

**ORDER OF THE DEPARTMENT OF REVENUE
REPEALING AND RECREATING AND CREATING RULES**

The Wisconsin Department of Revenue adopts an order to: **repeal and recreate** Tax 2.49; and **create** Tax 2.495; **relating to** the apportionment of apportionable income of interstate financial organizations.

Analysis by the Department of Revenue

Statutes interpreted: ss. 71.04 (4) (e), (8) (c), and (11) and 71.25 (6) (e), (10) (c), and (12), Stats.

Statutory authority: s. 71.80 (1) (c), Stats.

Explanation of agency authority: Under s. 71.80 (1) (c), Stats., the department may make such regulations as it shall deem necessary in order to carry out chapter 71 of the Wisconsin Statutes, relating to income and franchise taxes. Additionally, section 33, 2003 Wisconsin Act 37, requires the department to promulgate a rule requiring financial organizations to use an apportionment formula consisting solely of a sales factor.

Related statute or rule: ss. 71.04 (4) (e), (8) (c), and (11) and 71.25 (6) (e), (10) (c), and (12), Stats.

Plain language analysis: SECTION 1. Tax 2.49 is repealed and recreated to prescribe the method of apportioning the apportionable income of interstate financial organizations, other than brokerage houses, investment companies, and insurance companies, as required by ss. 71.04 (4) (e) and (8) (c) and 71.25 (6) (e) and (10) (c), Stats. This section of the rule order does all of the following:

- a. Defines "financial institution" and other terms used in the rule.
- b. Extends the application of Tax 2.49 to mortgage bankers, as authorized by ss. 71.04 (11) and 71.25 (12), Stats. Sections 71.04 (8) (a) and 71.25 (10) (a), Stats., exclude mortgage bankers from the definition of "financial organization."
- c. Phases in the use of an apportionment formula consisting solely of a receipts factor:
 - For taxable years beginning after December 31, 2005, and before January 1, 2007, apportionable income is apportioned using an apportionment fraction composed of a receipts factor representing 60% of the fraction and a payroll factor representing 40% of the fraction.
 - For taxable years beginning after December 31, 2006, and before January 1, 2008, apportionable income is apportioned using an apportionment fraction composed of a receipts factor representing 80% of the fraction and a payroll factor representing 20% of the fraction.
 - For taxable years beginning after December 31, 2007, apportionable income is apportioned using an apportionment fraction consisting of the receipts factor.
- d. Expands the types of income included in the receipts factor. In the existing rule, "gross receipts" includes all business income associated with the lending of money in the normal course of business, such as interest, discounts, finance charges or fees, and service charges or fees. In this rule, receipts also include the following:
 - Net gain from the sale of loans and credit card receivables.

- Gross receipts from credit card receivables, credit card issuer's reimbursement fees, and merchant discount.
- Loan servicing fees.
- Gross receipts from travelers checks, cashiers checks, certified checks, and money orders.
- Gross receipts from automated teller machines, debit card transactions, and electronic funds transfer
- Gross receipts from maintaining accounts, safety deposit boxes, investment banking services, cash management services, international trade services, data processing, document imaging, and microfilming services, research services, trust services, investment banking services, and security brokerage services.
- Net gain from the sale of trading assets.
- Gross receipts from leasing real or tangible personal property.
- Gross royalties for the use of intangible property.
- Gross receipts from computer software.
- Gross receipts from other services.
- Gross receipts from services provided to regulated investment companies.
- Gross receipts from sales of tangible personal property.
- Gross receipts passed through from partnerships.

e. Changes the way that receipts are attributed to Wisconsin. The existing rule assigns gross receipts to Wisconsin if the transaction producing the income was principally negotiated in this state. This rule specifies which receipts are assigned to Wisconsin, based on the type of receipt. For example, interest and other fees from loans secured by real property and net gains from the sale of loans secured by real property are assigned to Wisconsin if the real property is located in Wisconsin. Interest and other fees charged to credit card holders and net gains from the sale of credit card receivables are assigned to Wisconsin if the billing address of the credit card holder is in Wisconsin.

SECTION 2. Tax 2.495 is created to prescribe the method of apportioning the apportionable income of interstate brokerage houses, investment companies, and underwriters, as required by ss. 71.04(4) (e) and (8) and 71.25 (6) (e) and (10), Stats. This section of the rule order does all of the following:

- a. Defines "brokerage house" and other terms used in the rule.
- b. Prescribes the method of apportioning the apportionable income of investment advisers, as authorized by ss. 71.04 (11) and 71.25 (12), Stats. Sections 71.04 (8) (a) and 71.25 (10) (a), Stats., exclude investment advisers from the definition of "financial organization."
- c. Phases in the use of an apportionment formula consisting solely of a receipts factor:
 - For taxable years beginning after December 31, 2005, and before January 1, 2007, apportionable income is apportioned using an apportionment fraction composed of a receipts factor representing 60% of the fraction, a payroll factor representing 20% of the fraction, and a property factor representing 20% of the fraction.
 - For taxable years beginning after December 31, 2006, and before January 1, 2008, apportionable income is apportioned using an apportionment fraction composed of a receipts factor representing 80% of the fraction, a payroll factor representing 10% of the fraction, and a property factor representing 10% of the fraction.
 - For taxable years beginning after December 31, 2007, apportionable income is apportioned using an apportionment fraction consisting of the receipts factor.

