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TRD Publication 3.5 NMAC

**REGULATIONS PERTAINING TO THE
UNIFORM DIVISION OF INCOME FOR
TAX PURPOSES ACT
SECTION 7-4-1 THROUGH 7-4-21 NMSA 1978**

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**TAXATION AND REVENUE DEPARTMENT
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7-4-1. SHORT TITLE.--Chapter 7, Article 4 NMSA 1978 may be cited as the "Uniform Division of Income for Tax Purposes Act". (Laws 1981, Chapter 31, Section 47)

3.5.1.8 - CITATIONS

Unless otherwise noted, all citations to statute in Title 3, Chapter 5 NMAC are to the New Mexico Statutes Annotated, 1978 (NMSA 1978).

[1/15/97; 3.5.1.8 NMAC - Rn, 3 NMAC 5.1.8, 6/29/01]

7-4-2. DEFINITIONS.--As used in the Uniform Division of Income for Tax Purposes Act:

A. "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and income from the disposition or liquidation of a business or segment of a business. "Business income" includes income from tangible and intangible property if the acquisition, management or disposition of the property constitute integral parts of the taxpayer's regular trade or business operations;

B. "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed;

C. "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services;

D. "department" means the taxation and revenue department, the secretary of taxation and revenue or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

E. "nonbusiness income" means all income other than business income;

F. "sales" means all gross receipts of the taxpayer not allocated under Sections 7-4-5 through 7-4-9 NMSA 1978 of the Uniform Division of Income for Tax Purposes Act;

G. "secretary" means the secretary of taxation and revenue or a division director delegated by the secretary; and

H. "state" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(Laws 1999, Chapter 47, Section 7)

3.5.1.9 - "BUSINESS AND NONBUSINESS INCOME" DEFINED

A. Section 7-4-2 NMSA 1978 defines "business income" as income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management or disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. In essence, all income which arises from the conduct or the disposition or liquidation of trade or business operations of a taxpayer is business income.

B. "Nonbusiness income" means all income other than business income.

C. The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, nonoperating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of particular trade or business. In general, all transactions and activities of the

taxpayer which are dependent upon or contribute to the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, and constitute integral parts of, a trade or business.

[1/15/74, 9/15/88, 9/20/93, 1/15/97, 10/29/99; 3.5.1.9 NMAC - Rn & A, 3 NMAC 5.1.9, 6/29/01]

3.5.1.10 - BUSINESS AND NONBUSINESS INCOME; APPLICATION OF DEFINITIONS

A. The following are rules for determining whether particular income is business or nonbusiness income.

B. Rental income from real and tangible property is business income if the property with respect to which the rental income was received is used in the taxpayer's trade or business or is incidental thereto and therefore is includable in the property factor under Part 3.5.11 NMAC.

C. Gain or loss from the sale, exchange or other disposition of real or tangible or intangible personal property constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business. However, if such property was utilized for the production of nonbusiness income or otherwise was removed from the property factor before its sale, exchange or other disposition, the gain or loss will constitute nonbusiness income.

D. "Interest income" is business income where the intangible with respect to which the interest was received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the intangible is related to or incidental to such trade or business operations.

E. Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose of acquiring and holding the stock is related to or incidental to such trade or business operations.

F. Patent and copyright royalties are business income where the patent or copyright with respect to which the royalties were received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the patent or copyright is related or incidental to such trade or business operations.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.1.10 NMAC - Rn & A, 3 NMAC 5.1.10, 6/29/01]

3.5.1.11 - PRORATION OF DEDUCTIONS

A. In most cases an allowable deduction of a taxpayer will be applicable only to the business income arising from a particular trade or business or to a particular item of nonbusiness income. In some cases an allowable deduction may be applicable to the business incomes of more than one trade or business, to several items of nonbusiness income or to both. In such cases the deduction shall be prorated among such trades or businesses and such items of nonbusiness income in a manner which fairly distributes the deduction among the classes of income to which it is applicable.

B. In filing returns with this state, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

C. If the returns or reports filed by a taxpayer with all states to which the taxpayer reports under the Uniform Division of Income for Tax Purposes Act or Article IV of the Multistate Tax Compact are not uniform in the application or proration of any deduction, the taxpayer shall disclose in its return to this state the nature and extent of the variance.
[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.1.11 NMAC - Rn, 3 NMAC 5.1.11, 6/29/01]

**7-4-3. ALLOCATION AND APPORTIONMENT OF INCOME IN GENERAL.--Except as otherwise provided by law, any taxpayer having income which is taxable both within and without this state, other than the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in the Uniform Division of Income for Tax Purposes Act.
(Laws 1981, Chapter 37, Section 48)**

3.5.3.7 - DEFINITIONS

A. “Allocation” and “allocate” refer to the assignment of nonbusiness income to a particular state.

B. “Apportionment” and “apportion” refer to the division of business income between states by the use of a formula containing apportionment factors.

C. “Business activity” refers to the transactions and activity occurring in the regular course of a particular trade or business of a taxpayer.

D. “Taxpayer” means any individual subject to tax imposed by the Income Tax Act or any corporation required to file an income tax return pursuant to the Corporate Income and Franchise Tax Act.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.3.7 NMAC - Rn, 3 NMAC 5.3.7, 6/29/01]

3.5.3.8 - APPLICATION OF SECTIONS 7-4-2 TO 7-4-19 NMSA 1978; APPORTIONMENT

Where a taxpayer elects to apportion income pursuant to Section 7-2-11 NMSA 1978 or Section 7-2A-8 NMSA 1978, if the business activity in respect to any trade or business of a taxpayer occurs both within and without this state, and if by reason of such business activity the taxpayer is taxable in another state, the portion of the net income (or net loss) arising from such trade or business which is derived from sources within this state shall be determined by apportionment in accordance with Sections 7-4-10 to 7-4-18 NMSA 1978.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.3.8 NMAC - Rn & A, 3 NMAC 5.3.8, 6/29/01]

3.5.3.9 - APPLICATION OF SECTIONS 7-4-2 TO 7-4-19 NMSA 1978; COMBINED REPORT

If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in Sections 7-4-2 to 7-4-19 NMSA 1978 or in Title 3, Chapter 5 NMAC shall preclude the use of a “combined report” whereby the entire business income of such trade or business is apportioned in accordance with Sections 7-4-10 to 7-4-18 NMSA 1978.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.3.9 NMAC - Rn & A, 3 NMAC 5.3.9, 6/29/01]

3.5.3.10 - APPLICATION OF SECTIONS 7-4-2 TO 7-4-19 NMSA 1978; ALLOCATION

Any taxpayer electing to apportion income pursuant to Section 7-2-11 NMSA 1978 or Section 7-2A-8 NMSA 1978 and who is subject to the taxing jurisdiction of this state shall allocate all of its net nonbusiness income or loss within or without this state in accordance with

Sections 7-4-5 to 7-4-9 NMSA 1978. Such income or loss to be allocated within or without this state is the gross income less related expenses.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.3.10 NMAC - Rn & A, 3 NMAC 5.3.10, 6/29/01]

3.5.3.11 - CONSISTENCY AND UNIFORMITY IN REPORTING

A. In filing with this state, if the taxpayer departs from or modifies the manner in which income has been classified as business income or nonbusiness income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

B. If the returns or reports filed by a taxpayer for all states to which the taxpayer reports under the Uniform Division of Income for Tax Purposes Act or Article IV of the Multistate Tax Compact are not uniform in the classification of income as business or nonbusiness income, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.3.11 NMAC - Rn, 3 NMAC 5.3.11, 6/29/01]

7-4-4. WHEN TAXABLE IN ANOTHER STATE.--For purposes of allocation and apportionment of income under the Uniform Division of Income for Tax Purposes Act, a taxpayer is taxable in another state if:

A. in that state [the taxpayer] is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or

B. that state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether the state does or does not.

(Laws 1965, Chapter 203, Section 4)

3.5.4.8 - TAXABLE IN ANOTHER STATE - IN GENERAL

A taxpayer's income from business activity is taxable without this state if such taxpayer, by reason of such business activity, is taxable in another state within the meaning of Section 7-4-4 NMSA 1978. A taxpayer is taxable within another state if it meets either one of two tests:

A. if by reason of business activity in another state the taxpayer is subject to one of the types of taxes specified in Subsection A of Section 7-4-4 NMSA 1978, namely: a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax; or

B. if by reason of such business activity another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on a taxpayer.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.4.8 NMAC - Rn & A, 3 NMAC 5.4.8, 6/29/01]

3.5.4.9 - TAXABLE IN ANOTHER STATE - WHEN A TAXPAYER IS “SUBJECT TO” A TAX - FOR TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020

A. A taxpayer is “subject to” one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 if it carries on business activity in such state and such state imposes or has the ability to impose such a tax thereon. Any taxpayer which asserts that it is subject to one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in another state shall furnish to the department upon its request evidence to support such assertion. The department may request that such evidence include proof that the taxpayer has filed the requisite tax return in such other state and has paid any taxes imposed under the law of such other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in such other state.

B. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(1) does not actually engage in business activity in that state; or

(2) does actually engage in some business activity, not sufficient for nexus, and the minimum tax bears no relation to the taxpayer's business activity within such state, the taxpayer is not “subject to” one of the taxes specified within the meaning of Subsection A of Section 7-4-4 NMSA 1978.

C. The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in Subsection A of Section 7-4-4 NMSA 1978 which may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is “subject to” one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in another state.

D. When determining whether a taxpayer is taxable in another state, the term “taxpayer” shall apply to each separate member of a combined or consolidated filing group and shall not apply to the group as a single taxpaying entity, unless the taxpayer can demonstrate that application of this rule will subject it to multiple taxation based on the application of a contrary rule in the other state.

E. This version of this section applies to taxable years beginning prior to January 1, 2020. For tax periods beginning on or after January 1, 2020 see 3.5.4.11 NMAC. [1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997; 3.5.4.9 NMAC - Rn & A, 3 NMAC 5.4.9, 6/29/2001; A, 3/23/2021]

3.5.4.10- TAXABLE IN ANOTHER STATE - WHEN A STATE HAS JURISDICTION TO SUBJECT A TAXPAYER TO A NET INCOME TAX FOR TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

The second test, that of Subsection B of Section 7-4-4 NMSA 1978, applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. Sections 381-385. In the case of any “state” as defined in Section 7-4-2 NMSA 1978 other than a state of the United States or political subdivision of such state, the determination of whether such “state” has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that “state”. If jurisdiction is otherwise present, such “state” is not considered as without jurisdiction by reason of the provisions of a treaty between that “state” and the United States. This section applies to taxable years beginning prior to January 1, 2020. For taxable years beginning on or after January 1, 2020 see 3.4.11 NMAC.

[1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997; 3.5.4.10 NMAC - Rn & A, 3 NMAC 5.4.10, 6/29/2001; A, 3/23/2021]

3.5.4.11 - TAXABLE IN ANOTHER STATE; WHEN A TAXPAYER IS “SUBJECT TO” A TAX – FOR TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2020:

For periods beginning on or after January 1, 2020. New Mexico follows the so-called Finnigan approach. This approach determines when a corporation will be deemed to be taxable in New Mexico as well as to the question of when a taxpayer is “taxable in another state” for purposes of Section 7-4-4 NMSA 1978, and sourcing of sales under Sections 7-4-17 and 7-4-18 NMSA 1978. In general, under the Finnigan approach, New Mexico looks to the activities of the unitary group, or if the group has elected to file a consolidated return, to the activities of the consolidated group, to determine if any member of the group is taxable in New Mexico or in another state. If the

group, or any member of the group, could be subjected to New Mexico corporate income tax under both constitutional principles and any applicable federal statutory law, then all members of the group are taxable in New Mexico. Similarly, when determining if a member of the group is “taxable in another state,” if the state has jurisdiction to impose such a tax on the unitary business in whatever form it may allow that unitary business to file, whether or not it does impose such a tax, then all members of that unitary group are taxable in that state. This version of this section applies to taxable years beginning on or after January 1, 2020.

[3.5.4.11 NMAC - N, 3/23/2021]

7-4-5. ALLOCATION OF CERTAIN NONBUSINESS INCOME.--Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in Sections 6 through 9 of the Uniform Division of Income for Tax Purposes Act. (Laws 1965, Chapter 203, Section 5)

3.5.5.8 - RELATED EXPENSES

A. From the items of gross income from rents, patent and copyright royalties interest, dividends and capital gains being specifically allocated to or outside this state, there shall be deducted the expenses related thereto. The term “expenses related thereto” as used in Section 3.5.5.8 NMAC means the expenses and other deductions directly attributable to such rents, patent and copyright royalties, interest, dividends and capital gains and a ratable part of any other expenses or deductions which cannot definitely be allocated to some item or class of income.

