

## DEPARTMENT OF REVENUE

### Taxation Division

## INCOME TAX

### 1 CCR 201-2

*[Editor's Notes follow the text of the rules at the end of this CCR Document.]*

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#### **Rule 39-22-103(1). Assessment.**

The filing of a return by a taxpayer is an assessment for the amount of the tax due thereon together with the penalty and interest shown to be due thereon. The mailing of a notice with a demand for payment of any tax, penalty and interest imposed under the Act or for payment of any deficiency is an assessment. A deficiency arises from the failure of a taxpayer to pay the full amount of the tax due or to make a proper return or because an additional tax is found to be due. A notice to a taxpayer that the executive director believes a deficiency exists is not an assessment. (See 39-21-103, C.R.S. 1973) Any assessment under this Act is a debt due from the taxpayer to the state of Colorado for the amount shown (a) in the return as of the due date of that return or, (b) in a notice of final determination accompanied by a demand for payment which is not paid or against which an appeal is not filed within 30 days after date of mailing. Any notice and demand under the Act mailed to the last known address of the taxpayer shall be prima facie evidence of service of such notice and demand.

#### **Rule 39-22-103(8)(a). Resident Individual.**

(1) **General Rule.** A natural person is a resident individual of Colorado if either.

- (a) The person is domiciled in Colorado, or
- (b) The person satisfies the six-month rule (statutory residency rule).

(2) **Domicile.**

(a) *General Rules Regarding Domicile.*

- (i) A person's domicile is in Colorado if the person's place of abode is in Colorado and that person, whenever absent, has the present intention of returning after a departure or absence, regardless of the duration of the absence. A place of abode is not limited to a specific structure, but rather refers to a place or area to which the person expects to return.
- (ii) An intention to initially establish domicile without being physically present in the intended domicile is insufficient to establish a domicile in such place.
- (iii) A person can have only one domicile at any given instant, even if such person has homes in more than one state. See, paragraph (2)(d) regarding having more than one domicile during the same tax year.
- (iv) A person who is domiciled in a state remains a domiciliary of that state even if the person temporarily resides outside that state.

- (v) Once a person's domicile is established in a state, it will continue to be the person's domicile until the person establishes domicile in another state.
- (vi) A determination of residency or domicile by a Colorado state or local government agency for non-tax purposes is not a determination of domicile for purposes of Colorado income tax.
- (b) *Intent to Establish Domicile.* The intent to establish a domicile is essential in the determination of a person's domicile.
  - (i) Because a person's subjective intent is difficult to determine, a person's intention is determined only by objective, verifiable evidence. The indicia of domicile and presumptions set forth in paragraphs (2)(c) and (4), below, will determine a person's domicile, unless there is sufficient objective evidence to overcome the presumptions.
  - (ii) A person's reason for changing domicile, including to take advantage of tax benefits of a place of abode, is irrelevant so long as the person has an absolute and fixed intention to abandon one domicile and acquire another. For example, a person can lawfully establish domicile in Nevada solely for the purpose of living in a state with no income tax, but whether that person truthfully has a present intention to establish domicile in Nevada and abandon their domicile in Colorado is a matter of proof.
- (c) *Indicia of Domicile.* The Department will consider a number of factors to determine a person's domicile. These factors include, but are not limited to:
  - (i) Place of domicile in prior years;
  - (ii) Length of time in a purported domicile. Although domicile can be established on the first day that a person is physically present in a state, the greater the length of time a person is present in a place tends to indicate that that place is the person's domicile;
  - (iii) Location of, and length of time residing in, a place of abode by a spouse or dependent children;
  - (iv) Jurisdiction that issued person's current driver's license;
  - (v) Jurisdiction where motor vehicle is registered;
  - (vi) Jurisdiction where person is registered to vote;
  - (vii) Employment status, including whether employment or employment duties in the state are permanent or temporary and the location where the person performs most of their employment duties.
  - (viii) In the case of a sole proprietorship or other entity under the control of the person, the location of business assets owned by the person or by an entity controlled by the person;
  - (ix) Receipt of government benefits, such as unemployment benefits, welfare, and other government benefits;
  - (x) Location of living accommodations;

- (xi) Jurisdiction that issued a professional license;
- (xii) Jurisdiction where person filed a resident or nonresident individual state income tax return;
- (xiii) Statements of residency made publicly, to third parties, and in documents, including applications for insurance, federal income tax forms, or social media comments, particularly if such statements are contrary to the person's interests;
- (xiv) Primary mailing address for financial documents and other important correspondence;
- (xv) Business and social ties to the community, including child's school, location of family, business memberships, religious institution membership and social memberships;
- (xvi) Location of primary care physician and dentist;
- (xvii) Location of real property owned or controlled by the person and the attributes of such property, such as size, value, and purposes for which it is used;
- (xviii) Location of personal property and its attributes, such as monetary and sentimental value and whether it was located in prior place of domicile.

No one factor is determinative and not all factors may be relevant or equally weighted. For example, a person may register a vehicle where their vacation home is located and where the vehicle is primarily used, but that registration does not, by itself, create domicile. The amount of time spent in one place also does not always explain the difference between temporary home and domicile. A person may live in a temporary home or residence for months or years on a temporary work assignment or to attend school and maintain domicile in another state. The person's intent as shown by objective facts is the primary factor used to determine domicile.

(d) *Periodic and Seasonal Changes in Domicile.*

- (i) In limited cases, a person may periodically or seasonally abandon their domicile in one state and establish domicile in another. For example, a person who has a house in Colorado and Arizona and who seasonally moves from one home to another, may be a domiciliary of Colorado and Arizona for different parts of a tax year if the person treats both homes as their primary place of abode for the season.
- (ii) A person who lives in a motorized home and does not own or lease residential real property that they treat as their home in another state will be treated as a (full-year) domiciliary of Colorado if they have permanent ties to the state and spend, in the aggregate, more time in this state than in any other. However, a person who owns a home in another state but travels seasonally or periodically to Colorado will not, in the absence of other factors, be treated as a domiciliary of Colorado.

- (e) *Status as a Student.* A student who moves to another state to attend college but who does not intend to remain in that state after graduation has not changed domicile. Moreover, a student who is being supported by a parent or parents does not establish a domicile separate from the parent(s) simply by attending school in another state regardless of whether the student takes such steps as acquiring a driver's license or registering to vote in the state in which he or she attends school.
- (f) *Resident Aliens.* A person who is not a citizen of the United States but is a permanent resident alien may establish a domicile in Colorado. A person on a temporary visa is not a domiciliary. However, he or she may be a resident under the six-month rule.

**(3) Six-Month Rule or Statutory Resident Rule.**

- (a) A person satisfies the six-month rule if:
  - (i) The person maintains a permanent place of abode in Colorado, and
  - (ii) Spends, in the aggregate, more than six months of the taxable year in Colorado.
- (b) This six month rule does not apply to:
  - (i) A member of the armed forces who is stationed in Colorado pursuant to an order of the armed forces (see, Servicemembers Civil Relief Act of 2003 (50 USC App. § 501-597b));
  - (ii) A Colorado domiciliary who abandons their Colorado domicile during the tax year and does not maintain a permanent place of abode in Colorado after abandoning their domicile;
  - (iii) A person who is domiciled outside Colorado and establishes their domicile in Colorado during the tax year, unless that person has a place of abode in Colorado while maintaining a domicile outside Colorado;
  - (iv) A student whose domicile is not Colorado and attends college in Colorado but does not have a permanent place of abode in Colorado.
- (c) A "permanent place of abode" means any place in which a person has a possessory right to live.
  - (i) The person need not own the permanent place of abode. For example, a lease of an apartment can constitute a permanent abode.
  - (ii) A recreational vehicle with sleeping and cooking accommodations can constitute a permanent place of abode.
  - (iii) A person need not be liable for the lease or mortgage obligation for the permanent place of abode. For example, a person, whose domicile is in another state and whose employer leases an apartment in Colorado for the person to reside while on a temporary assignment in Colorado, has a permanent place of abode in Colorado.
- (d) The six month rule applies even if the person is a domiciliary of another state. For example, a person who is not domiciled in Colorado is a resident individual of Colorado for Colorado income tax purposes if the person maintains a permanent place of abode in Colorado and lives during the tax year, in aggregate, more than six months in Colorado.

- (4) **Burden of Proof and Presumptions.** The burden of production and persuasion (collectively referred to in this rule as the burden of proof) is on the person asserting a change of domicile or rebutting a presumption. Whether the burden of proof has been met will be determined based only on objective evidence and cannot ordinarily be established by subjective evidence (e.g., self-serving statements of intent unless such statements are against one's interest).
- (a) The place where one currently lives is presumed to be the person's current domicile.
  - (b) Once a domicile is established, it is presumed to continue in such place.
  - (c) Spouses are presumed to have the same domicile or permanent place of abode. This presumption does not apply after spouses are separated, even though no judgment or decree of separation or divorce has been rendered.
  - (d) A person in the armed forces does not, as a matter of law, abandon his or her domicile solely by reason of being absent from their state of domicile pursuant to orders of the armed services. However, such a person is not precluded from changing their domicile.
  - (e) A minor child and a dependent are presumed to have the same domicile or permanent place of abode as the custodial parent or custodial guardian. A minor child cannot, by their acts or intentions, change domicile.
  - (f) A person who is domiciled in Colorado and who leaves this state to accept a job assignment in a foreign nation is presumed not to have abandoned their Colorado domicile.
  - (g) The six-month rule does not create a presumption that a Colorado domiciliary not physically present in Colorado for more than six months has abandoned their Colorado domicile.
  - (h) The domicile of a person in the armed forces will initially generally be determined by the facts existing immediately prior to becoming a member of the armed forces.
  - (i) *Presumptions Regarding Permanent Place of Abode.*
    - (i) The mere ownership or leasing of real property in a jurisdiction is not presumed to be a place of abode in that jurisdiction.
    - (ii) A place of abode owned by an individual who leases it to others, not related to the owner or their spouse by blood or marriage where the individual has no right to occupy any portion of the premises and does not use such premises as their mailing address during the term of the lease is presumed not to be a permanent place of abode.
    - (iii) A recreational vehicle camp lot or camp ground without a hookup is presumed not to be a permanent place of abode.
    - (iv) A motel room or any construction which does not contain facilities ordinarily found in a place of abode, such as facilities for cooking, bathing, etc., is generally not deemed a permanent place of abode.
    - (v) A rented apartment, house, or condominium of an individual on a temporary work assignment in a state that returns to their state of domicile when they are not working (e.g. weekends) is generally not deemed a permanent place of abode.

- (vi) An apartment, house, or condominium in a state paid for by an employer in a location that is not the person's domicile is not considered a permanent place of abode if the person is in the state on a temporary work assignment. For example, an individual domiciled in another state may reside in an apartment in Colorado while on temporary assignment for the employer, after which the person will return to their domicile. If the employer pays for an apartment in Colorado while the employee is on a temporary work assignment in Colorado, the apartment does not constitute a permanent place of abode. However, if the employee pays for an apartment while on a temporary work assignment in Colorado and remains in Colorado when not working, the employee's apartment is a permanent place of abode.

Cross References

1. See IRS Publication 555 "Community Property" regarding the definition of domicile.
2. See Department Rule 39-22-108(3)(b) for special rules relating to persons in the military and their spouses.
3. *People v. White* 242 P.3d 1121 (2010), ("The current principal-or-primary-home test for voting purposes, largely adopted by the legislature in 1979 and now expressly made applicable to motor vehicle and income tax matters as well, however, clearly resolves this ambiguity [pertaining to the meaning and proof of "residence"] in favor of an objectively determined "legal residence" or domicile.")
4. §1-2-102(1)(a)(I), C.R.S.
5. *Texas v. Florida*, 307 U.S. 398 (1939)

**Rule 39-22-103(8)(b). Military Servicemember Resident Individual.**

- (1) **Servicemember.** A servicemember whose domicile is Colorado and who spends at least 305 days of the tax year stationed outside of the fifty state boundary of the United States of America, the District of Columbia or a United States possession on active military may, but is not required to, elect for that tax year to be treated as a nonresident of Colorado for Colorado income tax purposes. The servicemember makes this election on their Colorado income tax return.
- (2) **Servicemember Spouse.** The spouse of a servicemember described in paragraph (1), above, may also, but is not required to, elect to be treated as a nonresident of Colorado for purposes of Colorado income tax for the tax year if:
  - (a) the spouse spends at least 305 days of the tax year outside the United States and District of Columbia or a United States possession for the purpose of accompanying their spouse, and
  - (b) the servicemember elects, pursuant to paragraph (1), above, to be treated as a nonresident of Colorado.
- (3) The 305 days do not have to be consecutive days, but all 305 days must occur within the tax year for which the election is made.

Cross References

1. See, Department Rule 39-22-103(8)(a) for information on what constitutes a Colorado resident.

2. Servicemembers Civil Relief Act of 2003 (50 USC App. § 501-597b) and the Military Spouses Residency Relief Act (Public Law 111-97).

**Rule 39-22-104(1.7). Individual Income Tax Filing Status.**

- (1) **General Rule.** Because the Colorado income tax return begins with federal taxable income, taxpayers shall file their Colorado income tax return with the same status that such taxpayer files their federal income tax return.
- (2) State income tax provisions that depend upon federal income tax filing status will be administered in accordance with federal income tax filing status.
- (3) Any taxpayer filing as single, separate, or head-of-household shall file their Colorado income tax return in the individual taxpayer's name only. Taxpayers filing a joint federal return shall file a Colorado income tax return jointly for both taxpayers.

**Rule 39-22-104(3)(g). Gross Conservation Easement Addition.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1), 39-22-104(3)(g), and 39-22-522, C.R.S. The purpose of this rule is to clarify the requirement to add back, in the calculation of Colorado taxable income, any federal charitable contribution deduction a taxpayer claims for the donation of a gross conservation easement when a Colorado gross conservation easement credit is also claimed based on the donation of the same gross conservation easement.

- (1) Except as provided in paragraph (2) of this rule, any taxpayer that claims both a charitable contribution deduction pursuant to section 170 of the Internal Revenue Code and a gross conservation easement credit pursuant to section 39-22-522, C.R.S. based on the same gross conservation easement donation shall add the amount of the federal deduction back to taxable income in determining the taxpayer's Colorado taxable income. The taxpayer claiming the deduction is required to make the addition irrespective of whether all or part of the credit is:
  - (a) waitlisted pursuant to section 39-22-522(2.5) C.R.S.;
  - (b) carried forward to a subsequent tax year pursuant to section 39-22-522(5) C.R.S.;
  - (c) transferred to another taxpayer pursuant to section 39-22-522(7) C.R.S.; or
  - (d) allowed as increments in subsequent tax years pursuant to section 39-22-522(4)(a)(II.5), C.R.S.
- (2) With respect to any single gross conservation easement donation, the aggregate addition required by this rule is limited to the contribution amount upon which the gross conservation easement credit claimed is based.
  - (a) In the case of a donation made by joint tenants, tenants in common, a partnership, S corporation, or other similar entity or ownership group, the limitation prescribed by this paragraph (2) shall apply to the entity or group collectively and shares thereof shall be allocated to the entity's or group's owners, partners, members, or shareholders in the same proportion as prescribed for the credit pursuant to section 39-22-522(4)(b), C.R.S. For example, if sixty percent of a credit is allocated to a partner in a partnership, the aggregate addition required for that partner is limited to sixty percent of the contribution amount upon which the gross conservation easement credit claimed is based.

**Rule 39-22-104(3)(r). Qualified Business Income Deduction Addback.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1), 39-22-104(3)(o), and 39-22-104(3)(r), C.R.S. The purpose of this rule is to clarify the requirement to add back, in the calculation of Colorado taxable income, the amount that an electing pass-through entity owner is allowed to deduct under section 199A of the internal revenue code.

**General Rule.** A taxpayer who takes a federal deduction pursuant to section 199A of the Internal Revenue Code and adds that amount back to federal taxable income pursuant to section 39-22-104(3)(o), C.R.S., does not need to make any addition pursuant to section 39-22-104(3)(r), C.R.S.

**Rule 39-22-104(4). Subtractions from Federal Taxable Income.**

- (1) **Sequence of Modifications Decreasing Federal Taxable Income.** Modifications decreasing federal taxable income may be claimed in the sequence most advantageous to the taxpayer.
- (2) **Modification for Railroad Retirement and Railroad Unemployment Benefits.** Railroad retirement benefits are exempt from state taxation under 45 U.S.C., paragraph 231m, and railroad unemployment benefits are exempt under 45 U.S.C., paragraph 352(e). Thus, to the extent that such income is included in federal taxable income, it may be modified out in determining Colorado taxable income.
- (3) **Taxation of a Colorado Resident Individual on Income Earned Before Becoming Colorado Resident.** Colorado taxable income of a Colorado resident individual is defined as the resident's federal taxable income, as modified by additions and subtractions set forth in §§39-22-104(3) and (4), C.R.S., respectively. A resident individual's income is subject to Colorado taxation regardless of whether it is derived from sources inside or outside of Colorado. Income generated from sources outside Colorado prior to a taxpayer becoming a Colorado resident, but received after the taxpayer becomes a resident, is subject to Colorado income tax. Examples include, but are not limited to, pension payments, deferred compensation payments, or income from the exercise of a stock option. However, credit for income tax paid to another state in the same year will be allowed with respect to income derived from sources within such state(s) after the individual becomes a Colorado resident.

**Cross Reference**

1. See §39-22-108, C.R.S. and Department Rule 39-22-108 for information on the credit for taxes paid to another state.

**Rule 39-22-104(4)(a). Repurchase Agreements.**

Repurchase agreements. Interest income earned on short term agreements to repurchase United States government obligations is not United States federal interest exempt from Colorado income tax.

**Rule 39-22-104(4)(f). Pension and Annuity Subtraction.**

**Basis and Purpose.** The bases for this rule are §39-21-112(1) and §39-22-104(4)(f), C.R.S. The purpose of this rule is to clarify what income qualifies for the pension and annuity subtraction.

- (1) **General Rule.**
  - (a) Pension and annuity benefits subject to the limitations set forth in paragraph (2) are eligible to be subtracted from a taxpayer's federal taxable income if the benefits are paid periodically, are attributable to personal services performed by an individual prior to his or her retirement from employment, paid after such retirement, and that arise from:



- (i) An employee-employer relationship;
    - (ii) Service in the uniformed services of the United States; or
    - (iii) Contributions to a retirement plan that are deductible for federal income tax purposes.
  - (b) Periodic payments means a series of amounts paid at regular intervals (e.g., weekly, monthly, or yearly) over a period of time greater than one year.
  - (c) *Additional Qualifying Benefits.* The following pension and annuity benefits qualify for the subtraction, even though they are not paid periodically, are not attributable to personal services of the individual prior to retirement, and/or do not arise from one or more of the sources described in paragraphs (1)(a)(i)-(iii):
    - (i) Distributions from individual retirement arrangements (IRAs);
    - (ii) Distributions from self-employed retirement accounts;
    - (iii) Amounts received from fully matured privately purchased annuities;
    - (iv) Social security benefits; and
    - (v) Amounts paid from any such sources (i.e., sources described in (1)(a)(i) - (iii) and (c)(i)-(iv), above) by reason of permanent disability or death of the person entitled to receive the benefits.
- (2) **Limitations.** The following are limitations on the subtraction:
- (a) The amount of income that can be subtracted is limited to:
    - (i) \$20,000 for a taxpayer who is at least 55 years of age, but not more than 64 years of age, at the end of the tax year (See paragraph (3)(c) for benefits received due to the death of the person who was originally entitled to receive such benefits); or
    - (ii) \$24,000 for a taxpayer who is at least 65 years of age at the end of the tax year.
  - (b) The subtraction applies only to the extent taxpayer reports, in the same tax year that the subtraction is claimed, the pension or annuity benefit as federal taxable income on his or her federal income tax return.

- (c) **Premature Distributions.** Distributions from an IRA or self-employed retirement account plan (e.g., a 401(k), savings incentive match plan for employees (SIMPLE), or Simple Employee Pension (SEP) retirement plan for a self-employed taxpayer) that are deemed to be premature for federal income tax purposes do not qualify for the subtraction. A premature distribution (sometimes referred to as an early distribution) for federal tax purposes means a distribution that is subject to a federal income tax penalty (sometimes referred to as additional federal tax). See I.R.C. § 72(t). In general, a distribution made before a taxpayer reaches the minimum retirement age required by the pension or annuity plan is subject to the premature distribution penalty. However, federal law does not impose the premature distribution penalty for certain distributions made prior to the minimum retirement age (e.g., death, hardship, etc.). See I.R.C. § 72(t). These distributions are not disqualified from the subtraction if they otherwise meet the requirements and limitations of paragraphs (1) and (2). The restriction regarding premature distributions does not apply to pension and annuity benefits distributed from sources other than an IRA or self-employed retirement account plan.
- (i) **Example 1.** A distribution made from a self-employed 401(k) retirement plan to a taxpayer who is 55 years old does not meet the minimum retirement age for federal tax purposes and, therefore, is considered a premature distribution subject to the federal income tax penalty. Such distribution is not eligible for this subtraction because a premature distribution from a self-employed retirement account is not eligible for the subtraction.
- (ii) **Example 2.** Same facts as Example 1 except that the 401(k) plan is not a self-employed retirement plan but, rather, a retirement plan arising from an employer-employee relationship. The distribution is eligible for the subtraction even though the distribution is subject to the premature distribution penalty because premature distribution penalty only disqualifies distributions from self-employed retirement accounts and IRAs and does not disqualify distributions from other retirement plans.
- (iii) **Example 3.** Same facts as Example 1 except the distribution is a lump-sum distribution of the entire fund made for hardship and, therefore, is not subject to the federal premature distribution penalty. The distribution is allowed as a subtraction. Note that the distribution is eligible for the subtraction even though it is a lump-sum payment (i.e., not a periodic payment) because distributions from a self-employed retirement plan do not have to be periodic.
- (iv) **Example 4.** Same facts as Example 2 except the distribution is a lump-sum distribution of the entire fund and is subject to the premature distribution penalty. The distribution is not eligible for the subtraction because the distribution does not qualify as a periodic payment.
- (d) See §39-22-104(4)(f)(III), C.R.S. for apportionment of social security income reported in a Colorado joint return.
- (3) **Examples of Pension and Annuity Benefits that Qualify for the Subtraction.** The following is a non-exhaustive list of pension or annuity benefits that, if the benefit is derived from one or more of the sources described in paragraph (1), above, and is subject to the limitations of paragraph (2), qualify for the subtraction:
- (a) Pension and annuity plan benefits provided by a government employer to its employees after retirement.

- (b) Distributions from a 401(k) plan, tax-sheltered annuity plan (403(b) plan), 501(c)(18)(D) plan, salary reduction simplified employee pension plan (SARSEP), SIMPLE plan, thrift savings plan for federal employees, IRAs, SEP plan, profit-sharing plan, defined benefit plan, money purchase plan, employee stock ownership plan, 457 plan, governmental plan (e.g., 401(a) plan), and 409A nonqualified deferred compensation plan.
  - (c) Pension and annuity benefits, including any lump-sum distributions from sources in paragraphs (1)(a)(i) - (iii), paid to an individual who is less than 55 years of age at the close of the tax year if such benefits were received because of the death of the person who was originally entitled to receive such benefits. This paragraph (3)(c) applies only if the benefits are paid to an individual. The \$20,000 dollar limitation in paragraph (2) applies to individual beneficiaries who are, at the end of the tax year, less than 65 years of age (including beneficiaries who are less than 55 years of age), and the \$24,000 limitation in paragraph (2) applies to individual beneficiaries who are at least 65 years of age at the end of the tax year. Non-individuals (e.g., trust, estate, partnership, and other legal entity) that receive such benefits and individuals who receive such benefits from non-individuals may not claim the subtraction, even if the entity that received the benefit redistributes the benefit to an individual.
  - (d) Taxable permanent disability benefits received by an individual described in paragraph (1)(c)(v) who meets the age limitations set forth in paragraph (2) even if the compensation is characterized as wages rather than pension and annuity income for federal income tax purposes.
  - (e) Payments made pursuant to a divorce settlement or decree to the extent the payments arise from one of the sources listed in paragraph (1) and are subject to the limitations of paragraph (2). The settlement or decree must expressly state the amount of the pension or annuity benefit allocated to the taxpayer in order for the taxpayer to claim the subtraction. A nonperiodic payment representing a future stream of periodic payments from a pension or annuity plan made pursuant to the divorce settlement or decree will not qualify for the subtraction, unless the pension or annuity plan benefit is a pension or annuity plan listed as an exception in paragraph (1)(c), above.
- (4) **Examples of Pension and Annuity Benefits that Do Not Qualify for the Subtraction.** The following is a non-exhaustive list of benefits that do not qualify as a pension or annuity benefit for purposes of this subtraction:
- (a) A lump-sum distribution from a qualified or nonqualified pension or profit-sharing plan as defined in I.R.C. § 401.
  - (b) Distributions from a Roth IRA are excluded from federal gross income and, therefore, are not eligible for the subtraction. Contributions are also not eligible to be included in the subtraction.
  - (c) Sick leave or vacation leave payout.
  - (d) Early retirement incentive pay.
  - (e) Severance pay.
  - (f) Unemployment benefits.
  - (g) Interest income from a bank plan that is distributed to a surviving spouse as retirement income upon death of deceased spouse.

- (h) Joint savings accounts or jointly held certificates of deposits that are paid to the surviving spouse or owner.
  - (i) Alimony payments, including that portion of military pension awarded to a nonmilitary spouse as a result of a divorce settlement that is classified as alimony, except for alimony income that meets the requirements set forth in paragraph (3)(e), above.
  - (j) Life insurance proceeds.
  - (k) Payments from a long-term care insurance contract.
  - (l) Disability payments that are not for permanent disability, regardless of their source, even if reported as pension and annuity income on taxpayer's federal income tax return.
  - (m) Insurance or civil damages compensation for loss of use or function of a part of the body (e.g., loss of a limb).
  - (n) A guaranteed payment by a partnership to a partner, unless the payment is part of a plan that meets the general rule of paragraph (1) and subject to the limitations of paragraph (2), above.
  - (o) Distributions from an otherwise qualified profit-sharing plan to an employee prior to retirement.
  - (p) Distributions from an otherwise qualified employer-sponsored savings plan or employee stock ownership plan prior to retirement.
  - (q) Contribution to a pension or annuity plan, regardless of whether the contribution is taxable to the beneficiary of the pension or annuity plan at the time the contribution is made.
  - (r) Distribution of interest income derived from an U.S. savings bond, unless the bond was an asset of a pension or annuity plan that qualifies for the subtraction.
- (5) **Trusts/Estates.**
- (a) Trusts and estates cannot claim the pension and annuity benefit subtraction.
  - (b) An individual who is a beneficiary of a trust or estate cannot claim the subtraction for distributions of pension or annuity benefits from a trust or estate.
- (6) **Railroad Retirement Benefits.**
- (a) Railroad retirement annuity benefits, including Tier I and Tier II, annuity benefits for spouses, divorced spouses, survivors, vested dual benefits, supplemental railroad retirement annuity benefits and railroad disability benefits are exempt from state taxation under Section 231m of the Railroad Retirement Act (45 U.S.C. 231m and 231a(a)), regardless of whether such benefits meet the qualifications set forth in paragraph (1) of this rule. The amount of such subtraction is not limited by the dollar limitations set forth in paragraph (2), above. If a taxpayer also receives pension or annuity benefits described in paragraph (1), above, that qualify for the subtraction, then the amount of railroad retirement benefits is not included in calculating whether pension or annuity benefits of paragraph (1) have exceeded the dollar limitations set forth in paragraph (2).

- (b) If the benefits described in paragraph (6)(a), above, are included in the taxpayer's federal taxable income, the benefits are subtracted when computing Colorado taxable income as a "railroad retirement benefits subtraction." The income included in the railroad retirement benefits subtraction cannot be subtracted a second time under the pension and annuity subtraction and the amount of any railroad retirement benefits subtraction will not count against the \$20,000 or \$24,000 limitation of the pension / annuity subtraction.

**Rule 39-22-104(4)(i). Qualified State Tuition Program & ABLE Program Contributions Subtraction.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-22-104(4)(i), and 39-22-539, C.R.S. The purpose of this rule is to clarify requirements and limitations relating to the subtraction allowed to individuals, estates, and trusts for payments and contributions made to a qualified state tuition program or a qualified ABLE program.

- (1) **General Rule.** Subject to the limitations and restrictions in section 39-22-104(4)(i), C.R.S., and this rule, a subtraction from federal taxable income is allowed to an individual, estate, or trust who makes a qualifying payment or contribution to a qualified state tuition program or qualified ABLE program during the tax year. C corporations may not claim any subtraction for payments or contributions they make to a qualified state tuition program or qualified ABLE program.
- (2) **Employer Contributions.**
  - (a) *Employer Contribution Credits Under Section 39-22-539, C.R.S.* An employer who claims a credit under section 39-22-539, C.R.S., for a contribution made to a qualified state tuition program account owned by an employee cannot also claim a subtraction under section 39-22-104(4)(i), C.R.S., for the same contribution, regardless of whether the employer is sole-proprietorship, partnership, or S corporation. In the case of a partnership or S corporation, the partners and shareholders also cannot claim a subtraction under section 39-22-104(4)(i), C.R.S., for any contribution for which a credit is claimed under section 39-22-539, C.R.S.
  - (b) *Employees.* An employee cannot claim a subtraction under section 39-22-104(4)(i), C.R.S., for any contribution made on their behalf by their employer. However, an employee may claim a subtraction under section 39-22-104(4)(o), C.R.S., for any amount received as employer matching contributions to an adult learner's individual trust account or savings account made pursuant to part 3 of article 3.1 of title 23, C.R.S.
- (3) **Limitations**
  - (a) The limitation in section 39-22-104(4)(i)(II)(B), C.R.S., applies to the total of all payments or contributions made to accounts for the same beneficiary, regardless of whether the contributions are made to a qualified state tuition program or a qualified ABLE program.
  - (b) The per taxpayer per beneficiary limitation established in section 39-22-104(4)(i)(II)(B), C.R.S., applies jointly, rather than separately, for taxpayers filing a joint return.
  - (c) For the purpose of the limitation in section 39-22-104(4)(i)(II)(B), C.R.S., a taxpayer who files married filing separately or head of household on their federal income tax return is considered a single filer.

(4) **Rollovers.**

- (a) *Rollovers from an Out-of-State Plan.* In the case of a rollover pursuant to sections 529(c)(3)(C)(i) and 529A(c)(1)(c)(i) of the Internal Revenue Code, in which an amount is transferred from a qualified tuition program or qualified ABLE program, respectively, established and maintained by another state to a Colorado qualified tuition program or qualified ABLE program, only the portion of the rollover that constituted investment in the account for federal income tax purposes shall be considered a qualifying contribution for purposes of section 39-22-104(4)(i), C.R.S., and this rule. Any subtraction claimed for a rollover from an out-of-state plan is, collectively, along with any other payments and contributions made by the taxpayer during the tax year, subject to the limitations established by section 39-22-104(4)(i)(II)(B), C.R.S.
- (b) *Rollovers from a Colorado Plan.* When an amount is transferred from an account in a Colorado qualified tuition program or qualified ABLE program to another qualified tuition program or qualified ABLE program within Colorado, no portion of the rollover shall be considered a qualifying contribution for purposes of section 39-22-104(4)(i), C.R.S., and this rule.
- (c) *Change in Beneficiaries.* A change of the designated beneficiary of an existing plan, pursuant to sections 529(c)(3)(C)(ii) and 529A(c)(1)(C)(ii) of the Internal Revenue Code, shall not be considered a qualifying contribution for purposes of section 39-22-104(4)(i), C.R.S., and this rule.

(5) **Addition for Non-Qualifying Distributions.**

- (a) Except as provided in paragraph (5)(c) of this rule, if any distribution, refund, or any other withdrawal is made from a qualified state tuition program or qualified ABLE program for any reason other than the reasons listed in sections 39-22-104(4)(i)(III)(A) through (D), and 39-22-104(4)(i)(III.5)(A) through (C), C.R.S., the account holder must add to their federal taxable income for the taxable year of the distribution, refund, or withdrawal, the portion of the distribution, refund, or withdrawal that is considered investment for federal income tax purposes.
- (b) Distributions, refunds, and withdrawals to which paragraph (5)(a) of this rule applies include, but are not limited to, any amounts distributed, refunded, or withdrawn from a qualified state tuition program to:
  - (i) pay expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school, as described in section 529(c)(7) of the Internal Revenue Code;
  - (ii) pay principal or interest on a qualified education loan, as described in section 529(c)(9) of the Internal Revenue Code; or
  - (iii) transfer funds to a state tuition program maintained by a state other than Colorado in a rollover described in section 529(c)(3)(C)(i) of the Internal Revenue Code.
- (c) In determining what portion of a non-qualifying distribution may be subject to the addition requirement:

- (i) The total combined additions to federal taxable income an account holder must make pursuant to sections 39-22-104(4)(i)(III), or 39-22-104(4)(i)(III.5), C.R.S., and paragraph (5) of this rule for all tax years and all distributions, refunds, or withdrawals made from a single qualified state tuition program or a qualified ABLE program are limited to the total combined subtractions previously claimed by any taxpayers for payments and contributions made to that account.
- (ii) In the event that a subtraction was not claimed for one or more of the payments or contributions made to the account, the account holder bears the burden of proving that a subtraction was not claimed by the taxpayer making the payment or contribution. Such proof must include a full accounting of the payments and contributions made to the account, the amount of each payment or contribution, and the name and taxpayer identification number for the taxpayer who made each payment or contribution.

**Rule 39-22-104(4)(m). Charitable Contribution Subtraction for Taxpayers Claiming the Federal Standard Deduction.**

- (1) A taxpayer who claims the basic standard deduction on their federal income tax return pursuant to I.R.C. § 63(c)(2) can subtract on their Colorado income tax return the amount of charitable contributions in excess of five hundred dollars that the taxpayer could have claimed pursuant to I.R.C. § 170 if the taxpayer had not claimed the basic standard deduction. The subtraction is not available to taxpayers who are not allowed to claim the federal basic standard deduction, such as:
  - (a) Taxpayers for whom a dependency exemption is allowable to another taxpayer, even when a partial standard deduction is allowed under I.R.C. § 63(c)(5);
  - (b) Married individuals filing separate returns, when one spouse itemizes deductions
  - (c) Non-resident aliens
  - (d) Any individual who cannot claim the federal standard deduction because the individual has a short tax year; or
  - (e) Estates, trusts, or other entities that are not “individuals.”
- (2) **Limitations.**
  - (a) In determining the amount of the subtraction, I.R.C. § 170 shall govern, including the dollar limits on the amount of the contribution that can be claimed in any given tax year, any special rules regarding certain property, any limitations on contributions of clothing and household items, and what qualifies as a charitable contribution. For example,
    - (i) The charitable contribution subtraction is limited by a taxpayer’s contribution base as stated in I.R.C. § 170(b).
    - (ii) A claim in excess of \$5,000 for a noncash charitable contribution of one item or a group of similar items generally requires an appraisal.
  - (b) *Itemized Deduction Phase-Out.* Because the subtraction is equal to the amount of any deduction based upon the amount of a qualifying charitable contribution, any itemized deduction phase-out due to the level of adjusted gross income shall be applied to the calculation of the subtraction.

- (c) *Carryforward.* A carryforward of the charitable contribution subtraction is prohibited. The federal charitable contribution carryforward may never be claimed on a Colorado income tax return.
- (3) **Aggregation.** The dollar amount of all charitable contributions for the tax year are aggregated to determine whether the value of the charitable contributions exceed the \$500 threshold (i.e., the value of each contribution need not exceed the \$500 threshold so long as the sum of all qualified contribution for the tax year exceed \$500).
- (4) **Documentation and Substantiation.**
  - (a) A taxpayer must comply with the substantiation requirements set forth in I.R.C. § 170, including qualified appraisals, limitations on clothing and household items, and the documentation of cash contributions.
  - (b) Any claims of charitable contributions in excess of the applicable federal standard deduction must be accompanied by a clear written explanation and documentation demonstrating why the federal standard deduction was claimed.
- (5) **Part-Year and Nonresidents.** The subtraction is available to taxpayers who are required to file a Colorado income tax return, including part-year and nonresident taxpayers. When computing the Colorado tax liability of a part-year resident or nonresident, the subtraction is applied to compute the tentative Colorado tax liability before the tentative Colorado tax is apportioned.

**Rule 39-22-104(4)(n.5). Wildfire Mitigation Measures Subtraction.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1) and 39-22-104(4)(n.5), C.R.S. The purpose of this rule is to explain the requirements for the wildfire mitigation measures subtraction and to provide examples.

