tax002_EmR0943.pdf **Revenue – Revises Ch. Tax 2 – EmR0943**

Publication Date: **December 31, 2009**
Effective Dates: **December 31, 2009 through May 29, 2010**

ORDER OF THE DEPARTMENT OF REVENUE ADOPTING AN EMERGENCY RULE

The Wisconsin Department of Revenue hereby adopts an emergency rule interpreting ss. 71.04(4), (4m), (5), (6), (7), (8), and (10), 71.22(1r), 71.23(1) and (2), 71.25(5), (6), (6m), (7), (8), (9), (10), and (15), 71.255(5), and 77.93, Stats., relating to apportionment and nexus.

Analysis by the Department of Revenue

Statute interpreted: ss. 71.04(4), (4m), (5), (6), (7), (8), and (10), 71.22(1r), 71.23(1) and (2), 71.25(5), (6), (6m), (7), (8), (9), (10), and (15), 71.255(5), and 77.93, Stats.

Statutory authority:

- General rulemaking authority in s. 227.24, Stats.
- Specific rulemaking authority granted in ss. 71.04(8) and 71.25(10), Stats., relating to apportionment of net business income of railroads, sleeping car companies, car line companies, pipeline companies, financial organizations, telecommunications companies, air carriers, and public utilities.

Explanation of agency authority: An agency may promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements of the statutes if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

Related statute or rule: Sections Tax 2.60 to 2.67, Wisconsin Administrative Code
(Note: Sections Tax 2.60 to 2.67 are also emergency rules.)

Plain language analysis: This emergency rule order does the following:

1. Amends s. Tax 2.39, Apportionment Method, as follows:

- Explains how the rule applies to corporations that are required to use combined reporting, including applicable cross-references.

- Updates s. Tax 2.39(6), relating to the sales factor, to reflect applicable changes that were enacted by 2009 Acts 2 and 28. More specifically, provides that for taxable years beginning on or after January 1, 2009:
  - "Throwback sales" are included in the numerator at their full amount, rather than at 50%.
  - Throwback sales are no longer included in the numerator for sales of services or of the use of computer software.
  - Sales of intangibles or the use or licensing of intangibles are no longer sourced according to where the income producing activity occurs. Instead, they are sourced according to the newly created ss. 71.04(7)(dj) and (dk) and 71.25(9)(dj) and (dk), Stats. In general, these statutes source the transaction to where the customer uses the intangible property.
- Provides rules interpreting ss. 71.04(7)(dj) and (dk) and 71.25(9)(dj) and (dk), Stats. relating to sourcing for intangibles for taxable years beginning on or after January 1, 2009.

- Clarifies that for purposes of computing throwback sales, nexus for part of a taxable year is recognized as nexus for the entire taxable year.

2. Amends s. Tax 2.49, Apportionment of Apportionable Income of Interstate Financial Institutions, as follows:

- Explains how the rule applies to corporations that are required to use combined reporting, including applicable cross-references.

- Amends the definition of "financial institution" to include credit card banks and investment subsidiaries of banks.

- Provides that s. Tax 2.49(4)(zs) does not apply to taxable years beginning on or after January 1, 2009. This means that for taxable years beginning on or after January 1, 2009, throwback sales are not included in the numerator except for sales of tangible personal property.

3. Amends s. Tax 2.495, Apportionment of Apportionable Income of Interstate Brokers-Dealers, Investment Advisers, Investment Companies, and Underwriters, as follows:

- Explains how the rule applies to corporations that are required to use combined reporting, including applicable cross-references.

- Provides that s. Tax 2.495(4)(g) does not apply to taxable years beginning on or after January 1, 2009. This means that for taxable years beginning on or after January 1, 2009, throwback sales are not included in the numerator except for sales of tangible personal property.

4. Amends s. Tax 2.502, Apportionment of Apportionable Income of Interstate Telecommunications Companies, as follows:

- Explains how the rule applies to corporations that are required to use combined reporting, including applicable cross-references.

- Provides that for taxable years beginning on or after January 1, 2009, the sales factor means the sales factor under s. 71.25(9), Stats., as in effect for the current taxable year. This statute sources sales based on where the benefit of the service is received.

- Specifies how various types of telecommunications services would be sourced under s. 71.25(9), Stats.. Under the rule, the location where the benefit of the service is received is determined using principles consistent with the Streamlined Sales and Use Tax Agreement.

5. Amends s. Tax 2.82, Nexus, as follows:

- Explains how the rule applies to corporations that are required to use combined reporting, including applicable cross-references.

- Defines "loans" for purposes of applying s. 71.22(1r), Stats.

- Clarifies that nexus for part of a taxable year is recognized as nexus for the entire taxable year.

- Provides that the same nexus standards apply to the recycling surcharge as apply to the corporation franchise or income tax.

***6. Amends the following rules to explain how they apply to corporations that are required to use combined reporting, including applicable cross-references*:**

- Tax 2.46 – Apportionment of business income of interstate air carriers
- Tax 2.47 – Apportionment of business income of interstate motor carriers
- Tax 2.475 – Apportionment of net business income of interstate railroads, sleeping car companies, and car line companies
- Tax 2.48 – Apportionment of net business incomes of interstate pipeline companies

- Tax 2.50 – Apportionment of apportionable income of interstate public utilities

Summary of, and comparison with, existing or proposed federal regulation: There are no existing or proposed federal regulations that relate to apportionment of income among states.

Comparison with rules in adjacent states: Minnesota, Michigan, Illinois, and Iowa each have their own unique rules and relating to apportionment and nexus. Following is a summary of how the rules and regulations of these other states have provisions similar to the substantive provisions in this rule order:

Minnesota

- Services are sourced to where the benefit of the service is received.
- Holding loans secured by real or tangible personal property in the state creates nexus.
- Loan-backed securities are generally not "loans" that would create nexus.
- Nexus for part of the taxable year is nexus for the entire taxable year.

Michigan

- Services are sourced to where the benefit of the service is received.
- For telecommunications services, the location where the benefit of the service is received is determined using principles consistent with the Streamlined Sales and Use Tax Agreement.
- Loan-backed securities are generally not "loans" that would create nexus.
- Nexus for part of the taxable year is nexus for the entire taxable year.

Illinois

- Loan-backed securities are generally not "loans" that would create nexus.
- Nexus for part of the taxable year is nexus for the entire taxable year.
- For telecommunications services, the location where the benefit of the service is received is determined using principles consistent with the Streamlined Sales and Use Tax Agreement.
- Defines "financial organization" to specifically include credit card banks and their subsidiaries.

Iowa

- Services, including telecommunications services, are sourced to where the benefit of the service is received.
- Holding loans secured by real or tangible personal property in the state creates nexus.
- Loan-backed securities are generally not "loans" that would create nexus.
- Nexus for part of the taxable year is nexus for the entire taxable year.

Summary of factual data and analytical methodologies: The Department reviewed the statutory provisions enacted by 2009 Acts 2 and 28 and identified existing provisions of chapter Tax 2, Wisconsin Administrative Code, that no longer reflect current law or do not provide useful interpretation of the statutes as amended. The Department studied the laws and regulations of our neighboring states in addition to the model apportionment regulations developed by the Multistate Tax Commission (MTC) to determine how those states have been interpreting statutes that are similar to Wisconsin's. Also, since Michigan and Illinois just updated their apportionment rules for telecommunications companies (in 2008 and 2009, respectively), the Department contacted those states for insight on the industry reaction to those changes.

Analysis and supporting documents used to determine effect on small business: Nexus and apportionment issues apply only to businesses that are engaged in business in more than one state. Thus, this rule does not have a significant effect on small business.

Anticipated costs incurred by private sector: This rule does not result in a significant cost to the private sector.

