

# MINTZ LEVIN

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December 23, 2015

Via E-Mail

Commissioner Mark Nunnelly  
Department of Revenue  
100 Cambridge Street  
Boston, MA 02114

Re: Reduction of Regulatory Burden - Corporation Excise Apportionment

Dear Commissioner Nunnelly:

In connection with Governor Baker's program to reduce unnecessary regulatory burdens, as declared in Executive Order No. 562, I enclose a proposed amendment to the Department of Revenue's regulation on the apportionment of corporate income, which I am submitting on behalf of the Motion Picture Association of America, Inc.

The corporation excise tax regulations on apportionment of "sales" of multistate corporations are complex, perhaps necessarily so. This is especially true in the context of receipts from services and other intangibles. The attached proposal does not accomplish a systemic simplification, but it does simplify sales factor apportionment for one category of taxpayers, companies which produce film programming and deliver it together with advertising to customers other than the viewing public. The proposed amendment allows such companies, defined as "film programming networks," to apportion their receipts from licensing of film programming and the sale of advertising based upon the commercial domicile of their customers, similar to what producers/wholesalers of tangible products do. This method would be used in place of the current regulations' measurement based on the location of the ultimate viewing audience.

The audience approach not only ignores the lack of legal and economic relationships between such film programming networks and the viewing public but also imposes an impossible burden on the networks in light of the complex and constantly changing ways in which viewers access programming. This burden is inconsistent with the approach taken in more recent years by other states that have considered the question. It has made the Commonwealth an outlier, now seen as not friendly to business. Commercial domicile is a well-established concept in state taxation, already used in the Massachusetts regulations in other contexts. Its use here will provide ease of compliance for taxpayers and will facilitate effective audits by the Department in place of inevitable administrative disputes and litigation as to appropriate measurement standards.

**Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

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Enclosed is a redlined copy showing the proposed new language as well as a clean copy of the revised regulation.

I believe this proposal will help reduce the “unnecessary cost, burden and complexity” described in Executive Order No. 562. I would appreciate the opportunity to meet with you to discuss it, at your convenience, and thank you in advance for your consideration.

Best personal regards,



William F. Weld

Member

WFW/mew  
Enclosures

12-23-15

PROPOSED AMENDMENTS OF THE MOTION PICTURE ASSOCIATION OF  
AMERICA  
TO 830 CMR 63.38.1: APPORTIONMENT OF INCOME

Note: New language is underscored. Deleted language is stricken through.

Section 63.38.1(9)(d)(1)(h):

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

**i. Industry-Specific Sales Factor Provisions that Remain in Effect.** Prior to the enactment of St. 2013, c. 46, § 37 the Commissioner promulgated industry-specific alternative apportionment regulations for pipeline companies, corporations engaged in the electricity industry, and corporations engaged in the telecommunications industry. See 830 CMR 63.38.8 (pipeline companies); 830 CMR 63.38.10 (electricity industry) and 830 CMR 63.38.11 (telecommunications industry). These industry-specific regulations remain fully in effect and are not superseded in whole or in part by the rules of 830 CMR 63.38.1(9)(d), as these regulations continue to address circumstances where the provisions of M.G.L. c. 63, § 38, including M.G.L. c. 63, § 38(1), are not reasonably adapted to

approximate the net income derived from business carried on within Massachusetts. However, a special rule pertaining to taxpayers that provide telecommunications services that are also engaged in the sale or license of digital goods and services shall apply notwithstanding the rules set forth in 830 CMR 63.38.11. See 830 CMR 63.38.1(9)(d)7.b.ii.

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

**iii. New Industry-Specific Sales Factor Provisions now Determined under 830 CMR 63.38.1(9)(d).** In the case of the broadcast industry, the sales factor is now determined pursuant to the rule of 830 CMR 63.38.1(9)(d)(4)(c)(ii)(D).

**i. Application to Services Provided Directly or Indirectly to a RIC.** Nothing in 830 CMR 63.38.1(9)(d) shall be construed to supersede or affect the application of the rules set forth in 830 CMR 63.38.7 that apply to mutual fund service corporations. See M.G.L. c. 63, § 38(m). However, rules with respect to mutual fund sales, as defined at 830 CMR 63.38.1(2), as made by a taxpayer that is not a mutual fund service corporation, are set forth at 830 CMR 63.38.1(9)(d)4.d.iii(D).