- (1) **General Rule.** For the tax periods specified in section 39-22-104(4) (n.5), C.R.S., and subject to the provisions of section 39-22-104(4)(n.5), C.R.S., landowners may claim a subtraction for the cost of wildfire mitigation measures performed on their privately-owned land in a wildland-urban interface area in Colorado.
- (2) **Paid Out-of-Pocket Expenses.** A cost eligible for the subtraction must be an actual out-of-pocket expense incurred and paid by the landowner primarily for wildfire mitigation measures.
  - (a) *Examples.*
    - (i) A landowner who hires and pays a third-party contractor to cut down trees as a wildfire mitigation measure has incurred and paid an out-of-pocket expense.
    - (ii) A landowner who personally cuts down trees as a wildfire mitigation measure has not incurred or paid an out-of-pocket expense for their time and labor.
    - (iii) A landowner who purchases a chainsaw primarily for performing wildfire mitigation measures has incurred and paid an out-of-pocket expense.
- (3) **Costs Incurred Primarily for Non-Wildfire Mitigation Purposes.** Any cost must be for property or services primarily used for wildfire mitigation measures.
  - (a) *Examples.*



- (i) Purchases of an all-terrain vehicle, truck, tractor, or trailer are not eligible for the subtraction, even though the landowner may use these items to perform wildfire mitigation measures, if these items are not primarily used for wildfire mitigation measures. Similarly, rental charges for the items identified, above, would be eligible for the subtraction if the landowner primarily uses the rented items to perform wildfire mitigation measures.
  - (ii) Costs for landscaping that are primarily for aesthetic purposes, such as installation of a patio, lawn, garden, or similar landscaping, but also serve as a fire break or other wildfire mitigation measure, are not eligible for the subtraction because the costs were not incurred primarily for wildfire mitigation measures.
- (4) **Ineligible Costs.** Costs that are not eligible for the subtraction include an inspection or certification fee, in-kind contribution, donation, incentive, or a cost sharing arrangement associated with, or grants awarded for, performing wildfire mitigation measures.
  - (a) *Inspection or Certification Fees.*
    - (i) Example: The amount a landowner pays for a fire mitigation survey of their land to determine the amount of work necessary to perform wildfire mitigation measures or as means of verifying insurance compliance does not qualify as a “cost” that is eligible for the subtraction.
  - (b) *In-Kind Contributions.*
    - (i) Example. A landowner who personally performs wildfire mitigation measures for a summer camp and who also contributes the use of a chainsaw and truck as a gift to the summer camp cannot claim the value of the landowner’s personal services (because the personal service is not an actual out-of-pocket expense but rather an in-kind contribution and donation, neither of which qualify as “costs” for purposes of this rule) or the rental value for the use of the chainsaw or truck on the summer camp’s property (for the same reasons).
  - (c) *Donation.*
    - (i) *Example.* A landowner allows without charge the use of the landowner’s trailer by a third party to perform wildfire mitigation measures. Neither the landlord nor the third party may claim the value of the donation to rent the trailer as a subtraction.
    - (ii) *Example.* A landowner who performs wildfire mitigation services for free to a summer camp that neighbors the landowner’s property cannot claim the value of the donation as a subtraction.
  - (d) **Cost Sharing.** Cost sharing is an arrangement by which participants, which may include landowners and non-landowners, agree to share the cost of performing wildfire mitigation measures.
    - (i) *Example.* Neighboring landowners who agree to share the costs of purchasing or renting equipment for, or for hiring a third-party contractor to perform, wildfire mitigation measures on their respective private lands cannot claim their portion of such costs as a subtraction.
  - (e) *Grants and Incentives.* A cost paid from, or reimbursed by, an incentive or grant awarded to, or made available to, a landowner to perform wildfire mitigation measures is not eligible for the subtraction.

- (5) **Landowner.** A taxpayer claiming the subtraction must be a landowner of private land located in Colorado.
- (a) *Estate in Land.* A landowner is an individual who is an owner of record of a fee interest in real property (whether held solely, jointly or in common), easement, right-of-way, or other estate in real property. An easement is a non-possessory interest in real property to enter on to land and use the land, or to restrict the use of such land, for an indefinite or specific period of time, such as a right-of-way to travel across land or to use the land for recreational purposes (e.g., fishing, hunting, camping). A right-of-way typically is a type of easement. A lease is an estate in land and, therefore, a lessee is a landowner for purposes of this rule, provided that evidence of the lease is properly recorded. The lessor is also a landowner as either the owner of a fee interest in the land or as a lessee who is acting in the capacity of a sublessor.
- (b) *Taxpayer's Property Interest.* Wildfire mitigation measures must be performed on the taxpayer's property interest for the taxpayer to be eligible for the subtraction.
- (i) *Examples.*
- (A) A taxpayer who is a lessee of land owned by someone else can claim the subtraction for the costs they incur for wildfire mitigation measures performed on the property because the work was performed on an estate (e.g., lease) owned by the taxpayer, even though a third party owned the underlying fee interest in the land. If the lessor separately incurs costs for wildfire mitigation measures performed on the same property, they may also claim a subtraction for the costs they pay. However, if the lessor and lessee share the costs of the wildfire mitigation measures, they would be ineligible to claim the subtraction as noted in paragraph 4(d) of this rule.
- (B) A taxpayer who pays for wildfire mitigation measures on a neighboring landowner's land for the purpose of protecting the taxpayer's land cannot claim the costs for such work because the wildfire mitigation measure was not performed on the taxpayer's land.
- (c) *Public Property.* A person who holds an easement, right-of-way, lease, or other estate in land that is owned by a governmental entity is not a landowner because the subtraction is available only if the wildfire mitigation measures are performed on private land, not public land.
- (i) *Examples.*
- (A) A sole proprietor who owns or leases a building on land owned by the government is not a landowner for purposes of this rule because the land is not private land, even though the proprietor owns a private estate (lease).
- (B) An individual who has an easement or right-of-way on land owned by the federal Bureau of Land Management is not a landowner for purposes of this rule because the land is not private land, even though the proprietor owns a private estate (easement or right-of-way).

- (d) *Private Property Held by a Legal Entity.* A partnership, S corporation, or other similar legal entity cannot claim the subtraction. However, an individual who holds an easement, leasehold, right-of-way, or other estate in real property owned or leased by such legal entity is a landowner because the individual is a landowner (i.e., holds an estate) of private land. Corporations, partnerships, S corporations, and other similar legal entities are not eligible for this subtraction because section 39-22-104, C.R.S., applies only to individuals, estates, and trusts.

**Rule 39-22-108. Credit For Taxes Paid to Another State.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1), 39-21-113(1)(c), 39-22-103(11), 39-22-104, 39-22-105, 39-22-108, 39-22-109, 39-22-110, 39-22-202(4), and 39-22-329(1), C.R.S. The purpose of this rule is to provide clarification regarding the credit for taxes paid to other states and to explain the application of section 39-22-108, C.R.S., and the various elements thereof. This rule details the taxes, income, and limitations considered in determining the allowable credit for both full-year residents and part-year residents. The rule also prescribes certain requirements relating to any necessary correction in the amount of credit claimed and the documentation of state taxes paid.

- (1) **General Rule.** Subject to the limits prescribed in section 39-22-108, C.R.S., and this rule, a resident individual, estate, or trust is allowed a credit for the amount of net taxes on federal taxable income accrued to another state on income derived from sources in that state.
- (2) **Qualifying Taxes.**
  - (a) *State Taxes.* The credit is allowed only for taxes accrued to another state, the District of Columbia, or a territory or possession of the United States. As used in this rule, unless context otherwise requires, the term “state” includes another state of the United States, the District of Columbia, and any territory or possession of the United States. The credit is not allowed for taxes accrued to any city, local jurisdiction, foreign country, or any subdivision thereof.
  - (b) *Taxes on Income.* The credit is allowed only for taxes imposed on income. The credit is allowed regardless of whether the state imposing the tax refers to it as an income tax, as a gross receipts tax, or by another name. The credit is not allowed for any franchise tax or any other tax accrued to another state that is not imposed on income.
  - (c) *Taxes on Income Derived from Sources in Another State.* The credit is allowed only for the amount of tax imposed on income derived from sources in the other state. The source from which income is derived is determined in the manner prescribed in section 39-22-109, C.R.S. Credit is not allowed for any amount of tax a state imposes based on the taxpayer’s residency in that state, rather than based upon the source from which the income is derived.
  - (d) *Amount of Qualifying Tax.* The credit is allowed only for the net tax accrued. As used in this rule, unless context otherwise requires, “net tax” means the income tax imposed by a state, including any alternative minimum tax imposed by the state, minus any income tax credits allowed by the state against the income tax imposed, except for any credits allowed for estimated payments made by the taxpayer and income taxes withheld from the taxpayer’s wages or other income. “Net tax” does not include any recapture required by the state for credits claimed by the taxpayer in a prior tax year.
    - (i) *Dual-Resident Individuals.* If an individual is a full-year resident of both Colorado and another state for the same tax year, that individual may claim credit only for net tax accrued to the other state on income derived from sources in the other state, determined pursuant to paragraph (2)(c) of this rule.

(e) *Tax Year.*

- (i) *Tax Accrual.* The credit is allowed only for taxes accrued for the tax year. The credit may not be claimed for taxes accrued for any other tax year.
  - (A) For the purposes of section 39-22-202(4), C.R.S., taxes accrued by a partnership for a tax year are deemed to accrue for its partners in the partner's tax year within which the partnership's tax year ends.
  - (B) For the purposes of section 39-22-329(1), C.R.S., taxes accrued by an S corporation for a tax year are deemed to accrue for its shareholders in the shareholder's tax year within which the S corporation's tax year ends.
- (ii) *Income.* The credit is allowed only for taxes on income included in the taxpayer's modified federal adjusted gross income, determined pursuant to paragraph (3)(a)(ii) of this rule, for the tax year.

(3) **Limitations.**

- (a) For the purpose of this paragraph (3), unless context otherwise requires:
  - (i) "Gross Colorado tax" means the tax imposed pursuant to section 39-22-104, C.R.S., and any alternative minimum tax imposed pursuant to section 39-22-105, C.R.S., but does not include any credit recapture required pursuant to article 22 of title 39, C.R.S.
  - (ii) Except as otherwise provided in paragraph (4)(b) of this rule, "modified federal adjusted gross income" means the taxpayer's federal adjusted gross income modified by any additions and subtractions required by section 39-22-104, C.R.S., or any other applicable provision of article 22 of title 39, C.R.S., or under federal law, except for the following modifications:
    - (A) the state income tax addback required by section 39-22-104(3)(d), C.R.S.;
    - (B) the gross conservation easement deduction addback required by section 39-22-104(3)(g), C.R.S.;
    - (C) the qualified business income deduction addback required by section 39-22-104(3)(o), C.R.S.;
    - (D) the itemized deduction addback required by section 39-22-104(3)(p), C.R.S.;
    - (E) the itemized or standard deduction addback required by section 39-22-104(3)(p.5), C.R.S.;
    - (F) the qualified business income deduction addback required by section 39-22-104(3)(r), C.R.S.; and
    - (G) the charitable contribution subtraction allowed by section 39-22-104(4)(m), C.R.S.

- (b) *Limitation on Credit for Tax Paid to Another State.* The credit allowed for tax accrued to another state is limited to the taxpayer's gross Colorado tax multiplied by a fraction, the numerator of which is the taxpayer's modified federal adjusted gross income from sources within the other state, as determined pursuant to paragraph (2)(c) of this rule, and the denominator of which is the taxpayer's entire modified federal adjusted gross income. In determining the limitation pursuant to this paragraph (3)(b), all of the taxpayer's income, gains, and losses from sources within the other state are considered. A taxpayer's modified federal adjusted gross income from sources within another state shall be determined without regard to any additions made on the taxpayer's income tax return filed for that state, except to the extent that such addition is similarly required in determining the taxpayer's modified federal adjusted gross income as defined in paragraph (3)(a)(ii) of this rule.
  - (c) *Limitation on Total Credit for Taxes Paid to All Other States.* The total credit allowed for taxes accrued to all other states is limited to the taxpayer's gross Colorado tax multiplied by a fraction, the numerator of which is taxpayer's modified federal adjusted gross income from sources outside of Colorado, as determined pursuant to paragraph (2)(c) of this rule, and the denominator of which is the taxpayer's entire modified federal adjusted gross income. In determining the limitation pursuant to this paragraph (3)(c), all of the taxpayer's income, gains, and losses from sources outside of Colorado are considered.
- (4) **Part-Year Residents.** Subject to the limits prescribed in section 39-22-108, C.R.S., and this rule, an individual, estate, or trust that is a Colorado resident for only part of the tax year (a "part-year resident") is allowed a credit only for the amount of net taxes accrued to another state on income derived from sources in that state while the taxpayer was a Colorado resident.
- (a) *Tax Accrual.* A part-year resident can claim credit only for tax accrued to another state while the taxpayer was a Colorado resident. If the taxpayer accrued tax to the other state during both the part of the year that the taxpayer was a Colorado resident and the part of the year that the taxpayer was not a Colorado resident, the total net tax accrued to the other state for the tax year shall be prorated to determine the amount of credit the part-year resident may claim. The total net tax accrued to the other state shall be prorated by multiplying by a fraction in which:
    - (i) the numerator is the part of the total amount of income taxed by the other state for the tax year that is derived from sources in that state while the taxpayer was a Colorado resident; and
    - (ii) the denominator is the total amount of income taxed by the other state for the tax year.
  - (b) *Modified Adjusted Gross Income.* For the purpose of determining the limitations under paragraph (3) of this rule for a part-year resident:
    - (i) only that part of the part-year resident's modified federal adjusted gross income that relates to the period of the year they were a Colorado resident, as determined pursuant to section 39-22-110, C.R.S., is considered and included in the denominator of the fraction described in paragraphs (3)(b) and (3)(c) of this rule; and
    - (ii) only that part of the denominator determined pursuant to paragraph (4)(b)(i) of this rule that is income derived from sources in the other state is considered and included in the numerator of the fraction described in paragraphs (3)(b) and (3)(c) of this rule.

- (c) *Example.*
- (i) *Residency.* The taxpayer is a resident of State A from January 1 through June 30 and a resident of Colorado from July 1 through December 31 of the tax year.
  - (ii) *Income.* The taxpayer has wage income and rental income included in their federal taxable income for the tax year.
    - (A) *Wage Income.* The taxpayer earned:
      - (I) a total of \$48,000 of wage income during the tax year;
      - (II) \$6,000 of wage income while working in State A between January 1 and June 30, while they were a State A resident; and
      - (III) \$42,000 of wage income while working in Colorado between July 1 and December 31, while they were a Colorado resident.
    - (B) *Rental Income.* The taxpayer realized \$12,000 of rental income from real property located in State A. The rental income was received evenly throughout the year, with \$1,000 of rental income realized during each month of the tax year.
    - (C) *Federal Taxable Income.* The taxpayer had \$60,000 of federal adjusted gross income and \$15,000 of federal deductions, resulting in federal taxable income of \$45,000.
  - (iii) *State A Income and Tax.* State A imposed tax on the \$18,000 of the taxpayer's income for the tax year, consisting of the \$6,000 of wage income earned in State A while they were a State A resident and \$12,000 of rental income from real property in State A, realized over the course of the entire year. The taxpayer accrued \$900 of State A tax on the \$18,000 of income taxed by the state.
  - (iv) *State A Tax Attributable to Income Derived from the State During Colorado Residency.* Pursuant to paragraph (4)(a) of this rule, the tax accrued to State A while the taxpayer was a Colorado resident is \$300, determined by multiplying the \$900 of total State A tax accrued by a fraction in which:
    - (A) the numerator is the \$6,000 of State A rental income taxed by State A and realized by the taxpayer while they were a Colorado resident; and
    - (B) the denominator is the entire \$18,000 of income taxed by State A.
  - (v) *Gross Colorado Tax.* The taxpayer's gross Colorado income tax for the tax year is \$1,584.
    - (A) Pursuant to section 39-22-104, C.R.S., the taxpayer's Colorado tax is tentatively calculated on the taxpayer's full federal taxable income by multiplying their \$45,000 federal taxable income by the 4.4% Colorado income tax rate applicable for the tax year, resulting in \$1,980.

- (B) Pursuant to section 39-22-110, C.R.S., the taxpayer's gross Colorado tax is then determined by multiplying the \$1,980 of tentatively calculated tax by an apportionment percentage of 80%, resulting in gross Colorado tax of \$1,584. The 80% apportionment limitation is calculated by dividing the \$48,000 of the taxpayer's federal adjusted gross income that relates to the period of the year in which they were a Colorado resident by the taxpayer's full federal adjusted gross income of \$60,000.
- (vi) **Credit Limitation.** The credit the taxpayer may claim for taxes paid to State A is limited to \$198, determined as follows.
  - (A) **Total Modified Adjusted Gross Income Considered.** Pursuant to paragraph (4)(b)(i) of this rule, only the \$48,000 of income that relates to the period while the taxpayer was a Colorado resident is considered and included in the denominator of the fraction used to calculate the credit limitation. The \$48,000 of income included in the denominator consists of the \$42,000 of wage income earned while working as a Colorado resident and the \$6,000 of rental income realized while the taxpayer was a Colorado resident.
  - (B) **Total Modified Adjusted Gross Income Considered from State A Sources.** Pursuant to paragraph (4)(b)(ii) of this rule, the numerator used to calculate the credit limitation is the \$6,000 of rental income realized from State A sources that was included in the total modified adjusted gross income considered pursuant to paragraphs (4)(b)(i) and (4)(c)(vi)(A) of this rule.
  - (C) **Credit Limitation.** The credit the taxpayer can claim for tax paid to State A is limited to \$198. Pursuant to paragraphs (3)(b) and (4)(b) of this rule, the taxpayer's \$1,584 gross Colorado tax is multiplied by a fraction, the numerator of which is taxpayer's \$6,000 of State A rental income realized while the taxpayer was a Colorado resident and the denominator is the \$48,000 of total modified adjusted gross income considered pursuant to paragraphs (4)(b)(i) and (4)(c)(vi)(A) of this rule.
- (5) **Redeterminations.** In accordance with section 39-22-108(3), C.R.S., if the tax ultimately paid to the other state differs from the amount of tax for which a taxpayer claimed credit or if any part of the tax paid is refunded, the taxpayer must notify the Department by filing an amended return to correct the amount of the credit claimed. Additionally, a taxpayer must file an amended return to make any necessary corrections to the modified federal adjusted gross income from sources in other states reported on the taxpayer's return in calculating the allowable amount of the credit.
- (6) **Documentation.** Any taxpayer claiming a credit under section 39-22-108, C.R.S., and this rule must submit to the Department with their Colorado return the documentation required by this rule. Any taxpayer claiming a credit must also provide on request any additional documentation the Department determines is necessary to verify the credit claimed by the taxpayer.
  - (a) A taxpayer claiming a credit for taxes determined and reported on a return the taxpayer filed with another state must submit with their Colorado return a copy of the return filed with the other state or so much of the return as is relevant to the determination of the credit.

- (b) If another state imposes income tax on a pass-through entity (a partnership or S corporation), or a pass-through entity files a composite return with a state on behalf of its members (its partners or shareholders), any Colorado resident member claiming credit on their Colorado return for their distributive or pro rata share of the tax must submit with their Colorado return a copy of the statement provided by the pass-through entity reporting the member's distributive or pro rata share of the tax and the income derived from sources in that state.

**Rule 39-22-108.5. Dual Resident Trust Credit.**

**(1) Limitations.**

- (a) A taxpayer cannot claim both the dual resident trust credit and the credit for tax paid to another state (§39-22-108, C.R.S.) for the same tax year. If a taxpayer qualifies for both credits for the same tax year, the taxpayer shall elect which credit will be claimed on the return.
- (b) The credit is not available to a trust that became a Colorado resident trust prior to May 26, 2006.
- (c) The credit is available for tax years beginning on or after January 1, 2006.
- (d) Any excess credit is not refundable and cannot be carried forward or back to another tax year.

**(2) Documentation.**

- (a) A taxpayer claiming a dual resident trust credit shall file a copy of the income tax return from the other state(s) with the Department of Revenue at the time of filing the Colorado tax return in which the credit is claimed.
- (b) A taxpayer who electronically files the Colorado income tax return must include such information from the other state's tax return as may be required by the Department and submit a written copy of the same to the Department of Revenue upon request.
- (c) Documentation to support the tax return from another state must also be submitted to the Department of Revenue upon request.

**Rule 39-22-109. Colorado-Source Income.**

- (1) **General Rule.** A Nonresident who derives income from sources in Colorado and who has Nexus must file a Colorado income tax return and pay Colorado income tax on Colorado net taxable income. Deferred recognition of any income from sources in Colorado remains Colorado-source income when such income is finally recognized. A Nonresident's Colorado income tax liability is calculated by first calculating the Nonresident's Colorado income tax as if the Nonresident was a full year Colorado resident and multiplying such tentative tax by the ratio of the Nonresident's Colorado modified federal adjusted gross income to the Nonresident's total modified federal adjusted gross income. See Department Rule 39-22-110 for rules governing modifications to income.
- (2) **Definitions.** The following terms have the meanings set forth below unless the context of the rule indicates otherwise:



- (a) 'Nonresident' means an individual who is neither a domiciliary of Colorado nor a statutory resident of Colorado as set forth in § 39-22-103(8), C.R.S., and Department Rule 39-22-103(8)(a).
  - (b) 'Business' means a business, trade, profession or occupation, including the activities of a nonprofit Pass-through entity that has unrelated business taxable income for federal income tax purposes. Business does not include activities of a Nonresident whose only activity in Colorado is buying and selling intangible property on his or her own account (See § 39-22-109(2)(a)(V), C.R.S.).
  - (c) 'Entertainer' means an individual who receives compensation to act, entertain, or inform (e.g., speaker or lecturer) at one or more discrete events in Colorado. This includes, but is not limited to, actors, bands, singers, orchestras, dancers, comedians, speakers, lecturers and similar performers.
  - (d) 'Member' means a partner, member, or shareholder of a Pass-through entity as defined in subparagraph (2)(e), below.
  - (e) 'Pass-through entity' means a partnership, limited partnership, limited liability partnership, a limited liability company that is treated as a partnership for Colorado tax purposes or a trust that is not taxed at the entity level (e.g., a grantor-type trust).
  - (f) 'Nexus' means the Nonresident's presence in Colorado, whether by being personally present in Colorado or being present in Colorado through agents or representatives, including through membership in a Pass-through entity or in a series of Pass-through entities described in paragraph (3)(c), below, for the purpose of direct or indirect financial profit, gain, benefit or advantage. Once nexus has been established, that nexus will continue for as long as the person continues to receive income from sources in Colorado that are related to such presence.
- (3) **Common Types of Income Derived from Sources Within Colorado.** A Nonresident's income derived from a source within Colorado is subject to Colorado income tax. The source of income refers to the location where income is earned and not to the location of the payor or to the residency of the taxpayer. § 39-22-109, C.R.S., lists several types of income that are conclusively presumed to be Colorado-source income, but it is not an exclusive list of Colorado-source income. Colorado-source income includes any income derived from sources within Colorado including, but not limited to:
- (a) *Ownership of Real or Tangible Personal Property.* Income derived from any ownership interest in real or tangible personal property located in Colorado (e.g., leases and licenses) is Colorado-source income, regardless of whether the Nonresident carries on a Business within Colorado and regardless of the place where the sale of such property is consummated. The following are examples of Colorado-source income.
    - (i) Rent and royalty income earned from real or tangible personal property located in Colorado is Colorado-source income.
    - (ii) Any gain or loss realized from the sale of real property located in Colorado is Colorado-source income. Deferred recognition of a gain (or loss) from the sale or exchange of real property located in Colorado remains Colorado-source income when such gain (or loss) is finally recognized. These types of transactions include installment sales, exchanges or transfers.

- (A) Example: A Nonresident owns real property in Colorado and makes an I.R.C. § 1031 exchange of the Colorado property for real property located in Texas. At the time of the exchange, the property had appreciated in value. In the following year, the Nonresident sells the Texas property. That portion of the gain attributable to the appreciation in value of the Colorado property is Colorado-source income even though the income was not recognized until the Texas property was sold. The Nonresident continues to have Colorado Nexus as long as the gain is deferred.
- (iii) With respect to tangible personal property that appreciates in value while located in Colorado but is removed from Colorado for purposes of selling such property, the gain from the sale of such property is Colorado-source income.
  - (A) Example: A Nonresident owns a valuable painting that is displayed in her vacation home in Colorado. The painting significantly appreciates in value while located in Colorado. The Nonresident moves the painting to Nevada and immediately sells the painting for significant gain. The gain is Colorado-source income.
- (iv) Interest income paid on a tax lien certificate for property located in Colorado is Colorado-source income. Any other interest income derived from the ownership of real or tangible personal property located in Colorado is also Colorado-source income. However, interest income from a loan secured by real or tangible property located in Colorado is not Colorado-source income.
- (v) Interest income from an installment sale of real or tangible personal property located in Colorado is Colorado-source income.
- (b) *Business Income.* Income earned by, credited to, derived from, accumulated for, or otherwise effectively attributable to (referred to herein as “derived from”) a Business carried on in Colorado is Colorado-source income. A Nonresident carries on a Business in Colorado if the Nonresident (a) is present in Colorado for Business or (b) directly or indirectly (e.g., through employees, representatives, or as a member of a pass-through entity) maintains, operates or shares in the maintaining or operating of any place in Colorado where Business affairs are conducted. When a Business is carried on within and outside Colorado, only such income that is fairly and equitably attributable to the Business carried on in Colorado is Colorado-source income. The following is a non-exhaustive list of common types of Business income and rules for sourcing such income.
  - (i) *Wage Income.* Income earned as an employee for work performed in Colorado is Colorado-source income, unless a more specific rule below applies. “Performed in Colorado” means the employee is physically in Colorado when the employee performs the work.
    - (A) *Telecommuting.* A Nonresident employee who telecommutes from a location outside of Colorado is not working in Colorado and the employee’s income from such work is not Colorado-source income.

- (B) *Work Days.* An employee's income is apportioned to Colorado based on the number of days the employee works ("Work Day") in Colorado. A Work Day in Colorado means a day in which the majority of the employee's work time for that day is performed in Colorado. Travel time to Colorado is included in calculating the Colorado Work Day hours, but travel time departing from Colorado is not included calculating the Colorado Work Day hours. The denominator of this ratio is the total number of Work Days the employee works in the year. A day is not a Work Day if the work done on such day is *de minimis*. See example (II) below.
- (I) *Example.* Nonresident flies from California to Colorado on Tuesday but does not perform any other Business-related work in either California or Colorado on Tuesday. Nonresident attends a 2 hour Business meeting on Wednesday, returns to California Wednesday afternoon, and works 1 hour in the California office. Travel time to Colorado on Tuesday is considered a Work Day in Colorado because no other work was performed on Tuesday. Wednesday is not a Colorado Work Day because the majority of the work hours are allocated to California (flight to California and office work in California).
- (II) *Example.* Nonresident prolongs his work trip to Colorado through the weekend. While in Colorado on the weekend vacation, the Nonresident checks his or her email and responds to a few non-substantive emails. Such a day is neither a Colorado Work Day nor a Work Day anywhere.
- (ii) *Independent Contractor.* Business income of an independent contractor is sourced depending on whether the income is from a purely personal service or is from other than purely personal service. Purely personal services consist of services performed by an individual independent contractor with only incidental contributions from either other individuals or property. Such services include, but are not limited to, legal, accounting, architecture, or other professional services.
- (A) *Purely Personal Service Income.* If an independent contractor's Business income is earned by performing purely personal services and the purely personal services are performed both within and outside Colorado, the Nonresident shall apportion such income in the ratio of the number of hours the individual performed such services in Colorado to the total number of hours the individual performed such services in the year. But see paragraph (4)(b)(iii) and (iv) if the Nonresident is paid on commission or contingency for purely personal services. Each discrete Business activity shall be separately apportioned. See paragraph (4)(b)(ii)(3) for a discussion of discrete Business activities.
- (I) Hours worked includes non-billable hours.
- (II) Nonresidents independent contractors who work on a single job for entire days may utilize the Work Day rule described in paragraph (3)(b)(i)(B) of this rule.

- (III) Example. An expert witness testifies in trials conducted in Colorado during the year. The total hours the expert witness spent working in Colorado was 26. Therefore, the expert witness must apportion his or her income in the ratio of 26 hours in Colorado over the total number of work hours performed in that year.
- (B) *Other Than Purely Personal Services Income.* If an independent contractor's Business income is earned from activities other than the performance of purely personal services, then the Business income is apportioned under the apportionment rules for corporations set forth in § 39-22-303.6, C.R.S., and the rules thereunder.
  - (I) Example. A Nonresident independent contractor provides oil and gas consulting services and travels to Colorado to provide consultation services to an oil and gas exploration company. Consultant hires Company B to perform laboratory analysis, the results of which are used by consultant to provide consulting services to the exploration company. Consultant is not performing purely personal services because the personal services of Company B are not incidental in value to consultant's services. Consultant uses the apportionment rules set forth in § 39-22-303.6(6), C.R.S., and the rules thereunder.
  - (II) Example. Nonresident independent contractor provides interior design consulting services to homeowners. Designer also sells a substantial amount of tangible personal property to Colorado homeowners. Designer is not performing purely personal services in Colorado because he or she makes sales of tangible personal property that are not incidental in value. The designer will apportion Business income using § 39-22-303.6(5), C.R.S., and the rules thereunder.
- (C) *Discrete Business Activities.* If the Nonresident independent contractor carries on two or more discrete Business activities in Colorado during the year, then the Nonresident independent contractor shall separately apportion the income derived from each activity, unless the income from each cannot be separately determined. The apportionment for each discrete Business activity, if both are purely personal services, is calculated based on the ratio of the number hours the individual performed such services in Colorado to the total number of hours the individual performed such purely personal services everywhere in the tax year. If the Nonresident independent contractor carries on more than one discrete Business activity, and at least one is a purely personal service while at least another is not a purely personal service, the Nonresident independent contractor may choose to either apportion his or her income under 1) § 39-22-303.6, C.R.S., and the rules thereunder or 2) may separately calculate and apportion his or her income on the basis of work hours.

- (l) Example. An independent contractor provides purely personal services in the form of consulting services for two separate companies in the same year. Contractor is paid on an hourly basis and performs these services in and outside Colorado for the first company and performs all consulting services outside Colorado for the second company. Each consulting job is a discrete income producing activity and, in the absence of records demonstrating a more accurate apportionment methodology, the Department will presume that the income for work performed for the first company should be apportioned based on the ratio of the number of work hours the consultant worked in Colorado to the total number of work hours in the tax year for the first company. Income from the second company is a discrete Business activity, the income from such work is entirely allocated to a source outside Colorado, and neither the income nor the work hours for such work is included in the apportionment for the first company.
- (iii) *Commissions.* The amount of Colorado-source income of a Nonresident employee or independent contractor whose compensation is based on commissions is determined by multiplying the gross income earned from all commissions by a fraction, the numerator of which is the amount of sales made within Colorado and the denominator of which is the amount of sales made everywhere. The determination of whether sales are made within Colorado or elsewhere is based upon where the salesperson performs the activities in obtaining the order, not the location of the formal acceptance of the contract. If the Nonresident also earns income other than as commissions (e.g., wages as base pay), then the Nonresident must apportion such non-commission income based on the applicable rule (e.g., wage income apportioned as set forth in paragraph (4)(b)(i), above).
- (iv) *Contingency Fees.* Each contingency fee arrangements is usually viewed as discrete Business activity and the fee is apportioned based on the ratio of the number of hours the Nonresident worked in Colorado on the discrete Business activity to the total number of hours worked everywhere on the discrete Business activity in the year.
- (v) *Board of Directors.* Compensation paid by a corporation for services performed in Colorado by a Nonresident member of the board of directors for director services, including attendance at a board of directors' meeting, is Colorado-source income. If all services are performed in Colorado, the total income for such services is Colorado-source income. If the director's services are performed both within and outside Colorado, then the total income paid for performing such service is multiplied by a fraction, the numerator of which is the number of hours the director is in Colorado performing director services and the denominator of which is the total hours the director provides services in the year. If the Nonresident is a paid member of more than one board of directors in the year, then the ratio is determined separately for each board.
- (vi) *Construction Contractors.* Income of a construction contractor or subcontractor for construction services is sourced to the state where construction service is performed.

- (vii) *Professional Athletes Employed by a Professional Team.* Income earned in Colorado by a Nonresident professional athlete employed by a professional team is Colorado-source income. The compensation received for services rendered as a member of a professional athletic team reported for federal income tax purposes shall be apportioned in the ratio of the number of duty days of professional services performed in Colorado over the total number of duty days during the tax year for which the athlete is required to make his or her services available to the franchise under the terms of his or her contract. The formula applies to active team members, team members on the disabled list, and other persons required to travel with the team and to perform services on behalf of the team, including coaches, managers and trainers. Teams include, but are not limited to, any professional baseball, basketball, football, hockey, soccer, and lacrosse teams.
- (A) Duty days include all days of game, practice or travel that occur on or after the beginning of the team's official pre-season training through the last game in which the team competes. Duty days also include days the Nonresident is required by contract to perform services, but which fall outside this period, such as instructional leagues, "Pro Bowl", or promotional events. In addition, duty days include days during the off-season when a team member undertakes training activities as part of a team-imposed program, but only if performed at the team facilities. Duty days for any member joining a team during the season shall begin on the day such person becomes a member, and for any member leaving a team during the season shall end on the day such person ceases to be a member. When a person switches teams during a taxable year, a separate duty day calculation shall be made for the period such person was with each team. Duty days do not include any try-out or pre-season cut days for which the Nonresident is not under contract with a team or any days for which a member is not compensated and is not rendering services for the team in any manner because such person has been suspended without pay and prohibited from performing any services for the team.
- (B) Each duty day is assigned to the state in which the service is performed. Duty days during which a team member is on the disabled list performing no substantial services for the team will not be apportioned to any particular state but will be included in the total number of duty days for apportionment purposes.
- (C) Travel days are considered duty days and are apportioned as follows: Travel days which include a game, required practice, meeting, or other service are duty days apportioned to the state in which the game, practice, or service is conducted. Travel days not involving a game, practice, or required service will not be apportioned to any particular state, but will be included in the total number of duty days.

- (D) “Compensation received for services rendered as a member of a professional athletic team” means the total compensation received for the official pre-season training period through the last game in which the team competes or is scheduled to compete during the taxable year, plus any additional compensation received for rendering services for the team on a date that is not during the season (e.g., compensation for representing a team at an all-star game) during the taxable year. “Compensation received for services rendered as a member of a professional athletic team” includes, but is not limited to, salaries; wages; guaranteed payments; bonuses except as otherwise provided herein. Bonuses are includable in “compensation received for services rendered as a member of a professional athletic team” if they are earned as a result of play during the season or for playing in championship, playoff or “all-star” games. Bonuses are also includable if paid for signing a contract, unless all of the following conditions are met:
- (I) The bonus is not conditional upon the athlete playing any games, or performing any subsequent services, for the team, or even making the team,
  - (II) The bonus is separate from the payment of salary or any other compensation, and
  - (III) The bonus is nonrefundable.
- (E) Income not subject to apportionment would include strike benefits contract buy-out payments, severance pay, termination pay, relocation payments, and other payments not related to the performance of service.
- (F) *Examples.*
- (I) Player A, a Nonresident individual, is a member of a professional athletic team. His accounting period for federal income tax purposes (and, hence, for Colorado income tax purposes) is the calendar year. Player A's contract with the team requires Player A to report to his team's training camp and to participate in all exhibition, regular season and playoff games. This two-season contract covers an athletic season that begins during calendar year 2013 and ends during calendar year 2014 (for which Player A shall be paid \$400,000) and an athletic season that begins during calendar year 2014 and ends during calendar year 2015 (for which Player A shall be paid \$600,000). Assuming that Player A is paid \$500,000 during 2014 (50% of his salary for the 2013-2014 season and 50% of his salary for the 2014-2015 season), the proportion of such compensation received by Player A for calendar year 2014 that is derived from Colorado sources is that proportion of the \$500,000 Player A had duty days in Colorado during calendar year 2014 to the total duty days for Player A during calendar year 2014.

- (II) Player C, a Nonresident individual, is a member of a professional athletic team. During the season, Player C travels to Colorado to participate in the annual all-star game as a representative of his team. The days that Player C spends in Colorado for travel, practice and the game are considered to be duty days spent in Colorado during the taxable year and are included in duty days for Player C during the taxable year.
- (III) Assume that the facts are the same as in Example (c), except that Player C is not participating in the all-star game and is not rendering services for his team in any manner. Player C is travelling to and attending the game solely as a spectator. If Player C is not required to render services for the team during the all-star game, then the days that Player C spends in Colorado to attend the all-star game are not considered to be duty days spent in Colorado during the taxable year and are not included in duty days for Player C during the taxable year.
- (viii) *Entertainers and Professional Athletes Not Employed by a Professional Team.* Income earned by a Nonresident professional athlete that is not a member of a professional team (e.g., golfers, boxers, wrestlers, racers, etc.) or a Nonresident Entertainer for performances, competitions, or events held within Colorado is Colorado-source income. If the Entertainer or professional athlete is paid an identifiable amount for each event performed in Colorado, that amount is the amount of Colorado-source income. If the Nonresident is not paid a specific amount for the performance or competition in Colorado, then the Department will presume that a fair apportionment of the Nonresident's income for such activity is the Nonresident's gross income derived from the performance(s) or competition(s) multiplied by the ratio of the number of performances or competitions performed in Colorado divided by the total number of performances and competitions performed anywhere in the year.
- (ix) *Stock Options.* Income from the exercise of employee stock options is Colorado-source income if such income is treated as compensation for federal tax purposes and to the extent the employee worked in Colorado during the period the employee was required to work for the employer prior to the exercise of the option.
- (x) *Severance, Paid-out Sick and Vacation Leave, Disability Pay and Unemployment Insurance.* Severance pay, paid-out sick and vacation leave pay, disability pay and unemployment insurance is Colorado-source income to the extent that the income is attributable to employment in Colorado regardless of whether the person is a resident when the benefit is paid.



- (xi) *Deferred Compensation.* Deferred compensation is Colorado-source income to the extent it is income derived from a Business, including employment, carried on in Colorado. Deferred compensation includes all compensation paid or made available to the Nonresident in a tax year following the year in which the compensation was earned. Deferred compensation paid to a Nonresident is not subject to Colorado income tax if 4 U.S.C. § 114 applies to such income (including retirement plans under sections I.R.C. § 401(a), 403(a) and (b), 408(k), 7701(a)(38), 457, railroad retirement benefits (45 U.S.C. § 231(m)), Social Security benefits, or other income that federal law precludes Colorado from subjecting to Colorado income tax, even if the retirement benefits were earned in tax years when the taxpayer was a resident or was a Nonresident earning income from Colorado sources). Deferred compensation is often treated as wage income and therefore paragraph 4(b)(i) above applies in determining whether or not the deferred compensation derived from a Business carried on in Colorado in the year it was earned is Colorado-source income. Similarly, to the extent that deferred income reflects other types of income (e.g., royalties from patents employed in Colorado), then the relevant subparagraph of this rule applies.
- (xii) *Guaranteed Payments.* Guaranteed payments typically are in lieu of wage income and the source of such income is determined in accordance with the rules for sourcing wage income (see paragraph 4(b)(i), above). If the guaranteed payment is not in lieu of wage income, then the guaranteed payment is allocated or apportioned based on the income-generating activity (e.g., a guaranteed payment based on partnership income from the sale of real property located in Colorado is allocated pro rata to the Nonresident partner).
- (xiii) *State Income Tax Refunds.* A state income tax refund is apportioned to Colorado to the extent the underlying or related income is derived from any Business, including employment, carried on by the Nonresident in Colorado.
- (xiv) *Military Personnel and Their Spouses.* Compensation paid by the United States for service in the armed forces of the United States performed by a Nonresident in Colorado is not Colorado-source income. See §§ 39-22-109(2)(b) and 103(8)(b), C.R.S., and Department Rule 39-22-103(8) governing income of military personnel and their spouses.
- (xv) *Payments from a Covenant Not to Compete.* Income derived from a covenant not to compete is Colorado-source income to the extent that it is derived from any Business, including employment, carried on by the Nonresident in Colorado.
- (xvi) *Disaster Relief Workers.* For tax years beginning on or after January 1, 2015, the income earned by a Nonresident disaster relief worker performing work in Colorado during a disaster period is exempt from Colorado income tax. See § 39-22-104(4)(t), C.R.S.
- (c) *Distributive Share of a Member of a Pass-Through Entity.* Income received as part of the Nonresident individual's distributive share of a Pass-through entity income, gain, loss, or deduction is Colorado-source income to the extent that the Pass-through entity determines that income is Colorado-source income pursuant to § 39-22-203(1)(a), C.R.S., and the rules promulgated thereunder. These rules apply to all Members of a Pass-through entity regardless of the type of the entity (e.g., limited liability company, limited liability partnership, limited liability limited partnership) or the status of the Member (e.g., limited or general).
  - (i) A Nonresident has Nexus with Colorado if the Nonresident is a Member of a Pass-through entity doing business in Colorado.

