Revenue Code, B is treated as receiving S's $ 50 of earnings and profits in addition to its own $ 50 of earnings and profits. Therefore, $ 100 of the determined distribution is treated as a dividend and is eliminated from income for West Virginia tax purposes. The remaining $ 50 of the distribution reduces P's basis in the B stock from $ 400 to $ 350.

Apportionment. The reorganization has no effect on the sales factor. After the reorganization, S's property will be reflected in B's property factor at S's original cost.

13d.7. Obligations of members.

13d.7.a. Unless otherwise provided, this section follows Treasury Regulation section 1.1502-13(g) relating to the obligations of members.

13d.7.b. Example: The application of this section to obligations of members is illustrated by the following example.

Example: Interest on intercompany debt.

Treasury Regulation §1.1502-13(g)(5), Example 1. provides a similar example.

Facts. On January 1 of Year 1, B borrows $ 100 from S in return for B's note providing for $ 10 of interest annually at the end of each year, and repayment of $ 100 at the end of Year 5. Under their separate entity methods of accounting, B accrues a $ 10 interest deduction annually, and S accrues $ 10 of interest income annually.

Matching rule. Under subdivision 13d.7.a. of this rule, the accrual of interest on B's note is an intercompany transaction. Under the matching rule, S takes its $ 10 of income into account in each of Years 1. through 5 to reflect the $ 10 difference between B's $ 10 of interest expense taken into account and the $ 0 recomputed expense.

Interest offset. Neither S's intercompany interest income nor B's corresponding interest expense are taken into account for purposes of determining the interest offset or foreign investment interest offset under W. Va. Code §§11-24-1, *et seq.*

Apportionment. S's interest income is not included in the sales factor in any of Years 1. through 5. The intercompany loan is excluded from S's property factor, even if S is required to include loan balances in its property factor for West Virginia tax purposes.

13d.8. Anti-avoidance rules. If a transaction is engaged in or structured with the principal purpose of avoiding the purposes of this section (including, for example, avoiding treatment as an intercompany transaction, or manipulating the sourcing of income or the occurrence of acceleration events), adjustments may be made to carry out the purposes of this section.

13d.9. Miscellaneous operating rules.

Except as otherwise provided, this section applies the provisions of Treasury Regulation section 1.1502-13(j) relating to miscellaneous operating rules. However, the provisions of subsections (j)(5), (j)(6), and (j)(7) of Treasury Regulation section 1.1502-13 shall not apply for West Virginia tax purposes.

13d.9.a. Subgroups.

13d.9.a.1. If a change occurs in the composition of the combined reporting group, but both S and B either remain members of the same combined reporting group or leave the combined reporting group together and remain unitary with each other, that change alone will not cause S's intercompany items to be taken into account under the acceleration rule contained in subsection 13d.4 of this rule.

13d.9.a.2. If the event which causes the combined reporting group to change as described in paragraph 13d.9.a.1. also causes S's intercompany items to be taken into account in a federal consolidated return, then S may make an irrevocable election to take those intercompany items into account in the same period for West Virginia purposes. The election is made by reporting the income, gain, deduction, or loss on a timely filed original tax return. If this election is not made, then S and B shall maintain sufficient records to track the intercompany gain or loss which has been taken into account for federal purposes but which remains deferred for state purposes. The election is subject to the approval of the Tax Commissioner, and approval or disapproval of an election is within the sole discretion of the Tax Commissioner.

13d.9.a.3. Examples. The application of subdivision 13d.9.a. of this rule is illustrated by the following examples.

Example 1: S and B sold.

P is the principal corporation in a combined reporting group in which S and B are members. P sells S and B to Y, an unrelated entity. S and B remain unitary after the sale. The sale of S and B does not cause S's intercompany items to be taken into account under the acceleration rule. Therefore S's intercompany items will remain deferred until subsequent events cause those intercompany items to be taken into account under either the matching rule or the acceleration rule. However, if the sale of S and B caused S's intercompany items to be taken into account in the federal consolidated return, the taxpayer may elect the same treatment under paragraph 13d.9.a.2. of this rule by taking the intercompany items into account on its timely filed original West Virginia return.

13d.9.b. Recognition of income from intercompany transactions occurring prior to entering the state.

13d.9.b.1. Intercompany transactions as defined in subdivision 13d.2.a. of this rule shall include those transactions which occur prior to any member becoming taxable in this State if S and B would have been members of the same combined reporting group had any unitary member been taxable in this State in the year of the transaction.

13d.9.b.2. To the extent that intercompany transactions would have qualified for an election to be treated on a separate entity basis under subdivision 13d.5.b. of this rule but for the fact that no member of the combined reporting group was a West Virginia taxpayer in the year in which an election would have been required to be made, a retroactive election under subdivision 13d.5.b. of this rule will be made. The election shall apply to all intercompany transactions described by subdivision 13d.9.b.

13d.9.b.3. Examples. The application of this section to transactions occurring prior to entering the state is illustrated by the following examples.

Example 1: Sale outside of group after member enters the state.

Facts. S and B are members of a unitary group which conduct all of their business activity in the U.S. Both are members of a federal consolidated return group. In Year 1, when no member of the group is a West Virginia taxpayer, S sells land with a basis of $ 100 to B for $ 110. S's $ 10 gain is treated as a deferred intercompany item in S and B's consolidated return. The land is used in the unitary business. In Year 2, a member of the unitary group becomes taxable in West Virginia. Prior to the member becoming taxable in this state, no event occurred which would have caused the intercompany item to be taken into

account. In Year 3, B sells the land to Y for $ 130.

Matching rule. S's sale of the land to B is an intercompany transaction, and S's $ 10 gain is its intercompany item. S takes its intercompany gain into account in Year 3 to reflect the $ 10 difference between B's corresponding item of $ 20 from the sale to Y, and the recomputed corresponding item of $ 30 ($ 130-$ 100). This is the same result that would have occurred if S and B were unitary divisions of a single corporation and the transaction had been a transfer between divisions prior to the corporation becoming taxable within this state.

Apportionment. The land is included in B's property factor at S's $ 100 original cost basis. In Year 3, the $ 130 gross receipts from B's sale to Y, unless otherwise excluded by W. Va. Code §11-24-7(h), will be included in B's sales factor. S's gain will be treated as current apportionable business income in Year 3.

Example 2. Retroactive election under subdivision 13d.5.b. of this rule

Facts. The facts are the same as in Example 1, except that S and B do not file a consolidated federal return. The Year 1. intercompany transaction between S and B is reported as a $ 10 gain on S's separate return for federal purposes. An election to treat intercompany transactions between S and B on a separate entity basis could have been made if any member of the unitary group was a West Virginia taxpayer in the year of the transaction. Therefore, a retroactive election is made under this subsection in Year 3, which is the year that S's intercompany item would otherwise be taken into account.

Example 3. S leaves the combined reporting group after a member enters the state.

Facts. The facts are the same as in Example 1, except that instead of B selling the land, the stock of S is sold in Year 3 and S becomes a nonmember of the combined reporting group.

Acceleration rule. Once the stock of S is sold, the effect of treating the unitary operations of S and B as divisions of a single corporation cannot be achieved. Therefore, under the acceleration rule of subsection 13d.4 of this rule, S's $ 10 gain is taken into account in Year 3 immediately before S becomes a nonmember.

Apportionment. The land will be included in B's property factor at S's $ 100 original cost basis until S's intercompany gain is accelerated. Immediately after S's gain is taken into account, the $ 100 value of the land in B's property factor will be increased to reflect B's $ 110 cost. S's intercompany gain will be treated as current apportionable business income in Year 3.

13d.9.c. Partially included water's-edge corporations.

13d.9.c.1. Coordination with W. Va. Code §11-24-13f.

13d.9.c.1.A. If S is a corporation partially included in a water's-edge combined reporting group, and S enters into a transaction with another member of the water's-edge combined reporting group, the transaction is an intercompany transaction if the resulting income, gain, deduction, or loss would, but for the provisions of this section, be included as apportionable business income in the water's-edge combined report under W. Va. Code §11-24-13f.

13d.9.c.1.B. Except as provided in subparagraph 13d.9.c.1.C. of this rule, intercompany transactions include transactions where B is a corporation partially included in the combined reporting group immediately after the transaction pursuant to W. Va. Code §11-24-13f(4), but only to the extent that the object of the intercompany transaction gives rise to income, gain, deduction, or loss which would be included as apportionable business income in the water's-edge combined report under W. Va. Code §11-

24-13f(4).

13d.9.c.1.C. The sale, exchange, or other transfer of stock of an affiliated corporation to a corporation partially included in the combined reporting group pursuant to W. Va. Code §11-24-13f(4) will not be treated as an intercompany transaction unless the stock is considered to be a United States real property interest as defined in section 897(c) of the Internal Revenue Code.

13d.9.c.1.D. Where either S or B was partially included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(4), the intercompany item will be taken into account under the acceleration rule immediately before any income year in which either S or B has no includable income pursuant to W. Va. Code §11-24-13f(4) and is therefore excluded from the water's-edge combined reporting group. If, for any year, the includable income of S or B pursuant to W. Va. Code §11-24-13f(4) is insubstantial, the Tax Commissioner may permit or require the intercompany item to be taken into account under the acceleration rule immediately before that year.

13d.9.c.1.E. Where B is partially included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(4), the acceleration rule will apply to take an intercompany item into account to the extent the object of the intercompany transaction ceases to give rise to income, gain, loss, or deductions which would be included as apportionable business income in the water's-edge combined report under W. Va. Code §11-24-7(h). For example, if intangible property gives rise to income includible in the water's-edge combined report under W. Va. Code §11-24-7(h) while held by B, but a disposition of the property results in foreign-source gain or loss under sections 861. through 865 of the Internal Revenue Code which is not included in the water's-edge combined report, then the disposition will trigger application of the acceleration rule to take into account S's intercompany items with respect to the property.

13d.9.c.1.F. Where a sale, exchange, or other transfer of stock to a corporation included in the water's-edge combined reporting group, pursuant to W. Va. Code §11-24-13f(a)(4), has been treated as an intercompany transaction under subparagraph 13d.9.c.1.C. of this rule, the acceleration rule will apply to take into account intercompany items arising from that intercompany transaction if the stock ceases to be a United States real property interest as defined in section 897(c) of the Internal Revenue Code.

13d.9.c.2. Coordination with W. Va. Code §11-24-13f(a)(5).

13d.9.c.2.A. Definition. For purposes of this section, the term "partial inclusion ratio" means a fraction not to exceed one, the numerator of which is the "Subpart F income, as defined in section 952 of the Internal Revenue Code " of that corporation for that taxable year and the denominator of which is the "earnings and profits," as defined in Section 964 of the Internal Revenue Code of that corporation for that taxable year. The partial inclusion ratio shall be used for determining the includable amount of income and apportionment factors for a partially included corporation described in W. Va. Code §11-24-13f(a)(5).

