Review of the MTC Special Industry Rule
on the Sourcing of Television and Radio Broadcasting Receipts (Reg.IV.18(h))

Briefing Book prepared by the MTC staff

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Introduction

In 2014, the Commission approved a revised model version of its Art. IV, UDITPA statute for recommendation to the states, which amends Section 17 and uses market-based sourcing for receipts from sales of services and intangibles. The Commission then began a project to revise its model general allocation and apportionment regulations to implement this market-based sourcing approach—focusing on the Section 17 regulations. Detailed revisions to those regulations were adopted in 2017 (the "Section 17 regulations"). The Commission's Section 18 special industry rules, adopted prior to the revision of Section 17, were not specifically addressed as part of that project.

In 2022, the Uniformity Committee decided to undertake a project and form a work group to review the MTC's model receipts (sales) sourcing regulations, including the MTC's Section 18 special industry rules. The goal of this project is to identify and provide information to the states on issues that may not be sufficiently addressed by these regulations or that may require updates, corrections, or conforming changes.

One special industry rule that the Commission has recommended to the states is the MTC's Reg. IV.18(h) Special Rules: Television and Radio Broadcasting (the "Rule" or the "Broadcasting Rule"). The Rule was adopted in 1990 and amended in 1996. The MTC staff has reviewed the Rule as well as documents relating to its development.

The MTC staff also has reviewed those provisions of the Section 17 regulations that address the sourcing of broadcasting and similar receipts. As will be discussed below, the sourcing methodology contained in those general receipts-sourcing provisions essentially mirrors one part of the Rule but conflicts with another part.

This Briefing Book describes the relevant provisions of both the Rule and the Section 17 regulations adopted by the Commission, explains how these provisions overlap, and discusses what appears to be a flaw in the section of the Rule describing the sales factor. In addition, it explains why the Uniformity Committee might consider proposing that the section of the Rule describing the sales factor be withdrawn by the Commission and replaced with a cross-reference to the Section 17 regulations.

NOTE: A copy of the Rule is contained in Appendix A of this Briefing Book.[1]

Relevant provisions of the Broadcasting Rule

The opening paragraph of the Broadcasting Rule states that it applies to "the apportionment of income from television and radio broadcasting by a broadcaster that is taxable both in this state and in one or more other states."

The Rule then directs that when a "person in the business of broadcasting film or radio programming" has income from sources both within and without "this state," the amount of business income from sources within this state will be determined pursuant to Article IV of the Multistate Tax Compact, except as modified by the Rule. *See* §IV.18(h)(1).

The Rule defines "film" broadly to mean "any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium." §IV.18(h)(3)(i).

Section IV.18(h)(4)(iv) of the Rule describes the sales factor. This provision distinguishes between:

> (1) receipts from television, film, and radio programming in release to or by "television and radio stations located in this state"; and
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> (2) receipts from television, film, and radio programming in release to or by "a television station (independent or unaffiliated) or network of states for broadcast."

Receipts of the former are sourced entirely to "this state," while the receipts of the latter are sourced utilizing *audience factor*. Therefore, as will be discussed below, §IV.18(h)(4)(iv) appears to apply two different and conflicting sourcing methods to receipts of certain in-state television and radio stations.

[1] A review of Bloomberg Tax and other sources indicate that 32 states have adopted rules expressly addressing the sourcing of ad receipts of television and radio broadcasters: 22 of these states generally source these receipts based on audience and 10 states source these receipts based on commercial domicile of the advertiser. Fourteen states do not appear to have any special rule for broadcasters. There are various nuances, so review of statutes and regulations is essential.

Here is the actual language used by §IV.18(h)(4)(iv) to describe the sales factor (italics added):

> **A. Sales Factor Denominator.** The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under Reg.IV.18.(c).[2]
>
> **B. Sales Factor Numerator.** The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to the following:
>
> 1. Gross receipts, including advertising revenue, from television[,] film or radio programming in release to or by *television and radio stations located in this state*.
>
> 2. Gross receipts, including advertising revenue, from television[,] film or radio programming in release to or by *a television* [*or radio*] *station (independent or unaffiliated) or network of stations* for broadcast shall be attributed to this state in the ratio (hereafter *"audience factor")* that the audience for such station (or owned and affiliated stations in the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks).
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> . . .
>
> 3. Gross receipts from film programming in release to or by a *cable television system* shall be attributed to this state in the ratio (hereafter *"audience factor")* that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. . . .[3]

The bracketed items in the quoted text above do not appear in the version of the Rule that is posted on the MTC's website. However, these words and commas were contained in the original form of the rule adopted in 1990 and MTC staff has not found any evidence that they were removed by the 1996 amendment. There does not seem to be any reason why they would have been deleted. *See* MTC Resolution Regarding Adoption of Proposed Allocation and Apportionment Regulation IV.18.(h)(with attached regulation), adopted Aug. 31, 1990.

