

# INDEPENDENT OIL MARKETERS ASSOCIATION OF NEW ENGLAND

April 27, 2012

Kenneth L. Kimmell, Commissioner  
Massachusetts Department of Environmental Protection  
One Winter Street, 10<sup>th</sup> Floor  
Boston, MA 02108

RE: MassDEP DRAFT  
Underground Storage Tank Systems Regulations 310 CMR 80.00

Dear Commissioner Kimmell:

The Independent Oil Marketers Association of New England (IOMA) is pleased to provide the following, attached top twenty (20) concerns and attached red-line/strike-out comments concerning the Massachusetts Department of Environmental Protection's (MassDEP's) DRAFT Underground Storage Tank (UST) System regulations (310 CMR 80.00), hereinafter referred to as the Regulations. In summary:

1. After reviewing MassDEP's first complete set of UST regulations, IOMA is disappointed that after three (3) years of providing constructive comments to MassDEP's senior management and program staff concerning the importance of having a balanced UST program, MassDEP appears to have dismissed many of our substantive and technical concerns and comments. Based upon our review we believe that a shared vision for this program remains elusive and does not yet exist. We believe that the Department's current approach for the UST program suffers from an undeserved confidence about the workings of UST systems and the retail gasoline marketplace, incorrect assumptions about the people who own and operate, install, repair and remove USTs, which is further compounded by a lack of a clear and consistently applied vision and touchstones for the program to guide its most significant public policy decisions. Until this can occur IOMA requests that MassDEP promulgate the existing language of 527 CMR 9.00 into the proposed 310 CMR 8.00. IOMA then requests that MassDEP implement the program for a period of two years before proposing any changes.
2. As proposed, MassDEP's DRAFT Regulations are more stringent than those proposed (emphasis added) than the United States Environmental Protection Agency (US EPA). IOMA estimates that the DRAFT Regulations will cost the approximately 3,200 motor vehicle fuel dispensing system operators in excess of \$80 million annually to comply. This translates to a 3 cents per gallon tax increase placed upon, and without legislative or the governor's concurrence, the Massachusetts consumer. A recent analysis from Deutsche Bank finds that every penny increase in average gas prices at the pump in the United States equals \$1.4 billion siphoned out of the US economy. In addition to siphoning valuable resources from an already fragile Massachusetts economy, these regulations, remarkably, will generate 1,440,000 gallons per annum of contaminated water.

3. We estimate the implementation of these DRAFT regulations will likely result in the closing of between 300 – 600 independent motor fuel retailers which will be unable to bear these costs for compliance;
4. MassDEP has taken thirty-eight (38) pages of practical and time tested UST Regulations previously implemented by the Massachusetts Department of Fire Services (MassDFS) and turned these into a one hundred forty-five (145) page prescriptive and unworkable DRAFT UST Regulation. It is hard to imagine that this was the intent of the Governor's Article 87 which was to, "restructure(s) certain state agencies to make them more cost effective and responsive by consolidating programs and program staff within agencies whose mission and expertise will ensure the most coordinated, efficient operation of the programs."; and, that the DRAFT Regulation has received a passing grade under a cost-benefit analysis required by Executive Order 384 for which a copy is hereby requested; IOMA also does not believe this effort is consistent with the Agency's recent and highly touted regulatory reform initiative.
5. IOMA recommends that MassDEP implement UST system technical regulations identical to the time tested regulations formerly over-seen by the MassDFS. This will ensure compliance continuity for the regulated community and also ensure a smooth transition into regulations for which MassDEP staff do not have prior experience;
6. MassDEP should propose performance based regulations instead of prescriptive regulations which are difficult to understand and possibly infeasible to implement. Referencing the US EPA performance based technical standard is preferable to a detailed, prescriptive technical regulation, especially when equipment improvements are constantly being developed and implemented by UST system manufacturers;
7. MassDEP should not adopt UST system regulations more stringent than those proposed (emphasis added) by the US EPA which have serious technical drawbacks which have been questioned by the regulated industry as well as by State regulators. Once the US EPA adopts revisions to its technical standards for UST systems, only then should the MassDEP begin to revise its UST system regulations as its staff gains experience with UST systems and the regulations. Stakeholder input will facilitate the revision process to ensure the revisions reflect industry practice and the technical capabilities of the UST system equipment;
8. The proposed Third Party Inspector (TPI) program mirrors the Licensed Site Professional (LSP) program and does not reflect current nation-wide industry UST system installation, maintenance and inspection practices. Licensed Site Professionals and Registered Professional Engineers (PEs) do not have the practical experience or manufacturer's certifications required for the UST system inspections proposed. The standard of care for these UST system inspections is practiced by what are referred to as pump and tank mechanics who are involved daily with the on-site installation, maintenance and inspection of UST systems. These pump and tank mechanics are certified by the manufacturers' of the equipment and have the hands-on experience and

- knowledge to cost-effectively inspect and identify UST system compliance or compliance deficiencies. Requiring an LSP or PE to inspect UST systems for compliance is expected to triple the cost of current TPI inspections. IOMA is not aware of any other State in the United States which requires PEs to conduct UST system inspections; nor, was such a requirement proposed by the US EPA in its proposed UST system regulatory revisions.
9. In July of 2009 IOMA requested orally and in writing for the Department to prioritize the implementation of the federally mandated Operator Training Program. MassDEP chose not to. MassDEP had three years to promulgate regulations with enough lead time for parties to comply with the August 8, 2012 deadline whereby all public and private motor fuel dispensing stations must have three types of Certified Operators assigned to every facility. One Class A Operator who is expert in regulations and management, one Class B operator who is expert in UST system mechanics, and one or more Class C operators who are typically the store clerks. Any station that does not have one of each assigned to their facility cannot lawfully dispense fuel, in other words – they must shut down until they do. Within the last month MassDEP began offering the certification exam for Class A and B Operators. Despite our protests that the exam is too difficult to pass because of how rigidly it is scored, MassDEP believed nothing is wrong with the exam. Now, only after our insistence MassDEP is looking at the exam, in light of the looming federal deadline, the significant number of estimated Operators that are needed (thousands), and comparing it to the lack of people who have successfully passed the exam as of this writing is sixty (60).
  10. The agency for whatever reason has eliminated the long standing option of demonstrating financial responsibility through a self certification process by the Owner or Operator. This approach allows an Owner/Operator to demonstrate or certify they have the necessary assets and means to self-insure for the cleanup of environmental contamination should the tank leak. This approach is only used by the larger more sophisticated retail marketers. MassDEP despite IOMA's concerns eliminated this option. IOMA wants it restored. MassDEP also in this section of the UST regulations attempts to overturn a statutory provision in MGL c. 21(J) whereby it would allow municipalities to become eligible for reimbursement of cleanup costs under this dedicated Fund for retail marketers. MassDEP also proposed to overturn longstanding Insurance industry practices and laws, by requiring insurers to provide coverage even if the insured fails to pay premiums, or becomes insolvent or bankrupt. MassDEP's rules also appear to preclude or extend from 10 days to 120 days an Insurers option of canceling coverage for non-payment of premiums.