- d. Prescribes the types of income included in the receipts factor.
- e. Specifies which receipts are assigned to Wisconsin, based on the type of receipt.

Summary of, and comparison with, existing or proposed federal regulation: There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Comparison with rules in adjacent states: Iowa and Minnesota generally use a market-based approach for assigning gross receipts from the performance of services; that is, the gross receipts are assigned to the location of the customer. Illinois and Michigan generally assign gross receipts from the performance of services to the location where the services are performed. This rule proposes a market-based approach for assigning gross receipts from the performance of services. This market-based approach is similar to the method used to source sales made by manufacturers and retailers.

Summary of factual data and analytical methodologies: The department started with the Recommended Formula for Apportionment and Allocation of Net Income of Financial Institutions, which was adopted by the Multistate Tax Commission (MTC) on November 17, 1994. The MTC is an organization of state governments that works with taxpayers to develop and recommend uniform laws and regulations to promote equitable state tax treatment of multistate businesses. The MTC spent more than seven years working with state tax departments and multistate and multinational financial institutions from across the country in developing this apportionment formula. The laws, regulations, rules, and tax returns of the other states that impose a franchise or income tax on financial institutions and brokerage firms were then reviewed. Since state apportionment formulas are not uniform, neighboring states' apportionment formulas were the primary focus of this review. Revisions to the financial institution apportionment formula were then made, based on suggestions from Wisconsin's banking associations. The brokerage house apportionment formula was developed with input from a Wisconsin-based brokerage firm.

Analysis and supporting documents used to determine effect on small business: This rule order will only apply to financial institutions, brokers-dealers, investment advisers, investment companies, and underwriters that are required to use apportionment. Apportionment applies to financial institutions, brokers-dealers, investment advisers, investment companies, and underwriters that are large, multistate corporations. Therefore, this rule order does not have a significant effect on small business.

Anticipated costs incurred by private sector: This rule order does not have a significant fiscal effect on the private sector.

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

SECTION 1. Tax 2.49 is repealed and recreated to read:

Tax 2.49 Apportionment of apportionable income of interstate financial institutions. (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. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b) 1., Stats.

(2) DEFINITIONS. In this section:

(a) "Billing address" means the address indicated in the taxpayer's books and records on the first day of the taxable year, or on a later date in the taxable year when the customer relationship began, to which a taxpayer under this section regularly sends any notice, statement, or bill to the taxpayer's customer. The billing address of a customer who is a natural person means the address of that person's domicile.

(b) "Borrower located in this state" means either of the following:

1. A borrower that is engaged in a trade or business and uses the loan proceeds in trade or business activities in this state. If it cannot be determined where the funds are used, "borrower located in this state" means a borrower whose billing address is in this state.

2. A borrower whose billing address is in this state, but is not engaged in a trade or business.

(c) "Commercial domicile" means the location from which a trade or business is principally managed and directed. If the taxpayer is organized under the laws of a foreign country, the commonwealth of Puerto Rico, or any territory or possession of the United States, "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 the taxpayer's trade or business in the United States is principally managed and directed. It shall be rebuttably presumed that the location from which a trade or business is principally managed and directed is the state of the United States or the District of Columbia at which the greatest number of the taxpayer's employees work, have their office or base of operations, or are directed or controlled, as of the last day of the taxable year.

(d) "Credit card" includes a credit card, debit card, purchase card, charge card, and a travel or entertainment card.

(e) "Credit card issuer's reimbursement fee" means the fee that a taxpayer receives from a merchant's bank because a person to whom the taxpayer has issued a credit card has paid for merchandise or services sold by the merchant with the credit card.

(f) "Domicile" means a natural person's true, fixed, and permanent home where that person intends to remain permanently and indefinitely and to which, whenever absent, that person intends to return. A natural person may have only one domicile at any time.

(g) "Financial institution" means any financial organization whether incorporated or organized under federal law or under the laws of any state or foreign country that is one of the following:

1. A bank holding company as defined in s. 221.0901 (2) (c), Stats., including a federal bank holding company, an in-state bank holding company, an out-of-state bank holding company, and a foreign bank holding company.

2. A bank as defined under 12 USC 1841 (c), including a national bank organized and existing as a national bank association pursuant to the provisions of 12 USC ch. 2 and a state bank organized and operating under ch. 221, Stats.