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[2] Reg.IV.18.(c)'s language was deleted and replaced with entirely different language in 2017, so this exception no longer makes sense. If the Broadcasting Rule is retained by the Commission, the phrase containing this cross-reference will need to be redrafted.

[3] Section IV.18(h)(4)(iv) also states that receipts from "the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening" will be sourced pursuant to §16 of the MTC's general apportionment rules, meaning that these receipts will be sourced to the state where these items of tangible personal property are delivered. *See* §IV.18(h)(4)(iv)(B)(4).

The Rule also contains various definitions in addition to the definition of film. For example, it defines "radio," "telecast," and "broadcast." *See* §IV.18(h)(3). And in the section describing the sales factor, it describes audience factor for television or radio broadcasting as the ratio that a taxpayer's in-state viewing or listening audience bears to its total viewing or listening audience.[4]

The Rule's archaic language, which focuses on television and radio broadcasting, does not appear to encompass services delivered via the Internet such as the delivery of Internet ads or streaming services. This is hardly surprising, given that the Rule was last revised 30 years ago.[5]

The Rule's description of the Sales Factor is arguably flawed

It does not appear possible to reconcile paragraphs B.1 and B.2 of §IV.18(h)(4)(iv). Specifically, paragraph B.1 adds to the numerator of the receipts factor all gross receipts of television and radio stations which are "located in this state." In contrast, paragraph B.2 applies *audience factor* to the gross receipts of independent and unaffiliated television [and radio] stations (as well as to the gross receipts of networks). Thus, the two paragraphs apply different sourcing methodologies to the receipts of in-state independent and unaffiliated stations.

MTC staff has reviewed all documents in the possession of the MTC which describe or relate to the development of the original rule in 1990 and the amended rule in 1996, including drafts of the original rule.[6]

In an early draft of the original rule, paragraph B.1 applied to the gross receipts from programming "in release to television and radio stations located in this state" and paragraph B.2 applied exclusively to gross receipts from programming "in release to or by a network for network broadcast."[7] As a result, paragraphs 1 and 2 did not conflict. At some point prior to

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[4] The Rule states that audience factor in the case of stations and networks will be determined "either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state." The Rule further states that in the case of cable television systems if the number of a system's subscribers cannot be determined from its books and records, "such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys . . . ." §IV.18(h)(4)(iv)(B)(2),(3).

[5] The conclusion that the Rule does not apply to streaming or the delivery of Internet ads is perhaps debatable. On the one hand, one can argue that a streaming company or an Internet content provider is not a "television station" and therefore is not covered by the Rule's sales factor language. On the other hand, certain key terms used by the Rule, such as "telecast" and "broadcast," are defined broadly. The Rule does not define the word "television."

[6] Some of these materials are posted on the MTC's website while other materials can be found in the MTC's physical library which is located in the MTC's Washington, D.C. offices.

[7] This draft, which is undated, is attached to a resolution adopted by the MTC's Executive Committee on April 25, 1988.

adoption of the original rule, paragraph 2 was revised to also address receipts of independent or unaffiliated stations.[8] However, paragraph 1 was never deleted. The materials in the MTC's possession do not provide any explanation for why paragraph 1 was retained or what purpose that paragraph was intended to serve after paragraph 2 was revised.

Relevant provisions of the Section 17 regulations

The Section 17 regulations, which were adopted by the Commission in 2017, apply market-based sourcing principles to source receipts from the sale of services and intangibles. This approach mirrors the sourcing method described in paragraph (iv)(B)(2) of the Broadcasting Rule.

Specifically, the Section 17 regulations utilize an audience-type factor to source receipts from services delivered by electronic transmission on behalf of a customer, including receipts from television and radio broadcasting. The regulation states as follows:

> 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 . . . on behalf of the customer, the service is delivered in [state] if and to the extent that the end users or other third-party recipients are in [state]. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in [state] *to the extent that the audience for the advertising is in [state].* §IV.17.(d)(3)(B)3.a (italics added).[9]

Section IV.17.(d)(3)(A)2 of the regulations defines "services delivered by electronic transmission" very broadly, stating that the phrase includes, "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." This definition certainly includes services delivered via the Internet including Internet ads and streaming services.

To illustrate the application of these market-based sourcing principles, §IV.17.(d)(3)(B).3.d sets forth a series of examples involving cable companies, television networks, and businesses that provide Internet content to viewers. These examples address:

- Receipts from the sale of advertising time and subscriptions by a cable company [Example (i)]

[8] The paragraph 2 language contained in the final version of the original 1990 rule is very similar to the paragraph 2 language in the current 1996 version of the rule. The differences are not material to the issue addressed in the text above.

