

ALLOCATION AND APPORTIONMENT OF VERMONT NET INCOME BY CORPORATIONS

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

Effective for tax years beginning on and after November 1, 2020

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

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

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

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

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

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

(2) All items of nonbusiness income (income which is not includable in the apportionable tax base) shall be allocated as provided in Sec. 1.5833(e)(E)(6) of this regulation.

(3) The apportionment percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, sales or receipts, and payrolls within Vermont during the period covered by the return, and dividing the total of such percentages by three. However, if any one of the factors (for property, receipts or payroll) is missing, the other two percentages are added and the sum is divided by two, and if two of the factors are missing, the remaining percentage is the apportionment percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator and its denominator are zero).

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

Section B. (b) Property Factor

(1) The property factor is a fraction, the numerator of which is the average value of all real and tangible property within this state based on original cost at the beginning of the taxable year and at the end of the taxable year; and the denominator of which is the average value of property based on original cost both within and without the state at the beginning and at the end of the taxable year.

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

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

(3) Construction in progress will not be included in the factors until the asset constructed is placed in service.

(4) In determining the property factor, real and personal property rented or leased to the taxpayer, as well as real and personal property owned by it must be considered. The value of rented real and personal property both within and without the state is determined by multiplying the gross rent payable during the tax year by eight (8).

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

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

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

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

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

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

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

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

(D) "Gross Rent" does not include:

(~~A~~ 1) Intercompany rents if both the lessor and lessee are taxed on a consolidated basis.

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

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

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

Section C. (e) Payroll Factor

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

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

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

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

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

- (A) the individuals’ services are performed entirely within Vermont;
- (B) the individuals’ services are performed both within and without Vermont, but the out-of-state services are incidental to the Vermont services;
- (C) some of the individuals’ services are performed within Vermont and the company’s base of operation or the place from where the service is controlled is within Vermont; or
- (D) some of the individual’s services are performed within Vermont, which is his or her state of residence, and there is no base of operation or place from where the service is controlled in any of the other states where part of the individual’s services are performed.

Section D.-(d) Sales and Receipts Factor

(1) General Principles of Application; Definitions.

The sales and receipt factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts which constitute business income and are includable in the apportionable base for the tax year. Receipts from the following are allocable to Vermont:

- (a) sales of tangible personal property in Vermont;
- (b) services performed in Vermont;
- (c) rentals from property situated in Vermont;
- (d) licenses, leases, and sales of intangible property, royalties from the used in Vermont of patents and copyrights;
- (e) all other business receipts earned in Vermont.

All such receipts of the period covered by the return (computed on the cash or accrual basis, in accordance with the method of accounting used in the computation of the taxpayers “Vermont net income”) must be taken into account. When receipts from sales other than tangible personal property contribute to the sales factor, the method for calculating receipts shall rely on the principle of market-based sourcing.

(A) Definitions

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

- (1) “Billing address” means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer’s account as of the time of the transaction as kept in good faith in the normal course of business and not for tax avoidance purposes.
- (2) “Business customer” means a customer that is a business operating in any form, including a sole proprietorship. Sales to a non-profit organization, to a trust, to the U.S. Government, to a foreign, state or local government, or to an agency or instrumentality of that government are treated as sales to a business customer and must be assigned consistent with the rules for those sales.
- (3) “Code” means the Internal Revenue Code as currently written and subsequently amended.
- (4) “Individual customer” means a customer that is not a business customer.
- (5) “Intangible property” generally means property that is not physical or whose representation by physical means is merely incidental and includes, without limitation, copyrights; patents; trademarks; trade names; brand names; franchises; licenses; trade secrets; trade dress; information; know-how; methods; programs; procedures; systems; formulae; processes; technical data; designs; licenses; literary, musical, or artistic compositions; information; ideas; contract rights including broadcast rights; agreements not to compete; goodwill and going concern value; securities; and, except as otherwise provided, computer software. Receipts from the sale of intangible property may be excluded from the numerator and denominator of the taxpayer’s receipts factor pursuant to Article IV.17 and 32 V.S.A. §5833(a)(3)(D).
- (6) “Place of order,” means the physical location from which a customer places an order for a sale other than a sale of tangible personal property from a taxpayer, resulting in a contract with the taxpayer.

- (7) “Population” means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.
- (8) “Receipts” means all gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer’s trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.
- (9) “Related party” means:
- (1) a stockholder who is an individual, or a member of the stockholder's family set forth in section 318 of the Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 per cent of the value of the taxpayer's outstanding stock;
- (2) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 per cent of the value of the taxpayer's outstanding stock; or
- (3) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 per cent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.
- (10) “State where a contract of sale is principally managed by the customer,” means the primary location at which an employee or other representative of a customer serves as the primary contact person for the taxpayer with respect to the day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

(B) General Principles of Application; Contemporaneous Records.

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

1. A taxpayer shall apply the rules set forth in Section D based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing including, without limitation, the taxpayer’s books and records kept in the normal course of business. A taxpayer shall determine its method of assigning receipts in good faith, and apply it consistently with respect to similar transactions and year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its receipts,

including its underlying assumptions, and shall provide those records to the Department of Taxes upon request.

2. Section D provides various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy (and must continue to do so with each succeeding rule in the hierarchy, where applicable). For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.
3. A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the regulatory standards set forth in Section D, rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

(C) Rules of Reasonable Approximation.

