

State of Louisiana  
Department of Revenue

JOHN BEL EDWARDS  
Governor



KIMBERLY LEWIS ROBINSON  
Secretary

November 9, 2018

**Via e-mail (Return Receipt Requested) to: [apa.h-wm@legis.la.gov](mailto:apa.h-wm@legis.la.gov)**

The Honorable Neil Abramson, Chairman  
House Committee on Ways and Means  
P.O. Box 90462  
Baton Rouge, Louisiana 70804

**Via e-mail (Return Receipt Requested) to: [apa.s-r&f@legis.la.gov](mailto:apa.s-r&f@legis.la.gov)**

The Honorable Jean-Paul Morrell, Chairman  
Senate Committee on Revenue & Fiscal Affairs  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

**Re: Proposed Regulations LAC 61:I.1135 and 1136 - Corporation Income Tax;  
Apportionment of Income; Sourcing of Sales other than Sales of Tangible Personal  
Property; Exclusion of Certain Sales of Tangible Personal Property from the Sales Factor**

Dear Chairmen:

On September 10, 2018, a copy of the Notice of Intent for the above-referenced proposed regulations was mailed to you for review. The purpose of these regulations is to implement Act 8 of the 2016 Second Extraordinary Session of the Louisiana Legislature.

The *Notice of Intent* was published in the September 2018 issue of the *Louisiana Register*. A public hearing was held at the LaSalle Building on Monday, October 29, 2018. Two interested parties attended. No oral public comments were submitted. A copy of the sign-in sheet is included.

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## Written Public Comments

### **Renn G. Neilson, Attorney with the law firm Baker Botts, LLP**

*Comment:* Proposed Changes - (1) Remove LAC 61:I.1135.H.2.b.i.(c), which can prescribe arbitrarily divergent treatment from subsection (d) for substantively identical transactions; and (2) clarify “delivery” occurs where it is “ultimately received” following all immediate post-sale transportation.

Reason - The statute imposes the same general sourcing rules for both (1) sales of TPP and (2) sales of services performed on TPP; yet proposed subsection (c) could require these two transactions to be sourced to different states.

La. Rev. Stat. Ann. § 47:287.95(F)(3) requires taxpayers to source sales of TPP to where the TPP is “received” by the purchaser.

§ 47:287.95(L)(2)(a) requires taxpayers to source sales of *services* performed on TPP to where the service is “received” by the purchaser (for natural-person customers).

For sales of TPP, the statute clarifies the TPP is “received” where the TPP is “ultimately received after all transportation has been completed”—including transportation by purchaser. This is sound tax policy, because it (a) best captures the market for the sale; and (b) avoids arbitrarily divergent treatment depending on whether the purchaser or seller delivers the property.

This is made clear by Regulation 61:I.1134(D)(3)(c)(iii) (“There is no difference between a case where a taxpayer in Houston ships F.O.B., Houston to a purchaser in Baton Rouge, by common carrier, and a case where all facts are the same except that the purchaser goes to Houston in his own vehicle and returns with the goods to Baton Rouge”).

Sound tax policy would require the same treatment for sales of *services* performed on TPP. The Legislature intended the same treatment because it used the same term—“received.”

Proposed Regulation 1135.H.2.b.i.(d) mirrors the Multistate Tax Commission’s finalized Regulation IV.17.(d).(2).(B).1.c. for market-based sourcing of sales of services—both source services on TPP to where that TPP is delivered to the customer.

Proposed subsection (c) is not in the MTC’s finalized regulation. It would draw an arbitrary distinction between delivery by the customer and delivery by the seller. If the customer receives TPP out-of-state and stays there, then subsection (d) is sufficient to declare the market out-of-state. On the other hand, if the customer receives TPP out-of-state and immediately transports it to Louisiana, then the market should be Louisiana under subsection (d); however, subsection (c) would cause that sale to be sourced out-of-state.

The Department should delete subsection (c) and clarify that “ultimate delivery” controls. Subsection (c) introduces unnecessary confusion by taxing items “received” differently than items “delivered.”

