NOTICE OF HEARING

Revenue

NOTICE IS HEREBY GIVEN That, pursuant to ss. 71.04(8), 71.25(10), 227.11 (2) (a), and 227.24, Stats., and 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., the Department of Revenue will hold a public hearing to consider emergency rules and the creation of permanent rules revising Chapter Tax 2, relating to apportionment and nexus.

The proposed rule order will:

- 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;
- 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
- make 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.

Hearing Information

The hearing will be held:

<u>Date and Time:</u>	<u>Location:</u>
February 25, 2010 at 1:00 p.m.	Events Room State Revenue Building 2135 Rimrock Road Madison, Wisconsin

Handicap access is available at the hearing location.

Copies of Proposed Rules

A copy of the full text of the proposed rule order and the full fiscal estimate may be obtained at no cost by contacting the department. See *Agency Contact Person* listed below.

Submission of Written Comments

Interested persons are invited to appear at the hearing and may make an oral presentation. It is requested that written comments reflecting the oral presentation be given to the department at the hearing. Written comments may also be submitted to the contact person shown under *Agency Contact Person* listed below no later than March 4, 2010, and will be given the same consideration as testimony presented at the hearings.

Agency Contact Person

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Analysis Prepared by the Department of Revenue:

Statute interpreted

Sections 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

Sections 71.04(8), 71.25(10), and 227.11 (2) (a), Stats.

Explanation of agency authority

Section 227.11 (2) (a), Stats., provides that each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

Related statute or rule

Sections Tax 2.60 to 2.67, Wisconsin Administrative Code

Plain language analysis

This rule 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.

Small Business Impact

This rule order does not have a significant economic impact on a substantial number of small businesses.

Fiscal Estimate

This rule order makes various changes to 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.

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.

DEPARTMENT OF REVENUE

Dated: _________________________ By: ______________________________

Roger M. Ervin
Secretary of Revenue

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