1. In General. In general, Section D establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Vermont. The regulation also sets forth rules of reasonable approximation, which apply if the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation prescribed in Section D. In other cases, the applicable rule in Section D permits a taxpayer to reasonably approximate the state or states of assignment, using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in Section D.
2. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth in Section D(3)(Sale of a Service), a taxpayer can ascertain the state or states of assignment of a substantial portion of its receipts from sales of substantially similar services ("assigned receipts"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales which it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. This rule also applies in the context of licenses and sales of intangible property where the substance of the transaction resembles a sale of goods or services. See Section D(5) and Section D(6).
3. Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this Section D from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

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

1. The receipts factor only includes those amounts defined as receipts under Section D(1)(A)(8) and applicable regulations.
2. Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor. See Section D(6)(1)(D).
3. In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Section D (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer's receipts factor.
4. In a case in which a taxpayer can ascertain the state or states to which receipts from a sale are to be assigned pursuant to the applicable rules set forth in Section D, but the taxpayer is not taxable in one or more of those states, the receipts that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded apportioned pursuant to 32 V.S.A. §5833(a)(3)(A) for tangible personal property or apportioned pursuant to 32 V.S.A. §5833(a)(3)(B) for sales other than tangible personal property.
5. Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded.

(E) Changes in Methodology; Commissioner Review

1. Nothing in this Regulation is intended to limited the application of 32 V.S.A. §5833(b) or the authority granted to the Commissioner under that Section. If the application of this Regulation results in the attribution of receipts that does not fairly represent the extent of the taxpayer's business activity in Vermont, the taxpayer may petition for or the Commissioner may require the use of a different method for attributing those receipts.
2. General Rules Applicable to Original Returns. In any case in which a taxpayer files an original return for a taxable year in which it properly assigns its receipts using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in Section D, the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In those cases, neither the Commissioner nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer's methodology as applied for assigning those receipts for the taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

3. Commissioner Authority to Adjust a Taxpayer's Return. The Commissioner's ability to review and adjust a taxpayer's assignment of receipts on a return to more accurately assign receipts consistently with the rules or standards of Section D, includes, but is not limited to, each of the following potential actions.
 - A. In a case in which a taxpayer fails to properly assign receipts from a sale in accordance with the rules set forth in Section D, including the failure to properly apply a hierarchy of rules consistent with the principles of Section D(3), the Commissioner may adjust the assignment of the receipts in accordance with the applicable rules in Section D.
 - B. In a case in which a taxpayer uses a method of approximation to assign its receipts and the Commissioner determines that the method of approximation employed by the taxpayer is not reasonable, the Commissioner may substitute a method of approximation that the Commissioner determines is appropriate or may exclude the receipts from the taxpayer's numerator and denominator, as appropriate.
 - C. In a case in which the Commissioner determines that a taxpayer's method of approximation is reasonable, but has not been applied in a consistent manner with respect to similar transactions or year to year, the Commissioner may require that the taxpayer apply its method of approximation in a consistent manner.
 - D. In a case in which a taxpayer excludes receipts from the denominator of its receipts factor on the theory that the assignment of the receipts cannot be reasonably approximated, the Commissioner may determine that the exclusion of those receipts is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.
 - E. In a case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, or fails to provide those records to the Commissioner upon request, the Commissioner may treat the taxpayer's assignment of receipts as unsubstantiated, and may adjust the assignment of the receipts in a manner consistent with the applicable rules in Section D.
 - F. In a case in which the Commissioner concludes that a customer's billing address was selected by the taxpayer for tax avoidance purposes, the Commissioner may adjust the assignment of receipts from sales to that customer in a manner consistent with the applicable rules in Section D.
4. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. A taxpayer that seeks to change its method of assigning its receipts under Section D must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate."
5. Commissioner Authority to Change a Method of Assignment on a Prospective Basis. The Commissioner may direct a taxpayer to change its method of assigning its receipts

in tax returns that have not yet been filed, including changing the taxpayer's method of approximation, if upon reviewing the taxpayer's filing methodology applied for a prior tax year, the Commissioner determines that the change is appropriate to reflect a more accurate assignment of the taxpayer's receipts within the meaning of Section D, and determines that the change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making the change. In a case in which a taxpayer fails to comply with the Commissioner's direction on subsequently filed returns, the Commissioner may deem the taxpayer's method of assigning its receipts on those returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

(2) Sales of Tangible Personal Property in Vermont

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

- (A) the purchaser is the United States Government; or
- (B) the corporation is not taxable in the state in which the purchaser takes possession.

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

(3) Compensation for Services

~~Receipts for services are apportioned to Vermont if the services are performed in Vermont. All amounts received for providing such services are apportionable irrespective of whether such services are performed by employees, agents, subcontractors or any other persons.~~

~~When compensation for services are in payment of services performed both within and without Vermont, sales are apportioned to this state if a greater proportion of the income producing activity is performed in Vermont. If this rule causes an inequitable apportionment of income, the amount attributable to Vermont shall be determined based on the cost of performance.~~

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

(1) In-Person Services.

(A) In General.

Except as otherwise provided in this Subsection 1, in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer's real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry; construction contractor services; pest control; landscape services; medical and dental services, including medical testing, x-rays and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer's real or tangible personal property. Various professional services, including legal, accounting, financial and consulting services, and other similar services as described in Subsection 3, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this Subsection 1.

(B) Assignment of Receipts.

1. Rule of Determination. Except as otherwise provided in this Subsection B, if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Vermont if and to the extent the customer receives the in-person service in Vermont. In assigning its receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received, as follows:
 - a. If the service is performed with respect to the body of an individual customer in Vermont (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Vermont (e.g. live entertainment or athletic performances), the service is received in Vermont.
 - b. If the service is performed with respect to the customer's real estate in Vermont or if the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in Vermont, the service is received in Vermont.
 - c. If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed within or outside Vermont, the service is received in Vermont if the property is shipped or delivered to the customer in Vermont.

(C) Rule of Reasonable Approximation. In an instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient

information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. If the state to which the receipts are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to the state are excluded from the denominator of the taxpayer's receipts factor pursuant to 32 V.S.A. §5833(a)(3)(D).

(D) Examples.

In these examples assume, unless otherwise stated, that the taxpayer is taxable in each state to which its receipts would be assigned, so that there is no requirement that the receipts from the sale or sales be eliminated from the denominator of the taxpayer's receipts factor. See 32 V.S.A. §5833(a)(3)(D). Note that for purposes of the examples it is irrelevant whether the services are performed by an employee of the taxpayer or by an independent contractor acting on the taxpayer's behalf.