13d.9.c.2.B. A transaction between a corporation included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(5) and another member of the combined reporting group will be an intercompany transaction to the extent of that corporation's partial inclusion ratio for the income year.

13d.9.c.2.C. If both S and B are corporations included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(5), the partial inclusion ratios of both S and B shall be applied to determine the portion of the transaction that will be treated as an intercompany transaction.

13d.9.c.2.D. Where either S or B is included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(5), the intercompany item will be taken into account under the acceleration rule immediately before the first income year in which the partial inclusion ratio for either S or B is an amount equal to or lower than 50% of its partial inclusion ratio for the year of the intercompany

transaction. Regardless of whether the ratio decreases 50% or more below the intercompany transaction year partial inclusion ratio, the acceleration rule will apply to take the intercompany item into account if the partial inclusion ratio is less than 10%.

13d.9.c.2.E. If subparagraph 13d.9.c.2.D. of this rule applies, then, as an alternative to the application of the acceleration rule provided by that subparagraph, the taxpayer may elect to have the acceleration rule apply to take into account only a proportionate share of the intercompany item relative to the amount of the decrease in the partial inclusion ratio. If further decreases in the partial inclusion ratio occur in subsequent years, additional portions of the intercompany item shall be taken into account under the acceleration rule in proportion to the decreases. However, if in any income year the partial inclusion ratio is below 10%, any remaining intercompany items shall be taken into account and the election provided by this subparagraph shall not apply. The election shall be made by reporting the proportionate share of the intercompany item on a timely filed original tax return for the first year in which the partial inclusion ratio decreases 50% or more below the intercompany transaction year partial inclusion ratio. As a condition of this election, the taxpayer shall maintain books and records sufficient to identify the amounts of intercompany items, the annual partial inclusion ratios, and the application of this provision to the intercompany items.

13d.9.c.2.F. Where both S and B are included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(5), and the partial inclusion ratios of both S and B decrease 50% or more below their respective intercompany transaction year partial inclusion ratios, the acceleration methodology of subparagraph 13d.9.c.2.E. of this rule shall be applied in proportion to the greater of either (1) the amount of decrease attributable to S or (2) the amount of decrease attributable to B.

13d.9.c.3. Separate entity election for transactions with partially included entities. Paragraph 13d.5.b.2. of this rule sets forth procedures for application of the election to treat transactions on a separate entity basis with respect to transactions with partially included entities.

13d.9.c.4. Examples. The application of this subdivision to partially included entities in a water's-edge combined report is illustrated by the following examples.

Example 1: Intercompany sale of land by an entity included pursuant to W. Va. Code §11-24-13f(a)(4).

Facts. S is a foreign corporation with U.S. branches that are included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(4). S has a basis of $ 70 in land which it uses in its U.S. trade or business operations. On January 1 of Year 1, S sells the land to domestic corporation B for $ 100. On July 1 of Year 3, B sells the land to Y for $ 110.

Matching rule. But for the provisions of this section, S's $ 30 gain from the sale to B would be treated as U.S. source income and included in the water's-edge combined report under W. Va. Code §11-24-13f. However, the transaction is an intercompany transaction and S's $ 30 gain is an intercompany item. S takes its intercompany item into account under the matching rule in Year 3 to reflect the $ 30 difference for the year between B's corresponding item of $ 10 and the recomputed corresponding item of $ 40.

Apportionment. To produce the result that would occur if S and B were unitary divisions of a single corporation, the intercompany sale of land will not be reflected in the sales factor in Year 1. In Year 3, unless otherwise excluded, the $ 110 gross receipts from B's sale will be included in B's sales factor. The land is attributable to B after the sale, and it will be reflected in B's property factor at S's $ 70 original cost basis until it is sold outside the water's-edge combined reporting group in Year 3. Both S's $ 30 gain and B's $ 10 gain will be treated as current apportionable business income in Year 3.

Example 2: Intercompany transaction where buyer is an entity included pursuant to W. Va. Code §11-24-13f(a)(4).

Facts. B is a foreign corporation with a U.S. branch which is included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(4). In Year 1, domestic corporation S incurs expenses of $ 300 to provide engineering services to B in connection with the renovation of B's U.S. facility. B capitalizes the $ 500 fee which it pays to S for the services and computes depreciation on that basis. If S and B were divisions of a single corporation, only the $ 300 in expenses would be capitalized, which would result in smaller depreciation deductions.

Matching Rule. Because the engineering services are attributable to a facility used in the operation of U.S. business activities which give rise to income, gain, deduction, or loss included in the combined report under W. Va. Code §11-24-13f, the performance of those services is treated as an intercompany transaction. S has intercompany income of $ 200 ($ 500 receipts less $ 300 expenses). S's intercompany income will be taken into account in subsequent years based upon the difference between B's corresponding depreciation (based on a $ 500 basis) and the depreciation recomputed as though S and B were divisions of a single corporation (based on a $ 300 basis).

Apportionment. As would be the case if the services were performed between unitary divisions of a single corporation, the transaction will not be reflected in the sales factor. If S's expenses with respect to the engineering services include payroll expenses, those expenses would be included in S's payroll factor in Year 1. When the renovated facility is placed into service in the unitary business, the $ 300 capitalized cost of the engineering services will be included in B's property factor. In each subsequent year, S's intercompany income taken into account and B's corresponding depreciation deduction will be treated as current apportionable business income for that year.

Example 3: Transaction not related to U.S. activities.

Facts. Using the same facts as in Example 2, except that the engineering services relate to the construction of a plant in Brazil.

Matching rule. Although B is partially included in the water's-edge combined reporting group under W. Va. Code §11-24-13f(a)(4), the engineering services do not relate to an asset which will give rise to income, gain, deduction, or loss which will be included in the water's-edge combined report under W. Va. Code §11-24-13f. Therefore, the performance of services is not treated as an intercompany transaction. S's income of $ 500 and expenses of $ 300 are taken into account in Year 1.

Apportionment. Gross receipts of $ 500 are included in S's sales factor.

Example 3a: Transaction allocated between U.S. activities and foreign activities.

Facts. Using the same facts as in Example 2, except that the engineering services relate to the construction of two plants, one in the U.S. and one in Brazil. S's expenses with respect to the engineering services are allocated 55% to the U.S. activities under the rules in Treasury Regulation section 1.861. Therefore, 55% of the transaction will be treated as an intercompany transaction.

Matching Rule. S has intercompany income of $ 110 ($ 500 receipts less $ 300 expenses, multiplied by 55%). S's intercompany income will be taken into account in subsequent years based upon the difference between B's corresponding depreciation deduction and the depreciation deduction recomputed as though S and B were divisions of a single corporation.

Apportionment. Because 45% of the transaction is not treated as an intercompany transaction, S's $ 90 of non-intercompany income ([$ 500-$ 300] x 45%) will be treated as current apportionable

business income in Year 1. Likewise, receipts from engineering services of $ 225 ($ 500 x 45%) will be included in S's sales factor in Year 1. The capitalized cost of the engineering services allocated to the U.S. plant is $ 165 ($ 300 total cost x 55%). When the U.S. plant is placed into service in the unitary business, the $ 165 capitalized cost will be included in B's property factor. In each subsequent year, S's intercompany income taken into account and B's corresponding depreciation deduction will be treated as current apportionable business income for that year.

Example 4: Asset ceases to give rise to U.S. source income.

Facts. Using the same facts as in Example 2, except that the engineering services relate to the design of specialized equipment which is placed in service in B's U.S. facility by the end of Year 1. On December 31. of Year 4, the equipment is shipped to Germany for use in another plant owned and operated by B.

Matching rule. S has intercompany income of $ 200 (sets forth computations in Example 2), a portion of which is taken into account in Years 2. through 4 to reflect the difference between B's corresponding depreciation deduction and the depreciation recomputed as though S and B were divisions of a single corporation.

Acceleration rule. In Year 4, the equipment ceases to give rise to income, gain, loss, or deductions included in the water's-edge combined report under W. Va. Code §11-24-13f. Under the acceleration rule and subparagraph 13d.9.c.1.E. of this rule, S's remaining intercompany income is taken into account in Year 4.

Apportionment. The apportionment results of the transactions in Years 1. through 4 are the same as in Example 2. Because no gross receipts related to the transaction are generated in Year 4, the accelerated income is not reflected in the sales factor.

Example 5. Both Seller and Buyer partially included under W. Va. Code §11-24-13f(a)(4).

S and B are both foreign corporations with U.S. branches that are included in a water's-edge combined reporting group pursuant to W. Va. Code §11-24-13f(a)(4). S sells equipment which it uses in its U.S. trade or business operations to B for a gain. Thereafter, the equipment is used in B's U.S. trade or business operations. Except for the provisions of this section, S's gain from the sale of equipment would be treated as U.S. source income and included in the water's-edge combined report under W. Va. Code §11-24-13f. B's use of the equipment gives rise to income, gain, deduction, or loss which will be included in the water's-edge combined report under W. Va. Code §11-24-13f. Therefore, because the requirements of subparagraph 13d.9.c.1.A. and 13d.9.c.1.B. of this rule are both satisfied, S's sale of the equipment to B is treated as an intercompany transaction and subject to the provisions of this section.

Example 6. Seller excluded from the water's-edge combined reporting group.

Facts. S is a foreign corporation which owns 100% of the stock of affiliated domestic corporations B and RP. RP is a United States Real Property Holding Corporation as defined in section 897(c) of the Internal Revenue Code. In Year 1, S has no income from U.S. activities, and is excluded from the water's-edge combined reporting group of B and RP.

In Year 2, S sells its stock in RP to B for a gain of $ 1,000. Because S's sale of RP is treated as a disposition of a United States real property interest as defined by section 897 of the Internal Revenue Code, S's income, and apportionment factors attributable to that sale would, but for the provisions of this section, be included in the water's-edge combined report in Year 2. Therefore, the transaction is treated as an intercompany transaction. S's intercompany item is its $ 1,000 gain.

In Year 3, S has no income from U.S. activities, and is again excluded from the water's-edge combined reporting group of B and RP.

Acceleration Rule. The effect of treating the operations of S and B as divisions of a single corporation cannot be achieved once S is excluded from the water's-edge combined reporting group. Therefore, under the acceleration rule, S's $ 1,000 intercompany; gain is taken into account in Year 2. (immediately before the income year in which S is excluded from the combined reporting group).

Apportionment. Neither the intercompany sale of RP stock nor the acceleration of the intercompany gain is reflected in the sales factor in Year 2. S's accelerated gain will be treated as current apportionable business income in Year 2.

Example 7: Seller included under W. Va. Code §11-24-13f(a)(5).