**j. Further Guidance.** The Commissioner may issue further public written statements with respect to the rules set forth in 830 CMR 63.38.1(9)(d). Such further guidance may, among other things, include guidance with respect to: (1) what constitutes a reasonable method of approximation within the meaning of such rules, and (2) the circumstances in which a filing change with respect to a taxpayer's method of reasonable approximation will be deemed appropriate.

**Section 63.38.1(9)(d)(4)(c):**

**c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.**

**i. In General.** Where the service provided by the taxpayer is not an in-person service within the meaning of 830 CMR 63.38.1(9)(d)4.b or a professional service within the meaning of 830 CMR 63.38.1(9)(d)4.d, and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the sale is in Massachusetts if and to the extent that the service is delivered in Massachusetts. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c, a service that is delivered "to" a customer is a service in which the customer and not a third party is the 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 (see 830 CMR 63.38.1(9)(d)4.c.ii(A)) or, except as provided by 830 CMR 63.38.1(9)(d)(4)(c)(ii)(D), the direct or indirect delivery of advertising to the customer's intended audience (see 830 CMR 63.38.1(9)(d)4.c.ii(C)). 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. Except in the instance of a service that is delivered through a customer (where the service must be delivered electronically), a service is included within the meaning of this section, 830 CMR 63.38.1(9)(d)4.c, irrespective of the method of delivery, e.g., whether such service is delivered by a physical means or through an electronic transmission.

**ii. Assignment of Sales.** The assignment of a sale to a state or states in the instance of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this section, 830 CMR 63.38.1(9)(d)4.c., a service delivered by an electronic transmission shall not be considered a delivery by a physical means). In any instance where, applying the rules set forth in this section, 830 CMR 63.38.1(9)(d)4.c, the rule of assignment depends on whether the customer is an individual or a business customer, and the taxpayer acting in

good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

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

**1. Rule of Determination.** In assigning the sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where such services are delivered. Where the taxpayer is able to determine the state or states where the service is delivered, it shall assign the sale to such state or states.

**2. Rule of Reasonable Approximation.** Where the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate such state or states.

**3. Examples.** Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to

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

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

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

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

Example 4. Fulfillment Corp, a corporation based outside Massachusetts, provides product delivery fulfillment services in Massachusetts and in neighboring states to

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

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

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

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



**1. Services Delivered By Electronic Transmission to an Individual Customer.**

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

**b. Rules of Reasonable Approximation.** If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states. Where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall reasonably approximate such state or states using the customer's billing address.

**2. Services Delivered By Electronic Transmission to a Business Customer.**

**a. Rule of Determination.** In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Massachusetts if and to the extent that the taxpayer's customer receives the service in Massachusetts. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2, it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.

**b. Rule of Reasonable Approximation.** If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states.

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

**d. Safe Harbor.** In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate under 830 CMR 63.38.1(9)(d)4.c.ii(B)2.b, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.c, apply the safe harbor stated in this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d. Under this safe harbor, a taxpayer may assign its sales to a particular customer based upon the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 830 CMR 63.38.1(9)(d)4.c.ii(B)2, to services delivered by electronic transmission to a business customer, and not otherwise.

**3. Examples.** Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to

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

Example 1. Support Corp, a corporation that is based outside Massachusetts, provides software support and diagnostic services to individual and business customers that have previously purchased certain software from third-party vendors. These individual and business customers are located in Massachusetts and other states. Support Corp supplies its services on a case by case basis when directly contacted by its customer. Support Corp generally provides these services through the Internet but sometimes provides these services by phone. In all cases, Support Corp verifies the customer's account information before providing any service. Using the information that Support Corp verifies before performing a service, Support Corp can determine where its services are received, and therefore must assign its sales to these locations. The sales made to Support Corp's individual and business customers are in Massachusetts to the extent that Support Corp's services are received in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1 and 2.

Example 2. Online Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to individual customers who are resident in Massachusetts and in other states. These customers access Online Corp's web services primarily in their states of residence, and sometimes, while traveling, in other states. For a substantial portion of its sales, either Online Corp can determine the state or states where such services are received, or, where it cannot determine such state or states, it has sufficient information regarding the place of receipt to reasonably approximate such state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of such sales. Assuming that Online Corp reasonably believes, based on all

available information, that the geographic distribution of the sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Massachusetts the sales for which it does not know the customers' location in the same proportion as those sales for which it has this information. See 830 CMR 63.38.1(9)(d)1.e.ii.