Example (i). Salon Corp has retail locations in Vermont and in other states where it provides hair cutting services to individual and business customers, the latter of whom are paid for through the means of a company account. The receipts from sales of services provided at Salon Corp's in-state locations are in Vermont. The receipts from sales of services provided at Salon Corp's locations outside Vermont, even when provided to residents of Vermont, are not receipts from in-state sales.

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

Example (iii). Same facts as in Example (ii), except that Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to those locations of Retail Corp that are in Vermont and in other states. The receipts from the sale of services provided to Retail Corp are in Vermont to the extent the services are provided in Vermont.

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

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

Example (vi). Teaching Corp provides seminars in Vermont to individual and business customers. The seminars and the materials used in connection with the seminars are prepared outside the state, the teachers who teach the seminars include teachers that are resident outside the state, and the students who attend the seminars include students that are resident outside the state. Because the seminars are taught in Vermont the receipts from sales of the services are in Vermont.

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

(A) In General.

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

(B) Assignment of Receipts.

The assignment of receipts to a state or states in the instance of a sale of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this section, a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this section depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. If the state to which the receipts from a sale are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer’s receipts factor. See 32 V.S.A. §5833(a)(3)(D).

1. Delivery to or on Behalf of a Customer by Physical Means Whether to an Individual or Business Customer. Services delivered to a customer or on behalf of a customer through a physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers or other direct mail services; the delivery of advertising or advertising-

related services to the customer's intended audience in the form of a physical medium; and the sale of custom software (e.g., where software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of corporate taxation) where the taxpayer installs the custom software at the customer's site. The rules in this section apply whether the taxpayer's customer is an individual customer or a business customer.

- a. Rule of Determination. In assigning the receipts from a sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.
- b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate the state or states.
- c. Examples:

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

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

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

Example (iii). Same facts as example (ii), except that the contract is with a business customer that is based outside Vermont. The receipts from the sale of the design

services are in Vermont because the services are physically delivered on behalf of the customer to the customer's intended audience in Vermont.

Example (iv). Fulfillment Corp, a corporation based outside Vermont, provides product delivery fulfillment services in Vermont and in neighboring states to Sales Corp, a corporation located outside Vermont that sells tangible personal property through a mail order catalog and over the Internet to customers. In some cases when a customer purchases tangible personal property from Sales Corp to be delivered in Vermont, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Vermont. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to Vermont to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Vermont.

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

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

2. Delivery to a Customer by Electronic Transmission.

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

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

- i. Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.
- ii. Rules of Reasonable Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably

approximate the state or states. If a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall reasonably approximate the state or states using the customer's billing address.

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

- i. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Vermont if and to the extent that the taxpayer's customer receives the service in Vermont. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this section, it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.
- ii. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states.
- iii. Secondary Rule of Reasonable Approximation. In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, the taxpayer shall reasonably approximate the state or states as set forth in this regulation. In these cases, unless the taxpayer can apply the safe harbor set forth below, the taxpayer shall reasonably approximate the state or states in which the service is received as follows: first, by assigning the receipts from the sale to the state where the contract of sale is principally managed by the customer; second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the receipts from the sale to the customer's place of order; and third, if the customer's place of order is not reasonably determinable, by assigning the receipts from the sale using the customer's billing address; provided, however, if the taxpayer derives more than 5% of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.
- iv. Safe Harbor. In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate under Subsection ii, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated in Subsection iii, apply the safe harbor stated in this Subsection. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and (2) does not derive

more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of services delivered by electronic transmission to a business customer, and not otherwise.

- v. Related Party Transactions. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in Subsection iii but may use the rule of reasonable approximation in Subsection iii, and the safe harbor in Subsection iv, provided that the Commissioner may aggregate sales to related parties in determining whether the sales exceed 5% of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

c. Examples:

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

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

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

on all available information, that the geographic distribution of the receipts from sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Vermont the receipts from sales for which it does not know the customers' location in the same proportion as those receipts for which it has this information. See Section D(3)(2)(B)(2)(a)(ii).

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

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

Example (v). Net Corp, a corporation based outside Vermont, provides web-based services to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Vermont were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In this case, 75% of the receipts from the sale are received in Vermont. See Section D(3)(2)(B)(2)(b)(i). Assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate the location or locations. Under these circumstances, if Net Corp derives 5% or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under Section D(3)(2)(B)(2)(b)(iii) to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from sales of services to Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state.

Example (vi). Net Corp, a corporation based outside Vermont, provides web-based services through the means of the Internet to more than 250 individual

and business customers in Vermont and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate the state or states. Also assume that Net Corp does not derive more than 5% of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv) and may assign its receipts using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.
 - a. Rule of Determination. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in Vermont if and to the extent that the end users or other third-party recipients are in Vermont. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in Vermont to the extent that the audience for the advertising is in Vermont. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in Vermont to the extent that the end users or other third-party recipients receive the services in Vermont. The rules in this Subsection apply whether the taxpayer's customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.
 - b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate the state or states.
 - c. Select Secondary Rules of Reasonable Approximation.
 - i. If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if the taxpayer lacks sufficient information regarding the location of the audience

from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in that area.

- ii. If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that service to end users or other third party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third party recipients from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells the services, relative to the total population in that area.
- iii. When using the secondary reasonable approximation methods provided above, the relevant specific geographic area of delivery includes only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

d. Examples:

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

Example (i). Cable TV Corp, a corporation that is based outside of Vermont, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Vermont. Second, Cable TV Corp sells monthly subscriptions to individual customers in Vermont and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Vermont. See Section D(3)(2)(B)(2)(a)(i). If Cable TV Corp is unable to determine the actual location of its audience for the programming, and lacks sufficient information

regarding audience location to reasonably approximate the location, Cable TV Corp must approximate its Vermont audience using the percentage that reflects the ratio of its Vermont subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. See Section D(3)(2)(B)(3)(c)(i). To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to Vermont in any case in which the programming is received by a customer in Vermont. See Section D(3)(2)(B)(3)(a). In any case in which Cable TV Corp cannot determine the actual location where the programming is received, and lacks sufficient information regarding the location of receipt to reasonably approximate the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to Vermont where its customer's billing address is in Vermont. See Section D(3)(2)(B)(3)(a). Note that whether and to the extent that the monthly subscription fee represents a fee for a service or for a license of intangible property does not affect the analysis or result as to the state or states to which the receipts are properly assigned. See Section D(5)(E).