Facts. Corporation S is a controlled foreign corporation as defined in section 957 of the Internal Revenue Code and is included in the water's-edge combined reporting group under W. Va. Code §11-24-13f(a)(5) to the extent of its partial inclusion ratio. In Year 1, S sells land with a basis of $ 500 to domestic corporation B for $ 600. S's partial inclusion ratio for Year 1. is 66%. In Year 5, when S's partial inclusion ratio is 75%, B sells the land to Y for $ 650. At no time in Years 2. through 4 did S's partial inclusion ratio fall to 33% or lower (50% of the Year 1. ratio; see subparagraph 13d.9.c.2.D.).

Matching rule. $ 66 of S's $ 100 gain is an intercompany item and is deferred ($ 100 x 66%). The remaining $ 34 of S's gain is not included in the water's-edge combined report. In Year 5, B has a corresponding gain of $ 50 ($ 650-$ 600). For purposes of calculating the recomputed gain, S's original cost of $ 500 is increased by the amount of S's $ 34 non-intercompany gain. Therefore, the recomputed gain would be $ 116 ($ 650-$ 534). S's $ 66 intercompany gain is taken into account in the water's-edge combined report in Year 5 to reflect the $ 66 difference between B's $ 50 corresponding gain and the $ 116 recomputed gain.

Apportionment. Gross receipts of $ 396 from S's sale to B are included in the water's-edge combined report ($ 600 x 66%). If S and B were divisions of a single corporation, the transaction would not be reflected in the sales factor. Therefore, the $ 396 intercompany gross receipts shall be eliminated from S's sales factor under paragraph 13d.1.e.1. of this rule. For purposes of B's property factor, the land will be reflected at S's cost basis under subparagraph 13d.1.e.2.A. of this rule, adjusted by any gain or loss recognized by S as a result of the non-intercompany portion of the transaction. The net value assigned to the land in B's property factor will be $ 534 ($ 500 cost basis to S + $ 34 non-intercompany gain).

Example 8: Buyer included under W. Va. Code §11-24-13f(a)(5).

Facts. On December 31. of Year 1, domestic corporation S sells land with a basis of $ 500 to corporation B for $ 600. Corporation B is a controlled foreign corporation as defined in section 957 of the Internal Revenue Code and is included in the water's-edge combined reporting group under W. Va. Code §11-24-13f(a)(5) to the extent of its partial inclusion ratio. B's partial inclusion ratio for Year 1. is 66%. On December 31. of Year 5, when B's partial inclusion ratio is 75%, B sells the land to Y for $ 650. At no time in Years 2. through 4 did B's partial inclusion ratio fall to 33% or lower (50% of the Year 1. ratio).

Matching rule. $ 66 of S's $ 100 gain ($ 100 x 66%) is an intercompany item and is deferred. S's remaining $ 34 gain is taken into account currently in Year 1. In Year 5, B has a corresponding gain of $ 50 ($ 650-$ 600). For purposes of calculating the recomputed gain, S's original cost of $ 500 is increased by the amount of the $ 34 non-intercompany gain taken into account by S. Therefore, the recomputed gain would be $ 116 ($ 650-$ 534). S's $ 66 intercompany gain is taken into account in the water's-edge combined report in Year 5 to reflect the $ 66 difference between B's $ 50 corresponding gain and the $ 116 recomputed gain.

Apportionment. Unless otherwise excluded, S's sales factor in Year 1. will reflect gross receipts of $ 204 from the non-intercompany portion of the sale to B. The remaining $ 396 ($ 600 sales price x 66%) will be eliminated from S's sales factor under paragraph 13d.1.e.1. of this rule. The valuation of the land for purposes of B's property factor is S's cost basis adjusted by any gain or loss recognized by S as a result of the non-intercompany portion of the transaction. The net value assigned to the land will be $ 534 ($ 500 cost basis to S + $ 34 non-intercompany gain). The $ 534 valuation will be included in B's property factor to the extent of B's partial inclusion ratio for that year. For example, if B's partial inclusion ratio was 50% in Year 2, the land would be reflected in B's property factor for Year 2. at $ 267 ($ 534 x 50%). In Year 5, unless otherwise excluded, $ 487.50 gross receipts from B's sale of the land to Y will be reflected in B's sales factor ($ 650 sales price to Y x 75% Year 5 partial inclusion ratio).

Example 9: Both Seller and Buyer included under W. Va. Code §11-24-13f(a)(5).

Facts. Assume the same facts as in Example 8, except that S is also a controlled foreign corporation as defined in section 957 of the Internal Revenue Code and is included in the water's-edge combined reporting group under W. Va. Code §11-24-13f(a)(5) to the extent of its partial inclusion ratio. S's partial inclusion ratio for Year 1. is 80%. On December 31. of Year 5, when S's partial inclusion ratio is 60%, B sells the land to Y for $ 650. At no time in Years 2. through 4 did S's partial inclusion ratio fall to 40% or lower (50% of S's 80% Year 1. ratio).

Matching rule. $ 52.80 of S's $ 100 gain ($ 100 x S's 80% Year 1. ratio x B's 66% Year 1. ratio) is an intercompany item and is deferred. Of S's remaining $ 47.20 non-intercompany gain, $ 27.20 is currently taken into account in Year 1. ($ 100 total gain x S's 80% Year 1. ratio ' $ 80 of total gain includable in water's-edge combined report; less $ 52.80 deferred intercompany portion); $ 20 of non-intercompany gain is not included in the water's-edge combined report. In Year 5, B has a corresponding gain of $ 50 ($ 650-$ 600). For purposes of calculating the recomputed gain, S's original cost of $ 500 is increased by the amount of S's $ 47.20 non-intercompany gain. Therefore, the recomputed gain would be $ 102.80 ($ 650 sales price - $ 547.20 recomputed basis). S's $ 52.80 intercompany gain is taken into account in the water's-edge combined report in Year 5 to reflect the $ 52.80 difference between B's $ 50 corresponding gain and the $ 102.80 recomputed gain.

Apportionment. Gross receipts of $ 480 from S's sale to B ($ 600 x S's 80% Year 1. ratio) are included in the water's-edge combined report. Of that amount, $ 316.80 ($ 480 x B's 66% Year 1. ratio) is attributable to the intercompany transaction and will be eliminated from S's sales factor under paragraph 13d.1.e.1. of this rule. Unless otherwise excluded, S's sales factor will continue to reflect the remaining gross receipts of $ 163.20. In Year 5, unless otherwise excluded, $ 487.50 gross receipts from B's sale of the land to Y ($ 650 x B's 75% Year 5 ratio) will be reflected in B's sales factor.

The valuation of the land for purposes of B's property factor is S's cost basis in the land adjusted by any gain or loss recognized by S as a result of the non-intercompany portion of the transaction. The net value assigned to the land will be $ 547.20 ($ 500 cost basis to S + $ 47.20 non-intercompany gain). The $ 547.20 valuation will be included in B's property factor to the extent of B's partial inclusion ratio for that year. For example, if B's partial inclusion ratio was 50% in Year 2, the land would be reflected in B's property factor for Year 2. at $ 273.60 ($ 547.20 x 50%).

Example 10: Intercompany transaction between Seller included under W. Va. Code §11-24-13f(a)(4) and Buyer included under W. Va. Code §11-24-13f(a)(5).

Facts. S is a foreign corporation with a U.S. branch which is included in the water's-edge combined reporting group under W. Va. Code §11-24-13f(a)(4). B is a controlled foreign corporation as defined in section 957 of the Internal Revenue Code and is included in the water's-edge combined reporting group under W. Va. Code §11-24-13f(a)(5) to the extent of its partial inclusion ratio. In Year 1, S sells land

with a basis of $ 800 which it used in its U.S. trade or business activities to B for $ 1,000. B's partial inclusion ratio in Year 1. is 60%. In Year 4, when B's partial inclusion ratio is 65%, B sells the land to Y for $ 1,100. At no time in Years 2. or 3 did B's partial inclusion ratio fall to 30% or lower (50% of B's 60% Year 1. ratio).

Matching rule. Except for the provisions of this section, S's $ 200 gain from the sale to B would be treated as U.S. source income and included in the water's-edge combined report; therefore, the requirements of subparagraph 13d.9.c.1.A. of this rule are satisfied. $ 120 of S's gain ($ 200 total gain x B's 60% partial inclusion ratio) is an intercompany item and is deferred. S's remaining $ 80 non-intercompany gain is taken into account in the water's-edge combined report in Year 1. In Year 4, B has a corresponding gain of $ 100 ($ 1,100-$ 1,000). For purposes of calculating the recomputed gain, S's original cost of $ 800 is increased by the amount of the $ 80 non-intercompany gain taken into account by S. Therefore, the recomputed gain would be $ 220 ($ 1,100 sales price - $ 880 recomputed basis). S's $ 120 intercompany gain is taken into account in the water's-edge combined report in Year 4 to reflect the $ 120 difference between B's $ 100 corresponding gain and the $ 220 recomputed gain.

Apportionment. Unless otherwise excluded, S's sales factor in Year 1. will reflect gross receipts of $ 400 from the non-intercompany portion of the sale to B. The remaining $ 600 ($ 1,000 sale price x 60%) will be eliminated from S's sales factor under paragraph 13d.1.e.1. of this rule. The valuation of the land for purposes of B's property factor is S's cost basis adjusted by any gain or loss recognized by S as a result of the non-intercompany portion of the transaction. The net value assigned to the land will be $ 880 ($ 800 cost basis to S + $ 80 non-intercompany gain). The $ 880 valuation will be included in B's property factor to the extent of B's partial inclusion ratio for that year. For example, if B's partial inclusion ratio was 55% in Year 2, the land would be reflected in B's property factor for Year 2. at $ 484 ($ 880 x 55%). In Year 4, unless otherwise excluded, $ 715 gross receipts from B's sale of the land to Y ($ 1,100 sales price to Y x B's 65% Year 4 partial inclusion ratio) will be reflected in B's sales factor.

Example 11: Depreciable asset sold to buyer partially included under W. Va. Code §11-24-13f(a)(5).

Facts. On January 1 of Year 1, domestic corporation S buys equipment with a 10-year useful life for $ 100 and begins to depreciate it using the straightline method. On January 1 of Year 6, S sells the equipment to B for $ 60. B is a controlled foreign corporation partially included in the combined reporting group under W. Va. Code §11-24-13f(a)(5). B's partial inclusion ratio is 40% in Year 6. B determines that the useful life of the equipment is 5 years from the date it was acquired by B.

Depreciation through Year 5, intercompany gain in Year 6. S claims $ 10 of depreciation for each of Years 1. through 5, and has a $ 50 basis at the time of the sale to B. Thus, S has a $ 10 gain from its $ 60 sale to B in Year 6. $ 4 of S's gain is an intercompany gain ($ 10 gain x B's 40% partial inclusion ratio) and is deferred. S's remaining $ 6 non-intercompany gain is taken into account currently in Year 6.