You will note from the voluminous comments provided on the red-line/strike-out copy of the DRAFT Regulation attached that IOMA industry experts had difficulty understanding the practical implementation of the DRAFT Regulation. We submit that if the IOMA industry experts, who have been involved with the process since March 2009, cannot understand the implementation aspects of the DRAFT Regulation, then the average UST

system operator will be unable to comply with an overly prescriptive regulation which differs significantly from the time tested MassDFS regulations with which there is intimate industry familiarity and knowledge.

We look forward to discussing the details of this DRAFT Regulation at the public meeting scheduled for Tuesday, May 1<sup>st</sup> and we hope that the MassDEP will move toward a more balanced and performance based regulation. We hope that MassDEP also reconsiders its efforts to prematurely adopt proposed federal rules before their time comes. In addition, a performance based UST System Regulation will be more practical and cost-effective to implement than the onerous, proposed DRAFT Regulation.

Very truly yours,  
*Peter Romano*  
Peter Romano  
President

Attachments

CC: Mr. Gary Moran – [REDACTED]  
Mr. Edward A. Rachins – [REDACTED]  
Mr. Raymond F. Leather – [REDACTED]  
Ms. Angela M. Pimental – [REDACTED]  
Mr. Bruce Garrett – [REDACTED]  
Mr. Brian P. Moran – [REDACTED]  
Ms. Sarah Weinstein – [REDACTED]

**SECOND NOTICE:  
Massachusetts Class A, B, & C UST Operator Certification  
Deadline August 8, 2012**

**Underground Storage Tank (UST) System Owner/Operator:**

By August 8, 2012, you are required to designate at least one MassDEP-certified Class A, B and C Operator for each underground storage tank (UST) system you own/operate.

UST Operator certification exams are available online to qualify as a Class A, B or combination A/B UST Operator. There is no exam required to qualify for Class C Operator certification.

The MassDEP web site provides links to reference materials to study before starting an exam and to consult while taking it. <http://www.mass.gov/dep/to/xics/ust/operator.htm>

On June 14, 2012 MassDEP implemented a revised scoring protocol and has started rescoring all exams deemed as failed under the original scoring protocol. Now a score of at least 60 percent in each subject area AND a total score of 80 percent for the whole exam is required for certification. MassDEP will e-mail all affected past exam takers of their results based on our rescoring assessments.

**Questions?** Please contact the MassDEP UST Hotline: 617-556-1035, extension 2, or [dep.ust@state.ma.us](mailto:dep.ust@state.ma.us)

April 24, 2012

April Anderson Lamoureux , Assistant Secretary for Economic Development  
Executive Office of Housing & Economic Development  
One Ashburton Place, Room 2101  
Boston, MA 02108

**Re: AIM's Suggestions for Regulatory Review**

**Overview**

When asked “How can Massachusetts improve the regulatory environment?”, employers routinely respond with bottom line challenges and burdens related to the overall costs associated with compliance in arenas that directly impact their business operations, i.e. health care costs, electricity, taxation, workers compensation, employment law and unemployment insurance.<sup>1</sup> AIM members will highlight issues, which are overly burdensome, duplicative, outdated or outright punitive in nature and which often arise from legislation as well as regulation.

AIM submits the following suggestions for Governor Patrick’s state wide regulatory initiative with the goal of improving the Massachusetts business climate.

**Statewide Agency Reform:**

1. Online One Stop Shop - Add “Regulatory Reform” to Governor Patrick’s Massachusetts Transparency Website. Through this portal provide customers with an online “one stop shop” for regulations. This portal would provide residents and employers with a fully searchable database of all current regulations and proposed regulations. The portal would also allow individuals to sign up for electronic newsletters and RSS feeds for every state agency. The site would also provide a mechanism to track ongoing regulatory reform efforts and provide individuals with a way to provide ongoing feedback on regulatory reform.
2. Highlight best practices for small business impact statements, communications, engagement, education and outreach efforts for regulated community.
3. Ensure that all agencies allow for electronic filing
4. Streamline agency operations by focusing on the customer experience for any service of agency function.

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<sup>1</sup> <http://blog.aimnet.org/AIM-IssueConnect/bid/53019/Does-Massachusetts-Have-a-Business-Regulation-Problem>



**Healthcare:**

1. Eliminate the duplicative medical security trust fund and merge it with the Health Connector's Commonwealth Care Program, the state's primary health insurance program for uninsured adults who meet income and other eligibility requirements;
2. Impose a moratorium on health insurance benefit mandates and cost benefit analysis for any new proposed mandates.
3. Amend Minimum Creditable Coverage to allow deductibles to keep pace with medical inflation;
4. Change the Fair Share Contribution statute to exempt employees with spousal or other healthcare coverage; and
5. Repeal section 304 of Chapter 149 of the Act of 2004, which requires the Executive Office of Health and Human Services to produce a list of employers who have 50 or more employees using public health assistance each year.