Example (ii). Network Corp, a corporation that is based outside of Vermont, sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming as distributed by unrelated cable television and satellite television transmission companies. The receipts from Network Corp's sale of advertising time to its business customers are assigned to Vermont to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Vermont. See Section D(3)(2)(B)(3)(a). If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding audience location to reasonably approximate the location, Network Corp must approximate the receipts from sales of advertising that constitute Vermont sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. See Section D(3)(2)(B)(3)(c)(ii) and (iii). In any case in which Network Corp's receipts would be assigned to a state in which Network Corp is not taxable, the receipts must be excluded from the denominator of Network Corp's receipts factor.

Example (iii). Web Corp, a corporation that is based outside Vermont, provides Internet content to viewers in Vermont and other states. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. The receipts from Web Corp's sale of advertising space to its business customers are assigned to Vermont to the

extent that the viewers of the Internet content are in Vermont, as measured by viewings or clicks. See Section D(3)(2)(B)(3)(a). If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of its viewers to reasonably approximate the location, Web Corp must approximate the amount of its Vermont receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the Vermont population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. See Section D(3)(2)(B)(3)(c). In any case in which Web Corp's receipts would be assigned to a state in which Web Corp is not taxable, those receipts must be excluded from the denominator of Web Corp's receipts factor.

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

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

Example (vi). Wholesale Corp, a corporation that is based outside Vermont, develops an Internet-based information database outside Vermont and enters into a contract with Retail Corp whereby Retail Corp will market and sell

access to this database to end users. Depending on the facts, the provision of database access may be either the sale of a service or the license of intangible property or may have elements of both, but for purposes of analysis it does not matter. See Section D(5)E. Assume that on the particular facts applicable in this example Wholesale Corp is selling database access in transactions properly characterized as involving the performance of a service. When an end user purchases access to Wholesale Corp’s database from Retail Corp, Retail Corp in turn compensates Wholesale Corp in connection with that transaction. In this case, Wholesale Corp’s services are being delivered through Retail Corp to the end user. Wholesale Corp must assign its receipts from sales to Retail Corp to the state or states in which the end users receive access to Wholesale Corp’s database. If Wholesale Corp cannot determine the state or states where the end users actually receive access to Wholesale Corp’s database, and lacks sufficient information regarding the location from which the end users access the database to reasonably approximate the location, Wholesale Corp must approximate the extent to which its services are received by end users in Vermont by using a percentage that reflects the ratio of the Vermont population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp’s database relative to the total population in that area. See Section D(3)(2)(B)(3)(c)(ii). Note that it does not matter for purposes of the analysis whether Wholesale Corp’s sale of database access constitutes a service or a license of intangible property, or some combination of both. See Section D(5)(E). In any case in which Wholesale Corp’s receipts would be assigned to a state in which Wholesale Corp is not taxable, the receipts must be excluded from the denominator of Wholesale Corp’s receipts factor.

(3) Professional Services.

(A) In General.

Except as otherwise provided in this Section, professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. These services include the performance of technical services that require the application of specialized knowledge. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

(B) Overlap with Other Categories of Services.

1. Certain services that fall within the definition of “professional services” set forth in this Section are nevertheless treated as “in-person services” within the meaning of Section D(3)(1), and are assigned under the rules of that subsection. Specifically, professional services that are physically provided in person by the taxpayer such as

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

2. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment rules that apply are those for professional services, and not those pertaining to services delivered to a customer or through or on behalf of a customer.

(C) Assignment of Receipts.

In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from a sale of a professional service depends in many cases upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the receipts from a sale of a professional service, a taxpayer's customer is the person that contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer's services. In any instance in which the taxpayer is not taxable in the state to which receipts from a sale is assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor.

1. General Rule. Receipts from sales of professional services other than those services described in Subsection 2 (architectural and engineering services), Subsection 3 (transactions with related parties) are assigned in accordance with this general rule.
 - a. Professional Services Delivered to Individual Customers. Except as otherwise provided, in any instance in which the service provided is a professional service and the taxpayer's customer is an individual customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this paragraph. In particular, the taxpayer shall assign the receipts from a sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and

assign the receipts from the service or services provided to that customer to that state.

- b. Professional Services Delivered to Business Customers. Except as otherwise provided in Section D(3), in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth in the next paragraph, taxpayer shall assign the receipts from the sale as follows: first, by assigning the receipts to the state where the contract of sale is principally managed by the customer; second, if the place of customer management is not reasonably determinable, to the customer's place of order; and third, if the customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.
- c. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in Subsections a and b above, a taxpayer may assign its receipts from sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of Section D(3)(3)C(1) and not otherwise.
2. Architectural and Engineering Services with respect to Real or Tangible Personal Property. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of Section D(3). However, unlike in the case of the general rule that applies to professional services, (1) the receipts from a sale of an architectural service are assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in the state or states; and (2) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in this paragraph, the receipts from a sale of these services must be assigned under the general rule for professional services. See Section D(3)(C)(1).
3. Related Party Transactions. In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers, the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or (2) if the

service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states. The taxpayer may use the safe harbor provided by provided that the Commissioner may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

4. Examples:

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

Example (i). Broker Corp provides securities brokerage services to individual customers who are resident in Vermont and in other states. Assume that Broker Corp knows the state of primary residence for many of its customers, and where it does not know this state of primary residence, it knows the customer's billing address. Also assume that Broker Corp does not derive more than 5% of its receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. See Section D(3)(3)(C)(1)(a).