Matching rule. In each of Years 6 through 10, B's corresponding item is its $ 12. depreciation deduction ($ 60 basis / 5-year life). If S and B were divisions of a single corporation, the recomputed depreciation deduction would be the $ 10 annual depreciation for Years 6 through 10 based on S's $ 100 basis, plus an additional $ 1.20 of depreciation attributable to the $ 6 increase in basis resulting from S's non-intercompany gain ($ 6 non-intercompany gain / 5-year remaining life). Thus, in each of Years 6 through 10, S will take $ .80 of its intercompany gain into account to reflect the difference between B's $ 12. corresponding depreciation and the $ 11.20 recomputed depreciation.

Apportionment. Unless otherwise excluded, S's sales factor in Year 6 will reflect gross receipts of $ 36 from the non-intercompany portion of the sale to B. The remaining $ 24 ($ 60 x B's 40% partial inclusion ratio) will be eliminated from S's sales factor under paragraph 13d.1.e.1. of this rule. The valuation of the equipment for purposes of B's property factor is S's cost basis of $ 100. (Because S's $

10 total gain from the sale to B does not exceed the depreciation already deducted by S with respect to the equipment, the basis is not adjusted by the non-intercompany gain. If the total gain had exceeded the amount of depreciation already deducted by S, then the valuation of the property in B's property factor would be increased by the 60% non-intercompany portion of the excess gain.) The $ 100 valuation will be included in B's property factor in each year to the extent of B's partial inclusion ratio for that year. For example, the equipment would be reflected in B's property factor in Year 6 at $ 60 ($ 100 x 60%). In each of Years 6 through 10, S's $ .80 intercompany gain will be treated as current apportionable business income. B's $ 12. depreciation deduction will be included in combined report business income in each year to the extent of B's partial inclusion ratio for that year. For example, $ 7.20 of B's depreciation deduction would be included in combined report business income in Year 6 ($ 12. depreciation deduction x 60% partial inclusion ratio).

Example 12: Decreasing partial inclusion ratio.

Facts. Assume the same facts as in Example 8, except that B does not sell the land to Y in Year 5. In Year 6, B's partial inclusion ratio is 25%, a 62% decrease from B's Year 1. ratio of 66% (41% difference between 66% Year 1 ratio and 25% Year 6 ratio, divided by 66% Year 1 ratio, equals 62%).

Acceleration rule. Under subparagraph 13d.9.c.2.D. of this rule, the acceleration rule applies to take S's intercompany gain of $ 66 into account in Year 5 (immediately before the income year in which B's partial inclusion ratio falls below the 50% threshold).

Example 13: Election made under subparagraph 13d.9.c.2.E. of this rule

Facts. Using the same facts as in Example 12, except that the taxpayer elects under subparagraph 13d.9.c.2.E. of this rule to have the acceleration rule apply to take into account only a proportionate share of the intercompany item. B's partial inclusion ratio is 33% in Year 7, 16% in Year 8, and 8% in Year 9.

Acceleration rule. In Year 6, $ 40.92. of S's intercompany gain would be taken into account ($ 66 intercompany gain multiplied by the 62% proportionate decrease between B's 66% Year 1. ratio and B's 25% Year 6 ratio). B's partial inclusion ratio rose in Year 7; but the Year 8 partial inclusion ratio represented a new low point. At 16%, the Year 8 partial inclusion ratio was 76% below the Year 1. ratio of 66% (50% difference between 66% Year 1 ratio and 16% Year 8 ratio, divided by 66% Year 1 ratio, equals 76%). Accordingly, $ 9.24 of S's intercompany gain would be taken into account in Year 8 ($ 66 intercompany gain x 14% incremental difference between 76% decrease and the 62% decrease that was previously recognized). In Year 9, B's partial inclusion ratio fell below the 10% floor, so S's remaining intercompany gain of $ 15.84 is taken into account.

13d.9.d. Earnings and profits. The timing provisions of this section apply to the calculation of West Virginia earnings and profits. Therefore, the West Virginia earnings and profits of S will not reflect S's intercompany items until those items are taken into account under this section.

13d.9.e. Foreign country operations. To the extent that foreign country operations are included in the combined report, and the corporations engaging in those operations are not required to report intercompany transactions under a similar deferral method for federal income tax purposes or any other purposes, then intercompany transactions involving those foreign operations may be reported using the method used for consolidated financial reporting purposes if that method reasonably reflects income and approximates the result that would be obtained from use of the provisions of this section. However, adjustments may be permitted or required for any transaction or series of transactions for which the financial reporting method does not produce a result which reasonably approximates the results that would have been obtained under this section.

13d.9.f. If the taxpayer fails to disclose its DISA balance on its annual tax return, the Tax

Commissioner may, in the Tax Commissioner's discretion, require the amounts in the undisclosed DISA accounts to be taken into account in part or in whole in any year of the failure.

13d.9.g. Recordkeeping. Intercompany and corresponding items shall be reflected on permanent books and records (including work papers).

13d.10. Effective date. This section applies to intercompany transactions occurring on or after January 1, 2009.

13d.11. For tax years on or after January 1, 2022, income is apportioned as set forth in section heading 6 of this rule. Payroll and property are no longer factors in the apportionment formula and, therefore, any references to the payroll or property factor in this section have no longer any force or effect for tax years beginning on or after January 1, 2022.

§110-24-13e. Election To File A Group Return; Designation Of Surety.

13e.1. General. -- Every taxpayer subject to the West Virginia corporation net income tax is required to file its own tax return, including taxpayers that are members of a combined reporting group. Taxpayers subject to the West Virginia corporation net income tax that are members of a combined reporting group are required to attach a combined report to their annual tax returns. Members of a combined reporting group may annually elect to designate one taxpayer member of the combined group to file a single return in the form and manner prescribed by the Tax Department, in lieu of filing their own respective returns, without changing the respective liability of the group members. The group member taxpayer designated to file the single return shall consent to act as surety with respect to the tax liability of all other taxpayers properly included in the combined report and shall agree to act as agent on behalf of those taxpayers for the year of the election for tax matters relating to the combined report for that year. All combined group members required to file in West Virginia shall be included in the group tax return filed pursuant to this section and W. Va. Code §11-24-13e.

13e.1.a. Combined report. -- "Combined report" refers to the schedules that are required to be filed by W. Va. Code §11-24-13a, which are attached to the West Virginia Form 120 of a taxpayer member of the combined reporting group, which reports the taxpayer member's income from sources within this State under the combined reporting method and other information required by law.

13e.1.b. Combined reporting group. -- "Combined reporting group" refers to those corporations and entities with business income that are permitted or required to be included in a particular combined report under W. Va. Code §11-24-13a. A combined reporting group includes those partnerships and limited liability companies treated as partnerships for federal income tax purposes whose incomes are required to be included in a combined report.

13e.1.c. Group return. -- "Group return" means a single composite tax return filed under W. Va. Code §11-24-13e on behalf of members of a combined reporting group, and includes, but is not limited to annual returns and quarterly and other periodic returns, declarations of estimated tax and the forms for making installment payments of estimated tax. The group return reflects the aggregate total tax of the tax liabilities of all of the Taxpayer members, computed on the basis of the separate tax liability of each ~~such~~ Taxpayer member.

13e.1.d. Key corporation or key member. -- "Key corporation" or "key member" means the taxpayer member which files a group return described under this section on behalf of the taxpayer members of the combined reporting group as agent and surety for the taxpayer members of the combined reporting group pursuant to W. Va. Code §11-24-13e.

13e.1.e. Taxpayer member. -- "Taxpayer member" means a corporation or entity which is required

to file a tax return under W. Va. Code §§11-24-1, *et seq.* in this State, and which is a member of a combined reporting group.

13e.1.f. The term "corporation" as used in this section means and includes any entity required to file a tax return under W. Va. Code §§11-24-1, *et seq.*, and any entity whose income, expenses, capital, or activities are required to be included on or as a part of a combined report under W. Va. Code §§11-23-1, *et seq.* or W. Va. Code §§11-24-1, *et seq.*

13e.2. Requirements.

13e.2.a. In order to be eligible to make the election provided under this section, the electing key corporation shall meet the definition of a "key corporation" as defined in this section in addition to meeting the following requirements, by either being:

13e.2.a.1. The parent corporation of the combined reporting group as defined in subparagraph 8.7.a.1.A. of this rule; or

13e.2.a.2. If the parent corporation of the combined reporting group is not a taxpayer member, the taxpayer member with the largest West Virginia property factor numerator; and

13e.2.a.3. The key corporation's powers, rights and privileges must not be forfeited or suspended by the West Virginia Secretary of State and it must not have a petition with the United States Bankruptcy Court pending on the last day of the taxable year.

13e.2.b. If the entity that would have otherwise been designated as the key corporation under this section is disqualified due to the parent corporation not being a taxpayer member, or due to rights and privileges having been forfeited or suspended by the West Virginia Secretary of State, or due to a pending bankruptcy petition, then the members of the combined reporting group may not elect to designate one taxpayer member of the combined group to file a single return under W. Va. Code §11-24-13e.

13e.3. Manner for making the election. -- An election to file a group return is made by the key corporation by the filing of an Election to File Unitary Taxpayers' Group Return, filed in conjunction with its West Virginia Form 120, which sets forth the information prescribed by the Tax Commissioner. This election shall be made with an original, timely filed return, determined by including any authorized extensions for filing the return.

13e.4. Consequences of making an election.

13e.4.a. The election is binding on all the taxpayer members of the combined group and the key corporation for all matters for the taxable year of the election.

13e.4.b. The key corporation shall file the group return. -- The group return satisfies the requirement for filing a West Virginia form 120 by each taxpayer member listed on the key corporation's Election to File Unitary Taxpayers' Group Return, filed in conjunction with its West Virginia Form 120, listing of members included in the group return.

13e.4.b.1. A combined group member having income or gain not required to be reported on the combined return and having no income that is required to be reported on the combined return, need not be included in the group return, but may either file a separate return or may be included on the group return, and, if included shall report income or gain not required to be reported on the combined return in the group return. A combined group member having income that is required to be reported on the combined return, shall be included in the group return, and the group return shall report both income that is required to be reported on the combined return for that combined group member and any income or gain not required to

be reported on the combined return for that combined group member shall also be reported on the group return.

13e.4.b.2. By signing the West Virginia Form 120, an officer of the key corporation is attesting that he or she has the legal authority to bind the key corporation to all of its duties.

13e.4.b.3. Failure of a taxpayer member, properly included in a group return, to file its own return shall be considered to be an acknowledgement that the officer of the key corporation possesses the authority to fulfill the taxpayer member's return filing obligation.

13e.4.b.4. A taxpayer member asserting that it is not properly included in a group return shall independently satisfy its obligation to file a return.

13e.4.c. The key corporation is a surety for each taxpayer member properly included in a group return for payments owed under the West Virginia corporation net income tax law for the tax year for which the election applies.

13e.4.d. The key corporation is an agent for each taxpayer member.

13e.4.e. Extensions for filing tax returns or waivers to extend the statute of limitations for issuing notices of assessments shall be executed by the key corporation and shall be effective for all taxpayer members properly included in a group return for the tax year for which the election applies.