B. The amount to be allocated to or outside this state is this gross income from such rents, patent and copyright royalties, interest, dividends and capital gains less the related expenses.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.5.8 NMAC - Rn & A, 3 NMAC 5.5.8, 6/29/01]

7-4-6. ALLOCATION OF RENTS AND ROYALTIES.--

A. Net rents and royalties from real property located in this state are allocable to this state.

B. Net rents and royalties from tangible personal property are allocable to this state:

(1) if and to the extent that the property is utilized in this state; or

(2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

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

(Laws 1965, Chapter 203, Section 6)

7-4-7. ALLOCATION OF CAPITAL GAINS AND LOSSES.--

A. Capital gains and losses from sales of real property located in this state are allocable to this state.

B. Capital gains and losses from sales of tangible personal property are allocable to this state if:

(1) the property had a situs in this state at the time of the sale; or

(2) the taxpayer's commercial domicile is in this state, and the taxpayer is not taxable in the state in which the property had a situs.

C. Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(Laws 1965, Chapter 203, Section 7)

**7-4-8. ALLOCATION OF INTEREST AND DIVIDENDS.--Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.
(Laws 1965, Chapter 203, Section 8)**

7-4-9. ALLOCATION OF PATENT AND COPYRIGHT ROYALTIES.--

A. Patent and copyright royalties are allocable to this state:

(1) if and to the extent that the patent or copyright is utilized by the payer in this state; or

(2) if and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

B. A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

C. A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(Laws 1965, Chapter 203, Section 9)

7-4-10. APPORTIONMENT OF BUSINESS INCOME.—

A. Except as provided in Subsections B and C of this section, all business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

B. If eighty percent or more of the New Mexico numerators of the property and payroll factors for a filing group, or for a taxpayer that is not a member of a filing group, are employed in manufacturing or operating a computer processing facility, the filing group or the taxpayer may elect to have business income apportioned to this state by multiplying the income by the sales factor for the taxable year.

C. If a filing group, or a taxpayer that is not a member of a filing group, has a headquarters operation in New Mexico, the filing group or the taxpayer may elect to have business income apportioned to this state by multiplying the income by the sales factor for the taxable year.

D. To elect the method of apportionment provided by Subsection B or C of this section, the taxpayer shall notify the department of the election, in writing, no later than the date on which the taxpayer files the return for the first taxable year to which the election will apply. The election shall apply as follows:

(1) if the election is made for taxable years beginning prior to January 1, 2020, to the taxable year in which the election is made and to each taxable year thereafter for three years, or until the taxable year ending prior to January 1, 2020, whichever is earlier;

(2) if the election is made for a taxable year beginning on or after January 1, 2020, to the taxable year in which the election is made and to each taxable year thereafter until the taxpayer notifies the department, in writing, that the election is terminated, except that the taxpayer shall not terminate the election until the method of apportioning business income provided by Subsection B or C of this section has been used by the taxpayer for at least three consecutive taxable years, including a total of at least thirty-six calendar months; and

(3) if the election is made by a qualifying filing group, the election shall apply to the members of the filing group properly included pursuant to Section 7-2A-8.3 NMSA 1978.

E. For purposes of this section:

(1) "filing group" means "filing group" as that term is defined in the Corporate Income and Franchise Tax Act;

(2) "headquarters operation" means:

(a) the center of operations of a business: 1) where corporate staff employees are physically employed; 2) where the centralized functions are primarily performed, including administrative, planning, managerial, human resources, purchasing, information technology and accounting, but not including operating a call center; 3) the function and

purpose of which is to manage and direct most aspects and functions of the business operations within a subdivided area of the United States; 4) from which final authority over regional or subregional offices, operating facilities and any other offices of the business are issued; and 5) including national and regional headquarters if the national headquarters is subordinate only to the ownership of the business or its representatives and the regional headquarters is subordinate to the national headquarters; or

(b) the center of operations of a business: 1) the function and purpose of which is to manage and direct most aspects of one or more centralized functions; and 2) from which final authority over one or more centralized functions is issued;

(3) "manufacturing" means combining or processing components or materials to increase their value for sale in the ordinary course of business, but does not include:

(a) construction;

(b) farming;

(c) power generation; provided that for taxable years beginning prior to January 1, 2024, "manufacturing" includes electricity generation at a facility that does not require location approval and a certificate of convenience and necessity prior to commencing construction or operation of the facility pursuant to the Public Utility Act;

(d) processing natural resources, including hydrocarbons; or (e) processing or preparation of meals for immediate consumption; and

(4) "operating a computer processing facility" means managing the necessary and ancillary activities for the operation of a facility primarily used to process data or information, but does not include managing the operation of facilities that are predominantly used to support sales of tangible property or the provision of banking, financial or professional services.

(Laws 2020, Chapter 80, Section 3)

3.5.10.8 – [RESERVED]

[1/15/74, 9/15/88, 9/20/93, 1/15/97, 10/29/99; 3.5.10.8 NMAC - Rn & A, 3 NMAC 5.10.8, 6/29/01]

3.5.10.9 - APPORTIONMENT OF BUSINESS INCOME

“Business income” is defined in Section 7-4-2 NMSA 1978 and Part 3.5.1 NMAC. The business income to be apportioned is net business income after taking into account only those expenses and deductions which are allowable under the United States Internal Revenue Code of 1986, as amended, which are related to the production of business income. Expenses and deductions attributable to nonbusiness income may not be taken into account in arriving at net business income to be apportioned.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.10.9 NMAC - Rn & A, 3 NMAC 5.10.9, 6/29/01]

7-4-11. PROPERTY FACTOR FOR APPORTIONMENT OF BUSINESS INCOME.--The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.
(Laws 1965, Chapter 203, Section 11)

3.5.11.8 - PROPERTY FACTOR - IN GENERAL

A. The property factor of the apportionment formula for the trade or business of the taxpayer shall include all real and tangible personal property owned or rented by the taxpayer and used during the tax period in the regular course of such trade or business. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment and other real and tangible personal property but does not include coin or currency.

B. Property used in connection with the production of nonbusiness income shall be excluded from the property factor. Property used both in the regular course of taxpayer's trade or business and in the production of nonbusiness income shall be included in the factor only to the extent the property is used in the regular course of taxpayer's trade or business. The method of determining that portion of the value to be included in the factor will depend upon the facts of each case.

C. The property factor shall reflect the average value of property includable in the factor.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.11.8 NMAC - Rn, 3 NMAC 5.11.8, 6/29/01]

3.5.11.9 - PROPERTY FACTOR - PROPERTY USED FOR THE PRODUCTION OF BUSINESS INCOME

Property shall be included in the property factor if it is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor. Property or equipment under construction during the tax period (except inventorable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of the taxpayer. If the property is partially used in the regular course of the trade or business of the taxpayer while under construction, the value of the property to the extent used shall be included in the property factor. Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event such as its conversion to the production of nonbusiness income, its sale or the lapse of an extended period of time (normally five years) during which the property is held for sale.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.11.9 NMAC - Rn, 3 NMAC 5.11.9, 6/29/01]

3.5.11.10 - PROPERTY FACTOR - CONSISTENCY IN REPORTING

A. In filing returns with this state, if the taxpayer departs from or modifies the manner of valuing property, or of excluding or including property in the property factor, used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

B. If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under the Uniform Division of Income for Tax Purposes Act or Article IV of the Multistate Tax Compact are not uniform in the valuation of property and in the exclusion or inclusion of property in the property factor, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.11.10 NMAC - Rn, 3 NMAC 5.11.10, 6/29/01]

3.5.11.11 - PROPERTY FACTOR - NUMERATOR

The numerator of the property factor shall include the average value of the real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer. 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.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.11.11 NMAC - Rn, 3 NMAC 5.11.11, 6/29/01]

7-4-12. VALUATION OF PROPERTY FOR INCLUSION IN PROPERTY FACTOR.--Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. "Net annual rate" is the annual rental paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals. (Laws 1965, Chapter 203, Section 12)

3.5.12.8 - PROPERTY FACTOR - VALUATION OF OWNED PROPERTY

A. Property owned by the taxpayer shall be valued at its original cost. As a general rule "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc.

B. If the original cost of property is unascertainable, the property is included in the factor at its fair market value as of the date of acquisition by the taxpayer.

C. Inventory of stock of goods shall be included in the factor in accordance with the valuation method used for federal income tax purposes.

D. Property acquired by gift or inheritance shall be included in the factor at its basis for determining depreciation for federal income tax purposes.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.12.8 NMAC - Rn, 3 NMAC 5.12.8, 6/29/01]

3.5.12.9 - PROPERTY FACTOR - VALUATION OF RENTED PROPERTY

A. Property rented by the taxpayer is valued at eight times its net annual rental rate. The net annual rental rate for any item of rented property is the annual rental rate paid by the taxpayer for such property, less the aggregate annual subrental rates paid by subtenants of the taxpayer. Subrents are not deducted when the subrents constitute business income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income. Accordingly there is no reduction in its value.

B. "Annual rental rate" is the amount paid as rental for property for a twelve- month period (i.e., the amount of the annual rent). Where property is rented for less than a twelve-month period, the rent paid for the actual period of rental shall constitute the "annual rental rate" for the tax period. However, where a taxpayer has rented property for a term of twelve or more months and the current tax period covers a period of less than twelve months (due, for example, to a reorganization or change of accounting period), the rent paid for the short tax period shall be annualized. If the rental term is for less than twelve months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

C. "Annual rent" is the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use of the property and includes:

(1) any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or a percentage of sales, profits or otherwise; and

(2) any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services, etc.; if a payment includes rent and other charges unsegregated, the amount of rent shall be determined by consideration of the relative values of the rent and the other items.

D. "Annual rent" does not include:

(1) incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.; and

(2) royalties based on extraction of natural resources, whether represented by delivery or purchase; for this purpose, a royalty includes any consideration conveyed or credited to a holder of an interest in property which constitutes a sharing of current or future production of natural resources from such property, irrespective of the method of payment or how such consideration may be characterized, whether as a royalty, advance royalty rental or otherwise.

E. Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the original cost of leasehold improvements shall be included in the factor.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.12.9 NMAC - Rn & A, 3 NMAC 5.12.9, 6/29/01; A, 7/31/12]

**7-4-13. DETERMINATION OF AVERAGE VALUE OF PROPERTY FOR INCLUSION IN PROPERTY FACTOR.--The average value of property shall be determined by averaging the values at the beginning and ending of the tax period, but the department may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.
(Laws 1986, Chapter 20, Section 56)**

3.5.13.8 - PROPERTY FACTOR - AVERAGING PROPERTY VALUES

A. As a general rule, the average value of property owned by the taxpayer shall be determined by averaging the values at the beginning and ending of the tax period. However, the department may require or allow averaging by monthly values if such method of averaging is required to properly reflect the average value of the taxpayer's property for the tax period.

B. Averaging by monthly values will generally be applied if substantial fluctuations in the value of the property exist during the tax period or where property is acquired after the beginning of the tax period or disposed of before the end of the tax period.

C. Averaging with respect to rented property is achieved automatically by the method of determining the net annual rental rate of such property as set forth in Section 3.5.12.9 NMAC.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.13.8 NMAC - Rn & A, 3 NMAC 5.13.8, 6/29/01]

**7-4-14. PAYROLL FACTOR FOR APPORTIONMENT OF BUSINESS INCOME.--The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.
(Laws 1965, Chapter 203, Section 14)**

3.5.14.8 - PAYROLL FACTOR - IN GENERAL

A. The payroll factor of the apportionment formula for each trade or business of the taxpayer shall include the total amount paid by the taxpayer in the regular course of its trade or business for compensation during the tax period.

B. The total amount “paid” to employees is determined upon the basis of the taxpayer's accounting method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid. Notwithstanding the taxpayer's method of accounting at the election of the taxpayer, compensation paid to employees may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under such method for unemployment compensation purposes.

C. The compensation of any employee on account of activities which are connected with the production of nonbusiness income shall be excluded from the factor.

D. The term “compensation” means wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classifiable as an employee are excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts considered paid directly include the value of board, rent, housing, lodging and other benefits or services furnished to employees by the taxpayer in return for personal services provided that such amounts constitute income to the recipient under the federal Internal Revenue Code. In the case of employees not subject to the federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such benefits or services would constitute income to the employees shall be made as though such employees were subject to the federal Internal Revenue Code.

E. The term “employee” means any officer of a corporation or any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee. Generally, an individual will be considered to be an employee if the individual is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act. The term “employee” also includes a leased employee whenever the taxpayer is the employer or joint employer of such a leased employee.