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

Example (iii). Architecture Corp provides building design services as to buildings located, or expected to be located, in Vermont to individual customers who are resident in Vermont and other states, and to business customers that are based in Vermont and other states. The receipts from Architecture Corp's sales are assigned to Vermont because the locations of the buildings to which its design services relate

are in Vermont, or are expected to be in Vermont. For purposes of assigning these receipts, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for the services, and it is not relevant where, in the case of a business customer, the customer principally manages the contract, placed the order for the services, or is billed for the services. Further, these receipts are assigned to Vermont even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than Vermont or are electronically delivered to its customer in a state other than Vermont. See Section D(3)(3)(B)(2) and (C)(2).

Example (iv). Law Corp provides legal services to individual clients who are resident in Vermont and in other states. In some cases, Law Corp may prepare one or more legal documents for its client as a result of these services and/or the legal work may be related to litigation or a legal matter that is ongoing in a state other than where the client is resident. Assume that Law Corp knows the state of primary residence for many of its clients, and where it does not know this state of primary residence, it knows the client's billing address. Also assume that Law Corp does not derive more than 5% of its receipts from sales of all services from any one individual client. If Law Corp knows its client's state of primary residence, it shall assign the receipts to that state. If Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the receipts to that state. For purposes of the analysis it is irrelevant whether the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or the litigation or other legal matter that is the underlying predicate for the services is in another state.

Example (v). Same facts as in Example (iv), except that Law Corp provides legal services to several individual clients who it knows have a primary residence in a state where Law Corp is not taxable. Receipts from these services are excluded from the denominator of Law Corp's receipts factor even if the billing address of one or more of these clients is in a state in which Law Corp is taxable, including Vermont.

Example (vi). Law Corp provides legal services to several multistate business clients. In each case, Law Corp knows the state in which the agreement for legal services that governs the client relationship is principally managed by the client. In one case, the agreement is principally managed in Vermont; in the other cases, the agreement is principally managed in a state other than Vermont. If the agreement for legal services is principally managed by the client in Vermont the receipts from sale of the services are assigned to Vermont; in the other cases, the receipts are not assigned to Vermont. In the case of receipts that are assigned to Vermont, the receipts are so assigned even if (1) the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or (2) the litigation or other legal matter that is the underlying predicate for the services is in another state.

Example (vii). Same facts as in example 6, except that Law Corp is not taxable in one of the states other than Vermont in which Law Corp's agreement for legal services that governs the client relationship is principally managed by the business

client. Receipts from these latter services are excluded from the denominator of Law Corp's receipts factor.

Example (viii). Consulting Corp, a company that provides consulting services to law firms and other customers, is hired by Law Corp in connection with legal representation that Law Corp provides to Client Co. Specifically, Consulting Corp is hired to provide expert testimony at a trial being conducted by Law Corp on behalf of Client Co. Client Co pays for Consulting Corp's services directly. Assuming that Consulting Corp knows that its agreement with Law Co is principally managed by Law Corp in Vermont, the receipts from the sale of Consulting Corp's services are assigned to Vermont. It is not relevant for purposes of the analysis that Client Co is the ultimate beneficiary of Consulting Corp's services, or that Client Co pays for Consulting Corp's services directly. See Section D(3)(3)(C)(1)(b).

Example (ix). Bank Corp provides financial custodial services to 100 individual customers who are resident in Vermont and in other states, including the safekeeping of some of its customers' financial assets. Assume for purposes of this example that Bank Corp knows the state of primary residence for many of its customers, and where it does not know this state of primary residence, it knows the customer's billing address. Also assume that Bank Corp does not derive more than 5% of its receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in Section D(3)(3)(C)(1)(c). If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to Vermont if the customer's state of primary residence (or billing address, in cases where it does not know the customer's state of primary residence) is in Vermont, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Vermont. See Section D(3)(3)(C)(1)(a).

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

Example (xi). Same facts as Example (x), except that Bank Corp derives more than 5% of its receipts from sales from a single individual customer. As to the sales made to this customer, Bank Corp is required to determine the individual customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state. See D(3)(3)(C)(1)(a) and (C)(3). Receipts from sales to all other customers are assigned as described in Example (x).

Example (xii). Advisor Corp, a corporation that provides investment advisory services, provides these advisory services to Investment Co. Investment Co is a multistate business client of Advisor Corp that uses Advisor Corp's services in connection with investment accounts that it manages for individual clients, who are

the ultimate beneficiaries of Advisor Corp's services. Assume that Investment Co's individual clients are persons that are resident in numerous states, which may or may not include Vermont. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. It is not relevant for purposes of the analysis that the ultimate beneficiaries of Advisor Corp's services may be Investment Co's clients, who are residents of numerous states. See D(3)(3)(C)(1)(b).

Example (xiii). Advisor Corp provides investment advisory services to Investment Fund LP, a partnership that invests in securities and other assets. Assuming that Advisor Corp knows that its agreement with Investment Fund LP is principally managed by Investment Fund LP in Vermont, receipts from the sale of Advisor Corp's services are assigned to Vermont. See D(3)(3)(C)(1)(b). Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of numerous states.

Example (xiv). Design Corp is a corporation based outside Vermont that provides graphic design and similar services in Vermont and in neighboring states. Design Corp enters into a contract at a location outside Vermont with an individual customer to design fliers for the customer. Assume that Design Corp does not know the individual customer's state of primary residence and does not derive more than 5% of its receipts from sales of services from the individual customer. All of the design work is performed outside Vermont. Receipts from the sale are in Vermont if the customer's billing address is in Vermont. See D(3)(3)(C)(1)(a).

~~Section 4. (4) Rents and Royalties Receipts from rentals of real and personal property situated in Vermont, royalties from the use in Vermont of patents or copyrights and receipts from the licensing of computer software used in Vermont and similar transactions are apportionable to Vermont.~~

Receipts from rentals include all amounts received directly or indirectly by the taxpayer for use of or occupancy of property, whether or not such property is owned by the taxpayers.