3. A savings and loan holding company as defined under 12 USC 1467a (1) (D) or s. 215.01 (24m), Stats.

4. A savings bank holding company as defined in s. 214.01 (1) (tm), Stats.

5. A savings association or federal savings bank as defined in 12 USC 1813 (b), including a savings and loan association, building and loan association, or cooperative bank, and an association as defined in s. 215.01(1), Stats., and a savings bank as defined in s. 214.01 (1) (t), Stats.

6. A trust company operating as a fiduciary under ch. 223, Stats, or a corporation, limited liability company, association, partnership, business trust, or other legal entity authorized to act as a trustee, personal representative, executor, administrator, guardian, conservator, assignee, or agent or in any other fiduciary capacity for individuals and businesses in the administration of trust funds, estates, and custodial arrangements, in stock and bond transfer and registration, in fiduciary investment and estate planning, and other related services.

7. An industrial bank, industrial loan company, or similar organization as described in 12 USC 1841 (c) (2) (H).

8. A safe deposit company that maintains vaults for the deposit and safe-keeping of valuables and rents compartments or boxes to customers who have exclusive access to these compartments or boxes, subject to the oversight and under the rules and regulations of the company.

9. A private banker including an unincorporated entity operated as a partnership that specializes in investing and managing the money of private clients.

10. Any corporation engaged in international or foreign banking that is organized under the provisions of 12 USC 611 to 633.

11. Any agency or branch of a foreign depository as defined in 12 USC 3101.

12. Any credit union to the extent not exempt under s. 71.26 (1) (a), Stats., and s. 186.113 (20), Stats.

13. A production credit association organized under 12 USC 2071 or a land bank created under the Federal Farm Loan Act.

14. A consumer finance company, small loan company, or a sales finance company licensed under ch. 218, Stats.

15. A mortgage banker as defined in s. 224.71 (3), Stats.

(h) "Guarantor of a loan located in this state" means a person whose billing address is in this state.

(i) "Investment banking services" include assisting business customers in obtaining new financing by underwriting and selling new securities issued by the customer to the public.

(j) "Loan" means 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 s. 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; interests in a real estate mortgage investment conduit, or other mortgage-backed or asset-backed security; and other similar items.

(k) "Loan secured by real property" means that any of the collateral used to secure a loan or other obligation at the time the original loan or obligation was incurred or during the current taxable year

is real property. A loan secured by real property includes an installment sales contract for real property. An "agricultural lien" as defined in s. 409.102 (1) (b), Stats., or a "fixture filing" as defined in s. 409.102 (1) (js), Stats., does not by itself constitute a loan secured by real property.

(L) "Loan secured by tangible personal property" means that any of the collateral used to secure a loan or other obligation, other than a loan secured by real property, at the time the original loan or obligation was incurred or during the current taxable year is tangible personal property. A loan secured by tangible personal property includes an installment sales contract for tangible personal property.

(m) "Loan servicing fees" include fees or charges for originating and processing loan applications, such as prepaid interest and loan discounts, and for collecting, tracking, and accounting for loan payments received. "Loan servicing fees" also include gross receipts from the sale of loan servicing rights.

(n) "Merchant discount" means the fee or negotiated discount that is charged to a merchant for accepting a credit card as payment for merchandise or services that are sold to the credit card holder.

(o) "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.

Note: In a loan participation, the credit originator initially makes the loan and subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(p) "Person" means a natural person, estate, trust, partnership, limited liability company, corporation, or any other business entity.

(q) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is regularly maintained, occupied, or used by employees of the taxpayer.

(r) "State" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico, or any territory or possession of the United States.

(s) "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.

(t) "Taxpayer" means a financial organization that is subject to apportionment under this section.

(3) APPORTIONMENT FORMULA COMPUTATION. For taxable years beginning after December 31, 2005, a financial institution that does 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) 1., Stats. The financial institution shall apportion its remaining net income to this state as follows:

(a) For taxable years beginning after December 31, 2005, and before January 1, 2007, apportionable income shall be apportioned using an apportionment fraction composed of a receipts factor under sub. (4) representing 60% of the fraction and a payroll factor under sub. (5) representing 40% of the fraction.

(b) For taxable years beginning after December 31, 2006, and before January 1, 2008, apportionable income shall be apportioned using an apportionment fraction composed of a receipts factor under sub. (4) representing 80% of the fraction and a payroll factor under sub. (5) representing 20% of the fraction.

(c) 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).

(d) For taxable years beginning before January 1, 2008, in any case in which the financial institution has no employees nor pays management or service fees to a related entity, or in which the department determines that employees are not a substantial income producing factor, the department may order or permit the elimination of the payroll factor.

(4) RECEIPTS FACTOR. 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:

(a) *Gross receipts from the lease of real property.* The numerator of the receipts factor includes gross receipts from the lease, rental, or licensing 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.

(b) *Gross receipts from the lease of tangible personal property.* 1. Except as described in subd. 2., the numerator of the receipts factor includes gross receipts from the lease, rental, or licensing 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 receipts 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 impose an income tax or franchise tax measured by net income on the taxpayer in the taxable year.