*Response:* The Department disagrees with this comment. The statutory provision addressing the apportionment of sales of tangible personal property, La. R.S. 47:287.95(F)(3), uses the phrase “ultimately received”. However, La. R.S. 47:287.95(L), which applies to sales other than sales of tangible personal property, including services performed on tangible personal property, does not contain the phrase “ultimately received.” Therefore, the legislature did not intend the same apportionment treatment for sales of services performed on tangible personal property. LAC 61:I.1135(H)(2)(b)(i)(c) is necessary to address instances where the tangible personal property upon which the services were performed is not shipped or delivered to the customer. LAC 61:I.1135(H)(2)(b)(i)(c) addresses instances where the customer picks up, from the taxpayer’s location, the tangible personal property upon which the services were performed.

*Comment:* Proposed Change - Clarify that the market for services performed on aircraft is where the aircraft is regularly stored.

Reason - Aircraft require specialized rules for determining where they are delivered for tax purposes.

The Legislature makes clear that defining place of delivery for purposes of taxing aircraft involves special legal considerations. La. Rev. Stat. Ann. § 47:287.95(F)(3) states, “For purposes of sales of aircraft manufactured or assembled in this state, the place at which the aircraft is ultimately received shall be the place the aircraft is to be primarily stored when not in use.”

Likewise, for sales tax purposes, La. Rev. Stat. Ann. § 47:301(1)(m) states, “The place at which the aircraft is ultimately received shall be considered as the place at which the aircraft is stored after all transportation has been completed.”

If a taxpayer performs services on aircraft hangered in Louisiana, then the market for those services is clearly Louisiana—regardless of where the services are performed. Common carriers do not deliver aircraft—pilots do. So special rules are needed. The “market” for sourcing purposes should not change based on whether the aircraft-service-provider or its customer arranges for pilots to deliver the aircraft.

The Department should clarify that services performed on aircraft are sourced to where the aircraft is to be primarily stored when not in use.

*Response:* The Department disagrees with this comment. The statutory provision addressing the apportionment of sales of aircraft, La. R.S. 47:287.95(F)(3), requires the sales to be apportioned to the place at which the aircraft is primarily stored when not in use. However, La. R.S. 47:287.95(L), which applies to sales other than sales of tangible personal property, including services performed upon aircraft, does not contain special treatment for services performed upon aircraft. Therefore, the regulation may not extend special treatment for services performed upon aircraft.

**Jaye A. Calhoun and William J. Kolarik, II, Attorneys**

*Comment:* Section 1135.C – “Taxable in another state”

We believe that some of these provisions may be intended to address issues of constitutionality such as are addressed in cases of *Elan Pharmaceuticals, Inc. v. Director, Division of Taxation*, Dkt. No. 010589-2010 (Tax Ct. of N.J. February 6, 2017) and *Whirlpool Properties Inc. v. Director, Division of Taxation*, 208 N.J. 141 (2011). *Elan Pharmaceuticals* addressed the particular issues of the meaning of “taxable in another state” as well as rules for reasonable approximation, which may likewise be the intent of these new provisions. We are concerned that the provisions contained in the proposed regulation do not resolve the issues. The key concern here is whether “business activity” in another state is sufficient to assert “nexus”? As *Elan Pharmaceuticals* and related cases demonstrate, a throw-out rule becomes problematic and raises constitutional concerns when a state attempts to apply the rule in a manner that taxes income earned in another state that the other state’s legislature has jurisdiction to tax but chooses not to tax. Louisiana cannot, by regulation or otherwise, apply a throw-out rule to sales in destination states that have the ability to levy a tax on the taxpayer.

*Response:* The Department disagrees with this comment. Under New Jersey’s former throw-out rule, receipts assigned to a state in which the taxpayer is not subject to a tax on or measured by profits, income, or business activity must be excluded from the denominator of the sales fraction.