13e.4.f. All Tax Department notices, assessments, legal documents and administrative documents relating to or regarding the business franchise tax or corporation net income tax liability of a taxpayer member properly included in a group return, may be sent to the key corporation and additional amounts due with respect to any taxpayer member properly included in a group return, may be assessed and billed to the key corporation, which shall be liable for payment of those amounts. The key member may file a petition for reassessment on behalf of a taxpayer member properly included in a group return, in response to a notice of assessment. The key member may also file claims for refund or credit and petitions for refund or credit on behalf of a taxpayer member properly included in a group return. Any refund or credit due to a taxpayer member properly included in a group return may be paid or credited to the key corporation. Any levy, any notice of a lien, or any other proceeding to collect the amount of any assessment, after an assessment has become final, shall name the corporation or entity from which the collection is to be made. A taxpayer member properly included in a group return from which collection is to be made and the key corporation, as surety and agent of the taxpayer, are jointly and severally liable for any amount due.

13e.4.g. If some or all of the corporations included in the election to file a group return are subsequently determined not to be members of the combined reporting group of the key corporation, then the key corporation and the electing taxpayer members shall be considered to agree that any subsequent adjustment for any and all members included in the original group return may still be billed to or paid by the key corporation in the case of assessments and refunded to the key corporation in the case of overpayments.

13e.5. Duration of election to file group return. -- The election to file a group return for all matters for the taxable year of the election will remain in effect until 30 days following the receipt by the Tax Commissioner of a written notice of termination of the election by any of the taxpayer members. The taxpayer member that is terminating the election shall also notify the previously designated key corporation that the election is being terminated. The termination shall only be applied prospectively. If the key corporation is terminating the election, it shall notify all of the taxpayer members that were included in the group return election. If an employee, agent, or representative of the Tax Commissioner is conducting an examination of a combined group return at the time when any of the taxpayer members or a key corporation sends a written notice of termination to the Tax Commissioner, the terminating taxpayer member or

terminating key corporation shall provide the employee, agent or representative of the Tax Commissioner that is conducting the examination with a copy of the written notification of termination of the election.

13e.6. Failure or inability of key corporation to perform its duties. -- If the key corporation does not fulfill its obligation to pay any tax liability or to act on behalf of the taxpayer members, or if its powers, rights, and privileges are forfeited or suspended at any time with respect to a tax year, each taxpayer member may be independently assessed or billed for its own tax liability for that tax year. In that event, each taxpayer member will be credited with taxes previously paid in accordance with the taxpayer member's tax liability as indicated in the return data as filed. In the event that the liabilities of the taxpayer members cannot be derived from the return data as filed, the individual liabilities of the each of the respective members may be determined by the Tax Commissioner from data obtained during audit or supplied by the taxpayer members, using the best available information. If insufficient information is available to determine individual liabilities, the Tax Commissioner may credit taxes paid in a manner that is reasonable under the circumstances.

13e.7. Curing an invalid election.

13e.7.1. In the event that a taxpayer fails to satisfy one or more of the conditions of this section, the Tax Commissioner may, at the request of the taxpayer and at the Commissioner's discretion, treat the W. Va. Code §11-24-13e election to designate one taxpayer member of the combined group to file a single return, as being valid.

13e.7.2. In lieu of disallowing a W. Va. Code §11-24-13e election to designate one taxpayer member of the combined group to file a single return, the Tax Commissioner may allow the taxpayer members to designate another taxpayer member in substitution for the key corporation originally designated in the election.

13e.8. Appointment of designated agent for purposes of resolving disputes over membership in a combined group. -- If the Tax Commissioner determines that one or more corporations which did not join in the filing of a group return are members of a combined group, or that one or more corporations which did join in the filing of a group return are not members of the combined group which filed the return, then, for purposes of resolving disputes over the membership of the combined group and any separate company item of any corporation, the Tax Commissioner may take other actions as outlined in subdivisions 13e.8.1, 13e.8.2. and 13e.8.3.:

13e.8.1. Notification of deficiency or assessment to corporation which has ceased to be a member of the combined group. -- If a corporation that made the election to file or was required to join in the filing of a group return has ceased to be a member of the combined group, and if the corporation files written notice of the cessation with the Tax Commissioner, then the Commissioner upon request of the corporation shall furnish the corporation with a copy of any notice of deficiency or notice of assessment in respect of the tax for a group return year for which it was a member of the combined group and information regarding any notice and demand for payment of the deficiency. The written notice of cessation should be mailed to the address stated in the instructions to the West Virginia corporation net income tax return. The filing of the written notification and request by a corporation shall not have the effect of limiting the scope of the agency of the key member provided for in this section with respect to those tax years during which the corporation was a member of the combined group for which a group return was filed, and a failure by the Tax Commissioner to comply with the written request shall not have the effect of limiting the liability of the corporation.

13e.8.2. If no group return was filed, the corporations may appoint a member of the combined group as the designated agent solely for purposes of contesting the Tax Commissioner's determination. The Commissioner may accept a written representation made by any member of the combined group that it has been appointed the designated agent. The appointment of a designated agent under this provision shall not be construed as a concession by either the corporations or the Tax Commissioner regarding the

proper composition of the combined group. The designated agent appointed under this provision shall have all rights and responsibilities of a key corporation under this section, including the responsibility to file a group return for all tax periods beginning on or after the appointment of the key member. The designated agent appointed under this subsection, shall meet the qualifications of a key member as provided in this rule, and shall continue to act as designated agent for the combined group under the provisions this section for all tax periods beginning on or after the appointment of the key member, until the appointment of the key member is lawfully revoked.

13e.8.3. If a group return was filed, the key member which filed the return shall represent all corporations which joined in the filing of the group return and all corporations which the Tax Commissioner asserts are members of the combined group, except that the Commissioner may allow any corporation which the Commissioner asserts should be added to or eliminated from the combined group included in the return to represent itself after receipt of a written request from the corporation. And in that case, any corporation shall be bound by any action taken by the designated agent (including, for example, extensions of the statute of limitations, settlements, stipulations, or concessions of fact) before the request of the corporation to represent itself has been accepted by the Tax Commissioner.

13e.9. Liability for combined tax, additions to tax, penalty, and interest.

13e.9.1. Joint and several liability of members of a combined group. -- The taxpayer members who elected to file a group return are jointly and severally liable for the combined tax, addition to tax, penalty and interest computed in accordance with the West Virginia Tax Procedure and Administration Act codified in W. Va. Code §§11-10-1, *et seq.*.

13e.9.2. Effect of intercompany agreements. -- No agreement entered into by one or more members of a combined group with any other member of the group or with any other person shall in any case have the effect of reducing the liability prescribed under this Section, or this rule or W. Va. Code §§11-24-1, *et seq.*

13e.9.3. Additions to tax, penalties, and interest. -- If additions to tax, penalties or interest are imposed under W. Va. Code §§11-10-1, *et seq.*, with respect to a group return year, the amount shall be based on the combined tax liability or deficiency for the common taxable year.

13e.9.3.a. For purposes of applying the addition to tax for failure to file a return:

13e.9.3.a.1. A corporation which erroneously fails to join in the filing of a group return, but which timely files a separate West Virginia corporation net income tax return or joins in the timely filing of a group return for another combined group, shall not be subject to any addition to tax for failure to timely file the return. In determining whether the separate or group return is timely filed, the separate taxable year of the corporation or the common taxable year of the taxpayer members included in the group return the corporation erroneously joined shall be used, rather than the common taxable year of the group with which the corporation should have filed. Provided that the Tax Commissioner may disallow the group return under which the Taxpayer should have filed, but failed to file, and require all group members to each file separately. The Tax Commissioner may disallow the group return under which the Taxpayer filed, in circumstances where the Taxpayer erroneously filed under the group return of a different combined group and require all group members of the group under which the Taxpayer erroneously filed to each file separately. Also the Tax Commissioner may disallow both group returns and require separate filings for each member of both groups.

13e.9.3.a.2. A corporation which erroneously fails to join in the filing of a group return, and which fails, without reasonable cause, to timely file a separate West Virginia corporation net income tax return or to join in the timely filing of a group return for another combined group, shall be subject to additions to tax for failure to timely file a return computed on the amount of tax shown (or required to be

shown) due on the group return for its proper combined group. Because it is the duty of the key member, acting on behalf of the combined group, to include the corporation in the group return, the members of the combined groups are jointly and severally liable for the amount of the addition to tax.

13e.9.3.a.3. A corporation which erroneously joins in the timely filing of a group return shall not be subject to additions to tax for failure to file a return but depending on the facts and circumstances of the case, may be subject to applicable sanctions for failure to pay tax, late filing, tax evasion, fraud or other applicable administrative or criminal sanctions.

13e.9.3.b. For purposes of applying the addition to tax for failure to timely pay tax:

13e.9.3.b.1. In a case where a corporation or entity erroneously fails to join in the filing of a group return for a common taxable year, neither that corporation or entity nor the combined group shall be subject to any failure-to-pay addition to tax under the West Virginia Tax Procedure and Administration Act, if timely payment is made of the tax shown on a separate return filed by the corporation or on a group return in which it erroneously joins in filing for each taxable year ending with or within the common taxable year. Unless there is reasonable cause for the failure of the corporation or entity to join in the filing of the group return, the corporation or entity and the combined group may be jointly and severally liable for the addition to tax for failure to pay any additional amount which would have been shown on the group return had the corporation or entity been included. Depending on the facts and circumstances of the case the Taxpayer may be subject other applicable administrative or criminal sanctions.

13e.9.3.b.2. A corporation or entity which erroneously fails to join in the filing of a group return for a common taxable year or which joins in the filing of a group return, for the taxable year ending with or within the common taxable year, and which also fails to timely pay the tax shown on the return, shall be subject to additions to tax under the West Virginia Tax Procedure and Administration Act only for failure to pay the tax shown on the return it actually files or joins in filing. Unless there is reasonable cause for the failure of the corporation or entity to join in the filing of the group return, the corporation and the combined group may be jointly and severally liable for an addition to tax under the West Virginia Tax Procedure and Administration Act for failure to pay any additional amount which would have been shown on the group return had the corporation been included. Depending on the facts and circumstances of the case, the Taxpayer may be subject other applicable administrative or criminal sanctions.

13e.9.3.b.3. If a corporation erroneously joins in the filing of a group return, neither the corporation nor the combined group shall be subject to the addition to tax under the West Virginia Tax Procedure and Administration Act for failure to pay any tax required to be shown on a separate company return and the combined group shall not be subject to addition to tax under the Act for failure to pay any increase in tax resulting from the exclusion of the corporation from the combined group if the tax timely paid with the original group return exceeds the total tax required to be shown on the correct returns. Depending on the facts and circumstances of the case, the Taxpayer may be subject to other applicable administrative or criminal sanctions.