2. Gross receipts from the lease, rental, or licensing of moving property, including motor vehicles, rolling stock, aircraft, vessels, or mobile equipment, owned by the taxpayer and the sublease of moving property are included in the numerator of the receipts factor to the extent that the property is used in this state. The proportion of use of moving property in this state is determined as follows:

a. The proportion of use of a motor vehicle or rolling stock in this state is determined by multiplying the gross receipts from the lease, rental, licensing, or sublease of the motor vehicle or rolling stock by a fraction having as a numerator the number of miles traveled within this state by the motor vehicle or rolling stock while leased, rented, licensed, or subleased in the taxable year and having as a denominator the total number of miles traveled by the motor vehicle or rolling stock while leased, rented, licensed, or subleased in the taxable year.

b. The proportion of use of an aircraft in this state is determined by multiplying the gross receipts from the lease, rental, licensing, or sublease of the aircraft by a fraction having as a numerator the number of takeoffs and landings of the aircraft in this state while leased, rented, licensed, or subleased,

in the taxable year and having as a denominator the total number of takeoffs and landings of the aircraft while leased, rented, licensed, or subleased in the taxable year.

c. The proportion of use of a vessel or mobile equipment in this state is determined by multiplying the gross receipts from the lease, rental, licensing, or sublease of the vessel or mobile equipment by a fraction having as a numerator the number of days that the vessel or mobile equipment 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 vessel or mobile equipment is leased, rented, licensed, or subleased in the taxable year.

d. If the taxpayer is unable to determine the use of moving property under subdivision paragraphs 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, renter, licensee, or sublessee takes possession of the property.

(c) *Gross interest and other fees from loans secured by real property.* 1. The numerator of the receipts factor includes gross interest, fees, points, charges, and penalties from loans secured by real property if the real property securing the loan is located in this state. If the real property securing the loan is located in both this state and one or more other states or foreign countries, the gross interest, fees, points, charges, and penalties shall be divided among those states or foreign countries having jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer in proportion to the fair market value of the real property securing the loan located in each state or foreign country.

2. The determination of whether the real property securing a loan is located in this state shall be made at the time the original agreement was made and for each subsequent taxable year.

(d) *Gross interest and other fees from loans secured by tangible personal property.* 1. The numerator of the receipts factor includes gross interest, fees, points, charges, and penalties from loans secured by tangible personal property if the tangible personal property securing the loan is located in this state as described in par. (b). If the tangible personal property securing the loan is located in both this state and one or more other states or foreign countries, the gross interest, fees, points, charges, and penalties shall be divided among those states or foreign countries having jurisdiction to impose an

income tax or franchise tax measured by net income on the taxpayer in proportion to the fair market value of the tangible personal property securing the loan located in each state or foreign country.

2. The determination of whether the tangible personal property securing a loan is located in this state shall be made at the time the original agreement was made and for each subsequent taxable year.

(e) *Gross interest and other fees from loans not secured by real or tangible personal property.*

The numerator of the receipts factor includes interest, fees, points, charges, and penalties from loans that are not secured by real or tangible personal property if the loan borrower is located in this state.

(f) *Net gains from the sale of loans.* The numerator of the receipts factor includes net gains from the sale of loans, determined as follows:

1. The amount of net gains, but not less than zero, from the sale of loans secured by real property located in this state. If the real property securing the loan is located in both this state and one or more other states or foreign countries, the net gain shall be divided among those states or foreign countries having jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer in proportion to the fair market value of the real property securing the loan located in each state or foreign country.

2. The amount of net gains, but not less than zero, from the sale of loans secured by tangible personal property located in this state as described in par. (b). If the tangible personal property securing the loan is located in both this state and one or more other states or foreign countries, the net gain shall be divided among those states or foreign countries having jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer in proportion to the fair market value of the tangible personal property securing the loan located in each state or foreign country.

3. The amount of net gains, but not less than zero, from the sale of loans not secured by real or tangible personal property if the loan borrower is located in this state.

(g) *Gross receipts from credit card receivables.* The numerator of the receipts factor includes gross interest, fees, points, charges, and penalties from credit card receivables and gross receipts from annual fees and other fees charged to credit card holders if the billing address of the credit card holder is in this state.

(h) *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 if the billing address of the credit card holder is in this state.

(i) *Credit card issuer's reimbursement fees.* The numerator of the receipts factor includes the taxpayer's credit card issuer's reimbursement fees if the billing address of the credit card holder is in this state.

(j) *Gross receipts from merchant discount.* The numerator of the receipts factor includes gross receipts from merchant discount if the merchant's trade or business is located in this state. If the merchant's trade or business is located in and outside this state, the numerator includes only receipts from merchant discounts on sales made in this state. If the location of a sale cannot be determined, the numerator includes the merchant discount on the sale if the merchant's commercial domicile is in this state. The receipts shall be computed net of any credit card holder charge backs but may not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its credit card holders.