In *Elan Pharmaceuticals, Inc. v. Director of Taxation*, New Jersey Tax Court, No. 010589-2010, Feb. 6, 2017, the court prohibited the New Jersey Division of Taxation from applying New Jersey’s statutory throw-out rule in an unconstitutional regulatory manner. The court recognized and followed the principle established by the New Jersey Supreme Court’s decision in *Whirlpool Properties, Inc. v. Director, Division of Taxation*, 26 A.3d 446 (N.J. 2011).

In *Whirlpool*, the New Jersey Supreme Court held that New Jersey’s throw-out rule was constitutional as applied only “when the category of receipts that may be thrown out is limited to receipts that are not taxed by another state because the taxpayer does not have the requisite constitutional contacts with the state or because of congressional action such as P.L. 86-272.” However, the throw-out rule operates unconstitutionally where the excluded receipts are not taxed by another state because the state chooses not to impose an income tax.

As written, neither the New Jersey throw-out law (subsequently repealed) nor the Louisiana throw-out law is unconstitutional. In New Jersey, the administration of the throw-out rule was found to be unconstitutional based on the broad application of the phrase “the taxpayer is not subject to tax” in the state where the sales are sourced. New Jersey interpreted the phrase “not subject to tax” to include situations where the taxpayer had no nexus with the other state AND situations where there was nexus but the receipts were not taxable by law in that state. The court ruled that the phrase “not subject to tax” should only include situations where the taxpayer had no nexus with the other state and thus the other state had no jurisdiction to tax the taxpayer.

Louisiana's throw-out rule also requires throw-out when the receipts are assigned to a state in which the taxpayer is not subject to tax. Louisiana's proposed regulation clearly limits the interpretation of the phrase “the taxpayer is not subject to tax” to situations where the taxpayer has no nexus with the other state and thus the other state has no jurisdiction to tax the taxpayer.

LAC 61:I.1135(C) provides:

*A taxpayer is taxable within another state if it meets either one of two tests: (1) By reason of business activity in another state, the taxpayer is subject to one of the following types of taxes: 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 (2) 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 the taxpayer.*

Thus, neither the Louisiana throw-out law nor the administration of the Louisiana throw-out law would be considered to be unconstitutional under the New Jersey jurisprudence.

*Comment:* R.S. 47:2787.95(M)

Whether a taxpayer can reasonably approximate is subjective (both for the taxpayer and the auditor) and this aspect of the proposed regulations simply doesn't provide sufficient guidance. It would be helpful to taxpayers to have more concrete guidance as to what constitutes reasonable approximation.

*Response:* The Department disagrees with this comment. LAC 61:I.1136(F) provides guidance regarding the rules of reasonable approximation.

*Comment:* Section 1135.H(1)(a) Sale of Service. General Rule.

This provision states that a sale of service is sourced to Louisiana if and to the extent that the service is delivered to a location in Louisiana, which "delivered to a location" is further defined as delivery to the taxpayer's "market for the services". A taxpayer's market can be anywhere and everywhere. This is a definition that doesn't really clarify anything and does not provide sufficient or meaningful guidance to taxpayers.

*Response:* The Department disagrees with this comment. LAC 61:I.1135(H)(1)(a) provides a general rule, not a specific definition. The specific rules for determining the taxpayer's market for the services performed by the taxpayer are provided by the remainder of LAC 61:I.1135(H).

*Comment:* Section 1135.H(4) Services Delivered to Unrelated Business Entity

There is no definition of "unrelated business entity" in these provisions. It would be helpful to taxpayers to have further guidance on this issue.

*Response:* The Department disagrees with this comment. The term "related entity" is defined by La. R.S. 47:287.95(L)(3)(d). Therefore, for purposes of Louisiana's market based sourcing rules, any business entity that does not qualify as a "related entity" is by default an "unrelated business entity".

*Comment:* Safe Harbor Removed

This whole section has been completely reworded and is problematic in light of the significant number of subjective determinations that have to be made by taxpayers in their efforts to be

compliant and to report accurately. It initially was only for sales to an unrelated business, but the analysis is much more subjective now. The proposed regulations should be modified to provide more concrete guidance which would help taxpayers in good faith to comply and would be less likely to undermine confidence in the system (which has related negative effects on compliance and collections).