Effect on small business: This rule does not have a significant effect on small business.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dkleven@dor.state.wi.us, if you have any questions regarding this emergency rule.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than one week after the public hearing on this emergency rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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FINDING OF EMERGENCY

The Department of Revenue finds that an emergency exists and that the attached rule order is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

In 2009, the Wisconsin Legislature enacted Acts 2 and 28, both of which contained substantial changes to Wisconsin's corporation franchise and income tax laws. Most of these changes are effective retroactively to taxable years beginning on or after January 1, 2009. Emergency rules are needed to add certainty about the scope and application of the newly enacted statutes as soon as possible so that taxpayers can file their returns accordingly.

This rule is therefore promulgated as an emergency rule and shall take effect upon publication in the official state newspaper. Certified copies of this rule have been filed with the Legislative Reference Bureau, as provided in s. 227.24, Stats.

SECTION 1. Tax 2.39 (1) is amended to read:

Tax 2.39 (1) GENERAL. Except as provided in sub. (3), any person, except resident individuals, resident estates, and resident trusts, engaged in business both in and outside this state shall apportion its apportionable income using the statutory apportionment method as provided in s. 71.04 (4) or 71.25 (6), Stats., when the person's business in this state is an integral part of a unitary business unless the department, in writing, allows reporting on a different basis. <u>However, if a corporation is in a combined group, the corporation's Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61(7) or (8), as applicable.</u> Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats.

Note to LRB: Replace the note at the end of Tax 2.39 (1) with the following:

Note: See s. Tax 2.62 for rules that apply to determining if a unitary business exists.

Note: A corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 2. Tax 2.39 (2) (ag) and (ar) are created to read:

Tax 2.39 (2) (ag) "Combined group" has the meaning given in s. 71.255(1)(a), Stats.

(ar) "Commercial domicile" has the meaning given in s. 71.22(1g), Stats.

SECTION 3. Tax 2.39 (2) (b) is amended to read:

Tax 2.39 (2) (b) "Engaged in business in and outside this state" means having business activity which is sufficient to create nexus in this state and at least one other state or foreign country. <u>For a combined group, the activities of the</u>

combined group are taken as a whole in determining if the combined group is engaged in business in and outside this state, as provided in s. 71.255(5)(a), Stats.

SECTION 4. Tax 2.39 (2) (cm) is created to read:

Tax 2.39 (2) (cm) "Intangible property" includes but is not limited to patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customer lists. Intangible property does not include stocks, bonds, certificates of deposit, or other securities.

SECTION 5. Tax 2.39 (2) (d) is amended to read:

Tax 2.39 (2) (d) "Nexus" means that a taxpayer's business activity in a state or foreign country is of such a degree that the state or foreign country has jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer. For a combined group, the activities of the combined group are taken as a whole in determining if the combined group has nexus in a state or foreign country, as provided in s. 71.255(5)(a), Stats. Nexus may exist even if a state or foreign country does not impose a tax on the taxpayer. Conversely, voluntary filing and paying income or franchise taxes when not required to do so, or paying a fee for qualification, organization or for the privilege of doing business in that state or foreign country does not, in itself, create nexus.

Note to LRB: Amend the second example at the end of Tax 2.39 (2) (d) as follows:

2) State B requires all nonresident corporations which qualify or register to do business in State B to pay to the secretary of state an annual license fee or tax for the privilege of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of $50 and a maximum fee of $500. ~~Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights.~~ State B also imposes a corporation income tax. Nonresident Corporation Y is qualified to do business in State B and pays the required fee to the secretary of state but does not carry on any activities in State B ~~other than utilizing its courts~~. Corporation Y does not have "nexus" in State B under these circumstances.

SECTION 6. Tax 2.39 (3) (d) and (e) and (6) (b) 1. d., 2. (intro.) and b., and 4. b. are amended to read:

Tax 2.39 (3) (d) For taxable years beginning after December 31, 2007, persons engaged in business in and outside this state, except direct air carriers, financial organizations, telecommunications companies, pipeline companies, public utilities, railroads, and sleeping car companies, as defined in ss. 71.04 (8) (a) and (b) 2. and 71.25 (10) (a) and (b) 2., Stats., and corporations that are authorized to use an alternative method of apportionment under s. 71.25 (14), Stats., shall use ~~an~~ only the sales factor to compute the apportionment fraction, as ~~described~~ provided in s. 71.04 (4) (d) or 71.25 (6) (d), Stats. Sales related to the production of nonapportionable income may not be included in either the numerator or the denominator of the sales factor. If either the numerator or the denominator of the sales factor is zero or a negative number, the sales factor shall be determined as described in ss. 71.04 (4m) (a) 2., (b) 2., or (c) 2. or 71.25 (6m) (a) 2., (b) 2., or (c) 2., Stats.

Note to LRB: Insert a second note at the end of Tax 2.39 (3) (d) as follows:

Note: Corporations that are in combined groups use a modified sales factor to compute their Wisconsin share of apportionable income of the entire combined group. See s. 71.255(5), Stats., and s. Tax 2.61(7) for details.

(e) The apportionment method may be used only if the taxpayer or combined group is engaged in business both in Wisconsin and at least one other state or foreign country and its business in Wisconsin is an integral part of a unitary business. For a combined group that has made the controlled group election provided in s. 71.255(2m), Stats., the entire combined group's business is deemed to be a single unitary business.

Notes to LRB: 1) Delete the first note at the end of Tax 2.39 (3) (e) and amend the second note as follows:

Note: See s. Tax 2.395 for an alternative method of apportioning the income of certain corporations. A qualifying combined group may also petition for an alternative apportionment method. See s. Tax 2.64 for details.

2) Replace the note at the end of Tax 2.39 (6) (a) with the following:

Note: A corporation that is a combined group member must adjust its sales factor numerator and denominator as described in s. Tax 2.61(7).

(6) (b) 1. d. The recipient is in Wisconsin, even ~~thought~~ though the property is ordered from outside Wisconsin.

2. (intro.) If the taxpayer does not have nexus in the state of destination, the sale is attributed to Wisconsin if the property is shipped from an office, store, warehouse, factory or other place of storage in Wisconsin. ~~The~~ For taxable years beginning before January 1, 2009, the amount included in the numerator of the sales factor shall be ~~at~~ 50% of the ~~sales~~ gross receipts from the sale. For taxable years beginning on or after January 1, 2009, the amount included in the numerator of the sales factor shall be the total gross receipts from the sale. For purposes of this subdivision:

b. If the taxpayer does not have nexus in the state from which the property is delivered or shipped, then the sale is in Wisconsin ~~and the amount included in the numerator of the sales factor shall be at 50% of the sale~~. For taxable years beginning before January 1, 2009, the amount included in the numerator of the sales factor shall be 50% of the gross receipts from the sale. For taxable years beginning on or after January 1, 2009, the amount included in the numerator of the sales factor shall be the total gross receipts from the sale.

4. b. Gross receipts from the sales of tangible personal property are in Wisconsin if the property is shipped from an office, store, warehouse, factory or other place of storage in Wisconsin and delivered to the federal government, including its agencies and instrumentalities, outside Wisconsin and the taxpayer does not have nexus in the destination state. ~~The~~ For taxable years beginning before January 1, 2009, the amount included in the numerator of the sales factor shall be 50% of the gross receipts from the sale. For taxable years beginning on or after January 1, 2009, the amount included in the numerator of the sales factor shall be the total gross receipts from the sale.

SECTION 7. Tax 2.39 (6) (b) 5. is created to read:

Tax 2.39 (6) (b) 5. For purposes of applying subds. 2. to 4., whether the taxpayer has nexus in the destination state is determined using the same standards as set forth in s. Tax 2.82.