(k) *Loan servicing fees.* 1. The numerator of the receipts factor includes loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, and secured by real property located in this state. If the real property securing the loan is located in both this state and one or more other states or foreign countries, the loan servicing fees shall be divided among those states or foreign countries having jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer in proportion to the fair market value of the real property securing the loan located in each state or foreign country. If the location of the real property securing the loan cannot be determined, the numerator includes the loan servicing fees if the loan borrower or guarantor of the loan is located in this state.

2. The numerator of the receipts factor includes loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, and secured by tangible personal property located in this state as described in par. (b). If the tangible personal property securing the loan is located in both this state and one or more other states or foreign countries, the loan servicing fees shall be divided among those states or foreign countries having jurisdiction to impose an income tax or

franchise tax measured by net income on the taxpayer in proportion to the fair market value of the tangible personal property securing the loan located in each state or foreign country. If the location of the tangible personal property securing the loan cannot be determined, the numerator includes the loan servicing fees if the loan borrower or guarantor of the loan is located in this state.

3. The numerator of the receipts factor includes loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, and not secured by real or tangible personal property if the loan borrower or guarantor of the loan is located in this state.

(L) *Gross receipts from travelers checks, cashiers checks, certified checks, and money orders.* The numerator of the receipts factor includes gross fees or other charges for the issuance of travelers checks, cashiers checks, certified checks, and money orders if the checks or money orders are purchased in this state.

(m) *Gross receipts from automated teller machines.* The numerator of the receipts factor includes gross receipts from the usage of automated teller machines located in this state.

(n) *Gross receipts from safety deposit boxes.* The numerator of the receipts factor includes gross receipts from the rental of safety deposit boxes if the boxes are located in this state.

(o) *Gross receipts from maintaining accounts.* The numerator of the receipts factor includes gross receipts from the maintenance of accounts, including but not limited to service charges for maintaining accounts, overdraft charges, charges for copies of statements and checks, and fees for account reconciliation, if either of the following applies:

1. The service is provided to an account holder that is not engaged in a trade or business, and the account holder's billing address is in this state.

2. The service is provided to an account holder that is engaged in a trade or business, the account holder maintains a regular place of business in this state, and the service received relates to the business in this state. If the account holder receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the account holder, in the regular course of the account holder's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the account holder's billing address is in this state.

(p) *Gross receipts from electronic funds transfer.* The numerator of the receipts factor includes electronic funds transfer fees if either of the following applies:

1. The service is provided to a customer that is not engaged in a trade or business, and the customer's billing address is in this state.

2. The service is provided to a customer that is engaged in a trade or business, the customer maintains a regular place of business in this state, and the service received relates to the business in this state. If the customer receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the customer, in the regular course of the customer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the customer's billing address is in this state.

(q) *Gross receipts from cash management services.* The numerator of the receipts factor includes the gross amount of any fees or charges generated from cash management services, including but not limited to lockbox services, depository transfer checks, and payables management, if the service is provided to a customer that is engaged in a trade or business, the customer maintains a regular place of business in this state, and the service received relates to the business in this state. If the customer receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the customer, in the regular course of the customer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the customer's billing address is in this state.

(r) *Gross receipts from international trade services.* The numerator of the receipts factor includes the gross receipts from international trade services, including but not limited to letters of credit and bankers acceptance notes, if the service is provided to a customer that is engaged in a trade or business, the customer maintains a regular place of business in this state, and the service received relates to the business in this state. If the customer receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the customer, in the regular course of the customer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the customer's billing address is in this state.

(s) *Gross receipts from data processing services, document imaging services, and microfilming services.* The numerator of the receipts factor includes the gross receipts from data processing services, document imaging services, and microfilming services if the service is provided to a customer that is engaged in a trade or business, the customer maintains a regular place of business in this state, and the service received relates to the business in this state. If the customer receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the customer, in the regular course of the customer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the customer's billing address is in this state.

(t) *Gross receipts from research services.* The numerator of the receipts factor includes gross receipts from research services if either of the following applies:

1. The service is provided to a customer that is not engaged in a trade or business, and the customer's billing address is in this state.
2. The service is provided to a customer that is engaged in a trade or business, the customer maintains a regular place of business in this state, and the service received relates to the business in this state. If the customer receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the customer, in the regular course of the customer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the customer's billing address is in this state.

(u) *Gross receipts from trust services.* The numerator of the receipts factor includes gross receipts from trust services if either of the following applies:

1. The service is provided to a customer that is not engaged in a trade or business, and the customer's billing address is in this state.
2. The service is provided to a customer that is engaged in a trade or business, the customer maintains a regular place of business in this state, and the service received relates to the business in this state. If the customer receives the service in more than one state or the state in which the service is received cannot be determined, the service is received in this state if the customer, in the regular course

of the customer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the services are received in this state if the customer's billing address is in this state.