*Response:* The Department disagrees with this comment. LAC 61:I.1135(H)(4)(c) provides that the taxpayer may utilize alternative methods to source services delivered to an unrelated business entity in cases where the provided methods fail to clearly reflect the taxpayer's market in Louisiana.

*Comment:* Section 1135.H(5) Services delivered to a Related Business Entity

This section is essentially the same as the prior proposed rule but if you look at (1) and (2), especially (1), to determine where the related entity operates, you are directed to consider its payroll in the different locations to which the service relates. How is this test applied if the related entity does not have any payroll, which is common in certain large operations? Additional guidance would be helpful on these issues.

*Response:* The Department disagrees with this comment. In instances where the related business entity has no payroll, the taxpayer may use a method of reasonable approximation to determine the state of assignment.

*Comment:* Section 1135.L Sale of Intangible Property.

With regards to sales of intangibles, the receipts from the sales are assigned to Louisiana if the intangible is used in Louisiana. In general the term "use" is construed to refer to the location of the "market" for the use of the intangible being sold. This is extremely subjective and more useful guidance would be helpful.

*Response:* The Department disagrees with this comment. LAC 61:I.1135(L)(2)(a)(i) states that in general, the term "use" is construed to refer to the location of the market for the use of the intangible property that is being sold and is not to be construed to refer to the location of the property or payroll of the owner.

*Comment:* Section 1136. Exclusion of Certain Sale of Tangible Personal Property from the Sales Factor.

Louisiana has always been an ultimate destination state but this section provides rules of reasonable approximation when a taxpayer cannot ascertain where to source. These two doctrines can be burdensome to reconcile.

*Response:* The Department disagrees with this comment. There is no conflict between the "ultimate receipt" doctrine used to source sales of tangible personal property and the doctrine of reasonable approximation in cases where the state of assignment cannot be determined. The "ultimate receipt" doctrine remains the primary method of sourcing sales of tangible personal property.

*Comment:* Section 1136.F(2) Related Party Transactions

This section provides that information is imputed from customer to taxpayer in related party transactions. Louisiana is a separate filing state so this is problematic. There appears to be no legal basis for this aspect of the proposed regulations.

*Response:* The Department disagrees with this comment. The fact that related business organizations are required to file separate corporation income tax returns has no bearing on the business organizations' status of being related parties. Pursuant to La. R.S. 47:1511, the Secretary is authorized to prescribe rules and regulations to carry out the purpose of statutes under the Secretary's authority.

Thank you for your consideration. If you have any questions or need additional information, please contact me at (225) 219-2700.

Sincerely,

A handwritten signature in blue ink, appearing to read 'KLR', with several loops and flourishes extending to the right.

Kimberly Lewis Robinson  
Secretary

## NOTICE OF INTENT

### Department of Revenue Policy Services Division

Sourcing of Sales other than Sales of Tangible Personal Property; Exclusion of Certain Sales of Tangible Personal Property from the Sales Factor (LAC 61:I.1135 and 1136)

Under the authority of R.S. 47:1511 and R.S. 47:287.95 and pursuant to the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Revenue, Policy Services Division, proposes to adopt LAC 61:I.1135 and 1136.

The primary purpose of this proposed regulation is to implement Act 8 of the 2016 Second Extraordinary Session of the Louisiana Legislature.

#### Title 61

#### REVENUE AND TAXATION

#### Part I. Taxes Collected and Administered by the Secretary of Revenue

#### Chapter 11. Corporation Income Tax

#### §1135. Sourcing of Sales other than Sales of Tangible Personal Property

A. General. R.S. 47:287.95(L) provides for the inclusion in the numerator of the sales factor of sales other than sales of tangible personal property.

B. Market-Based Sourcing. Sales other than sales of tangible personal property are sourced to Louisiana if and to the extent that the taxpayer's market for the sales is in Louisiana. In general, the provisions in this section establish rules for:

1. determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Louisiana,

2. reasonably approximating the state or states of assignment where the state or states cannot be determined,

3. excluding certain sales of intangible property from the numerator and denominator of the receipts factor pursuant to R.S. 47:287.95(L)(1)(e), and

4. excluding sales from the numerator and denominator of the sales factor, pursuant to R.S. 47:287.95(M), where the state or states of assignment cannot be determined or reasonably approximated, or where the taxpayer is not taxable in the state to which the sales are assigned.