SECTION 8. Tax 2.39 (6) (c) (title) is amended to read:

Tax 2.39 (6) (c) (title) *~~Sales other than sales~~* *Leases, rentals, or licensing of tangible personal property attributable to Wisconsin.*

SECTION 9. Tax 2.39 (6) (c) 1. to 4. are repealed

SECTION 10. Tax 2.39 (6) (c) 5. is renumbered (6) (c) 1. and amended as renumbered to read:

Tax 2.39 (6) (c) 1. Except as described in subd. ~~6.~~ 2., the numerator of the sales factor includes gross receipts from the lease, rental, licensing, or other use of tangible personal property owned by the taxpayer and the sublease of tangible personal property if the property is located in this state during the entire period of lease, rental, licensing, sublease, or other use. If the property is used in and outside this state during the period of lease, rental, licensing, or sublease, gross receipts are included in the numerator of the sales factor to the extent that the property is used in this state. The proportion of use in this state is determined by multiplying the gross receipts from the lease, rental, licensing, sublease, or other use of the property by a fraction having as a numerator the number of days the property is in this state while leased, rented, licensed, or subleased in the taxable year and having as a denominator the total number of days that the property is leased, rented, licensed, or subleased in all states having jurisdiction to tax the taxpayer during the taxable year.

SECTION 11. Tax 2.39 (6) (c) 6. (intro.) and a. to c. are renumbered (6) (c) 2. (intro.) and a. to c.

SECTION 12. Tax 2.39 (6) (c) 6. d. is renumbered (6) (c) 2. d. and amended as renumbered to read:

Tax 2.39 (6) (c) 2. d. If the taxpayer is unable to determine the use of moving property under subd. ~~6.~~ 2. a., b., or c. while the property is leased, rented, licensed, or subleased in the taxable year, the moving property is conclusively deemed to be used in the state in which the property is located at the time that the lessee, licensee, or sublessee takes possession of the property.

SECTION 13. Tax 2.39 (6) (c) 7. and 8. are repealed

SECTION 14. Tax 2.39 (6) (d) to (i) are created to read:

Tax 2.39 (6) (d) *Sales, leases, rentals, or licensing of real property attributable to Wisconsin.* The numerator of the sales factor includes gross receipts from the sale, lease, rental, licensing, or other use of real property owned by the taxpayer if the real property is located in this state and gross receipts from the sublease of real property if the real property is located in this state.

(e) *Receipts attributable to Wisconsin from the use of computer software.* Receipts attributable to Wisconsin from providing the use of computer software are determined as provided in ss. 71.04(7)(df) and 71.25(9)(df), Stats.

Note: For taxable years beginning after December 31, 2004 and before January 1, 2009, subd. 3. of ss. 71.04(7)(df) and 71.25(9)(df), Stats., provided that if the taxpayer is not subject to income tax in the state in which the gross receipts are considered received but the taxpayer's commercial domicile is in Wisconsin, 50 percent of the taxpayer's receipts from the transaction are included in the numerator of the sales factor. This provision was repealed by 2009 Act 28.

(f) *Sales of services attributable to Wisconsin.* Sales of services are attributable to Wisconsin if the benefit of the service is received in Wisconsin, as provided in ss. 71.04(7)(dh) and 71.25(9)(dh), Stats.

Note: For taxable years beginning after December 31, 2004 and before January 1, 2009, subd. 4. of ss. 71.04(7)(dh) and 71.25(9)(dh), Stats., provided that if the taxpayer is not subject to income tax in the state in which the benefit of the service is received, 50 percent of the taxpayer's receipts from the transaction are included in the numerator of the sales factor to the extent the taxpayer's employees or representatives performed the service from a location in Wisconsin. This provision was repealed by 2009 Act 28.

(g) *Receipts from intangible property for taxable years beginning before January 1, 2009.* For taxable years beginning before January 1, 2009, the numerator of the sales factor includes gross receipts from the sale, licensing the use of, or other use of intangible property, if the income producing activity occurs in this state during the taxable year. If the income producing activity occurs in and outside this state, the gross receipts shall be allocated between those states having jurisdiction to tax the taxpayer based on the direct costs of performance. For purposes of this paragraph, "income producing activity" means the act or acts engaged in by the taxpayer, or persons acting on behalf of the taxpayer, for the ultimate purpose of obtaining gains or profit, and "costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

Note: Refer to ss. 71.04 (7) (d), (df), and (dh) and 71.25 (9) (d), (df), and (dh), Stats., as affected by 2005 Wis. Act 25 but prior to amendment by 2009 Act 28. In 2009 Act 28, ss. 71.04(7)(d) and 71.25(9)(d) were repealed for taxable years beginning on or after January 1, 2009.

Note: In *The Hearst Corporation vs. Wisconsin Department of Revenue*, Wisconsin Tax Appeals Commission, Docket No. I−8511 (May 15, 1990), the taxpayer received income from the television network for broadcasting network programming in Wisconsin and income from the sale of national advertising time. The Commission held that the network income is a result of the income producing activity of broadcasting the network programming in Wisconsin and is includable in full in the numerator of the sales factor. The national advertising income is a result of the income producing activity of broadcasting in Wisconsin and the income is includable in full in the sales factor numerator.

(h) *Receipts from intangible property for taxable years beginning on or after January 1, 2009.* For taxable years beginning on or after January 1, 2009, the amount includable in the numerator of the sales factor for gross receipts from the sale of, license of, or allowing use of intangible property in this state is determined as provided in ss. 71.04(7)(dj) and (dk) and 71.25(9)(dj) and (dk), Stats. For purposes of applying these paragraphs, the following rules apply:

1. To determine the purchaser's or licensee's use of intangible property in this state, factors that may be considered include the number of licensed sites in each state, the volume of property manufactured, produced, or sold pursuant to the arrangement at locations in this state, or other data that reflects the relative usage of the intangible property in this state.

2. If the purchaser's or licensee's billing address or commercial domicile is in this state, that billing address or commercial domicile shall not conclusively determine that the transaction is in this state except in cases where the location of use of the intangible property cannot be determined. If the location of use of the intangible property cannot be determined, subds. 3. and 4. apply.

3. If the location of use of the intangible property cannot be determined, the gross receipts from the sale of, license of, or other receipts from allowing use of intangible property are in this state if the purchaser's or licensee's commercial domicile is in this state.

4. If subd. 3. would otherwise apply except that the state of the purchaser's or licensee's commercial domicile cannot be determined, the gross receipts from the sale of, license of, or allowing use of intangible property are in this state if the purchaser or licensee is billed for the purchase, license, or use of the intangible property at a location in this state.

(i) The provisions of pars. (c) to (h) shall also apply to sales to the federal government.

Note to LRB: Amend the notes at the end of Tax 2.39 (6) (i) as follows:

Note: Section Tax 2.39 interprets ss. 71.04 (4), (4m), (5), (6), (7), (10), and (11) ~~and~~ ,71.25 (5), (6), (6m), (7), (8), (9), (11), and (15), and 71.255 (5), Stats.

Note: The provisions of s. Tax 2.39 first apply for taxable years beginning on January 1, 2005. For returns required under combined reporting, the provisions of s. Tax 2.39 first apply for taxable years beginning on January 1, 2009.

SECTION 15. Tax 2.46 is repealed and recreated to read:

Tax 2.46 Apportionment of apportionable income of interstate air carriers. The apportionable income of an air carrier engaged in business in and outside this state shall be apportioned to Wisconsin as described in this section, except if the air carrier is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61(7).

Note: An air carrier that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

(1) DEFINITION. For purposes of this section, "engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

(2) APPORTIONMENT FORMULA COMPUTATION. An air carrier that is engaged in business in and outside this state shall apportion its apportionable income to this state on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

(a) The ratio which the aircraft arrivals and departures within this state scheduled by such carrier during the calendar or fiscal year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; provided that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures.

(b) The ratio which the revenue tons handled by such carrier at airports within this state during the calendar or fiscal year bears to the total revenue tons handled at airports within and without this state during the same period.