13e.9.3.c. For purposes of applying the addition to tax for negligence imposed by the West Virginia Tax Procedure and Administration Act or the addition to tax for fraud imposed by that Act, in any case in which a corporation erroneously joins or fails to join in the filing of a group return, the addition may be imposed on any deficiency resulting from the error, without taking into account any overpayment which may have resulted from the error.

Example. Corporations A, and B meet all the requirements of a unitary business combined group. Corporations A and B cannot be included in the same unitary business group as their non-unitary affiliate Corporation C. On a separate-return basis, Corporation A has a West Virginia net loss of $500, Corporation B has West Virginia net income of $300 and Corporation C has West Virginia net income of $700. Corporations A and C file a group return reporting combined West Virginia net income of $200,

while Corporation B files a separate return reporting West Virginia net income of $300. On audit, the Tax Commissioner corrects the liabilities by combining Corporations A and B, which eliminates Corporation B's separate return income and entitles them to a refund of the taxes paid by Corporation B, and by determining a separate return deficiency for Corporation C. If the combination of Corporations B and C on the original return was due to negligence or an intent to defraud, Corporation C will be subject to the applicable addition to tax on its entire deficiency without regard to the overpayment made by Corporation B.

13e.9.4. Interest. -- If interest is imposed under the West Virginia Tax Procedure and Administration Act, with respect to a group return year, the amount shall be based on the separate tax liability, deficiency underpayment or overpayment of the group return members for the common taxable year.

13e.9.5. Combined amended returns.

13e.9.5.a. If an election to file a group return is in effect for a taxable year and that election is subsequently revoked for that year because the group is not a unitary business, the key member may not file a group amended return. If a group files what it believes to be a correct group return and it is later determined that the group is not engaged in a unitary business, the key member shall not file a group amended return. Instead, in either instance, the key member and each corporation which joined in the filing of the group return shall file a separate amended return. In computing the tax due on any amended return, the filer shall take into account all payments, credits, and other amounts (including refunds) actually paid by, or to, the filer, or applied by, or for, the filer under the erroneously filed group return.

13e.9.6. Ineligible member. -- If a change in liability relates to the removal from the group return of a member that was not eligible to be included in the group return, or of a taxpayer which could not be required to be a part of the group (e.g., a corporation which was not engaged in a unitary business with the combined group members), the key member shall file a group amended return and the ineligible taxpayer member shall file a separate amended return.

13e.9.7. If a corporation erroneously fails to join in the filing of a group return, the key member shall file an amended group return adding the corporation and, if a separate return was filed by the corporation, the corporation shall file an amended separate return showing no net income, overpayment, or underpayment, and stating that the corporation has joined in the filing of a group return.

13e.10. Application. -- This section applies to taxable years beginning after December 31, 2008.

§110-24-13f. Reserved for future use.

§110-24-13g. Treatment Of Certain Charitable Expenses.

13g.1. When a charitable expense is incurred by a member of a combined group, the threshold question is whether the charitable contribution was paid from nonbusiness income, from business income that is unitary group business income, or from business income that is not unitary group business income. If the contribution was of property other than money, the question becomes whether the property was an asset that generated nonbusiness income, unitary group business income, or other business income from a separate line of business. In the event the property generated no income, the preceding sentence shall be applied as if the property generated income. Only when the charitable expense, or any part of the expense, was not paid from nonbusiness income or from business income that is not unitary business income, may the expense, or the portion of the expense, not paid from nonbusiness income, or from business income that is not unitary group business income, be applied against unitary group business income as provided in subsection 13g.2. of this section.

13g.2. When the charitable expense incurred by a member of a combined group was paid from unitary group business income then, to the extent allowable as a deduction pursuant to IRC §170, it shall be subtracted first from the business income of the combined group, subject to the income limitations of IRC §170 applied to the entire business income of the group and any remaining amount shall then be treated as a nonbusiness expense allocable to the member that incurred the expense, subject to the income limitations of IRC §170 applied to the nonbusiness income of that specific member. If nonbusiness income is less than the nonbusiness charitable expenses, the difference may be carried forward. Any charitable deduction disallowed under the foregoing rule but allowed as a carryover deduction in a subsequent year, shall be treated as originally incurred in the subsequent year by the same member this subsection shall apply in the subsequent year in determining the allowable deduction in that year.

13g.3. This section applies to contributions made during a taxable year beginning after December 31, 2008.

§§110-24-14 through 19. Reserved for future use.

§110-24-20. Report of Change In Federal Taxable Income.

20.1. General rule.

20.1.a. If the amount of a taxpayer's federal taxable income reported on its federal income tax return for any taxable year is changed or corrected by the United States Internal Revenue Service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States, the taxpayer shall file an amended West Virginia return to report the change or correction in federal taxable income within the time specified in W. Va. Code §11-24-20, after the final determination of the change, correction or renegotiation, or as otherwise required by the Tax Commissioner, and shall concede the accuracy of the determination or state in which it is erroneous, except as otherwise provided in this section.

20.1.b. Any taxpayer filing an amended federal income tax return shall also file an amended corporation net income tax return within the time specified in W. Va. Code §11-24-20 and shall give the information as required by the Tax Commissioner.

20.2. Amended combined report. -- When the taxpayer files an amended return as provided in this section, and the taxpayer is a member of a combined group engaged in unitary business activity in this State, the taxpayer shall file with the amended return an amended combined report for the combined group.

20.3. Amended group return. -- The general rule provided in subsection 20.1. of this section applies when the taxpayer files its annual return on a separate company basis. For a taxable year beginning after December 31, 2009, a taxpayer engaged in unitary business activity in this State that shall file an amended return as provided in W. Va. Code §11-24-20 and in this section, which filed under a group return as provided in W. Va. Code §11-24-13e for the tax year at issue, may not file a separate amended return. Instead, the key member which filed the group return which included the taxpayer as one of the group filers, shall file an amended group corporation net income tax return for the tax year at issue. The key member shall attach to the amended group return an amended combined report for the combined group engaged in unitary business activity in this State.

§§110-24-21. through 25. Reserved for future use.

§110-24-26. Priority Of Tax In Distributions Of Property And Estates.

26.1. In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid under W. Va. Code §11-24-1, *et seq.* shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts

due the United States which under federal law are given priority over the debts and liens created by W. Va. Code §§11-24-1, et seq. Any person charged with the administration or distribution of the property or estate who violates the provisions of this section shall be personally liable for any taxes accrued and unpaid under W. Va. Code §11-24-1, *et seq.* which are chargeable against the person whose property or estate is in administration or distribution.

26.2. There is a priority for all unpaid corporation net income tax in distributions of the property or estate of any person, and the tax shall be paid from the first money available for distribution in priority to all other claims and liens, except taxes and debts due the United States.

26.2.a. The distribution of property subject to federal tax liens is subject to the priority of the liens provided in the Internal Revenue Code.

26.2.b. The distribution of property in federal bankruptcy proceedings is subject to the priorities of debts and liens provided in the United States Bankruptcy Code (11. U.S.C. §101, *et seq.*).

26.2.c. This priority applies to the amount of tax, interest, additions to tax, and penalties.

26.3. The priority applies to all distributions of the property or estate of any person. A "distribution" of property of an estate is the sale or transfer of the property, or the disbursement of money resulting from the sale or transfer of the property or estate of any person. Distributions include, but are not limited to, the transfer of property or disbursement of proceeds of sales of property by any executor, administrator, receiver, trustee, fiduciary, special commissioner, or any public officer under judicial process; and distributions in any proceedings such as bulk sale, liquidation sale, estate sale, assignment for the benefit of creditors, interpleader action, and administrative or judicial proceeding for the dissolution of a partnership or corporation.

26.4. The priority does not apply to transactions that do not constitute distributions of property. These transactions include: the sale or transfer of property in the ordinary course of the business of the owner of the property; the sale or transfer of any property by the owner; or consideration payable to the owner by the purchaser or transferee.

26.5. This priority applies to the distribution of all property, including but not limited to real property or any interest in the real property; tangible personal property, including fixtures, equipment, machinery, furniture, and vehicles; intangible property, including accounts receivable, contract rights, bank accounts, stocks, bonds; and the proceeds from the sale or liquidation of the property.

26.6. This priority requires payment of the tax from the first money that is available for distribution to lienors, creditors, beneficiaries, or any other person, after payment of costs, commissions, fees, and any other expenses incurred in the preservation, storage, liquidation, or transportation of the property or estate.

26.7. The debt or claim for taxes has priority over all claims and liens, except debts due the United States.

26.7.a. Claims subject to this priority include any debt or obligation, liquidated or unliquidated, that does not constitute a lien upon the property or estate.

26.7.b. Liens subject to this priority include any charge or encumbrance on the property or estate for payment of any claim, debt or obligation, such as a deed of trust, judgment lien, security interest, vendors lien, execution lien, tax lien, mechanics lien, landlords lien and municipal lien.

26.7.c. The priority of the corporation net income tax debt in these distributions is not determined by the presence or absence of a perfected notice of tax lien, by the presence or absence of a perfected lien

securing any competing claim or debt, or by the order in which any competing liens were perfected.

§110-24-27. "Safety Zones" Bar Imposition Of Additions To Tax For Underpayment Of Estimated Tax.

27.1. In General. - Additions to tax will not be imposed for any underpayment of any installment of estimated tax if, on or before the date prescribed for payment of the installment (determined with regard to any authorized extension of time for payment), the total amount of all payments of estimated tax made equals or exceeds the least of the amounts due under "Safety zones" set forth in this section.

27.1.a. Safety zone 27.1.a.. - The amount of tax due with the annual return is five hundred dollars ($500) or less.

27.1.b. Safety zone 27.1.b.- The amount of tax due with the annual return is ten percent (10%) or less of the tax liability for the taxable year.

27.1.c. Safety zone. B For tax years beginning on or after January 1, 2010 -- The amount of tax which would be due if computed using current year rates, exemptions, and credits rather than being based on the facts and law applicable to the West Virginia corporation net income tax return for the preceding year. This safety zone avoids additions to tax if the total payments of estimated tax already made by the installment date are at least equal to an amount which would have been required on that installment date if the estimated tax was determined based on the facts shown on the previous year's return and the previous year's law, but using current year rates, exemptions, and credits. In this safety zone, the following rules apply:

27.1.c.1. Nonrecurring items of income and deductions are not to be excluded; and

27.1.c.2. An entity that did not file a West Virginia corporation net income tax return for the preceding tax year cannot use this safety zone.

27.1.d. Application of safety zones to short tax years. B For purposes of this subsection and subsection 27.2. of this rule, additions to tax for an underpayment of estimated tax are equally applicable to short tax years where a declaration of estimated tax is required to be filed. In computing the safety zones for short taxable years, the estimated tax (whether based on that shown on the previous year's return, based on the previous year's facts, or based on annualized current income) is reduced by multiplying the estimated tax for a full year by the percentage which the number of months in the short tax year bears to twelve (12).