C. Taxable in another State. A taxpayer is taxable within another state if it meets either one of two tests:

1. by reason of business activity in another state, the taxpayer is subject to one of the following types of taxes: 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

2. 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 the taxpayer.

D. State. For purposes of this regulation, *state* means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

E. General Principles of Application; Contemporaneous Records. In order to satisfy the requirements of this regulation, a taxpayer's assignment of sales other than sales

of tangible personal property must be consistent with the following principles:

1. A taxpayer shall apply the rules set forth in this regulation based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing, including, without limitation, the taxpayer's books and records kept in the normal course of business. A taxpayer shall determine its method of assigning sales in good faith, and apply it consistently with respect to similar transactions and year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its sales, including its underlying assumptions, and shall provide those records to the Secretary of the Louisiana Department of Revenue upon request.

2. This regulation provides various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy (and must continue to do so with each succeeding rule in the hierarchy, where applicable). For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.

3. A taxpayer's method of assigning its sales, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of sales consistent with these regulatory standards rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

#### F. Rules of Reasonable Approximation

1. In General. In general, this regulation establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Louisiana. This regulation also sets forth rules of reasonable approximation, which apply if the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation as prescribed in this regulation. In other cases, the applicable rule in this regulation permits a taxpayer to reasonably approximate the state or states of assignment, using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in this regulation.

2. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth for sale of a service, a taxpayer can ascertain the state or states of assignment of a substantial portion of its sales from sales of substantially similar services ("assigned sales"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned sales, it shall include those sales which it believes tracks the geographic



distribution of the assigned sales in its sales factor in the same proportion as its assigned sales.

3. Related-Party Transactions; Information Imputed from Customer to Taxpayer. Where a taxpayer has sales subject to this regulation from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

G. Rules with Respect to Exclusion of Receipts from the Receipts Factor

1. The sales factor only includes those amounts defined as sales under applicable statutes and regulations.

2. Certain sales arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor pursuant to R.S. 47:287.95 (L)(1)(e).

3. In a case in which a taxpayer cannot ascertain the state or states to which sales are to be assigned pursuant to the applicable rules set forth in this regulation, (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95 (M).

4. In a case in which a taxpayer can ascertain the state or states to which sales are to be assigned pursuant to this regulation, but the taxpayer is not taxable in one or more of those states, the sales that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95(M).

H. Sale of a Service

1. General Rule

a. The sale of a service is sourced to Louisiana if and to the extent that the service is delivered to a location in Louisiana. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth below.

2. Direct Personal Services Received by a Natural Person

a. In General

i.(a). Except as otherwise provided in this regulation, direct personal services are services that are physically provided in person by the taxpayer, where the customer or the customer's tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of direct personal services include, without limitation: cleaning services; pest control; medical and dental services, including medical testing, x-rays and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. Direct personal services include services within the description above that are performed at:

[i]. a location that is owned or operated by the service provider or

[ii]. a location of the customer, including the location of the customer's tangible property.

(b). Various professional services, including legal, accounting, financial and consulting services, and

other similar services, although they may involve some amount of direct person contact, are not treated as direct personal services within the meaning of this regulation.

b. Assignment of Sales

i. Rule of Determination. Except as otherwise provided in this regulation, if the service provided by the taxpayer is a direct personal service, the service is delivered to the location where the service is received. Therefore, the sale is in Louisiana if and to the extent the customer receives the direct personal service in Louisiana. In assigning its sales from direct personal services, a taxpayer must first attempt to determine the location where a service is received, as follows:

(a). If the service is performed with respect to the body of an individual customer in Louisiana (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Louisiana (e.g. live entertainment or athletic performances), the service is received in Louisiana.