(c) The ratio which such air carrier's originating revenue within this state for the calendar or fiscal year bears to the total originating revenue within and without this state for the same period.

Note: Air carriers that are in combined groups must adjust the numerator and denominator of each of these factors and then convert the arithmetical average of these factors to the modified sales factor. The modified sales factor then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255(5), Stats., and s. Tax 2.61(7) for details.

Note: Section Tax 2.46 interprets ss. 71.04 (8) (c) and 71.25 (10) (c), Stats.

SECTION 16. Tax 2.47 (title) is amended to read:

Tax 2.47 (title) **Apportionment of ~~net business incomes~~ apportionable income of interstate motor carriers.**

SECTION 17. Tax 2.47 (intro.) is created to read:

Tax 2.47 (intro.) The apportionable income of a motor carrier engaged in business in and outside this state shall be apportioned to Wisconsin as described in this section, except if the motor carrier is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61(7).

Note to LRB: Insert the following note at the end of Tax 2.47 (intro.):

Note: A motor carrier that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 18. Tax 2.47 (1) is repealed and recreated to read:

Tax 2.47 (1) DEFINITIONS. In this section:

(a) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39 (2) (d).

(b) "Ton mile" means the movement of one ton of persons or property, or both, the distance of one mile. For carriage of persons, each person shall be considered the equivalent of 200 pounds.

SECTION 19. Tax 2.47 (2) (title) and (intro.) are amended to read:

Tax 2.47 (2) (title) ~~GENERAL~~ APPORTIONMENT FORMULA COMPUTATION.

(intro.) For taxable years beginning on or after January 1, 1997, ~~the apportionable income of an interstate motor carrier of persons or property, or both, doing business in Wisconsin, shall be apportioned to Wisconsin~~ a motor carrier that is engaged in business in and outside this state shall apportion its apportionable income to this state on the basis of the arithmetical average of the following 2 factors:

Note to LRB: Insert the following note at the end of Tax 2.47 (2) (b):

Note: Motor carriers that are in combined groups must adjust the numerator and denominator of each of these factors and then convert the arithmetical average of these factors to the modified sales factor. The modified sales factor then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255 (5), Stats., and s. Tax 2.61 (7) for details.

SECTION 20. Tax 2.475 (title) is amended to read:

Tax 2.475 (title) **Apportionment of ~~net business incomes~~ apportionable income of interstate railroads, sleeping car companies and car line companies.**

SECTION 21. Tax 2.475 (intro.) is created to read:

Tax 2.475 (intro.) The apportionable income of a railroad, sleeping car company, or car line company engaged in business in and outside this state shall be apportioned to Wisconsin as described in this section, except if the company is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255 (5), Stats., and further detailed in s. Tax 2.61 (7).

Note to LRB: Insert the following note at the end of Tax 2.475 (intro.):

Note: A railroad, sleeping car company, or car line company that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 22. Tax 2.475 (1) (a) and (b) are renumbered (1) (b) and (c)

SECTION 23. Tax 2.475 (1) (a) is created to read:

Tax 2.475 (1) (a) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

SECTION 24. Tax 2.475 (2) (intro.) and (4) are amended to read:

Tax 2.475 (2) (intro.) INTERSTATE RAILROADS AND SLEEPING CAR COMPANIES. With respect to the imposition of Wisconsin franchise or income tax measured by or on net income for taxable years beginning on or after January 1, 1991, the apportionable income of a railroad or sleeping car company ~~operating within and without Wisconsin~~ engaged in business in and outside this state shall be apportioned to Wisconsin on the basis of the arithmetical average of the following 2 factors:

Note to LRB: Insert the following note at the end of Tax 2.475 (2) (b):

Note: Railroads and sleeping car companies that are in combined groups must adjust the numerator and denominator of each of these factors and then convert the arithmetical average of these factors to the modified sales factor. The modified

sales factor then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255 (5), Stats., and s. Tax 2.61 (7) for details.

(4) CAR LINE COMPANIES. With respect to the imposition of Wisconsin franchise or income tax measured by or on net income for taxable years beginning on or after January 1, 1991, the income of a car line company ~~operating within and without Wisconsin~~ engaged in business in and outside this state shall be allocated or apportioned to Wisconsin as provided in s. 71.04 (4) or 71.25 (6), Stats., and s. Tax 2.39.

SECTION 25. Tax 2.48 (title) and (1) are amended to read:

Tax 2.48 (title) **Apportionment of ~~net business incomes~~ apportionable income of interstate pipeline companies.**

(1) GENERAL. With respect to the imposition of Wisconsin franchise or income tax measured by or on net income, the apportionable income of a pipeline company ~~operating within and without Wisconsin~~ engaged in business in and outside this state shall be apportioned to Wisconsin on the basis of the arithmetical average of the 3 factors in subs. (3), (4) and (5), except if the pipeline company is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255 (5), Stats., and further detailed in s. Tax 2.61 (7).

Note to LRB: Insert the following note at the end of Tax 2.48 (1):

Note: A pipeline company that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 26. Tax 2.48 (1) (am) is created to read:

Tax 2.48 (1) (am) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

Note to LRB: Insert the following note at the end of Tax 2.48 (5) and before the existing note:

Note: Pipeline companies that are in combined groups must adjust the numerator and denominator of each of these factors and then convert the arithmetical average of these factors to the modified sales factor. The modified sales factor then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255(5), Stats., and s. Tax 2.61(7) for details.

SECTION 27. Tax 2.49 (1) is amended to read:

Tax 2.49 (1) SCOPE. A financial institution that is engaged in business both in and outside this state shall apportion its apportionable income as provided in this section, except if the financial institution is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61 (7). Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats.

Note to LRB: Insert the following note at the end of Tax 2.49 (1):

Note: A financial institution that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 27. Tax 2.49 (2) (dm), (fm), and (g) 16. and 17. are created to read:

Tax 2.49 (2) (dm) "Credit card bank" means an institution that is primarily engaged in credit card operations, which does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others, and which does not engage in the business of making commercial loans.

(fm) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

(g) 16. A credit card bank.

17. Any subsidiary of an entity described in subds. 1. to 16., if a significant purpose for the subsidiary is to hold investments or if the subsidiary primarily functions to hold investments, as provided in s. 71.25(10)(a)2., Stats.

SECTION 28. Tax 2.49 (2) (h) is amended to read:

Tax 2.49 (2) (h) "Guarantor of a loan located in this state" means a ~~person~~ guarantor whose billing address is in this state.

SECTION 29. Tax 2.49 (2) (hm) is created to read:
Tax 2.49 (2) (hm) "Intangible property" has the same meaning as in s. Tax 2.39(2)(f).

SECTION 30. Tax 2.49 (3) (intro.) is amended to read:
Tax 2.49 (3) (intro.) For taxable years beginning after December 31, 2005, a financial institution that ~~does~~ is engaged in business in and outside this state shall determine its net income for state franchise or income tax purposes as provided in this section. The financial institution shall first deduct from its total net income its nonapportionable income, less related expenses. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats. The financial institution shall apportion its remaining net income to this state as follows:

SECTION 31. Tax 2.49 (3) (c) is repealed
SECTION 32. Tax 2.49 (3) (d) is renumbered (3) (c)
SECTION 33. Tax 2.49 (3) (d) is created to read:
Tax 2.49 (3) (d) For taxable years beginning after December 31, 2007, apportionable income shall be apportioned using an apportionment fraction composed of the receipts factor under sub. (4).

Note: Financial institutions that are in combined groups use the receipts factor numerator and denominator to compute the modified sales factor, which then determines the financial institution's Wisconsin share of the combined group's apportionable income. See s. 71.255(5), Stats., and s. Tax 2.61(7) for details.