**Employment Law:**

1. Fix the Personnel Records Statute: Pass clarifying language that would answer many of the questions posed by employers and employees around the issue of what exactly triggers the notification requirement under the new personnel records law. Specifically, the ambiguity lies in the question of what is considered to be part of the personnel record.
2. Fix Treble Damages statute: Pass the House approved Fiscal Year 13 budget proposal which included a provision that would limit the treble damages statute to "willful" violations of the wage and hour statute. The change would remove the threat of automatic punitive damages for employers who make honest mistakes understanding the complex state wage laws or who are involved in good-faith compensation disputes.
3. Fix Independent Contractor Statute: Pass legislation that would provide relief to individuals and employers that want to engage in legitimate independent contractor relationships. The current Massachusetts independent contractor statute conflicts with federal law and prohibits many opportunities for job creation.
4. Reform adjudicatory process for the Massachusetts Commission Against Discrimination (MCAD): Pass legislation to improve the operation of the MCAD and its ability to provide timely due process and equity for all parties by requiring guidelines and standardized procedures.



## **Taxation:**

The administration and enforcement of the Commonwealth's tax laws continue to pose a challenge for many business taxpayers. Massachusetts Department of Revenue (DOR) is well-known for its aggressive interpretation of statutes and focus on revenue maximization. While streamlining regulations may be part of the solution, there are many other issues on the tax policy front that need to be addressed.

First and foremost, to improve the DOR, we need to change the mindset of many senior staff who believes that the agency is always right, maximizing revenue is always appropriate and that DOR should help make the law in addition to implementing it. Contributing to this problem is the deference that the Legislature gives to the DOR. Because there is no institutional expertise in the legislature and our tax laws have become increasingly more complicated, legislators rely on DOR to tell them what good tax policy is.

Several laws enacted in recent years have given the Commissioner of Revenue unfettered discretion to determine parts of the law and its interpretation. The combined reporting statute is the most recent example. Another troubling phenomenon is the trend by DOR to propose changes to the law if the Courts side with taxpayers in litigation. For example, when a court found that the work product of tax professionals prepared on behalf of a taxpayer client was not subject to disclosure in litigation, the DOR filed legislation to change it.

These are some changes to statutes that would provide more balance between DOR and the taxpayer:

1. Encouraging the Settlement of Cases in the Litigation Pipeline
2. Require Dynamic Analysis of tax policy
3. Encourage independent analysis of tax issues by another state agency such as the State Auditor.
4. Equalized Interest Payments
5. Four Equal Quarterly Payments for Estimated Taxes
6. Reduce and standardize fees for the purpose of incorporating and filing annual online reports by corporations, Limited Partnership (LP), Limited Liability Partnership (LLP) and Limited Liability Corporation (LLC). LP, LLP and LLC's are considered to be unduly high.
7. Require all DOR rules and regulations to include a business impact statement

## **Environment**

1. Lamp Recycling - In 2007 the DEP adopted regulations implementing the lamp recycling law. The regulations took the most restrictive approach possible and rejected industry efforts to allow significant flexibility so that industry could avoid fines if the state failed to achieve a designated recycling rate. While we are trying to amend the underlying statutory requirement, in the event that we do not succeed another approach would be to amend those initial regulations.



2. Prevent overly burdensome storm water regulations: In 2009, DEP proposed statewide stormwater regulations. The proposed regulations unfairly imposed on commercial and industrial facilities the bulk of the cost and burden of reducing phosphorous in stormwater discharges. The estimated compliance costs associated with the state's draft regulations were in the billions of dollars. The draft regulations went well beyond what other states have adopted for their stormwater regulatory programs. DEP did not undertake any cost/benefit analysis that could have been used to determine if (i) the cost of the proposed program would achieve a comparable level of environmental benefit or (ii) there were other less costly regulatory approaches to managing stormwater discharges. After significant pushback from the business community, the state regulations were put on hold. Since that time, EPA issued draft MS-4 permits and a draft RDA General Permit for the communities of Milford, Franklin and Bellingham. EPA's initiatives target phosphorus in stormwater and have many of the same water quality goals as DEP's proposed program. For these reasons, DEP should hold off on moving forward with any stormwater regulations until the impact of EPA's initiatives take effect. This would ensure that commercial and industrial facilities regulated under both permitting programs would not be burdened with redundant or inconsistent regulatory requirements.
3. Department of Public safety Steam Boiler and hoisting licenses: The DPS laws and regulations as they pertain to steam boiler licensing and hoisting requirements are often outdated and overlap or are inconsistent with federal law. The DPS should review and update these licensing laws and regulations with an eye toward streamlining, including consistency with nearby states. Massachusetts licensing requirements for these two areas are far more stringent than neighboring states and in some cases have been outdated due to technological changes in the industry.
4. Endangered Species Enforcement - The Massachusetts Endangered Species program needs to be reformed and the program needs to operate within the confines of the statute that the legislature passed in 1990 so that developers and other can have a predictable process.

The 1990 Endangered species statute granted the Natural Heritage and Endangered Species Program (NH) to set aside areas in the Commonwealth as "significant habitat", a designation used to protect the habitats of species that are considered endangered or threatened. When designating a certain piece of land significant habitat, NH must notify the land owner, hold a public hearing, record its findings and pay just compensation. Since 1990, the Natural Heritage Program has gone beyond its legislative mandate, designating thousands of acres as "priority habitat" which has no grounding in statute. In effect this circumvents the rules that this



legislature established and often times halts development and requires expensive consulting costs to prove that there are no endangered species in the area.

5. Department of Environmental Protection (DEP) – Regulatory change – currently new gas stations are not exempted from Stage II vapor recovery systems. The states of CT<sup>2</sup>, NY, ME, NH and VT have already exempted new stations from Stage II.

**Other Regulations:** Directly below are comments that were submitted by AIM members and may require additional research. AIM is ready to work with the administration and AIM members to identify the necessary details for these suggested items for regulatory review.

1. Local permitting for business expansion is onerous
2. Onerous record keeping and disclosure regulations for pharmaceutical companies
3. Extremely vague lobbying and reporting requirements
4. Ever changing Building Codes and lack of notification
5. New sprinkler requirements for commercial and new homes
6. Recent HVAC regulations and licensing – overextended qualification periods for construction trade licensing makes it difficult for smaller firms to train new people to enter the trades.
7. Review of Department of Public Safety and DCAM regulations that conflict with federal law. Most often state regulations are more burdensome and conflict with OSHA or HUD standards including:

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<sup>2</sup> In a press release by the state of CT, stated “The responsible elimination of these now obsolete vapor recovery systems is a good example of how we are striving to leverage the benefits of new technology to reduce the regulatory costs of our clean air programs,” said DEEP Commissioner Daniel C. Esty. “These and other efforts to modernize the regulatory process – while still maintaining high environmental standards – will help make Connecticut a less costly place to do business and a better place to live.”