~~Receipts from royalties include all amounts received by the taxpayer for the use of patents or copyrights whether or not such patents or copyrights were originally issued to or are owned by the taxpayer.~~

~~——— A patent or copyright is used in Vermont to the extent that activities thereunder are carried on in Vermont.~~

5 License or Lease of Intangible Property

A. General Rules.

1. The receipts from the license of intangible property are in Vermont if and to the extent the intangible is used in Vermont. In general, the term “use” is construed to refer to the location of the taxpayer’s market for the use of the intangible property that is being licensed and is not to be construed to refer to the location of the property or payroll of the taxpayer. The rules that apply to determine the location of the use of intangible property in the context of several specific types of licensing transactions are set forth in Section D(5)(A)(2)-(5). For purposes of the rules set forth in this Section 5, a lease of intangible property is to be treated the same as a license of intangible property.
2. In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of this regulation. See D(6). Note, however, that for purposes of Section D(5) and (6), a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use or disposition of the property.
3. Intangible property licensed as part of the sale or lease of tangible property is treated as the sale or lease of tangible property under this regulation.
4. In any instance in which the taxpayer is not taxable in the state to which the receipts from the license of intangible property are assigned, the receipts are excluded from the denominator of the taxpayer’s receipts factor. See 32 V.S.A. §5833(a)(3)(D).
5. Nothing in this Section 5 shall be construed to allow or require inclusion of receipts in the receipts factor that are not included in the definition of “receipts” pursuant to Section D(1)(A)(8) or that are excluded from the numerator and the denominator of the receipts factor. To the extent that the transfer of either a security, or business “goodwill” or similar intangible value, including, without limitation, “going concern value” or “workforce in place,” may be characterized as a license or lease of intangible property, receipts from such transaction shall be excluded from the numerator and the denominator of the taxpayer’s receipts factor.

B. License of a Marketing Intangible.

Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items (i.e., a marketing intangible) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Vermont to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Vermont. Examples of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or trade name; certain copyrights; the license of a film, television or multimedia production or event for commercial distribution; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales. In the case of the license of a marketing intangible, where a taxpayer has actual evidence of the amount or proportion of its receipts that is attributable to Vermont, it shall assign that amount or proportion to Vermont.

In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Vermont consumers, the portion of the licensing fee to be assigned to Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the licensee makes material use of the intangible property to regularly market its goods, services or other items relative to the total population in that area. If the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the portion of the licensing fee to be assigned to Vermont must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Vermont population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

C. License of a Production Intangible.

If a license is granted for the right to use intangible property other than in connection with the sale, lease, license, or other marketing of goods, services, or other items, and the license is to be used in a production capacity (a "production intangible"), the licensing fees paid by the licensee for that right are assigned to Vermont to the extent that the use for which the fees are paid takes place in Vermont. Examples of a license of a production intangible include, without limitation, the license of a patent, a copyright, or trade secrets to be used in a manufacturing process, where the value of the intangible lies predominately in its use in that process. In the case of a license of a production intangible to a party other than a related party where the location of actual use is unknown, it is presumed that the use of the intangible property takes place in the state of the licensee's commercial domicile (where the licensee is a business) or the licensee's state of primary residence (where the licensee is an individual). If the Commissioner can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in Vermont, it is presumed that the entire use is in this state except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Vermont. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.

D. License of a Mixed Intangible.

If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible (a "mixed intangible") and the fees to be paid in each instance are separately and reasonably stated in the licensing contract, the Commissioner will accept that separate statement for purposes of Section D. If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible and the fees to be paid in each instance are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the Commissioner can reasonably establish otherwise.

E. License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services.

1. In general.

In some cases, the license of intangible property will resemble the sale of an electronically-delivered good or service rather than the license of a marketing intangible or a production intangible. In these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in Section D(3)(2)(B)(2) and (3), as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this Subsection 5 include, without limitation, the license of database access, the license of access to information, the license of digital goods (see Section D(7)(2)), and the license of certain software (e.g., where the transaction is not the license of pre-written software that is treated as the sale of tangible personal property, see Section D(7)(1).

2. Sublicenses.

Pursuant to Section D(5)(1)(A), the rules of Section D(3)(2)(B)(3) may apply where a taxpayer licenses intangible property to a customer that in turn sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the rules set forth at Section D(3)(2)(B)(3) that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users. For this purpose, the intangible property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to that property (e.g., because the sublicensee's rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because that property is bundled with additional services or items of property.

3. Examples:

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

Example (i). Crayon Corp and Dealer Co enter into a license contract under which Dealer Co as licensee is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Co's sale of certain products to retail customers. Under the contract, Dealer Co is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co of products using the Crayon Corp trademarks. Under the contract, Dealer Co is permitted to sell the products at multiple store locations, including store locations that are both within and without Vermont. Further, the licensing fees that are paid by Dealer Co are broken out on a per-store basis. The licensing fees paid to Crayon Corp by Dealer Co

represent fees from the license of a marketing intangible. The portion of the fees to be assigned to Vermont are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Vermont stores relative to Dealer Co's total receipts. See Section D(5)(B).

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

Example (iii). Moniker Corp enters into a license contract with Wholesale Co. Pursuant to the contract Wholesale Co is granted the right to use trademarks owned by Moniker Corp to brand sports equipment that is to be manufactured by Wholesale Co or an unrelated entity, and to sell the manufactured equipment to unrelated companies that will ultimately market the equipment to consumers in a specific geographic region, including a foreign country. The license agreement confers a license of a marketing intangible, even though the trademarks in question will be affixed to property to be manufactured. In addition, the license of the marketing intangible is for the right to use the intangible property in connection with sales to be made at wholesale rather than directly to retail customers. The component of the licensing fee that constitutes the Vermont receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Vermont population in the specific geographic region relative to the total population in that region. See Section D(5)(E). If Moniker Corp is able to reasonably establish that the marketing intangible was materially used throughout a foreign country, then the population of that country will be included in the population ratio calculation. However, if Moniker Corp is unable to reasonably establish that the marketing intangible was materially used in the foreign country in areas outside a particular major city; then none of the foreign country's population beyond the population of the major city is include in the population ratio calculation. If Moniker Corp is not taxable in any state (including a foreign country) in which Wholesale Co's ultimate consumers are located, the receipts that would be assigned to that state are excluded from the denominator of Moniker Corp's receipts factor.