- (ii) *Character of Income.* The activities of a Pass-through entity are attributable to its Members. Therefore, a Member is engaged in a Business in Colorado to the extent the Pass-through entity is engaged in Business in Colorado. The character of the item of income, loss, deduction or credit included in the Member's distributive share is determined as if the item was realized or incurred directly by the Member from the source from which the item was realized by the Pass-through entity or incurred in the same manner as the Pass-through entity. The principles of this paragraph apply in the case of an ownership chain that runs through multiple Pass-through entities.
- (iii) A Nonresident Member of a Pass-through entity deriving income from within Colorado and elsewhere has Colorado-source income as determined by § 39-22-109, C.R.S., and this rule, or as determined by § 39-22-303.6, C.R.S., and the rules thereunder if the Pass-through entity elects under § 39-22-203(1)(a), C.R.S., to apportion its income pursuant to § 39-22-303.6, C.R.S.
- (iv) A Nonresident Member's share of Colorado-source Business income of a Pass-through entity that elects to apportion its income pursuant to § 39-22-303.6, C.R.S. (including the special apportionment rules adopted thereunder), shall be based on the Member's pro rata share of such Pass-through entity's income multiplied by the Pass-through entity's apportionment percentage.
- (v) In the case of a Nonresident who is a Member of a partnership ("first partnership"), which partnership is a partner in another partnership ("second partnership"), the following rules apply:
  - (A) *Unitary Partnerships.* In the case of unitary partnerships, the election made by the second partnership is irrelevant to the treatment of income of the first partnership.
    - (I) If the first partnership makes the election to apportion its income pursuant to § 39-22-303.6, C.R.S. (including the special apportionment rules adopted thereunder), and is unitary with the second partnership as determined by general unitary theory, then the Nonresident member of the first partnership's share of Colorado source income is the Member's pro rata share of the partnership's Colorado-source income as determined by § 39-22-303.6, C.R.S. The first and second partnerships are treated as a single entity for purposes of calculating apportionment under § 39-22-303.6, C.R.S.
    - (II) If the first partnership makes the election not to apportion its income pursuant to § 39-22-303.6, C.R.S., and is unitary with the second partnership, then the partnerships are treated as one partnership and the income is sourced in accordance with this rule.
  - (B) *Non-Unitary Partnerships.* In the case of non-unitary partnerships, the election made by the first partnership is irrelevant to the treatment of income of the second partnership.

- (l) If the two partnerships are non-unitary, then regardless of the election made by the first partnership, the first partnership's pro-rata share of the second partnership's Colorado-source income is directly allocated by the first partnership to Colorado and is not apportioned. The pro-rata share of such income passes through to the Nonresident Member as Colorado-source income.
- (vi) A Nonresident individual may include as a credit for taxes paid on their Nonresident individual income tax return any payment made on their behalf by a partnership or Subchapter S corporation on a composite return. See §§ 39-22-601(2.5) and (5), C.R.S.
- (vii) *Investment Partnerships.* A partnership whose sole activity is to buy and sell securities for its own account is not carrying on a Business in Colorado. Therefore, a Nonresident individual partner of such a partnership is not subject to Colorado income tax on their distributive share of such partnership income. § 39-22-109(2)(a)(V), C.R.S. A partnership that engages in other activities in Colorado that are neither the described activities here nor entirely ancillary to such activities is carrying on Business in Colorado.
- (viii) *Foreign Source Income of an Export Partnership.* See, § 39-22-206, C.R.S., for the exclusion of foreign source income of an export partnership from Colorado taxable income.
- (d) *Estates and Trusts.* The Colorado-source income of a Nonresident's distributive share of estate or trust income shall be determined as follows:
  - (i) A Nonresident individual's share of estate or trust income, gain, loss or deduction is Colorado-source income to the extent the estate or trust derives income from sources described in section (3), above. Estates or trusts that derive income from a Business carried on partly within and without Colorado allocate and apportion their income in accordance with the provisions of this rule.
  - (ii) Income received by a Nonresident fiduciary of a resident trust is sourced to Colorado.
  - (iii) The character of the item of income, loss, deduction or credit included in the Nonresident beneficiary's distributive share is determined as if the item was realized or incurred directly by the beneficiary from the source from which the item was realized by the estate or trust, or incurred in the same manner as the estate or trust.
- (e) *Intangible Personal Property.* Income, including gain, loss, interest, annuity benefits, and dividends earned by a Nonresident is Colorado-source income when the intangible property earning income is employed in a Business in Colorado. The following is a non-exhaustive list of examples of intangible property employed in a Business activity.
  - (i) Patent and copyright (including trademark and other similar intangible interests) royalties constitute Colorado-source income if, in the case of a patent, the patent is employed in production, fabrication, manufacturing, processing or other commercial activity in Colorado and, in the case of copyright, if the printing or publication of the copyrighted material occurs in Colorado.

- (ii) *Sale of Interest in Pass-Through Entity.* Gain or loss from the sale of a Member's active interest in a Pass-through entity is Colorado-source income in the same proportion as the entity's average apportionment factor for the immediately prior three tax years. Gain or loss from the sale of a Member's passive interest in a Pass-through entity is not Colorado-source income. A Member's interest is passive if, in the tax year the interest is sold, the Member did not materially participate in the Business of the Pass-through entity as defined in I.R.C. § 469(h).
    - (iii) Income from the sale of goodwill in a Business is allocated or apportioned in the same percentage as the sale of the Business's other assets.
  - (f) *Subchapter S Corporations.*
    - (i) A Subchapter S corporation's distribution of Colorado-source income to a Nonresident is subject to Colorado income tax. Subchapter S corporation distribution of income attributable to Colorado sources is allocated and apportioned pursuant to § 39-22-303.6, C.R.S., and the rules thereunder.
    - (ii) The character of income of a shareholder of a Subchapter S corporation is not determined as if the item of income or expense is incurred by the shareholder but, rather, is determined as if the income is incurred directly by the Subchapter S corporation. See § 39-22-323(3), C.R.S.
    - (iii) See § 39-22-326, C.R.S., for calculation for an individual who is a part-year Nonresident. A subchapter S corporation must file a tax return that applies apportionment as described in § 39-22-303.6, C.R.S. See § 39-22-601(2.5), C.R.S.
  - (g) *Gambling and Games of Chance.* Income from gambling and games of chance conducted in Colorado, including limited stakes gambling, bingo, raffle, Colorado Lottery, sweepstakes, door prizes and other games of chance, is Colorado-source income regardless of whether the Nonresident was present in Colorado when the gambling or game was conducted or the winnings or prize was awarded or paid.
- (4) **Net Operating Loss Carryforwards.** A net operating loss carryforward is treated as Colorado or non-Colorado sourced based on the source in the year the loss was generated.
- (a) *Example:* Taxpayer is a resident of California in tax year 1 and generates a federal net operating loss of \$80,000 that is carried forward on the federal return. In tax year 2, taxpayer has \$50,000 of California-source income and \$60,000 in Colorado-source income. Pursuant to § 39-22-110, C.R.S., taxpayer calculates the tentative Colorado income tax based on the net income of \$30,000. The numerator of the apportioning ratio that is applied to the tentative Colorado income tax does not include the net operating loss generated in California but the denominator includes the net operating loss. Assuming taxpayer has no "above-the-line" adjustments or adjustments described in §§ 39-22-104(3) and (4), C.R.S., the ratio is  $50/(50+60-80)=5/3$ . In this case, the taxpayer multiplies Colorado tentative tax by a ratio greater than one. See Department Rule 39-22-110 for a discussion of the tentative tax and adjustments to income of part-year residents and full-year nonresidents.

Cross References

1. See 1 CCR 201-2, Rule 39-22-110 for guidance on how a part-year resident or nonresident reports Colorado-source income, and for the treatment of modifications to federal income on the Colorado return.

**Rule 39-22-110. Apportionment of Tax for Part-Year Residents and Nonresident Individuals.**

**Basis and Purpose.** The basis for this rule is § 39-21-112(1), § 39-22-110, § 39-22-104, § 39-22-323, § 39-22-326, § 39-22-504, and § 39-22-518, C.R.S. The purpose of this rule is to clarify the apportionment of Colorado tax for part-year residents and nonresidents. This rule provides guidance for such apportionment regarding the treatment of federal adjustments to gross income, Colorado additions to income, and Colorado subtractions to income.

- (1) **Computation of Colorado Income Tax.** Colorado income tax of a part-year resident individual is the Colorado income tax calculated as if taxpayer was a full-year Colorado resident (referred to as the “tentative” Colorado income tax) multiplied by the ratio of the Colorado modified federal adjusted gross income divided by the modified federal adjusted gross income (“Ratio”). The Ratio can be greater than one hundred percent and cannot be less than zero.
  - (a) *Modified Federal Adjusted Gross Income (Ratio’s denominator).* The modified federal adjusted gross income is the taxpayer’s federal adjusted gross income modified by the following additions and subtractions:
    - (i) *Additions.*
      - (A) All additions set forth in § 39-22-104(3), C.R.S., except as noted, are added to federal adjusted gross income. The state income tax addback (§ 39-22-104(3)(d), C.R.S.), the gross conservation easement deduction addback (§ 39-22-104(3)(g), C.R.S.) (both of which are discussed in paragraph (1)(a)(iii), below), and the addition described in § 39-22-104(3)(c), C.R.S. are not added to federal adjusted gross income.
      - (B) Any net operating loss carryforward or carryback deducted in the calculation of the taxpayer’s federal adjusted gross income that is not allocated to Colorado pursuant to § 39-22-504(1), C.R.S. is added to federal adjusted gross income.
      - (C) Shareholder’s share of Subchapter S corporation’s additions described in § 39-22-323, C.R.S., including the modifications described in §§ 39-22-304 (e.g., foreign tax addition) and 39-22-104, C.R.S. See § 39-22-326, C.R.S. for determining the part-year resident shareholder’s income attributable to Colorado is added to federal adjusted gross income.
    - (ii) *Subtractions.*
      - (A) All subtractions set forth in § 39-22-104(4), C.R.S., except as noted are subtracted from federal adjusted gross income. The charitable contribution subtraction (§ 39-22-104(4)(m), C.R.S.) and marriage penalty subtraction (§ 39-22-104(4)(j), C.R.S.) (both of which are discussed in paragraph (1)(a)(iii), below) are not subtracted from federal adjusted gross income.

- (B) Railroad retirement benefits are subtracted from federal adjusted gross income. See Department Rule 39-22-104(4)(f) Pension and Annuity Subtraction for additional information.
  - (C) Colorado net capital gains (§ 39-22-518, C.R.S.) are subtracted from federal adjusted gross income.
  - (D) Income of a tribal member who lives on a tribal reservation and recognized income on a tribal reservation is subtracted from federal adjusted gross income. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).
  - (E) Foreign source income of an export taxpayer (§ 39-22-206, C.R.S.) is subtracted from federal adjusted gross income.
  - (F) Shareholder's share of Subchapter S corporation's subtractions described in § 39-22-323, C.R.S., including modifications pursuant to §§ 39-22-304 and 39-22-104, C.R.S. are subtracted from federal adjusted gross income. See § 39-22-326, C.R.S. for determining the part-year resident shareholder's income attributable to Colorado.
- (iii) Certain additions and subtractions listed in § 39-22-104, C.R.S. and listed below are not included in the calculation of the Ratio. The Ratio is based on the taxpayer's federal adjusted gross income. Most modifications in subsection § 39-22-104, C.R.S. (listed in subparagraph (1)(a), above) relate to federal tax items that are used to calculate federal adjusted gross income. However, certain other state modifications in subsection 104 (listed below) relate to federal tax items that are "below-the-line" adjustments and are not used to compute federal adjusted income. Therefore, adding or subtracting the modifications listed below to compute the Ratio would be improper. State modifications not included in the calculation of the Ratio are:
- (A) State income tax addback for state income tax claimed as an itemized deduction (§ 39-22-104(3)(d), C.R.S.).
  - (B) Gross conservation easement addback (§ 39-22-104(3)(g), C.R.S.).
  - (C) Charitable contribution subtraction (§ 39-22-104(4)(m), C.R.S.).
  - (D) Marriage penalty subtraction described in § 39-22-104(4)(j), C.R.S.
- (b) *Colorado Modified Federal Adjusted Gross Income (Ratio's Numerator)*. The Colorado modified federal adjusted gross income is that portion of taxpayer's federal gross income that is earned during the period of the year when a taxpayer was a resident plus Colorado-sourced income earned when taxpayer was not a resident (see Department Rule 39-22-109 for rules regarding Colorado-source income of a nonresident), and (1) reduced by federal "above-the-line" adjustments to federal gross income that are allocated or apportioned as set forth in subparagraph (1)(b)(i), below, and (2) modified by those additions and subtractions enumerated in subparagraphs (1)(b)(ii) and (iii), below.
- (i) *Adjustments to Colorado Federal Gross Income*. Federal "above-the-line" adjustments are allocated or apportioned when calculating the Colorado modified federal adjusted gross income in order to fairly reflect that portion of taxpayer's federal adjusted gross income which is subject to Colorado income tax.

- (A) The following “above-the-line” adjustments are allowed in the ratio of taxpayer’s Colorado wages and Colorado self-employment income to taxpayer’s total wages and/or total self-employment income:
  - (I) Educator expenses.
  - (II) IRA deductions.
  - (III) Self-employed SEP, SIMPLE, or other qualified plan deductions.
  - (IV) Business expenses of members of the National Guard and reservists, performing artists and fee-based government officials.
  - (V) Health savings account and Archer medical savings account deductions.
  - (VI) Deductible self-employment taxes.
  - (VII) Self-employment health insurance deductions.
  - (VIII) Contributions to a 501(c)(18)(D) plan.
  - (IX) Contributions to a 403(b) plan by certain chaplains.
- (B) The following “above-the-line” adjustments are allowed in the ratio of taxpayer’s Colorado federal gross income to total federal gross income:
  - (I) Student loan interest deduction.
  - (II) Alimony deduction.
  - (III) Tuition and fees deduction.
  - (IV) Reforestation amortization and expense deduction.
  - (V) Repayment of supplemental unemployment benefits under the Trade Act of 1974 if such benefits were included in taxpayer’s Colorado modified federal adjusted gross income in a prior tax year.
  - (VI) Attorney fees and court costs relating to claims for unlawful discrimination claims.
  - (VII) Attorney fees and court costs relating to an award from the IRS relating to detecting tax law violations.
- (C) Domestic production activities deduction is allowed in the ratio of Colorado qualified production activities income to total federal qualified production activities income.
- (D) Penalties for early withdrawals from a certificate of deposit or other deferred interest account if paid while a Colorado resident.

- (E) Moving expenses for moving into Colorado unless the expenses are incurred when moving out of Colorado and taxpayer becomes a nonresident.
  - (F) Jury duty pay taxpayer paid his or her employer because the employer paid taxpayer's salary while on jury duty for jury service in Colorado.
  - (G) Expenses incurred for rental of personal property while a Colorado resident or for rental property located in Colorado.
- (ii) *Additions to Colorado Adjusted Gross Income.* Additions to Colorado adjusted gross income required by § 39-22-104(3), C.R.S. and subparagraph (1)(a)(i), above, are allocated or apportioned when calculating the Colorado modified federal adjusted gross income in order to fairly reflect that portion of taxpayer's modified federal adjusted gross income which is subject to Colorado income tax.
- (A) The following additions are always allocated to Colorado when calculating Colorado modified federal adjusted gross income:
    - (I) A withdrawal from a Colorado medical savings account described in § 39-22-504.7(3)(b)(II) or (III), C.R.S., when contributions to such account were excluded from taxpayer's Colorado taxable income in a prior tax year (§ 39-22-104(3)(f), C.R.S.).
    - (II) Recapture of prior tuition cost if the contribution or payment into the qualified tuition program was excluded from taxpayer's Colorado taxable income in a prior tax year (§ 39-22-104(4)(i)(III), C.R.S.).
    - (III) Expenses related to a discriminatory club (§ 39-22-104(3)(e)(I), C.R.S.).
  - (B) The following additions are allocated to Colorado when calculating Colorado modified federal adjusted gross income to the extent that the underlying or related income or loss was recognized or incurred while taxpayer was a Colorado resident:
    - (I) Interest income derived from obligations of a state or local government, other than of the State of Colorado or its political subdivisions, and computed as described in § 39-22-104(3)(b), C.R.S.
    - (II) The addition set forth in § 39-22-104(3)(c), C.R.S. (addition of deduction from federal income for certain lump-sum distributions) does not apply in tax years beginning on or after January 1, 1996. See subparagraph (1)(a)(i)(1), above.
  - (C) The following additions are allocated to Colorado when calculating Colorado modified federal adjusted gross income to the extent that the underlying or related expenses or losses were from business activity in Colorado or were incurred while the taxpayer was a Colorado resident:
    - (I) Unauthorized alien labor costs (§ 39-22-104(3)(i), C.R.S.) paid when taxpayer was a resident.



- (II) Net operating loss carried over from a tax year beginning prior to January 1, 1987 (§ 39-22-104(3)(a), C.R.S.).
  - (III) Shareholder's share of Subchapter S corporation's additions pursuant to § 39-22-323, C.R.S. related to business expenses.
- (D) The following addition is never allocated to Colorado when calculating Colorado modified federal adjusted gross income:
  - (I) Net operating loss that is not allocated to Colorado pursuant to § 39-22-504(1), C.R.S.
- (iii) *Subtractions from Colorado Adjusted Gross Income.* Colorado subtractions allowed under § 39-22-104(4), C.R.S. and subparagraph (1)(a)(ii), above, are allocated or apportioned when calculating Colorado modified federal adjusted gross income in order to fairly reflect that portion of the taxpayer's modified federal adjusted gross income that is subject to Colorado income tax.
  - (A) The following subtractions are allocated to Colorado when calculating Colorado modified federal adjusted gross income to the extent the underlying or related income is included in Colorado gross income determined under subparagraph (1)(b), above:
    - (I) State income tax refund or credit for overpayment of income tax imposed by Colorado or any other taxing jurisdiction and received when taxpayer was a Colorado resident (§ 39-22-104(4)(e), C.R.S.).
    - (II) Interest income on obligations of the United States and its possessions (e.g., Guam, Puerto Rico) (§ 39-22-104(4)(a), C.R.S.).
    - (III) Gain or loss resulting from higher Colorado adjusted basis (§ 39-22-104(4)(b), C.R.S.).
    - (IV) Qualifying pension / annuity income (§39-22-104(4)(f), C.R.S.). See Rule 39-22-104(4)(f) for qualifications and limitations.
    - (V) Distributions from qualified tuition program (described in § 39-22-104(4)(i), C.R.S.).
    - (VI) Compensation for exonerated individual (defined in §39-22-104(4)(q), C.R.S.).
    - (VII) Income of a tribal member who lives on tribal reservation and recognized the income on a tribal reservation. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).
    - (VIII) Railroad retirement benefits. (See § 39-22-104(4)(f), C.R.S. and Department Rule 39-22-104(4)(f) for qualifications and limitations.)
    - (IX) Qualified Colorado net capital gains (§ 39-22-518, C.R.S.).

- (X) Contributions by employees to the Public Employee Retirement Association contributions made between and including calendar year 1984 to 1986 and contributions by employee to the Denver Public School retirement plan made in calendar 1986 that were previously subject to Colorado income tax.
    - (XI) Shareholder's share of Subchapter S corporation's subtractions pursuant to § 39-22-323, C.R.S. related to income.
  - (B) The following subtractions are always allocated to Colorado when calculating Colorado modified federal adjusted gross income:
    - (I) Medical savings account contribution (§ 39-22-104(4)(h), C.R.S.).
    - (II) Wildfire mitigation measures (§ 39-22-104(4)(n), C.R.S.).
    - (III) Employer matching contribution to adult learner individual trust account or savings account (§ 39-22-104(4)(o), C.R.S.).
    - (IV) Grant from military family relief fund (§ 39-22-104(4)(p), C.R.S.).
    - (V) Disallowed expenditure relating to medical and/or recreational marijuana (§ 39-22-104(4)(r) and (s), C.R.S.).
    - (VI) Payments and contributions to a qualified tuition program (described in § 39-22-104(4)(i)(II), C.R.S.).
    - (VII) The subtraction allowed under § 39-22-104(4)(c), C.R.S., in an amount necessary to prevent Colorado taxation of Colorado income or gain that was subject in a prior year to Colorado income tax paid by the taxpayer, by a descendant by whose death the taxpayer acquired the right to receive such income, or by a trust or estate from which the taxpayer receives such income.
  - (C) The following subtraction is allocated to Colorado when calculating Colorado modified federal adjusted gross income to the extent that the underlying or related expenses or losses are from business activity in Colorado or were incurred while the taxpayer was a Colorado resident:
    - (I) Shareholder's share of Subchapter S corporation's subtractions pursuant to § 39-22-323, C.R.S. related to business expenses. See § 39-22-326, C.R.S. for determining the part-year resident shareholder's income attributable to Colorado.
- (2) **Part-Year Partners, Trusts, and Estates.** For application of the allocation and apportionment of the "above-the-line" adjustments described in subparagraph (1)(b)(i), above, and application of the modifications described in subparagraph (1)(b)(ii), above, to distributions from partnerships to a part-year resident individual partner, see §§ 39-22-202 to 206, C.R.S. For modifications relating to the taxable income of part-year resident trusts and estates, see §§ 39-22-108.5 and 401 to 404, C.R.S.

- (3) **Computation of Credit for Taxes Paid to Another State.** A credit will be allowed for income taxes paid another state. See Department Rule 39-22-108 (credit for taxes paid another state), § 39-22-108.5, C.R.S. (dual resident trust income tax), and Department Rule 39-22-109 (Colorado-source income).

Cross Reference(s)

1. See Department Rule 39-22-109 for guidance on what constitutes Colorado-source income.

**Rule 39-22-119. Child Care Expenses Tax Credit.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1) and 39-22-119, C.R.S. The purpose of this rule is to clarify that the child care expenses tax credit must be adjusted if the federal credit on which it is based is adjusted, and to describe the proper apportionment of the credit allowed to part-year Colorado residents.

- (1) The allowable Colorado child care expenses tax credit is equal to a percentage of the federal tax credit allowed for child care expenses. If the federal tax credit a taxpayer claims for child care expenses is disallowed, in whole or in part, or otherwise adjusted, the allowable Colorado child care expenses tax credit shall be adjusted accordingly based on the amount of the federal credit that is allowed.
- (2) **Part-Year Residents.** In the case of a part-year Colorado resident, the allowable child care expenses tax credit shall be apportioned by multiplying the credit otherwise calculated pursuant to section 39-22-119, C.R.S., by the ratio determined under section 39-22-110(1), C.R.S.; except that the ratio for apportioning the child care expenses tax credit may not exceed 100%, even if the ratio determined under section 39-22-110(1), C.R.S., exceeds 100%.
- (a) *Example 1.* Taxpayer A is a part-year Colorado resident in tax year 2020. Their apportionment ratio determined pursuant to section 39-22-110(1), C.R.S., is 60%. Taxpayer A is allowed a credit of \$1,000 on their 2020 federal income tax return for child care expenses. Taxpayer A satisfies the requirements for the child care expenses tax credit pursuant to section 39-22-119, C.R.S. The Colorado child care expenses tax credit allowed to Taxpayer A is calculated first by multiplying the \$1,000 federal credit by 50%, pursuant to section 39-22-119(1.7), C.R.S., and then multiplying the result (\$500) by the 60% apportionment ratio, pursuant to section 39-22-119(4), C.R.S. Taxpayer A is allowed a Colorado child care expenses tax credit of \$300.
- (b) *Example 2.* Taxpayer B is a part-year Colorado resident in tax year 2020. Their apportionment ratio determined pursuant to section 39-22-110(1), C.R.S., is 110%. Taxpayer B is allowed a \$1,000 credit on their 2020 federal income tax for child care expenses. Taxpayer B satisfies the requirements for the child care expenses tax credit pursuant to section 39-22-119, C.R.S. The Colorado child care expenses tax credit allowed to Taxpayer B is calculated first by multiplying the \$1,000 federal credit by 50%, pursuant to section 39-22-119(1.7), C.R.S., and then multiplying the result (\$500) by the 100%, pursuant to section 39-22-119(4), C.R.S., and paragraph (2) of this rule, because the apportionment ratio determined pursuant to section 39-22-110(1), C.R.S., exceeds 100%. Taxpayer B is allowed a Colorado child care expenses tax credit of \$500.

**Rule 39-22-119.5. Low-Income Child Care Expenses Tax Credit.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1) and 39-22-119.5, C.R.S. The purpose of this rule is to describe the proper apportionment of the low-income child care expenses tax credit allowed to part-year Colorado residents.

- (1) In the case of a part-year Colorado resident, the allowable low-income child care expenses tax credit shall be apportioned by multiplying the credit otherwise calculated pursuant to section 39-22-119.5, C.R.S., by the ratio determined under section 39-22-110(1), C.R.S.; except that the ratio for apportioning the low-income child care expenses tax credit may not exceed 100%, even if the ratio determined under section 39-22-110(1), C.R.S., exceeds 100%.
- (a) *Example 1.* Taxpayer A is a part-year Colorado resident in tax year 2020. Their apportionment ratio determined pursuant to section 39-22-110(1), C.R.S., is 60%. Taxpayer A satisfies the requirements for the low-income child care expenses tax credit pursuant to section 39-22-119.5, C.R.S. Taxpayer A's child care expenses in 2020 were \$2,000. The Colorado low-income child care expenses tax credit allowed to Taxpayer A is calculated first by multiplying the \$2,000 in child care expenses by 25%, pursuant to section 39-22-119.5(3)(b), C.R.S., and then multiplying the result (\$500) by the 60% apportionment ratio, pursuant to section 39-22-119.5(6), C.R.S. Taxpayer A is allowed a Colorado low-income child care expenses tax credit of \$300.
- (b) *Example 2.* Taxpayer B is a part-year Colorado resident in tax year 2020. Their apportionment ratio determined pursuant to section 39-22-110(1), C.R.S., is 110%. Taxpayer B satisfies the requirements for the low-income child care expenses tax credit pursuant to section 39-22-119.5, C.R.S. Taxpayer B's child care expenses in 2020 were \$2,000. The Colorado low-income child care expenses tax credit allowed to Taxpayer B is calculated first by multiplying the \$2,000 in child care expenses by 25%, pursuant to section 39-22-119.5(3)(b), C.R.S., and then multiplying the result (\$500) by the 100% apportionment ratio, pursuant to section 39-22-119.5(6), C.R.S., and paragraph (1) of this rule, because the apportionment ratio determined pursuant to section 39-22-110(1), C.R.S., exceeds 100%. Taxpayer B is allowed a Colorado low-income child care expenses tax credit of \$500.

**Rule 39-22-121. Child Care Contribution Credit.**

**Basis and Purpose.** The bases for this rule are § 39-21-112(1) and § 39-22-121, C.R.S. The purpose of this rule is to provide clarification regarding the child care contribution credit and the conditions necessary to qualify for the credit.

- (1) **Computation of the Credit.**
- (a) Any taxpayer that makes a qualifying monetary contribution to promote child care in Colorado may claim an income tax credit of fifty percent of the total value of the qualifying contribution.
- (b) No credit may be claimed for in-kind contributions made in tax years commencing on or after January 1, 2000.
- (2) **Limitation on Amount of Credit that May be Generated.**
- (a) The amount of credit generated for contributions made during any one tax year may not exceed \$100,000 per taxpayer and is further subject to the limitations in this paragraph (2), and in paragraphs (3), and (8). For purposes of this rule, two taxpayers filing a joint return are considered one taxpayer.
- (b) Credits for contributions made to facilities listed in paragraph 5(a)(viii) in tax years beginning on or after January 1, 2013 but before January 1, 2014 shall not be claimed until a tax year commencing on or after January 1, 2014.

- (c) Qualifying contributions made in tax years 2011 and 2012 may only be used beginning in tax year 2013 and after. See paragraph (8) of this rule for information on the calculation of such credit. See § 39-22-121(6.7)(a), C.R.S.
- (3) **Carryforwards.** If the amount of credit generated in one tax year exceeds the amount of tax due, the excess may be carried forward for up to five tax years. A credit carryforward does not restrict additional credits from being generated in future years. Notwithstanding the suspension of the credit in tax years 2011 and 2012, no extension of the five-year carryforward is allowed by the statute.
- (4) **Qualifying Contributions.** In order for a contribution to be a qualifying contribution, it must be one of the following:
  - (a) Monetary contributions made to a qualifying child care facility, as defined in paragraph (5)(a) below, to the extent that the facility utilizes the contribution for child care provided to children who are twelve years of age or younger.
  - (b) Monetary contributions made to a qualifying grandfathered facility or program, as defined in paragraph (7) below, and utilizes the contribution for child care provided to children eighteen years of age or under.
- (5) **Qualifying Child Care Facilities or Programs.**
  - (a) Qualifying contributions to the following child care facilities or programs are eligible for the child care contribution credit. Programs and facilities specified in paragraphs (i) through (viii) qualify only if the programs or facilities are licensed by the Department of Human Services. Programs and facilities specified in paragraphs (ix) through (xiii) qualify only if the facility or program is registered with the Department of Revenue.
    - (i) A child care center as defined in § 26-6-102(5), C.R.S.,
    - (ii) A child placement agency as defined in § 26-6-102(7), C.R.S.,
    - (iii) A family child care home as defined in § 26-6-102(13), C.R.S.,
    - (iv) A foster care home as defined in § 26-6-102(14), C.R.S.,
    - (v) A homeless youth shelter as defined in § 26-6-102(17), C.R.S.,
    - (vi) A residential child care facility as defined in § 26-6-102(33), C.R.S.,
    - (vii) A secure residential treatment center as defined in § 26-6-102(35), C.R.S.,
    - (viii) Any approved facility school as such term is defined in section § 22-2-402(1), C.R.S., that is also affiliated with a licensed or certified hospital in the state and is also a nonprofit organization (see the restriction on a credit for contributions made to such facilities in paragraph 2(b) of this rule),
    - (ix) An unlicensed child care facility that provides child care services similar to those provided by a licensed child care center as defined in § 26-6-102(5), C.R.S. This includes child care provided for the whole or part of a day. The program must provide for the care of five or more children who are not related to the owner, operator, or manager. This does not include;

- (A) facilities or programs that provide services identical or similar to day treatment centers, guest child care facilities, family child care homes, foster care homes, homeless youth shelters, medical foster care, residential care facilities, secure residential treatment centers, specialized group facilities, or therapeutic foster care,
- (B) facilities or programs that qualify for the enterprise zone administrator credit, or
- (C) school programs maintained during regular school hours including kindergartens;
  - (I) maintained in connection with a public, private, or parochial elementary school system of at least six grades, or
  - (II) operated as a component of a school district's preschool program operated pursuant to article 28 of title 22, C.R.S.,
- (x) A grant or loan program for a parent or parents in Colorado requiring financial assistance for child care,
- (xi) A training program for child care providers in Colorado,
- (xii) An information dissemination program in Colorado to provide information and referral services to assist a parent or parents in obtaining child care,
- (xiii) A grandfathered child care facility or program as defined in paragraph (7) below.

**(6) Registration of Unlicensed Facilities or Programs.**

- (a) Facilities or programs that are licensed by the Department of Human Services as a child care facility or program do not need to separately register with the Department of Revenue. However, unlicensed facilities or programs must register with the Department of Revenue to be a qualified facility or program for the purposes of this credit. The application for registration must include:
  - (i) An explanation why they are a qualified facility or program,
  - (ii) An explanation why licensing with the Department of Human Services is not required,
  - (iii) Brochures, newspaper articles, community publications and other documentation describing the facility or program.
- (b) Applicants for registration, either pursuant to this paragraph (6) or (7) below, whose application has been denied in whole or in part, may appeal the denial by filing a request for hearing before the Executive Director pursuant to the Colorado Administrative Procedures Act (§ 24-4-104, C.R.S.) and not pursuant to § 39-21-103, C.R.S.

**(7) Grandfathered Facilities or Programs.**

- (a) A grandfathered child care program is considered a qualifying facility or program on or after March 9, 2004 if the facility or program:

- (i) Received contributions prior to January 1, 2004 for which a child care contribution credit was properly allowed and claimed,
    - (ii) No longer qualifies for the credit under the new rules because the program no longer meets the qualifications of the law and/or some or all children cared for in the program are age thirteen through eighteen,
    - (iii) Has applied for eligibility with the Department of Revenue and been approved to continue to accept contributions that qualify for the credit.
  - (b) The grandfather application must include:
    - (i) Documentation proving the program qualified for the credit under the law as it existed prior to March 9, 2004,
    - (ii) Documentation regarding the children age thirteen through eighteen that were assisted by contributions received in 2003 or prior, and
    - (iii) A list of taxpayers who claimed the credit in tax year 2003 or prior.
- (8) **Limitation to the Credit for Tax Years 2013 and 2014.**
- (a) For tax years beginning on or after January 1, 2013 but prior to January 1, 2014 (tax year 2013), the maximum credit that can be used to offset tax is limited to 50% of the total of the carryforward credits from 2012 and any credit generated by contributions made during 2013. Any unused credits must be carried forward to tax year 2014.
  - (b) For tax years beginning on or after January 1, 2014 but prior to January 1, 2015 (tax year 2014), the maximum credit that can be used to offset tax is limited to 75% of the total of the carryforward credits from 2013 and any credit generated by contributions made during 2014. Any unused credits must be carried forward to tax year 2015.
  - (c) There is no similar limitation to the percentage of the credit that can be used in tax year 2015 or later.
- (9) **Exceptions.** Contributions will not qualify for this credit if any of the following apply:
- (a) The contribution is made to a child care facility or program in which the taxpayer or a person related to the taxpayer has a financial interest.
    - (i) A "person related to the taxpayer" means a person connected with another person by blood or marriage. The term also includes:
      - (A) a corporation, partnership, limited liability company, trust or association controlled by the taxpayer;
      - (B) an individual, corporation, limited liability company, partnership, trust or association under the control of the taxpayer; or
      - (C) a corporation, limited liability company, partnership, trust, or association controlled by an individual, corporation, limited liability company, partnership, trust, or association under the control of the taxpayer.

- (b) The contribution is made to a for-profit business, unless the contribution is directly used for the acquisition or improvement of facilities, equipment, or services, including the improvement of staff salaries, staff training, or the quality of child care.
- (c) The contribution is not directly related to promoting child care in Colorado as defined in this rule.
- (d) The contribution is made in a tax year commencing after December 31, 2024.
- (e) The donor receives consideration from the donee facility or program facility or program in exchange for the contribution. If this is the case, a sale occurs rather than a contribution. However, this will not restrict a company from contributing to a child care facility and claiming a credit based on that contribution if the employees of the company receive a benefit in the form of discounted child care, assuming that the employer has no financial interest in the child care facility.

**(10) Contributions Split Between Qualified and Nonqualified Purposes.**

- (a) Donee facilities or programs may accept contributions that are used in part for qualified child care purposes but are also used, in part, for nonqualified purposes. Examples include:
  - (i) A child care facility that cares for children both 12 and under and 13 and over,
  - (ii) A church that uses part of the contribution to fund its child care facility and part to fund other charitable functions,
  - (iii) Contributions to a community center construction project where a child care facility is only part of the overall project.
- (b) The donee facility or program must allocate the portion of a contribution that qualifies for the child care contribution credit for the donor. This allocation must be done in a reasonable manner based on the facts of the situation. Examples of methods that can be used to allocate the contribution include:
  - (i) A child care facility that cares for children of various ages, some of which are 13 or older who do not qualify for the credit.
    - (A) The child care facility can compute the percentage of children in its care that qualify for the credit. This percentage can be used to allocate contributions that are made to the facility.
    - (B) The child care facility can document the expenses incurred in caring for children who are 12 and younger versus children who are 13 and older. The contribution would be allocated using this percentage. This method requires extensive supporting documentation.
  - (ii) A facility or program that operates several different programs, not all of which qualify for the credit.
    - (A) The expenses of the various programs must be accounted for and contributions can be directly allocated to the qualified programs.
    - (B) The contribution can be allocated on a percentage basis utilizing total expense figures for the entire facility.