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

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

Example 5. Net Corp, a corporation based outside Massachusetts, provides web-based services to a business customer, Business Corp, a company with offices in Massachusetts and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Massachusetts were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In such case, 75% of the sale is received in Massachusetts, and therefore 75% of the sale is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)2.a. Assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate such location or

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

Example 6. Net Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to more than 250 individual and business customers in Massachusetts and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate such state or states. Also assume that Net Corp does not derive more than 5% of its sales of services from any single customer. Net Corp may apply the safe harbor stated in CMR 830 63.38.1(9)(d)4.c.ii(B)2.d, and may assign its sales using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its sales would be otherwise assigned, it must exclude those sales from the numerator and denominator of its sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

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

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

**2. Rule of Reasonable Approximation.** If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate such state or states.

**3. Select Secondary Rules of Reasonable Approximation.** i. Where~~Where~~Except as provided by 830 CMR 63.38.1(9)(d)(4)(c)(ii)(D), where a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate such location, the taxpayer shall reasonably approximate the audience in a state for such advertising using the following secondary rules of reasonable approximation. Where 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 such 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 such area.

ii. Where a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling such service to end users or other third-party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third-party recipients from which it can determine or reasonably approximate such location, the taxpayer shall 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 such services, relative to the total population in such area.

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

Example 1. Cable TV Corp, a corporation that is based outside of Massachusetts, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Massachusetts. Second, Cable TV Corp sells monthly subscriptions to individual

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

~~Example 2. Network Corp, a corporation that is based outside of Massachusetts, sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming as distributed by unrelated cable television and satellite television transmission companies. Network Corp's sale of advertising time to its business customers is assigned to Massachusetts to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(C)1. If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding~~



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

Example 4.3. Retail Corp, a corporation that is based outside of Massachusetts, sells tangible property through its retail stores located in Massachusetts and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls

from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp, and must assign the proceeds from this service to the state or states from which the phone calls are placed by such customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate such locations, Answer Co must approximate the amount of its Massachusetts sales by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Massachusetts population in the specific geographic area from which the calls are placed relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.i; 830 CMR 63.38.1(9)(d)4.c.ii(C) . Answer Co's sales shall also be excluded from the numerator and denominator of its sales factor in any case in which such sales would be assigned to a state in which Answer Co is not taxable. See 830 CMR 63.38.1(9)(d).1.f.ii.

Example 5.4. Web Corp, a corporation that is based outside of Massachusetts, sells tangible property to customers via its Internet website. Design Co designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co's services are delivered to Web Corp, the proceeds from which are assigned pursuant to 830 CMR 63.38.1(9)(d)4.c.ii(B). The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co's services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

Example 6.5. Wholesale Corp, a corporation that is based outside Massachusetts, develops an Internet-based information database outside Massachusetts and enters into a contract with Retail Corp whereby Retail Corp will market and sell access to this database to end users. Depending on the facts, the provision of database

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

(D) Services Provided by Film Programming Networks. Services provided by a film programming network as defined in this regulation consist of the distribution of film programming and advertising. Except in the case of receipts from retail sales of film programming directly to consumers, receipts from the distribution of film programming and advertising are assigned to Massachusetts only if the commercial domicile of the film programming network's customer is in this state. For purposes of this section, the following definitions shall apply:

(i) Film programming means one or more performances, events or productions (or segments of performances, events or productions) intended to be distributed for visual or auditory perception including, but not limited to, news, entertainment, sporting events, plays, stories or other literary commercial, educational or artistic works.

(ii) Film programming network means an entity, including a pass-through entity and its members or partners, engaged in the business of transmitting film programming and includes cable program networks, television broadcast networks and affiliated television distribution companies but does not include FCC-licensed television stations nor cable operating systems, direct broadcast satellite systems, or other multi-channel video program distributors.

(iii) Transmitting film programming means the transfer of film programming by an electronic or other signal or through any other means of communication.

(iv) Commercial domicile is defined in 830 CMR 63.38.1(2).

(v) Customer means a person that has a direct contractual relationship with a film programming network and from whom the film programming network derives receipts from the distribution of film programming or advertising.