(v) *Gross receipts from investment banking services.* The numerator of the receipts factor includes gross receipts, including commissions, management fees, or underwriting fees, earned from investment banking services if either of the following applies:

1. The issuer of the securities is not engaged in a trade or business, and the issuer's billing address is in this state.

2. The issuer of the securities is engaged in a trade or business, the issuer of the securities maintains a regular place of business in this state, and the securities relate to that person's business in this state. If the securities relate to that person's regular place of business in more than one state, the receipts from the performance of the service are included in the numerator of the receipts factor according to the portion of the service received in this state. If the regular place of business to which the securities relate cannot be determined, the service is received in this state if the issuer of the securities, in the regular course of the issuer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the service is received in this state if the issuer's billing address is in this state.

(w) *Gross receipts from security brokerage services.* 1. The numerator of the receipts factor includes fees, commissions, margin interest, and other gross receipts from security brokerage services if the customer's billing address is in this state.

2. The numerator of the receipts factor includes net gains, net of commissions, but not less than zero, from sales of trading assets if the customer's billing address is in this state. "Trading assets" include securities, commodities, and related financial instruments that a taxpayer acquires and holds for sale in its inventory account. The receipts factor does not include gross receipts or net gains from sales or other dispositions of investment assets.

(x) *Gross receipts from other services.* The numerator of the receipts factor includes gross receipts from services that are not described in pars. (a) to (w) if the purchaser of the service received the benefit of the service in this state under any of the following circumstances:

1. The benefit of a service is received in this state if any of the following applies:

a. The service relates to real property that is located in this state.

b. The service relates to tangible personal property that is located in this state at the time that the service is received or tangible personal property that is delivered directly or indirectly to customers in this state.

c. The service is provided to an individual who is physically present in this state at the time that the service is received.

d. The service is provided to a person engaged in a trade or business in this state and relates to that person's business in this state.

2. If the purchaser of a service receives the benefit of a service in more than one state, the gross receipts from the performance of the service are included in the numerator of the receipts factor according to the portion of the service received in this state.

(y) *Gross receipts from computer software.* 1. The numerator of the receipts factor includes gross receipts from the use of computer software if the purchaser or licensee uses the computer software at a location in this state.

2. Computer software is used at a location in this state if the purchaser or licensee uses the computer software in the regular course of business operations in this state, for personal use in this state, or if the purchaser or licensee is an individual whose domicile is in this state. If the purchaser or licensee uses the computer software in more than one state, the gross receipts shall be divided among those states having jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer in proportion to the use of the computer software in those states. To determine computer software use in this state, the department may consider the number of users in each state where the computer software is used, the number of site licenses or workstations in this state, and any other factors that reflect the use of computer software in this state.

(z) *Gross royalties and other gross receipts from intangibles.* 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.

2. Intangible property is used at a location in this state if the user, purchaser, or licensee uses the property in the operation of a trade or business at a location in this state, for personal use in this state, or if the user, purchaser, or licensee is an individual whose domicile is in this state. If the user, purchaser, or licensee uses the intangible property in more than one state, the gross royalties and other gross receipts from the sale or use of the intangible property shall be divided among those states having jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer in proportion to the use of the intangible property in those states. To determine intangible property use in this state, the department may consider the number of licensed sites in each state, the volume of property manufactured, produced, or sold at locations in this state, or any other factors that reflect the use of the intangible property in this state.

(ze) Gross receipts from services provided to regulated investment companies. 1. Except as provided in subd. 2, the numerator of the receipts factor includes gross receipts and net gain described under pars. (a) to (z) from services provided to or on behalf of a regulated investment company, as defined in s. 851 of the Internal Revenue Code. The regulated investment company is considered the purchaser or consumer of the services.

2. At the taxpayer's option, the portion of the gross receipts received from a regulated investment company from the sale of administration, distribution, or management services shall be included in the numerator of the receipts factor as described in subd. 3. A taxpayer that makes this election shall use this method to determine the receipts included in the numerator of the receipts factor from each regulated investment company for or on behalf of which it performs services and shall compute the receipts from each regulated investment company separately. For purposes of this subdivision:

a. "Administration services" include clerical, accounting, participant record keeping, transfer agency, bookkeeping, data processing, custodial, internal auditing, legal, and tax services provided for a regulated investment company but only if the provider of the services also provides, or is affiliated with a person that provides, distribution or management services to the regulated investment company.

b. "Distribution services" include advertising, servicing investor accounts, marketing, or selling shares of the regulated investment company. In the case of advertising, servicing, or marketing shares, the services shall be performed by a person that is or, in the case of a closed end company, was either engaged in the service of selling the shares or affiliated with a person that is engaged in the service of selling the shares. In the case of an open end company, the service of selling shares shall be performed pursuant to a contract entered into under 15 USC 80a-15(b).

c. "Management services" include rendering investment advice directly or indirectly to a regulated investment company, determining when sales and purchases of securities are to be made on behalf of the regulated investment company, selling or purchasing securities constituting assets of a regulated investment company, and related activities, but only if the activities are performed pursuant to a contract with the regulated investment company entered into under 15 USC 80a-15(a), for a person that has entered into the contract with the regulated investment company or for a person that is affiliated with a person that has entered into the contract with a regulated investment company.

d. A person is affiliated with another person if each person is a member of the same affiliated group, as defined under s. 1504 of the Internal Revenue Code without regard to sub. (b) of s. 1504.

e. Receipts received from a regulated investment company include amounts received directly or indirectly from the regulated investment company and amounts received from shareholders in the regulated investment company.