- (iii) The construction of a community center, which includes a child care facility.
  - (A) A percentage of area method can be utilized if this provides an equitable calculation of the credit (i.e. 30% of the floor space is for the child care facility so 30% of the costs are allocated to the child care facility).
  - (B) If construction costs vary greatly between the child care area of the building and other areas, a more equitable allocation of the contribution would be achieved by determining the difference between the cost of the facility with and without the child care facility. That difference can be used to determine the percentage of costs to allocate to the child care facility.
  - (C) If construction costs are reasonably allocated using the method in paragraph (1), above, but the costs of equipping the child care facility varies significantly from other areas of the building, a hybrid method of allocating contributions can be used. Construction costs can be allocated using a percentage of area method with equipment costs directly allocated. These factors could then be combined into one overall percentage to be used in allocating the contributions.
- (iv) If the methods above do not equitably allocate the contribution to the child care facility or program, a written request to the Department of Revenue may be made to obtain permission to use an alternate method of allocation.
- (c) If contributions are accepted as earmarked for only the child care facility despite the existence of nonqualified programs, the full contribution will qualify for the 50% credit. The facility must have accounting procedures in place to verify that those contributions are indeed utilized 100% for the child care function and no funds are utilized for nonqualified purposes. Any excess funds left over at the end of the year must be carried forward for eligible expenses in the next year. Accounting procedures must be in place to track and document this allocation process. A separate fund cannot be arbitrarily set up to accept contributions for the child care facility while funds from other sources (such as federal or state funds, charitable organizations, nonresident donors) are used to pay other expenses that would not qualify for the credit.
- (11) **Documentation.** Any contribution must be supported by a signed statement from the donee child care facility or program and furnished to the donor.
  - (a) The statement must state the amount of the monetary contribution.
  - (b) The statement must list the name and Department of Human Service's license number, if applicable, of the eligible facility or program, or the name and Department of Revenue registration number of a pre-registered facility or program that qualifies for the credit.
  - (c) The statement must include a detailed description of the eligible purpose(s) for which the contribution will be used and that the contribution will be utilized one-hundred percent for purposes directly related to promoting child care.

- (d) If the contribution is not being utilized one-hundred percent for purposes directly related to promoting child care, the statement must clearly state the portion of the contribution that qualifies for the credit computation. It will be the responsibility of the donee facility or program to prove that the percentage of the contribution reported as utilized for purposes directly related to promoting child care is accurate and no portion has been expended on any other expense or purpose. Example: A contribution of \$1,000 is made to a qualifying child care facility. Seventy percent of the contribution is expended on qualifying purposes and the other thirty percent is expended on unrelated overhead expenses of the organization. The statement must clearly state that only \$700 of the contribution is eligible for calculating the fifty percent credit.
  - (e) The donor must provide the statement to the Department of Revenue with an income tax return filed on a paper form. In the case of an income tax return filed electronically, the certification must be provided to the Department of Revenue upon request with all information specified by the Department provided.
- (12) **Investment Funds.** Money donated to a qualified facility or program may be invested by that facility or program in an account that provides future payments to the facility or program. The interest and the principal, when removed from the account in any future year, must be utilized 100% for qualifying child care purposes in order for the original contribution to qualify for the credit.

**Rule 39-22-123.5. Earned Income Tax Credit.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-21-113, 39-22-123, and 39-22-123.5, C.R.S. The purpose of this rule is to clarify the availability and calculation of the earned income tax credit.

- (1) The Colorado earned income tax credit is allowed:
  - (a) under section 39-22-123, C.R.S., for tax years commencing during 1999, 2000, 2001, and 2015; and
  - (b) under section 39-22-123.5, C.R.S. for income tax years commencing on or after January 1, 2016.
- (2) Under section 39-22-123.5(2), C.R.S., the allowable Colorado earned income tax credit is equal to a percentage of the allowed federal earned income tax credit. If the federal earned income tax credit a taxpayer claims is disallowed, in whole or in part, or otherwise adjusted, the allowable Colorado earned income tax credit under section 39-22-123.5(2), C.R.S., shall be adjusted accordingly based on the amount of the federal credit that is allowed. However, additional Colorado earned income tax credit may be allowable under sections 39-22-123.5 (2.5) or (2.7), C.R.S.
- (3) In the case of a part-year Colorado resident, the allowable Colorado earned income tax credit shall be apportioned by multiplying the credit otherwise calculated pursuant to section 39-22-123.5, C.R.S., by the ratio determined under section 39-22-110(1), C.R.S.; except that the ratio for apportioning the Colorado earned income tax credit may not exceed 100%, even if the ratio determined under section 39-22-110(1), C.R.S., exceeds 100%.

**Rule 39-22-129. Child Tax Credit.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1) and 39-22-129, C.R.S. The purpose of this rule is to clarify that the child tax credit must be adjusted if the federal credit on which it is based is adjusted, and to describe the proper apportionment of the child tax credit allowed to part-year Colorado residents.

- (1) Under section 39-22-129(3), C.R.S., the allowable Colorado child tax credit is equal to a percentage of the allowed federal child tax credit. If the federal child tax credit a taxpayer claims is disallowed, in whole or in part, or otherwise adjusted, the allowable Colorado child tax credit under section 39-22-129(3), C.R.S., shall be adjusted accordingly based on the amount of the federal credit that is allowed. However, additional Colorado child tax credit may be allowable under section 39-22-129(3.5), C.R.S.
- (2) In the case of a part-year Colorado resident, the allowable child tax credit shall be apportioned by multiplying the credit otherwise calculated pursuant to section 39-22-129, C.R.S., by the ratio determined under section 39-22-110(1), C.R.S.; except that the ratio for apportioning the child tax credit may not exceed 100%, even if the ratio determined under section 39-22-110(1), C.R.S., exceeds 100%.

**Rule 39-22-301(1). Doing Business in Colorado.**

- (1) A corporation is doing business in Colorado for income tax purposes whenever the minimum standards of Public Law 86-272 (15 U.S.C. 381) are exceeded, and it has substantial nexus with this state as further provided in this rule.
- (2) **Substantial Nexus Standard.**
  - (a)
    - (i) Business entities that are organized or commercially domiciled in this State have substantial nexus with this State.
    - (ii) Business entities organized outside the State are doing business in this State, have substantial nexus, and are subject to Colorado filing requirements and, if applicable, Colorado income tax imposed by Article 22 of Title 39 when in any tax period the property, payroll or sales of the business in the State, as such property, payroll, and sales are defined below in Subsection (c), exceeds the thresholds set forth in Subsection (b).
  - (b) Substantial nexus is established if any of the following thresholds is exceeded during the tax period:
    - (i) a dollar amount of \$50,000 of property; or
    - (ii) a dollar amount of \$50,000 of payroll; or
    - (iii) a dollar amount of \$500,000 of sales; or
    - (iv) twenty-five percent of total property, total payroll or total sales.

- (c) Property, payroll and sales are defined as follows:
- (i) Property counting toward the threshold is the average value of the taxpayer's real property and tangible personal property owned or rented and used in this State during the tax period. Property owned by the taxpayer is valued at its original cost basis. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the executive director may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.
  - (ii) Payroll counting toward the threshold is the total amount paid by the taxpayer for compensation in this State during the tax period. Compensation means wages, salaries, commissions and any other form of remuneration paid to employees and defined as gross income under Internal Revenue Code § 61. Compensation is paid in this State if (A) the individual's service is performed entirely within the State; (B) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or (C) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.
  - (iii) Sales counting toward the threshold include the total dollar value of the taxpayer's gross receipts from
    - (A) the sale, lease or license of real property located in this State;
    - (B) the lease or license of tangible personal property located in this State;
    - (C) the sale of tangible personal property other than software or digital products received in this State as indicated by receipt at a business location of the seller in this State or by instructions, known to the seller, for delivery or shipment to a purchaser (or to another at the direction of the purchaser) in this State;
    - (D) the sale of software or digital products for primary use by a purchaser known to the seller to be in this state; and
    - (E) the sale, lease or license of services and intangibles for primary use by a purchaser known to the seller to be in this State. If the seller knows that a service or intangible will be used in multiple States because of separate charges levied for, or measured by, the use at different locations, because of other contractual provisions measuring use, or because of other information provided to the seller, the seller shall apportion the receipts according to usage in each State.

- (F) If the seller does not know where a service or intangible will be used or where a tangible (including software or a digital product) will be received, the receipts shall count toward the threshold of the State indicated by an address for the purchaser that is available from the business records of the seller maintained in the ordinary course of business when such use does not constitute bad faith. If that is not known, then the receipts shall count toward the threshold of the State indicated by an address for the purchaser that is obtained during the consummation of the sale, including the address of the purchaser's payment instrument, if no other address is available, when the use of this address does not constitute bad faith.
  - (iv) Notwithstanding the other provisions of this Subsection (c), for a taxpayer subject to the special apportionment methods under Colorado Special Rules for Allocation and Apportionment of Corporate Income, the property, payroll and sales for measuring against the nexus thresholds shall be defined as they were for tax periods prior to 1/1/09 for apportionment purposes under those rules. Such rules are maintained and are available at the Colorado Department of Revenue, Office of Tax Policy Analysis, 1881 Pierce Street, Lakewood, CO 80214. Financial institutions subject to an apportioned income or franchise tax shall determine property, payroll and sales for nexus threshold purposes the same as for apportionment purposes under the Financial Institutions special rule.
  - (v) Pass-through entities, including, but not limited to, partnerships, limited liability companies, S corporations, and trusts, shall determine threshold amounts at the entity level. If property, payroll or sales of an entity in this State exceeds the nexus threshold, members, partners, owners, shareholders or beneficiaries of that pass-through entity are subject to tax on the portion of income earned in this State and passed through to them.
  - (vi) For purposes of the application of this rule and in order to clearly reflect the activity of a taxpayer in the state, the executive director may combine the payroll, property, or sales of two or more entities within a combined group if the payroll, property, or sales of those entities have been manipulated in order to artificially fall below the de minimis thresholds of (2)(b)(i) of this rule.
- (3) A "safe harbor" lease transaction, by itself, does not create nexus for Colorado income tax purposes.

**Rule 39-22-303–1. Tax Periods Subject to SB19-233.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1) and 39-22-303, C.R.S., and Senate Bill 19-233, 2019 Colo. Sess. Laws., ch. 397, sec. 3. The purpose of this rule is to clarify the tax periods to which Senate Bill 19-233 will apply.

Senate Bill 19-233 ("the act") took effect on August 2, 2019 in accordance with section 3 of the act. The provisions of the act apply to tax periods beginning on and after September 1, 2019.

**Rule 39-22-303.6. Distributions and Allocation of Gross Income and Deductions Between or Among C Corporations.**

Even though subsection 39-22-303(6), C.R.S. has been superseded by subsection 39-22-303(11), C.R.S., as a vehicle for requiring combined reporting for affiliated C corporations, subsection 39-22-303(6) is still available for use by the Department of Revenue or by the taxpayer for determining Colorado taxable income by use of methodology such as that contained in section 482 of the Internal Revenue Code in applying "arm's length pricing" procedures.

**Rule 39-22-303(8).**

For tax years beginning on or after Jan. 1, 1986, corporations are not includible in a combined report if eighty percent or more of the property and payroll are assigned to locations outside the United States. The eighty percent threshold is determined by averaging the property and payroll factors. The property and payroll factors shall be determined in accordance with section 24-60-1301, C.R.S. and all rules thereunder.

**Rule 39-22-303(10). Foreign Source Income.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-22-103(5.3), 39-22-103(11), 39-22-303, 39-22-303.6, 39-22-304, and 39-22-305, C.R.S. The purpose of this rule is to provide guidance regarding the definition of foreign source income in section 39-22-303(10), C.R.S., the calculation of the amount of foreign source income considered in the apportionment and allocation of a C corporation's net income, and the requirement to report any changes to that amount.

- (1) **General Rule.** In apportioning and allocating income, a C corporation's foreign source income shall be considered only to the extent provided in section 39-22-303(10), C.R.S., and this rule. In the case of a combined return filed pursuant to section 39-22-303(11), C.R.S., a consolidated return filed pursuant to section 39-22-305, C.R.S., or a combined-consolidated return filed pursuant to sections 39-22-303(11) and -305, C.R.S., the foreign source income exclusion shall be calculated with respect to only the C corporations that are included in such combined, consolidated, or combined-consolidated return and based upon the foreign tax credit or deduction determined with respect to only the group of C corporations included in that combined, consolidated, or combined-consolidated Colorado return. In the case of a separate return filed by a single C corporation, the foreign source income exclusion shall be calculated with respect to only that C corporation and based upon the foreign tax credit or deduction determined with respect to only that C corporation.
- (2) **Foreign Source Income.** For the purpose of this rule, unless context otherwise requires, "foreign source income" means taxable income from sources without the United States, as used in section 862 of the Internal Revenue Code, and includes any taxable income from sources without the United States considered in the calculation of the limit on the federal foreign tax credit pursuant to section 904(a) of the Internal Revenue Code. In accordance with section 862(b) of the Internal Revenue Code, there shall be deducted from gross income from sources without the United States any expenses, losses, and other deductions properly apportioned or allocated thereto, including any deduction allowed pursuant to section 250 of the Internal Revenue Code, and a ratable part of any other expenses, losses, or deductions that cannot be allocated to some item or class of gross income. "Gross income from sources without the United States" includes, but is not limited to:
  - (a) the types of income enumerated in section 862(a) of the Internal Revenue Code;
  - (b) income allocated to sources without the United States pursuant to section 863 of the Internal Revenue Code;

- (c) amounts included in a C corporation's federal taxable income pursuant to section 951 or 951A of the Internal Revenue Code;
  - (d) the amount treated as a dividend received by the C corporation pursuant to section 78 of the Internal Revenue Code; and
  - (e) any item of income treated as arising from sources outside of the United States under treaty obligation of the United States as described in section 245(a)(10), 904(d)(6), or 904(h)(10) of the Internal Revenue Code.
- (3) **Federal Deduction for Foreign Tax.** If, for federal income tax purposes, a C corporation has elected to claim foreign taxes paid or accrued as a deduction, the portion of the C corporation's foreign source income to be subtracted in apportioning and allocating the C corporation's income shall be determined pursuant to section 39-22-303(10), C.R.S., and this paragraph (3). The amount of the deduction allowed pursuant to section 164(a)(3) of the Internal Revenue Code for foreign income taxes paid or accrued shall be subtracted from:
  - (a) the C corporation's net income determined pursuant to section 39-22-304(1), C.R.S., to the extent that such foreign taxes:
    - (i) were added to the C corporation's federal taxable income pursuant to section 39-22-304(2)(a); and
    - (ii) do not exceed the foreign source income otherwise included in the C corporation's federal taxable income upon which such foreign taxes were paid or accrued; and
  - (b) the total receipts of the C corporation in the calculation of the denominator described in section 39-22-303.6(4)(a), C.R.S., to the extent that such foreign taxes do not exceed the foreign source income, otherwise included in the denominator, upon which such foreign taxes were paid or accrued.
- (4) **Federal Credit for Foreign Tax.**
  - (a) If, for federal income tax purposes, a C corporation has elected to claim foreign taxes as a credit, the portion of the C corporation's foreign source income to be excluded in apportioning and allocating the C corporation's income shall be determined pursuant to section 39-22-303(10), C.R.S., and this paragraph (4).
  - (b) *Separate Calculation of Exclusion with Respect to Certain Categories of Income.* In accordance with section 39-22-103(11), C.R.S., the amount that shall be excluded pursuant to section 39-22-303(10)(b), C.R.S., and paragraph (4) of this rule shall be calculated separately with respect to each category of income for which separate calculation of the foreign tax credit is required pursuant to section 245(a)(10), 865(h), 901(j), 904(d), 904(d)(6), or 904(h)(10) of the Internal Revenue Code. The sum of such separately calculated amounts shall be excluded from federal taxable income and total receipts as prescribed by section 39-22-303(10), C.R.S., and this paragraph (4).
  - (c) *Coordination with Sections 39-22-303(8)(b) and 39-22-304(3)(q), C.R.S.*
    - (i) For the purpose of this paragraph (4)(c), a "section 303(8)(b) included entity" means a business entity that is included in a combined or combined-consolidated return pursuant to section 39-22-303(8)(b), C.R.S.

- (ii) In the case of a combined or combined-consolidated return that includes a section 303(8)(b) included entity, the application of section 39-22-303(10), C.R.S., and this rule to that return shall be made as follows:
  - (A) for the purpose of section 39-22-303(10)(b), C.R.S., and this paragraph (4), the federal taxable income of the section 303(8)(b) included entity shall be determined in accordance with sections 39-22-304(1)(b) and 39-22-303(10)(c), C.R.S.;
  - (B) for the purpose of section 39-22-303(10)(b), C.R.S., and paragraph (4)(e)(i)(A) of this rule, the foreign taxes paid or accrued by the section 303(8)(b) included entity shall be determined under the applicable provision of the Internal Revenue Code as if that C corporation was a domestic corporation, as defined in section 7701(a)(3) and (4) of the Internal Revenue Code;
  - (C) any amount that is subtracted from federal taxable income on the combined or combined-consolidated return pursuant to section 39-22-304(3)(q), C.R.S., shall be disregarded in the determination of both foreign source income, for the purpose of section 39-22-303(10), C.R.S., and paragraphs (2) and (4) of this rule, and federal taxable income, for the purpose of section 39-22-303(10)(b), C.R.S., and paragraph (4) of this rule; and
  - (D) any foreign tax deemed paid pursuant to section 960 of the Internal Revenue Code by a U.S. shareholder of a section 303(8)(b) included entity, on any amount included in federal taxable income pursuant to section 951(a) or 951A(a) of the Internal Revenue Code and subtracted pursuant to 39-22-304(3)(q), C.R.S., shall be disregarded for the purpose of section 39-22-303(10)(b), C.R.S., and paragraph (4)(e)(i)(B) of this rule.
- (d) The portion of the C corporation's foreign source income, determined pursuant to this paragraph (4), shall be excluded, subject to the limit prescribed in paragraph (4)(g) of this rule, from:
  - (i) the C corporation's net income determined pursuant to section 39-22-304(1), C.R.S., to the extent such foreign source income is otherwise included in the C corporation's net income; and
  - (ii) the total receipts of the C corporation in the calculation of the denominator described in section 39-22-303.6(4)(a), C.R.S., to the extent such foreign source income is otherwise includible in total receipts. See section 39-22-303.6(4)(b), C.R.S., regarding the exclusion of foreign source income from the numerator described in section 39-22-303.6(4)(a), C.R.S.
- (e) The portion of a C corporation's foreign source income that shall be excluded pursuant to paragraph (4)(d) of this rule shall be determined by first deducting from foreign source income any amount subtracted from federal taxable income pursuant to section 39-22-304(3)(j), C.R.S., and multiplying the remaining foreign source income by a fraction calculated pursuant to this paragraph (4)(e).



- (i) The numerator of the fraction shall be the total of any income taxes, subject to the limitation imposed by section 904(a) of the Internal Revenue Code and any other sections of the Internal Revenue Code imposing limitations on the amount of the federal foreign tax credit allowed, that are:
  - (A) paid or accrued to foreign countries and United States possessions during the tax year by the C corporation pursuant to section 901 of the Internal Revenue Code;
  - (B) deemed paid pursuant to section 960 of the Internal Revenue Code for the tax year; and
  - (C) carried over or carried back to such tax year pursuant to section 904(c) of the Internal Revenue Code.
- (ii) The denominator of the fraction shall be determined by multiplying:
  - (A) the C corporation's effective federal corporate income tax rate, as computed pursuant to section 39-22-303(10)(b)(III), C.R.S., and paragraph (4)(f) of this rule, by:
  - (B) the C corporation's foreign source income without first deducting from such foreign source income any amount subtracted from federal taxable income pursuant to section 39-22-304(3)(j), C.R.S.
- (f) *Effective Federal Corporate Income Tax Rate.* For purposes of paragraph (4)(e)(ii)(A) of this rule, a C corporation's effective federal corporate income tax rate is a fraction.
  - (i) The numerator of the fraction is the C corporation's federal corporate income tax calculated in accordance with section 11(a) and (b) of the Internal Revenue Code, without regard to any credits against tax allowed or claimed by the C corporation.
  - (ii) The denominator of the fraction is the C corporation's federal taxable income as determined pursuant to section 63 of the Internal Revenue Code.
- (g) The amount that shall be excluded from net income pursuant to paragraph (4)(d)(i) of this rule and from total receipts pursuant to paragraph (4)(d)(ii) of this rule shall be limited to the foreign source income otherwise included in net income or total receipts, respectively.
- (h) The amount excluded pursuant to section 39-22-303(10)(b)(III), C.R.S., and paragraph (4) of this rule is the sum of the exclusion amounts calculated separately for each income category described in paragraph (4)(b) of this rule. The calculation of the exclusion amount for each income category pursuant to section 39-22-303(10)(b)(III), C.R.S., and paragraphs (4)(e) and (4)(f) of this rule is represented by the formula in paragraph (4)(h)(i) of this rule with the terms therein defined in paragraph (4)(h)(ii):
  - (i)  $\text{Separate Income Category Exclusion} = (\text{FSI net } \$ 78) \times (\text{FT} / (\text{Fed. Rate} \times \text{FSI}))$
  - (ii) As used in the formula presented in paragraph (4)(h)(i):
    - (A) "Separate Income Category Exclusion" means the amount of foreign source income in the separate income category to be excluded and determined pursuant to paragraph (4)(e) of this rule;

- (B) “FSI net § 78” means foreign source income, as defined in section 39-22-303(10), C.R.S., and paragraph (2) of this rule, in the separate income category, minus the amount treated as a dividend received by the C corporation with respect to such separate category income pursuant to section 78 of the Internal Revenue Code and subtracted from federal taxable income pursuant to section 39-22-304(3)(j), C.R.S., as described in paragraph (4)(e) of this rule;
  - (C) “FT” means the amount of foreign income taxes with respect to the separate income category determined pursuant to paragraph (4)(e)(i) of this rule and the applicable provisions of the Internal Revenue Code;
  - (D) “Fed. Rate” means the effective federal corporate income tax rate determined pursuant to paragraphs (4)(e)(ii)(A) and (4)(f) of this rule; and
  - (E) “FSI” means foreign source income in the separate income category, as defined in section 39-22-303(10), C.R.S., and paragraph (2) of this rule, as described in paragraph (4)(e)(ii)(B) of this rule.
- (i) In any case in which the amount of foreign source income excluded on the C corporation's Colorado return was not properly calculated, as the result of an error in the original calculation, adjustments made in the accounting of the C corporation's foreign source income, or for any other reason, the C corporation shall file an amended return reflecting the corrected calculation of the amount excluded.
- (j) *Redetermination Under Section 905(c) of the Internal Revenue Code.*
- (i) If a redetermination of federal tax is made or required pursuant to section 905(c) of the Internal Revenue Code for a C corporation that excluded any foreign source income pursuant to section 39-22-303(10)(b), C.R.S., and paragraph (4) of this rule in the calculation of its Colorado income tax, that C corporation shall file an amended Colorado return to report any change to the amount of the foreign source income exclusion resulting from any adjustment to the amount of the federal foreign tax credit.
  - (ii) Pursuant to section 39-21-107(2), C.R.S., and section 6501(c)(5) of the Internal Revenue Code, any additional Colorado income tax due as the direct result of a redetermination of federal tax pursuant to section 905(c) of the Internal Revenue Code and a corresponding adjustment to the C corporation's foreign source income exclusion may be assessed and collected at any time, without regard to the provisions of section 6501(a) of the Internal Revenue Code (relating to limitations on assessment and collection). A C corporation may claim a credit or refund in the time provided by section 39-21-108(1), C.R.S., and section 6511(d)(3) of the Internal Revenue Code for any overpayment of Colorado income tax resulting directly from a redetermination of federal tax pursuant to section 905(c) of the Internal Revenue Code and a corresponding adjustment to the C corporation's foreign source income exclusion. This paragraph (4)(j)(ii) shall not apply to any increase or decrease in Colorado income tax that does not result directly from a redetermination of federal tax pursuant to section 905(c) of the Internal Revenue Code and a corresponding adjustment to the C corporation's foreign source income exclusion.

**Rule 39-22-303(11)(a). Combined Returns.**

- (1) In any case, when two or more C corporations which are members of an affiliated group as defined in subsection 39-22-303(12), C.R.S., qualify under the provisions of subsection 39-22-303(11) to file a combined report for Colorado income tax purposes, they must do so.
- (2) Section 39-22-303(11)(a), C.R.S., provides that only those members of an affiliated group of C corporations that satisfy three of the six tests of unity as provided therein for the current tax year and the two preceding tax years may join in the filing of a combined report. Thus, corporations that were not in existence for the two preceding tax years may not join in the filing of a combined report.
- (3) In order to be included in a combined report, an affiliated C corporation must meet at least three of six tests of unity with one or more other affiliated C corporations includable in the combined report. The six tests of unity are discussed in paragraphs a) through f) following:

- (a) The first test of unity is met if 50% or more of the gross operating receipts of one affiliated C corporation is from sales or leases to another affiliated C corporation; or if 50% or more of the cost of goods sold and/or leased by one affiliated C corporation is paid to another affiliated C corporation.

Example: \$85,000 of A corporation's gross operating receipts of \$100,000 are from sales to affiliated corporation B. A and B have met the first test of unity.

Example: \$69,000 of C corporation's total costs of goods sold of \$75,000 are purchases from affiliated corporation D. C and D have met the first test of unity.

- (b) The second test of unity is met if 50% or more of the value of five or more of the listed services utilized by one C corporation during the tax year is furnished by an affiliated C corporation at less than an arm's length charge.

Example: Corporation E furnished the following services to corporation F during the tax year at the charges indicated. As a result, E and F have met the second test of unity.

<b>Service</b>	<b>Total value of services provided to F from all sources</b>	<b>Value of services provided to F by E</b>	<b>Percent provided by E</b>	<b>Charge</b>
Advertising and public relations	\$150,000	\$110,000	73%	\$26,000
Accounting and bookkeeping	\$80,000	\$70,000	87.5%	\$15,000
Legal services	\$50,000	\$35,000	70%	\$30,000
Personnel services	\$120,000	\$120,000	100%	-0-
Sales services	\$235,000	\$141,000	60%	\$135,000
Purchasing services	\$100,000	\$40,000	40%	\$15,000
Research and development services	\$240,000	\$240,000	100%	\$240,000
Insurance procurement and servicing exclusive of employee benefit programs	-0-	\$100,000	0%	-0-
Employee benefit programs	-0-	\$250,000	0%	-0-

- (c) The third test is met if 20% or more of the long-term debt (debt lasting more than one year) is owed to or guaranteed by an affiliated corporation.

Example: Corporation G guarantees 35% of affiliated corporation H's long-term debt and 15% of corporation I's long-term debt. Corporations G and H have met the third test of unity. Corporations G and I have not met the third test of unity.

- (d) The fourth test of unity is met for two affiliated C corporations if one of them substantially uses the patents, trademark, service marks, logo-types, trade secrets, copyrights, or other proprietary materials owned by the other.

- (e) The fifth test of unity is met for both corporations if 50% or more of the board of directors of one affiliated C corporation are members of the board of directors or are corporate officers of another affiliated C corporation.

Example: Parent corporation J has 20 members on its board of directors. Twelve of these members are members of subsidiary corporation K's board of directors and eight are members of subsidiary corporation L's board of directors. Corporations J and K have met the fifth test of unity. Corporations J and L have not.

- (f) The sixth test of unity is met for both corporations if 25% or more of the 20 highest ranking officers of one affiliated C corporation are members of the board of directors or are corporate officers of an affiliated C corporation.

Example: Five of the 20 highest ranking officers of corporation M are either officers or board members of corporation N. Corporations M and N have met the sixth test of unity.

Example: Corporation O has only 13 officers. Three of these officers were officers of P corporation and another one was a P corporation board member. Since over 25% of O corporation's highest officers ( $4/13 = 30.76\%$ ) were either board members or officers of P corporation, corporations O and P have met the sixth test of unity.

- (4) Only those members of an affiliated group of C corporations that have met at least three of the six tests of unity within a given affiliated group of corporations may join in the filing of a combined report.

Example: Parent corporation Q has met 4 tests of unity with subsidiary corporation R, 3 tests of unity with subsidiary S, 2 tests of unity with subsidiary T, and no tests of unity with subsidiary U. R has met two tests with S and 1 test with U. S has met two tests with T and two with U. Since each member of this affiliated group has met at least three tests of unity with other members of the group, a combined report is required to be filed.

Example: Unitary affiliated group Q-U acquired unitary affiliated group V-Z on October 13, 1993. The tests of unity are met between members of group Q-U on the one hand and members of group V-Z on the other but there have not been at least three tests of unity met between the two groups. Group Q-U would be required to file one combined report, and group V-Z would be required to file another combined report. The two groups could elect to file a consolidated return under section 39-22-305, C.R.S., if they so qualify.

**Rule 39-22-303(11)(c). Apportionment of Income on a Combined Report or Consolidated Return.**

**Basis and Purpose.** The bases for this rule are §§ 39-21-112(1), 39-22-301, 39-22-303, 39-22-303.6, 39-22-303.7, 39-22-303.9, and 39-22-305, C.R.S. The purpose of this rule is to clarify how an affiliated group of C corporations apportion their income when included in a combined report or consolidated return.

- (1) When filing a combined report, the affiliated group of C corporations shall file one return, apportioning income under the provisions of §§ 39-22-303.6, 39-22-303.7, or 39-22-303.9, C.R.S., and summing the numerators of each affiliated C corporation doing business in Colorado to derive a single apportionment factor for the combined group.
- (a) In making any calculation pursuant to this rule, including calculations of income, gross receipts, apportionment, or minimal commercial activity determinations, all intercompany transactions shall be eliminated before making any such calculation.
- (b) Example: Corporations A, B, and C are an affiliated group of C corporations meeting three of the six tests in § 39-22-303(11), C.R.S. Corporations A and B are doing business in Colorado under 1 CCR 201-2, Department 39-22-301.1 and C is not. The Colorado receipts factors of the three corporations are as follows:

	Colorado Receipts	Total Receipts
Corporation A	\$5,160,118	\$7,652,492
Corporation B	\$1,642,720	\$80,009,652
Corporation C	\$183,290	\$814,005

The combined receipts factor would be as follows:

Colorado receipts (A+B) = \$6,802,838

Total receipts (A+B+C) = \$88,476,149 (Assumes no intercompany transactions.)

Combined receipts factor (Colorado receipts divided by total receipts) = 7.6889%

The 7.6889% receipts factor is applied to the combined modified federal taxable income (after elimination of intercompany transactions) of the affiliated group to determine the Colorado taxable income to be reported on the combined report.

#### Cross References

1. For additional information on doing business in Colorado, see 1 CCR 201-2, Rule 39-22-301(1).
2. For information on which members of an affiliated group must be included in a combined report see 1 CCR 201-2, Rule 39-22-303(11)(a).
3. For additional information for taxpayers subject to multiple apportionment methods, see 1 CCR 201-2, Rule 39-22-303.6–3.

#### **Rule 39-22-303(11)(f). Domestic C Corporations with De Minimis or No Property and Payroll.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112 and 39-22-303, C.R.S. The purpose of this rule is to explain the manner in which the de minimis standard in section 39-22-303(11)(f), C.R.S., will be uniformly applied to taxpayers.

- (1) For purposes of section 39-22-303(11)(f), C.R.S., “de minimis” means less than \$100,000 of property and payroll, combined. Property and payroll is determined by factoring pursuant to section 24-60-1301, C.R.S. For purposes of section 39-22-303(11)(f), C.R.S., and this rule, section 24-60-1301, C.R.S., establishes the criteria for valuing the amounts of property and payroll counting toward the \$100,000 de minimis threshold set forth in this paragraph (1).
- (2) *Example.* A C corporation has \$70,000 of property and \$0 of payroll as determined by factoring pursuant to section 24-60-1301, C.R.S. That C corporation has de minimis property and payroll for purposes of section 39-22-303(11)(f), C.R.S., and is therefore deemed to satisfy the requirements of section 39-22-303(11)(a), C.R.S.

**Rule 39-22-303(12)(a). An Affiliated Group.**

An affiliated group is formed when more than fifty percent of the voting power of all classes of stock and more than fifty percent of each class of nonvoting stock of each includible corporation, except the common parent corporation, are owned directly by one or more of the other includible corporations, and the common parent corporation owns directly stock possessing more than fifty percent of the voting power of all classes of stock and more than fifty percent of each class of the nonvoting stock of at least one of the other includible corporations.

**Rule 39-22-303.5–1. Business and Nonbusiness Income.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) Section 39-22-303.5(1)(a), C.R.S., defines “business income” as income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. All income that arises from the conduct of trade or business operations of a taxpayer is business income. The income of the taxpayer is business income unless clearly classifiable as nonbusiness income under the standards set forth in this rule, under constitutional law or otherwise as explicitly provided by law.
- (2) The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is “business income” or “nonbusiness income” is the identification of the transactions and activities that are the elements of a particular trade or business. In general all transactions and activities of the taxpayer that are dependent upon or contribute to the operation of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, and will constitute integral parts of, a trade or business. (See 1 CCR 201-2, paragraph (4) of Rule 39-22-303.6–3 concerning the calculation of income when a taxpayer engages in more than one commercial activity.)
- (3) **Business and Nonbusiness Income: Application of Definitions.** The following are rules for determining whether particular income is business or nonbusiness income:
  - (a) *Rents from real and tangible personal property.* Rental income from real and tangible property is business income if the property with respect to which the rental income was received is used in the taxpayer's trade or business or is incidental thereto.

- (b) *Gains or losses from sales of assets.*
    - (i) Gain or loss from the sale, exchange or other disposition of real or tangible or intangible personal property constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business. However, if such property was utilized exclusively for the production of nonbusiness income the gain or loss will constitute nonbusiness income. If the property was used both for the production of business income and nonbusiness income then the gain from the sale is business income. If the property was held for sale after having been used for the production of business income, the gain or loss shall be business income.
    - (ii) Gain or loss from the sale, exchange or other disposition of property shall be included in business income if such property is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Gain or loss from the disposition of property held as reserves or standby facilities or property held as a reserve source of materials shall be included in business income. Gain or loss from the disposition of property or equipment under construction during the tax period shall be included in business income if such property was intended to be used in the regular course of the trade or business of the taxpayer.
  - (c) *Interest.* Interest income is business income where the intangible with respect to which the interest was received arises out of, is used, or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the intangible is related to or incidental to such trade or business operations.
  - (d) *Dividends.* Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is related to or incidental to such trade or business operations.
  - (e) *Patent and copyright royalties.* Patent and copyright royalties are business income where the patent or copyright with respect to which the royalties were received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the patent or copyright is related to or incidental to such trade or business operations.
- (4) **Proration of Deductions.**
- (a) In most cases an allowable deduction of a taxpayer will be applicable only to the business income arising from a particular trade or business or to a particular item of nonbusiness income. In some cases an allowable deduction may be applicable to the business incomes of more than one trade or business and/or to several items of nonbusiness income. In such cases the deduction shall be prorated among such trades or businesses and such items of nonbusiness income in a manner that fairly distributes the deduction among the classes of income to which it is applicable.
  - (b) *Consistency and uniformity in reporting.*
    - (i) *Year-to-Year consistency.* In filing returns with this state, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modifications.

- (ii) *State-to-State uniformity.* If the returns or reports filed by a taxpayer with all states to which the taxpayer reports under this section, Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the application or proration of any deduction then the taxpayer shall disclose in its return to this state the nature and extent of the variance or variances, except where such non-uniformity in reporting is a direct and necessary consequence of differences between the law of this state and the law of another state.

#### **Rule 39-22-303.5-2. Other Definitions.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

In addition to the definitions provided in § 39-22-303.5, C.R.S., the following terms are defined or further defined as follows:

- (1) “Apportionment” refers to the division of business income among states by use of a formula containing apportionment factors.
- (2) “Allocation” refers to the assignment of nonbusiness income to one or more particular states.
- (3) “Business activity” refers to the transactions and activity occurring in the regular course of a particular trade or business of a taxpayer.
- (4) “Sales” – See 1 CCR 201-2, Rule 39-22-303.5-4.

#### **Rule 39-22-303.5-3. Apportionment and Allocation.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) **Apportionment.** If the business activity in respect to any trade or business of a taxpayer occurs both within and without this state, and if by reason of such business activity the taxpayer is taxable in another state, the portion of the net income (or net loss) arising from such trade or business that is derived from sources within this state shall be determined by apportionment in accordance with § 39-22-303.5(4), C.R.S.
- (2) **Allocation.** Unless electing to treat all income as business income (see Rule 39-22-303.5-8), any taxpayer subject to the taxing jurisdiction of this state shall allocate all of its nonbusiness income or loss within or without this state in accordance with § 39-22-303.5(5), C.R.S.
- (3) **Combined Report.** If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in these rules shall preclude the use of a “combined report” whereby the entire business income of such trade or business is apportioned in accordance with § 39-22-303, § 39-22-303.5, or § 39-22-303.7, C.R.S. However, the income in the combined report may be required to be calculated pursuant to 1 CCR 201-2, Rule 39-22-303.6-3 paragraph (4) of and pursuant to any applicable special rules for allocation and apportionment of corporate income.
- (4) **Consistency and Uniformity in Reporting.** In filing returns with this state, if the taxpayer departs from or modifies the manner in which income has been classified as business income or nonbusiness income, except for nonbusiness income with respect to which an election has been made pursuant to § 39-22-303.5(6), C.R.S., in the returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.



(5) **Taxable in Another State.**

- (a) *In general.* Under § 39-22-303.5(3)(b), C.R.S., the taxpayer is subject to the allocation and apportionment provisions of this section if it has income from business activity that is taxable both within and without this state. A taxpayer's income from business activity is taxable without this state if such taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of § 39-22-303.5(3)(c), C.R.S.
- (b) *Applicable tests.* A taxpayer is taxable within another state if it meets either one of two tests: (1) If by reason of business activity in another state the taxpayer is subject to one of the types of taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., namely: a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax, or other similar tax; or (2) If by reason of such business activity another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.
- (c) *Producing nonbusiness income.* A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in such other state pertaining to the production of nonbusiness income or business activities relating to a separate trade or business.
- (d) A taxpayer is "subject to" one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., if it carries on business activities in such state and such state imposes such a tax thereon. Any taxpayer that asserts that it is subject to one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., in another state shall furnish to the executive director upon his or her request evidence to support such assertion. The executive director may request that such evidence include proof that the taxpayer has filed the requisite tax return in such other state and has paid any taxes imposed under the law of such other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., in such other state.
- (e) *Voluntary tax payment.* If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but
  - (i) does not actually engage in business activity in that state, or
  - (ii) does actually engage in some business activity, not sufficient for nexus, and the minimum tax bears no relation to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of § 39-22-303.5(3)(c)(I), C.R.S.
- (f) *Taxability.* The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states that do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in § 39-22-303.5(3)(c)(I), C.R.S., that may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., in another state. By way of illustration and not of limitation, regulatory measures could include fees charged out-of-state cigarette and tobacco vendors for access to the state's market or out-of-state alcoholic beverage vendors to ensure compliance with local liquor laws.