SECTION 34. Tax 2.49 (4) (intro.), (z) 1., (zm), and (zs) are amended to read:
Tax 2.49 (4) (intro.) The receipts factor is the ratio of the taxpayer's receipts in this state to the taxpayer's total receipts everywhere during the taxable year. Interest, dividends, gross receipts or net gains from sales of securities held for investment purposes, and other income from investment assets may not be included in the receipts factor. The receipts factor shall include the ~~following sources of a taxpayer's income subject to apportionment:~~ items described in paragraphs (a) to (zs).

Note to LRB: Insert the following note at the end of Tax 2.49 (4) (intro.):
Note: A financial institution that is a combined group member must adjust its receipts factor numerator and denominator as described in s. Tax 2.61(7).

(z) 1. The numerator of the receipts factor includes gross royalties and other gross receipts received for the use of intangible property~~, including, but not limited to, patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customer lists,~~ if the user, purchaser, or licensee uses the intangible property at a location in this state.~~ For purposes of this paragraph, intangible property excludes securities.~~

(zm) *Other sales.* The numerator of the receipts factor includes all other receipts ~~as~~ described in s. Tax 2.39 (6) (b) to (i), to the extent not described in this subsection.

(zs) *Receipts not taxed.* ~~Fifty~~ For taxable years beginning before January 1, 2009, fifty percent of the taxpayer's receipts that are apportioned under this section to a state which does not have jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer shall be included in the numerator of the apportionment fraction if the taxpayer's employees or representatives performed such services from a location in this state. With regard to receipts described in pars. (a) to (ze), this paragraph does not apply to taxable years beginning on or after January 1, 2009.

SECTION 35. Tax 2.495 (1) is amended to read:
Tax 2.495 (1) SCOPE. A brokerage house, investment adviser, investment company, or underwriter that is engaged in business both in and outside this state shall apportion its apportionable income as provided in this section, except if the brokerage house, investment adviser, investment company, or underwriter is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61(7). Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats.

Note to LRB: Insert the following note at the end of Tax 2.495 (1):

Note: A brokerage house, investment adviser, investment company, or underwriter that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 36. Tax 2.495 (2) (em) is created to read:
Tax 2.495 (2) (em) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

SECTION 37. Tax 2.495 (3) (intro.) is amended to read:
Tax 2.495 (3) (intro.) For taxable years beginning after December 31, 2005, a broker−dealer, investment adviser, investment company, or underwriter that ~~does~~ is engaged in business in and outside this state shall determine its net income for state franchise or income tax purposes as provided in this section. The broker−dealer, investment adviser, investment company, or underwriter shall first deduct from its total net income its nonapportionable income, less related expenses. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats. The broker−dealer, investment adviser, investment company, or underwriter shall apportion its remaining net income to this state as follows:

SECTION 38. Tax 2.495 (3) (c) is repealed
SECTION 39. Tax 2.495 (3) (d) is renumbered (3) (c)
SECTION 40. Tax 2.495 (3) (d) is created to read:
Tax 2.495 (3) (d) For taxable years beginning after December 31, 2007, apportionable income shall be apportioned using an apportionment fraction composed of the receipts factor under sub. (4).

Note: Brokers-dealers, investment advisers, investment companies, and underwriters that are in combined groups use the receipts factor numerator and denominator to compute the modified sales factor, which then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255(5), Stats., and s. Tax 2.61(7) for details.

SECTION 41. Tax 2.495 (4) (intro.) and (h) are amended to read:

Tax 2.495 (4) (intro.) The receipts factor is the ratio of the taxpayer's receipts in this state to the taxpayer's total receipts everywhere during the taxable year. Interest, dividends, gross receipts or net gains from sales of securities, and other income from investment assets held by a taxpayer in the taxpayer's investment account may not be included in the receipts factor. The receipts factor shall include the ~~following sources of a taxpayer's income subject to apportionment:~~ items described in paragraphs (a) to (h).

Note to LRB: Insert the following note at the end of Tax 2.495 (4) (intro.):
Note: A broker-dealer, investment adviser, investment company, or underwriter that is a combined group member must adjust its receipts factor numerator and denominator as described in s. Tax 2.61(7).

(h) *Receipts not taxed.* ~~Fifty~~ For taxable years beginning before January 1, 2009, fifty percent of the taxpayer's receipts that are apportioned under this section to a state which does not have jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer shall be included in the numerator of the apportionment fraction if the taxpayer's commercial domicile is in this state. With regard to receipts described in pars. (a) to (f), this paragraph does not apply to taxable years beginning on or after January 1, 2009.

SECTION 42. Tax 2.50 (1) is amended to read:
Tax 2.50 (1) SCOPE. A public utility that is engaged in business both in and outside this state shall apportion its apportionable income as provided in this section, except if the public utility is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61(7). Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats.

SECTION 43. Tax 2.50 (2) (a) to (d) are renumbered (2) (b) to (e)

SECTION 44. Tax 2.50 (2) (a) is created to read:
Tax 2.50 (2) (a) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

SECTION 45. Tax 2.50 (3) (intro.) is amended to read:

Tax 2.50 (3) (intro.) For taxable years beginning after December 31, 2004, a public utility that ~~does~~ is engaged in business in and outside this state shall determine its net income for state franchise or income tax purposes as provided in this section. The public utility shall first deduct from its total net income its nonapportionable income, less related expenses. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats. The public utility shall apportion its remaining net income to this state as follows:

Note to LRB: Insert the following note at the end of Tax 2.50 (3) (d) and before the existing notes:

Note: Public utilities that are in combined groups must adjust the numerator and denominator of the sales factor as described in s. Tax 2.61(7).

SECTION 46. Tax 2.502 (1) is amended to read:

Tax 2.502 (1) SCOPE. A telecommunications company that is engaged in business both in and outside this state shall apportion its apportionable income as provided in this section, except if the telecommunications company is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255(5), Stats., and further detailed in s. Tax 2.61(7). Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats.

Note to LRB: Insert the following note at the end of Tax 2.502 (1):

Note: A telecommunications company that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 47. Tax 2.502 (2) (am) is created to read:

Tax 2.502 (2) (am) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

SECTION 48. Tax 2.502 (2) (d) is repealed

SECTION 49. Tax 2.502 (2) (e) is renumbered (2) (d) and amended as renumbered to read:

Tax 2.502 (2) (d) "Telecommunications company" means any person that owns, operates, manages, or controls any plant or equipment used to furnish telecommunications services and cable television services within this state directly or indirectly to the public and derives at least 70 % of its gross income for the current taxable year from the provision of telecommunications services and cable television services, not including internet service and excluding the resale of telecommunications by telecommunications resellers as defined in s. 196.01(9), Stats. For purposes of the 70 % test, gross income does not include interest, dividends, rents, royalties, capital gains or ordinary gains from ~~assets~~ asset dispositions, other than in the normal course of business. "Telecommunications company" does not include internet service providers.

SECTION 50. Tax 2.502 (2) (f) is repealed

SECTION 51. Tax 2.502 (2) (e) is created to read:

Tax 2.502 (2) (e) The following terms have the same definitions as provided in ss. 77.51 and 77.522 (4) (a), Stats.:

1. "Ancillary services" (s. 77.51 (1ba), Stats.).
2. "Call-by-call basis" (s. 77.522 (4) (a) 2., Stats.).
3. "Communications channel" (s. 77.522 (4) (a) 3., Stats.).
4. "Customer" (s. 77.522 (4) (a) 4., Stats.).
5. "Customer channel termination point" (s. 77.522 (4) (a) 5., Stats.).
6. "Home service provider" (s. 77.522 (4) (a) 7., Stats.).
7. "Interstate telecommunications services" (s. 77.51 (5n), Stats.).
8. "Intrastate telecommunications services" (s. 77.51 (5r), Stats.).
9. "Mobile telecommunications service" (s. 77.522 (4) (a) 8., Stats.).
10. "Place of primary use" (s. 77.522 (4) (a) 9., Stats.).
11. "Postpaid calling service" (s. 77.522 (4) (a) 10., Stats.).
12. "Prepaid calling service" (s. 77.51 (10d), Stats.).
13. "Prepaid wireless calling service" (s. 77.51 (10f), Stats.).
14. "Private communication service" (s. 77.51 (10s), Stats.).
15. "Service address" (s. 77.51 (17m), Stats.).
16. "Telecommunications services" (s. 77.51 (21n), Stats.).