[9] The regulations further provide that if a taxpayer cannot determine the location where viewers or subscribers are located, then the taxpayer must reasonably approximate the state or states where the services are delivered and if that is not possible it may utilize population figures.

- Receipts from the sale of advertising time by a television network [Example (ii)]

- Advertising receipts of a business that provides Internet content to viewers [Example (iii)].

A copy of the relevant provisions of the Section 17 regulations, with key text highlighted, is contained in Appendix B of this Briefing Book.[10]

Reasons for the MTC to withdraw the sales factor section of the Broadcasting Rule

There are at least five reasons for the MTC to remove the sales factor section, §IV, 18(h)(4)(iv), from the Broadcasting Rule that it recommends for state adoption and instead insert a cross-reference to the relevant provisions of the Section 17 regulations.

- First, as discussed above, the Rule's description of the sales factor appears flawed and creates confusion with respect to where receipts of in-state independent and unaffiliated television and radio stations should be sourced.

- Second, to the extent that paragraph B.1 of §IV.18(h)(4)(iv) is operative, it potentially conflicts with market-based sourcing principles which the MTC embraced in 2017.

- Third, the Section 17 regulations essentially mirror paragraph B.2, making the Broadcasting Rule's recommended sales factor section largely duplicative and unnecessary.

- Fourth, the Broadcasting Rule, unlike the Section 17 regulations, has become stale because it does not expressly apply to Internet activities, such as streaming services. It also does not address the sourcing of receipts of third parties such as content providers/creators who license their property to broadcasters for delivery to viewers.

- Fifth, and most broadly, recommending two overlapping models that apply to the same activities but use different language without explanation might mislead states to adopt the rules without modification, creating potential confusion and possible unfairness as taxpayers seek out the set of rules that is most beneficial to them.

[10] The Section 17 regulations not only address the receipts of broadcasters but also the receipts of content providers/creators that license their property to a broadcaster who in turn delivers that content to its viewers or subscribers. The regulations provide that license fees received by a content provider must be sourced to the location of the broadcaster's (*i.e.,* the licensee's) audience. *See* §IV.17.(e)(2) (License of a Marketing Intangible & §IV.17.(e)(5) (License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services). *See also* §IV.17(e)(5)(C)(Example ii), which is directly on point. There are no parallel provisions in the Broadcasting Rule because that rule applies only to "television and radio broadcasting by a broadcaster."

The MTC staff has not identified any compelling reason to retain the sales factor language contained in the current and arguably flawed §IV.18(h)(4)(iv).[11]

APPENDIX A

[11] Some states that adopted the MTC's model Broadcasting Rule years ago have subsequently amended their tax code to utilize market-based sourcing. In those states, both traditional broadcasting (under the Rule) and streaming (under the updated code) would be subject to market-based sourcing principles. But in states that have not amended their tax code, and continue to utilize predominant cost of performance to apportion income, receipts from traditional broadcasting would be sourced using audience factor, while receipts from streaming arguably would be sourced using cost of performance. Cost of performance states should consider amending their version of the Rule to expressly address streaming in order to treat traditional broadcasting and its modern counterpart similarly.

APPENDIX B

Here are the key provisions in the section 17 regulations that apply to the sourcing of receipts of broadcasters, other transmitters of electronic media, and content providers/creators:

••• Reg. IV.17.(d). Sale of a Service.

(1) General Rule.

The receipts from a sale of a service are in [state] if and to the extent that the service is delivered to a location in [state]. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth at Reg.s IV.17.(d).(2)-(4).

. . .

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

(A) In General.

If the service provided by the taxpayer is not an in-person service within the meaning of Reg. IV.17.(d).(2) or a professional service within the meaning of Reg. IV.17(d)(4), 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 [state] if and to the extent that the service is delivered in [state]. For purposes of this Reg. IV.17.(d).(3), 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 Reg. IV.17.(d).(3)(B)1 and Example (iv) under (d).(3)(B)1.c.). A service can be delivered to or on behalf of a customer by physical means or through electronic transmission. A service that is delivered electronically "through" a customer is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient.

. . .

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

. . .

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.

    a. Rule of Determination. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in [state] if and to the extent that the end users or other third-party recipients are in [state]. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in [state] to the extent that the audience for the advertising is in [state]. 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 [state] to the extent that the end users or other third-party recipients receive the services in [state]. The rules in this subsection Reg. IV.17(d).(3)(B)3.a. apply whether the taxpayer's customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.

    b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the

customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate the state or states.

c. Select Secondary Rules of Reasonable Approximation.