- (g) The second test, that of § 39-22-303.5(3)(c)(II), C.R.S., applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C.A., paragraphs 381-385. In the case of any "state" as defined in § 39-22-303.5(1)(e), C.R.S., other than a state of the United States or political subdivision of such state, the determination of whether such "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applies in that "state". If jurisdiction is otherwise present, such "state" is not considered as without jurisdiction by reason of the provisions of a treaty between that state and the United States.

**Rule 39-22-303.5-4. Calculation of Sales Factor.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) **In General.** Section 39-22-303.5(1)(d), C.R.S., generally defines the term "sales" to mean all gross receipts of the taxpayer not allocated under subsection (5) of section 303.5, C.R.S. Thus, except as otherwise specifically provided, for the purposes of the sales factor of the apportionment formula for each trade or business of the taxpayer, the term "sales" means all gross receipts derived by the taxpayer from transactions and activity in the regular course of such trade or business. The following are rules for determining "sales" in various situations:
  - (a) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products (or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.
  - (b) In the case of cost-plus-fixed fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost, plus the fee.
  - (c) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency, the performance of equipment service contracts, or research and development contracts, "sales" includes the gross receipts from the performance of such services including fees, commissions, and similar items.
  - (d) In the case of a taxpayer engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.
  - (e) In the case of a taxpayer engaged in the assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.
  - (f) In the case of a taxpayer engaged in the sale of intangible personal property, including patents and copyrights, "sales" means the gain therefrom.
  - (g) If a taxpayer derives receipts from the sale of equipment used in its business, such receipts constitute "sales".

- (h) “Safe Harbor” lease income. All income and deductions created by “safe harbor” lease transactions shall be included in the numerator of the Colorado sales factor only if the lessor's commercial domicile is located in Colorado. All income and deductions created by “safe harbor” lease transactions shall not be included in the numerator of the Colorado sales factor if the lessor's commercial domicile is not in Colorado.
- (2) **Exceptions.** In some cases certain gross receipts should be disregarded in determining the sales factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business.
- (3) Colorado destination sales of a corporation not having nexus in Colorado when such corporation is an includable member of an affiliated group of corporations. In the case of a corporation that does not have nexus (is not doing business) in Colorado even though it is an “includable corporation” in an affiliated group of unitary corporations filing a combined Colorado return, the sales of such corporation of property delivered to purchasers in Colorado shall not constitute Colorado sales for purposes of determining the sales factor.
- (4) **Denominator.** The denominator of the sales factor shall include the total sales derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under § 39-22-303.5(7)(b), C.R.S.
- (5) **Numerator.** The numerator of the sales factor shall include sales attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to such gross receipts shall be included regardless of (1) the place where the accounting records are maintained or (2) the location of the contract or other evidence of indebtedness.
- (6) **Consistency and Uniformity in Reporting.**
  - (a) *Numerator/denominator consistency.* In filing returns with this state, the taxpayer must use the same methodology in calculating both the numerator and the denominator of the sales factor.
  - (b) *Year-to-Year consistency.* In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.
  - (c) *State-to-State uniformity.* If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under this section, Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the inclusion or exclusion of gross receipts, then the taxpayer shall disclose in its return to this state the nature and extent of the variance or variances, except where such non-uniformity in reporting is a direct and necessary consequence of differences between the law of this state and the law of another state.

**Rule 39-22-303.5–5. Sales of Tangible Personal Property in this State.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) Gross receipts from sales of tangible personal property are in this state:

- (a) if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other condition of sale; or
  - (b) if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state to which the property is shipped.
- (2) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.
- (3) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.
- (4) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.
- (5) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.
- (6) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.
- (7) If a taxpayer whose salesperson operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:
  - (a) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in this state only if the third party ships the property from this state.
  - (b) If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

**Rule 39-22-303.5–6. Sales Other Than Sales of Tangible Personal Property in This State.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) Gross receipts from services rendered are included in the Colorado sales factor numerator if the service that gave rise to the gross receipt is performed wholly within Colorado. If the service is performed within and without Colorado, and except as otherwise provided by § 39-22-303.7, C.R.S., or applicable special rules for allocation and apportionment of corporate income or other rule, the portion of the gross receipt included in the Colorado numerator is found by multiplying the gross receipt by a fraction, the numerator of which is the direct costs incurred in the performance of that service in Colorado and the denominator of which is the direct costs incurred in the performance of that service everywhere.
  - (a) Direct costs include:
    - (i) wages of employees engaged in the performance of the service;
    - (ii) taxpayer's payments to an agent or independent contractor for the performance of personal services on behalf of the taxpayer which give rise to the particular item of gross receipts;

- (iii) a reasonable measure of the real and tangible-personal property used in the performance of the service. Such reasonable measure could be a market lease rate, depreciation, or other reasonable method. However, the same method must be used consistently from year to year and from state to state.
- (iv) **Services on Behalf of the Taxpayer.** An activity giving rise to gross receipts performed on behalf of a taxpayer by an agent or independent contractor is attributed to this state if such activity giving rise to gross receipts is in this state. In order to be included as a sale of the taxpayer in either the numerator or denominator of the sales factor, the activities described in this subparagraph iv must themselves directly give rise to gross receipts of the taxpayer. By way of illustration and not of limitation, such costs could include, for an accounting firm, amounts paid to an independent contractor accountant whose time or activities directly relate to the accounting of the firm's client and which time or activities directly give rise to a billing item presented to the firm's client. Such costs would not include, for the same firm, amounts paid to an independent contractor accountant whose services consist of accounting services related to the firm's accounting, because these activities do not give rise to gross receipts of the taxpayer.
  - (1) Such activity giving rise to gross receipts is in this state:
    - (A) when the taxpayer can reasonably determine at the time of filing that the activity is actually performed in this state by the agent or independent contractor, but if the activity occurs in more than one state, the location where the activity is actually performed shall be deemed to be not reasonably determinable at the time of filing under this subparagraph (1)(a)(iv)(1)(A);
    - (B) if the taxpayer cannot reasonably determine at the time of filing where the activity is actually performed, when the contract between the taxpayer and the agent or independent contractor indicates it is to be performed in this state and the portion of the taxpayer's payment to the agent or contractor associated with such performance is determinable under the contract;
    - (C) if it cannot be determined where the activity is actually performed and the agent or independent contractor's contract with the taxpayer does not indicate where it is to be performed, when the contract between the taxpayer and the taxpayer's customer indicates it is to be performed in this state and the portion of the taxpayer's payment to the agent or contractor associated with such performance is determinable under the contract; or
    - (D) if it cannot be determined where the activity is actually performed and neither contract indicates where it is to be performed or the portion of the payment associated with such performance, when the domicile of the taxpayer's customer is in this state. If the taxpayer's customer is not an individual, "domicile" means commercial domicile.

- (2) If the location of the activity giving rise to gross receipts by an agent or independent contractor, or the portion of the payment associated with such performance, cannot be determined under subparagraphs (1)(a)(iv)(1)(A) through (1)(a)(iv)(1)(C), or the taxpayer's customer's domicile cannot be determined under subparagraph (1)(a)(iv)(1)(D), or, although determinable, such activity is in a state in which the taxpayer is not taxable, such income producing activity shall be disregarded.
- (b) Direct costs do not include:
  - (i) Overhead costs,
  - (ii) Management costs, unless such management was directly involved in the performance of the service, and
  - (iii) The costs of property not directly used in the performance of the service.
- (2) Rents and royalties from real property located in Colorado are included in the Colorado sales factor numerator.
- (3) Gross proceeds from the sale of real property located in Colorado are included in the Colorado sales factor numerator.
- (4) Interest and dividend income is included in the Colorado sales factor numerator if the taxpayer's commercial domicile for that trade or business is located in Colorado.
- (5) Gain from the sale of intangible property is included in the Colorado sales factor numerator if the taxpayer's commercial domicile for that trade or business is located in Colorado.
- (6) Patent and copyright royalties are included in the Colorado sales factor numerator if:
  - (a) The patent or copyright is utilized by the payer in Colorado, or
  - (b) The patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile for that trade or business is located in Colorado.
- (7) Revenue from the performance of purely personal services is included in the Colorado sales factor numerator if the income producing activity is performed in Colorado.
  - (a) Purely personal services consist of services that are performed by individuals with only incidental contributions either from individuals not directly engaged in the performance of the service or from property.
  - (b) Such services include, but are not limited to:
    - (i) legal, accounting, or other professional services,
    - (ii) entertainment and sporting services.

- (c) In general, the performance of each individual is a separate income producing activity. Where sales are generated by the performance of services of a number of individuals, such sales must be divided among the several individuals performing the services. Such division must be reasonably related to the generation of the revenue. The contributions of individuals whose services are not the direct object of the contract (such as para-professionals and support and administrative staff) are not considered income producing activities. Their contributions are not considered in performing the calculation described in subparagraph (d) of this paragraph (7). If the contributions of such personnel are more than incidental, then the activity is not a purely personal service and would be apportioned pursuant to § 39-22-303.5(4)(c)(I), C.R.S.
- (d) Each income producing activity is performed in Colorado to the extent that the individual is in Colorado when performing the service. Thus, an income producing activity for the performance of purely personal services is in Colorado in the ratio of the time spent in Colorado in performing the service to the total time spent in performing the service. Time spent in performing the service includes the amount of time expended in the performance of a contract or other obligation that gives rise to the revenue. Personal service not directly connected with the performance of the contract or other obligation, as for example time expended in negotiating the contract, is excluded from the computation.

**Rule 39-22-303.5–7. Nonbusiness Income.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

Tangible personal property has a situs in Colorado at the time of the sale if it is physically located in Colorado immediately prior to the sale of the property. The movement of property in anticipation of sale or as part of the sale transaction is not considered in determining its situs immediately prior to the time of sale.

**Rule 39-22-303.5–8. Election to Treat Nonbusiness Income as Business Income.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) Every year, taxpayers have an election to treat all nonbusiness income as business income.
  - (a) The election must be made with the original return on the appropriate departmental form filed prior to the extended due date of the return (the fifteenth day of the tenth month following the close of the tax year). If no departmental form is available, the taxpayer may make the election on its own form in a clear and unequivocal manner filed together with the original return. The taxpayer's form must be clearly marked "Election to treat nonbusiness income as business income for the tax year ending MM, YYYY" (enter the appropriate month and year in which the tax year for which the election is being made ends).
  - (b) Once the election has been filed for the year, it may not be changed, even if the extended due date for the year has not passed.
  - (c) The filing of a return without the election constitutes the non-exercise of the election for that tax year, even if the return is calculated with all income as business income.
  - (d) The failure to file a return prior to the extended due date of the return constitutes the non-exercise of the election for that tax year.

- (2) If the election described in this rule is made for the income tax year, all sales of the taxpayer are included in the denominator and, if appropriate, the numerator of the taxpayer's sales factor.

**Rule 39-22-303.5–9. Alternative Apportionment.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

- (1) Section 39-22-303.5(7)(b), C.R.S., permits a departure from the allocation and apportionment provisions of § 39-22-303.5, C.R.S., (hereinafter "303.5") only in limited and specific cases. Paragraph (7)(b) of 303.5 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in section 303.5.
- (2) In the case of certain industries, the general rules under section 303.5 in respect to the apportionment formula do not set forth appropriate procedures for determining the apportionment factors. Nothing in § 39-22-303.5(7)(b), C.R.S., or in this Rule 39-22-303.5–9 shall preclude the executive director from establishing appropriate procedures under 303.5 and paragraph (7)(a) of 303.5 for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.
- (3) In the case of certain taxpayers, the general rules under §§ 39-22-303 and 303.5, C.R.S. do not set forth appropriate procedures for determining income or the apportionment factors. Nothing in § 39-22-303.5(7)(b), C.R.S., or in this Rule 39-22-303.5–9 shall preclude the executive director from distributing or allocating income and deductions under § 39-22-303(6), C.R.S.
- (4) **Special rules.**
  - (a) Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor.
  - (b) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless such exclusion would materially affect the amount of income apportioned to this state.
  - (c) Where business income from intangible property cannot readily be attributed to any particular income-producing activity of the taxpayer, and such income cannot be assigned to the numerator of the sales factor for any state, such income shall be excluded from the denominator of the sales factor.
  - (d) Where the income-producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income-producing activity occurs in this state, in the numerator of the sales factor as well.

**Rule 39-22-303.5–10. Income from Foreclosures.**

The provisions of this rule apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

A taxpayer who qualifies under the provisions of § 39-22-303.5(8), C.R.S., must file using the rules of that provision (direct allocation). A taxpayer may not make an election pursuant to § 39-22-303.5(6), C.R.S., to treat such income as business income.



**Rule 39-22-303.6–1. Apportionment and Allocation Definitions.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide definitions for the terms used throughout Rules 39-22-303.6–1 through –17. Consistent with the General Assembly’s adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state’s income tax laws to the Multistate Tax Commission’s model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **Definitions.** In addition to the definitions provided in § 39-22-303.6, C.R.S., and unless the context otherwise requires, the following terms, as used throughout Rules 39-22-303.6–1 through –17, are defined or further defined as follows:
- (a) “Allocation” refers to the assignment of nonapportionable income to a particular state.
  - (b) “Apportionment” refers to the division of apportionable income among states by use of a formula containing apportionment factors.
  - (c) “Billing address” means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer’s account as of the time of the transaction and kept in good faith in the normal course of business and not for tax avoidance purposes.
  - (d) “Business activity” refers to the transactions and activities occurring in the regular course of a particular trade or business of a taxpayer and includes the acquisition, employment, development, management, or disposition of property that is or was related to the operation of the taxpayer’s trade or business.
  - (e) “Business customer” means a customer that is a business operating in any form, including a sole proprietorship. Sales to a nonprofit organization, to a trust, to the U.S. Government, to a foreign, state, or local government, or to an agency or instrumentality of that government are treated as sales to a business customer and must be assigned consistent with the rules for those sales.
  - (f) “Code” has the same meaning as “internal revenue code” in section 39-22-103(5.3), C.R.S.
  - (g) “Gross receipts” are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction that produces apportionable income for which the income or loss is recognized under the Internal Revenue Code, and, where the income of foreign entities is included in apportionable income, amounts that would have been recognized under the Internal Revenue Code if the relevant transactions or entities were in the United States. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.
  - (h) “Individual customer” means a customer that is not a business customer.

- (i) “Intangible property” generally means property that is not physical or whose representation by physical means is merely incidental and includes, without limitation, copyrights; patents; trademarks; trade names; brand names; franchises; licenses; trade secrets; trade dress; information; know-how; methods; programs; procedures; systems; formulae; processes; technical data; designs; literary, musical, or artistic compositions; ideas; contract rights including broadcast rights; agreements not to compete; goodwill and going concern value; securities; and, except as otherwise provided in this rule, computer software. Receipts from the sale of intangible property may be excluded from the numerator and denominator of the taxpayer’s receipts factor pursuant to § 39-22-303.6(d)(III), C.R.S., and paragraph (1)(d) of Rule 39-22-303.6–12.
- (j) “Place of order” means the physical location from which a customer places an order for a sale, other than a sale of tangible personal property from a taxpayer, resulting in a contract with the taxpayer.
- (k) “Population” means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.
- (l) “Receipts” means all gross receipts of the taxpayer that are not allocated under § 39-22-303.6, C.R.S., and that are received from transactions and activity in the regular course of the taxpayer’s trade or business. The following are additional rules for determining “receipts” in various situations:
  - (i) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, “receipts” includes all gross receipts from the sale of such goods or products (or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances.
  - (ii) In the case of cost-plus-fixed-fee contracts, such as the operation of a government-owned plant for a fee, “receipts” includes the entire reimbursed cost plus the fee.
  - (iii) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, “receipts” includes the gross receipts from the performance of such services including fees, commissions, and similar items.
  - (iv) In the case of a taxpayer engaged in the sale of equipment used in the taxpayer’s trade or business, where the taxpayer disposes of the equipment under a regular replacement program, “receipts” includes the gross receipts from the sale of this equipment. For example, a truck express company that owns a fleet of trucks, and sells its trucks under a regular replacement program, the gross receipts from the sale of the trucks would be included in “receipts.”
  - (v) In the case of a taxpayer with insubstantial amounts of gross receipts arising from sales in the ordinary course of business, the insubstantial amounts may be excluded from the receipts factor unless their exclusion would materially affect the amount of income apportioned to Colorado.

- (vi) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan, or other disposition of cash or securities, shall be excluded except as otherwise provided in 1 CCR 201-2, Special Rule 7A and Special Rule 9A. Receipts arising from a business activity are receipts from hedging if the primary purpose of engaging in the business activity is to reduce the exposure to risk caused by other business activities. Whether events or transactions not involving cash or securities are hedging transactions shall be determined based on the primary purpose of the taxpayer engaging in the activity giving rise to the receipts, including the acquisition or holding of the underlying asset. Receipts from the holding of cash or securities, or maturity, redemption, sale, exchange, loan, or other disposition of cash or securities are excluded from the definition of receipts whether or not those events or transactions are engaged in for the purpose of hedging. The taxpayer's treatment of the receipts as hedging receipts for accounting or federal tax purposes may serve as indicia of the taxpayer's primary purpose, but shall not be determinative.
- (vii) Receipts, even if apportionable income, are presumed not to include such items as, for example:
  - (A) damages and other amounts received as the result of litigation;
  - (B) property acquired by an agent on behalf of another;
  - (C) tax refunds and other tax benefit recoveries;
  - (D) contributions to capital;
  - (E) income from forgiveness of indebtedness;
  - (F) amounts realized from exchanges of inventory that are not recognized by the Code; or
  - (G) amounts realized as a result of factoring accounts receivable recorded on an accrual basis.
- (viii) Notwithstanding any other provision of law, foreign source income that is included in taxable income is not included as receipts of the taxpayer in Colorado for purposes of apportioning apportionable income under § 39-22-303.6, C.R.S., but may be included in the denominator as otherwise required by § 39-22-303.6, C.R.S., and its accompanying rules.
- (ix) Exclusion of an item from the definition of "receipts" is not determinative of its character as apportionable or nonapportionable income. Certain gross receipts that are "receipts" under the definition are excluded from the "receipts factor" under § 39-22-303.6(6), C.R.S. Nothing in this definition shall be construed to modify, impair, or supersede any provision of § 39-22-303.6(9), C.R.S.
- (m) "Related party" means:
  - (i) a stockholder who is an individual, or a member of the stockholder's family as set forth in section 318 of the Code, if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock;

- (ii) a stockholder, or a stockholder's partnership, limited liability company, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts, and corporations own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; or
- (iii) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code, if the taxpayer owns, directly, indirectly, beneficially, or constructively, at least 50 percent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.
- (n) "Security" means any interest or instrument commonly treated as a security as well as other instruments that are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.
- (o) "State where a contract of sale is principally managed by the customer" means the primary location at which an employee or other representative of a customer serves as the primary contact person for the taxpayer with respect to the day-to-day execution and performance of a contract entered into by the taxpayer with the customer.
- (p) "Trade or business," as used in the definition of apportionable income and in the application of that definition means the unitary business of the taxpayer, part of which is conducted within Colorado.

**Rule 39-22-303.6–2. Apportionable and Nonapportionable Income.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining what is apportionable and nonapportionable income. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** Section 39-22-303.6(1)(a) and (c), C.R.S., requires every item of income be classified either as apportionable income or nonapportionable income. Income for purposes of classification as apportionable or nonapportionable includes gains and losses. Apportionable income is apportioned among jurisdictions by use of a formula. Nonapportionable income is specifically assigned or allocated to one or more specific jurisdictions pursuant to express rules. An item of income is classified as apportionable income if it falls within the definition of apportionable income. An item of income is nonapportionable income only if it does not meet the definitional requirements for being classified as apportionable income.
- (2) **Apportionable Income.**
  - (a) Apportionable income means:
    - (i) any income that would be allocable to Colorado under the United States Constitution, but that is apportioned rather than allocated pursuant to the laws of this state.

- (ii) all income that is apportionable under the United States Constitution and is not allocated under the laws of this state, including:
    - (A) income arising from transactions and activity in the regular course of the taxpayer's trade or business; and
    - (B) income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business.
  - (b) The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, income derived from accounts receivable, operating income, non-operating income, etc., is of no aid in determining whether income is apportionable or nonapportionable income.
- (3) **Principal Tests of Apportionable Income.**
  - (a) *Transactional Test.* Apportionable income includes income arising from transactions and activity in the regular course of the taxpayer's trade or business.
    - (i) If the transaction or activity is in the regular course of the taxpayer's trade or business, part of which trade or business is conducted within Colorado, the resulting income of the transaction or activity is apportionable income for Colorado. Income may be apportionable income even though the actual transaction or activity that gives rise to the income does not occur in Colorado.
    - (ii) For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business and will, therefore, satisfy the transactional test. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. However, even if a taxpayer frequently or customarily engages in investment activities, if those activities are for the taxpayer's mere financial betterment rather than for the operations of the trade or business, such activities do not satisfy the transactional test.
    - (iii) The transactional test includes, but is not limited to, income from sales of:
      - (A) inventory;
      - (B) property held for sale to customers;
      - (C) services which are commonly sold by the trade or business; and
      - (D) property used in the production of apportionable income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

- (b) *Functional Test.* Apportionable income also includes income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business.
  - (i) "Property" includes any direct or indirect interest in, control over, or use of real property, tangible personal property, and intangible property by the taxpayer.
  - (ii) Property that is "related to the operation of the trade or business" refers to property that is or was used to contribute to the production of apportionable income directly or indirectly, without regard to the materiality of the contribution. Property that is held merely for investment purposes is not related to the operation of the trade or business.
  - (iii) "Acquisition, management, employment, development or disposition" refers to a taxpayer's activities in acquiring property, exercising control and dominion over property, and disposing of property, including dispositions by sale, lease, or license. Income arising from the disposition or other utilization of property that was acquired or developed in the course of the taxpayer's trade or business constitutes apportionable income, even if the property was not directly employed in the operation of the taxpayer's trade or business.
  - (iv) *Application of Functional Test.*
    - (A) Income from the disposition or other utilization of property is apportionable if the property is or was related to the operation of the taxpayer's trade or business. This is true even though the transaction or activity from which the income is derived did not occur in the regular course of the taxpayer's trade or business.
    - (B) Income that is derived from isolated sales, leases, assignments, licenses, and other infrequently occurring dispositions, transfers, or transactions involving property, including transactions made in the full or partial liquidation or the winding-up of any portion of the trade or business, is apportionable income if the property is or was related to the taxpayer's trade or business. Income from the licensing of an intangible asset, such as a patent, copyright, trademark, service mark, know-how, trade secrets, or the like that was developed or acquired for use by the taxpayer in its trade or business constitutes apportionable income whether or not the licensing itself constituted the operation of a trade or business, and whether or not the taxpayer remains in the same trade or business from or for which the intangible asset was developed or acquired.
    - (C) Income from intangible property is apportionable income when the intangible property serves an operational function as opposed to solely an investment function.
    - (D) If the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business, then income from that property is apportionable income even if the actual transaction or activity involving the property that gives rise to the income does not occur in Colorado.

- (E) Income from the disposition or other utilization of property that has been withdrawn from use in the taxpayer's trade or business and is instead held solely for unrelated investment purposes is not apportionable. Property that was related to the operation of the taxpayer's trade or business is not considered converted to investment purposes merely because it is placed for sale, but any property which has been withdrawn from use in the taxpayer's trade or business for five years or more is presumed to be held for investment purposes.
  - (F) If, with respect to an item of property, a taxpayer takes a deduction from income that is apportioned to Colorado, it is presumed that the item of property is or was related to the operation of the taxpayer's trade or business. No presumption arises from the absence of any of these actions.
  - (G) Application of the functional test is generally unaffected by the form of the property (e.g., tangible, intangible, real, or personal property). Income arising from an intangible interest, as, for example, corporate stock or other intangible interest in an entity or a group of assets, is apportionable income when the intangible itself, or the property underlying or associated with the intangible, is or was related to the operation of the taxpayer's trade or business. Thus, while apportionment of income derived from transactions involving intangible property may be supported by a finding that the issuer of the intangible property and the taxpayer are engaged in the same trade or business, i.e., the same unitary business, establishment of such a relationship is not the exclusive basis for concluding that the income is subject to apportionment. It is sufficient to support the finding of apportionable income if the holding of the intangible interest served an operational rather than an investment function.
- (v) *Examples.*
- (A) *Example (i):* Taxpayer purchases a chain of 100 retail stores for the purpose of merging those store operations with its existing business. Five of the retail stores are redundant under the taxpayer's business plan and are sold six months after acquisition. Even though the five stores were never integrated into the taxpayer's trade or business, the income is apportionable because the property's acquisition was related to the taxpayer's trade or business.
  - (B) *Example (ii):* Taxpayer is in the business of developing adhesives for industrial and construction uses. In the course of its business, it accidentally creates a weak but non-toxic adhesive and patents the formula, awaiting future applications. Another manufacturer uses the formula to create temporary body tattoos. Taxpayer wins a patent infringement suit against the other manufacturer. The entire damages award, including interest and punitive damages, constitutes apportionable income.

- (C) *Example (iii):* Taxpayer is engaged in the oil refining business and maintains a cash reserve for buying and selling oil on the spot market as conditions warrant. The reserve is held in overnight “repurchase agreement” accounts of U.S. treasuries with a local bank. The interest on those amounts is apportionable income because the reserves are necessary for the taxpayer’s business operations. Over time, the cash in the reserve account grows to the point that it exceeds any reasonably expected requirement for acquisition of oil or other short-term capital needs and is held pending subsequent business investment opportunities. The interest received on the excess amount is nonapportionable income.
- (D) *Example (iv):* A manufacturer decides to sell one of its redundant factories to a real estate developer and transfers the ownership of the factory to a special purpose subsidiary, SaleCo, immediately prior to its sale to the real estate developer. The parties elect to treat the sale as a disposition of assets under section 338(h)(10) of the Code, resulting in SaleCo recognizing a capital gain on the sale. The capital gain is apportionable income. Note: although the gain is apportionable, application of the standard apportionment formula in § 39-22-303.6(6), C.R.S., may not fairly reflect the taxpayer’s business presence in any state, necessitating resort to equitable apportionment pursuant to § 39-22-303.6(9), C.R.S.
- (E) *Example (v):* A manufacturer purchases raw materials to be incorporated into the product it offers for sale. The nature of the raw materials is such that the purchase price is subject to extreme price volatility. In order to protect itself from extreme price increases (or decreases), the manufacturer enters into futures contracts pursuant to which the manufacturer can either purchase a set amount of the raw materials for a fixed price, within a specified time period, or resell the futures contract. Any gain on the sale of the futures contract would be considered apportionable income, regardless of whether the contracts were made or resold in Colorado.
- (F) *Example (vi):* A national retailer produces substantial revenue related to the operation of its trade or business. It invests a large portion of the revenue in fixed income securities that are divided into three categories: (a) short-term securities held pending use of the funds in the taxpayer’s trade or business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market; and (c) long-term securities held as an investment. Interest income on the short-term securities held pending use of the funds in the taxpayer’s trade or business (a) is apportionable income because the funds represent working capital necessary to the operations of the taxpayer’s trade or business. Interest income derived from the other investment securities ((b) and (c)) is not apportionable income as those securities were not held in furtherance of the taxpayer’s trade or business.

- (4) **Nonapportionable Income.** Nonapportionable income means all income other than apportionable income.



- (5) **General Rules for Certain Classes of Income.** The following applies the foregoing principles for purposes of determining whether particular income is apportionable or nonapportionable income. The examples used throughout these rules are illustrative only and are limited to the facts they contain.
- (a) ***Rents from Real and Tangible Personal Property.*** Rental income from real and tangible property is apportionable income if the property with respect to which the rental income was received is or was used in the taxpayer's trade or business.
- (i) ***Example (i):*** The taxpayer operates a multistate car rental business. The income from car rentals is apportionable income.
- (ii) ***Example (ii):*** The taxpayer is engaged in the heavy construction business in which it uses equipment such as cranes, tractors, and earth-moving vehicles. The taxpayer makes short-term leases of the equipment when particular pieces of equipment are not needed on any particular project. The rental income is apportionable income.
- (iii) ***Example (iii):*** The taxpayer operates a multistate chain of men's clothing stores. The taxpayer purchases a five-story office building for use in connection with its trade or business. It uses the street floor as one of its retail stores and the second and third floors for its general corporate headquarters. The remaining two floors are held for future use in the trade or business and are leased to tenants on a short-term basis in the meantime. The rental income is apportionable income.
- (iv) ***Example (iv):*** The taxpayer operates a multistate chain of grocery stores. It purchases as an investment an office building in another state with surplus funds and leases the entire building to others. The net rental income is not apportionable income of the grocery store trade or business. Therefore, the net rental income is nonapportionable income.
- (v) ***Example (v):*** The taxpayer operates a multistate chain of men's clothing stores. The taxpayer invests in a 20-story office building and uses the street floor as one of its retail stores and the second floor for its general corporate headquarters. The remaining 18 floors are leased to others. The rental of the 18 floors is not done in furtherance of but rather is separate from the operation of the taxpayer's trade or business. The net rental income is not apportionable income of the clothing store trade or business. Therefore, the net rental income is nonapportionable income.
- (vi) ***Example (vi):*** The taxpayer constructed a plant for use in its multistate manufacturing business, and 20 years later the plant was closed and put up for sale. The plant was rented for a temporary period from the time it was closed by the taxpayer until it was sold 18 months later. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.
- (b) ***Gains or Losses from Sales of Assets.*** Gain or loss from the sale, exchange, or other disposition of real property or of tangible or intangible personal property constitutes apportionable income if the property, while owned by the taxpayer, was related to the operation of the taxpayer's trade or business.

- (i) *Example (i):* In conducting its multistate manufacturing business, the taxpayer systematically replaces automobiles, machines, and other equipment used in the trade or business. The gains or losses resulting from those sales constitute apportionable income.
  - (ii) *Example (ii):* The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later sold the property at a gain while it was in operation by the taxpayer. The gain is apportionable income.
  - (iii) *Example (iii):* Same as (ii) except that the plant was closed and put up for sale but was not in fact sold until a buyer was found 18 months later. The gain is apportionable income.
  - (iv) *Example (iv):* Same as (ii) except that the plant was rented while being held for sale. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.
- (c) *Interest.* Interest income is apportionable income when the intangible with respect to which the interest was received arose out of, or was created in, the regular course of the taxpayer's trade or business, or the purpose of acquiring and holding the intangible is or was related to the operation of the taxpayer's trade or business.
- (i) *Example (i):* The taxpayer operates a multistate chain of department stores, selling for cash and on credit. Service charges, interest, or time-price differentials and the like are received with respect to installment sales and revolving charge accounts. These amounts are apportionable income.
  - (ii) *Example (ii):* The taxpayer conducts a multistate manufacturing business. During the year, the taxpayer receives a federal income tax refund pertaining to the taxpayer's trade or business and collects a judgment against a debtor of the business. Both the tax refund and the judgment bear interest. The interest income is apportionable income.
  - (iii) *Example (iii):* The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, rain and storm damage, machinery replacement, etc. The funds in those accounts earn interest. Similarly, the taxpayer temporarily invests funds intended for payment of federal, state, and local tax obligations pertaining to the taxpayer's trade or business. The interest income is apportionable income.
  - (iv) *Example (iv):* The taxpayer is engaged in a multistate money order and traveler's check business. In addition to the fees received in connection with the sale of the money orders and traveler's checks, the taxpayer earns interest income by the investment of the funds pending their redemption. The interest income is apportionable income.
  - (v) *Example (v):* The taxpayer is engaged in a multistate manufacturing and selling business. The taxpayer usually has working capital and extra cash totaling \$200,000 that it regularly invests in short-term interest bearing securities. The interest income is apportionable income.

- (vi) *Example (vi):* In January, the taxpayer sold all of the stock of a subsidiary for \$20,000,000. The funds are placed in an interest-bearing account pending a decision by management as to how the funds are to be utilized. The funds are not pledged for use in the business. The interest income for the entire period between the receipt of the funds and their subsequent utilization or distribution to shareholders is nonapportionable income.
- (d) *Dividends.* Dividends are apportionable income when the stock with respect to which the dividends were received arose out of or was acquired in the regular course of the taxpayer's trade or business, or when the purpose for acquiring and holding the stock is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.
  - (i) *Example (i):* The taxpayer operates a multistate chain of stock brokerage houses. During the year, the taxpayer receives dividends on stock that it owns. The dividends are apportionable income.
  - (ii) *Example (ii):* The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are apportionable income.
  - (iii) *Example (iii):* The taxpayer and several unrelated corporations own all of the stock of a corporation whose business consists solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing trade or business. The dividends are apportionable income.
  - (iv) *Example (iv):* The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity, the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are apportionable income.
  - (v) *Example (v):* The taxpayer receives dividends from the stock of its subsidiary or affiliate that acts as the marketing agency for products manufactured by the taxpayer. The dividends are apportionable income.
  - (vi) *Example (vi):* The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonapportionable income.
- (e) *Patent and Copyright Royalties.* Patent and copyright royalties are apportionable income when the patent or copyright with respect to which the royalties were received arose out of or was created in the regular course of the taxpayer's trade or business, or when the acquiring and holding the patent or copyright is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

- (i) *Example (i)*: The taxpayer is engaged in the multistate business of manufacturing and selling industrial chemicals. In connection with that business, the taxpayer obtained patents on certain of its products. The taxpayer licensed the production of the chemicals in foreign countries, in return for which the taxpayer receives royalties. The royalties received by the taxpayer are apportionable income.
  - (ii) *Example (ii)*: The taxpayer is engaged in the music publishing trade or business and holds copyrights on numerous songs. The taxpayer acquires the assets of a smaller publishing company, including music copyrights. These acquired copyrights are thereafter used by the taxpayer in its trade or business. Any royalties received on these copyrights are apportionable income.
- (6) **Proration of Deductions.** In most cases, an allowable deduction of a taxpayer will be applicable to only the apportionable income arising from a particular trade or business or to a particular item of nonapportionable income. In some cases, an allowable deduction may be applicable to the apportionable incomes of more than one trade or business and to items of nonapportionable income. In such cases, the deduction shall be prorated among those trades or businesses and those items of nonapportionable income in a manner that fairly distributes the deduction among the classes of income to which it is applicable.
  - (a) Consistency in Reporting.
    - (i) *Year-to-Year Consistency.* In filing returns with Colorado, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modifications.
    - (ii) *State-to-State Consistency.* If the returns or reports filed by a taxpayer with all states to which the taxpayer reports under § 39-22-303.6, C.R.S., Article IV of the Multistate Tax Compact, or the Uniform Division of Income for Tax Purposes Act are not uniform in the application or proration of any deduction, the taxpayer shall disclose in its Colorado return the nature and extent of the variance.
- (7) Consistency and Uniformity in Reporting.
  - (a) *Year-to-Year Consistency.* In filing returns with Colorado, if the taxpayer departs from or modifies the manner in which income has been classified as apportionable income or nonapportionable income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.
  - (b) *State-to-State Consistency.* If the returns or reports filed by a taxpayer for all states to which the taxpayer reports under § 39-22-303.6, C.R.S., Article IV of the Multistate Tax Compact, or the Uniform Division of Income for Tax Purposes Act are not uniform in the classification of income as apportionable or nonapportionable income, the taxpayer shall disclose in its Colorado return the nature and extent of the variance.

**Rule 39-22-303.6—3. Apportionment and Allocation of Income.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining whether income must be allocated or apportioned. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **Apportionment.** If the business activity with respect to any trade or business of a taxpayer occurs both within and without Colorado, and if by reason of such business activity, the taxpayer is taxable in another state, the portion of the net income (or net loss) arising from such trade or business that is derived from sources within Colorado shall be determined by apportionment in accordance with § 39-22-303.6(4), (5), and (6), C.R.S.
- (2) **Allocation.** Unless electing to treat all income as apportionable income, any taxpayer subject to the taxing jurisdiction of Colorado shall allocate all of its nonapportionable income or loss within or without Colorado in accordance with § 39-22-303.6(7), C.R.S., and the corresponding rules.
- (3) **Combined Report.** If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in § 39-22-303.6, C.R.S., or in these rules, shall preclude the use of a “combined report” whereby the entire apportionable income of such trade or business is apportioned in accordance with §§ 39-22-303, 39-22-303.6, 39-22-303.7, or 39-22-303.9, C.R.S.
- (4) **Taxpayers Subject to Multiple Apportionment Methodologies.** A taxpayer may be engaged in two or more distinctly different commercial activities. Each activity may require the use of different apportionment methodologies described in Rules 39-22-303.6–1 through –17 (regular apportionment of apportionable income) and Special Rules for Allocation and Apportionment 1A through 8A.
  - (a) *Minimal Commercial Activities.*
    - (i) When the sum of the gross receipts of one commercial activity that requires the use of a different apportionment methodology amounts to less than one percent of the taxpayer’s total gross receipts, such commercial activity is conclusively minimal and the taxpayer shall apportion the income from the minimal activity in the same ratio that it apportions its gross receipts pursuant to the receipts factor for the remainder of the commercial activity.
    - (ii) When the sum of the gross receipts of one commercial activity that requires the use of a different apportionment methodology amounts to less than five percent of the taxpayer’s total gross receipts, such commercial activity may be minimal depending on the facts. If such commercial activity is considered minimal, the taxpayer shall apportion the income from the minimal activity in the same ratio that it apportions its gross receipts pursuant to the receipts factor for the remainder of the commercial activity.
  - (b) *Commercial Activities that are Not Minimal.* If multiple activities give rise to gross receipts that are not minimal, the taxpayer shall use the apportionment methodology most applicable to each commercial activity to separately allocate and apportion Colorado income for such commercial activities. The Colorado taxable income for each commercial activity shall be computed on a separate apportionment schedule. Such Colorado taxable incomes shall then be combined and any net operating loss carryforward applied. Any tax and credits shall then be computed on the total Colorado taxable income.