- Section 310 CMR 6.02 – Requires that training is site and equipment specific
  - Section 310 CMR 6.R 6.03 Performance evaluation is only valid for 2 years, when OSHA is valid for 3 years.
  - Section 310 CMR 6.06 Requires far more rigorous inspections and documentation than OSHA
8. 780 CMR 901.5.1 and Chapter 13 section 103.7 that effectively saddle architects and engineers with liability as "super inspectors" and responsible for subcontractors liability.
  9. Extensive time and overly burdensome process for state bidding and contracting with the State Purchasing & Operational Services
  10. Provide oversight and or analysis of DEP's application of the toxic use reduction act (TURA)
  11. Rideshare Regulation 310 CMR 7.16 The difficult parts of the regulation are the convoluted reporting requirements and the need for burdensome / questionable value biennial employee surveys of where employees (and contractors working on site) have to track and submit their commute info for a given week and data must be obtained from at least 50% of the site population to be valid. An employer's submittal was rejected by DEP in the past because it had data on slightly less than 50% of the site population. There are alternatives to get around the survey, but they have been even more difficult to do. In order to get >50% response, a major promotion of the survey is required.
  12. Lack of harmonization of plumbing regulations, causing conflict and inconsistent application between state plumbing codes (interior building) and the state BOH regulations, which govern the exterior issues outside of a building.
  13. Gateway Cities: Revitalize and Encourage the Redevelopment of Brownfield Sites
    - a. Revise Regulatory Definition of Background to Expedite Cleanup of Brownfield Sites - The concept of "Background" in the Massachusetts Contingency Plan is important for those who are involved in the actual clean-up of disposal sites, since the 21E statute and the MCP require that any such remediation have, as its goal, the reduction of contaminant concentrations to this level. In 1993, DEP significantly limited the concept of background contamination. With no basis in either legislative text or history, DEP eliminated from consideration the majority of situations that would meet the statutory definition of background. DEP's narrow definition of "background" in the MCP is particularly problematic at brownfield sites. In many older urban and industrialized areas of the Commonwealth, elevated levels of various common contaminants are widespread. These "background" contaminants can rarely be attributed to a particular release, source or "disposal site," and appear to be precisely the situation the Legislature had in mind in enacting the statutory background concept. Yet, under DEP's current MCP definition of "background," sites containing historic fill and other instances of such widespread contamination are subject to the provisions of the MCP, and require at least some response actions (assessment and/or remediation). The cost

and time required to go through this process, which for most urban development projects results in no real net benefit, present yet another obstacle to the successful redevelopment of Brownfield sites. We urge DEP to revise the definition of “background” in the MCP to be consistent with the broad definition of “background” in the statute. Eliminating the need to assess and remediate such typical widespread contaminants in urban and industrialized areas would expedite and reduce the cost of brownfields redevelopment in the Commonwealth, without adding additional risks to the environment. Passage of S. 340, *An Act to Revitalize Urban Centers*, would address this issue.

- b. Allow for Permanent Solution at Brownfield Sites with Active Systems- We also urge DEP to expand the existing regulatory definition of Permanent Solution contained in the MCP to include a disposal site with an active remedial system whose purpose is to mitigate vapor intrusion. Under the existing regulatory definition, it is simply not possible to achieve closure for sites with an active remedial system, and without such an endpoint, financing - already difficult in the present economy - becomes nearly impossible. Once a Permanent Solution has been achieved, it would be possible to close out the site, as is the case with other sites subject to the requirements of the MCP. Passage of S. 339, *An Act to Advance the Redevelopment of Brownfields*, would also address this issue.
14. Building code regulations, etc.
- a. State building codes and challenges associated with rainwater use / grey water reuse (having to dye the water a different color), wind turbines (especially the fall zones including roadways), etc.
  - b. Historic commission requirements that prevent efficiency measures (new windows, adding exterior insulation that would slightly change dimensions, solar on roof), etc.
  - c. A lot of the air quality permitting gets in the way of distributed generation of power; nobody wants to run their generators, even if their generators are cleaner and more efficient than some of our other centralized power options. Eased air permits in terms of run hours (still strict about air pollutants) for generation equipment.
15. Use of generators / co-generation units as primary power and grid as back-up / emergency power. To do so would only be cost-effective if they didn't need to also provide an emergency generator, which would require regulation re-interpretation. The logic is this:
- d. Current System: Grid power primary, emergency generator back-up
    - i. Pros: Have reliable power and a back up that is there just in case, though it is almost never used



- ii. Cons: Owners spend a lot of money on a generator that doesn't get used and the overall system efficiency isn't very good – we need to build more large power plants
  - e. Proposed System: Co-generation primary power (at least for a portion of the building including life safety), grid power back-up
    - i. Pros: More efficient overall, still just as much redundancy built into system, essentially the same cost of equipment as the current system, reduce need for new power plants and ease congestion of distribution system
    - ii. Cons: Regulations would need to be change, emissions would shift from centralized to local
16. Timeliness of Workers Compensation Claims: Review the administration and timeliness of Workers Compensation claims in the following three specific areas as described by statute – (M.G.L. 152 Section 10A) A. Conciliation to Conference B. Conference to Hearing and C. Hearing decision due date. For all three events, the workers compensation statute calls for no more than 28 days between each of the separate events listed above. For all parties involved, the time it takes for a decision at each of these events is excessive and costly. The lack of timeliness and decision making is a serious concern.



## State Tax Today

DECEMBER 29, 2014

### Massachusetts Group Calls Market-Based Sourcing Reg Burdensome

Neil Downing

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Summary by **taxanalysts**

A prominent business group in Massachusetts has told the state Department of Revenue that its proposed regulation on market-based sourcing is complicated and burdensome.

Full Text Published by **taxanalysts**

A prominent business group in Massachusetts has told the state Department of Revenue that its proposed regulation on market-based sourcing is complicated and burdensome.