27.1.e. For purposes of this subsection and subsection 27.2. of this rule, if the tax rates for the current year have changed from those in effect for the preceding year, the estimated tax shall be computed using current rates.

27.1.f. Safety zone requirements. - For purposes of this subsection and subsection 27.2. of this rule, safety zone requirements shall be satisfied on each installment date to avoid the imposition of additions to tax on an underpayment of estimated tax as of the installment date. For purposes of this rule, it is presumed that a taxpayer's West Virginia taxable income is received in equal installments throughout the taxable year. The taxpayer bears the burden of proof to establish that the West Virginia taxable income was received during the taxable year in some other manner.

27.2. Transition period safety zones. The combined reporting requirements of W. Va. Code §§11-24-1, *et seq.* apply for tax years beginning on and after January 1, 2009. Safety zones set forth in this subsection apply only with relation to estimated payments made for the first tax year beginning on or after January 1, 2009.

27.2.a. For purposes of safety zones set forth in this subsection, the terms "a previous tax year" or "a previous year" mean the tax year immediately preceding the first tax year beginning on or after January 1, 2009.

27.2.a.1. Additions to tax will not be imposed for any underpayment of any installment of estimated tax if, on or before the date prescribed for payment of the installment (determined with regard to any authorized extension of time for payment), the total amount of all payments of estimated tax made equals or exceeds the least of the amounts due under "Transition period safety zones" set forth in this subsection.

27.2.b. Transition period safety zone 27.2.b B This safety zone applies for a Taxpayer who filed separately for the tax year immediately preceding the first tax year beginning on or after January 1, 2009, but not on a combined reporting basis. This safety zone is available only for the first tax year beginning on or after January 1, 2009:

27.2.b.1. For any entity who filed separately for the tax year immediately preceding the first tax year beginning on or after January 1, 2009:

27.2.b.2. If the previous tax year was a full 12 month tax year;

27.2.b.3. If the amount of tax shown for the previous year has not been adjusted, redetermined or the subject of an assessment or other challenge by the Tax Commissioner; and

27.2.b.4. If total payments of estimated tax made by each installment date for the first tax year beginning on or after January 1, 2009, are at least equal to the amount which would have been required on that installment date if the estimated tax was the amount of tax shown on the previous year's West Virginia corporation net income tax return, then this safety zone applies, except that:

27.2.b.5. If the annual return for the preceding year is not filed on or before the due date, including extensions of time to file, of the annual return for the preceding year, then the declaration of estimated tax for the current tax year cannot be based on last year's tax, and this safety zone does not apply; and

27.2.b.6. If the preceding taxable year was a short year, estimated tax for the current year will be computed on an annualized basis. For purposes of this safety zone, the pro forma amount of tax that would have been shown on the preceding tax year's West Virginia corporation net income tax return, on a recomputed separate filing basis, shall be computed on an annualized basis. The requirements of paragraphs 27.2.b.3. through 27.2.b.5 of this rule shall be met for the short year in order for this safety zone to apply. The annual tax payable for the current year and the estimated tax for the current year will not be reduced because the previous year was a short year.

27.2.c. Transition period safety zone 27.2.c -- This safety zone applies for a Taxpayer who filed as part of a consolidated filing unit, composite filing unit or group filing unit other than a combined reporting or unitary group for the tax year immediately preceding the tax year beginning on or after January 1, 2009. This safety zone is available only for the first tax year beginning on or after January 1, 2009:

27.2.c.1. For any entity that filed corporation net income tax as a component member of a consolidated, composite or group filing unit other than a combined or unitary filing group:

27.2.c.2. If the previous tax year was a full 12 month tax year; and

27.2.c.3. If the previous year amount of tax shown has not been adjusted, or redetermined or the subject of an assessment or other challenge by the Tax Commissioner; and

27.2.c.4. If total payments of estimated tax made by each installment date are at least equal to the amount which would have been required on that installment date if the estimated tax was determined based on the pro forma amount of tax that would have been shown on the pro forma previous year's West Virginia corporation net income tax return, determined on a recomputed separate filing basis for the Taxpayer but not on a combined reporting basis, then this safety zone applies, except that:

27.2.c.5. If the annual return for the preceding year is not filed on or before the due date, including extensions of time to file, of the annual return for the preceding year, then the declaration of estimated tax for the current tax year cannot be based on last year's tax, and this safety zone does not apply; and

27.2.c.6. If the preceding taxable year was a short year, estimated tax for the current year will be computed on an annualized basis. For purposes of this safety zone, the pro forma amount of tax that would have been shown on the preceding tax year's West Virginia corporation net income tax return, on a recomputed separate filing basis, but not on a combined reporting basis, shall be computed on an annualized basis. The requirements of paragraphs 27.2.c.3 through 27.2.c.5 of this rule shall be met for the short year in order for this safety zone to apply. The annual tax payable for the current year and the estimated tax for the current year will not be reduced because the previous year was a short year.

27.2.d. Transition period safety zone 27.2.d -- This safety zone applies for a Taxpayer who filed a separate tax return, but as a component member of a unitary, or combined reporting group for the tax year immediately preceding the first tax year beginning on or after January 1, 2009. This safety zone is available only for estimated payments made for the first tax year beginning on or after January 1, 2009.

27.2.d.1. This safety zone applies with relation to taxpayers that filed a separate tax return, but as a component member of a unitary, or combined reporting group, for the tax year immediately preceding the tax year beginning on or after January 1, 2009:

27.2.d.2. For any entity that filed corporation net income tax as a component member of a unitary, composite or group filing unit:

27.2.d.3. If the previous tax year was a full 12 month tax year;

27.2.d.4. The amount of tax shown for the previous year has not been adjusted, redetermined or the subject of an assessment or other challenge by the Tax Commissioner;

27.2.d.5. If the unitary or combined reporting group remains the same for the first tax year beginning on or after January 1, 2009, as the previous tax year, and

27.2.d.6. If total payments of estimated tax made by each installment date are at least equal to the amount which would have been required on that installment date if the estimated tax was computed based on the amount of tax shown on the previous year's West Virginia corporation net income tax return, then this safety zone applies, except that:

27.2.d.7. If the annual return for the preceding year is not filed on or before the due date, including extensions of time to file, of the annual return for the preceding year, then the declaration of estimated tax for the current tax year cannot be based on last year's tax, and this safety zone does not apply; and

27.2.d.8. If the preceding taxable year was a short year, estimated tax for the current year will be computed on an annualized basis. The requirements of paragraphs 27.2.d.4. through 27.2.d.7 of this rule shall be met for the short year in order for this safety zone to apply. The annual tax payable for the

current year and the estimated tax for the current year will not be reduced because the previous year was a short year.

27.2.e. Transition period safety zone 27.2.e -- This safety zone applies for a Taxpayer who filed as a component member of a composite tax return or group tax return, and as a component member of a unitary, or combined reporting group for the tax year immediately preceding the first tax year beginning on or after January 1, 2009, and who will likewise file as a component member of a composite tax return or group tax return, and as a component member of a unitary, or combined reporting group for the first tax year beginning on or after January 1, 2009. This safety zone is available only for estimated payments made for the first tax year beginning on or after January 1, 2009.

27.2.e.1. This safety zone applies with relation to Taxpayers that did not file a separate return in the previous year, and who instead filed as a component member of a composite tax return or group tax return filing unit, and as a component member of a unitary, or combined reporting group for the tax year immediately preceding the tax year beginning on or after January 1, 2009:

27.2.e.2. For any entity that filed corporation net income tax as a component member of a composite tax return or group tax return, and as a component member of a unitary, or combined reporting group filing unit for the tax year immediately preceding the tax year beginning on or after January 1, 2009:

27.2.e.3. If the previous tax year was a full 12 month tax year;

27.2.e.4. The amount of tax shown for the previous year has not been adjusted, redetermined or the subject of an assessment or other challenge by the Tax Commissioner;

27.2.e.5. If the unitary or combined reporting group remains the same for the first tax year beginning on or after January 1, 2009, as the previous tax year;

27.2.e.6. If the component membership of the composite tax return or group tax return remains the same for the first tax year beginning on or after January 1, 2009, as the previous tax year; and

27.2.e.7. If total payments of estimated tax made by each installment date are at least equal to the amount which would have been required on that installment date if the estimated tax was computed based on the amount of tax shown on the previous year's West Virginia corporation net income tax return, then this safety zone applies, except that:

27.2.e.8. If the annual return for the preceding year is not filed on or before the due date, including extensions of time to file, of the annual return for the preceding year, then the declaration of estimated tax for the current tax year cannot be based on last year's tax, and this safety zone does not apply;

27.2.e.9. If the preceding taxable year was a short year, estimated tax for the current year will be computed on an annualized basis. The requirements of paragraphs 27.2.e.4. through 27.2.d.8 of this rule shall be met for the short year in order for this safety zone to apply. The annual tax payable for the current year and the estimated tax for the current year will not be reduced because the previous year was a short year.

27.2.f. Transition period safety zone 27.2.f. -- This safety zone applies for a Taxpayer who filed as a component member of a composite tax return or group tax return, and as a component member of a unitary, or combined reporting group for the tax year immediately preceding the first tax year beginning on or after January 1, 2009, and who will file separately as a component member of a unitary, or combined reporting group for the first tax year beginning on or after January 1, 2009. This safety zone is available only for estimated payments made for the first tax year beginning on or after January 1, 2009.