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12-23-15

**PROPOSED AMENDMENTS OF THE MOTION PICTURE ASSOCIATION OF  
AMERICA  
TO 830 CMR 63.38.1: APPORTIONMENT OF INCOME**

**Section 63.38.1(9)(d)(1)(h):**

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

**i. Industry-Specific Sales Factor Provisions that Remain in Effect.** Prior to the enactment of St. 2013, c. 46, § 37 the Commissioner promulgated industry-specific alternative apportionment regulations for pipeline companies, corporations engaged in the electricity industry, and corporations engaged in the telecommunications industry. See 830 CMR 63.38.8 (pipeline companies); 830 CMR 63.38.10 (electricity industry) and 830 CMR 63.38.11 (telecommunications industry). These industry-specific regulations remain fully in effect and are not superseded in whole or in part by the rules of 830 CMR 63.38.1(9)(d), as these regulations continue to address circumstances where the provisions of M.G.L. c. 63, § 38, including M.G.L. c. 63, § 38(f), are not reasonably adapted to approximate the net income derived from business carried on within Massachusetts.

However, a special rule pertaining to taxpayers that provide telecommunications services that are also engaged in the sale or license of digital goods and services shall apply notwithstanding the rules set forth in 830 CMR 63.38.11. See 830 CMR 63.38.1(9)(d)7.b.ii.

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

**iii. New Industry-Specific Sales Factor Provisions now Determined under 830 CMR 63.38.1(9)(d).** In the case of the broadcast industry, the sales factor is now determined pursuant to the rule of 830 CMR 63.38.1(9)(d)(4)(c)(ii)(D).

**i. Application to Services Provided Directly or Indirectly to a RIC.** Nothing in 830 CMR 63.38.1(9)(d) shall be construed to supersede or affect the application of the rules set forth in 830 CMR 63.38.7 that apply to mutual fund service corporations. See M.G.L. c. 63, § 38(m). However, rules with respect to mutual fund sales, as defined at 830 CMR 63.38.1(2), as made by a taxpayer that is not a mutual fund service corporation, are set forth at 830 CMR 63.38.1(9)(d)4.d.iii(D).

**j. Further Guidance.** The Commissioner may issue further public written statements with respect to the rules set forth in 830 CMR 63.38.1(9)(d). Such further guidance may, among other things, include guidance with respect to: (1) what constitutes a reasonable method of approximation within the meaning of such rules, and (2) the circumstances in which a filing change with respect to a taxpayer's method of reasonable approximation will be deemed appropriate.



**Section 63.38.1(9)(d)(4)(c):**

**c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.**

**i. In General.** Where the service provided by the taxpayer is not an in-person service within the meaning of 830 CMR 63.38.1(9)(d)4.b or a professional service within the meaning of 830 CMR 63.38.1(9)(d)4.d, and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the sale is in Massachusetts if and to the extent that the service is delivered in Massachusetts. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c, a service that is delivered "to" a customer is a service in which the customer and not a third party is the 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 (see 830 CMR 63.38.1(9)(d)4.c.ii(A)) or, except as provided by 830 CMR 63.38.1(9)(d)(4)(c)(ii)(D), the direct or indirect delivery of advertising to the customer's intended audience (see 830 CMR 63.38.1(9)(d)4.c.ii(C)). 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. Except in the instance of a service that is delivered through a customer (where the service must be delivered electronically), a service is included within the meaning of this section, 830 CMR 63.38.1(9)(d)4.c, irrespective of the method of delivery, e.g., whether such service is delivered by a physical means or through an electronic transmission.

**ii. Assignment of Sales.** The assignment of a sale to a state or states in the instance of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this section, 830 CMR 63.38.1(9)(d)4.c., a service delivered by an electronic transmission shall not be considered a delivery by a physical means). In any instance where, applying the rules set forth in this section, 830 CMR 63.38.1(9)(d)4.c, the rule of assignment depends on whether the customer is an individual or a business customer, and the taxpayer acting in

good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

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

**1. Rule of Determination.** In assigning the sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where such services are delivered. Where the taxpayer is able to determine the state or states where the service is delivered, it shall assign the sale to such state or states.

**2. Rule of Reasonable Approximation.** Where the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate such state or states.

**3. Examples.** Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to

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

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

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

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

Example 4. Fulfillment Corp, a corporation based outside Massachusetts, provides product delivery fulfillment services in Massachusetts and in neighboring states to

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

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

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

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

## **1. Services Delivered By Electronic Transmission to an Individual Customer.**

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

**b. Rules of Reasonable Approximation.** If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states. Where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall reasonably approximate such state or states using the customer's billing address.