Associated Industries of Massachusetts (AIM), which represents about 4,500 employers in the state, said in a letter to the DOR, "While detail can be helpful, as an entire body of work, these regulations represent a voluminous and overly complex manner of implementing market sourcing regulations."

The proposed 71-page regulation creates opportunities for the DOR "to over assess a taxpayer," Bradley MacDougall of AIM said in a December 4 letter to the DOR. The proposed regulation is also "inconsistent with other states and imposes the most costly version of market sourcing in the country," MacDougall said.

AIM urged the DOR "to turn this complex regime into one that contains the fundamental principles for creating a sound tax regime, most notably, equity and fairness, certainty, economy of calculation and simplicity."

AIM also posted an article about the issue on its blog on December 19, written by Michael Jacobs and Robert Weyman, both with AIM-member law firm Reed Smith LLP.

Asked for the DOR's response, DOR spokeswoman Maryann Merigan told Tax Analysts on December 19 that the DOR "asked for comments and received a considerable number of them on the revised regulation and has responded by clarifying language in some of the provisions and incorporating more than 60 examples to provide additional clarity."

Merigan added, "It is the Department's goal to provide the taxpayer with certainty through a thorough and thoughtful revision of this regulation."

Massachusetts is at the forefront of developing rules for market-based sourcing. (Prior coverage [📄](#).)

The Multistate Tax Commission's Uniformity Committee on December 11 voted to instruct the work group charged with designing market-based sourcing model regulations to use as its starting draft the package of rules proposed in Massachusetts. (Prior coverage [📄](#).)

## Background

A provision in a transportation revenue bill [📄](#), enacted by the Massachusetts legislature on July 24, 2013, changed the apportionment formula for corporate income tax purposes to reflect market-based sourcing. (Prior coverage [📄](#).)

To implement the law, the DOR issued an initial draft regulation [📄](#) on March 25; many practitioners found it complex and potentially difficult for taxpayers to apply.

The DOR on October 30 issued a revised working draft regulation [📄](#) on a new market-based sourcing law designed to address practitioner and taxpayer concerns. (Prior coverage [📄](#).)

The revised working draft provides more detail and more examples to help clarify the department's position, Michael Fatale, chief of the DOR's Rulings and Regulations Bureau, told Tax Analysts at the time.

In its December letter, AIM raised concerns about provisions in the revised draft that involve a safe harbor provision, tiering rules, the treatment of professional services, the regulation's relationship to other apportionment rules, issues involving transportation services, and other matters.

For example, AIM said that the revised draft does not appear to include a provision to allow for a reasonable approximation of the sourcing of professional service receipts.

"Is this because it is assumed that the taxpayer will always know the billing address of its customer? What if this is not the case, does the sale have to be thrown out, or can a reasonable approximation be used? Taxpayers should be allowed to make a reasonable approximation for sourcing of professional services as they do for personal services and all other services," AIM said.

The Greater Boston Chamber of Commerce, which represents about 1,500 businesses, has also provided comments on the regulation to the DOR, said Jim Klocke of the chamber. "It's an important issue. It affects a lot of companies," Klocke told Tax Analysts on December 19. He said he hopes that the comments the DOR receives on the matter will be reflected in the regulation's final version.

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## Tax Analysts Information

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**Institutional Author:** Tax Analysts

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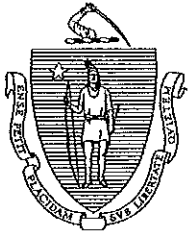
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# *The Commonwealth of Massachusetts*

*Department of Revenue*  
*Rulings and Regulations Bureau*

*P.O. Box 9566*  
*Boston, MA 02114-9566*

January 2, 2015

Jessica Seney

[REDACTED]

Bradley A. MacDougall

[REDACTED]

Dear Ms. Seney and Mr. MacDougall:

Thank you for your recent comments regarding the proposed amendments to DOR Regulation 830 CMR 63.38.1, Apportionment of Income. The amended regulation has now been filed in final form with the Secretary of the Commonwealth and is scheduled to be published today. As you know, throughout the development of the amended regulation, the Department has sought the input of the taxpayer and practitioner communities, through formal public comment as well as informally at forums and conferences. The various comments that the Department received through multiple channels on both the initial working draft and the subsequent proposed regulation have greatly helped to improve the final document.

The recent legislative revisions to the corporate income apportionment provisions (Mass. Gen. Laws, c. 63, sec. 38) relating to the sales factor as applied to sales "other than sales of tangible personal property" necessarily require taxpayers to change their methods of reporting such sales. The Department has endeavored to limit the administrative burden necessitated by those changes by incorporating significant flexibility for taxpayers into the regulation, in part

Jessica Senev  
Bradley A. MacDougall  
January 2, 2015  
Page Two

relying on the concept of “reasonable approximation” provided for in the statute. The Department has also included a large number of examples in the amended regulation in order to further explain and illuminate the application of the amended regulation, both in general and as to particular types of businesses and service industries that are likely to be affected. We are gratified to have heard from many practitioners and taxpayers that they appreciate the flexibility as well as the level of detail and the examples in the regulation.<sup>1</sup>

We are providing this letter as a word of thanks, and also to explain our response and general thinking with respect to some of the comments we have received, which we hope you will find helpful.

The recently enacted statutory revisions to Section 38(f) of Chapter 63 were worded in relatively general terms. Consequently, the Department has sought in the amended regulation to provide specific transaction-based guidance. The working draft of the regulation circulated in May established a conceptual framework for the regulation that distinguished among various types of service and intangibles-based transactions. From the comments we received, taxpayers and tax practitioners seemed generally satisfied with this approach to the regulatory framework, but requested that the Department revise the rules to make them easier to apply and fairer in their application.

For example, in response to the working draft of the amended regulation that was circulated last May, the Department received comments requesting the inclusion of safe harbors in some of the regulatory rules governing service transactions. The Department added two safe harbors to the proposed regulation that was circulated in October, and at that time received additional comments requesting that these safe harbors be made more accessible. In response to these comments, the Department has in the final regulation broadened the availability of the safe harbors.