SECTION 52. Tax 2.502 (3) is amended to read:

Tax 2.502 (3) APPORTIONMENT FORMULA COMPUTATION. For taxable years beginning after December 31, 2004, a telecommunications company that ~~does~~ is engaged in business in and outside this state shall determine its net income for state franchise or income tax purposes as provided in this section. The telecommunications company shall first deduct from its total net income its nonapportionable income, less related expenses. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats. The telecommunications company shall apportion its remaining net income to this state using an apportionment fraction obtained by taking the arithmetical average of the property factor, payroll factor, and sales factor. The sales factor is determined as prescribed in subs. (4) and (5), as applicable.

SECTION 53. Tax 2.502 (4) and (5) are created to read:

Tax 2.502 (4) SALES FACTOR FOR TAXABLE YEARS BEGINNING BEFORE JANUARY 1, 2009. For taxable years beginning before January 1, 2009, the sales factor is the sales factor as would be determined under s. 71.25 (9), 2001 Stats.

(5) SALES FACTOR FOR TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2009. For taxable years beginning on or after January 1, 2009, the sales factor is determined as provided in s. 71.25 (9), Stats., as effective for the current taxable year. For purposes of computing the numerator of a telecommunications company's sales factor under this subsection, the following rules apply:

(a) *General.* Except as provided otherwise in paragraphs (b) through (f), gross receipts from the sale of a telecommunications service or mobile telecommunications service are in this state if the customer's place of primary use of the service is in this state.

(b) *Telecommunications services on call-by-call basis.* Gross receipts from the sale of telecommunications services sold on an individual call-by-call basis are in this state if either of the following applies:

1. The call both originates and terminates in this state.

2. The call either originates or terminates in this state and the service address is located in this state.

(c) *Postpaid calling services, prepaid calling services, and prepaid wireless calling services.* Gross receipts from the sale of postpaid calling services, prepaid calling services, and prepaid wireless calling services are in this state if the origination point of the telecommunication signal, as first identified by the service provider's telecommunication system or, if the system used to transport telecommunication signals is not the seller's, as identified by information received by the seller from its service provider, is located in this state.

(d) *Private communication services.* The following gross receipts from the sale of private communication services are in this state:

1. Any separate charge attributable to a customer channel termination point located within this state.

2. If all customer channel termination points are located entirely in this state, the gross receipts attributable to those customer channel termination points.

3. Fifty percent of the gross receipts attributable to segments of a channel between two customer channel termination points located in different states, if one of those customer channel termination points is located in this state.

4. If the segments are not charged separately, the gross receipts attributable to segments of a communications channel that is located in this state and in more than one other state or equivalent jurisdiction, computed based on a percentage determined by dividing the number of customer channel termination points in this state by the total number of customer channel termination points in all jurisdictions where segments of the communications channel are located.

(e) *Ancillary services.* Gross receipts from the sale of ancillary services are in this state if the customer's primary place of use is in this state.

(f) *Carrier network access and sales for resale*. The following gross receipts from carrier network access and from the sale of telecommunications services for resale are in this state:

1. Gross receipts from access fees attributable to intrastate telecommunications service that both originates and terminates in this state.

2. Where subd. 1. does not apply, 50 percent of the gross receipts from access fees attributable to interstate telecommunications service if the interstate call either originates or terminates in this state.

3. Gross receipts from interstate end user access line charges, including but not limited to the surcharge approved by the federal communications commission and levied pursuant to 47 CFR 69, if the customer's service address is in this state.

4. Gross receipts from sales of telecommunications services to other telecommunication service providers for resale if the reseller's sale to the customer would be sourced to this state under the rules of this subsection, provided the information is readily available to make that determination. If the information is not readily available, the taxpayer must use a reasonable and consistent method to determine the amount of gross receipts from sales for resale that are derived from Wisconsin, based on the information that is available.

(g) *Other sales*. Sales other than those described in paragraphs (a) to (f) are in this state if so determined under s. 71.25 (9), Stats., and s. Tax 2.39.

Note to LRB: Insert the following note at the end of Tax 2.502 (5) and before the existing notes at the end of s. Tax 2.502:

Note: Telecommunications companies that are in combined groups must adjust the numerator and denominator of each of their apportionment factors and then convert the arithmetical average of these factors to the modified sales factor. The modified sales factor then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255 (5), Stats., and s. Tax 2.61 (7) for details.

SECTION 54. Tax 2.505 (intro.) is amended to read:

Tax 2.505 (intro.) The apportionable income of professional sports clubs engaged in business ~~both~~ in~~side~~ and outside Wisconsin during the year shall be apportioned to Wisconsin using the apportionment fraction described in s. 71.25 (6), Stats., and the apportionment formula computation described in s. 71.25 (6m), Stats., if applicable, except if the professional sports club is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255 (5), Stats., and further detailed in s. Tax 2.61 (7). The property, payroll, and sales factors described in s. 71.25 (6) and (6m), Stats., shall be determined as ~~follows:~~ described in this section.

Note to LRB: Insert the following note at the end of Tax 2.505 (intro.):

Note: A professional sports club that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61(2) for a description of corporations required to use combined reporting.

SECTION 55. Tax 2.505 (1) to (3) are renumbered (2) to (4)

SECTION 56. Tax 2.505 (1) is created to read:

Tax 2.505 (1) DEFINITION. For purposes of this section, "engaged in business in and outside this state" has the same meaning as in s. Tax 2.39(2)(d).

Notes to LRB: 1) Insert the following note at the end of Tax 2.505 (2):

Note: The property factor does not apply to taxable years beginning after December 31, 2007.

2) Insert the following note at the end of Tax 2.505 (3):

Note: The payroll factor does not apply to taxable years beginning after December 31, 2007.

3) Insert the following note at the end of Tax 2.505 (4) (d) and before the existing notes at the end of s. Tax 2.505:

Note: Professional sports clubs that are in combined groups must adjust the numerator and denominator of the sales factor as described in s. Tax 2.61(7).

SECTION 57. Tax 2.82 is repealed and recreated to read:

Tax 2.82 Nexus. (1) BACKGROUND AND SCOPE. (a) Every domestic corporation (one incorporated under Wisconsin's laws), except those exempt under ss. 71.26(1) and 71.45(1), Stats., and every "licensed" foreign corporation (one not incorporated in Wisconsin) is required to file a complete corporation franchise/income tax return (form 4 or 5) regardless of whether or not business was transacted.

(b) A foreign corporation is "licensed" if it has obtained a Certificate of Authority from the Wisconsin secretary of state to transact business in this state pursuant to s. 180.801, 1987 Stats. A "licensed" foreign corporation is presumed to be subject to Wisconsin franchise/income taxes.

Note: 1989 Wis. Act 303 repealed s. 180.801, Stats.

(c) An unlicensed foreign corporation is subject to Wisconsin franchise/income taxes if it has "nexus" with Wisconsin. The purpose of this rule is to provide guidelines for determining what constitutes "nexus", that is, what business activities are needed for a foreign corporation to be subject to Wisconsin franchise/income taxes. The rule also explains how nexus applies to a foreign corporation in the context of s. 71.255, Stats., relating to combined reporting, and s. 77.93, Stats., relating to the recycling surcharge.