## **2. Services Delivered By Electronic Transmission to a Business Customer.**

**a. Rule of Determination.** In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Massachusetts if and to the extent that the taxpayer's customer receives the service in Massachusetts. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states. For purposes of this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2, it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.

**b. Rule of Reasonable Approximation.** If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states.

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

**d. Safe Harbor.** In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate under 830 CMR 63.38.1(9)(d)4.c.ii(B)2.b, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.c, apply the safe harbor stated in this section, 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d. Under this safe harbor, a taxpayer may assign its sales to a particular customer based upon the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 830 CMR 63.38.1(9)(d)4.c.ii(B)2, to services delivered by electronic transmission to a business customer, and not otherwise.

**3. Examples.** Assume in each of these examples that the taxpayer that provides the service is taxable in Massachusetts and is to apportion its income pursuant to

**M.G.L. c. 63, § 38.** Also, assume, where relevant, unless otherwise stated, that the taxpayer is taxable in each state other than Massachusetts to which its sale or sales would be assigned, so that there is no requirement in such examples that such sale or sales must be eliminated from the numerator and denominator of the taxpayer's sales factor. See 830 CMR 63.38,1(9)(d)1.f.ii. Further, assume where relevant, unless otherwise stated, that the safe harbor set forth at 830 CMR 63.38.1(9)(d)4.c.ii(B)2.d , does not apply.

Example 1. Support Corp, a corporation that is based outside Massachusetts, provides software support and diagnostic services to individual and business customers that have previously purchased certain software from third-party vendors. These individual and business customers are located in Massachusetts and other states. Support Corp supplies its services on a case by case basis when directly contacted by its customer. Support Corp generally provides these services through the Internet but sometimes provides these services by phone. In all cases, Support Corp verifies the customer's account information before providing any service. Using the information that Support Corp verifies before performing a service, Support Corp can determine where its services are received, and therefore must assign its sales to these locations. The sales made to Support Corp's individual and business customers are in Massachusetts to the extent that Support Corp's services are received in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)1 and 2.

Example 2. Online Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to individual customers who are resident in Massachusetts and in other states. These customers access Online Corp's web services primarily in their states of residence, and sometimes, while traveling, in other states. For a substantial portion of its sales, either Online Corp can determine the state or states where such services are received, or, where it cannot determine such state or states, it has sufficient information regarding the place of receipt to reasonably approximate such state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of such sales. Assuming that Online Corp reasonably believes, based on all

available information, that the geographic distribution of the sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Massachusetts the sales for which it does not know the customers' location in the same proportion as those sales for which it has this information. See 830 CMR 63.38.1(9)(d)1.e.ii.

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

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

Example 5. Net Corp, a corporation based outside Massachusetts, provides web-based services to a business customer, Business Corp, a company with offices in Massachusetts and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Massachusetts were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In such case, 75% of the sale is received in Massachusetts, and therefore 75% of the sale is in Massachusetts. See 830 CMR 63.38.1(9)(d)4.c.ii(B)2.a. Assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate such location or



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

Example 6. Net Corp, a corporation based outside Massachusetts, provides web-based services through the means of the Internet to more than 250 individual and business customers in Massachusetts and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate such state or states. Also assume that Net Corp does not derive more than 5% of its sales of services from any single customer. Net Corp may apply the safe harbor stated in CMR 830 63.38.1(9)(d)4.c.ii(B)2.d, and may assign its sales using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its sales would be otherwise assigned, it must exclude those sales from the numerator and denominator of its sales factor. See 830 CMR 63.38.1(9)(d)1.f.ii.

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

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

**2. Rule of Reasonable Approximation.** If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate such state or states.

**3. Select Secondary Rules of Reasonable Approximation.** i. Except as provided by 830 CMR 63.38.1(9)(d)(4)(c)(ii)(D), where a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate such location, the taxpayer shall reasonably approximate the audience in a state for such advertising using the following secondary rules of reasonable approximation. Where 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 such 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 such area.

ii. Where a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling such service to end users or other third-party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third-party recipients from which it can determine or reasonably approximate such location, the taxpayer shall 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 such services, relative to the total population in such area.