F. In filing returns with this state, if the taxpayer departs from or modifies the treatment of compensation paid used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

G. If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under the Uniform Division of Income for Tax Purposes Act or Article IV of the

Multistate Tax Compact are not uniform in the treatment of compensation paid, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

[1/15/74, 9/15/88, 9/20/93, 1/15/97, 3/31/98; 3.5.14.8 NMAC - Rn & A, 3 NMAC 5.14.8, 6/29/01]

3.5.14.9 - PAYROLL FACTOR - DENOMINATOR

The denominator of the payroll factor is the total compensation paid everywhere during the tax period. Accordingly, compensation paid to employees whose services are performed entirely in a state where the taxpayer is immune from taxation, for example, by Public Law 86-272, are included in the denominator of the payroll factor.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.14.9 NMAC - Rn & A, 3 NMAC 5.14.9, 6/29/01]

3.5.14.10 - PAYROLL FACTOR - NUMERATOR

The numerator of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation. The tests in Section 7-4-15 NMSA 1978 to be applied in determining whether compensation is paid in this state are derived from the Model Unemployment Compensation Act. Accordingly, if compensation paid to employees is included in the payroll factor by use of the cash method of accounting or if the taxpayer is required to report such compensation under such method for unemployment compensation purposes, it shall be presumed that the total wages reported by the taxpayer to this state for unemployment compensation purposes constitutes compensation paid in this state except for compensation excluded under Parts 3.5.14 and 3.5.15 NMAC. The presumption may be overcome by satisfactory evidence that an employee's compensation is not properly reportable to this state for unemployment compensation purposes.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.14.10 NMAC - Rn & A, 3 NMAC 5.14.10, 6/29/01]

7-4-15. DETERMINATION OF COMPENSATION FOR INCLUSION IN PAYROLL FACTOR.--Compensation is paid in this state if:

- A. the individual's service is performed entirely within the state; or**
- B. the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or**
- C. some of the service is performed in the state and:
 - (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state; or**
 - (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.****

(Laws 1965, Chapter 203, Section 15)

3.5.15.8 - PAYROLL FACTOR - COMPENSATION PAID IN THIS STATE

A. Compensation is paid in this state if any one of the following tests, applied consecutively, are met.

- (1) The employee's service is performed entirely within the state.
- (2) The employee's service is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.
- (3) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:
 - (a) if the employee's base of operations is in this state; or
 - (b) if there is no base of operations in any state in which some part of the service is performed, but the place from which the service is directed or controlled is in this state; or
 - (c) if the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee's residence is in this state.

B. The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment or perform any other functions necessary to the exercise of his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.15.8 NMAC - Rn, 3 NMAC 5.15.8, 6/29/01]

7-4-16. SALES FACTOR FOR APPORTIONMENT OF BUSINESS INCOME.--The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period and the denominator of which is the total sales of the taxpayer everywhere during the tax period.
(Laws 1965, Chapter 203, Section 16)

3.5.16.8 - SALES FACTOR - IN GENERAL

A. Section 7-4-2 NMSA 1978 defines the term “sales” to mean all gross receipts of the taxpayer not allocated under Sections 7-4-5 through 7-4-9 NMSA 1978. Thus for the purposes of the sales factor of the apportionment formula for each trade or business of the taxpayer, the term “sales” means all gross receipts derived by the taxpayer from transactions and activity in the regular course of such trade or business. The following are rules for determining “sales” in various situations.

(1) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, “sales” includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales, less returns and allowances and includes all interest income, service charges, carrying charges or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes and gross receipts taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.

(2) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, “sales” includes the entire reimbursed cost, plus the fee.

(3) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency, or the performance of equipment service contracts or research and development contracts, “sales” includes the gross receipts from the performance of such services including fees, commissions and similar items.

(4) In the case of a taxpayer engaged in renting real or tangible property, “sales” includes the gross receipts from the rental, lease or licensing the use of the property.

(5) In the case of a taxpayer engaged in the sale, assignment or licensing of intangible personal property, such as patents and copyrights, “sales” includes the gross receipts therefrom.

(6) If a taxpayer derives receipts from the sale of equipment used in its business, such receipts constitute “sales”. For example, a truck express company owns a fleet of trucks and sells its trucks under a regular replacement program. The gross receipts from the sales of the trucks are included in the sales factor.

B. In some cases certain gross receipts should be disregarded in determining the sales factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business.

C. In filing returns with this state, if the taxpayer departs from or modifies the basis

for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

D. If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under the Uniform Division of Income for Tax Purposes Act or Article IV of the Multistate Tax Compact are not uniform in the inclusion or exclusion of gross receipts, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.16.8 NMAC - Rn & A, 3 NMAC 5.16.8, 6/29/01]

3.5.16.9 - SALES FACTOR - DENOMINATOR

The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under Section 3.5.19.11 NMAC.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.16.9 NMAC - Rn & A, 3 NMAC 5.16.9, 6/29/01]

3.5.16.10 - SALES FACTOR - NUMERATOR

The numerator of the sales factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges or time-price differential charges incidental to such gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.16.10 NMAC - Rn, 3 NMAC 5.16.10, 6/29/01]

3.5.16.11 EFFECT OF COMBINED FILING ON THE SALES FACTOR: For corporations that file on a combined or consolidated basis, the sales factor for the filing group is calculated without the inclusion of intercompany sales that would otherwise be deferred or eliminated under federal consolidated filing rules when calculating net income for the group.

[3.5.16.11 NMAC - N; 3/23/2021]

7-4-17. DETERMINATION OF SALES IN THIS STATE OF TANGIBLE PERSONAL PROPERTY FOR INCLUSION IN SALES FACTOR.-- Sales of tangible personal property are in this state if:

A. the property is delivered or shipped to a purchaser other than the United States government within this state regardless of the f. o. b. point or other conditions of the sale; or

B. the property is shipped from an office, store, warehouse, factory or other place of storage in this state and:

(1) the purchaser is the United States government; or

(2) the taxpayer:

(a) is not taxable in the state of the purchaser; and

(b) did not make an election for apportionment of business income pursuant to Subsection B or C of Section 7-4-10 NMSA 1978.

(Laws 2015 S.S., Chapter 2, Section 7; Applicable to taxable years beginning on or after January 1, 2015)

3.5.17.8 - SALES FACTOR - SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE

A. Gross receipts from sales of tangible personal property (except sales to the United States government) are in this state:

(1) If the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale; or

(2) If the property is shipped from an office, store, warehouse, factory or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.

B. Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

C. Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

D. The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

E. When property being shipped by a seller from the state of origin to a consignee in another state is diverted while enroute to a purchaser in the state, the sales are in this state.

F. If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory or other place of storage in this state.

G. If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(1) if the taxpayer is taxable in the state from which the third party ships the property, then the sale is in such state.

(2) if the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.17.8 NMAC - Rn, 3 NMAC 5.17.8, 6/29/01]

3.5.17.9 - SALES FACTOR - SALES OF TANGIBLE PERSONAL PROPERTY TO UNITED STATES GOVERNMENT IN THIS STATE

Gross receipts from sales of tangible personal property to the United States government are in this state if the property is shipped from an office, store, warehouse, factory or other place of storage in this state. For purposes of Section 3.5.17.9 NMAC, only sales for which the United States government makes direct payment to the seller pursuant to the terms of a contract constitute sales to the United States government. Thus, as a general rule, sales by a subcontractor to the prime contractor, the party to the contract with the United States government, do not constitute sales to the United States government.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.17.9 NMAC - Rn & A, 3 NMAC 5.17.9, 6/29/01]

7-4-18. DETERMINATION OF SALES IN THIS STATE OF SERVICES AND OTHER PROPERTY FOR INCLUSION IN SALES FACTOR.-

A. Sales, other than sales described in Section 7-4-17 NMSA 1978, are in this state:

(1) in the case of sale, rental, lease or license of real property, if and to the extent the real property is located in this state;

(2) in the case of rental, lease or license of tangible personal property, if and to the extent the tangible personal property is located in this state;

(3) in the case of sale of a service, if and to the extent the service is delivered to a location in this state; and

(4) in the case of sale, rental, lease or license of intangible property, if and to the extent the intangible property is used in this state.

B. If the state or states of assignment under Subsection A of this section cannot be determined, the state or states of assignment shall be reasonably approximated.

C. If the taxpayer is not taxable in a state to which a sale is assigned pursuant to Subsection A of this section or if the state of assignment cannot be determined or reasonably approximated pursuant to Subsection B of this section, that sale shall be excluded from the numerator and denominator of the sales factor.

D. The department may promulgate rules as necessary or appropriate to carry out the purposes of this section.

(Laws 2019, Chapter 270, Section 22)

3.5.18.8 SALES FACTOR - SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE - APPLICABLE TO TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

A. In general. Section 7-4-18 NMSA 1978 provides for the inclusion in the numerator of the sales factor of gross receipts from transactions other than sales of tangible personal property (including transactions with the United States government). Under Section 7-4-18 NMSA 1978 gross receipts are attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. Also, gross receipts are attributed to this state if, with respect to a particular item of income, the income producing activity is performed within and without this state but the greater proportion of the income producing activity is performed in this state, based on costs of performance.

B. Income producing activity: defined.

(1) The term "income producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its obtaining gains or profit. Such activity does not include transactions and activities performed on behalf of a taxpayer such as those conducted on its behalf by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:

(a) the rendering of personal services by employees or the utilization of tangible or intangible property by the taxpayer in performing a service;
(b) the sale, rental, leasing, licensing or other use of real property;
(c) the rental, leasing, licensing or other use of tangible personal property;

or

(d) the sale, licensing or other use of intangible personal property.

(2) The mere holding of intangible personal property is not, of itself, an income producing activity.

C. Costs of performance: defined. The term “costs of performance” means direct cost determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

D. Application:

(1) In general. Receipts (other than from sales of tangible personal property) in respect to a particular income producing activity are in this state if:

(a) the income producing activity is performed wholly within this state; or

(b) the income producing activity is performed both in and outside this state and a greater proportion of the income producing activity is performed in this state than in any other state, based on costs of performance.

(2) Special rules: The following are special rules for determining when receipts from the income producing activities described below are in this state:

(a) Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.

(b) Gross receipts from the rental, lease or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing or other use of tangible personal property in this state is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this state during the rental lease or licensing period, gross receipts attributable to this state shall be measured by the ratio which the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during such period.

(c) Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. If services relating to a single item of income are performed partly within and partly without this state, the gross receipts for the performance of such services shall be attributable to this state only if a greater portion of the services were performed in this state, based on costs of performance. Usually where services are performed partly within and partly without this state the services performed in each state will constitute a separate income producing activity; in such case the gross receipts for the performance of services attributable to this state shall be measured by the ratio which the time spent in performing such services in this state bears to the total time spent in performing everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computations.

E. This section applies to taxable years beginning before January 1, 2020.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.18.8 NMAC - Rn & A, 3 NMAC 5.18.8, 6/29/01; Rp, 3/23/2021]

3.5.18.9 SALES FACTOR - SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE - APPLICABLE TO TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2020:

A. Sales factor: Sales other than sales of tangible personal property in this state: General rules:

(1) Definitions. For the purposes of this Section (3.5.18.9 NMAC) these terms have the following meanings:

(a) "Billing address" means 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.

(b) "Business customer" means a customer that is a business or organization operating in any form and generally includes customers other than individual customers.

(c) "Customer" means the person with which the taxpayer has a contract for the transaction, regardless of who pays for or may benefit from the transaction.

(d) "IRC" means the Internal Revenue Code as currently written and subsequently amended.

(e) "Individual customer" means a customer that is a natural person.

(f) "Intangible property" means property that is not physical or whose representation by physical means is merely incidental.

(g) "Place of order" means the physical location from which a customer places an order resulting in a contract with the taxpayer.

(h) "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.

(i) "Related party" means any person who may exercise control of the taxpayer, or is generally controlled by the taxpayer, directly or indirectly, whether through ownership or agreement.

(j) "Sale" in the context of Section 7-4-18 NMSA 1978 means a transaction described in that section, including a lease or license and depending on the context also means the receipts from that transaction.

(k) "Source" means, in general, attributing a sale to a state using the rules under Section 7-4-18 NMSA, 1978 and this regulation.

(l) "State or location where a contract of sale is principally managed by the customer" means the primary location from which a customer's employee or agent interacts with the taxpayer and oversees the taxpayer's activities under the contract.

(m) "Use" means use for the intended purpose of the intangible property.

(2) Hierarchical rules: Where a hierarchical rule applies under this regulation, a taxpayer must make a reasonable effort to apply each rule, in order, before defaulting to any subsequent rule.

(3) Rules of reasonable approximation as provided for in Subsection B of Section 7-4-18 NMSA 1978. This regulation includes various rules of reasonable approximation for

determining when a sale should be included in the New Mexico sales factor numerator. These rules apply when the proper inclusion of sales in sales factor numerator cannot be determined. The method of reasonable approximation should make use of reliable information and be applied consistently.

(4) Exclusion of sales from the sales factor: As provided in Subsection C of Section 7-4-18 NMSA 1978, sales should be excluded from the sales factor if:

(a) using the same rules applicable under Subsection A of Section 7-4-19 NMSA 1978 or a method of reasonable approximation under Subsection B of Section 7-4-18 NMSA 1978 used by the taxpayer to determine if sales are included in the New Mexico sales factor numerator, the sales would be sourced to a state in which the taxpayer is not taxable, as defined under Section 7-4-4 NMSA 1978 and applicable regulations; or

(b) the taxpayer is unable to determine where sales are sourced under Subsection A of Section 7-4-18 NMSA 1978 or a proper method of reasonable approximation under Subsection B of Section 7-4- 18 NMSA 1978.