(b). If the service is performed with respect to the customer's immovable property in Louisiana or if the service is performed with respect to the customer's tangible personal property at the customer's residence in Louisiana or in the customer's possession in Louisiana, the service is received in Louisiana.

(c). If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be received by the customer at the taxpayer's location in Louisiana, the service is received in Louisiana.

(d). If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed within or outside Louisiana, the service is received in Louisiana if the property is shipped or delivered to the customer in Louisiana.

c. Rule of Reasonable Approximation. In an instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of sale from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. If the state to which the sales are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to the state are excluded from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95(M).

3. Non Direct Personal Services Received by a Natural Person. Non direct personal services delivered to a natural person shall be sourced to the customer's billing address.

a. Non direct personal services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

b. *Billing address* means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer's account as of the time of the

transaction as kept in good faith in the normal course of business and not for tax avoidance purposes.

#### 4. Services Delivered to an Unrelated Business Entity

##### a. Services with a Substantial Connection to a Specific Geographic Location

i. Services provided to an unrelated business entity that have a substantial connection to a specific geographic location shall be sourced to the state of the specific geographic location. If the services have a substantial connection to specific geographic locations in more than one state, the services shall be reasonably sourced between those states.

##### ii. Examples

(a). Cleaning Company, Inc. (taxpayer) has a contract to provide cleaning services to Company A, an unrelated business entity. The contract specifies that cleaning services are to be provided to company A's locations in Louisiana and other states. Cleaning Company, Inc. should source a portion of the total service receipts to Louisiana based on the amount of services performed at company A's locations in Louisiana compared to the total amount of services performed at all of company A's locations.

(b). Training Company, Inc. (taxpayer) contracts with company B, an unrelated business entity, to provide on-site training services to company B's employees at company B's business offices located in Louisiana and three other states. The services are related to specific geographic locations; therefore they should be sourced to the state where company B's employees received the training. Training Company, Inc. should source the receipts from its contract with company B by reasonably assigning those receipts between Louisiana and the three other states using a formula based on the number of training hours provided to company B locations in Louisiana to the total number of training hours provided to all company B locations.

(c). Engineering Company, Inc. (taxpayer) contracts with company C, an unrelated business entity, to provide engineering services related to the construction of an office complex in Louisiana. Engineering Company, Inc. performs some of their service in Louisiana at the building site and additional service in state B at their headquarters. The engineering services are related to a specific geographic location; i.e. the building site in Louisiana; therefore all of the services should be sourced to Louisiana.

##### b. Services without a Substantial Connection to a Specific Geographic Location

i. Services provided to an unrelated business entity that do not have a substantial connection to a specific geographic location shall be sourced to the state of the taxpayer's commercial domicile.

ii. *Commercial domicile* is the principle place from which the business is directed or managed.

c. Alternative Methods. In the case where the methods contained in Subparagraphs H.4.a and H.4.b of this section fail to clearly reflect the taxpayer's market in Louisiana, the taxpayer may utilize, or the department may require, the use of alternative methods, including but not limited to the following:

i. By assigning the sales to the state where the contract of sale is principally managed by the customer:

(a). state where a contract of sale is principally managed by the customer" means the primary location at which an employee or other representative of a customer serves as the primary contact person for the taxpayer with

respect to the day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

ii. by assigning the sales to the customer's place of order;

iii. by assigning the sales to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5 percent of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

5. Services Delivered to a Related Business Entity. In any instance in which the service is sold to a related entity, the state or states to which the service is assigned is the place of receipt by the related entity as reasonably approximated using the following hierarchy:

a. if the service primarily relates to specific operations or activities of a related entity conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related entity's payroll at the locations to which the service relates in the state or states; or

b. if the service does not relate primarily to operations or activities of a related entity conducted in particular locations, but instead relates to the operations of the related entity generally, then to the state or states in which the related entity has employees, in proportion to the related entity's payroll in those states.

I. Sale, Rental, Lease, or License of Immovable Property. In the case of the sale, rental, lease, or license of immovable property, the receipts are sourced to Louisiana if and to the extent that the immovable property is located in Louisiana.