Example (iv). Formula, Inc and Appliance Co enter into a license contract under which Appliance Co is permitted to use a patent owned by Formula, Inc to manufacture appliances. The license contract specifies that Appliance Co is to pay Formula, Inc a royalty that is a fixed percentage of the gross receipts from the products that are later sold. The contract does not specify any other fees. The appliances are both manufactured and sold in Vermont and several other states. Assume the licensing fees are paid for the license of a production intangible, even though the royalty is to be paid based upon the sales of a manufactured product (i.e., the license is not one that includes a marketing intangible). Because the Commissioner can reasonably establish that the actual use of the intangible property takes place in part in Vermont, the royalty is assigned based to the location of that use rather than to location of the licensee's commercial domicile, in accordance with Section D(5)(A). It is presumed that the entire use is in Vermont except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Vermont. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Vermont using the patent relative to the manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Vermont receipts. See Section D(5)(E).

Example (v). Axel Corp enters into a license agreement with Biker Co in which Biker Co is granted the right to produce motor scooters using patented technology owned by Axel Corp, and also to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The contract is a license of both a marketing and production intangible, i.e., a mixed intangible. The scooters are manufactured outside Vermont. Assume that Axel Corp lacks actual information regarding the proportion of Biker Co.'s receipts that are derived from Vermont customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Vermont population constitutes 25% of the total population during the period in question. The licensing contract requires an upfront licensing fee to be paid by Biker Co to Axel Corp and does not specify what percentage of the fee derives from Biker Co's right to use Axel Corp's patented technology. Because the fees for the license of the marketing and production intangible are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible, unless either the taxpayer or Commissioner reasonably establishes otherwise. Assuming that neither party establishes otherwise, 25% of the licensing fee constitutes Vermont receipts. See Section D(5)(B),(D).

Example (vi). Same facts as Example 5, except that the license contract specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing contract constitutes both the license of a marketing intangible and the license of a production intangible. Assuming that the separately stated fees are reasonable, [the tax administrator] will: (1) assign no part of the licensing fee paid for the production intangible to Vermont, and (2) assign 25% of the licensing fee paid for the marketing intangible to Vermont. See Section D(5)(D).

Example (vii). Better Burger Corp, which is based outside Vermont, enters into franchise contracts with franchisees that agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Vermont. In each case, the franchise contract between the individual and Better Burger provides that the franchisee is to pay Better Burger Corp an upfront fee for the receipt of the franchise and monthly franchise fees, which cover, among other things, the right to use the Better Burger name and service marks, food processes and cooking know-how, as well as fees for management services. The upfront fees for the receipt of the Vermont franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Vermont receipts because the franchises are for the right to make Vermont sales. The monthly franchise fees paid by Vermont franchisees constitute fees paid for (1) the license of marketing intangibles (the Better Burger name and service marks), (2) the license of production intangibles (food processes and know-how) and (3) personal services (management fees). The fees paid for the license of the marketing intangibles and the production intangibles constitute Vermont receipts because in each case the use of the intangibles is to take place in Vermont. See Section D(5)(B),(C). The fees paid for the personal services are to be assigned pursuant to Section D(3).

Example (viii). Online Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to individual customers that are resident in Vermont and in other states. These customers access Online Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with Section D(5)(E). If Online Corp can determine or reasonably approximate the state or states where its database is accessed, it must do so. Assuming that Online Corp cannot determine or reasonably approximate the location where its database is accessed, Online Corp must assign the receipts made to the individual customers using the customers' billing addresses to the extent known. Assume for purposes of this example that Online Corp knows the billing address for each of its customers. In this case, Online Corp's receipts from sales made to its individual customers are in Vermont in any case in which the customer's billing address is in Vermont. See Section D(3)(1)(B).

Example (ix). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to a business customer, Business Corp, a company with offices in Vermont and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with Section D(5)(E). Assume that Net Corp cannot determine where its database is accessed but reasonably approximates that 75% of Business Corp's database access took place in Vermont, and 25% of Business Corp's database access took place in other states. In that case, 75% of the receipts from database access is in Vermont. Assume alternatively that Net Corp lacks sufficient information regarding the location where its database is accessed to reasonably approximate the location. Under these circumstances, if Net Corp derives 5% or less of its receipts from database access from Business Corp, Net Corp must assign the

receipts to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from database access from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state.

Example (x). Net Corp, a corporation based outside Vermont, licenses an information database through the means of the Internet to more than 250 individual and business customers in Vermont and in other states. The license is a license of intangible property that resembles a sale of goods or services and receipts from that license are assigned in accordance with Section D(5)(5). Assume that Net Corp cannot determine or reasonably approximate the location where its information database is accessed. Also assume that Net Corp does not derive more than 5% of its receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in Section D(3)(2)(B)(2)(b)(iv), and may assign its receipts to a state or states using each customer's billing address. If Net Corp is not taxable in one or more states to which some of its receipts would be otherwise assigned, it must exclude those receipts from the denominator of its receipts factor.

Example (xi). Web Corp, a corporation based outside of Vermont, licenses an Internet-based information database to business customers who then sublicense the database to individual end users that are resident in Vermont and in other states. These end users access Web Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. Web Corp's license of the database to its customers includes the right to sublicense the database to end users, while the sublicenses provide that the rights to access and use the database are limited to the end users' own use and prohibit the individual end users from further sublicensing the database. Web Corp receives a fee from each customer based upon the number of sublicenses issued to end users. The license is a license of intangible property that resembles a sale of goods or services and are assigned by applying the rules set forth in Section D(3)(2)(B)(3). See Section D(5)(E). If Web Corp can determine or reasonably approximate the state or states where its database is accessed by end users, it must do so. Assuming that Web Corp lacks sufficient information from which it can determine or reasonably approximate the location where its database is accessed by end users, Web Corp must approximate the extent to which its database is accessed in Vermont using a percentage that represents the ratio of the Vermont population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area. See Section D(3)(2)(B)(3)(c)(i).