(5) Related-party transactions - Information imputed from customer to taxpayer. Where a taxpayer has receipts subject to this Section (3.5.18.9 NMAC) from transactions with a related-party customer, any information necessary to apply the rules under Subsection A Section 7-4-18 NMSA 1978 will be imputed to the taxpayer and the taxpayer may not use a rule of reasonable approximation to determine if those sales should be included in the New Mexico sales factor numerator or should be excluded from the sales factor under Subsection C Section 7-4-18 NMSA 1978.

(6) No limitation on Section 7-4-19 NMSA 1978. Nothing in this regulation limits the authority granted to the department under Section 7-4-19 NMSA 1978. Regulations adopted pursuant to Section 7- 4-19 NMSA 1978 control to the extent they conflict with provisions of this regulation.

B. Sale, rental, lease or license of real property. In the case of a sale, rental, lease or license of real property, the receipts from the sale are in New Mexico if and to the extent that the property is in New Mexico.

C. Rental, lease or license of tangible personal property: In the case of a rental, lease or license of tangible personal property, the receipts are from the sale of tangible personal property in New Mexico if and to the extent that the tangible personal property is located in New Mexico. If property is mobile property that is located both within and without New Mexico during the period of the lease or other contract, the receipts are assigned to New Mexico in the same percentage as the time the property is used in the state.

D. Sale of a service: general rule - Determining the category of a service. The receipts are from a sale of a service in New Mexico if and to the extent that the product of the service or the service is delivered to a location in New Mexico. These rules in this subsection define three general categories of services and set out rules for when a service in that category is delivered in New Mexico. A service may fall into more than one category. If a service could be characterized as both an in-person service and a professional service, it will be deemed an inperson service. The third category of service - other services - excludes services that can be categorized and assigned based on the rules for in-person or professional services.

(1) In-person services: An in-person service is a service that is physically performed by the taxpayer, whether through employees, agents, or by third parties on behalf of

the taxpayer, while in the same location as the customer or on the customer's real or tangible personal property. Examples include: health care services; in-person training or entertainment; child care services; repair, installation, cleaning or maintenance services; and construction and similar services.

(a) Determining the New Mexico sales factor numerator. Sales of in-person services are included in the New Mexico sales factor numerator if those services are performed on a customer or the customer's property in the state.

(b) Reasonable approximation. If the taxpayer has insufficient information to determine where its in-person services are performed, the taxpayer shall reasonably approximate where those sales are sourced using general information on customers' locations or other similar information.

(2) Professional services. In general. Professional services are services performed for customers by the taxpayer's employees or agents, or by third parties on behalf of the taxpayer, which require the application of specialized knowledge or skill to the customer's particular facts and circumstances, but exclude in person services. Examples include: management, consulting and similar services; financial and investment services not subject to 3.5.19.17 NMAC; technology and data processing services; legal services; and architectural, engineering and design services.

(a) Determining the New Mexico sales factor numerator: The following hierarchy of rules apply:

(i) Architectural and engineering services with respect to real or tangible personal property. If the service is an architectural or engineering service, it is included in the New Mexico sales factor numerator if the service relates to real estate improvements or tangible personal property located, or expected to be located, in the state.

(ii) Related party transactions. If the customer is a related party, then the taxpayer's sale of the services to that customer are included in the New Mexico sales factor numerator to the extent of that customer's New Mexico apportionment factor as properly determined under Section 7-4-1, et seq. NMSA 1978 and applicable regulations.

(iii) Large individual or business customers: If the sale is to an individual or business customer to which the taxpayer sells five percent or more of its total professional services in a single year, then the sale is included in the New Mexico sales factor numerator: (1) if the customer is an individual customer whose residence is New Mexico, or (2) if the customer is a business customer and the place where the contract for professional services is primarily managed by the customer is in New Mexico.

(iv) Other individual customers: If the taxpayer has information to accurately determine where an individual customer takes delivery of the sale of the professional service, then that sale is included in the New Mexico sales factor numerator if the customer took delivery of the service in New Mexico. Otherwise, the sale is included in the New Mexico sales factor numerator if the customer's primary billing address is in the state.

(v) Other business customers: If the taxpayer has information to accurately determine the location from which the contract for professional services is principally managed by a business customer, then the sale is included in the New Mexico sales factor numerator if that location is in New Mexico. Otherwise, the sale is included in the sales factor numerator if the customer's billing address is in New Mexico.

(b) Reasonable approximation: If, in applying the rules under (iv) and (v) above, the taxpayer lacks information to determine the customer's primary billing address (for example, if someone other than the customer is paying for the service) the taxpayer may use a method of reasonable approximation to determine whether the sales for which the information is lacking are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

(3) Other services. Services other than in-person or professional services are sourced under this Paragraph (3) of Subsection D of 3.5.18.9 NMAC. The rules in this paragraph may distinguish services based on whether they are delivered physically or electronically, whether they are delivered to a customer or to a third party (including the customer's customer), and whether the customer is an individual or business customer. If a rule depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer.

(a) Services delivered by physical means to a customer or a third party. Services delivered by physical means to a customer or third party exclude in-person and professional services, but generally include delivery services, themselves, and services that produce a physical product which is then delivered by the taxpayer. In addition to delivery services, examples include: items designed and printed by the taxpayer to the order of the customer that are delivered to the customer's customers by mail; and customized software services where the software is physically installed on the customer's computer.

(i) Determining the New Mexico sales factor numerator. The sale of services delivered by physical means to a customer or third party are delivered are included in the New Mexico sales factor numerator if the delivery takes place in New Mexico.

(ii) Rule of reasonable approximation. If the taxpayer cannot determine where services are actually delivered, the taxpayer may use a method of reasonable approximation determine sales that will be included in the New Mexico sales factor, and for purposes of Subsection C of 7-4-18 NMSA 1978, including the use of population or other information.

(b) Services delivered electronically to a customer. Services delivered electronically include services that are transmitted by any electronic medium whether or not the service provider owns, leases or otherwise controls medium.

(i) Determining the New Mexico sales factor numerator. In the case of the sale of a service delivered electronically, the following hierarchy of rules apply: (a) if the sale is to a related party, the sale is included in the New Mexico sales factor numerator to the extent of that customer's New Mexico apportionment factor as properly determined under Section 7-4-1, et seq. NMSA 1978 and applicable regulations; (b) if the sale is to an individual or business customer to which the taxpayer sells five percent or more of its total other services in a single year, the sale is included in the New Mexico sales factor numerator: if the customer is an individual customer whose residence is New Mexico, or if the customer is a business customer and the place where the contract for professional services is primarily managed by the customer is in New Mexico; and (c) if the sale is to a customer other than a customer described in (a) or (b), the sale is included in the New Mexico sales factor numerator if the customer's primary billing address is in the state.

(ii.) Reasonable Approximation: If, in applying the rule under sub-item (c) of item (i) above, the taxpayer lacks information to determine the customer's primary billing address (for example, if someone other than the customer is paying for the service) the taxpayer may use a method of reasonable approximation to determine whether the sales for which the information is lacking are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

(c) Services delivered electronically on behalf of a customer to a third party. A service delivered electronically "on behalf of" a customer is one in which a customer contracts for the service to be delivered electronically directly by the taxpayer or through one or more intermediaries, provided the service does not change its form, to one or more third parties who are the customer's intended recipients of the service. Examples include: delivery of electronic advertising to a customer's intended audience and subcontracted services performed electronically for the customer's customers.

(i) determining the New Mexico sales factor numerator. The sale of a service delivered electronically to third-party recipients on behalf of the customer is delivered in New Mexico if and to the extent that the third-party recipients are in New Mexico;

(ii) rule of reasonable approximation. If the taxpayer cannot determine the state or states where the sales of a service delivered electronically are actually delivered to the customer's intended third-party recipients, the taxpayer may use a method of reasonable approximation to determine whether the sales are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

E. Sale, lease, or license of intangible property. General rule. Sourcing of receipts from the sale, lease or license of intangible property depends primarily on the nature of the intangible property and the method by which receipts are determined, rather than on whether the transaction is a true sale, lease or license.

(1) Contract right or government license that authorizes activity in specific geographic area. In the case of a sale, lease or license of a contract right, government license or similar intangible property that authorizes the holder to conduct a activity in a specific geographic area, the receipts from the sale are included in the New Mexico sales factor numerator to the extent that the intangible property is used or is authorized to be used within the state.

(2) Marketing intangible: The receipts from granting a right to use intangible property in connection with the sale, lease, license, or other marketing of goods or services to a consumer are included in the New Mexico sales factor numerator to the extent of the sale or provision of those goods or services is located or occurs in New Mexico. Examples of marketing intangibles include trademarks, service marks and trade names.

(3) Production intangible: The receipts from granting a right to use intangible property, other than a marketing intangible, used in manufacturing (a "production intangible") are included in the New Mexico sales factor numerator to the extent that the use for which the fees are paid takes place in New Mexico.

(4) Mixed intangible: The receipts from a sale, lease or license transaction that involves a mixture of a marketing and production intangible may be included in the New Mexico

sales factor as provided in Paragraphs (2) or (3) of Subsection E of 3.5.18.9 NMAC on the basis of the taxpayer's separate statement of these rights, and the related receipts, to the customer as part of the contract with the customer. Otherwise, the receipts will be treated as receipts from a marketing intangible.

(5) Intangible property that resembles a sale of goods or services, including digital goods and services. If receipts from the sale, lease or license of intangible property resembles the sale of a goods or services such that other rules under Section 7-4-17-18 NMSA 1978, or these or other regulations of the department can accurately and appropriately be used to source those receipts, including rules of reasonable approximation, the receipts are included in the New Mexico sales factor numerator as provided in those rules.

(6) Sublicenses. If the receipts from the sale, lease or license of intangible property is to a customer that the taxpayer is aware will grant a sublicense to others, regardless of the form that sublicense may take, and if the taxpayer's own receipts are determined based on its customer's sublicensing of the intangible property, then the taxpayer shall use the rules under this regulation, including rules of reasonable approximation, that would apply to the sourcing of its customer's receipts to determine the sales to be included in the New Mexico sales factor numerator. It is not necessary for the application of this paragraph for the taxpayer to use the same method actually used by its customer to source the sublicensing receipts.

(7) Software transactions - Generally: Receipts from the sale, lease or license of software, whether "canned" or custom, is treated as the sale, lease or license of tangible personal property, rather than intangible property or the performance of a service, except that, to the extent necessary, the taxpayer may use a method of reasonable approximation under these rules if the taxpayer lacks information to determine where the software is delivered.

F. Mediation: Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the department and one or more other state taxing authorities, the taxpayer may petition for, and the department may participate in, and encourage the other state taxing authorities to participate in, nonbinding mediation in accordance with the alternative dispute resolution rules promulgated by the multistate tax commission from time to time, regardless of whether all the state taxing authorities are members of the multistate tax compact.

[3.5.18.9 NMAC - N, 3/23/2021]

7-4-19. EQUITABLE ADJUSTMENT OF STANDARD ALLOCATION OR APPORTIONMENT.--If the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- A. separate accounting;**
- B. the exclusion of any one or more of the factors;**
- C. the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or**
- D. the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.**

(Laws 1986, Chapter 20, Section 57)

3.5.19.8 - SPECIAL RULES - IN GENERAL

A. Section 7-4-19 NMSA 1978 provides that if the allocation and apportionment provisions of Sections 7-4-2 to 7-4-18 NMSA 1978 do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

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

B. Section 7-4-19 NMSA 1978 permits a departure from the allocation and apportionment provisions of Sections 7-4-2 to 7-4-18 NMSA 1978 only in limited and specific cases where the apportionment and allocation provisions contained in Sections 7-4-2 to 7-4-18 NMSA 1978 produce incongruous results.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.19.8 NMAC - Rn & A, 3 NMAC 5.19.8, 6/29/01; A, 7/31/12]

3.5.19.9 - ADJUSTMENT OF FORMULA

A. If a taxpayer requests any deviation from the statutory allocation and apportionment formula, the taxpayer must submit a written petition to the department with the return. The petition must be accompanied by returns for the taxable year computed on both:

- (1) the basis of the standard statutory allocation and apportionment formula; and
- (2) the basis of the method requested by the taxpayer.

B. To avoid interest and penalty under the Tax Administration Act, timely payment of tax based on the statutory allocation and apportionment formula must be made on the due date. If the petition is allowed in whole or in part, in an appropriate case the petition will be considered a claim for refund.

C. In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the provisions of Parts 3.5.10 through 3.5.18 NMAC in respect to the apportionment formula may not set forth appropriate procedures for determining the apportionment factors. Nothing in Section 7-4-19 NMSA 1978 or in Sections 3.5.19.8 through 3.5.19.11 NMAC shall preclude the department from establishing appropriate procedures under Section 7-4-11 to 7-4-18 NMSA 1978 for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.19.9 NMAC - Rn & A, 3 NMAC 5.19.9, 6/29/01]

3.5.19.10 - SPECIAL RULES - PROPERTY FACTOR

The following special rules are established in respect to the property factor of the apportionment formula:

A. If the subrents taken into account in determining the net annual rental rate under Section 3.5.12.9 NMAC produce a negative or clearly inaccurate value for any item of property, another method which will properly reflect the value of rented property may be required by the department or requested by the taxpayer. In no case however, shall such value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for such property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

B. If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for such property shall be determined on the basis of a reasonable market rental rate for such property.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.19.10 NMAC - Rn & A, 3 NMAC 5.19.10, 6/29/01]

3.5.19.11 - SPECIAL RULES - SALES FACTOR

A. The following special rules are established in respect to the sales factor of the apportionment formula:

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

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

(3) Where the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator of the sales factor as well. For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property and income from the sale, licensing or other use of intangible personal property.