J. Rental, Lease, or License of Tangible Personal Property. In the case of the rental, lease, or license of tangible personal property, the receipts are sourced to Louisiana if and to the extent that the tangible personal property is located in Louisiana.

K. Lease or License of Intangible Property. In the case of the lease or license of intangible property, the receipts are sourced to Louisiana if and to the extent that the intangible property is used in Louisiana.

##### L. Sale of Intangible Property

1. Assignment of Sales. The assignment of sales to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold.

2. Sale Where Receipts are Contingent on Productivity, Use or Disposition of the Intangible Property

a. In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use or disposition of the property, the receipts from the sale are assigned as follows:

i. the receipts are in Louisiana if and to the extent the intangible is used in Louisiana. In general, the term *use* is construed to refer to the location of the market for the use of the intangible property that is being sold and is not to be construed to refer to the location of the property or payroll of the owner.

3. Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area

a. In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a

specific geographic area, the sale is assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state, the taxpayer shall assign the sale to Louisiana. If the intangible property is used or is authorized to be used in Louisiana and one or more other states, the taxpayer shall assign the sale to Louisiana to the extent that the intangible property is used in or authorized for use in Louisiana through the means of a reasonable approximation.

#### 4. Excluded Sales

a. Sales of intangible property not described by Paragraphs 2 and 3 of this Subsection shall be excluded from the numerator and the denominator of the sales factor. Excluded sales include, but are not limited to, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, and sales of similar intangible property.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:1511 and R.S. 47:287.95.

HISTORICAL NOTE: Promulgated by the Department of Revenue, LR 44:

### **§1136. Exclusion of Certain Sales of Tangible Personal Property from the Sales Factor**

A. General sourcing rule for sales of tangible personal property. Generally, for purposes of determining a taxpayer's Louisiana Apportionment Percent, sales of tangible personal property are sourced to the location where the tangible personal property is ultimately received by the purchaser.

B. Exclusion. Pursuant to R.S. 47:287.95(M), sales, including sales of tangible personal property, shall be excluded from both the numerator and the denominator of the sales factor if either of the following conditions apply:

1. the taxpayer is not taxable in a state to which a sale is assigned; or

2. the state of assignment cannot be determined or reasonably approximated pursuant to R.S. 47:287.95 and the regulations thereunder.

C. Taxable in Another State. A taxpayer is taxable within another state if it meets either one of two tests:

1. by reason of business activity in another state, the taxpayer is subject to one of the following types of taxes: 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

2. 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 the taxpayer.

D. State. For purposes of this regulation, *state* means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

E. Reasonable Approximation. Generally. In a case in which a taxpayer cannot ascertain the state or states to which sales are to be assigned pursuant to the applicable rules set forth in this regulation, (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95(M).

F. Rules of Reasonable Approximation

1. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth for sales of tangible personal property, a taxpayer can ascertain the state or states of assignment of a substantial portion of its sales from sales of substantially similar tangible personal property, (assigned sales), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned sales, it shall include those sales which it believes tracks the geographic distribution of the assigned sales in its sales factor in the same proportion as its assigned sales.

2. Related-Party Transactions—Information Imputed from Customer to Taxpayer. Where a taxpayer has sales subject to this regulation from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

3. Approximation Based on Place of Sale. In an instance in which the state or states where tangible personal property is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of sale from which it can reasonably approximate the state or states where the tangible personal property is received, the taxpayer shall reasonably approximate such state or states as the place of sale.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:1511 and R.S. 47:287.95.

HISTORICAL NOTE: Promulgated by the Department of Revenue, LR 44:

#### **Family Impact Statement**

The proposed adoption of LAC 61:I.1135-1136 regarding corporation income tax; apportionment of income; sourcing of sales other than sales of tangible personal property; exclusion of certain sales of tangible personal property from the sales factor should not have any known or foreseeable impact on any family as defined by R.S. 49:972(D) or on family formation, stability and autonomy. Specifically, the implementation of this proposed rule will have no known or foreseeable effect on:

1. the stability of the family;
2. the authority and rights of parents regarding the education and supervision of their children;
3. the functioning of the family;
4. family earnings and family budget;
5. the behavior and personal responsibility of children;
6. the ability of the family or a local government to perform this function.