6. Sale of Intangible Property.

(1) Assignment of Receipts.

The assignment of receipts to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold. For purposes of

this Section 6, a sale or exchange of intangible property includes a license of that property where the transaction is treated for tax purposes as a sale of all substantial rights in the property and the receipts from transaction are not contingent on the productivity, use or disposition of the property. For the rules that apply where the consideration for the transfer of rights is contingent on the productivity, use or disposition of the property, see Section D(5)(A).

(A) Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area.

In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the receipts from the sale are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state the taxpayer shall assign the receipts from the sale to Vermont. If the intangible property is used or is authorized to be used in Vermont and one or more other states, the taxpayer shall assign the receipts from the sale to Vermont to the extent that the intangible property is used in or authorized for use in Vermont, through the means of a reasonable approximation.

(B) Sale that Resembles a License (Receipts are Contingent on Productivity, Use or Disposition of the Intangible Property).

In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in Section 5 (pertaining to the license or lease of intangible property).

(C) Sale that Resembles a Sale of Goods and Services.

In the case of a sale or exchange of intangible property where the substance of the transaction resembles a sale of goods or services and where the receipts from the sale or exchange do not derive from payments contingent on the productivity, use or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in Section D(5)(E)(relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in Section D(5)(E).

(D) Excluded Receipts.

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

approximated, but where the taxpayer is not taxable in such state, the receipts that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's receipts factor.

(E) Examples.

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

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

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

Example (iii). Same facts as in Example 2 except that Wireless Corp sells to Buyer Corp an FCC license to operate wireless telecommunications services in a designated area in Vermont and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Vermont. For purposes of making this reasonable approximation, Wireless Corp may rely upon credible data that identifies the percentage of persons that use wireless telecommunications in the two states covered by the license. See Section D(6)(1)(A).

Example (iv). Same facts as in Example 3 except that Wireless Corp is not taxable in the adjacent state in which the FCC license authorizes it to operate wireless telecommunications services. The receipts paid to Wireless Corp that would be assigned to the adjacent state must be excluded from the denominator of Wireless Corp's receipts factor.

Example (v). Sports League Corp, a corporation that is based outside Vermont, sells the rights to broadcast the sporting events played by the teams in its league in all 50 U.S. states to Network Corp. Although the games played by Sports League Corp will be broadcast in all 50 states, the games are of greater interest in the northeast region of the country, including Vermont. Because the intangible property sold is a contract right that authorizes the holder to conduct a business activity in a specified

geographic area, Sports League Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Vermont. For purposes of making this reasonable approximation, Sports League Corp may rely upon audience measurement information that identifies the percentage of the audience for its sporting events in Vermont and the other states. See Section D(6)(1)(A).

Example (vi). Same facts as in Example 5, except that Sports League Corp is not taxable in one state. The receipts paid to Sports League Corp that would be assigned to that state must be excluded from the denominator of Sports League Corp's receipts factor.

Example (vii). Inventor Corp, a corporation that is based outside Vermont, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Vermont. Assume that the sale is not one in which the receipts derive from payments that are contingent on the productivity, use or disposition of the property. See Section D(6)(1)(A). Inventor Corp understands that Buyer Corp is likely to use the patented technology in Vermont, but the patented technology can be used anywhere (i.e., the rights sold are not rights that authorize the holder to conduct a business activity in a specific geographic area). The receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. See Section D(6)(1)(D).

(7) Special Rules.

(1) Software Transactions.

A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) transferred on a tangible medium is treated as the sale of tangible personal property, rather than as either the license or sale of intangible property or the performance of a service. In these cases, the receipts are in Vermont as determined under the rules for the sale of tangible personal property set forth under Section D(2) and related regulations. In all other cases, the receipts from a license or sale of software are to be assigned to Vermont as determined otherwise under Section D. (e.g., depending on the facts, as the development and sale of custom software, see Section D(5)(B), as a license of a marketing intangible, see Section D(5)(B), as a license of a production intangible, see Section D(5)(C), as a license of intangible property where the substance of the transaction resembles a sale of goods or services, see Section D(5)(E) or as a sale of intangible property, see Section D(6).

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

In the case of a sale or license of digital goods or services, including, among other things, the sale of various video, audio and software products or similar transactions, the receipts from the sale or license are assigned by applying the same rules as are set forth in Section D(3)(2) or (3), as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. For purposes of the analysis, it is not relevant what the terms of the contractual relationship are or whether the

sale or license might be characterized, depending upon the particular facts, as, for example, the sale or license of intangible property or the performance of a service. See Section D(5)(E) and Section D(6)(1)(C).

8. Other Business Receipts All business receipts earned by the taxpayer within Vermont are apportionable to Vermont. Business receipts are not considered to have been earned in Vermont solely by reason of the fact that they were payable in Vermont or were received in Vermont. Business receipts include all income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible or intangible property if the acquisition, management ~~and~~ or disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

9. Nonbusiness Receipts Nonbusiness receipts are all receipts other than business receipts resulting from operations unrelated to its regular business operations. Typically nonbusiness receipts are comprised of passive or portfolio income. Income from dividends, interest and capital gains will be considered nonbusiness income unless the acquisition, management, ~~and~~ or disposition of the underlying property generating the income constitute an integral part of the taxpayer's regular business operations.

Section E. Nonbusiness Income

(e) Nonbusiness income will be allocated to the state in which the income producing assets are located. If the income producing asset has no situs, the income will be allocated to the state of commercial domicile, the ~~principle~~ principal place from which the business is directed or managed.

Section F. Discretionary Adjustment of Vermont Apportionment Percentage

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

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