(4) Where the taxpayer realizes gains from the sale or other disposition of

intangible property held as part of the taxpayer's short term investments of working capital, only the net gain from such sales reported as taxable income shall be included in the taxpayer's sales factor.

B. Where business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer, such dividends and interest shall be excluded from the denominator of the sales factor. [1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.19.11 NMAC - Rn, 3 NMAC 5.19.11, 6/29/01]

3.5.19.12 - SPECIAL RULES - CONSTRUCTION CONTRACTORS

A. The special rules established in Section 3.5.19.12 NMAC apply to the apportionment of income of long-term construction contractors.

B. *In general.* When a taxpayer elects to use the percentage of completion method of accounting, or the completed contract method of accounting for long-term contracts (construction contracts covering a period in excess of one year from the date of execution of the contract to the date on which the contract is finally completed and accepted), and has income from sources both within and without this state from a trade or business, the amount of business income derived from such long-term contracts from sources within this state shall be determined pursuant to this section. In such cases, the first step is to determine which portion of the taxpayer's income constitutes "business income" and which portion constitutes "nonbusiness income" under Section 7-4-2 NMSA 1978 and Sections 3.5.1.9 and 3.5.1.10 NMAC. Nonbusiness income is directly allocated to specific states pursuant to the provisions of Section 7-4-5 through 7-4-9 NMSA 1978, inclusive. Business income is apportioned among the states in which the business is conducted pursuant to the property, payroll, and sales apportionment factors set forth in this section. The sum of (1) the items nonbusiness income directly allocated to this state and (2) the amount of business income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax by this state.

C. *Business and nonbusiness income.* For definitions and rules for determining business and nonbusiness income, see Sections 3.5.1.9 and 3.5.1.10 NMAC.

D. *Methods of accounting and year of inclusion.* New Mexico follows the Internal Revenue Code with respect to general rules of accounting, definitions and methods of accounting for long-term construction contracts.

E. *Apportionment of business income.*

(1) In general. Business income is apportioned to this state by a three-factor formula consisting of property, payroll and sales regardless of the method of accounting for long-term contracts elected by the taxpayer. The total of the property, payroll and sales percentages is divided by three to determine the amount apportioned to this state.

(2) Percentage of completion method. Under this method of accounting for long-term contracts, the amount to be included each year as business income from each contract is the amount by which the gross contract price which corresponds to the percentage of the entire contract which has been completed during the income year exceeds all expenditures made during

the income year in connection with the contract. In so doing, account must be taken of the material and supplies on hand at the beginning and end of the income year for use in each such contract.

(3) Completed contract method. Under this method of accounting business income derived from long-term contracts is reported for the income year in which the contract is finally completed and accepted. Therefore, a special computation is required to compute the amount of business income attributable to this state from each completed contract. Thus, all receipts and expenditures applicable to such contracts whether complete or incomplete as of the end of the income year are excluded from business income derived from other sources, as for example, short-term contracts, interest, rents, royalties, etc., which is apportioned by the regular three-factor formula of property, payroll and sales.

(4) Property factor. In general the numerator and denominator of the property factor shall be determined as set forth in Sections 7-4-11, 7-4-12 and 7-4-13 NMSA 1978, inclusive, and Sections 3.5.11.8 through 3.5.11.11, 3.5.12.8, 3.5.12.9 and 3.5.13.8 NMAC inclusive. However, the following special rules are also applicable.

(a) The average value of the taxpayer's cost (including materials and labor of construction in progress, to the extent that such costs exceed progress billings (accrued or received, depending on whether the taxpayer is on the accrual or cash basis for keeping its accounts) shall be included in the denominator of the property factor. The value of any such construction costs attributable to construction projects in this state shall be included in the numerator of the property factor.

(b) Rent paid for the use of equipment directly attributable to a particular construction project is included in the property factor at eight times the net annual rental rate even though such rental expense may be capitalized into the cost of construction.

(c) The property factor is computed in the same manner for all long-term contract methods of accounting and is computed for each income year even though under the completed contract method of accounting, business income is computed separately (see Subsection F of this section below).

(5) Payroll factor. In general the numerator and denominator of the payroll factor shall be determined as set forth in Section 7-4-14 and 7-4-15 NMSA 1978 and Sections 3.5.14.8 through 3.5.14.13 and 3.5.15.8 NMAC. However, the following special rules are also applicable:

(a) Compensation paid employees which is attributable to a particular construction project is included in the payroll factor even though capitalized into the cost of construction.

(b) Compensation paid employees who in the aggregate perform most of their services in a state to which their employer does not report them for unemployment tax purposes, shall nevertheless be attributed to the state in which the services are performed.

(c) The payroll factor is computed in the same manner for all long-term contract methods of accounting and is computed for each income year even though, under the completed contract method of accounting, business income is computed separately (see Subsection F of this section below).

(6) Sales factor. In general, the numerator and denominator of the sales factor shall be determined as set forth in Sections 7-4-16 through 7-4-18 NMSA 1978, inclusive, and Sections 3.5.16.8 through 3.5.16.10, 3.5.17.8, 3.5.17.9 and 3.5.18.8 NMAC, inclusive. However,

the following special rules are also applicable:

(a) Gross receipts derived from the performance of a contract are attributable to this state if the construction project is located in this state. If the construction project is located partly within and partly without this state, the gross receipts attributable to this state are based upon the ratio which construction costs for their project in this state incurred during the income year bear to the total of construction costs for the entire project during the income year, or upon any other method, such as engineering cost estimates, which will provide a reasonable apportionment.

(b) If the percentage of completion method is used, the sales factor includes only that portion of the gross contract price which corresponds to the percentage of the entire contract which was completed during the income year.

(c) If the completed contract method of accounting is used, the sales factor includes the portion of the gross receipts (progress billings) received or accrued, whichever is applicable, during the income year attributable to each contract.

(d) The sales factor, except as noted above in items 2 and 3 above, is computed in the same manner, regardless of which long-term method of accounting the taxpayer has elected, and is computed for each income year even though, under the completed contract method of accounting, business income is computed separately.

(7) Apportionment percentage. The total of the property, payroll and sales percentages is divided by three to determine the apportionment percentage. The apportionment percentage is then applied to business income to establish the amount apportioned to this state.

F. *Completed contract methods - special computation.* The completed contract method of accounting requires that the reporting of income (or loss) be deferred until the year in which the construction project is completed or accepted. Accordingly, a separate computation is made for each such contract completed during the income year, regardless of whether the project is located within or without this state, in order to determine the amount of income which is attributable to sources within this state. The amount of income from each contract completed during the income year apportioned to this state plus other business income apportioned to this state by the regular three-factor formula such as interest income, rents, royalties, income from short-term contracts, etc. plus all nonbusiness income allocated to this state is the measure of tax for the income year. The amount of income (or loss) from each contract which is derived from sources within this state using the completed contract method of accounting is computed as follows:

(1) in the income year in which the contract is completed, the income (or loss) therefrom is determined; and then

(2) the income (or loss) determined at Paragraph (1) of this subsection is apportioned to this state by the following method:

(a) a fraction is determined for each year during which the contract was in progress. The numerator is the amount of construction costs paid or accrued in each year during which the contract was in progress and the denominator is the total of all such construction costs for the project;

(b) each percentage determined in 1 above is multiplied by the apportionment formula percentage for that year as determined in Paragraph (7) of Subsection E of this section;

(c) the percentages determined at Subparagraph (b) of this paragraph for each year during which the contract was in progress are totaled. The amount of total income (or loss) from the contract determined at Paragraph (1) of this subsection is multiplied by the total percentage. The resulting income (or loss) is the amount of business income from such contract derived from sources within this state.

G. *Computation for year of withdrawal, dissolution or cessation of business - completed method.*

(1) Use of the completed contract method of accounting for long-term contracts requires that income derived from sources within this state from incomplete contracts in progress outside this state on the date of withdrawal, dissolution or cessation of business in this state be included in the measure of tax for the taxable year during which the corporation withdraws, dissolves or ceases doing business in this state.

(2) The amount of income (or loss) from each such contract to be apportioned to this state by the apportionment method set forth in Paragraph (2) of Subsection F of this section shall be determined as if the percentage of completion method of accounting were used for all such contracts on the date of withdrawal, dissolution or cessation of business. The amount of business income (or loss) for each such contract shall be the amount by which the gross contract price from each such contract which corresponds to the percentage of the entire contract which has been completed from the commencement thereof to the date of withdrawal, dissolution or cessation of business exceeds all expenditures made during such period in connection with each such contract. In so doing, one must take into account the material and supplies on hand at the beginning and end of the income year for use in each such contract.

H. The provisions of this version of this section retroactively apply to any taxable year beginning on or after January 1, 1996.

[12/29/89, 9/20/93, 7/15/96; 3.5.19.12 NMAC - Rn & A, 3 NMAC 5.19.12, 6/29/01]

3.5.19.13 - SPECIAL RULES - RAILROADS

A. The special rules established in Section 3.5.19.13 NMAC apply to railroads.

B. *In general.* Where a railroad has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this section. In such cases, the first step is to determine what portion of the railroad's income constitutes "business" income and which portion constitutes "nonbusiness" income under Section 7-4-2 NMSA 1978 and Sections 3.5.1.9 and 3.5.1.10 NMAC. Nonbusiness income is directly allocable to specific states pursuant to the provisions of Sections 7-4-5 through 7-4-9 NMSA 1978, inclusive. Business income is apportioned among the states in which the business is conducted pursuant to property, payroll and sales apportionment factors set forth in this section. The sum of the items of nonbusiness income directly allocated to this state and the amount of business income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax by this state.

C. *Business and nonbusiness income.* For definitions and rules for determining business and nonbusiness income, see Sections 3.5.1.9 and 3.5.1.10 NMAC.

D. *Apportionment of business income.*

(1) In general. The property factor shall be determined in accordance with Parts 3.5.11 through 3.5.13 NMAC and the sales factor in accordance with Parts 3.5.14 and 3.5.15

NMAC, inclusive, except as modified in this section.

(2) The property factor.

(a) Property valuation. Owned property shall be valued at its original cost and property rented from others shall be valued at eight (8) times the net annual rental rate in accordance with Section 7-4-12 NMSA 1978. Railroad cars owned and operated by other railroads and temporarily used by the taxpayer in its business and for which a per diem or mileage charge is made are not included in the property factor as rented property. Railroad cars owned and operated by the taxpayer and temporarily used by other railroads in their business and for which a per diem charge is made by the taxpayer are included in the property factor of the taxpayer.

(b) General definitions. The following definitions are applicable to the numerator and denominator of the property factor.

(i) "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments except for subsequent capital additions, improvements thereto or partial dispositions); or, if the property has no such basis, the valuation of such property for interstate commerce commission purposes. If the original cost of property is unascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer.

(ii) "Rent" does not include the per diem and mileage charges paid by the taxpayer for the temporary use of railroad cars owned or operated by another railroad.

(iii) The "value" of owned real and tangible personal property shall mean its original cost.

(iv) "Average value" of property means the amount determined by averaging the values at the beginning and ending of the income tax year, but the department may require the averaging of monthly values during the income year or such averaging as necessary to effect properly the average value of the railroad's property.

(v) The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate.

(vi) "Net annual rental rate" means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(vii) "Property used during the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

(viii) A "locomotive-mile" is the movement of a locomotive (a self-propelled unit of equipment designed solely for moving other equipment) a distance of one mile under its own power.

(ix) A "car-mile" is a movement of a unit of car equipment a distance of one mile.

(c) The denominator and numerator of the property factor.

(i) The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year.

(ii) In determining the numerator of the property factor, all property except mobile or movable property such as passenger cars, freight cars, locomotives and freight containers which are located within and without this state during the income year shall be included in the numerator of the property factor in accordance with Sections 7-4-11 through 7-4-13 NMSA 1978, inclusive, and Parts 3.5.11 through 3.5.13 NMAC, inclusive.

(iii) Mobile or movable property such as passenger cars, freight cars, locomotives and freight containers which are located within and without this during the income year shall be included in the numerator of the property factor in the ratio which “locomotive-miles” and “car-miles” in the state bear to the total everywhere.

(3) The payroll factor.

(a) The denominator of the payroll factor is the total compensation paid everywhere by the taxpayer during the income year for the production of business income. The numerator of the payroll factor is the total amount paid in this state during the income year by the taxpayer for compensation. With respect to all personnel except enginemen and trainmen performing services on interstate trains, compensation paid to such employees shall be included in the numerator as provided in Sections 7-4-14 and 7-4-15 NMSA 1978 and Parts 3.5.14 and 3.5.15 NMAC.