3. The numerator of the receipts factor includes the sum of receipts determined by multiplying the gross receipts from the sale of administration, distribution, and management services provided to or on behalf of each separate regulated investment company by a fraction, computed as follows:

a. The numerator of the fraction is the sum of the monthly percentages determined for each month of the regulated investment company's taxable year for federal income tax purposes, which taxable year ends within or at the same time as the taxpayer's taxable year, but excluding any month during which the regulated investment company had no outstanding shares. The monthly percentage for each month is determined by dividing the number of shares in the regulated investment company that are owned on the last day of the month by shareholders whose domicile or commercial domicile is in this state by the total number of shares in the regulated investment company outstanding on that date.

b. The denominator of the fraction is the number of monthly percentages.

(zm) *Other sales.* The numerator of the receipts factor includes all other receipts as described in s. Tax 2.39 (6) (b) and (7).

(zs) *Receipts not taxed.* 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.

(5) PAYROLL FACTOR. The payroll factor is the ratio of the total compensation paid to employees located in this state to the total compensation paid to employees located everywhere, determined in accordance with the provisions of ss. 71.04 (6) and 71.25 (8), Stats., and s. Tax 2.39 (5). "Compensation paid to employees" includes deductible management or service fees paid to a related entity directly or indirectly for the performance of personal services, and the situs of the fees is in this state if the services are performed in this state. The recipient of the fees may not include the compensation paid to its employees with respect to the personal services in either the numerator or denominator of its payroll factor.

Note: The provisions of s. Tax 2.49 first apply for taxable years beginning on January 1, 2006.

SECTION 2. Tax 2.495 is created to read:

Tax 2.495 Apportionment of apportionable income of interstate brokers-dealers, investment advisers, investment companies, and underwriters. (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. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b) 1., Stats.

(2) DEFINITIONS. In this section:

(a) "Billing address" means the address indicated in the taxpayer's books and records on the first day of the taxable year, or on a later date in the taxable year when the customer relationship began, to which a taxpayer regularly sends any notice, statement or bill to the taxpayer's customer. The billing address of a customer who is a natural person means the address of that person's domicile.

(b) "Brokerage commission" includes, but is not limited to, all sales fees on agency or principal transactions whether charged explicitly or implicitly.

(c) "Brokerage house" means a firm or place where a broker-dealer conducts business.

(d) "Broker-dealer" means a person engaged in the business of effecting transactions in securities, commodities, and related financial instruments for the account of another or for the person's own account. "Broker-dealer" does not include a sales agent; an issuer with respect to purchasing and selling the issuer's own securities; a bank, savings institution, or trust company, when effecting transactions for its own account or as an agent; a person in that person's capacity as a personal representative, executor, administrator, holder of power of attorney, guardian, trustee of a testamentary or inter vivos trust, conservator, or pledgee; or any other person excluded from the definition of "broker-dealer" in s. 551.02 (3), Stats.

(e) "Commercial domicile" means the location from which a trade or business is principally managed and directed. If the taxpayer is organized under the laws of a foreign country, the commonwealth of Puerto Rico, or any territory or possession of the United States, "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 the taxpayer's trade or business in the United States is principally managed and directed. It shall be rebuttably presumed that the location from which a trade or business is principally managed and directed is the state of the United States or the District of Columbia at which the greatest number of the taxpayer's employees work, have their office or base of operations, or are directed or controlled, as of the last day of the taxable year.

(f) "Investment adviser" has the meaning given in 15 USC 80b-2 (a) (11).

(g) "Investment company" has the meaning given in 15 USC 80a-3.

(h) "Person" means a natural person, estate, trust, partnership, limited liability company, corporation, or any other business entity.

(i) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is regularly maintained, occupied, or used by employees of the taxpayer.

(j) "Sales agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect transactions in securities. A sales agent includes a partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions.

(k) "State" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico, or any territory or possession of the United States.

(L) "Taxpayer" means a broker-dealer, investment adviser, investment company, or underwriter who is subject to apportionment under this section.

(m) "Trading assets" include securities, commodities, and related financial instruments that a taxpayer acquires and holds for sale in its inventory account.

(n) "Underwriter" includes all persons described under 15 USC 77b (a) (11).