(c) *Examples.*

- (i) *Example (i).* Corporation A and Corporation B are an affiliated group of C corporations that are required to file a combined report. Corporation A engages in trucking and Corporation B engages in retail sales of tangible personal property. Corporation A derives all of its income from sales of transportation services to Corporation B. Corporation A and Corporation B have distinctly different commercial activities; however, Corporation A does not derive income from sources outside its affiliate, Corporation B. Corporation A and Corporation B apportion their taxable income pursuant to § 39-22-303.6 C.R.S., and the rules thereunder because of Corporation B's retail sales. Special Rule 6A, regarding the apportionment of trucking income, is not used to apportion Corporation A's income because all of Corporation A's receipts are excluded from the apportionment calculation as intercompany transactions.
- (ii) *Example (ii).* Same facts as Example (i), except Corporation A derives \$2 million from sales of transportation services to third-parties who are not part of the affiliated group. Corporation B makes \$20 million in sales of its goods to consumers. Total sales of the affiliated group are \$22 million. Corporation A must use Special Rule 6A, prescribing apportionment of income for trucking companies, and Corporation B must apportion its income pursuant to § 39-22-303.6, C.R.S., and the rules thereunder. Corporation A and Corporation B must separately calculate their receipts factors using the appropriate methodologies. Each corporation must also calculate separate taxable income for each commercial activity and use the appropriate receipts factor to calculate Colorado taxable income. The combined group then calculates tax and applies any credits generated.

**Rule 39-22-303.6—4. Taxable in Another State.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining whether a taxpayer is taxable in another state. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** A taxpayer is subject to the allocation and apportionment provisions of § 39-22-303.6, C.R.S., if it has income from business activity that is taxable both within and without Colorado. A taxpayer's income from business activity is taxable without Colorado if the taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of § 39-22-303.6(3)(c), C.R.S.
- (2) **Applicable Tests.** A taxpayer's income is taxable in another state if it meets either one of two tests:
  - (a) by reason of business activity in another state, the taxpayer is subject to one of the types of taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., or
  - (b) by reason of such business activity, another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

- (3) **Producing Nonapportionable Income.** A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in that other state pertaining to the production of nonapportionable income or business activities relating to a separate trade or business.
- (4) **Subject to Tax in Another State.** A taxpayer is “subject to” one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., if it carries on business activities in a state and the state imposes such a tax thereon. Any taxpayer that asserts that it is subject to one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., in another state shall furnish to the Department upon its request evidence to support such assertion. The Department may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., in the other state.
- (a) *Voluntary Tax Payment.* If the taxpayer voluntarily files and pays one or more of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., when not required to do so by the laws of that state, or pays a minimal fee for the qualification, organization, or privilege of doing business in that state, but:
- (i) does not actually engage in business activity in that state, or
  - (ii) engages in some business activity not sufficient for nexus, and
- the minimum tax bears no relationship to the taxpayer's business activity within such state, the taxpayer is not “subject to” one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S.
- (A) *Example:* State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the \$50 minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.
- (b) The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states that do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in § 39-22-303.6(3)(c)(I), C.R.S., that may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is “subject to” one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., in another state.
- (i) *Example (i):* State A requires all nonresident corporations which qualify or register in State A 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 A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not “taxable” in State A.

- (ii) *Example (ii):* Same facts as Example (i) except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is “subject to” the net income tax of State A and is “taxable” in State A.
  - (iii) *Example (iii):* State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of (1) outstanding capital stock, and (2) surplus and undivided profits. The fee or tax base attributable to State B is determined by a three factor apportionment formula. Nonresident Corporation X, which operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is “taxable” in State B.
  - (iv) *Example (iv):* State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.
- (5) **Another State has Jurisdiction to Subject Taxpayer to a Net Income Tax.** The second test, that of § 39-22-303.6(3)(c), C.R.S., applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present when the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C., §§ 381–385. In the case of any “state,” as defined in § 39-22-303.6(1)(e) C.R.S., other than a state of the United States or political subdivision thereof, the determination of whether the “state” has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that “state.” If jurisdiction is otherwise present, that “state” is not considered as without jurisdiction by reason of the provisions of a treaty between that state and the United States.
- (a) *Example:* Corporation X is actively engaged in manufacturing farm equipment in State A and in Foreign Country B. Both State A and Foreign Country B impose a net income tax but Foreign Country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and Foreign Country B.

#### **Rule 39-22-303.6–5. Calculating the Receipts Factor.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** All apportionable income of each trade or business of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in § 39-22-303.6(4), C.R.S.
  - (a) *Denominator.* The denominator of the receipts factor shall include the gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under § 39-22-303.6, C.R.S., and these rules.



- (b) *Numerator.* The numerator of the receipts factor shall include the gross receipts attributable to Colorado and derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under § 39-22-303.6, C.R.S., and these rules.
- (c) *Exceptions.* In some cases, certain gross receipts should be disregarded in determining the receipts factor in order that the apportionment formula will operate fairly to apportion to Colorado the income of the taxpayer's trade or business.
- (d) The receipts factor for an affiliated group of C corporations filing a combined return shall not include receipts from property delivered in Colorado by an includable C corporation that is not doing business in Colorado.
- (e) *Consistency in Reporting.*
  - (i) *Numerator and Denominator Consistency.* In filing returns with Colorado, the taxpayer must use the same methodology in calculating both the numerator and the denominator of the receipts factor.
  - (ii) *Year-to-Year Consistency.* In filing returns with Colorado, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the receipts factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.
  - (iii) *State-to-State Consistency.* If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under § 39-22-303.6, C.R.S., Article IV of the Multistate Tax Compact, or the Uniform Division of Income for Tax Purposes Act are not uniform in the inclusion or exclusion of gross receipts, the taxpayer shall disclose in its return to Colorado the nature and extent of the variance.
- (2) **Mediation.** Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services by the Department and one or more other state taxing authorities, the taxpayer may petition for, and the Department may participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution regulations promulgated by the Multistate Tax Commission from time to time, regardless of whether all the state taxing authorities are members of the Multistate Tax Compact.

#### **Rule 39-22-303.6–6. Sales of Tangible Personal Property in Colorado.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from sales of tangible personal property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** Gross receipts from sales of tangible personal property are in Colorado:
  - (a) if the property is delivered or shipped to a purchaser within Colorado regardless of the f.o.b. point or other condition of sale; or
  - (b) if the property is shipped from an office, store, warehouse, factory, or other place of storage in Colorado and the taxpayer is not taxable in the state to which the property is shipped.

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- (2) Property is delivered or shipped to a purchaser within Colorado if the recipient is located in Colorado, even though the property is ordered from outside Colorado.
- (a) *Example:* The taxpayer, with inventory in State A, sold \$100,000 of its products to a purchaser having branch stores in several states, including Colorado. The order for the purchase was placed by the purchaser's central purchasing department located in State B. \$25,000 of the purchase order was shipped directly to purchaser's branch store in Colorado. The branch store in Colorado is the purchaser within Colorado with respect to \$25,000 of the taxpayer's sales.
- (3) Property is delivered or shipped to a purchaser within Colorado if the shipment terminates in Colorado, even though the property is subsequently transferred by the purchaser to another state.
- (a) *Example:* The taxpayer makes a sale to a purchaser who maintains a central warehouse in Colorado at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of the taxpayer's products shipped to the purchaser's warehouse in Colorado constitute property delivered or shipped to a purchaser within Colorado.
- (4) The term "purchaser within Colorado" shall include the ultimate recipient of the property if the taxpayer, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within Colorado.
- (a) *Example:* A taxpayer sold merchandise to a purchaser in State A. Taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in Colorado pursuant to purchaser's instructions. The sale by the taxpayer is in Colorado.
- (5) When property being shipped by the taxpayer from the state of origin to a consignee in another state is diverted while en route to a purchaser in Colorado, the sales are in Colorado.
- (a) *Example:* The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route, the produce is diverted to the purchaser's place of business in Colorado in which state the taxpayer is subject to tax. The sale by the taxpayer is attributed to Colorado.
- (6) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to Colorado if the property is shipped from an office, store, warehouse, factory, or other place of storage in Colorado.
- (a) *Example:* The taxpayer has its head office and factory in State A. It maintains a branch office and inventory in Colorado. Taxpayer's only activity in State B is the solicitation of orders by a resident salesperson. All orders by the State B salesperson are sent to the branch office in Colorado for approval and are filled by shipment from the inventory in Colorado. Since the taxpayer is immune under Public Law 86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to Colorado, the state from which the merchandise was shipped.
- (7) If a taxpayer whose salesperson operates from an office located in Colorado makes a sale to a purchaser in another state in which the taxpayer is not taxable, and the property is shipped directly by a third party to the purchaser, the following rules apply:
- (a) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

- (b) If the taxpayer is not taxable in the state from which the third party ships the property, then the sale is in Colorado.
- (c) *Example:* The taxpayer in Colorado sold merchandise to a purchaser in State A. Taxpayer is not taxable in State A. Upon direction of the taxpayer, the merchandise was shipped directly to the purchaser by the manufacturer in State B. If the taxpayer is taxable in State B, the sale is in State B. If the taxpayer is not taxable in State B, the sale is in Colorado.

**Rule 39-22-303.6–7. Sales Other Than Sales of Tangible Personal Property in Colorado.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from sales other than sales of tangible personal property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.**

- (a) In general, § 39-22-303.6(6), C.R.S., provides for the inclusion in the numerator of the receipts factor of gross receipts arising from transactions other than sales of tangible personal property
- (b) Receipts, other than receipts described in § 39-22-303.6(5), C.R.S., (from sales of tangible personal property) are in Colorado within the meaning of § 39-22-303.6(6), C.R.S., and Rules 39-22-303.6–7 through –13 if and to the extent that the taxpayer's market for the sales is in Colorado. In general, the provisions in this section establish uniform rules for (1) determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Colorado, (2) reasonably approximating the state or states of assignment when the state or states cannot be determined, (3) excluding receipts from the sale of intangible property from the numerator and denominator of the receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S., and (4) excluding receipts from the denominator of the receipts factor, pursuant to § 39-22-303.6(6)(f), C.R.S., where the state or states of assignment cannot be determined or reasonably approximated.

(2) **General Principles of Application.** In order to satisfy the requirements of Rules 39-22-303.6–7 through –13, a taxpayer's assignment of receipts from sales of other than tangible personal property must be consistent with the following principles:

- (a) A taxpayer shall apply the rules set forth in Rules 39-22-303.6–7 through –13 based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing including, without limitation, the taxpayer's books and records kept in the normal course of business. A taxpayer shall determine its method of assigning receipts in good faith, and apply it such method consistently with respect to similar transactions year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, and shall provide those records to the Department upon request.

- (b) Rules 39-22-303.6–7 through –13 provide various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy, and must continue to do so with each succeeding rule in the hierarchy, where applicable. For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.
- (c) A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the standards set forth in Rules 39-22-303.6–7 through –13, rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

(3) **Rules of Reasonable Approximation.**

- (a) In general, Rules 39-22-303.6–7 through –13 establish uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Colorado. Each rule also sets forth rules of reasonable approximation, which apply if the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation prescribed in Rules 39-22-303.6–7 through –13. In other cases, the applicable rule in Rules 39-22-303.6–7 through –13 permits a taxpayer to reasonably approximate the state or states of assignment using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in Rules 39-22-303.6–7 through –13.
- (b) *Approximation Based Upon Known Sales.* In an instance where, applying the applicable rules set forth in Rule 39-22-303.6–10 (Sale of a Service), a taxpayer can ascertain the state or states of assignment for a substantial portion of its receipts from sales of substantially similar services ("assigned receipts"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales that it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. This rule also applies in the context of licenses and sales of intangible property where the substance of the transaction resembles a sale of goods or services. See paragraph (5) of Rule 39-22-303.6–11 and paragraph (1)(c) of Rule 39-22-303.6–12.
- (c) *Related-Party Transactions.* Where a taxpayer has receipts subject to these Rules 39-22-303.6–7 through –13 from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

(4) **Rules with Respect to Exclusion of Receipts from the Receipts Factor.**

- (a) The receipts factor only includes those amounts defined as receipts under § 39-22-303.6(1)(d), C.R.S., and applicable rules.

- (b) Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S. See *paragraph (1)(d) of Rule 39-22-303.6-12*.
  - (c) In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Rules 39-22-303.6-7 through -13 (including through the use of a method of reasonable approximation, when relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer's receipts factor pursuant to § 39-22-303.6(6)(f), C.R.S., and these rules.
  - (d) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded pursuant to §§ 39-22-303.6(1)(d) and (6), C.R.S., except as provided in 1 CCR 201-2, Special Rule 7A and Special Rule 9A.
- (5) **Changes in Methodology; Department Review.**
- (a) *No Limitation on § 39-22-303.6(9), C.R.S., or Rules 39-22-303.6-16 and -17.* Nothing in the rules adopted here pursuant to § 39-22-303.6(6), C.R.S., is intended to limit the application of § 39-22-303.6(9), C.R.S., or the authority granted to the Department under § 39-22-303.6(9), C.R.S. To the extent that rules adopted pursuant to § 39-22-303.6(9), C.R.S., conflict with provisions of these rules adopted pursuant to § 39-22-303.6(6), C.R.S., the rules adopted pursuant to § 39-22-303.6(9), C.R.S., control. If the application of § 39-22-303.6(6), C.R.S., or the rules adopted pursuant thereto result in the attribution of receipts to the taxpayer's receipts factor that do not fairly represent the extent of the taxpayer's business activity in Colorado, the taxpayer may petition for, or Department may require, the use of a different method for attributing those receipts.
  - (b) *General Rules Applicable to Original Returns.* In any case in which a taxpayer files an original return for a taxable year in which it properly assigns its receipts using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in Rules 39-22-303.6-7 through -13, the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In those cases, neither the Department nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer's methodology as applied for assigning those receipts for the taxable year. However, the Department and the taxpayer may each subsequently, through the applicable administrative process, correct factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.
  - (c) *Department's Authority to Adjust a Taxpayer's Return.* The provisions contained in this paragraph (5)(c) are subject to paragraph (5)(b). The Department's authority to review and adjust a taxpayer's assignment of receipts on a return to more accurately assign receipts consistently with the rules or standards of Rules 39-22-303.6-7 through -13 includes, but is not limited to, each of the following potential actions.
    - (i) In a case in which a taxpayer fails to properly assign receipts from a sale in accordance with the rules set forth in Rules 39-22-303.6-7 through -13, including the failure to properly apply a hierarchy of rules consistent with the principles of paragraph (2)(b), the Department may adjust the assignment of the receipts in accordance with the applicable rules in Rules 39-22-303.6-7 through -13.

- (ii) In a case in which a taxpayer uses a method of approximation to assign its receipts and the Department determines that the method of approximation employed by the taxpayer is not reasonable, the Department may substitute a method of approximation that the Department determines is appropriate or may exclude the receipts from the taxpayer's numerator and denominator, as appropriate.
- (iii) In a case in which the Department determines that a taxpayer's method of approximation is reasonable, but has not been applied in a consistent manner with respect to similar transactions or year to year, the Department may require that the taxpayer apply its method of approximation in a consistent manner.
- (iv) In a case in which a taxpayer excludes receipts from the denominator of its receipts factor on the theory that the assignment of the receipts cannot be reasonably approximated, the Department may determine that the exclusion of those receipts is not appropriate, and may instead substitute a method of approximation that the Department determines is appropriate.
- (v) In a case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, or fails to provide those records to Department upon request, the Department may treat the taxpayer's assignment of receipts as unsubstantiated, and may adjust the assignment of the receipts in a manner consistent with the applicable rules in Rules 39-22-303.6-7 through -13.
- (vi) In a case in which the Department concludes that a customer's billing address was selected by the taxpayer for tax avoidance purposes, the Department may adjust the assignment of receipts from sales to that customer in a manner consistent with the applicable rules in Rules 39-22-303.6-7 through -13.
- (d) *Taxpayer Authority to Change a Method of Assignment on a Prospective Basis.* A taxpayer that seeks to change its method of assigning its receipts under Rules 39-22-303.6-7 through -13 must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the Department may disregard the taxpayer's change and substitute an assignment method that the Department determines is appropriate.
- (e) *Department Authority to Change a Method of Assignment on a Prospective Basis.* The Department may direct a taxpayer to change its method of assigning its receipts in tax returns that have not yet been filed, including changing the taxpayer's method of approximation, if upon reviewing the taxpayer's filing methodology applied for a prior tax year, the Department determines that the change is appropriate to reflect a more accurate assignment of the taxpayer's receipts within the meaning of Rules 39-22-303.6-7 through -13, and determines that the change can be reasonably adopted by the taxpayer. The Department will provide the taxpayer with a written explanation as to the reason for making the change. In a case in which a taxpayer fails to comply with the Department's direction on subsequently filed returns, the Department may deem the taxpayer's method of assigning its receipts on those returns to be unreasonable, and may substitute an assignment method that the Department determines is appropriate.

- (f) *Further Guidance.* The Department may issue further public written statements with respect to the rules set forth in this rule. These statements may, among other things, include guidance with respect to: (1) what constitutes a reasonable method of approximation within the meaning of the rules, and (2) the circumstances in which a filing change with respect to a taxpayer's method of reasonable approximation will be deemed appropriate.

**Rule 39-22-303.6–8. Sale, Rental, Lease, or License of Real Property.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from the sale, rental, lease, or license of real property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

In the case of a sale, rental, lease, or license of real property, the receipts from the sale are in Colorado if and to the extent that the property is in Colorado.

**Rule 39-22-303.6–9. Rental, Lease, or License of Tangible Personal Property.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from the rental, lease, or license of tangible personal property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

In the case of a rental, lease, or license of tangible personal property, the receipts from the sale are in Colorado if and to the extent that the property is in Colorado. If property is mobile property that is located both within and without Colorado during the period of the lease or other contract, the receipts assigned to Colorado are the receipts from the contract period multiplied by a fraction, the numerator of which is the total time within Colorado during the tax period and the denominator of which is the total time during the tax period (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).

**Rule 39-22-303.6–10. Sale of a Service.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from sales of services are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** The receipts from a sale of a service are in Colorado if and to the extent that the service is delivered to a location in Colorado. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth in paragraphs (2)–(4).

(2) **In-Person Services.**

- (a) *In General.* Except as otherwise provided in this paragraph (2), in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer's real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry; construction contractor services; pest control; landscape services; medical and dental services, including medical testing, x-rays, and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer's real or tangible personal property. Although various professional services, including legal, accounting, financial, and consulting services, and other similar services as described in paragraph (4), may involve some amount of in-person contact, they are not treated as in-person services within the meaning of this paragraph (2).
- (b) *Assignment of Receipts.*
- (i) *Rule of Determination.* Except as otherwise provided in this paragraph (2)(b), if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Colorado if and to the extent the customer receives the in-person service in Colorado. In assigning receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received, as follows:
- (A) If the service is performed with respect to the body of an individual customer in Colorado (e.g., hair cutting or x-ray services) or in the physical presence of the customer in Colorado (e.g., live entertainment or athletic performances), the service is received in Colorado.
- (B) If the service is performed with respect to the customer's real estate in Colorado, or if the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in Colorado, the service is received in Colorado.
- (C) If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed within or outside Colorado, the service is received in Colorado if the property is shipped or delivered to the customer in Colorado.
- (c) *Rule of Reasonable Approximation.* In an instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states.
- (d) *Examples.* For purposes of the examples, it is irrelevant whether the services are performed by an employee of the taxpayer or by an independent contractor acting on the taxpayer's behalf.



- (i) *Example (i).* Salon Corp has retail locations in Colorado and in other states where it provides hair cutting services to individual and business customers, the latter of whom are paid for through the means of a company account. The receipts from sales of services provided at Salon Corp's Colorado locations are in Colorado. The receipts from sales of services provided at Salon Corp's locations outside Colorado, even when provided to residents of Colorado, are not receipts from Colorado sales.
- (ii) *Example (ii).* Landscape Corp provides landscaping and gardening services in Colorado and in neighboring states. Landscape Corp provides landscaping services at the in-state vacation home of an individual who is a resident of another state and who is located outside Colorado at the time the services are performed. The receipts from sale of services provided at the Colorado location are in Colorado.
- (iii) *Example (iii).* Same facts as Example (ii), except that Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to those locations of Retail Corp that are in Colorado and the other states. The receipts from the sale of services provided to Retail Corp are in Colorado to the extent the services are provided in Colorado.
- (iv) *Example (iv).* Camera Corp provides camera repair services at a Colorado retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its Colorado location at a facility that is in another state. In these cases, the repaired camera is then returned to the customer at Camera Corp's Colorado location. The receipts from the sale of these services are in Colorado.
- (v) *Example (v).* Same facts as Example (iv), except that a customer located in Colorado mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Colorado by mail. The receipts from the sale of the service are in Colorado.
- (vi) *Example (vi).* Teaching Corp provides seminars in Colorado to individual and business customers. The seminars and the materials used in connection with the seminars are prepared outside Colorado, the teachers who teach the seminars include teachers that are resident outside Colorado, and the students who attend the seminars include students that are resident outside Colorado. Because the seminars are taught in Colorado, the receipts from sales of the services are in Colorado.

(3) **Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.**

- (a) *In General.* If the service provided by the taxpayer is not an in-person service within the meaning of paragraph (2), or a professional service within the meaning of paragraph (4), and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in Colorado if and to the extent that the service is delivered in Colorado.
  - (i) For purposes of this paragraph (3):
    - (A) A service that is delivered "to" a customer is a service in which the customer and not a third party is the recipient of the service.

- (B) A service that is delivered “on behalf of” a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services or the direct or indirect delivery of advertising to the customer’s intended audience. (See *paragraph (3)(b)(i)* and *Example (iv)* under *paragraph (3)(b)(i)(C)*)
  - (C) A service can be delivered to or on behalf of a customer by physical means or through electronic transmission.
  - (D) A service that is delivered electronically “through” a customer is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient.
- (b) *Assignment of Receipts.* The assignment of receipts to a state or states in the instance of a sale of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this paragraph (3), a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this paragraph (3) depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer.
  - (i) *Delivery to or on Behalf of a Customer by Physical Means Whether to an Individual or Business Customer.* Services delivered to a customer or on behalf of a customer through physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers, or other direct mail services; the delivery of advertising or advertising-related services to the customer’s intended audience in the form of a physical medium; and the sale of custom software (e.g., when software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of corporate income taxation) when the taxpayer installs the custom software at the customer’s site. The rules in this paragraph (3)(b)(i) apply whether the taxpayer’s customer is an individual customer or a business customer.
    - (A) *Rule of Determination.* In assigning the receipts from a sale of a service delivered to a customer or on behalf of a customer through physical means, a taxpayer must first attempt to determine the state or states where the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.
    - (B) *Rule of Reasonable Approximation.* If the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate the state or states.

(C) *Examples.*

- (I) *Example (i).* Direct Mail Corp, a corporation based outside Colorado, provides direct mail services to its customer, Business Corp. Business Corp contracts with Direct Mail Corp to deliver printed fliers to a list of customers that is provided to it by Business Corp. Some of Business Corp's customers are in Colorado and some of those customers are in other states. Direct Mail Corp will use the postal service to deliver the printed fliers to Business Corp's customers. The receipts from the sale of Direct Mail Corp's services to Business Corp are assigned to Colorado to the extent that the services are delivered on behalf of Business Corp to Colorado customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Colorado).
- (II) *Example (ii).* Ad Corp is a corporation based outside Colorado that provides advertising and advertising-related services in Colorado and in neighboring states. Ad Corp enters into a contract at a location outside Colorado with an individual customer, who is not a Colorado resident, to design advertisements for billboards to be displayed in Colorado, and to design fliers to be mailed to Colorado residents. All of the design work is performed outside Colorado. The receipts from the sale of the design services are in Colorado because the service is physically delivered on behalf of the customer to the customer's intended audience in Colorado.
- (III) *Example (iii).* Same facts as Example (ii), except that the contract is with a business customer that is based outside Colorado. The receipts from the sale of the design services are in Colorado because the services are physically delivered on behalf of the customer to the customer's intended audience in Colorado.
- (IV) *Example (iv).* Fulfillment Corp, a corporation based outside Colorado, provides product delivery fulfillment services in Colorado and in neighboring states to Sales Corp, a corporation located outside Colorado that sells tangible personal property through a mail order catalog and over the Internet to customers. In some cases when a customer purchases tangible personal property from Sales Corp to be delivered in Colorado, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Colorado. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to Colorado to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Colorado.

- (V) *Example (v).* Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in Colorado, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside Colorado, and then physically installs the software on Buyer Corp's computer hardware located in Colorado. The development and sale of the custom software is properly characterized as a service transaction, and the receipts from the sale are assigned to Colorado because the software is physically delivered to the customer in Colorado.
- (ii) *Delivery to a Customer by Electronic Transmission.* Services delivered by electronic transmission include, without limitation, services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases, or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following rules apply.
  - (A) *Services Delivered By Electronic Transmission to an Individual Customer.*
    - (I) *Rule of Determination.* In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Colorado if and to the extent that the taxpayer's customer receives the service in Colorado. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.
    - (II) *Rules of Reasonable Approximation.* If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states. If a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall reasonably approximate the state or states using the customer's billing address.
  - (B) *Services Delivered By Electronic Transmission to a Business Customer.*
    - (I) *Rule of Determination.* In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Colorado if and to the extent that the taxpayer's customer receives the service in Colorado. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this paragraph (3)(b)(ii)(B), it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.

- (II) *Rule of Reasonable Approximation.* If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states.
- (III) *Secondary Rule of Reasonable Approximation.* In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, the taxpayer shall reasonably approximate the state or states as set forth in this paragraph (3)(b)(ii)(B)(III). In these cases, unless the taxpayer can apply the safe harbor set forth in paragraph (3)(b)(ii)(B)(IV), the taxpayer shall reasonably approximate the state or states in which the service is received as follows:
  - (1) first, by assigning the receipts from the sale to the state where the contract of sale is principally managed by the customer;
  - (2) second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the receipts from the sale to the customer's place of order; and
  - (3) third, if the customer's place of order is not reasonably determinable, by assigning the receipts from the sale using the customer's billing address;

provided, however, if the taxpayer derives more than 5% of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

- (IV) *Safe Harbor.* In the case of the delivery of a service to a business customer by electronic transmission, a taxpayer may not be able to determine or reasonably approximate under paragraph (3)(b)(ii)(B)(II) the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated in paragraph (3)(b)(ii)(B)(III), apply the safe harbor stated in this paragraph. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer:
  - (1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and

- (2) does not derive more than 5% of its receipts from sales of all services from that customer.

This safe harbor applies only for purposes of services delivered by electronic transmission to a business customer, and not otherwise.

- (V) **Related Party Transactions.** In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in (3)(b)(ii)(B)(III) but may use the rule of reasonable approximation in paragraph (3)(b)(ii)(B)(II) and the safe harbor in paragraph (3)(b)(ii)(B)(IV), provided that the Department may aggregate sales to related parties in determining whether the sales exceed 5% of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

- (C) **Examples.** In these examples, unless otherwise stated, assume that the taxpayer is not related to the customer to which the service is delivered. Further, assume if relevant, unless otherwise stated, that the safe harbor set forth in paragraph (3)(b)(ii)(B)(IV) does not apply.

- (I) **Example (i).** Support Corp, a corporation based outside Colorado, provides software support and diagnostic services to individual and business customers that have previously purchased certain software from third-party vendors. These individual and business customers are located in Colorado and other states. Support Corp supplies its services on a case by case basis when directly contacted by its customer. Support Corp generally provides these services through the Internet but sometimes provides these services by phone. In all cases, Support Corp verifies the customer's account information before providing any service. Using the information that Support Corp verifies before performing a service, Support Corp can determine where its services are received, and therefore must assign its receipts to these locations. The receipts from sales made to Support Corp's individual and business customers are in Colorado to the extent that Support Corp's services are received in Colorado. See paragraph (3)(b)(ii)(A) and (B).

- (II) *Example (ii).* Online Corp, a corporation based outside Colorado, provides web-based services through the Internet to individual customers who are resident in Colorado and in other states. These customers access Online Corp's web services primarily in their states of residence, and sometimes, while traveling, in other states. For a substantial portion of its receipts from the sale of services, Online Corp can either determine the state or states where the services are received, or, where it cannot determine the state or states, it has sufficient information regarding the place of receipt to reasonably approximate the state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of the sales of its services. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the receipts from sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Colorado the receipts from sales for which it does not know the customers' location in the same proportion as those receipts for which it has this information. See *paragraph (3)(b) of Rule 39-22-303.6-7*.
- (III) *Example (iii).* Same facts as Example (ii), except that Online Corp reasonably believes that the geographic distribution of the receipts from sales for which it cannot determine or reasonably approximate the location of the receipt of its web-based services do not generally track the sales for which it does have this information. Online Corp must assign the receipts from sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. See *paragraph (3)(b)(ii)(A)*.
- (IV) *Example (iv).* Net Corp, a corporation based outside Colorado, provides web-based services to a business customer, Business Corp, a company with offices in Colorado and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Colorado were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In this case, 75% of the receipts from the sale are received in Colorado. See *paragraph (3)(b)(ii)(B)(I)*.

- (V) *Example (v).* Same facts as Example (iv), except assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate the location or locations. Under these circumstances, if Net Corp derives 5% or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under paragraph (3)(b)(ii)(B)(III) to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from sales of services to Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state.
- (VI) *Example (vi).* Net Corp, a corporation based outside Colorado, provides web-based services through the Internet to more than 250 individual and business customers in Colorado and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate the state or states. Also assume that Net Corp does not derive more than 5% of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in paragraph (3)(b)(ii)(B)(IV), and may assign its receipts using each customer's billing address.
- (iii) *Services Delivered Electronically Through or on Behalf of an Individual or Business Customer.* A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.



- (A) *Rule of Determination.* In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in Colorado if and to the extent that the end users or other third-party recipients are in Colorado. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in Colorado to the extent that the audience for the advertising is in Colorado. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in Colorado to the extent that the end users or other third-party recipients receive the services in Colorado. The rules in this paragraph (3)(b)(iii) apply whether the taxpayer's customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.
- (B) *Rule of Reasonable Approximation.* If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, the taxpayer shall reasonably approximate the state or states.
- (C) *Select Secondary Rules of Reasonable Approximation.*
  - (I) If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in that area.

- (II) If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that service to end users or other third party recipients, and if the taxpayer lacks sufficient information regarding the location of the end users or other third party recipients from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells the services, relative to the total population in that area.
- (III) When using the secondary reasonable approximation methods provided above, the relevant specific geographic area of delivery includes only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

(D) *Examples.*

- (I) *Example (i).* Cable TV Corp, a corporation based outside of Colorado, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Colorado. Second, Cable TV Corp sells monthly subscriptions to individual customers in Colorado and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to Colorado to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Colorado. *See paragraph (3)(b)(iii)(A).* If Cable TV Corp is unable to determine the actual location of its audience for the programming, and lacks sufficient information regarding audience location to reasonably approximate the location, Cable TV Corp must approximate its Colorado audience using the percentage that reflects the ratio of its Colorado subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. *See paragraph (3)(b)(iii)(C)(I).* To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to Colorado in any case in which the programming is received by a customer in Colorado. *See paragraph (3)(b)(iii)(A).* In any case in which Cable TV Corp cannot determine the actual location where the programming is received, and lacks sufficient information regarding the location of receipt to reasonably approximate the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to Colorado where its customer's billing address is in Colorado. *See paragraph (3)(b)(ii)(A)(II).* Note that whether and to the extent that the monthly subscription fee represents a fee for a service or for a license of intangible property does not affect the analysis or result as to the state or states to which the receipts are properly assigned. *See paragraph 5 of Rule 39-22-303.6-11.*

- (II) *Example (ii).* Network Corp, a corporation based outside of Colorado, sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming as distributed by unrelated cable television and satellite television transmission companies. The receipts from Network Corp's sale of advertising time to its business customers are assigned to Colorado to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Colorado. See *paragraph (3)(b)(iii)(A)*. If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding audience location to reasonably approximate the location, Network Corp must approximate the receipts from sales of advertising that constitute Colorado sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the Colorado population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. See *paragraphs (3)(b)(iii)(C)(II) and (III)*.
- (III) *Example (iii).* Web Corp, a corporation based outside of Colorado, provides Internet content to viewers in Colorado and other states. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. The receipts from Web Corp's sale of advertising space to its business customers are assigned to Colorado to the extent that the viewers of the Internet content are in Colorado, as measured by viewings or clicks. See *paragraph (3)(b)(iii)(A)*. If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of its viewers to reasonably approximate the location, Web Corp must approximate the amount of its Colorado receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the Colorado population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. See *paragraph (3)(b)(iii)(C)*.

- (IV) *Example (iv).* Retail Corp, a corporation based outside of Colorado, sells tangible property through its retail stores located in Colorado and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp and must assign the proceeds from this service to the state or states from which the phone calls are placed by the customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate the locations, Answer Co must approximate the amount of its Colorado receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Colorado population in the specific geographic area from which the calls are placed relative to the total population in that area. See *paragraph (3)(b)(iii)(C)(I)*.
- (V) *Example (v).* Web Corp, a corporation based outside of Colorado, sells tangible property to customers via its Internet website. Design Co. designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co.'s services are delivered to Web Corp, the proceeds from which are assigned pursuant to paragraph (3)(b)(ii). The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co.'s services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

- (VI) *Example (vi).* Wholesale Corp, a corporation based outside of Colorado, develops an Internet-based information database outside Colorado and enters into a contract with Retail Corp whereby Retail Corp will market and sell access to this database to end users. Depending on the facts, the provision of database access may be either the sale of a service or the license of intangible property or may have elements of both, but for purposes of analysis it does not matter. *See paragraph (5) of Rule 39-22-303.6–11.* Assume that on the particular facts applicable in this example, Wholesale Corp is selling database access in transactions properly characterized as involving the performance of a service. When an end user purchases access to Wholesale Corp's database from Retail Corp, Retail Corp in turn compensates Wholesale Corp in connection with that transaction. In this case, Wholesale Corp's services are being delivered through Retail Corp to the end user. Wholesale Corp must assign its receipts from sales to Retail Corp to the state or states in which the end users receive access to Wholesale Corp's database. If Wholesale Corp cannot determine the state or states where the end users actually receive access to Wholesale Corp's database, and lacks sufficient information regarding the location from which the end users access the database to reasonably approximate the location, Wholesale Corp must approximate the extent to which its services are received by end users in Colorado by using a percentage that reflects the ratio of the Colorado population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in that area. *See paragraph (3)(b)(iii)(C)(II).* Note that it does not matter for purposes of the analysis whether Wholesale Corp's sale of database access constitutes a service or a license of intangible property, or some combination of both. *See paragraph (5) of Rule 39-22-303.6–11.*

(4) **Professional Services.**

- (a) *In General.* Except as otherwise provided in this paragraph (4), professional services are services that require specialized knowledge and in some cases require a professional certification, license, or degree. These services include the performance of technical services that require the application of specialized knowledge. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

- (b) *Overlap with Other Service Categories.*
  - (i) Certain services that fall within the definition of “professional services” set forth in this paragraph (4) are nevertheless treated as “in-person services” within the meaning of paragraph (2), and are assigned under the rules of paragraph (2). Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services, or child care services, where the customer or the customer’s real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are “in-person services” and are assigned as such, notwithstanding that they may also be considered to be “professional services.” However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial, and consulting services, are assigned as professional services under the rules of this paragraph (4), notwithstanding the fact that these services may involve some amount of in-person contact.
  - (ii) Professional services may, in some cases, include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment rules that apply are those set forth in this paragraph (4), and not those set forth in paragraph (3), pertaining to services delivered to a customer or through or on behalf of a customer.
- (c) *Assignment of Receipts.* In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from a sale of a professional service depends, in many cases, upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the receipts from a sale of a professional service, a taxpayer’s customer is the person who contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer’s services.
  - (i) *General Rule.* Receipts from sales of professional services other than those services described in paragraph (4)(c)(ii) (architectural and engineering services), paragraph (4)(c)(iii) (services provided by a financial institution) and paragraph (4)(h)(iv) (transactions with related parties) are assigned in accordance with this paragraph (4)(c)(i).

- (A) *Professional Services Delivered to Individual Customers.* Except as otherwise provided in this paragraph (4) (see, in particular, paragraph (4)(c)(v)), in any instance in which the service provided is a professional service, and the taxpayer's customer is an individual customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this paragraph (4)(c)(i)(A). In particular, the taxpayer shall assign the receipts from a sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.
- (B) *Professional Services Delivered to Business Customers.* Except as otherwise provided in paragraph (4), in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this paragraph (4)(c)(i)(B). In particular, unless the taxpayer may use the safe harbor set forth in paragraph (4)(c)(i)(C), the taxpayer shall assign the receipts from the sale as follows:
- (I) first, by assigning the receipts to the state where the contract of sale is principally managed by the customer;
  - (II) second, if the place of customer management is not reasonably determinable, to the customer's place of order; and
  - (III) third, if the customer's place of order is not reasonably determinable, to the customer's billing address;
- provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.
- (C) *Safe Harbor. Large Volume Transactions.* Notwithstanding the rules set forth in paragraph (4)(c)(i)(A) and (B), a taxpayer may assign its receipts from sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of paragraph (4)(c)(i) and not otherwise.



- (ii) *Architectural and Engineering Services with Respect to Real or Tangible Personal Property.* Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this paragraph (4). However, unlike in the case of the general rule that applies to professional services, (a) the receipts from a sale of an architectural service are assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in the state or states; and (b) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in this paragraph (4)(c)(ii), the receipts from a sale of these services must be assigned under the general rule for professional services. *See paragraph (4)(c)(i).*
- (iii) *Services Provided by a Financial Institution.* The apportionment rules that apply to financial institutions are set forth in 1 CCR 201-2, Special Rule 7A, which includes specific rules for determining a financial institution's receipts factor. However, 1 CCR 201-2, Special Rule 7A also provides that receipts from sales, other than sales of tangible personal property, including service transactions that are not otherwise apportioned under 1 CCR 201-2, Special Rule 7A, are to be assigned pursuant to § 39-22-303.6, C.R.S., and these rules. In any instance in which a financial institution performs services that are to be assigned pursuant to § 39-22-303.6, C.R.S., and these rules, including, for example, financial custodial services, those services are considered professional services within the meaning of this paragraph (4) and are assigned according to the general rule for professional service transactions as set forth paragraph (4)(c)(i).
- (iv) *Services Provided by a Mutual Fund Service Corporation.* To the extent the services that give rise to "mutual fund sales" as defined in § 39-22-303.7(1)(e), C.R.S., would be considered professional services, the apportionment rules that apply to "mutual fund sales" by a "mutual fund service corporation," as that term is defined in § 39-22-303.7(1)(f), C.R.S., are set forth in § 39-22-303.7, C.R.S., and the rules thereunder.
- (v) *Related Party Transactions.* In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers in paragraph (4)(c)(i)(B), the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy:
  - (A) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or
  - (B) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states.