(b) With respect to enginemen and trainmen performing services on interstate trains, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere. Compensation for services performed in this state should be deemed to be the compensation reported or required to be reported by such employees for determination of their income tax liability to this state.

(4) The sales (revenue) factor.

(a) In general.

(i) All revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer which produces business income, except per diem and mileage charges which are collected by the taxpayer, is included in the denominator of the revenue factor.

(ii) The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year, other than revenue from hauling freight, passengers, mail and express, shall be attributable to this state in accordance with Sections 7-4-16, 7-4-17 and 7-4-18 NMSA 1978 and Parts 3.5.16 through 3.5.18 NMAC.

(b) Numerator of sales (revenue) factor from freight, mail and express. The total revenue of the taxpayer in this state during the income year for the numerator of the revenue factor from hauling freight, mail and express shall be attributable to this state as follows:

(i) all receipts from shipments which both originate and terminate within this state; and

(ii) that portion of the receipts from each movement or shipment passing through, into, or out of this state is determined by the ratio which the miles traveled by such movement or shipment in this state bear to the total miles traveled by such movement or shipment from point of origin to destination.

(c) Numerator of sales (revenue) factor from passengers. The numerator of

the sales (revenue) factor shall include:

(i) all receipts from the transportation of passengers (including mail and express handled in passenger service) which both originate and terminate within this state; and

(ii) that portion of the receipts from the transportation of interstate passengers (including mail and express handled in passenger service) determined by the ratio which revenue passenger miles in this state bear to the total everywhere.

E. The provisions of Section 3.5.19.13 NMAC apply to any taxable year beginning on or after January 1, 1990.

[12/29/89, 9/20/93, 1/15/97; 3.5.19.13 NMAC - Rn & A, 3 NMAC 5.19.13, 6/29/01]

3.5.19.14 - SPECIAL RULES - AIRLINES

A. The special rules established in Section 3.5.19.14 NMAC apply to airlines.

B. *In general.* Where an airline has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to the provisions of the Uniform Division of Income for Tax Purposes Act, Sections 7-4-1 through 7-4-21 NMSA 1978, except as modified by this section.

C. *Apportionment of business income.*

(1) General definitions. The following definitions are applicable to the terms used in the apportionment factor descriptions.

(a) "Value" of owned real and tangible personal property shall mean its original cost.

(b) "Cost of aircraft by type" means the average original cost or value of aircraft by type which are ready for flight.

(c) "Original cost" means the initial federal tax basis of the property plus the value of capital improvements to such property, except that, for this purpose, it shall be assumed that safe harbor leases are not true leases and do not affect the original initial federal tax basis of the property.

(d) "Average value" of the property means the amount determined by averaging the values at the beginning and ending of the income year, but the taxation and revenue department may require the averaging of monthly values during the income year if such averaging is necessary to reflect properly the average value of the airline's property.

(e) The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate.

(f) "Net annual rental rate" means the annual rental rate paid by the taxpayer.

(g) "Property used during the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

(h) "Aircraft ready for flight" means aircraft owned or acquired through rental or lease (but not interchange) which are in the possession of the taxpayer and are available for service on the taxpayer routes.

(i) "Revenue service" means the use of aircraft ready for flight for the production of revenue.

(j) "Transportation revenue" means revenue earned by transporting

passengers, freight and mail as well as revenue earned from liquor sales, pet crate rentals, etc.

(k) "Departures" means for purposes of Section 3.5.19.14 NMAC all takeoffs, whether they be regularly scheduled or charter flights, that occur during revenue service.

(2) Property factor.

(a) Property valuation. Owned aircraft shall be valued at its original cost and rented aircraft shall be valued at eight (8) times the net annual rental rate in accordance with Section 7-4-12 NMSA 1978 and Part 3.5.12 NMAC. The use of the taxpayer's owned or rented aircraft in an interchange program with another air carrier will not constitute a rental of such aircraft by the airlines to the other participating airline. Such aircraft shall be accounted for in the property factor of the owner. Parts and other expendables, including parts for use in contract overhaul work, will be valued at cost.

(b) The denominator and numerator of the property factor.

(i) The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year.

(ii) In determining the numerator of the property factor, all property except aircraft ready for flight shall be included in the numerator of the property factor in accordance with Sections 7-4-11 through 7-4-13 NMSA 1978 inclusive. Aircraft ready for flight shall be included in the numerator of the property factor in the ratio calculated as follows:

(iii) Departures of aircraft from locations in this state weighted as to the cost and value of aircraft by type compared to total departures similarly weighted.

(3) The payroll factor. The denominator of the payroll factor is the total compensation paid everywhere by the taxpayer during the income year. The numerator of the payroll factor is the total amount paid in this state during the income year by the taxpayer for compensation. With respect to non-flight personnel, compensation paid to such employees shall be included in the numerator as provided in Sections 7-4-14 and 7-4-15 NMSA 1978. With respect to flight personnel (the air crew aboard an aircraft assisting in the operations of the aircraft or the welfare of passengers while in the air), compensation paid to such employees shall be included in the ratio of departures of aircraft from locations in this state, weighted as to the cost and value of aircraft by type compared to total departures similarly weighted, multiplied by the total flight personnel compensation.

(4) Sales (transportation revenue) factor. The transportation revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer and miscellaneous sales of merchandise, etc., are included in the denominator of the revenue factor. Passive income items such as interest, rental income, dividends, etc., will not generally be included in either the denominator nor the numerator of the sales factor nor will the proceeds or net gains or losses from the sale of aircraft be included in the denominator or numerator of the sales factor unless such income is derived from transactions or activities in the regular trade or business of the taxpayer. The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year is the result of the following calculation: the ratio of departures of aircraft in this

state weighted as to the cost and value of aircraft by type, as compared to total departures similarly weighted multiplied by the total transportation revenue. The product of this calculation is to be added to any non-flight revenues directly attributable to this state.

D. *Records.* The taxpayer must maintain the records necessary to arrive at departures by type of aircraft as used in this section. Such records are to be subject to review by the respective state taxing authorities or their agents.

E. The provisions of Section 3.5.19.14 NMAC apply to any taxable year beginning on or after January 1, 1990.

[12/29/89, 9/20/93, 1/15/97; 3.5.19.14 NMAC - Rn & A, 3 NMAC 5.19.14, 6/29/01]

3.5.19.15 - SPECIAL RULES - TRUCKING COMPANIES

A. The special rules established in Section 3.5.19.15 NMAC apply to trucking companies.

B. *In general.* As used in this section, the term “trucking company” means a motor common carrier, a motor contract carrier or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking company has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this section. In such cases, the first step is to determine what portion of the trucking company's income constitutes “business” income and what portion constitutes “nonbusiness” income under Subsections A and E of Section 7-4-2 NMSA 1978 and Sections 3.5.1.9 and 3.5.1.10 NMAC. Nonbusiness income is directly allocable to specific states pursuant to the provisions of Sections 7-4-5 through 7-4-9 NMSA 1978, inclusive. Business income is apportioned among the states in which the business is conducted and pursuant to the property, payroll and sales apportionment factors set forth in this section. The sum of the items of nonbusiness income directly allocated to this state and the amount of business income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax in this state.

C. *Business and nonbusiness income.* For definitions and rules for determining business and nonbusiness income, see Sections 3.5.1.9 and 3.5.1.10 NMAC.

D. *Apportionment of business income.*

(1) In general. The property factor shall be determined in accordance with Parts 3.5.11 through 3.5.13 NMAC, inclusive, the payroll factor in accordance with Parts 3.5.14 and 3.5.15 NMAC, and the sales factor in accordance with Parts 3.5.16 through 3.5.18 NMAC, inclusive, except as modified by this section.

(2) The property factor.

(a) Property valuation. Owned property shall be valued at its original cost and property rented from others shall be valued at eight (8) times the net annual rental rate in accordance with Section 7-4-11 NMSA 1978 and Part 3.5.11 NMAC.

(b) General definitions. The following definitions are applicable to the numerator and denominator of the property factor, as well as other apportionment factor descriptions.

(i) “Average value” of property means the amount determined by averaging the values at the beginning and end of the income tax year, but the taxation and revenue department may require the averaging of monthly values during the income tax year or

such averaging as is necessary to reflect properly the average value of the trucking company's property.

(ii) "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property, other than support vehicles used predominantly in a local capacity. Mobile property shall include purchased transportation.

(iii) A "mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.

(iv) "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments, except for subsequent capital additions, improvements thereto, or partial dispositions); or, if the property has no such basis, the valuation of such property for interstate commerce commission purposes. If the original cost of property is unascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer.

(v) "Property used during the course of the income tax year" includes property which is available for use in the taxpayer's trade or business during the income year.

(vi) "Purchased transportation" means the taxpayer's use of a motor vehicle owned and operated by another for the purpose of transporting tangible personal property for which a charge, whether based upon a per diem, mileage, or other basis, is incurred.

(vii) "Temporarily used" means the use of any mobile property owned by another for a period not to exceed a total of 30 days during any income tax year.

(viii) The "value" of owned real and tangible personal property means its original cost.

(ix) The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate.

(c) The denominator and numerator of the property factor.

(i) The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year. In the determination of the numerator of the property factor, all property, except mobile property as defined in this section, shall be included in the numerator of the property factor in accordance with Sections 7-4-11 to 7-4-13 NMSA 1978, inclusive, and Parts 3.5.11 through 3.5.13 NMAC, inclusive.

(ii) Mobile property as defined in this section, which is located within and without this state during the income year, shall be included in the numerator of the property factor in the ratio which mobile property miles in the state bear to the total mobile property miles.

(3) The payroll factor.

(a) The denominator of the payroll factor is the compensation paid everywhere by the taxpayer during the income year for the production of business income. The numerator of the payroll factor is the total compensation paid in this state during the income year by the taxpayer. With respect to all personnel, except those performing services within and

without this state, compensation paid to such employees shall be included in the numerator as provided in Section 7-4-14 and 7-4-15 NMSA 1978 and Parts 3.5.14 and 3.5.15 NMAC.

(b) With respect to personnel performing services within and without this state, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere based on mobile property miles.

(4) The sales (revenue) factor.

(a) In general.

(i) All revenue derived from transactions and activities in the regular course of the taxpayer's trade or business which produce business income shall be included in the denominator of the revenue factor.

(ii) The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total state revenue of the taxpayer, other than from hauling freight, mail, and express, shall be attributable to this state in accordance with Sections 7-4-16 to 7-4-18 NMSA 1978 and Parts 3.5.16 through 3.5.18 NMAC.

(b) Numerator of the sales (revenue) factor from freight, mail, and express. The total revenue attributable to this state during the income year from hauling freight, mail, and express shall be:

(i) intrastate: All receipts from any shipment which both originates and terminates within this state; and

(ii) interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

E. *Records.* The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as those terms are used in this section. Such records are subject to review by the taxation and revenue department or its agents.

F. *De minimis nexus standard.* Notwithstanding any provision contained herein, this section shall not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:

(1) owns nor rents any real or personal property in this state, except mobile property; nor

(2) makes any pick-ups or deliveries within this state; nor

(3) travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the income tax year do not exceed 3 percent of the total mobile property miles traveled in all states by the trucking company during that period; nor

(4) makes more than twelve trips into this state.

G. The provisions of Section 3.5.19.15 NMAC apply to any taxable year beginning on or after January 1, 1990.

[12/29/89, 9/20/93, 1/15/97; 3.5.19.15 NMAC - Rn & A, 3 NMAC 5.19.15, 6/29/01]

3.5.19.16 - [RESERVED]

3.5.19.17 - SPECIAL RULES - FINANCIAL INSTITUTIONS

A. *Apportionment and allocation.*

(1) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this section. All items of nonbusiness income (income which is not includable in the apportionable income tax base) shall be allocated pursuant to the provisions of Sections 7-4-5 through 7-4-9 NMSA 1978 and Parts 3.5.5 through 3.5.9 NMAC. A financial institution organized under the laws of a foreign country, the commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income (as defined under the federal Internal Revenue Code) is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this section.

(2) All business income (income which is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by adding the taxpayer's receipts factor (as described in Subsection C of this section), property factor (as described in Subsection D of this section), and payroll factor (as described in Subsection E of this section) together and dividing the sum by three. If one of the factors is missing, the two remaining factors are added and the sum is divided by two. If two of the factors are missing, the remaining factor is the apportionment percentage. A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

(3) Each factor shall be computed according to the method of accounting used by the taxpayer for federal income tax purposes for the taxable year, except as provided in Section 3.5.14.8 NMAC.