#### **Poverty Impact Statement**

The proposed regulation will have no impact on poverty as described in R.S. 49:973.

#### **Small Business Analysis**

It is anticipated that the proposed Rule should not have a significant adverse impact on small businesses as defined in the Regulatory Flexibility Act. The agency, consistent with health, safety, environmental and economic factors has considered and, where possible, utilized regulatory methods in drafting the proposed Rule to accomplish the objectives of applicable statutes while minimizing any anticipated adverse impact on small businesses.

#### **Provider Impact Statement**

The proposed regulation will have no known or foreseeable effect on:

1. the staffing levels requirements or qualifications required to provide the same level of service;
2. the total direct and indirect effect on the cost to the provider to provide the same level of service;
3. the overall effect on the ability of the provider to provide the same level of service.

**Public Comments**

Any interested person may submit written data, views, arguments or comments regarding this proposed regulation to David Hansen, Attorney, Policy Services Division, Office of Legal Affairs by mail to P.O. Box 44098, Baton Rouge, LA 70804-4098. All comments must be received no later than 4:30 p.m. on October 26, 2018.

**Public Hearing**

A public hearing will be held on October 29, 2018 at 10 a.m. in the LaBelle Room, located on the first floor of the LaSalle Building, 617 North Third Street, Baton Rouge, LA 70802.

Kimberly Lewis Robinson  
Secretary

The proposed rules will have an effect on competition and employment as a result of shifting tax burdens among firms, both in-state and out-of-state, as well as among firms within the state. As a result of the shifting tax burdens, firms carrying a lower tax burden will have a competitive advantage over firms carrying a larger tax burden as a result of the market sourcing methodology.

Kimberly Lewis Robinson  
Secretary  
1809#053

Gregory V. Albrecht  
Chief Economist  
Legislative Fiscal Office

**FISCAL AND ECONOMIC IMPACT STATEMENT  
FOR ADMINISTRATIVE RULES**

**RULE TITLE: Sourcing of Sales other than Sales of  
Tangible Personal Property; Exclusion of Certain Sales  
of Tangible Personal Property from the Sales Factor**

**I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO  
STATE OR LOCAL GOVERNMENT UNITS (Summary)**

The purpose of the proposed rule is to implement some of the provisions of Act 8 of the 2016 Second Extraordinary Session of the Louisiana Legislature. Act 8 enacted rules for the sourcing of sales, other than sales of tangible personal property, for purposes of determining the sales ratio component of the corporate income tax apportionment ratio. Generally, the new rules source a sale to Louisiana, to the extent the market for the sale is in Louisiana. Also, a sale is excluded from the numerator and denominator if the taxpayer is not taxable in the state to which the sale is assigned or the state of assignment cannot be determined or reasonably approximated. The proposed rule provides guidance and clarification for complying with these sourcing rules. Minor implementation costs to the Department of Revenue (LDR), related to taxpayer inquiries, are expected. The costs are relatively small and will be absorbed in LDR's budget allocation.

**II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE  
OR LOCAL GOVERNMENTAL UNITS (Summary)**

The impact on state revenue collections is indeterminable. LDR does not have the information necessary to estimate the impact. Market sourcing may incorporate an increased amount of net incomes of firms selling into the state's tax base. However, to the extent firms have large out-of-state sales, market sourcing may reduce their tax liabilities.

This proposal should have no impact on the revenue collections of local governmental units.

**III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO  
DIRECTLY AFFECTED PERSONS OR NONGOVERNMENTAL  
GROUPS (Summary)**

No additional tax forms or paperwork is anticipated of affected taxpayers, as LDR staff indicate that field auditors will assess whether or not sales are being sourced to the appropriate locations. Tax liabilities of affected taxpayers will increase or decrease by an indeterminable amount, dependent on the individual business model of each taxpayer.

**IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT  
(Summary)**