

TITLE 3: TAXATION
CHAPTER 5: UNIFORM DIVISION OF INCOME FOR TAX PURPOSES
PART 19: EQUITABLE ADJUSTMENT OF STANDARD ALLOCATION OR APPORTIONMENT

3.5.19.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630
[7/15/96; 3.5.19.1 NMAC - Rn, 3 NMAC 5.19.1, 6/29/01]

3.5.19.2 SCOPE: This part applies to every taxpayer having income which is taxable for income tax purposes both within and without New Mexico.
[7/15/96, 1/15/97; 3.5.19.2 NMAC - Rn, 3 NMAC 5.19.2, 6/29/01]

3.5.19.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[7/15/96; 3.5.19.3 NMAC - Rn, 3 NMAC 5.19.3, 6/29/01]

3.5.19.4 DURATION: Permanent.
[7/15/96; 3.5.19.4 NMAC - Rn, 3 NMAC 5.19.4, 6/29/01]

3.5.19.5 EFFECTIVE DATE: 7/15/96, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[7/15/96, 1/15/97; 3.5.19.5 NMAC - Rn & A, 3 NMAC 5.19.5, 6/29/01]

3.5.19.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Uniform Division of Income for Tax Purposes Act.
[7/15/96; 3.5.19.6 NMAC - Rn, 3 NMAC 5.19.6, 6/29/01]

3.5.19.7 DEFINITIONS: [Reserved.]
[7/15/96; 3.5.19.7 NMAC - Rn, 3 NMAC 5.19.7, 6/29/01]

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]

[12/29/89, 3/17/94, 1/15/97; R 5/31/98; 3.5.19.16 NMAC - Rn, 3 NMAC 5.19.16, 6/29/01]

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]

HISTORY OF 3.5.19 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: BOR 71-1, (Income Tax Regulation 10-1) Attachment of Federal Schedule C to New Mexico Income Tax Return, filed 1/5/71.

BOR 72-1, Regulation for Income Tax Act Section 72-15A-10 NMSA 1953, filed 1/12/72.

BOR 72-2, (Income Tax Reg. 10-2) Filing of New Mexico Partnership Returns, filed 1/18/72.

R.D.I.T. Regulation 12:2, Regulation Pertaining to Requirement for the Acceptance of Computer Generated Form PIT-1 and Related Schedules Income Tax Act, Section 7-2-12 NMSA 1978, filed 4/2/84.

I.T. Regulation 12:4, Regulation Pertaining to Requirement for the Acceptance of Computer Generated Form PIT-1

and Related Schedules Income Tax Act, Section 7-2-12 NMSA 1978, filed 9/4/87.

R.D.-I.T. Regulation 12:3, Regulation Pertaining to Requirement for the Preparation of Acceptable Reproductions of New Mexico Income Tax Forms Income Tax Act Section 7-2-12 NMSA 1978, filed 4/18/84.

BOR 74-1, Regulations in Effect and Pertaining to the New Mexico Income Tax Act and the New Mexico Uniform Division of Income for Tax Purposes Act, filed 1/15/74.

TRD Rule 4-88, Regulations Pertaining to the Uniform Division of Income for Tax Purposes Act Sections 7-4-1 to 7-4-21 NMSA 1978, filed 9/16/88.

TRD Rule UDI-93, Regulations Pertaining to the Uniform Division of Income for Tax Purposes Act, Sections 7-4-1 through 7-4-21 NMSA 1978, filed 9/20/93.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 5.19, Equitable Adjustment of Standard Allocation or Apportionment, filed 7/2/96.

3.5.19 NMAC, Equitable Adjustment of Standard Allocation or Apportionment, filed 6/18/2001.