(2) DEFINITIONS. In this rule:

(a) "Business location" includes a repair shop, parts department, purchasing office, employment office, warehouse, meeting place for directors, sales office, permanent sample or display room, research facility or a recreational facility for use of employees or customers. A residence of an employee or representative is not ordinarily considered a business location of the employer unless the facts indicate otherwise. Facts that may indicate a residence of an employee or representative is a business location include the following: a portion of the residence is used exclusively for the business of the employer, the employee is reimbursed or paid a flat fee for the use of this space by the employer; the employee's phone number is listed in the yellow pages or on the Internet under the name of the employer; the employee uses supplies, equipment or samples furnished by the employer; or the space is used by the employee to interview prospective employees, hold sales meetings, or discuss business with customers.

(b) "Loans" include any extension of credit resulting from direct negotiations between the taxpayer and its customer, or the purchase, in whole or in part, of an extension of credit from another. "Loans" include participations, syndications, and leases treated as loans for federal income tax purposes. "Loans" do not include properties treated as loans under section 595 of the Internal Revenue Code prior to its repeal by P.L. 104−188; 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; or interests in a real estate mortgage investment conduit or other mortgage−backed or asset−backed security.

(c) "Representative" includes an employee, independent contractor, or any other person or entity engaged in substantial activities that helped the taxpayer to establish or maintain a market in this state.

Note: Under *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 US. 232 (1987), the U.S. Supreme Court held that it made no difference whether the taxpayer's representatives were classified as independent contractors or employees. Also see *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

(3) FEDERAL LIMITATIONS ON TAXATION OF FOREIGN CORPORATIONS. (a) *Federal constitutional provisions.* 1. Article I, Section 8 of the U.S. Constitution grants congress the power to regulate commerce with foreign nations and among the several states. States are prohibited from levying a tax which imposes a burden on interstate or foreign commerce. However, this does not mean states may not impose any tax on interstate commerce. A state tax on net income from interstate commerce which is fairly attributable to the state is constitutional. (*Northwestern States Portland Cement Co. v. Minnesota; Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 79 S. Ct. 357.)

2. Section I of the 14th Amendment protects taxpayers within any class against discrimination and guarantees a remedy against illegal taxation.

(b) *Federal Public Law 86−272.* 1. Under Public Law 86−272, a state may not impose its franchise/income tax on a business selling tangible personal property, if the *only* activity of that business is the solicitation of orders by its salesperson or representative which orders are sent outside the state for approval or rejection, and are filled by delivery from a point outside the state. The activity must be *limited* to solicitation. If there is any activity which exceeds solicitation, the immunity from taxation under Public Law 86−272 is lost.

2. This law, enacted by congress in 1959, does not extend to:

a. Those businesses which sell services, real estate or intangibles in more than one state;

b. Domestic corporations; or

c. Foreign nation corporations, that is, those not incorporated in the United States.

3. If the *only* activities in Wisconsin of a foreign corporation selling tangible personal property are those described in subd. 3. a. and b. such corporation is not subject to Wisconsin franchise/income taxes under P.L. 86−272:

a. Usual or frequent activity in Wisconsin by employees or representatives soliciting orders for tangible personal property which orders are sent outside this state for approval or rejection.

b. Solicitation activity by non−employe independent contractors, conducted through their own office or business location in Wisconsin.

(4) WHAT CONSTITUTES "NEXUS". If a foreign corporation has one or more of the activities described in paragraph (a) or (b), it is considered to have "nexus" and shall be subject to Wisconsin franchise or income taxes.

(a) *General.* Any of the following activities constitute nexus:

1. Maintenance of any business location in Wisconsin, including any kind of office.
2. Ownership of real estate in Wisconsin.
3. Ownership of a stock of goods in a public warehouse or on consignment in Wisconsin.
4. Ownership of a stock of goods in the hands of a distributor or other non−employe representative in Wisconsin, if used to fill orders for the owner's account.
5. Usual or frequent activity in Wisconsin by employees or representatives soliciting orders with authority to accept them.
6. Usual or frequent activity in Wisconsin by employees or representatives engaged in a purchasing activity or in the performance of services (including construction, installation, assembly, repair of equipment).
7. Other usual and frequent activities by employees or representatives in Wisconsin such as credit investigations, collection of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, or repair and maintenance of the taxpayer's products.
8. Operation of mobile stores in Wisconsin (such as trucks with driver−salespersons), regardless of frequency.
9. Leasing of tangible property and licensing of intangible rights for use in Wisconsin.
10. The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.
11. The performance of construction contracts and personal services contracts in Wisconsin.
12. Engaging in substantial activities that help to establish and maintain a market in Wisconsin.

(b) *"Doing business in this state."* Additionally, if a corporation has any of the activities that are specifically included in the statutory definition of "doing business in this state" (s. 71.22(1r), Stats.), the corporation has nexus except where prohibited by P.L. 86-272. Therefore, the following activities constitute nexus in Wisconsin to the extent sub. (3)(b)3. does not apply:

1. Issuing credit cards, debit cards, or travel and entertainment cards to customers in Wisconsin.
2. Regularly selling products or services of any kind or nature to customers in Wisconsin that receive the product or service in Wisconsin.
3. Regularly soliciting business from potential customers in Wisconsin.
4. Regularly performing services outside Wisconsin for which the benefits are received in Wisconsin.
5. Regularly engaging in transactions with customers in Wisconsin that involve intangible property and result in receipts flowing to the corporation from within Wisconsin.
6. Holding loans secured by real or tangible personal property located in Wisconsin.
7. Owning, directly or indirectly, a general or limited partnership interest in a partnership that does business in Wisconsin, regardless of the percentage of ownership.

8. Owning, directly or indirectly, an interest in a limited liability company that does business in Wisconsin, regardless of the percentage of ownership, if the limited liability company is treated as a partnership for federal income tax purposes.

(c) *Nexus for entire taxable year*. If a corporation has nexus in Wisconsin for any part of its taxable year, it is considered to have nexus in Wisconsin for its entire taxable year, regardless of whether the activity that created the nexus took place throughout the year.

Example: Corporation W is a calendar year corporation that operates five retail stores, one of which is in Wisconsin. The stores constitute a unitary business. Corporation W is not in a combined group. In the year 2010, Corporation W operated one store in Wisconsin. On August 31, 2010, Corporation W sold the Wisconsin store to Corporation Y but continued to operate the other stores outside Wisconsin. Between September 1, 2010 and December 31, 2010, Corporation W had no activities that would create nexus in Wisconsin. Corporation W is considered to have nexus in Wisconsin for its entire taxable year. Therefore, on its 2010 Wisconsin Form 4, Corporation W must compute its apportioned share of Wisconsin income based on its apportionable income from all of its stores for the entire year 2010. In addition, the numerator of the sales factor in its apportionment computation must include sales to shipped to Wisconsin customers for the entire year 2010.

(d) *How to obtain ruling.* The guidelines in par. (a) and the statutory definitions summarized in par. (b) as to what activities constitute "nexus" should not be considered all−inclusive. A ruling may be requested about a particular foreign corporation as to whether it is subject to Wisconsin franchise/income taxes by writing to the Wisconsin Department of Revenue, Audit Technical Services Section, P.O. Box 8906, Madison, WI 53708.

Note: Section 71.23(3), Stats., provides specific activities that do not constitute nexus in Wisconsin even if they exceed the protection of P.L. 86-272.

(5) NEXUS FOR COMBINED GROUP MEMBERS. (a) *General.* For a combined group, nexus is determined for the unitary business as a whole, as provided in s. 71.255(5)(a), Stats. Therefore, if a member of a combined group has nexus in Wisconsin and that nexus is attributable to the combined group's unitary business, all members of the combined group have nexus in Wisconsin.