(3) APPORTIONMENT FORMULA COMPUTATION. For taxable years beginning after December 31, 2005, a broker-dealer, investment adviser, investment company, or underwriter that does 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) 1., Stats. The broker-dealer, investment adviser, investment company, or underwriter shall apportion its remaining net income to this state as follows:

(a) For taxable years beginning after December 31, 2005, and before January 1, 2007, apportionable income shall be apportioned using an apportionment fraction composed of a receipts factor under sub. (4) representing 60% of the fraction, a payroll factor under sub. (5) representing 20% of the fraction, and a property factor under sub. (6) representing 20% of the fraction.

(b) For taxable years beginning after December 31, 2006, and before January 1, 2008, apportionable income shall be apportioned using an apportionment fraction composed of a receipts factor under sub. (4) representing 80% of the fraction, a payroll factor under sub. (5) representing 10% of the fraction, and a property factor under sub. (6) representing 10% of the fraction.

(c) 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).

(d) In any case in which the taxpayer has no employees nor pays management or service fees to a related entity, or in which the department determines that employees are not a substantial income producing factor, the department may order or permit the elimination of the payroll factor. In any case in which the taxpayer has no property, or in which the department determines that property is not a substantial income producing factor, the department may order or permit the elimination of the property factor. This subsection does not apply to taxable years beginning after December 31, 2007.

(4) RECEIPTS FACTOR. 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:

(a) *Gross brokerage commissions.* The numerator of the receipts factor includes gross brokerage commissions earned if the billing address of the customer is in this state.

(b) *Gross margin interest.* The numerator of the receipts factor includes total margin interest earned on behalf of brokerage accounts owned by customers if the billing address of the customer is in this state.

(c) *Gross account maintenance fees.* The numerator of the receipts factor includes account maintenance fees received on behalf of brokerage accounts owned by customers if the billing address of the customer is in this state.

(d) *Gross receipts from trading assets.* 1. Except as provided in subd. 2, the numerator of the receipts factor includes gross receipts, net of commissions, from sales of trading assets, if the day-to-day decisions regarding the trading assets occur at a location in this state. If the day-to-day decisions regarding the trading assets occur at locations both in and outside this state, the assets shall be considered to be located at the location where the trading policies and guidelines are established. It shall be rebuttably presumed that the location where the trading policies and guidelines are established is at the taxpayer's commercial domicile.

2. If the inclusion of gross receipts results in substantial distortion of the receipts factor, the department may order or permit the substitution of net gain, net of commissions, from sales of trading assets.

(e) *Investment company receipts.* The numerator of the receipts factor includes gross payments received on investment contracts issued by the taxpayer and held by customers if the billing address of the customer is in this state. "Investment contract" includes any bonds, shares, coupons, certificates of membership, or other obligations or agreements issued by the taxpayer to return to the holders or owners money or anything of value at some future date.

(f) *Gross receipts from underwriting services.* The numerator of the receipts factor includes gross receipts, including gross commissions, gross management fees, or gross underwriting fees, earned in performing underwriting activities on behalf of the issuer of the securities if either of the following applies:

1. The issuer of the securities is not engaged in a trade or business, and the issuer's billing address is in this state.

2. The issuer of the securities is engaged in a trade or business, the issuer of the securities maintains a regular place of business in this state, and the securities relate to that person's business in this state. If the securities relate to that person's regular place of business in more than one state, the receipts from the performance of the service are included in the numerator of the receipts factor according to the portion of the service received in this state. If the regular place of business to which the securities relate cannot be determined, the service is received in this state if the issuer of the securities, in the regular course of the issuer's business, ordered the service from an office in this state. If the ordering office cannot be determined, the service is received in this state if the issuer's billing address is in this state.

(g) *Other gross receipts or net gains.* The numerator of the receipts factor includes any other gross receipts or net gains as provided in s. Tax 2.49 (4).

(h) *Receipts not taxed.* 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.

(5) PAYROLL FACTOR. The payroll factor is the ratio of the total compensation paid to employees located in this state to the total compensation paid to employees located everywhere, determined in accordance with the provisions of ss. 71.04 (6) and 71.25 (8), Stats., and s. Tax 2.39 (5). "Compensation paid to employees" includes deductible management or service fees paid to a related entity directly or indirectly for the performance of personal services, and the situs of the fees is in this state if the services are performed in this state. The recipient of the fees may not include the compensation paid to its employees with respect to the personal services in either the numerator or denominator of its payroll factor.

(6) PROPERTY FACTOR. The property factor is determined in accordance with the provisions of ss. 71.04 (5) and 71.25 (7), Stats., and s. Tax 2.39 (4).

Note: The provisions of s. Tax 2.495 first apply for taxable years beginning on January 1, 2006.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Final Regulatory Flexibility Analysis

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

DEPARTMENT OF REVENUE

Dated: _____ By: _____

Michael L. Morgan
Secretary of Revenue

E:\Rules\249 2495 Final Order