27.2.f.1. This safety zone applies with relation to Taxpayers who filed as a component member of a composite tax return or group tax return filing unit, and as a component member of a unitary, or combined reporting group for the tax year immediately preceding the tax year beginning on or after January 1, 2009, and who will file separately as a component member of a unitary, or combined reporting group for the first tax year beginning on or after January 1, 2009;

27.2.f.2. For any entity that filed corporation net income tax as a component member of a composite tax return or group tax return, and as a component member of a unitary, or combined reporting group filing unit, and who will file separately as a component member of a unitary, or combined reporting group for the first tax year beginning on or after January 1, 2009:

27.2.f.3. If the previous tax year was a full 12 month tax year;

27.2.f.4. The amount of tax shown for the previous year has not been adjusted, redetermined or the subject of an assessment or other challenge by the Tax Commissioner;

27.2.e.5. If the unitary or combined reporting group remains the same for the first tax year beginning on or after January 1, 2009, as the previous tax year; and

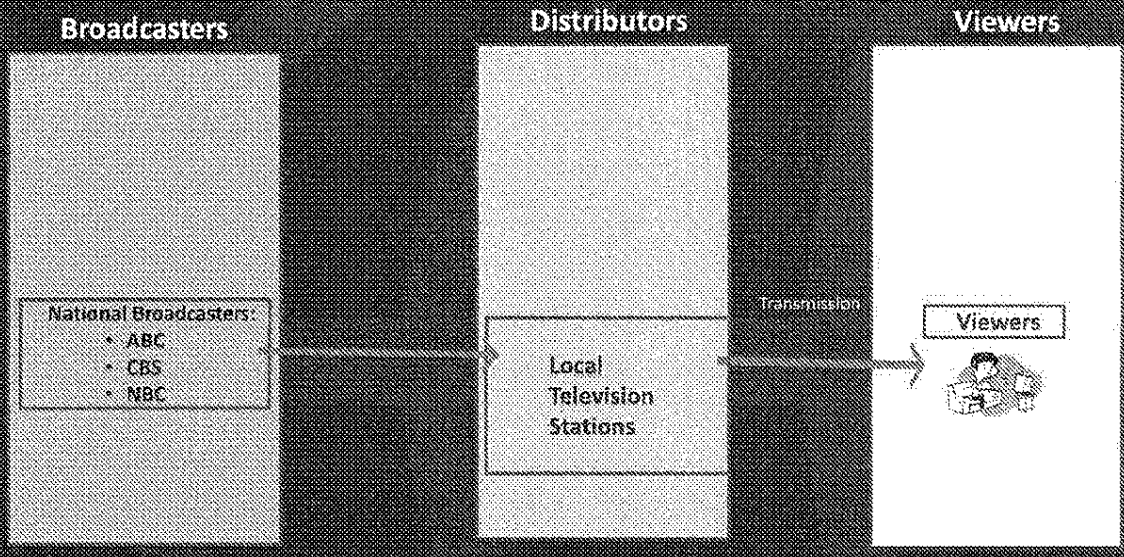
27.2.f.6. If total payments of estimated tax made by each installment date are at least equal to the amount which would have been required on that installment date if the estimated tax was determined based on the pro forma amount of tax that would have been shown on the pro forma previous year's West Virginia corporation net income tax return, determined on a recomputed separate filing basis for the Taxpayer and on a combined reporting basis, then this safety zone applies, except that:

27.2.f.7. If the annual return for the preceding year is not filed on or before the due date, including extensions of time to file, of the annual return for the preceding year, then the declaration of estimated tax for the current tax year cannot be based on last year's tax, and this safety zone does not apply; and

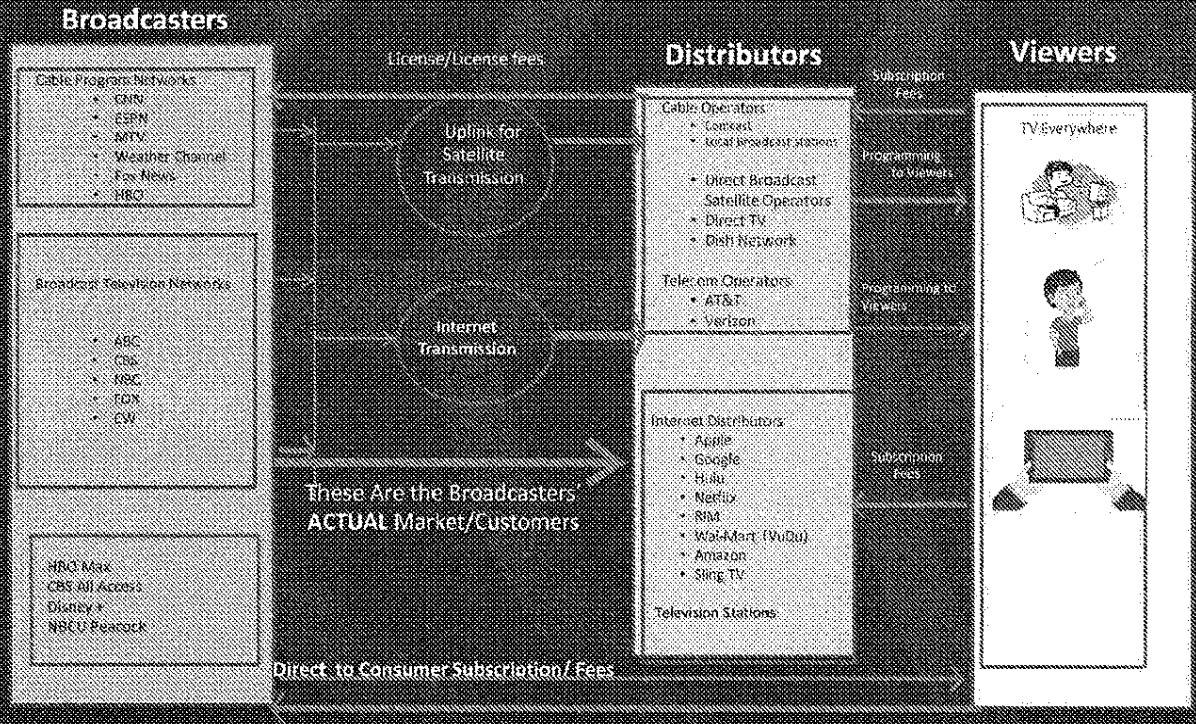
27.2.f.8. If the preceding taxable year was a short year, estimated tax for the current year will be computed on an annualized basis. The requirements of paragraphs 27.2.f.4. through 27.2.f.7. of this rule shall be met for the short year in order for this safety zone to apply. The annual tax payable for the current year and the estimated tax for the current year will not be reduced because the previous year was a short year.

Attachment to MPA Market Sourcing Rule Comment

Broadcasters' Old Method of Content Delivery



Broadcasters Today
Current Method of Content Delivery



States with Commercial Domicile Apportionment Sourcing – 7/2021

Missouri – General apportionment statute SB884 enacted in 2018 and Customer Location/ Commercial Domicile apportionment for broadcasters Rule adopted in December, 2020. October 2020 Proposed Rules Pages 1608-9 Missouri Secretary of State: Register (mo.gov) ; Page 267 Final Rule adopted, one minor change to the definition of broadcaster Missouri Secretary of State: Register

Michigan - In 2007, Michigan enacted market-based sourcing for apportionment purposes. Shortly thereafter, the State adopted a statute under which broadcasters apportion both advertising revenues and the license fees earned from cable and satellite system operators and Internet distributors based on the commercial domicile of the advertiser or licensee. Mich. Comp. Laws Ann. Section 208.1305(20).

Illinois - Similar to Michigan, subsequent to the enactment of market-based sourcing for apportionment purposes in 2009, additional legislation was enacted which clarified how the market-based sourcing statutes applied to broadcasters. This statute provides that advertising income and license fees earned from cable and satellite system operators and Internet distributors are sourced to the principal place of business of the Networks' direct customers (i.e., commercial domicile). ILCS 5/304(a)(3)(B-1)(i), (B-2), (B-7) and (C-5).

Iowa - In 2015, Iowa enacted a statute to repeal a 25-year old viewing audience-based apportionment formula. The Governor and the legislature recognized that the viewing audience method was outdated given the significant changes in the rapidly evolving ways in which television content is seen. The new law modernizes the method for sourcing receipts within and without Iowa based on the commercial domicile of customers (i.e., advertisers, cable and satellite operators and Internet distributors.

Florida - Florida has issued two rulings which conclude that the taxpayer's cable program networks should source both their advertising revenues and license fees from their distributors to Florida when the taxpayer's customers (advertisers, cable and satellite operators, Internet distributors) are located in Florida. The rulings indicate that a taxpayer's customers are considered to be located in Florida when the principal place from which their trade or business is directed or managed is within Florida (i.e., their commercial domicile). Florida Technical Assistance Advisement, No. 13C1-004 (May 21, 2013); Florida Technical Assistance Advisement, No. 11C1-008 (Sep. 15, 2011).

Texas - House Bill 2896 was enacted in 2015, which provided certainty regarding apportionment for licensing fees. The new provision provides the apportionment of receipts from the distribution

of television programming by national and local broadcasters similar to the method for apportioning receipts from other intangible property under Texas law. It adds a new section to the Texas Tax Code Section 171.106 to clarify that receipts from the distribution of programming by Texas television stations and national cable and television networks should be apportioned based on the "location of the payor rule," i.e., the state of incorporation/ formation of the cable system operators and direct broadcast satellite operators.

Louisiana - Louisiana enacted commercial domicile based apportionment - Act 381 of 2011 following protracted audits and litigation regarding application of the audience apportionment statute. Louisiana Code R.S. 47:287.95(K) and 606(A)(1)(e), relative to corporation income and franchise tax.

Tennessee - Tennessee enacted general market sourcing legislation in 2015 (H.B. 644 for tax years beginning on or after 7/1/2016), and posted rules for public comment in February, 2016. In September, 2016 the state's rules became effective and included MPAA's commercial domicile apportionment for broadcasters. Tenn. Comp. Rules & Regs. § 1320-06-01-.42

Rhode Island - Legislation enacted in June 2014 established mandatory unitary combined reporting, single sales factor apportionment, and market-based sourcing. The statute directed the Rhode Island Department of Revenue to promulgate regulations. The Department's regulations, adopted in 2015, endorse the concept that a broadcasters' "market" for corporate tax apportionment should be based on the location of their direct customers, i.e., their commercial domicile. Once the state transitioned to market sourcing they rejected the previously existing audience apportionment methodology. Rhode Island - Market Sourcing Apportionment - Broadcasters

Kentucky – Kentucky enacted market sourcing legislation in 2018 and regulations have been approved, which would adopt a commercial domicile apportionment method for broadcasters. Took effect May 3, 2019 https://apps.legislature.ky.gov/law/kar/103/016/270reg.pdf

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https://nam05.safelinks.protection.outlook.com/?url=https%3A%2F%2Fdocs.legis.wisconsin.gov%2Fstatutes%2Fstatutes%2F71%2FIV%2F25%2F9%2Fdh&data=02%7C01%7Cangela_miele%40mpaa.org%7C34f48b5c821349263c1908d6e08175Oe%7C17e50b56d5dd439b962acc7ecd9ab7fe%7C0%7C0%7C636943243961081897&sdata=vnQx128BvTlv%2FMpTiIMPs4Gv2vzudvt6Pn%287bCm5vkM%3D&reserved=0

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PUBLIC COMMENTS AND RESPONSES

110CSR24

CORPORATION NET INCOME TAX

The State Tax Department received comments from the Motion Picture Association ("MPA") regarding the proposed amendments to 110 C.S.R. 24, the rule for the West Virginia Corporation Net Income Tax. The comments consisted of a cover letter summarizing the desirability of amending the proposed rule to adopt commercial domicile apportionment sourcing, a Powerpoint presentation illustrating changes in broadcast transmission methods justifying adoption of commercial domicile apportionment sourcing, a list of twelve states that have recently adopted commercial domicile apportionment, and a copy of the proposed rule with highlighted suggested changes reflecting adoption of commercial domicile apportionment, all of which are attached and not repeated herein.

Response:

Upon consideration of the MPA comments, the State Tax Department will not adopt the changes suggested by the MPA. The changes suggested by the MPA fall outside the statutory authority of the Tax Department to determine the sourcing of the use of advertising sales.