Similarly, in the working draft of the amended regulation, the Department included an “extrapolation” rule that was not specifically referenced in the statute, as a means to simplify compliance. This rule permits taxpayers that have insufficient information regarding the delivery location of a sale to approximate such location based on sales for which the taxpayer does have sufficient information. Several of the comments that the Department recently received with respect to the proposed regulation specifically requested that the Department expand its

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<sup>1</sup> We also note that the Multistate Tax Commission, at a meeting held on December 11, 2014, endorsed the Massachusetts rules as a starting place for a model regulation that could be used by states nationwide. In part, that endorsement was based on the fact that the Massachusetts regulation provides a significant amount of detailed taxpayer guidance.

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application across a wider spectrum of services addressed by the regulation, in particular so as to be available for “professional services”. In response to these comments, the Department has in the final regulation extended the extrapolation rule to the professional services category.

In response to other comments on the proposed regulation, the Department has provided guidance to taxpayers in the form of additional examples. In particular, the Department clarified the section regarding services delivered “on behalf of a customer,” including the addition, as requested, of additional examples of such types of services. Also, the Department revised the rules on “professional services,” as specifically requested, to clarify the assignment of sales in the case of potential overlap between the category encompassing such professional services and the category of “in-person services.”

Although the Department addressed many of the recent comments received with respect to the proposed regulation, in some cases the Department concluded the particular comment could not reasonably be addressed or, alternatively, that the comment should be addressed in a different manner than that proposed by the commenter. For example, in both the working draft of the amended regulation and the subsequent proposed regulation, the Department endeavored to be clear that taxpayers and the Department are subject to similar limitations with respect to their authority to adjust returns that apply a reasonable method of assigning sales. The working draft of the regulation provided taxpayers with considerable flexibility to make use of the concept of reasonable approximation, but taxpayers were nonetheless concerned that the Department might have the ability to make an adjustment to a taxpayer’s chosen method of assignment of sales even where the method was otherwise reasonable. The proposed regulation made clear that neither the taxpayer nor the Department may modify a taxpayer’s methodology retrospectively in any case where the taxpayer has properly assigned its sales, including where the taxpayer has used a method of reasonable approximation that is in accordance with the regulatory rules.<sup>2</sup>

Notwithstanding these efforts to refine the rules with respect to methods of reasonable approximation, the Department recently received some further comments suggesting that the proposed regulation failed to place taxpayers and the Department “on equal footing.”<sup>3</sup> The basis for this perception seems to be that while the regulation would restrict the ability of the taxpayer to make retroactive changes to the approximation method used on past returns, it would allow the

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<sup>2</sup> The proposed and final versions of the regulation also expressly allow a taxpayer to change its method of reasonable approximation on a prospective basis, in order to improve the accuracy of the approximation, and similarly allow the Commissioner to require a change in method of approximation to be used prospectively on future taxpayer returns, in order to improve the accuracy of the method of approximation.

<sup>3</sup> See, for example, Michael Jacobs and Robert Weyman, “AIM Proposes Improvements to Tax Rules,” Dec. 19, 2014, available at: <http://blog.aimnet.org/aim-issueconnect/aim-proposes-improvements-to-tax-rules>.

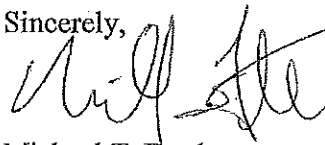
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Department to review on audit whether the taxpayer employed a reasonable methodology in accordance with the regulation. The Department disagrees with this objection, and we thought it would be helpful to share with you the reasons for this.

The ability of the Department to review a taxpayer's chosen methodology to ensure that it satisfies the regulatory criteria is a fundamental part of the audit process. In general, taxpayers and the Department cannot be placed on an "equal footing" in the audit process. As with many aspects of tax reporting in a self-assessment system, the taxpayer has the ability -- and responsibility -- to report its pertinent information in accordance with statutory and regulatory rules and guidance, which in this instance includes the opportunity in many situations for the taxpayer to adopt its own method of reasonable approximation for assigning sales. The Department must in turn be afforded an opportunity to review a taxpayer's chosen method to ensure that such method does in fact satisfy the statutory and regulatory requirements. Therefore, the Department refrained from making additional changes to the structure of the reasonable approximation provisions.

Thank you again for your comments. I hope this information is helpful to you and your members.

Sincerely,



Michael T. Fatale  
Chief, Rulings and Regulations Bureau

Cc: Amy A. Pitter, Commissioner  
Kevin W. Brown, General Counsel  
David S. Davenport, Deputy Commissioner and Senior Policy Counsel

## **Board of Registration in Medicine**

### 243 CMR 2.00 – Licensing and the Practice of Medicine

- Suggested change: Strike section 2.08(4) **Billing For Services of a Physician Assistant. A physician assistant may not bill separately for services rendered.**
- Rationale: Strike this section from the provisions concerning PA billing to allow PAs to bill carriers directly in alignment with Chapter 224 re: PAs as PCPs.

## **Center for Health Information and Analysis**

### 114.5 CMR 11.00 – Criteria and Procedure for the Submission of Health Plan Data

- Suggested change: Repeal full regulation
- Rationale:
  - These regulations are a holdover from the former agency and are no longer followed or enforced.
  - The requested health plan data is given to CHIA by the Massachusetts Health Quality Partners (MHQP), not the health plans.

## **Connector Authority**

### 956 CMR 5.00 – Minimum Creditable Coverage

- Suggested change: Repeal or conform to ACA requirements
- Rationale: The Affordable Care Act contains elements that protect Massachusetts consumers from substandard coverage making the state MCC requirements unnecessary and overly complex and confusing. The ACA Essential Health Benefits, Minimum Essential Coverage and Minimum Actuarial Value rules ensure access to comprehensive and affordable health insurance. Therefore, MCC only adds an additional layer of administrative burden for the state and additional administrative costs for employers (particularly those with employees in other states). MCC also limits employer flexibility when attempting to manage the Cadillac tax and offer affordable health insurance options to employees. For these reasons, MCC regulations should be repealed or conform to ACA requirements.