The taxpayer may use the safe harbor provided in paragraph (4)(c)(i)(C) provided that the Department may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

- (vi) *Examples.* Unless otherwise stated, assume in each of these examples that the customer is not a related party and that the safe harbor set forth in paragraph (4)(c)(i)(C) does not apply.
- (A) *Example (i).* Broker Corp provides securities brokerage services to individual customers who are residents in Colorado and in other states. Assume that Broker Corp knows the state of primary residence for many of its customers, and where it does not know the state of primary residence, it knows the customer's billing address. Also assume that Broker Corp does not derive more than 5% of its receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. *See paragraph (4)(c)(i)(A).*
- (B) *Example (ii).* Same facts as Example (i), except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives 5% or less of its receipts from sales of all services must be assigned as described in Example (i). For each customer from whom it derives more than 5% of its receipts from sales of all services, Broker Corp is required to determine the customer's state of primary residence and must assign the receipts from the services provided to that customer to that state. In any case in which a 5% customer's state of primary residence is Colorado, receipts from a sale made to that customer must be assigned to Colorado; in any case in which a 5% customer's state of primary residence is not Colorado receipts from a sale made to that customer are not assigned to Colorado.
- (C) *Example (iii).* Architecture Corp provides building design services for buildings located, or expected to be located, in Colorado to individual customers who are resident in Colorado and other states, and to business customers that are based in Colorado and other states. The receipts from Architecture Corp's sales are assigned to Colorado because the locations of the buildings to which its design services relate are in Colorado, or are expected to be in Colorado. For purposes of assigning these receipts, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for the services, and it is not relevant where, in the case of a business customer, the customer principally manages the contract, placed the order for the services, or is billed for the services. Further, these receipts are assigned to Colorado even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than Colorado or are electronically delivered to its customer in a state other than Colorado. *See paragraphs (4)(b)(ii) and (c)(ii).*

- (D) *Example (iv).* Law Corp provides legal services to individual clients who are resident in Colorado and in other states. In some cases, Law Corp may prepare one or more legal documents for its client as a result of these services and/or the legal work may be related to litigation or a legal matter that is ongoing in a state other than where the client is a resident. Assume that Law Corp knows the state of primary residence for many of its clients, and where it does not know the state of primary residence, it knows the client's billing address. Also assume that Law Corp does not derive more than 5% of its receipts from sales of all services from any one individual client. If Law Corp knows its client's state of primary residence, it shall assign the receipts to that state. If Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the receipts to that state. For purposes of the analysis, it is irrelevant whether the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or the litigation or other legal matter that is the underlying predicate for the services is in another state. *See paragraphs (4)(b)(ii) and (c)(i).*
- (E) *Example (v).* Law Corp provides legal services to several multistate business clients. In each case, Law Corp knows the state in which the agreement for legal services that governs the client relationship is principally managed by the client. In one case, the agreement is principally managed in Colorado; in the other cases, the agreements are principally managed in states other than Colorado. If the agreement for legal services is principally managed by the client in Colorado, the receipts from sale of the services are assigned to Colorado; in the other cases, the receipts are not assigned to Colorado. In the case of receipts that are assigned to Colorado, the receipts are so assigned even if (1) the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or (2) the litigation or other legal matter that is the underlying predicate for the services is in another state. *See paragraphs (4)(b)(ii) and (c)(i).*
- (F) *Example (vi).* Consulting Corp, a company that provides consulting services to law firms and other customers, is hired by Law Corp in connection with legal representation that Law Corp provides to Client Co. Specifically, Consulting Corp is hired to provide expert testimony at a trial being conducted by Law Corp on behalf of Client Co. Client Co pays for Consulting Corp's services directly. Assuming that Consulting Corp knows that its agreement with Law Corp is principally managed by Law Corp in Colorado, the receipts from the sale of Consulting Corp's services are assigned to Colorado. It is not relevant for purposes of the analysis that Client Co is the ultimate beneficiary of Consulting Corp's services, or that Client Co pays for Consulting Corp's services directly. *See paragraph (4)(c)(i)(B).*

- (G) *Example (vii).* Bank Corp provides financial custodial services, including the safekeeping of some of its customers' financial assets, to 100 individual customers who are resident in Colorado and in other states. Assume for purposes of this example that Bank Corp knows the state of primary residence for many of its customers, and where it does not know the state of primary residence, it knows the customer's billing address. Also assume that Bank Corp does not derive more than 5% of its receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in paragraph (4)(c)(i)(C). If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to Colorado if the customer's state of primary residence (or billing address, in cases where it does not know the customer's state of primary residence) is in Colorado, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Colorado. *See paragraph (4)(c)(i)(A).*
- (H) *Example (viii).* Same facts as Example (vii), except that Bank Corp has more than 250 customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in paragraph (4)(c)(i)(C), and may assign its receipts from sales to a state or states using each customer's billing address.
- (I) *Example (ix).* Same facts as Example (viii), except that Bank Corp derives more than 5% of its receipts from sales from a single individual customer. As to the sales made to this customer, Bank Corp is required to determine the individual customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state. *See paragraphs (4)(c)(i)(A) and (c)(iii).* Receipts from sales to all other customers are assigned as described in Example (viii).
- (J) *Example (x).* Advisor Corp, a corporation that provides investment advisory services, provides these advisory services to Investment Co. Investment Co is a multistate business client of Advisor Corp that uses Advisor Corp's services in connection with investment accounts that it manages for individual clients, who are the ultimate beneficiaries of Advisor Corp's services. Assume that Investment Co's individual clients are persons that are resident in numerous states, which may or may not include Colorado. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in Colorado, receipts from the sale of Advisor Corp's services are assigned to Colorado. It is not relevant for purposes of the analysis that the ultimate beneficiaries of Advisor Corp's services may be Investment Co's clients, who are residents of numerous states. *See paragraph (4)(c)(i)(B).*

- (K) *Example (xi).* Advisor Corp provides investment advisory services to Investment Fund LP, a partnership that invests in securities and other assets. Assuming that Advisor Corp knows that its agreement with Investment Fund LP is principally managed by Investment Fund LP in Colorado, receipts from the sale of Advisor Corp's services are assigned to Colorado. See *paragraph (4)(c)(i)(B)*. Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of other states.
- (L) *Example (xii).* Design Corp is a corporation based outside Colorado that provides graphic design and similar services in Colorado and in neighboring states. Design Corp enters into a contract at a location outside Colorado with an individual customer to design fliers for the customer. Assume that Design Corp does not know the individual customer's state of primary residence and does not derive more than 5% of its receipts from sales of services from the individual customer. All of the design work is performed outside Colorado. Receipts from the sale are in Colorado if the customer's billing address is in Colorado. See *paragraph (4)(c)(i)(A)*.

**Rule 39-22-303.6–11. License or Lease of Intangible Property.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from the license or lease of intangible property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

**(1) General Rules.**

- (a) The receipts from the license of intangible property are in Colorado if and to the extent the intangible is used in Colorado. In general, the term "use" is construed to refer to the location of the taxpayer's market for the use of the intangible property that is being licensed and is not to be construed to refer to the location of the property or payroll of the taxpayer. The rules that apply in determining the location of the use of intangible property in the context of several specific types of licensing transactions are set forth in paragraphs (2) through (5) of this rule. For purposes of the rules set forth in this Rule 39-22-303.6–11, a lease of intangible property is to be treated the same as a license of intangible property.
- (b) In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of Rules 39-22-303.6–7 through –13. See *Rule 39-22-303.6–12*. Note, however, that for purposes of Rules 39-22-303.6–11 and –12, a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use, or disposition of the property.
- (c) Intangible property licensed as part of the sale or lease of tangible property is treated under Rules 39-22-303.6–7 through –13 as the sale or lease of tangible property.

- (d) Nothing in this Rule 39-22-303.6–11 shall be construed to allow or require the inclusion of receipts in the receipts factor that are not included in the definition of “receipts” pursuant to § 39-22-303.6(1)(d), C.R.S., or related rules, or that are excluded from the numerator and the denominator of the receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S. For examples of the types of intangibles that are excluded pursuant to § 39-22-303.6(1)(d), C.R.S., see paragraphs (1)(i), (1)(l)(vi), and (1)(l)(vii) of Rule 39-22-303.6–1. For examples of the types of intangibles that are excluded pursuant to § 39-22-303.6(6)(d)(III), C.R.S., see paragraph (1)(d) of Rule 39-22-303.6–12. To the extent that the transfer of either a security, as defined in paragraph (1)(n) of Rule 39-22-303.6–1, or business “goodwill” or similar intangible value, including, without limitation, “going concern value” or “workforce in place,” may be characterized as a license or lease of intangible property, receipts from such transaction shall be excluded from the numerator and the denominator of the taxpayer’s receipts factor.
- (2) **License of a Marketing Intangible.** Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items (a “marketing intangible”) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Colorado to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Colorado.
- (a) Examples of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or trade name; certain copyrights; the license of a film, television, or multimedia production, or event for commercial distribution; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales.
- (b) In the case of the license of a marketing intangible, where a taxpayer has actual evidence of the amount or proportion of its receipts that is attributable to Colorado, it shall assign that amount or proportion to Colorado. In the absence of actual evidence of the amount or proportion of the licensee’s receipts that are derived from Colorado consumers, the portion of the licensing fee to be assigned to Colorado must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Colorado population in the specific geographic area in which the licensee makes material use of the intangible property to regularly market its goods, services, or other items relative to the total population in that area. If the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the portion of the licensing fee to be assigned to Colorado must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Colorado population in the specific geographic area in which the licensee’s goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.
- (3) **License of a Production Intangible.** If a license is granted for the right to use intangible property other than in connection with the sale, lease, license, or other marketing of goods, services, or other items, and the license is to be used in a production capacity (a “production intangible”), the licensing fees paid by the licensee for that right are assigned to Colorado to the extent that the use for which the fees are paid takes place in Colorado.
- (a) Examples of a license of a production intangible include, without limitation, the license of a patent, a copyright, or trade secrets to be used in a manufacturing process, where the value of the intangible lies predominately in its use in that process.

- (b) In the case of a license of a production intangible to a party, other than a related party where the location of actual use is unknown, it is presumed that the use of the intangible property takes place in the state of the licensee's commercial domicile (where the licensee is a business) or the licensee's state of primary residence (where the licensee is an individual). If the Department can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in Colorado, it is presumed that the entire use is in Colorado except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Colorado. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.
- (4) **License of a Mixed Intangible.** If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible (a "mixed intangible") and the fees to be paid in each instance are separately and reasonably stated in the licensing contract, the Department will accept that separate statement for purposes of Rules 39-22-303.6–7 through –13. If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible and the fees to be paid in each instance are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the Department can reasonably establish otherwise.
- (5) **License of Intangible Property where the Substance of the Transaction Resembles a Sale of Goods or Services.**
  - (a) *In General.* In some cases, the license of intangible property will resemble the sale of an electronically delivered good or service rather than the license of a marketing intangible or a production intangible. In these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in paragraphs (3)(b)(ii) and (iii) of Rule 39-22-303.6–10, as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this paragraph (5) include, without limitation, the license of database access, the license of access to information, the license of digital goods (see paragraph (2) of Rule 39-22-303.6–13), and the license of certain software (e.g., where the transaction is not the license of pre-written software that is treated as the sale of tangible personal property see paragraph (1) of Rule 39-22-303.6–13).
  - (b) *Sublicenses.* Pursuant to paragraph (5)(a), the rules of paragraph (3)(b)(iii) of Rule 39-22-303.6–10 may apply where a taxpayer licenses intangible property to a customer that, in turn, sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the rules set forth at paragraph (3)(b)(iii) of Rule 39-22-303.6–10 that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users. For this purpose, the intangible property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to that property (e.g., because the sublicensee's rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because that property is bundled with additional services or items of property.

- (6) **Examples.** In these examples, unless otherwise stated, assume that the customer is not a related party.
- (a) *Example (i).* Crayon Corp and Dealer Co enter into a license contract under which Dealer Co, as licensee, is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Co's sale of certain products to retail customers. Under the contract, Dealer Co is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co of products using the Crayon Corp trademarks. Under the contract, Dealer Co is permitted to sell the products at multiple store locations, including store locations that are both within and without Colorado. Further, the licensing fees that are paid by Dealer Co are broken out on a per-store basis. The licensing fees paid to Crayon Corp by Dealer Co represent fees from the license of a marketing intangible. The portion of the fees to be assigned to Colorado are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's receipts that are derived from its Colorado stores relative to Dealer Co's total receipts. *See paragraph (2).*
- (b) *Example (ii).* Program Corp, a corporation based outside Colorado, licenses programming that it owns to licensees, such as cable networks, that, in turn, will offer the programming to their customers on television or other media outlets in Colorado and in all other U.S. states. Each of these licensing contracts constitutes the license of a marketing intangible. For each licensee, assuming that Program Corp lacks evidence of the actual number of viewers of the programming in Colorado, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Colorado receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Colorado audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. *See paragraph (5).* Note that the analysis and result as to the state or states to which receipts are properly assigned would be the same to the extent that the substance of Program Corp's licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. *See paragraph (5).*
- (c) *Example (iii).* Moniker Corp enters into a license contract with Wholesale Co. Pursuant to the contract, Wholesale Co is granted the right to use trademarks owned by Moniker Corp to brand sports equipment that is to be manufactured by Wholesale Co or an unrelated entity and to sell the manufactured equipment to unrelated companies that will ultimately market the equipment to consumers in a specific geographic region, including a foreign country. The license agreement confers a license of a marketing intangible, even though the trademarks in question will be affixed to property to be manufactured. In addition, the license of the marketing intangible is for the right to use the intangible property in connection with sales to be made at wholesale rather than directly to retail customers. The component of the licensing fee that constitutes the Colorado receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Colorado population in the specific geographic region relative to the total population in that region. *See paragraph (2).* If Moniker Corp is able to reasonably establish that the marketing intangible was materially used throughout a foreign country, then the population of that country will be included in the population ratio calculation. However, if Moniker Corp is unable to reasonably establish that the marketing intangible was materially used in the foreign country in areas outside a particular major city; then none of the foreign country's population beyond the population of the major city is included in the population ratio calculation.



- (d) *Example (iv).* Formula, Inc and Appliance Co enter into a license contract under which Appliance Co is permitted to use a patent owned by Formula, Inc to manufacture appliances. The license contract specifies that Appliance Co is to pay Formula, Inc a royalty that is a fixed percentage of the gross receipts from the products that are later sold. The contract does not specify any other fees. The appliances are both manufactured and sold in Colorado and several other states. Assume the licensing fees are paid for the license of a production intangible, even though the royalty is to be paid based upon the sales of a manufactured product (i.e., the license is not one that includes a marketing intangible). Because the Department can reasonably establish that the actual use of the intangible property takes place, in part, in Colorado, the royalty is assigned based to the location of that use rather than to the location of the licensee's commercial domicile in accordance with paragraph (1). It is presumed that the entire use is in Colorado except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Colorado. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Colorado using the patent relative to the manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Colorado receipts. *See paragraph (5).*
- (e) *Example (v).* Axle Corp enters into a license agreement with Biker Co in which Biker Co is granted the right to produce motor scooters using patented technology owned by Axle Corp and also to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The contract is a license of both a marketing and production intangible, i.e., a mixed intangible. The scooters are manufactured outside Colorado. Assume that Axle Corp lacks actual information regarding the proportion of Biker Co's receipts that are derived from Colorado customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Colorado population constitutes 25% of the total population during the period in question. The licensing contract requires an upfront licensing fee to be paid by Biker Co to Axle Corp and does not specify what percentage of the fee derives from Biker Co's right to use Axle Corp's patented technology. Because the fees for the license of the marketing and production intangible are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible, unless either the taxpayer or the Department reasonably establish otherwise. Assuming that neither party establishes otherwise, 25% of the licensing fee constitutes Colorado receipts. *See paragraphs (2) and (4).*
- (f) *Example (vi).* Same facts as Example (v), except that the license contract specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing contract constitutes both the license of a marketing intangible and the license of a production intangible. Assuming that the separately stated fees are reasonable, the Department will: (1) assign no part of the licensing fee paid for the production intangible to Colorado, and (2) assign 25% of the licensing fee paid for the marketing intangible to Colorado. *See paragraph (4).*

- (g) *Example (vii).* Better Burger Corp, which is based outside Colorado, enters into franchise contracts with franchisees that agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Colorado. In each case, the franchise contract between the individual and Better Burger provides that the franchisee is to pay Better Burger Corp an upfront fee for the receipt of the franchise and monthly franchise fees, which cover, among other things, the right to use the Better Burger name and service marks, food processes and cooking know-how, as well as fees for management services. The upfront fees for the receipt of the Colorado franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Colorado receipts because the franchises are for the right to make Colorado sales. The monthly franchise fees paid by Colorado franchisees constitute fees paid for (1) the license of marketing intangibles (the Better Burger name and service marks), (2) the license of production intangibles (food processes and know-how) and (3) personal services (management fees). The fees paid for the license of the marketing intangibles and the production intangibles constitute Colorado receipts because in each case the use of the intangibles is to take place in Colorado. See paragraphs (2) and (3). The fees paid for the personal services are to be assigned pursuant to Rule 39-22-303.6–10.
- (h) *Example (viii).* Online Corp, a corporation based outside Colorado, licenses an information database through the Internet to individual customers who are resident in Colorado and in other states. These customers access Online Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with paragraph (5). If Online Corp can determine or reasonably approximate the state or states from which its database is accessed, it must do so. Assuming that Online Corp cannot determine or reasonably approximate the location from which its database is accessed, Online Corp must assign the receipts made to the individual customers using the customers' billing addresses to the extent known. Assume for purposes of this example that Online Corp knows the billing address for each of its customers. In this case, Online Corp's receipts from sales made to its individual customers are in Colorado in any case in which the customer's billing address is in Colorado. See paragraph (3)(b)(ii)(A) of Rule 39-22-303.6–10.
- (i) *Example (ix).* Net Corp, a corporation based outside Colorado, licenses an information database through the Internet to a business customer, Business Corp, a company with offices in Colorado and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with paragraph (5). Assume that Net Corp cannot determine the location from which its database is accessed but reasonably approximates that 75% of Business Corp's database access took place in Colorado, and 25% of Business Corp's database access took place in other states. In that case, 75% of the receipts from database access is in Colorado. Assume alternatively that Net Corp lacks sufficient information regarding the location from which its database is accessed to reasonably approximate the location. Under these circumstances, if Net Corp derives 5% or less of its receipts from database access from Business Corp, Net Corp must assign the receipts under paragraph (3)(b)(ii)(B) of Rule 39-22-303.6–10 to the state from which Business Corp principally managed the contract, or if that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from database access from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state. See paragraph (3)(b)(ii)(B) of Rule 39-22-303.6–10

- (j) *Example (x).* Net Corp, a corporation based outside Colorado, licenses an information database through the Internet to more than 250 individual and business customers in Colorado and in other states. The license is a license of intangible property that resembles a sale of goods or services and receipts from that license are assigned in accordance with paragraph (5). Assume that Net Corp cannot determine or reasonably approximate the location where its information database is accessed. Also assume that Net Corp does not derive more than 5% of its receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in paragraph (3)(b)(ii)(B)(IV) of Rule 39-22-303.6–10 and may assign its receipts to a state or states using each customer's billing address.
- (k) *Example (xi).* Web Corp, a corporation based outside of Colorado, licenses an Internet-based information database to business customers that then sublicense the database to individual end users that are resident in Colorado and in other states. These end users access Web Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. Web Corp's license of the database to its customers includes the right to sublicense the database to end users, but the sublicenses provide that the rights to access and use the database are limited to the end users' own use and prohibit the individual end users from further sublicensing the database. Web Corp receives a fee from each customer based upon the number of sublicenses issued to end users. The license is a license of intangible property that resembles a sale of goods or services and are assigned by applying the rules set forth in paragraph (3)(b)(iii) of Rule 39-22-303.6–10. *See paragraph (5).* If Web Corp can determine or reasonably approximate the state or states from which its database is accessed by end users, it must do so. Assuming that Web Corp lacks sufficient information from which it can determine or reasonably approximate the location from which its database is accessed by end users, Web Corp must approximate the extent to which its database is accessed from Colorado using a percentage that represents the ratio of the Colorado population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area. *See paragraph (3)(b)(iii)(C) of Rule 39-22-303.6–10.*

#### **Rule 39-22-303.6–12. Sale of Intangible Property.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from the sale of intangible property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **Assignment of Receipts.** The assignment of receipts to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold. For purposes of this Rule 39-22-303.6–12, a sale or exchange of intangible property includes a license of that property where the transaction is treated for tax purposes as a sale of all substantial rights in the property and the receipts from the transaction are not contingent on the productivity, use, or disposition of the property. For the rules that apply where the consideration for the transfer of rights is contingent on the productivity, use, or disposition of the property, see paragraph (1) of Rule 39-22-303.6–11.

- (a) *Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area.* In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the receipts from the sale are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in Colorado, the taxpayer shall assign the receipts from the sale to Colorado. If the intangible property is used or is authorized to be used in Colorado and one or more other states, the taxpayer shall assign the receipts from the sale to Colorado to the extent that the intangible property is used in or authorized for use in Colorado through reasonable approximation.
- (b) *Sale that Resembles a License (Receipts are Contingent on Productivity, Use, or Disposition of the Intangible Property).* In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use, or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in Rule 39-22-303.6–11 (pertaining to the license or lease of intangible property).
- (c) *Sale that Resembles a Sale of Goods and Services.* In the case of a sale or exchange of intangible property where the substance of the transaction resembles a sale of goods or services, and where the receipts from the sale or exchange do not derive from payments contingent on the productivity, use, or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in paragraph (5) of Rule 39-22-303.6–11 (relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in paragraph (5) of Rule 39-22-303.6–11.
- (d) *Excluded Receipts.* Receipts from the sale of intangible property are not included in the receipts factor in any case in which the sale does not give rise to receipts within the meaning of § 39-22-303.6(1)(d), C.R.S. In addition, in any case in which the sale of intangible property does result in receipts within the meaning of § 39-22-303.6(1)(d), C.R.S., those receipts are excluded from the numerator and the denominator of the taxpayer's receipts factor if the receipts are not referenced in §§ 39-22-303.6(6)(d)(I), 39-22-303.6(6)(d)(II)(A), or 39-22-303.6(6)(d)(II)(B), C.R.S. See §§ 39-22-303.6(6)(d)(III), C.R.S. The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's receipts factor under this provision includes, without limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value.

(2) **Examples.**

- (a) *Example (i).* Airline Corp, a corporation based outside Colorado, sells its rights to use several gates at an airport located in Colorado to Buyer Corp, a corporation based outside Colorado. The contract of sale is negotiated and signed outside of Colorado. The receipts from the sale are in Colorado because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Colorado. See *paragraph (1)*.
- (b) *Example (ii).* Wireless Corp, a corporation based outside Colorado, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Colorado to Buyer Corp, a corporation based outside Colorado. The contract of sale is negotiated and signed outside of Colorado. The receipts from the sale are in Colorado because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Colorado. See *paragraph (1)(a)*.

- (c) *Example (iii).* Same facts as Example (ii) except that Wireless Corp sells to Buyer Corp an FCC license to operate wireless telecommunications services in a designated area in Colorado and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Colorado. For purposes of making this reasonable approximation, Wireless Corp may rely upon credible data that identifies the percentage of persons that use wireless telecommunications in the two states covered by the license. *See paragraph (1)(a).*
- (d) *Example (iv).* Sports League Corp, a corporation based outside Colorado, sells the rights to broadcast the sporting events played by the teams in its league in all 50 U.S. states to Network Corp. Although the games played by Sports League Corp will be broadcast in all 50 states, the games are of greater interest in the western region of the country, including Colorado. Because the intangible property sold is a contract right that authorizes the holder to conduct a business activity in a specified geographic area, Sports League Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Colorado. For purposes of making this reasonable approximation, Sports League Corp may rely upon audience measurement information that identifies the percentage of the audience for its sporting events in Colorado and the other states. *See paragraph (1)(a).*
- (e) *Example (v).* Inventor Corp, a corporation based outside Colorado, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Colorado. Assume that the sale is not one in which the receipts derive from payments that are contingent on the productivity, use, or disposition of the property. *See paragraph (1)(a).* Inventor Corp understands that Buyer Corp is likely to use the patented technology in Colorado, but the patented technology can be used anywhere (i.e., the rights sold are not rights that authorize the holder to conduct a business activity in a specific geographic area). The receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. *See § 39-22-303.6(6)(III), C.R.S., and paragraph (1)(d).*

### **Rule 39-22-303.6–13. Special Rules.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance for determining which gross receipts from sales of certain property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. *See* 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **Software Transactions.** A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) transferred on a tangible medium is treated as the sale of tangible personal property, rather than as either the license or sale of intangible property or the performance of a service. In these cases, the receipts are in Colorado as determined under the rules for the sale of tangible personal property set forth under § 39-22-303.6(5), C.R.S., and Rule 39-22-303.6–6. In all other cases, the receipts from a license or sale of software are to be assigned to Colorado as determined otherwise under Rules 39-22-303.6–7 through –13 (e.g., depending on the facts, as the development and sale of custom software, see paragraph (3) of Rule 39-22-303.6–10; as a license of a marketing intangible, see paragraph (2) of Rule 39-22-303.6–11; as a license of a production intangible, see paragraph (3) of Rule 39-22-303.6–11; as a license of intangible property where the substance of the transaction resembles a sale of goods or services, see paragraph (5) of Rule 39-22-303.6–11; or as a sale of intangible property, see Rule 39-22-303.6–12).

(2) **Sales or Licenses of Digital Goods or Services.**

- (a) *In General.* In the case of a sale or license of digital goods or services, including, among other things, the sale of various video, audio and software products or similar transactions, the receipts from the sale or license are assigned by applying the same rules as set forth in paragraph (3)(b)(ii) or (iii) of Rule 39-22-303.6–10 as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. For purposes of the analysis, it is not relevant what the terms of the contractual relationship are or whether the sale or license might be characterized, depending upon the particular facts, as, for example, the sale or license of intangible property or the performance of a service. *See paragraph (5) of Rule 39-22-303.6–11 or paragraph (1)(c) of Rule 39-22-303.6–12.*
- (b) *Telecommunications Companies.* In the case of a taxpayer that provides telecommunications or ancillary services, and that is thereby subject to 1 CCR 201-2, Special Rule 8A, receipts from the sale or license of digital goods or services not otherwise assigned for apportionment purposes pursuant to that rule are assigned pursuant to this paragraph (2)(b) by applying the rules set forth in paragraphs (3)(b)(ii) or (iii) of Rule 39-22-303.6–10 as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. However, in applying these rules, if the taxpayer cannot determine the state or states where a customer receives the purchased product, it may reasonably approximate this location using the customer's "place of primary use" of the purchased product, applying the definition of "place of primary use" set forth in 1 CCR 201-2, Special Rule 8A.

**Rule 39-22-303.6–14. Nonapportionable Income.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance in the allocation of nonapportionable income.

In the allocation of nonapportionable income, tangible personal property has a situs in Colorado at the time of the sale if it is physically located in Colorado immediately prior to the sale of the property. The movement of property in anticipation of sale or as part of the sale transaction is not considered in determining its situs immediately prior to the time of sale.

**Rule 39-22-303.6–15. Election to Treat All Income as Apportionable Income.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, 39-22-303.6, C.R.S. The purpose of this rule is to clarify how a taxpayer makes an election to treat all income as apportionable income.

- (1) Every year, taxpayers may elect to treat all income as apportionable income.
  - (a) The election to treat all income as apportionable income must be made on or before the extended due date of the return (the fifteenth day of the tenth month following the close of the tax year) by marking the appropriate box on the original return.
  - (b) Once the original return has been filed for the year, the election may not be changed even if the extended due date for the year has not passed.
  - (c) Filing a return without making the election as provided in paragraph (1)(a) constitutes the non-exercise of the election for that tax year, even if the return is calculated with all income as apportionable income.

- (d) The failure to file a return prior to the extended due date of the return constitutes the non-exercise of the election for that tax year.
- (2) If the election described in this rule is made for the income tax year, all income of the taxpayer is apportionable income and is included in the denominator and, if appropriate, the numerator of the taxpayer's receipts factor if not excluded pursuant to §§ 39-22-303.6(6)(d)(III) or (6)(f), C.R.S.

**Rule 39-22-303.6–16. Alternative Apportionment.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to provide guidance regarding the use of alternative apportionment methods. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** Section 39-22-303.6(9), C.R.S., provides that if the allocation and apportionment provisions of § 39-22-303.6, C.R.S., do not fairly represent the extent of the taxpayer's business activity in Colorado, the taxpayer may petition for, or the Department may require, with respect to all or any part of the taxpayer's business activities, if reasonable:
  - (a) separate accounting;
  - (b) the inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in Colorado;
  - (c) the inclusion of any receipts of a taxpayer otherwise excluded under § 39-22-303.6(1)(d), C.R.S., including those from hedging transactions or from the maturity, redemption, sale, exchange, loan, or other disposition of cash or securities; or
  - (d) the employment of any other method, notwithstanding any other provision of § 39-22-303.6(9), C.R.S., to effectuate an equitable apportionment or allocation of the taxpayer's income, fairly calculated to determine the net income derived from or attributable to sources in Colorado.
- (2) Section 39-22-303.6(9)(b), C.R.S., permits a departure from the allocation and apportionment provisions of § 39-22-303.6, C.R.S., only in limited and specific cases where the apportionment and allocation provisions contained in § 39-22-303.6, C.R.S., produce incongruous results.
- (3) In the case of certain industries, transactions, or activities, Rules 39-22-303.6–1 through –13, with respect to the apportionment formula, may not set forth appropriate procedures for determining the apportionment factor. Nothing in § 39-22-303.6(9)(b), C.R.S., or in this Rule 39-22-303.6–16 shall preclude the Department from establishing appropriate procedures under §§ 39-22-303.6(4) through (6), C.R.S., for determining the apportionment factor for each such industry, but such procedures shall be applied uniformly.
- (4) In the case of certain taxpayers, the general rules under §§ 39-22-303 and 39-22-303.6, C.R.S., and the rules thereunder may not set forth appropriate procedures for determining gross income or the apportionment factor. Nothing in § 39-22-303.6(9)(b), C.R.S., or in this rule, shall preclude the Department from distributing or allocating gross income and deductions under § 39-22-303(6), C.R.S.

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**Rule 39-22-303.6–17. Apportioning Gross Receipts of Taxpayers with De Minimis or No Receipts.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this rule is to clarify how taxpayers with *de minimis* or no receipts shall determine their receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these rules are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

- (1) **General Rule.** This Rule 39-22-303.6–17 applies to the determination of the receipts factor if the taxpayer's receipts are less than 3.33 percent of the taxpayer's gross receipts. A taxpayer's receipts subject to assignment under § 39-22-303.6 paragraph (5) and (6), C.R.S., are assigned under those sections and are not assigned by this Rule 39-22-303.6–17.
- (2) **Definitions.**
  - (a) "Gross receipts from lending activities" means interest income and other gross receipts arising from the activities described in paragraphs (1)(c)(iv) through (1)(c)(x) of 1 CCR 201-2, Special Rule 7A, Financial Institutions.
  - (b) An entity's apportionment factor is "*de minimis*" if the denominator is less than 3.33 percent of the entity's apportionable gross receipts or if the factor is insignificant in producing income.
- (3) The following gross receipts are included in the receipts factor denominator and are assigned to the receipts factor numerator in Colorado as follows:
  - (a) Dividends paid by a related party are assigned to the receipts factor numerator in Colorado as follows:
    - (i) If paid from earnings that can be reasonably attributed to a particular year, the dividends are assigned to the receipts factor numerator in Colorado in a proportion equal to the dividend payor's apportionment factor in Colorado for that year as determined pursuant to § 39-22-303.6, C.R.S.
    - (ii) If the dividends were paid from earnings that cannot reasonably be attributed to a particular year, the dividends are assigned to the receipts factor numerator in Colorado in a proportion equal to the dividend payor's average apportionment factor in Colorado for the current and preceding year as determined pursuant to § 39-22-303.6, C.R.S.



- (iii) *Example.* Taxpayer Bigbox Holding, Inc. (Holding) is a domestic corporation, domiciled in Delaware, with numerous foreign and domestic subsidiaries. Holding has no “receipts.” Holding is the corporate parent of Bigbox Retailing, Inc. (Retailing), a domestic corporation with its commercial domicile in State X. During the tax year, Holding receives \$100 million in dividends from Retailing. In both the current tax year and the prior tax year, Retailing conducted operations in ten states, including Colorado. Retailing’s apportionment factor in Colorado in the current year is 20%, and the factor was 18% in the prior year. The dividends received from Retailing cannot be reasonably attributed to that entity’s earnings in any specific year. Therefore, pursuant to paragraph (3)(a)(ii), Holding’s receipts factor in Colorado is calculated by including the \$100 million of apportionable dividends received from Retailing in the denominator, and \$19 million in the receipts factor numerator in Colorado, based on the average of Retailing’s apportionment factors in Colorado in the current year (20%) and prior year (18%).
- (b) Gains are assigned to the receipts factor numerator in Colorado as follows:
  - (i) Gains (net of related losses, but not less than zero) from the disposition of stock (or other intangible property rights) representing at least a 20% ownership interest in an entity are assigned to the receipts factor numerator in Colorado in a proportion equal to what the entity’s separate apportionment factor was in Colorado for the tax year preceding the disposition as determined pursuant to § 39-22-303.6, C.R.S.
  - (ii) Gains (net of related losses, but not less than zero) from the disposition of assets of an entity or segment of a business are assigned to the receipts factor numerator in Colorado in a proportion equal to what the entity’s separate apportionment factor was in Colorado in the tax year preceding the disposition as determined pursuant to § 39-22-303.6, C.R.S.
  - (iii) In applying paragraphs (3)(b)(i) or (ii), in any case in which the entity did not exist in the prior year, or had an apportionment factor of zero, or had only a *de minimis* apportionment factor, the gross receipts from the gain are attributed to the receipts factor numerator of Colorado under paragraphs (4) or (5) of this Rule 39-22-303.6–17, as appropriate.
  - (iv) In applying this paragraph (b), in the case of an entity that was not subject to entity-level taxation, the apportionment percentage shall be computed as if the entity were a C corporation.
  - (v) *Examples.*
    - (A) *Example (i).* Taxpayer, Nuclear Corp. (Nuclear) is a holding company with no “receipts” from transactions and activities in the ordinary course of business. In the prior tax year, Nuclear formed Target Corp. (Target) and transferred its stock ownership interest in three power plants, located in three states, one of which is in Colorado, to Target in exchange for the stock of Target. In the current tax year, Nuclear sells the stock of Target to Risky Investments for \$500 million in cash, recognizing a gain of \$100 million. In the tax year preceding the sale, Target’s apportionment factor in Colorado was 30%. Based on Target’s prior year apportionment factor, Nuclear would include \$100 million in the denominator of its receipts factor and would assign \$30 million to the receipts factor numerator in Colorado.

- (B) *Example (ii).* Same facts as example (i) except during the current tax year Nuclear formed Target and then sold the Target stock on the same day. Because Target did not exist in the year preceding the disposition, Nuclear would have to use paragraph (4) or (5), as appropriate, to assign a portion of the \$100 million gain to its receipts factor numerator in Colorado.
- (c) Gross receipts from lending activities are included in the receipts factor denominator and assigned to the receipts factor numerator in Colorado to the extent those gross receipts would have been assigned to Colorado under 1 CCR 201-2, Special Rule 7A, Financial Institutions (including the rule of assignment to commercial domicile under (1)(c)(xv) of that rule) as if the taxpayer were a financial institution subject to Special Rule 7A, except that:
  - (i) in the case of gross receipts derived from loans to a related party, which are not secured by real property, including interest, fees, and penalties, the gross receipts are included in Colorado's numerator in a proportion equal to the related party's apportionment factor in Colorado as determined by § 39-22-303.6, C.R.S., in the year the gross receipts were included in apportionable income; and
  - (ii) gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer are assigned under paragraph (3)(d).
  - (iii) *Examples.*
    - (A) *Example (i).* Taxpayer Bigbox Holding, Inc. (Holding) is a domestic corporation domiciled in Delaware, with numerous foreign and domestic subsidiaries. Holding has no "receipts." Holding is the corporate parent of Bigbox Retailing, Inc. (Retailing), a domestic corporation with its commercial domicile in state X. During the current tax year, Holding receives \$100 million in dividends from Retailing. In both the current tax year and the prior tax year, Retailing conducted operations in ten states, including Colorado. Retailing's apportionment factor in Colorado in the current year is 20%, and its factor was 18% in the prior year. In a prior year, Holding lent its excess capital to Retailing as an unsecured loan. In repayment of that loan, Holding received \$40 million of interest income from Retailing in the current tax year, in addition to the \$100 million of dividend income that Holding received from Retailing. Pursuant to paragraph (3)(c) of this Rule 39-22-303.6-17, Holding's interest income would be included in its receipts factor denominator, and 20% of Holding's interest income (\$8 million) would be included in its receipts factor numerator in Colorado because 20% of Retailing's apportionment factors were in Colorado in the year the interest income was included in taxable income. Assuming Holding had no other gross receipts, Holding's receipt factor numerator in Colorado is 19.28% (\$27 million / \$140 million).