(4) If the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Secretary may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (a) separate accounting;
- (b) the exclusion of any one or more of the factors,
- (c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

B. *Definitions.* As used in this section, unless the context otherwise requires:

(1) "billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year (or on such later date in the taxable year when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed;

(2) "borrower or credit card holder located in this state" means:

- (a) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or

(b) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state;

(3) “commercial domicile” means:

(a) the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(b) if a taxpayer is organized under the laws of a foreign country, or of the commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile shall be deemed for the purposes of this section to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It shall be presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year;

(4) “compensation” means wages, salaries, commissions and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the federal Internal Revenue Code. In the case of employees not subject to the federal Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the federal Internal Revenue Code shall be made as though such employees were subject to the federal Internal Revenue Code;

(5) “credit card” means credit, travel or entertainment card;

(6) “credit card issuer's reimbursement fee” means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card;

(7) “employee” means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer;

(8) “financial institution” means:

(a) any corporation or other business entity registered under state law as a bank holding company or registered under the federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company under the federal National Housing Act, as amended;

(b) a national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. 21 et seq.;

(c) a savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(1);

(d) any bank or thrift institution incorporated or organized under the laws of any state;

(e) any corporation organized under the provisions of 12 U.S.C. Sections 611 to 631;

(f) any agency or branch of a foreign depository as defined in 12 U.S.C. Section 3101;

(g) a state credit union the loan assets of which exceed \$50,000,000 as of

the first day of its taxable year;

(h) a production credit association organized under the federal Farm Credit Act of 1933, all of whose stock held by the federal production credit corporation has been retired;

(i) any corporation whose voting stock is more than fifty percent (50%) owned, directly or indirectly, by any person or business entity described in items (a) through (h) of this paragraph other than an insurance company taxable under the Insurance Code, Chapter 59A NMSA 1978;

(j) a corporation or other business entity that derives more than fifty percent (50%) of its total gross income for financial accounting purposes from finance leases. For purposes of this subparagraph, a "finance lease" shall mean - any lease transaction which is the functional equivalent of an extension of credit and that transfers substantially all of the benefits and risks incident to the ownership of property. The phrase shall include any "direct financing lease" or "leverage lease" that meets the criteria of financial accounting standards board statement No. 13, "accounting for leases" or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles. No corporation or other business entity will be classified as a financial institution under this subparagraph unless the income from finance leases exceeds fifty percent of gross income for the current year and each of the two immediately preceding years and gross income from non-recurring, extraordinary items is disregarded; and

(k) any other person, other than an insurance company or a reciprocal or inter-insurance exchange that pays a premium tax to this state, that derives more than fifty percent of its gross income from activities that a person described in subparagraphs (b) through (h) and (j) of this paragraph is authorized to transact. For the purpose of this subparagraph, the computation of gross income shall not include income from non-recurring, extraordinary items;

(9) "gross rents" means the actual sum of money or other consideration payable for the use or possession of property. "Gross rents" shall include, but not be limited to:

(a) any amount payable for the use or possession of real property or tangible property whether designated as a fixed sum of money or as a percentage of receipts, profits or otherwise;

(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; and

(c) a proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year. However, where a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer;

(d) The following are not included in the term "gross rents":

(i) reasonable amounts payable as separate charges for water and electric service furnished by the lessor;

(ii) reasonable amounts payable as service charges for janitorial

services furnished by the lessor;

(iii) reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and

(iv) that portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it;

(10) “loan” means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: properties treated as loans under Section 595 of the federal Internal Revenue Code; futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items;

(11) “loan secured by real property” means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property;

(12) “merchant discount” means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the card holder;

(13) “participation” means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower;

(14) “person” means an individual, estate, trust, partnership, corporation and any other business entity;

(15) “principal base of operations” with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the “principal base of operations” means the place of more or less permanent nature from which the employee regularly

(a) starts his or her work and to which he or she customarily returns in order to receive instructions from his or her employer;

(b) communicates with his or her customers or other persons; or

(c) performs any other functions necessary to the exercise of his or her trade or profession at some other point or points;

(16) “real property owned” and “tangible personal property owned” mean real and tangible personal property, respectively, on which the taxpayer may claim depreciation for federal income tax purposes or property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure;

(17) “regular place of business” means an office at which the taxpayer carries on

its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees or authorized representatives of the taxpayer;

(18) “state” means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country;

(19) “syndication” means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount;

(20) “taxable” means either:

(a) that a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any tax which is imposed upon or measured by net income; or

(b) that another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not;

(21) “transportation property” means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

C. *Receipts factor.*

(1) General. The receipts 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 as the method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts described in this subsection which constitute business income and are included in the computation of the apportionable income base for the taxable year.

(2) Receipts from the lease of real property. The numerator of the receipts factor includes receipts from the lease or rental of real property owned by the taxpayer if the property is located within this state or receipts from the sublease of real property if the property is located within this state.

(3) Receipts from the lease of tangible personal property.

(a) Except as described in Subparagraph (b) of this paragraph, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(b) Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of receipts that is to be included in the numerator of this state's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the

state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(4) Interest from loans secured by real property.

(a) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subparagraph are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the receipts described in this subparagraph shall be included in the numerator of the receipts factor if the borrower is located in this state.

(b) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(5) Interest from loans not secured by real property. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state.

(6) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Internal Revenue Code.

(a) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to Paragraph (4) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(b) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to Paragraph (5) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(7) Receipts from credit card receivables. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and receipts from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state.

(8) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to Paragraph (7) of this subsection and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(9) Credit card issuer's reimbursement fees. The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of

which is the amount included in the numerator of the receipts factor pursuant to Paragraph (7) of this subsection and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(10) Receipts from merchant discount. The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this state. Such receipts shall be computed net of any cardholder charge backs, but shall not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its card holders.

(11) Loan servicing fees.

(a) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to Paragraph (4) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property. The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to Paragraph (5) of this subsection and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(b) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor shall include such fees if the borrower is located in this state.

(12) Receipts from services. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection if the service is performed in this state. If the service is performed both within and without this state, the numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection, if a greater proportion of the income-producing activity is performed in this state based on cost of performance.

(13) Receipts from investment assets and activities and trading assets and activities.

(a) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities shall be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities and foreign currency transactions. With respect to the investment and trading assets and activities described in Items (i) and (ii) of this subparagraph, the receipts factor shall include the amounts described in such items.

(i) The receipts factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(ii) The receipts factor shall include the amount by which interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency

transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(b) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities described in Subparagraph (a) of this paragraph that are attributable to this state.

(i) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(ii) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in Item (i) of Subparagraph (a) of this paragraph from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(iii) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions, (but excluding amounts described in Item (i) or (ii) of this subparagraph), attributable to this state and included in the numerator is determined by multiplying the amount described in Item (ii) of Subparagraph (a) of this paragraph by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(iv) For purposes of this item, average value shall be determined using the rules for determining the average value of tangible personal property set forth in Subsection D of this section.

(c) In lieu of using the method set forth in Subparagraph (b) of this paragraph, the taxpayer may elect, or the department may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this item.

(i) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(ii) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying

the amount described in Item (i) of Subparagraph (a) of this paragraph from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(iii) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in Item (i) or (ii) of this subparagraph), attributable to this state and included in the numerator is determined by multiplying the amount described in Item (ii) of Subparagraph (a) of this paragraph by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(d) If the taxpayer elects or is required by the department to use the method set forth in Subparagraph (c) of the paragraph, it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the department to use, or the department requires a different method.

(e) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established at the commercial domicile of the taxpayer.

(14) All other receipts. The numerator of the receipts factor includes all other receipts pursuant to the rules set forth in Sections 7-4-17 and 7-4-18 NMSA 1978 and Parts 3.5.17 and 3.5.18 NMAC.

(15) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this subsection to a state in which the taxpayer is not taxable shall be included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

D. *Property factor.*

(1) General. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located or used within this state during the taxable year, the average value of the taxpayer's real and tangible personal property owned that is located or used within this state during the taxable year, and the average value of the taxpayer's loans and credit card receivables that are located within this state during the taxable year, and the denominator of which is the average value of all such property located or used within and without this state during the taxable year.

(2) Property included. The property factor shall include only property the income or expenses of which are included (or would have been included if not fully depreciated or

expensed, or depreciated or expensed to a nominal amount) in the computation of the apportionable income base for the taxable year.

(3) Value of property owned by the taxpayer.

(a) The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for federal income tax purposes without regard to depletion, depreciation or amortization.

(b) Loans are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a loan is charged-off in whole or in part for federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established pursuant to regulatory or financial accounting guidelines which is treated as charged-off for federal income tax purposes shall be treated as charged-off for purposes of this subsection.

(c) Credit card receivables are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a credit card receivable is charged-off in whole or in part for federal income tax purposes, the portion of the receivable charged-off is not outstanding.

(4) Average value of property owned by the taxpayer. The average value of property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable year and the value on the last day of the taxable year and dividing the sum by two. If averaging on this basis does not properly reflect average value, the department may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the department or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property within and without this state and on all subsequent returns unless the taxpayer receives prior permission from the department or the department requires a different method of determining average value.

(5) Average value of real property and tangible personal property rented to the taxpayer.

(a) The average value of real property and tangible personal property that the taxpayer has rented from another and which is not treated as property owned by the taxpayer for federal income tax purposes, shall be determined annually by multiplying the gross rents payable during the taxable year by eight.

(b) Where the use of the general method described in this subparagraph results in inaccurate valuations of rented property, any other method which properly reflects the value may be adopted by the department or by the taxpayer when approved in writing by the department. Once approved, such other method of valuation must be used on all subsequent returns unless the taxpayer receives prior approval from the department or the department requires a different method of valuation.

(6) Location of real property and tangible personal property owned by or rented to the taxpayer.

(a) Except as described in Subparagraph (b) of this paragraph, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated or used within this state.

(b) Transportation property is included in the numerator of the property

factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(7) Location of loans.

(a) A loan is considered to be located within this state if it is properly assigned to a regular place of business of the taxpayer within this state.

(i) A loan is properly assigned to the regular place of business with which it has a preponderance of substantive contacts. A loan assigned by the taxpayer to a regular place of business without the state shall be presumed to have been properly assigned if the taxpayer has assigned, in the regular course of its business, such loan on its records to a regular place of business consistent with federal or state regulatory requirements; such assignment on its records is based upon substantive contacts of the loan to such regular place of business; and the taxpayer uses said records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

(ii) The presumption of proper assignment of a loan provided in Item (i) of Subparagraph (a) of this paragraph may be rebutted upon a showing by the department, supported by a preponderance of the evidence, that the preponderance of substantive contacts regarding such loan did not occur at the regular place of business to which it was assigned on the taxpayer's records. When such presumption has been rebutted, the loan shall then be located within this state if the taxpayer had a regular place of business within this state at the time the loan was made and the taxpayer fails to show, by a preponderance of the evidence, that the preponderance of substantive contacts regarding such loan did not occur within this state.

(b) In the case of a loan which is assigned by the taxpayer to a place without this state which is not a regular place of business, it shall be presumed, subject to rebuttal by the taxpayer on a showing supported by the preponderance of evidence, that the preponderance of substantive contacts regarding the loan occurred within this state if, at the time the loan was made the taxpayer's commercial domicile, as defined by Paragraph (3) of Subsection B of this section, was within this state.

(c) To determine the state in which the preponderance of substantive contacts relating to a loan have occurred, the facts and circumstances regarding the loan at issue shall be reviewed on a case-by-case basis and consideration shall be given to such activities as the solicitation, investigation, negotiation, approval and administration of the loan. The terms "solicitation", "investigation", "negotiation", "approval" and "administration" are defined as follows:

(i) "Solicitation". Solicitation is either active or passive. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. Such activity is located at the regular place of business which the taxpayer's employee is regularly connected with or working out of, regardless of where the services of such employee

were actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

(ii) "Investigation". Investigation is the procedure whereby employees of the taxpayer determine the credit-worthiness of the customer as well as the degree of risk involved in making a particular agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(iii) "Negotiation". Negotiation is the procedure whereby employees of the taxpayer and its customer determine the terms of the agreement (e.g., the amount, duration, interest rate, frequency of repayment, currency denomination and security required). Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(iv) "Approval". Approval is the procedure whereby employees or the board of directors of the taxpayer make the final determination whether to enter into the agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed. If the board of directors makes the final determination, such activity is located at the commercial domicile of the taxpayer.

(v) "Administration". Administration is the process of managing the account. This process includes bookkeeping, collecting the payments, corresponding with the customer, reporting to management regarding the status of the agreement and proceeding against the borrower or the security interest if the borrower is in default. Such activity is located at the regular place of business which oversees this activity.

(8) Location of credit card receivables. For purposes of determining the location of credit card receivables, credit card receivables shall be treated as loans and shall be subject to the provisions of Paragraph (7) of this subsection.

(9) Period for which properly assigned loan remains assigned. A loan that has been properly assigned to a state shall, absent any change of material fact, remain assigned to said state for the length of the original term of the loan. Thereafter, said loan may be properly assigned to another state if said loan has a preponderance of substantive contact to a regular place of business there.

E. *Payroll factor.*

(1) General. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both within and without this state during the taxable year. The payroll factor shall include only that compensation which is included in the computation of the apportionable income tax base for the taxable year.

(2) Compensation relating to nonbusiness income and independent contractors. The compensation of any employee for services or activities which are connected with the production of nonbusiness income (income which is not includable in the apportionable income base) and payments made to any independent contractor or any other person not properly

classifiable as an employee shall be excluded from both the numerator and denominator of the factor.

(3) When compensation paid in this state. Compensation is paid in this state if any one of the following tests, applied consecutively, is met.