### 956 CMR 6.00 – Determining Affordability for the Individual Mandate

- Suggested change: Repeal or conform to ACA requirements
- Rationale: The state has already changed the operation of the penalty provisions related to the individual mandate in an attempt to assure that no one is double penalized under both ACA and this regulation. Since the ACA provides for a penalty if individuals do not obtain health insurance, and the penalties are more onerous (i.e. state law provides a three month grace period when changing between insurance plans, ACA requires that you demonstrate that you have insurance at least one day of each month of the year), the state law penalties are duplicative and administratively burdensome. A duplicative set of federal and state requirements also creates confusion in the marketplace.

#### 956 CMR 7.00 – Small Group Wellness Incentive Program

- Suggested change: Repeal
- Rationale: Since the program applies to a very small portion of the market only within the Connector and depends on state funding that has not yet been fully allocated, the regulations should be repealed.

#### 956 CMR 8.00 – Student Health Insurance Program

- Suggested change: Amend section 8.04(2)(d) and section 8.05(2)(b) to strengthen the Student Health Insurance Program by allowing students with MassHealth coverage to obtain a waiver from the mandatory participation provision, but not students who obtain subsidized coverage in the Connector.
- Rationale: While this provision was inserted to drive more traffic and revenue to the Connector, it has had the effect of lowering enrollment levels in student health plans thereby potentially affecting premium rates for those plans. Further, it creates an adverse selection process where students who are healthy and are therefore okay with more limited networks, higher deductibles and less covered services, select cheaper Connector plans, and students who are less health stay in the more robust student health plans. This can also have an adverse effect on premiums.

## **Department of Public Health**

#### 105 CMR 130.00 – Hospital Licensure

- Suggested change: Revise 105 CMR 130.20(A) to read as follows:

*(A) A hospital which meets all of the applicable regulations and laws shall be recommended for licensure to the Public Health Council **no less than 60 days in advance of the effective date of the license.** Upon approval of the application for a license by the*

*Public Health Council, the Department shall issue a hospital license to the applicant. Every license shall state the name and address of the hospital if it either differs from that of the licensee; the period of the licensure; the specific service(s) which the hospital is licensed to deliver; and the name and address of any satellite unit for which the Department has authorized coverage by the hospital license.*

- Rationale:
  - Less than 60 days' notice of state approval of changes affecting licensure negatively affects carriers' ability to operationalize changes, including payment rates and execution of new contracts. These challenges in turn pose a threat to network continuity as they are a necessary prerequisite to maintaining a contractual arrangement with a hospital.
  - The above-mentioned challenges were evident with respect to Baystate's recent acquisition of Wing Memorial Hospital and the limited notice of the approval of that acquisition afforded to carriers.
  - In private contracts, 60 days' notice is generally required to make such a change, which is not inconsistent with industry standards. For example, § 130.122(c) requires a minimum of 90 days' notice to the DPH in the event of a planned discontinuation of services.

## **Division of Insurance**

### 211 CMR 41.00 – Nongroup Health Insurance Rate and Policy Form Filings, Review, and Hearing Procedures under M.G.L. c. 176M

- Suggested change: Repeal full regulation
- Rationale: M.G.L. c. 176M, which is the source of these regulations, is an obsolete statute. Chapter 176M regulated the nongroup market before it was merged with the small group market in 2006. When the small and nongroup markets were merged, the nongroup market became governed by M.G.L. c. 176J. As a result, BCBSMA, and to our knowledge every other carrier, no longer writes products under 176M.

### 211 CMR 52.00 – Managed Care Consumer Protections and Accreditation of Carriers

- Suggested change #1:
  - Include “physician assistant” in definitions and throughout 211 CMR 52.00 (alongside “nurse practitioner”).
- Rationale:
  - Makes regulations consistent with current Massachusetts law.
- Suggested change #2: Amend section 52.12 – (Standards for Provider Contracts)

- Add electronic notification as an option for providing notice
- Rationale:
  - Clarifies that notice may either be electronically or in writing and makes regulations consistent with current business practice.
- Suggested change #3: Amend section 211 CMR 52.13 – (Evidences of Coverage)
  - Strike paper format requirement and move to strictly electronic EOCs
  - Add “carrier” to involuntary disenrollment of members
- Rationale:
  - The requirement for paper EOCs is administratively burdensome.
  - “Carrier” should be added as there’s otherwise no right to cancel or refuse to renew an insured’s coverage for commission of acts of physical or verbal abuse against a carrier.
- Suggested change #4: Amend section 211 CMR 52.15 – Managed Care Consumer Protections (Provider Directories)
  - Strike paper directory requirement
- Rationale:
  - The requirement for paper directories is administratively burdensome. We have electronic directories that are updated one time per week, whereas paper directories are updated one time per year.

211 CMR 63.00 – Young Adult Health Benefit Plans

- Suggested change: Repeal full regulation
- Rationale:
  - These regulations have been replaced by 956 CMR 8.00 and therefore need to be repealed.

211 CMR 66.00 - Small Group Health Insurance [Suggested changes: see below for changes by subsection.]

**Suggested Changes to 211 CMR 66.04 – Definitions:**

- Delete definition of “Actuarial Equivalent”, as no longer applicable.
  - Rationale: This defined term is only used in the definition of “eligible individual” (and our recommendation below for revising the definition of eligible individual



removes the language containing the term “actuarial equivalent”) and certain subsections of 66.07 which we also recommend be deleted. This definition is not included in M.G.L. c. 176J Sec. 1.

- Replace definition of “Creditable Coverage” with the attached new definition, to remove the last section referencing waiting periods and pre-existing conditions.
  - Rationale: make consistent with the definition in M.G.L. c. 176J Sec. 1. As further explained below, we recommend that references to waiting periods and pre-existing conditions be removed to be consistent with 176J.
- Replace definition of “Eligible Dependent” with the attached new definition.
  - Rationale: make consistent with current definition in M.G.L. c. 176J Sec. 1 as updated by Chapter 35 of the Acts of 2013, Sec. 43 (176J updated effective 1/1/14 to include age limit of dependents).
- Replace definition of “Eligible Individual” with the attached new definition.
  - Rationale: make consistent with current definition in M.G.L. c. 176J Sec. 1, as updated by Chapter 35 of the Acts of 2013, Sec. 44 (176J updated effective 1/1/14 to expand definition of eligible individual to any individual who is a resident of the commonwealth).
- Delete definition of “Pre-existing Conditions Provision”
  - Rationale: make consistent with 176J Sec. 1. The definition of “Pre-existing conditions provision” was deleted from 176J Sec. 1 effective 1/1/14 by Chapter 35 of the Acts of 2013, Sec. 46.
- Delete definition of “Waiting Period”.
  - Rationale: make consistent with M.G.L. c. 176J Sec. 1. The definition of “Waiting period” was deleted from 176J Sec. 1 effective 1/1/14 by Chapter 35 of the Acts of 2013, Sec. 47.