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

ii. If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that service to end users or other third party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third party recipients from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells the services, relative to the total population in that area.

iii. When using the secondary reasonable approximation methods provided above, the relevant specific geographic area [of delivery] 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.

d. Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D).

Example (i). Cable TV Corp, a corporation that is based outside of [state], 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 [state]. Second, Cable TV Corp sells monthly subscriptions to individual customers in [state] and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to [state] to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in [state]. See Reg. IV.17.(d).(3)(B)3.a. 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 [state] audience using the percentage that reflects the ratio of its [state] subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. See Reg. IV.17.(d).(3)(B)3.c.i. To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to [state] in any case in which the programming is received by a customer in [state]. See Reg. IV.17.(d).(3)(B)2.a. In any case in which Cable TV Corp cannot determine the actual location where the programming is received, and lacks sufficient information regarding the location of receipt to reasonably approximate the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to [state] where its customer's billing address is in [state]. See Reg. IV.17.(d).(3)(B)2.a.ii. Note that whether and to the extent that the monthly subscription fee represents a fee for a service or for a license of intangible property does not affect the analysis or result as to the state or states to which the receipts are properly assigned. See Reg. IV.17.(e).(5).

Example (ii). Network Corp, a corporation that is based outside of [state], 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 [state] to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in [state]. See Reg. IV.17.(d).(3)(B)3.a. If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding audience location to reasonably approximate the location, Network Corp must approximate the receipts from sales of advertising that constitute [state] sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the [state] population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. See Reg. IV.17.(d).(3)(B)3.c.ii. and iii. In any case in which Network Corp's receipts would be assigned to a state in which Network Corp is not taxable, the receipts must be excluded from the denominator of Network Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D).

Example (iii). Web Corp, a corporation that is based outside [state], provides Internet content to viewers in [state] 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 [state] to the extent that the viewers of the Internet content are in [state], as measured by viewings or clicks. See Reg. IV.17.(d).(3)(B)3.a. If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of its viewers to reasonably approximate the location, Web Corp must approximate the amount of its [state] receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the [state] population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. See Reg. IV.17.(d).(3)(B)3.c. In any case in which Web Corp's receipts would be assigned to a state in which Web Corp is not taxable, those receipts

must be excluded from the denominator of Web Corp's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D).

. . .

••• Reg. IV.17.(e). License or Lease of Intangible Property.

(1) General Rules.

(A) The receipts from the license of intangible property are in [state] if and to the extent the intangible is used in [state]. 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 Reg. IV.17.(e).(2)-(5). For purposes of the rules set forth in this Reg. IV.17.(e)., a lease of intangible property is to be treated the same as a license of intangible property.

. . .

(2) 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 [state] 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 [state]. 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 [state], it shall assign that amount or proportion to [state]. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from [state] consumers, the portion of the licensing fee to be assigned to [state] must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the [state] 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 [state] must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the [state] 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.

. . .

(5) License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services.

(A) 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 Reg. IV.17.(d).(3)(B)2 and 3, as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this Reg. IV.17.(e).(5) include, without limitation, the license of database access, the license of access to information, the license of digital goods (see Reg. IV.17.(g).(2)), and the license of certain software (e.g., where the transaction is not the license of pre-written software that is treated as the sale of tangible personal property, see Reg. IV.17.(g).(1)).

(B) Sublicenses.

Pursuant to Reg. IV.17.(e).(5)(A), the rules of Reg. IV.17.(d).(3)(B)3. may apply where a taxpayer licenses intangible property to a customer that in turn sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the rules set forth at Reg. IV.17.(d).(3)(B)3. that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users. For this purpose, the intangible

property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to that property (e.g., because the sublicensee's rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because that property is bundled with additional services or items of property.

(C) Examples:

In these examples, unless otherwise stated, assume that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement in these examples that the receipts must be eliminated from the denominator of the taxpayer's receipts factor. See Article IV.17.(c). and Reg. IV.17.(a).(6)(D). Also assume that the customer is not a related party.

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Example (ii). Program Corp, a corporation that is based outside [state], licenses programming that it owns to licensees, such as cable networks, that in turn will offer the programming to their customers on television or other media outlets in [state] and in all other U.S. states. Each of these licensing contracts constitutes the license of a marketing intangible. For each licensee, assuming that Program Corp lacks evidence of the actual number of viewers of the programming in [state], the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's [state] receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the [state] audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. See Reg. IV.17.(e).(5). If Program Corp is not taxable in any state in which the licensee's audience is located, the receipts are excluded from the denominator of Program Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D). Note that the analysis and result as to the state or states to which receipts are properly assigned would be the same to the extent that the substance of Program Corp's licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. See Reg. IV.17.(e).(5).

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