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

Example 1. Cable TV Corp, a corporation that is based outside of Massachusetts, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Massachusetts. Second, Cable TV Corp sells monthly subscriptions to individual

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

Example 2. Web Corp, a corporation that is based outside Massachusetts, provides Internet content to viewers in Massachusetts and other states. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. Web Corp's sale of advertising space to its business customers is assigned to Massachusetts to the extent that the viewers of the Internet content are in Massachusetts, as measured by viewings or clicks. See 830 CMR

63.38.1(9)(d)4.c.ii(C)1. If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of its viewers to reasonably approximate such location, Web Corp must approximate the amount of its Massachusetts sales by multiplying the amount of such sales by a percentage that reflects the Massachusetts population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.i. In any case in which Web Corp's sales would be assigned to a state in which Web Corp is not taxable, such sales shall be excluded from the numerator and denominator of Web Corp's sales factor. See 830 CMR 63.38.1(9)(d).1.f.ii.

Example 3. Retail Corp, a corporation that is based outside of Massachusetts, sells tangible property through its retail stores located in Massachusetts and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp, and must assign the proceeds from this service to the state or states from which the phone calls are placed by such customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate such locations, Answer Co must approximate the amount of its Massachusetts sales by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Massachusetts population in the specific geographic area from which the calls are placed relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.i; 830 CMR 63.38.1(9)(d)4.c.ii(C) . Answer Co's sales shall also be excluded from the numerator and denominator of its sales factor in any case in which such sales would be assigned to a state in which Answer Co is not taxable. See 830 CMR 63.38.1(9)(d).1.f.ii.

Example 4. Web Corp, a corporation that is based outside of Massachusetts, sells tangible property to customers via its Internet website. Design Co designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co's services are delivered to Web Corp, the proceeds from which are assigned pursuant to 830 CMR 63.38.1(9)(d)4.c.ii(B). The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co's services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

Example 5. Wholesale Corp, a corporation that is based outside Massachusetts, develops an Internet-based information database outside Massachusetts and enters into a contract with Retail Corp whereby Retail Corp will market and sell access to this database to end users. Depending on the facts, the provision of database access may be either the sale of a service or the license of intangible property or may have elements of both. Assume that on the particular facts applicable in this example Wholesale Corp is selling database access in transactions properly characterized as involving the performance of a service. When an end user purchases access to Wholesale Corp's database from Retail Corp, Retail Corp in turn compensates Wholesale Corp in connection with that transaction. In this case, Wholesale Corp's services are being delivered through Retail Corp to the end user. Wholesale Corp must assign its sales to Retail Corp to the state or states in which the end users receive access to Wholesale Corp's database. If Wholesale Corp cannot determine the state or states where the end users actually receive access to Wholesale Corp's database, and lacks sufficient information regarding the location from which the end users access the database to reasonably approximate such location, Wholesale Corp must approximate the extent to which its services are received by end users in Massachusetts by using a percentage that reflects the ratio of the Massachusetts population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in such area. See 830 CMR 63.38.1(9)(d)4.c.ii(C)3.ii. Note that it does not matter for purposes of the analysis

whether Wholesale Corp's sale of database access constitutes a service or a license of intangible property, or some combination of both. See 830 CMR 63.38.1(9)(d)5.e. In any case in which Wholesale Corp's sales would be assigned to a state in which Wholesale Corp is not taxable, such sales shall be excluded from the numerator and denominator of Wholesale Corp's sales factor. See 830 CMR 63.38.1(9)(d).1.f.ii.

**(D) Services Provided by Film Programming Networks.** Services provided by a film programming network as defined in this regulation consist of the distribution of film programming and advertising. Except in the case of receipts from retail sales of film programming directly to consumers, receipts from the distribution of film programming and advertising are assigned to Massachusetts only if the commercial domicile of the film programming network's customer is in this state. For purposes of this section, the following definitions shall apply:

**(i)** Film programming means one or more performances, events or productions (or segments of performances, events or productions) intended to be distributed for visual or auditory perception including, but not limited to, news, entertainment, sporting events, plays, stories or other literary commercial, educational or artistic works.

**(ii)** Film programming network means an entity, including a pass-through entity and its members or partners, engaged in the business of transmitting film programming and includes cable program networks, television broadcast networks and affiliated television distribution companies but does not include FCC-licensed television stations nor cable operating systems, direct broadcast satellite systems, or other multi-channel video program distributors.

**(iii)** Transmitting film programming means the transfer of film programming by an electronic or other signal or through any other means of communication.

**(iv)** Commercial domicile is defined in 830 CMR 63.38.1(2).

(v) Customer means a person that has a direct contractual relationship with a film programming network and from whom the film programming network derives receipts from the distribution of film programming or advertising.

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