**Suggested Changes to 211 CMR 66.05 – Minimum Coverage Standards:**

- Update dates of open enrollment period listed in 211 CMR 66.05(1)(a) from July 1-August 15 to October 15-December 7.
  - Rationale: Make regulation consistent with requirements under M.G.L. c. 176J. 176J sec. 4(a)(3) was updated by Chapter 3 of the Acts of 2013, Sec. 8, to revise the open enrollment period dates.

- Revise subsections 66.05(1)(a)(1)-(2) to reflect new requirements regarding enrollment of individuals.
  - Rationale: Make consistent with requirements under M.G.L. c. 176J Sec. 4(a)(2). 176J Sec. 4(a)(2) was revised by Chapter 35 of Acts of 2013, Sec. 49, effective 1/1/14 (as well as Chapter 3 of Acts of 2013, Sec. 8, effective 2/15/13 and as reflected in DOI Bulletin 2013-04) to include certain individuals, other than just HIPAA-eligible individuals, in an exception to the mandatory open enrollment period.
- Revise effective dates of coverage listed in 66.05(1)(b) consistent with changes to M.G.L. c. 176J Sec. 4(a)(2) and 4(a)(3).
  - Rationale: make effective dates of coverage consistent with 176J sec. 4(a)(2) and (4)(a)(3) as updated by Chapter 35 of the Acts of 2013, Sec. 49 and Chapter 3 of the Acts of 2013, Sec. 8.

**Suggested Changes to 211 CMR 66.07 -- Pre-existing Conditions and Waiting Periods:**

- Delete subsections 66.07(3) - (9), leaving unchanged subsections (1) and (2) of 211 CMR 66.07. Also recommend adding one sentence prohibiting carriers from imposing pre-existing conditions or waiting periods on a health plan.
  - Rationale: make consistent with M.G.L. c. 176J Sec. 4 and 5. Chapter 35 of Acts of 2013, Sec. 50, deleted from 176J Sec. 5 the provisions regarding pre-existing conditions and waiting periods, and Chapter 35 of the Acts of 2013, Sec. 49, added a new sentence to 176J Sec. 4(a)(2) prohibiting carriers from imposing pre-existing conditions or waiting periods of any duration. The sentence we recommend adding is identical to the language in 176J Sec. 4(a)(2).

**Suggested Changes to 211 CMR 66.09 -- Submission and Review of Rate Filings:**

- Update filing deadlines listed in subsection 66.09(2) to July 1 for rates effective the following January 1.
  - Rationale: reflect current submission deadlines outlined in M.G.L. c. 176J Sec. 6(c). 176J Sec. 6(c) was updated by Chapter 35 of the Acts of 2013, Sec. 51, effective July 5, 2013.

**Suggested Changes to 211 CMR 66.12 -- Disclosure:**

- Delete subsection (2).
  - Rationale: make consistent with M.G.L. c.176J, which (as described above) was updated by the Acts of 2013 to remove references to pre-existing conditions and waiting periods.

## Regulatory Review Examples

### Health Connector

#### *Align regulations with Affordable Care Act*

Example:

#### 956 CMR 5.00 – Minimum Creditable Coverage (MCC)

- The Affordable Care Act contains elements that protect Massachusetts consumers from substandard coverage making the state MCC requirements unnecessary and overly complex and confusing. The ACA Essential Health Benefits, Minimum Essential Coverage and Minimum Actuarial Value rules ensure access to comprehensive and affordable health insurance. Therefore, MCC only adds an additional layer of administrative burden for the state and additional administrative costs for employers (particularly those with employees in other states). MCC also limits employer flexibility when attempting to manage the Cadillac tax and offer affordable health insurance options to employees. For these reasons, MCC regulations should be repealed or conform to ACA requirements.

### Division of Insurance

#### *Update Regulations to reflect changes in the market*

Example:

#### 211 CMR 52.00 – Managed Care Consumer Protections and Accreditation of Carriers

- Strike paper directory requirement. Electronic directories exist that are updated one time per week, whereas paper directories are updated one time per year.

#### 211 CMR 41.00 – Nongroup Health Insurance Rate and Policy Form Filings, Review, and Hearing Procedures under M.G.L. c. 176M

- These regulations applied to the nongroup market before it was merged with the small group market in 2006. No products are written under this statute.

#### 211 CMR 63.00 – Young Adult Health Benefit Plans

- These regulations have been replaced by another section, 956 CMR 8.00

### Center for Health Information and Analysis (CHIA)

#### *Recognize out of date data requests from previous entity, Division of Health Care Finance and Policy (DHCFP)*

Example:

114.5 CMR 11.00 – Criteria and Procedure for the Submission of Health Plan Data

- These regulations are a holdover from when the agency was DHCFP
- These regulations are no longer enforced and this data is provided by another external entity, not health plans.



**Regulatory Review – AIM Member Call List**

**CONFIDENTIAL**

**Updated: April 15, 2015**

Issue: Emergency Generator Regulations  
Contact: Brad Duffin and Steven Fugarazzo

T. Bradley Duffin

Director, Facilities and Real Estate

Redacted contact information for T. Bradley Duffin, including phone and email addresses.

Issue: Hoisting Regulations

Contact: Arthur Barrett, CEO

Redacted contact information for Arthur Barrett, including phone and email addresses.

Issue: MCAD process

Contact: Peter Vickery, Esq

Redacted contact information for Peter Vickery, including phone and email addresses.

Issues: 1.) Fire sprinkler regulations and state board Automatic Sprinkler Appeals Board (ASAB)  
2.) Statewide push for business representation on all state agencies, boards etc. that establish rules or make judgements

Contact: Kate Putnam, CEO Package Machinery Company, Inc. (AIM Board Member)

Redacted contact information for Kate Putnam, including phone and email addresses.