(a) The employee's services are performed entirely within this state.

(b) The employee's services are performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The term "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.

(c) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:

(i) if the employee's principal base of operations is within this state;

or

(ii) if there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this state; or

(iii) if the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed but the employee's residence is in this state.

F. Section 3.5.19.17 NMAC applies to taxable years beginning on or after January 1, 1996.

[12/22/95, 1/15/97, 3/31/99; 3.5.19.17 NMAC - Rn & A, 3 NMAC 5.19.17, 6/29/01]

3.5.19.18 - SPECIAL RULES - TELEVISION AND RADIO BROADCASTING

A. The following special rules are established in respect to the apportionment of income from television and radio broadcasting by a broadcaster that is taxable both in this state and in one or more other states.

B. *In general.* When a person in the business of broadcasting film or radio programming, whether through the public airways, by cable, direct or indirect satellite transmission or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to Article IV. of the Multistate Tax Compact and the regulations issued thereunder by this state, except as modified by Section 3.5.19.18 NMAC.

C. *Business and nonbusiness income.* For definitions and regulations for determining whether income shall be classified as "business" or "nonbusiness" income, see Part 3.5.1 NMAC.

D. *Definitions.* The following definitions are applicable to the terms contained in this section, unless the context clearly requires otherwise.

(1) "Film" or "film programming" means any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium. Each episode of a series of films produced for

television shall constitute a separate “film” notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(2) “Outer-jurisdictional” property means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but which are not physically located in any particular state.

(3) “Radio” or “radio programming” means any and all performances, events or productions broadcast on radio, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of an audio tape, disc or any other format or medium. Each episode of a series of radio programming produced for radio broadcast shall constitute a separate “radio programming” notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(4) “Release” or “in release” means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience for which the program was created. Thus, for example, a film is placed into service when it is first publicly telecast for entertainment, educational, commercial, artistic or other purpose. Each episode of a television or radio series is placed into service when it is first broadcast. A program is not placed into service merely because it is completed and therefore in a condition or state of readiness and availability for broadcast or merely because it is previewed to prospective sponsors or purchasers.

(5) “Rent” shall include license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.

(6) A “subscriber” to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

(7) “Telecast” or “broadcast” (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radiowaves or microwaves or by wires, lines, coaxial cables, wave guides, fiber optics, satellite transmissions directly or indirectly to viewers and listeners or by any other means of communication.

E. *Apportionment of business income.*

(1) In general. The property factor shall be determined in accordance with Parts 3.5.11 through 3.5.13 NMAC, the payroll factor in accordance with Parts 3.5.14 and 3.5.15 NMAC and the sales factor in accordance with Parts 3.5.16 and 3.5.17 NMAC, except as modified by Section 3.5.19.18 NMAC.

(2) The property factor.

(a) In general.

(i) In the case of rented studios, the net annual rental rate shall include only the amount of the basic or flat rental charge by the studio for the use of a stage or other permanent equipment such as sound recording equipment and the like; except that additional equipment rented from other sources or from the studio not covered in the basic or flat rental charge and used for one week or longer (even though rented on a day-to-day basis) shall be included. Lump-sum net rental payments for a period which encompasses more than a single income year shall be assigned ratably over the rental period.

(ii) No value or cost attributable to any outer-jurisdictional, film or

radio programming property shall be included in the property factor at any time.

(b) Property factor denominator.

(i) All real property and tangible personal property (other the outer-jurisdictional and film or radio programming property), whether owned or rented, which is used in the business shall be included in the denominator of the property factor.

(ii) Audio or video cassettes, discs or similar medium containing film or radio programming and intended for sale or rental by the taxpayer for home viewing or listening shall be included in the property factor at their original cost. To the extent that the taxpayer licenses or otherwise permits others to manufacture or distribute such cassettes, discs or other medium containing film or radio programming for home viewing or listening, the value of said cassettes, discs or other medium shall include the license, royalty or other fees received by the taxpayer capitalized at a rate of eight times the gross receipts derived therefrom during the income year.

(iii) Outer-jurisdictional, film and radio programming property shall be excluded from the denominator of the property factor.

(c) Property factor numerator.

(i) With the exception of outer-jurisdictional, film and radio programming property, all real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period shall be included in the numerator of the property factor as provided in Section 3.5.11.11 NMAC.

(ii) Outer-jurisdictional, film and radio programming property shall be excluded from the numerator of the property factor.

(3) The payroll factor.

(a) Payroll factor denominator. The denominator of the payroll factor shall include all compensation, including residual and profit participation payments, paid to employees during the income year, including that paid to directors, actors, newscasters and other talent in their status as employees.

(b) Payroll factor numerator. Compensation for all employees shall be attributed to the state or states as may be determined by the application of Parts 3.5.14 and 3.5.15 NMAC.

(4) The sales factor.

(a) Sales factor denominator. The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under Section 3.5.19.11 NMAC.

(b) Sales factor numerator. The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to the following:

(i) gross receipts, including advertising revenue, from television film or radio programming in release to or by television and radio stations located in this state;

(ii) gross receipts, including advertising revenues, from television or radio programming in release to or by a television or radio station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter the "audience factor") that the audience for such station (or owned and affiliated stations in the case of networks) located in this state bears to the total audience for such station (of owned and

affiliated stations in the case of networks). The audience factor for film or radio programming shall be determined by the ratio of the taxpayer's in-state viewing or listening audience bears to its total viewing or listening audience. Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided that the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state;

(iii) gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. If the number of subscribers cannot be determined accurately from the books and records maintained by the taxpayer, such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose; and

(iv) receipts from the sale, rental, licensing or other disposition of video or audio cassettes, discs or similar medium intended for home viewing or listening shall be included in the sales factor as provided in Part 3.5.17 NMAC.

[1/29/99; 3.5.19.18 NMAC - Rn & A, 3 NMAC 5.19.18, 6/29/01]

3.5.19.19 - SPECIAL RULES: PUBLISHING

The following special rules are established with respect to the apportionment of income derived from the publishing, sale, licensing or other distribution of books, newspapers, magazines, periodicals, trade journals or other printed material.

A. *In General.* Except as specifically modified by this regulation, when a person in the business of publishing, selling, licensing or distributing newspapers, magazines, periodicals, trade journals or other printed material has income from sources both within and without this state, the amount of business income from sources within this state from such business activity shall be determined pursuant to the provisions of the Uniform Division of Income for Tax Purposes Act, Section 7-4-1 through 7-4-21, NMSA 1978.

B. *Definitions.* The following definitions are applicable to the terms contained in this regulation, unless the context clearly requires otherwise.

(1) "Outer-jurisdictional property" means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in the business of publishing, licensing, selling or otherwise distributing printed material, but which are not physically located in any particular state.

(2) "Print or printed material" includes, without limitation, the physical embodiment or printed version of any thought or expression including, without limitation, a play, story, article, column or other literary, commercial, educational, artistic or other written or printed work. The determination of whether an item is or consists of print or printed material shall be made without regard to its content. Printed material may take the form of a book, newspaper, magazine, periodical, trade journal or any other form of printed matter and may be contained on any medium or property.

(3) "Purchaser" and "subscriber" mean the individual, residence, business or other outlet which is the ultimate or final recipient of the print or printed material. Neither of such terms shall mean or include a wholesaler or other distributor of print or printed material.

(4) "Terrestrial facility" shall include any telephone line, cable, fiber optic,

microwave, earth station, satellite dish, antennae or other relay system or device that is used to receive, transmit, relay or carry any data, voice, image or other information that is transmitted from or by any outer-jurisdictional property to the ultimate recipient thereof.

C. *Apportionment of business income.*

(1) The property factor.

(a) Property factor denominator. All real and tangible personal property, including outer-jurisdictional property, whether owned or rented, which is used in the business shall be included in the denominator of the property factor.

(b) Property factor numerator.

(i) All real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period shall be included in the numerator of the property factor.

(ii) Outer-jurisdictional property owned or rented by the taxpayer and used in this state during the tax period shall be included in the numerator of the property factor in the ratio which the value of such property that is attributable to its use by the taxpayer in business activities in this state bears to the total value of such property that is attributable to its use in the taxpayer's business activities everywhere. The value of outer-jurisdictional property to be attributed to the numerator of the property factor of this state shall be determined by the ratio that the number of uplinks and downlinks (sometimes referred to as "half-circuits") that were used during the tax period to transmit from this state and to receive in this state any data, voice, image or other information bears to the total number of uplinks and downlinks or half-circuits that the taxpayer used for transmissions everywhere. Should information regarding such uplink and downlink or half-circuit usage not be available or should such measurement of activity not be applicable to the type of outer jurisdictional property used by the taxpayer, the value of such property to be attributed to the numerator of the property factor of this state shall be determined by the ratio that the amount of time (in terms of hours and minutes of use) or such other measurement of use of outer jurisdictional property that was used during the tax period to transmit from this state and to receive in this state any data, voice, image or other information bears to the total amount of time or other measurement of use that was used for transmissions everywhere.

(iii) Outer-jurisdictional property shall be considered to have been used by the taxpayer in its business activities within this state when such property, wherever located, has been employed by the taxpayer in any manner in the publishing, sale, licensing or other distribution of books, newspapers, magazines or other printed material and any data, voice, image or other information is transmitted to or from this state either through an earth station or terrestrial facility located in this state.

(2) The payroll factor. The payroll factor shall be determined in accordance with Sections 7-4-14 and 7-4-15, NMSA 1978 and the regulations promulgated thereunder.

(3) The sales factor.

(a) Sales factor denominator. The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts that may be excluded under NMAC 3.5.19.11.

(b) Sales factor numerator. The numerator of the sales factor shall include

all gross receipts of the taxpayer from sources within this state, including, but not limited to, the following:

(i) Gross receipts derived from the sale of tangible personal property, including printed materials, delivered or shipped to a purchaser or a subscriber in this state.

(ii) Except as provided in subparagraph Item iii of Subparagraph b of Paragraph 3 of Subsection C, gross receipts derived from advertising and the sale, rental or other use of the taxpayer's customer lists or any portion thereof shall be attributed to this state as determined by the taxpayer's "circulation factor" during the tax period. The circulation factor shall be determined for each individual publication by the taxpayer of printed material containing advertising and shall be equal to the ratio that the taxpayer's in-state circulation to purchasers and subscribers of its printed material bears to its total circulation to purchasers and subscribers everywhere. The circulation factor for an individual publication shall be determined by reference to the rating statistics as reflected in such sources as audit bureau of circulations or other comparable sources, provided that the source selected is consistently used from year to year for such purpose. If none of the foregoing sources are available, or, if available, none is in form or content sufficient for such purposes, then the circulation factor shall be determined from the taxpayer's books and records.

(iii) When specific items of advertisements can be shown, upon clear and convincing evidence, to have been distributed solely to a limited regional or local geographic area in which this state is located, the taxpayer may petition, or the department may require, that a portion of such receipts be attributed to the sales factor numerator of this state on the basis of a regional or local geographic area circulation factor and not upon the basis of the circulation factor provided by Item ii of Subparagraph b of Paragraph 3 of Subsection C. Such attribution shall be based upon the ratio that the taxpayer's circulation to purchasers and subscribers located in this state of the printed material containing such specific items of advertising bears to its total circulation of such printed material to purchasers and subscribers located within such regional or local geographic area. This alternative attribution method shall be permitted only upon the condition that such receipts are not double counted or otherwise included in the numerator of any other state.

(iv) In the event that the purchaser or subscriber is the United States government or that the taxpayer is not taxable in a state, the gross receipts from all sources, including the receipts from the sale of printed material, from advertising, and from the sale, rental or other use of the taxpayer's customer's lists, or any portion thereof that would have been attributed by the circulation factor to the numerator of the sales factor for such state, shall be included in the numerator of the sales factor of this state if the printed material or other property is shipped from an office, store, warehouse, factory, or other place of storage or business in this state.

[3.5.19.19 NMAC - N, 10/31/05]

7-4-20. AGREEMENTS AUTHORIZED IN UNUSUAL CASES.--In circumstances within the scope of Section 7-4-19 NMSA 1978 and in other circumstances where the revenues of this state would not be adversely affected, the secretary is authorized to enter into an agreement in writing with any person with respect to apportionment and allocation of that person's income. Except upon a showing of fraud or misrepresentation of a material fact or a change in the statutory law, such agreement shall be conclusive. Any agreement, however, may be terminated by either party by written notice thereof to the other party at least ninety days before the beginning of the taxable year to which the termination applies.
(Laws 1986, Chapter 20, Section 58)

**7-4-21. CONSTRUCTION OF ACT.--The Uniform Division of Income for Tax Purposes Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.
(Laws 1965, Chapter 203, Section 21)**

3.5.21.8 - APPLICATION

Regulations issued under the Uniform Division of Income for Tax Purposes Act are applicable to Article IV of the Multistate Tax Compact to the extent they are not inconsistent with the provisions of the Multistate Tax Compact.

[1/15/74, 9/15/88, 9/20/93, 1/15/97; 3.5.21.8 NMAC - Rn, 3 NMAC 5.21.8, 6/29/01]