Example: Assume the same facts as the example in sub. (4)(c). In addition, assume Corporation Y is a member of Combined Group XYZ, which reports on a calendar year. Although Group XYZ operated numerous stores outside Wisconsin for the entire year, none of the members of Group XYZ had any nexus-creating activities in Wisconsin until July 1, 2010, when Corporation Y set up a temporary office in Wisconsin in anticipation of the purchase of the store from Corporation W. However, Corporation Z had sales shipped to Wisconsin customers during 2010. Since Corporation Y established nexus in Wisconsin during the year, Group XYZ is considered to have nexus in Wisconsin for its entire taxable year. Therefore, Group XYZ must file a combined Wisconsin Form 4 for the year 2010. On the combined return, Group XYZ must include its apportionable income for the entire taxable year (from all stores) in the combined unitary income to be apportioned. The Wisconsin share of the combined unitary income for Corporation Y and Corporation Z is then determined as described in s. 71.255(5), Stats., and s. Tax 2.61(7). Assuming all of Group XYZ's Wisconsin sales are attributable to Corporations Y and Z, Corporations Y and Z would be the only corporations in the group with Wisconsin income.

(b) *Effect of controlled group election.* For a combined group that has made the controlled group election provided in s. 71.255(2m), Stats., the entire commonly controlled group's business is deemed to be a single unitary business, and the commonly controlled group becomes a combined group. Therefore, if a combined group has made the controlled group election and at least one member of the combined group has nexus in Wisconsin, all members of the combined group have nexus in Wisconsin.

Note: See s. Tax 2.62 for further discussion of the concept of a unitary business. Also see s. Tax 2.61(4)(h) for details of how a corporation's nexus may be affected by the water's edge rules of combined reporting, and how these water's edge rules may affect taxation of a corporation's income from a unitary business.

(6) NEXUS FOR RECYCLING SURCHARGE. If a corporation has nexus under the rules prescribed in this section, the corporation is considered to be "doing business in this state" for purposes of s. 77.93, Stats., relating to the recycling surcharge. Therefore, if a corporation, other than a corporation exempt from taxation, has nexus and has at least

$4,000,000 of gross receipts from all activities for the taxable year, the corporation is subject to the recycling surcharge. The recycling surcharge applies to each member of a combined group separately.

Note: See s. Tax 2.32 for a description of what constitutes "gross receipts" for purposes of applying the $4,000,000 threshold.

Examples: 1) Corporation A is incorporated outside Wisconsin and is not a member of a combined group. Corporation A is licensed to do business in Wisconsin, but all of its activities in Wisconsin are protected by P.L. 86-272. Therefore, Corporation A does not have nexus. Corporation A is not subject to the recycling surcharge because it does not have nexus in Wisconsin.

2) Assume the same facts as Example 1, except that Corporation A is in Combined Group ABCD, which consists of Corporations A, B, C, and D. Corporation D has a warehouse and several stores in Wisconsin that are part of the combined group's common unitary business. Since Corporation D has nexus in Wisconsin, all corporations in the combined group have nexus in Wisconsin. Corporations A, B, and D have sales to Wisconsin customers but Corporation C does not. The gross receipts, Wisconsin income, gross tax, and resulting recycling surcharge for each corporation in the group are as follows:

Corporation	"Gross Receipts"	Wisconsin Income	Gross Tax	Recycling Surcharge
A	**$10,000,000**	**$100,000**	**$7,900**	**$237**
B	**$3,000,000**	**$400,000**	**$31,600**	**$0**
C	**$50,000,000**	**$0**	**$0**	**$25**
D	**$100,000,000**	**$6,000,000**	**$474,000**	**$9,800**

The Wisconsin income and gross tax are computed using the method described in s. Tax 2.61. Since the recycling surcharge applies to each member of a combined group separately:

- Corporation A is subject to the recycling surcharge because its gross receipts are at least $4,000,000.
- Corporation B is not subject to the recycling surcharge because its gross receipts are less than $4,000,000.
- Corporation C is subject to the minimum $25 recycling surcharge because its gross receipts are at least $4,000,000 and it has no gross tax liability.
- Corporation D is subject to the maximum $9,800 recycling surcharge because its gross tax of $474,000 multiplied by the recycling surcharge rate of 3% exceeds $9,800. The amount in excess of $9,800 is not imposed even though the other members have recycling surcharge liability of less than $9,800.

Note: Section Tax 2.82 interprets ss. 71.22(1r), 71.23(1) and (2), 71.255(5), and 77.93, Stats.

The rules contained in this order shall take effect upon publication in the official state newspaper as provided in s. 227.22(2)(c), Stats.

DEPARTMENT OF REVENUE

Dated: _____ By: _____

Roger M. Ervin
Secretary of Revenue

E:Rules/Combined Reporting 2 Proposed Order (emergency)

FISCAL ESTIMATE FORM **2009 Session**

☒ ORIGINAL ☐ UPDATED

☐ CORRECTED ☐ SUPPLEMENTAL

LRB # 09-

INTRODUCTION #

Admin. Rule # Emergency Tax 2.39 through Tax 2.82

Subject

Fiscal Effect

State: ☒ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

☐ Increase Existing Appropriation

☐ Increase Existing Revenues

☐ Decrease Existing Appropriation

☐ Decrease Existing Revenues

☐ Create New Appropriation

☐ Increase Costs - May be Possible to Absorb Within Agency's Budget

☐ Yes ☐ No

Local: ☐ No Local Government Costs

1. ☐ Permissive ☐ Mandatory

2. ☐ Permissive ☐ Mandatory

3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory

4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory

5. Types of Local Governmental Units Affected:

☐ Towns ☐ Villages ☐ Cities

☐ Counties ☐ _____ Others

☐ School Districts ☐ WTCS Districts

Fund Sources Affected

☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

This rule order makes various changes to Chapters Tax 2.39 through Tax 2.82 to:

1) update rules for apportionment and nexus to reflect statutory changes in 2009 Act 2 and 2009 Act 28 relating to the implementation of combined reporting for affiliated groups of corporations;

2) update rules on the sourcing of sales as well as definitions of certain terms to implement the streamlined sales tax statutory changes contained in 2009 Act 2; and

3) certain other changes to administrative rules under the authority of s. 71.04(8) and 71.25(10), Stats, related to railroads, financial organizations and public utilities.

A summary of the proposed rule changes is included in Attachment I.

The fiscal effects of the rule changes for items 1 and 2 above were included in the fiscal effects for 2009 Act 2 and 2009 Act 28. As such, these rule changes have no fiscal effect.

The fiscal effect of the rule changes promulgated under authority of s. 71.04(8) and 71.25(10), Stats., are expected to be minimal.

FISCAL ESTIMATE WORKSHEET	Detailed Estimate of Annual Fiscal Effect	**2009 Session**
☒ ORIGINAL ☐ UPDATED	**LRB # 09**	Admin. Rule #
☐ CORRECTED ☐ SUPPLEMENTAL	**INTRODUCTION #**	Emergency Tax 2.39 - Tax 2.82

Subject

I. One-Time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized scal effect):

. II. Annualized Costs:	**Annualized Fiscal impact on State nds from:**	
. A. State Costs by Category	**Increased Costs**	**Decreased Costs**
State Operations - Salaries and Fringe	$	$ -
(FTE Position Changes)	(FTE)	(- FTE)
State Operations-Other Costs		-
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs **by Category**	$	$ -
. B. State Costs by **Source of Funds**	Increased Costs	Decreased osts
GPR	$	$ -
FED		-
PRO/PRS		-
SEG/SEG-S	$	-
III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee,	Increased Rev.	Decreased ev.

etc.)		
GPR Taxes	$	$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues	$	$ -

NET ANNUALIZED FISCAL IMPACT

	STATE	**LOCAL**
NET CHANGE IN COSTS	$	$
NET CHANGE IN REVENUES	a $ See Text	$

Agency/Prepared by:	**Authorized Signature/Telephone No.**	**Date**
Wisconsin Department of Revenue		
Michael Oakleaf, 261-5173	**Rebecca Boldt, 261-6785**	December 18, 2009