- (B) *Example (ii).* Taxpayer Loan Participation Inc. (LPI) was formed to acquire and hold a participation in loans secured by real property originated by an unrelated financial institution. LPI has no employees or property and no other gross receipts except for payments of interest on the participation loan held. Even though LPI would not be considered a financial institution under 1 CCR 201-2, Special Rule 7A, LPI's gross receipts are included in the denominator and assigned to the receipts factor numerator in Colorado under paragraph (1)(c)(iv) of 1 CCR 201-2, Special Rule 7A in proportion to the value of loans secured by real property in Colorado compared to the value of loans secured by real property everywhere.
- (d) Gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer are included in the denominator and assigned to the receipts factor numerator in Colorado to the extent those accounts receivable are attributed to borrowers located in Colorado.
  - (i) *Examples.*
    - (A) *Example (i).* Taxpayer IH Factoring, Inc. (Factoring) is a Delaware corporation that has twenty employees, all of whom are located in Delaware. Factoring purchases installment agreements (accounts receivable) from its parent corporation, Iron Horse Motorcycles, Inc. (Iron Horse). Factoring has access to information showing the addresses of the installment agreement customers. Factoring purchases installment agreements originating from Iron Horse's borrowers in States A and Colorado. Factoring is taxable in State A and Colorado. Factoring re-sells the agreements as securitized instruments to institutional investors. Factoring's gross receipts from selling the securitized instruments originating from Iron Horse's borrowers in State A and Colorado would be included in the receipts factor denominator, and Factoring's gross receipts from selling securitized instruments originating from Iron Horse's borrowers in Colorado would be assigned to the receipts factor numerator in Colorado.
    - (B) *Example (ii).* Same facts as example (i), but IH Factoring retains its ownership in the installment agreements and receives principal, interest, and related fees from Iron Horse's customers (borrowers). The principal, interest, and related fees received by Factoring from borrowers in State A and Colorado would be included in Factoring's receipts factor denominator, and Factoring's receipts received from Iron Horse's customers (borrowers) in Colorado would be assigned to the receipts factor numerator in Colorado.
- (e) The net amount (but not less than zero) of gross receipts not otherwise assigned under this paragraph (3) arising from investment activities, including the holding, maturity, redemption, sale, exchange, or other disposition of marketable securities or cash, are assigned to the receipts factor numerator in Colorado if the gross receipts would be assigned to Colorado under paragraphs (1)(c)(xiii) or (1)(c)(xv) of 1 CCR 201-2, Special Rule 7A; all other gross receipts from investment activities not otherwise assigned under this paragraph (3) are assigned to the receipts factor numerator in Colorado if the investments are managed in Colorado.

- (4) Except for gross receipts included and assigned under paragraph (3), gross receipts of a taxpayer whose income and receipts factor are included in a combined report in Colorado are included in the receipts factor denominator and are assigned to the receipts factor numerator in Colorado in the same proportion as the ratio of: (A) the total of the receipts factor numerators of all members of the combined group in Colorado, whether taxable or nontaxable, as determined pursuant to § 39-22-303(11), C.R.S., to (B) the denominator of the combined group.
- (a) *Example.* Taxpayer Windfall, Inc. (Windfall) is a wholly owned subsidiary of ABC Manufacturing Company (ABC). Windfall's only gross receipt during the year is \$1 billion received in settlement of ABC's patent infringement suit against a business competitor that has been ongoing for several years. Windfall is included on a combined report filed by ABC on behalf of ABC, Windfall, and other direct and indirect controlled subsidiaries of ABC (collectively, the Combined Subsidiaries). The ratio of the total numerators of ABC and Combined Subsidiaries in Colorado, as reported on the combined report, to the denominator of the combined group is 25 percent. Windfall would include \$1 billion in its receipts factor denominator and would include \$250 million in the receipts factor numerator in Colorado.
- (5) Except for those gross receipts included and assigned under paragraphs (3) or (4), gross receipts of a taxpayer that files as part of a federal consolidated return are included in the receipts factor denominator and are assigned to the receipts factor numerator in Colorado in a proportion equal to a percentage (but not greater than 100%), the numerator of which is the total of the consolidated group members' income allocated or apportioned to Colorado pursuant to § 39-22-303.6, C.R.S., and the denominator of which is the total federal consolidated taxable income.
- (a) *Example.* Taxpayer Windfall, Inc. (Windfall) is a wholly owned subsidiary of ABC Manufacturing Corp. (ABC). Windfall's only gross receipt is \$1 billion received in settlement of ABC's patent infringement suit against a business competitor that has been ongoing for several years. Windfall is not included on a combined report filed in Colorado, but is included on a consolidated federal return filed by ABC on behalf of Windfall and other affiliated corporations that are included in such consolidated return. The total federal taxable income of that consolidated group is \$5 billion, and the total amount of that income that is apportioned to Colorado by members of the consolidated group other than Windfall is \$500 million. Because the percentage of the consolidated group's income that would be apportioned to Colorado is 10%, Windfall would include \$1 billion in its receipts factor denominator and would assign 10% of that amount (\$100 million) to the receipts factor numerator in Colorado.
- (6) Nothing in this Rule 39-22-303.6–17 shall prohibit a taxpayer from petitioning for, or the Department from applying, an alternative method to calculate the taxpayer's receipts factor in order to fairly represent the extent of the taxpayer's business activity in Colorado as provided for in § 39-22-303.6(9)(b), C.R.S., including the application of this rule in situations that do not meet the threshold of paragraph (1) of this Rule 39-22-303.6–17. Such alternative method may be appropriate, for example, in situations otherwise addressed under paragraph (3)(a) where dividends were paid from earnings that were generated by the activities of a related party of the dividend payor, in which case the dividends may be more appropriately assigned to the receipts factor numerator in Colorado using the related party's average apportionment factors in Colorado.

**Rule 39-22-303.6–18. Income from Foreclosures.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112, 39-22-301, 39-22-303, 39-22-303.6, C.R.S. The purpose of this rule is to clarify that a taxpayer who qualifies under § 39-22-303.6(10), C.R.S., may not make an election pursuant to § 39-22-303.6(8), C.R.S.

A taxpayer who qualifies under the provisions of § 39-22-303.6(10), C.R.S., must file using the rules of that provision (direct allocation). A taxpayer may not make an election pursuant to § 39-22-303.6(8), C.R.S., to treat such income as apportionable income.

**Rule 39-22-303.7–1. Definitions for Sourcing Sales of Mutual Fund Service Corporations.**

In addition to the definitions provided in §39-22-303.7, C.R.S., and for the purpose of implementing §§ 39-22-303.5, 39-22-303.6, 39-22-304, and 39-22-303.7, C.R.S., and related rules, the following terms are defined or further defined as follows:

- (1) “Affiliate of” or “affiliated with” another person means any person directly or indirectly controlling, controlled by, or under common control with such other person.
- (2) “Affiliated regulated investment company” or “affiliated RIC” means a regulated investment company that (1) is a shareholder in another regulated investment company and (2), in common with such other regulated investment company, obtains management or distribution services, as described in (4)(a) and (4)(b), from the same provider of such services or a related provider.
- (3) “Direct” and “indirect” services:
  - (a) *Direct services.* Amounts are derived directly from the performance of management, distribution, or administration services when they are received as compensation for providing such services to a RIC or to a RIC’s officers, directors or trustees acting on behalf of the RIC. For example, the fee received by a person hired by a RIC’s trustees to manage the RIC’s assets is derived directly from the performance of management services.
  - (b) *Indirect services.* Amounts are derived indirectly from the performance of management, distribution, or administration services when they are received as compensation for providing such services to a person who is directly responsible for providing management, distribution or administration services to a RIC pursuant to a contract between such person and the RIC or the RIC’s officers, directors, or trustees acting on behalf of the RIC. For example, the fee received by a brokerage firm hired by a person that is under contract to provide management services to a RIC is derived indirectly from the performance of management services.
- (4) “Mutual Fund Sales” means gross receipts derived, directly or indirectly, from the performance of the following services:
  - (a) “Management services.” The term management services includes, but is not limited to, the rendering of investment advice or investment research to or on behalf of a RIC, making determinations as to when sales and purchases of securities are to be made on behalf of the RIC, or the selling or purchasing of securities constituting assets of a RIC. Such activities must be performed:
    - (i) pursuant to a contract with the RIC entered into pursuant to 15 U.S.C. section 80a-15(a);

- (ii) for a person that has entered into a contract referred to in subsection i) with the RIC; or
    - (iii) for a person that is affiliated with a person that has entered into a contract referred to in i) with the RIC.
  - (b) “Distribution services.” The term distribution services includes, but is not limited to, advertising, servicing, marketing or selling shares of a RIC, including the receipt of contingent deferred sales charges and fees received pursuant to 17 CFR § 270.12b-1 (Sept. 9, 2004), which is incorporated herein by reference, but such incorporation by reference does not include later amendments or editions of this referenced material. Certified copies of this material are available for review in the Office of Tax Policy Analysis at the Colorado Department of Revenue at 1881 Pierce Street, Lakewood, CO 80214. Additionally, a copy of this material may be examined at any state publications depository library.
    - (i) In the case of an open end company, advertising, servicing or marketing shares must be performed by a person who is either engaged in or affiliated with a person that is engaged in the services of selling shares of a RIC. The service of selling shares of a RIC must be performed pursuant to a contract entered into pursuant to 15 U.S.C. section 80a-15(b).
    - (ii) In the case of a closed end company, advertising, servicing or marketing shares must be performed by a person who was either engaged in or affiliated with a person that was engaged in the services of selling shares of a RIC.
  - (c) “Administration services.” The term administration services includes, but is not limited to, clerical, fund or shareholder accounting, participant record keeping, transfer agency, bookkeeping, data processing, custodial, internal auditing, legal and tax services performed for a RIC. The provider of administration services must also provide or be affiliated with a person that provides management or distribution services to any RIC.
- (5) “Average Number of Shares” means the average of the number of shares owned by a class of shareholders at the beginning of each year and by the same class of shareholders at the end of the year, where “the year” refers to the RIC’s taxable year that ends with or within the mutual fund service corporation’s taxable year.
- (6) “RIC” or “regulated investment company” or “fund” means a regulated investment company as defined in section 851 of the federal internal revenue code of 1986, as amended. For purposes § 39-22-303.6(9), C.R.S., and these rules, if the mutual fund service corporation principally provides management, distribution, or administration services to regulated investment companies as defined in section 851 of the federal internal revenue code, such terms also include pension and employee retirement plans and foreign entities similar to regulated investment companies as defined in section 851 of the federal internal revenue code.
- (7) “Shareholder factor” or “Colorado shareholder factor” means the Average Number of Shares owned by the RIC’s shareholders domiciled in Colorado divided by the Average Number of Shares owned by the RIC’s shareholders everywhere.

**Rule 39-22-303.7–2. Application.**

- (1) The Colorado net income of mutual fund service corporations shall be calculated pursuant to §§ 39-22-303.6, and 39-22-304, C.R.S., with the modification to apportionment set out in § 39-22-303.7, C.R.S., and related rules.

- (2) **Colorado Receipts from Mutual Fund Sales.** To determine Colorado receipts from mutual fund sales, a mutual fund service corporation must calculate mutual fund sales by fund and apply the Colorado shareholder factor for each fund to such mutual fund sales by fund.
- (a) Colorado receipts by fund are calculated by multiplying mutual fund sales by fund by each fund's shareholder factor.
  - (b) The total Colorado receipts from mutual fund sales are then calculated by adding together the Colorado receipts for each separate fund.
- (3) If the domicile of a shareholder is unknown to the mutual fund service corporation because the shareholder of record is a person that holds the shares of a regulated investment company as a depositor for the benefit of others, §39-22-303.7(2)(b) provides that the mutual fund service corporation may use any reasonable basis, such as ZIP codes of underlying shareholders or US census bureau data, in order to determine the proper location for the assignment of the shares. If no other basis appears reasonable, and if the number of such shares is not a majority of the total shares of the fund, then it shall be reasonable to exclude such shares from both the numerator and the denominator of the shareholder factor calculation.

**Rule 39-22-304(2)(f). Gross Conservation Easement Addition.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1), 39-22-304(3)(f), and 39-22-522, C.R.S. The purpose of this rule is to clarify the requirement to add back, in the calculation of Colorado taxable income, any federal charitable contribution deduction a taxpayer claims for the donation of a gross conservation easement when a Colorado gross conservation easement credit is also claimed based on the donation of the same gross conservation easement.

- (1) Except as provided in paragraph (2) of this rule, any taxpayer that claims both a charitable contribution deduction pursuant to section 170 of the Internal Revenue Code and a gross conservation easement credit pursuant to section 39-22-522, C.R.S. based on the same gross conservation easement donation shall add the amount of the federal deduction back to taxable income in determining the taxpayer's Colorado taxable income. The taxpayer claiming the deduction is required to make the addition irrespective of whether all or part of the credit is:
- (a) waitlisted pursuant to section 39-22-522(2.5) C.R.S.;
  - (b) carried forward to a subsequent tax year pursuant to section 39-22-522(5) C.R.S.;
  - (c) transferred to another taxpayer pursuant to section 39-22-522(7) C.R.S; or
  - (d) allowed as increments in subsequent tax years pursuant to section 39-22-522(4)(a)(II.5), C.R.S.
- (2) With respect to any single gross conservation easement donation, the aggregate addition required by this rule is limited to the contribution amount upon which the gross conservation easement credit claimed is based.
- (a) In the case of a donation made by joint tenants, tenants in common, a partnership, S corporation, or other similar entity or ownership group, the limitation prescribed by this paragraph (2) shall apply to the entity or group collectively and shares thereof shall be allocated to the entity's or group's owners, partners, members, or shareholders in the same proportion as prescribed for the credit pursuant to section 39-22-522(4)(b), C.R.S. For example, if sixty percent of a credit is allocated to a partner in a partnership, the aggregate addition required for that partner is limited to sixty percent of the contribution amount upon which the gross conservation easement credit claimed is based.

**Rule 39-22-304(3)(i). Wages and Salaries Corporate Income Tax Modification.**

Wages and salaries that cannot be deducted on the federal level because of the limitations of section 280C of IRC can be subtracted from federal taxable income reported to the State of Colorado. Wages and salaries that qualify for this subtraction include those for which the following federal credit(s) was taken on the federal return:

- (a) The Indian Employment Credit under section 45A(a),
- (b) The Work Opportunity Credit under section 51(a),
- (c) The Empowerment Zone Employment Credit under section 1396(a).
- (d) The Orphan Drug Credit under section 45C(a).
- (e) The Research Expense Credit under section 41(a).
- (f) The Employee Retention Credit under Section 1400R
- (g) The Welfare-To-Work Credit under Section 51A
- (h) The Mine Rescue Team Training Credit under Section 45N

The Employer Social Security Credit (FICA Tip Credit) under section 45B of the IRC is not referenced in section 280C of the Internal Revenue Code and, therefore, cannot be subtracted from federal taxable income on the Colorado income tax return.

**Rule 39-22-304(3)(j). Corporate Subtraction for Section 78 Dividend.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-22-103(5.3), and 39-22-304(3)(j), C.R.S. The purpose of this rule is to clarify the application of section 39-22-304(3)(j), C.R.S., regarding the subtraction from federal taxable income of amounts treated as dividends pursuant to section 78 of the Internal Revenue Code.

- (1) **General Rule.** The subtraction allowed pursuant to section 39-22-304(3)(j), C.R.S., is limited to the amount treated as a dividend and included in a C corporation's federal taxable income pursuant to section 78 of the Internal Revenue Code. The subtraction is not allowed for any part of an amount treated as a dividend pursuant to section 78 of the Internal Revenue Code that is deducted in the calculation of federal taxable income.
- (2) **Coordination with Section 250.** No subtraction is allowed for any amount treated as a dividend pursuant to section 78 of the Internal Revenue Code that is:
  - (i) attributable to global intangible low taxed income pursuant to section 951A and 960(d) of the Internal Revenue Code; and
  - (ii) deducted, pursuant to section 250(a)(1)(B)(ii) of the Internal Revenue Code, in the calculation of federal taxable income.
- (3) **Subtraction Allowed Only to C Corporations.** The subtraction authorized by section 39-22-304(3)(j), C.R.S., is allowed only to C corporations subject to Colorado income tax imposed by Part 3 of Article 22 of Title 39, C.R.S. The subtraction is not allowed to any individual, estate, or trust subject to Colorado income tax imposed by Part 1 of Article 22 of Title 39, C.R.S.



**Rule 39-22-305. Consolidated Returns.**

**Basis and Purpose.** The bases for this rule are §§ 39-21-112(1) and 39-22-305, C.R.S. The purpose of this rule is to clarify how to make an election to file a consolidated return and how to withdraw such election.

**(1) Election to File a Consolidated Return.**

- (a) The election to file a consolidated C corporation return pursuant to § 39-22-305, C.R.S., must be made on or before the due date of the filing of the return, including any extensions of time for filing the return. Such election must be made by indication on the return in the designated manner. If an election is made, such election may not be withdrawn after the due date, including any extension of time, for filing the return. A taxpayer who has not made a timely election may request permission from the Executive Director or his or her designee to make a consolidated return election consistent with the requirements set forth in Treas. Reg. (26 C.F.R.) § 301.9100-3.
- (b) The election to file a consolidated return is binding for the election year and the next three tax years, unless permission is granted in writing by the Executive Director or the Executive Director's designee for an earlier change.
- (c) From the fifth year forward, a taxpayer may revoke the election prior to the due date for filing a consolidated return, including any extensions of time for filing the return. If revoked, the revocation may not be withdrawn after such due date or any extension of time for filing the return. If the taxpayer revokes the election, it may subsequently elect to file on a consolidated basis pursuant to (1)(a) of this rule. The filing by multiple taxpayers of non-consolidated returns shall be considered the revocation of the election. However, the inadvertent exclusion of a corporation from a consolidated return shall not be considered a revocation of the election.
  - (i) Example. A taxpayer will not revoke its consolidated election if the taxpayer acquires a new C corporation doing business in Colorado and inadvertently fails to include such corporation in the consolidated return for the year of acquisition.
- (d) For any year a consolidated return is filed, the taxpayer shall file an affiliation schedule with the return.

- (2) Members of the Consolidated Return.** The Colorado income tax liability for an affiliated group of corporations filing a consolidated return is based only on the net income of those members of the affiliated group that have substantial nexus in Colorado, exceed the minimum standards of Public Law 86-272 (15 U.S.C. § 381) in Colorado, and for which a tax is imposed under § 39-22-301, C.R.S., during that tax year. The consolidated net income of such corporations is allocated and apportioned in accordance with § 39-22-303.6, § 39-22-303.7, or § 39-22-303.9, C.R.S. The apportionment factors of such consolidated group are based solely on the consolidated sales of the consolidated group.

**(3) Consolidated Return that Includes a Combined Report.**

- (a) An election to file a consolidated return can be made even if the consolidated return will include members of an affiliated group of corporations that are required to file a combined report. When filing a consolidated return that includes any member of an affiliated group that is required to be included in a combined report, such consolidated return must include the income as computed in the combined report even if that income calculation is based on business activities of one or more affiliated corporations not doing business in Colorado.

- (b) The affiliated group electing to file a consolidated return shall be treated as one taxpayer for purposes of filing the combined report.

Cross References

1. See 1 CCR 201-2, Rule 39-22-301(1) for additional information on substantial nexus.
2. See 1 CCR 201-2, Rule 39-22-303(11)(a) for additional information on filing a combined report.

**Rule 39-22-503. Colorado Net Income of a Real Estate Investment Trust.**

A real estate investment trust shall be taxed as a corporation for Colorado income tax purposes.

**Rule 39-22-504–1. Colorado Net Operating Losses for Individuals, Estates, and Trusts.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-22-103(5.3), 39-22-104(3)(l), 39-22-104(4)(z), and 39-22-504, C.R.S. The purpose of this rule is to provide guidance regarding the portion of any net operating losses deducted in the calculation of federal taxable income for an individual, estate, or trust that is allocated to Colorado and any required addition for any portion of a net operating loss that is not allocated to Colorado.

- (1) **General Rule.** Except as provided in sections 39-22-104(3)(l), 39-22-104(4)(z), and 39-22-504, C.R.S., and this rule, a net operating loss deduction is allowed for Colorado income tax purposes in the same manner that it is allowed under the Internal Revenue Code. An individual, estate, or trust that has claimed a net operating loss deduction pursuant to section 172 of the Internal Revenue Code is neither required nor allowed to make any further modification to federal taxable income related to the net operating loss deduction in the calculation of Colorado income tax, except as provided by law and this rule.
- (2) **Addition Required for Loss Not Allocated to Colorado.** In the calculation of Colorado income tax pursuant to section 39-22-104, C.R.S., an addition to federal taxable income is required in the amount determined pursuant to section 39-22-504, C.R.S., and this rule. The amount of the addition is equal to the amount of any federal net operating loss deducted pursuant to section 172 of the Internal Revenue Code in the calculation of federal taxable income, minus the portion of such deducted loss that is allocated to Colorado in the taxable year that the net operating loss was sustained.
  - (a) *Full-year Colorado Residents.* In the case of an individual, estate, or trust that is a Colorado resident pursuant to section 39-22-103, C.R.S., for the entirety of the taxable year in which the net operating loss was sustained, the entire loss is allocated to Colorado.
  - (b) *Colorado Nonresidents.* In the case of an individual, estate, or trust that is not a Colorado resident pursuant to section 39-22-103, C.R.S., for any part of the taxable year in which the net operating loss was sustained, the loss is allocated to Colorado to the extent that it is derived from sources within Colorado as determined pursuant to section 39-22-109 or 39-22-403, C.R.S., as applicable.
  - (c) *Part-year Colorado Residents.* In the case of an individual, estate, or trust that is a Colorado resident pursuant to section 39-22-103, C.R.S., for only part of the taxable year in which the net operating loss was sustained, the loss shall be allocated to Colorado pursuant to this paragraph (2)(c).
    - (i) The net operating loss shall first be allocated to Colorado pursuant to paragraph (2)(b) of this rule.

- (ii) Any part of the net operating loss that is not allocated to Colorado pursuant to paragraph (2)(c)(i) of this rule, shall be allocated to Colorado by multiplying that part of the net operating loss by a fraction, the numerator of which is number of days during the tax year that the taxpayer was a Colorado resident and the denominator of which is the total number of days in the tax year.

**Rule 39-22-504-2. Colorado Net Operating Losses for C Corporations.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-22-103(5.3), 39-22-304(2)(c), 39-22-304(3)(g), and 39-22-504, C.R.S. The purpose of this rule is to provide guidance regarding the Colorado net operating loss deduction allowed to C corporations.

- (1) **Allocation of Federal Net Operating Loss to Colorado.** The Colorado net operating loss of a C corporation is allowed in the same manner as a federal net operating loss, except that the Colorado net operating loss is computed as only that portion of the federal net operating loss that is allocated to Colorado pursuant to article 22 of title 39, C.R.S., and this rule. In accordance with paragraph (1)(a) of this rule, and subject to the limitation described in paragraph (1)(d) of this rule, the portion of the federal net operating loss that is allocated to Colorado shall be determined by modifying the federal net operating loss as prescribed in paragraph (1)(b) of this rule and apportioning and allocating the resulting modified federal net operating loss, if any, as prescribed in paragraph (1)(c) of this rule. The requirements of paragraph (1)(a) of this rule relating to combined, consolidated, combined-consolidated, and separate filing and the modification, allocation, and apportionment provisions of paragraphs (1)(b) and (1)(c) of this rule shall apply in accordance with the law in effect for the tax year in which the loss was sustained, as provided in paragraph (1)(e) of this rule.
  - (a) *Combined, Consolidated, Combined-Consolidated, and Separate Filing.* In the case of a combined return filed pursuant to section 39-22-303(11), C.R.S., a consolidated return filed pursuant to section 39-22-305, C.R.S., or a combined-consolidated return filed pursuant to sections 39-22-303(11) and -305, C.R.S., the Colorado net operating loss shall be calculated with respect to only the C corporations that are included in such combined, consolidated, or combined-consolidated return and based upon the federal net operating loss determined with respect to only the group of C corporations included in that combined, consolidated, or combined-consolidated Colorado return. In the case of a separate return filed by a single C corporation, the Colorado net operating loss shall be calculated with respect to only that C corporation and based upon the federal net operating loss determined with respect to only that C corporation.
  - (b) *Modification of Federal Net Operating Loss.* For the purpose of Colorado income tax, the federal net operating loss of a C corporation computed pursuant to section 172 of the Internal Revenue Code, represented as a negative amount, shall be modified by any addition, subtraction, or other modification required or allowed in the calculation of the net income of the C corporation for the loss year, including, but not limited to:
    - (i) any addition required by section 39-22-304(2), C.R.S.;
    - (ii) any subtraction allowed by section 39-22-304(3), C.R.S.; and
    - (iii) any exclusion of foreign source income pursuant to section 39-22-303(10), C.R.S.
  - (c) *Allocation and Apportionment of Modified Federal Net Operating Loss.* For the purpose of Colorado income tax, the modified federal net operating loss of a C corporation computed pursuant to paragraph (1)(b) of this rule shall be allocated and apportioned pursuant to this paragraph (1)(c).

- (i) Unless the C corporation has made an election pursuant to section 39-22-303.6(8), C.R.S., to treat all income as apportionable income, any nonapportionable income, as defined by section 39-22-303.6(1)(c), C.R.S., included in a C corporation's federal taxable income shall be subtracted from the modified federal net operating loss computed pursuant to paragraph (1)(b) of this rule.
    - (A) *Example 1.* A taxpayer has \$110,000 of apportionable income, \$90,000 of nonapportionable income, \$250,000 of federal deductions, and no Colorado modifications. This results in a modified federal net operating loss of \$50,000. To determine the modified federal net operating loss after deduction of nonapportionable income under this paragraph (1)(c)(i), the \$90,000 of nonapportionable income is subtracted from negative \$50,000. The result is negative \$140,000.
    - (B) *Example 2.* A taxpayer has \$95,000 of apportionable income, a \$30,000 loss that is nonapportionable income, \$150,000 of federal deductions, and no Colorado modifications. This results in a modified federal net operating loss of \$85,000. To determine the modified federal net operating loss after deduction of nonapportionable income under this paragraph (1)(c)(i), the negative \$30,000 of nonapportionable loss is subtracted from negative \$85,000. The result is negative \$55,000.
  - (ii) The amount computed pursuant to paragraph (1)(c)(i) of this rule, shall be allocated to Colorado by multiplying it by the fraction determined pursuant to section 39-22-303.6(4)(a), C.R.S., and any applicable special apportionment rules promulgated by the Department, for the C corporation for the loss year.
  - (iii) Any nonapportionable income, as defined by section 39-22-303.6(1)(c), C.R.S., included in a C corporation's gross income and allocated to Colorado pursuant to section 39-22-303.6(7), C.R.S., shall be added to the amount computed pursuant to paragraph (1)(c)(ii) of this rule.
  - (iv) For the purpose of paragraphs (1)(c)(i) and (1)(c)(iii) of this rule, nonapportionable income shall be the net of the nonapportionable income and any federal expenses, losses, and other deductions and any Colorado modifications allowed pursuant to paragraph (1)(b) of this rule that are properly apportioned or allocated to such nonapportionable income.
- (d) If the Colorado net operating loss calculated pursuant to paragraph (1) of this rule exceeds the amount of the federal net operating loss, the Colorado net operating loss is limited to the amount of the federal net operating loss computed in accordance with paragraph (1)(a) of this rule.
- (i) If a group of C corporations filing a combined, consolidated, or combined-consolidated Colorado return does not collectively have a federal net operating loss for a tax year, as determined with respect to only the group of C corporations included in that combined, consolidated, or combined-consolidated Colorado return, that group does not have a Colorado net operating loss for that tax year.
  - (ii) If a C corporation filing a separate Colorado return does not have a federal net operating loss for a tax year, as determined with respect to only that C corporation, that C corporation does not have a Colorado net operating loss for that year.

- (e) *Determining Colorado Net Operating Loss Under Laws Applicable to the Loss Year.*  
Paragraph (1) of this rule shall be applied in determining the amount of the Colorado net operating loss by reference to the applicable provisions of part 3 of article 22 of title 39, C.R.S., in effect for the tax year in which the loss arose. For tax years commencing prior to January 1, 2019, that includes, but is not limited to:
  - (i) section 39-22-304, C.R.S., for the modification of the federal net operating loss pursuant to paragraph (1)(b) of this rule; and
  - (ii) section 39-22-303, section 39-22-303.5, or Article IV in section 24-60-1301, C.R.S., as applicable, for the allocation and apportionment of modified federal net operating loss pursuant to paragraph (1)(c) of this rule.
- (2) **Carryforward of Colorado Net Operating Losses.** Colorado net operating losses may be carried forward as prescribed in section 39-22-504(3), C.R.S. The entire amount of any Colorado net operating loss shall be first carried forward to the tax year immediately following the tax year in which the loss was sustained. In the event a C corporation has available for deduction Colorado net operating losses originating in multiple tax years, the C corporation must first deduct the loss arising from the earliest tax year. If all or any part of an available net operating loss may not be deducted because of the limitations prescribed in paragraph (3) of this rule, the part that may not be deducted may be carried forward to the next tax year, but in no event may a loss be carried forward beyond the time periods prescribed in section 39-22-504(3), C.R.S.
- (3) **Limitations on Colorado Net Operating Loss Deduction.**
  - (a) The Colorado net operating loss deduction a C corporation may claim for any given tax year is limited to the C corporation's Colorado taxable income before net operating loss deduction determined pursuant to article 22 of title 39, C.R.S., and paragraph (3)(c) of this rule for that tax year. The Colorado net operating loss deduction is also subject to the limitations described in paragraph (3)(b) of this rule.
  - (b) Except as provided in section 39-22-504(1)(b), C.R.S., and this paragraph (3), the Colorado net operating loss deduction allowed for any taxable year shall be subject to the same limitations that apply with respect to the federal net operating loss deduction allowed pursuant to section 172 of the Internal Revenue Code.
    - (i) Limitations applicable to the Colorado net operating loss deduction include, but are not limited to, the limitations prescribed by:
      - (A) section 172(a)(2) of the Internal Revenue Code, subject to the requirements of section 39-22-504(1)(b), C.R.S., and paragraph (3)(b)(ii) of this rule;
      - (B) sections 381, 382, and 384 of the Internal Revenue Code;
      - (C) section 860E of the Internal Revenue Code; and
      - (D) 26 CFR § 1.1502-21.
    - (ii) *Eighty Percent Limitation Pursuant to Section 39-22-504(1)(b), C.R.S.* The 80 percent limitation prescribed by section 172(a)(2) of the Internal Revenue Code and section 39-22-504(1)(b), C.R.S., shall apply to Colorado net operating loss deductions, subject to the following requirements:

- (A) The 80 percent limitation shall apply to Colorado net operating loss deductions claimed for losses arising in taxable years beginning after December 31, 2017, regardless of the tax year for which the deduction is claimed.
  - (B) The 80 percent limitation shall apply with respect to a C corporation's Colorado taxable income before net operating loss deduction determined pursuant to paragraph (3)(c) of this rule. Pursuant to section 39-22-504(1)(b), C.R.S., and notwithstanding section 172(a)(2)(B)(ii)(I) of the Internal Revenue Code, federal taxable income shall be determined for the purpose of paragraph (3)(c) with regard to any deduction allowed under section 250 of the Internal Revenue Code.
  - (C) The 80 percent limitation shall apply with respect to Colorado taxable income after the deduction of any Colorado net operating loss deduction allowed pursuant to section 39-22-504, C.R.S., for a loss arising in a taxable year beginning prior to January 1, 2018.
- (iii) *Limitation Established by Section 382 of the Internal Revenue Code.* For its application to the Colorado net operating loss deduction, the net operating loss limitation prescribed by section 382 of the Internal Revenue Code shall be apportioned to Colorado using the Colorado apportionment fraction for the old loss corporation for the last full tax year prior to the change in ownership. If the old loss corporation's Colorado apportionment fraction for the last full tax year prior to the change in ownership does not fairly represent the extent of the old loss corporation's business activity in Colorado, the old loss corporation may petition for, or the executive director may require, an alternative method for apportioning the limitation prescribed by section 382.
- (iv) *Limitation Established by Section 860E of the Internal Revenue Code.* Pursuant to section 860E of the Internal Revenue Code, the excess inclusion of any holder of a residual interest in a REMIC may not be offset by a Colorado net operating loss. For the purpose of paragraph (3)(c) of this rule, a C corporation's federal taxable income shall be reduced, prior to modification, allocation, and apportionment, by any excess inclusion included therein pursuant to section 860E of the Internal Revenue Code.
- (v) *SRLY Limitation Established by 26 CFR § 1.1502-21(c).* For the application of the SRLY limitation prescribed by 26 CFR § 1.1502-21(c) to Colorado net operating losses, the provisions of this paragraph (3)(b)(v) apply. The SRLY limitation applies to a Colorado net operating loss only if it is a portion of a federal net operating loss to which the SRLY limitation applies. For the purpose of this paragraph (3)(b)(v), whether a taxable year is a separate return year or separate return limitation year, as defined in 26 CFR § 1.1502-1(e) and (f), or a consolidated return year, as defined in 26 CFR § 1.1502-1(d), is determined with respect to the filing of the corporation's federal income tax return, not its Colorado income tax return.
- (A) The aggregate of the Colorado net operating loss carryforwards of a member (SRLY member) arising (or treated as arising) in SRLYs (SRLY NOLs) that are included in the Colorado net operating loss deductions for all consolidated return years of the group may not exceed the aggregate Colorado taxable income for all consolidated return years of the group determined by reference to only the member's items of income, gain, deduction, and loss (cumulative register) and pursuant to 26 CFR § 1.1502-21(c) and this rule.

- (B) For the purpose of paragraph (3)(b)(v)(A) of this rule, the aggregate Colorado taxable income for all consolidated return years of the group determined by reference to only the member's items of income, gain, deduction, and loss (cumulative register) is the sum of the consolidated taxable income for each consolidated return year, determined pursuant to 26 CFR § 1.1502-21(c)(1)(i) by reference to only the member's items of income, gain, deduction, and loss, and modified, allocated, and apportioned pursuant to paragraph (3)(b)(v)(C) of this rule.
- (C) The consolidated taxable income for each consolidated return year, determined pursuant to 26 CFR § 1.1502-21(c)(1)(i) by reference to only the member's items of income, gain, deduction, and loss shall be, for Colorado income tax purposes:
  - (I) modified by any additions and subtractions required by Colorado law, including, but not limited to, section 39-22-304, C.R.S., determined by reference to only the member; and
  - (II) allocated and apportioned pursuant to section 39-22-303.6, C.R.S., by reference to only the member's receipts, income, and loss.
- (D) If a limitation on the amount of Colorado taxable income that may be offset under section 172(a) of the Internal Revenue Code and section 39-22-504(1)(b), C.R.S., applies in a taxable year to a member whose carryforwards are subject to a SRLY limitation (SRLY member), the amount of net operating loss subject to a SRLY limitation that is available for use by the affiliated group in that year is limited to the percentage of the balance in the cumulative register (determined pursuant to paragraphs (3)(b)(v)(A), (B), and (C) or this rule) that would be available for offset under section 172(a) of the Internal Revenue Code and section 39-22-504(1)(b), C.R.S., if the SRLY member filed a separate return and reported as Colorado taxable income in that year the amount contained in the cumulative register. For example, assume that an affiliated group has a SRLY member that is a corporation other than a nonlife insurance company, and that the SRLY member has a SRLY NOL that arose in a taxable year beginning after December 31, 2017 (post-2017 NOL). The affiliated group's Colorado taxable income for a consolidated return year is \$200, but the cumulative register has a positive balance of only \$120 (and no other net operating loss carryforwards are available for the year). Because the SRLY limitation would be \$96 ( $\$120 \times 80$  percent), only \$96 of SRLY loss may be used, rather than \$160 ( $\$200 \times 80$  percent). In addition, to the extent that this paragraph (3)(b)(v)(D) applies, the cumulative register is decreased by the full amount of income required under section 172(a) of the Internal Revenue Code to support the amount of SRLY NOL absorption.
- (E) If a corporation becomes a member of a federal consolidated group as defined in 26 CFR § 1.1502-1(h) (the SRLY event) within six months of the change date of an ownership change giving rise to an IRC section 382(a) limitation with respect to the carryover of a federal net operating loss (the section 382 event) so as to constitute an overlap as defined in 26 CFR § 1.1502-21(g)(2)(ii) and thereby precluding the application of the SRLY limitation to that federal net operating loss carryover, then the SRLY limitation will also not apply to the Colorado net operating loss that is a portion of that federal net operating loss carryover.

- (vi) Treasury Regulations 26 CFR §§ 1.1502-1, 1.1502-11, and 1.1502-21, are hereby incorporated by reference. The regulations hereby incorporated are the versions of those regulations in effect as of April 1, 2021 and does not include any later amendments or editions of these regulations. Copies of these regulations are available online at:
  - (A) <https://www.govinfo.gov/content/pkg/CFR-2021-title26-vol14/pdf/CFR-2021-title26-vol14-sec1-1502-1.pdf>
  - (B) <https://www.govinfo.gov/content/pkg/CFR-2021-title26-vol14/pdf/CFR-2021-title26-vol14-sec1-1502-11.pdf> and
  - (C) <https://www.govinfo.gov/content/pkg/CFR-2021-title26-vol14/pdf/CFR-2021-title26-vol14-sec1-1502-21.pdf>.
- (c) *Colorado Taxable Income Before Net Operating Loss Deduction for Determining Colorado Net Operating Loss Deduction and Limits Thereon.* For the purpose of determining the allowable Colorado net operating loss deduction pursuant to section 39-22-504, C.R.S., and paragraphs (3)(a), (3)(b)(ii), and (3)(b)(v) of this rule, a C corporation's Colorado taxable income before net operating loss deduction is its federal taxable income modified, apportioned, and allocated pursuant to article 22 of title 39, C.R.S., computed without regard to the Colorado net operating loss deduction allowed pursuant to sections 39-22-304(3)(g) and 504, C.R.S.

**Rule 39-22-504(6).**

- (1) **Employer as Account Administrator.** In order to be a medical savings account administrator, an employer must establish or have established and must maintain a self-insured health plan meeting the requirements of the federal "employee retirement income security act", as amended.
  - (a) Such plan must meet the definition of an "employee welfare benefit plan" as defined in Section 3(1) of the federal Employee Retirement Income Security Act of 1974. (29 U.S.C., Section 1002).
  - (b) Such plan must meet the coverage requirements of Section 4 of the federal Employee Retirement Income Security Act of 1974. (29 U.S.C., Section 1003).
  - (c) With respect to such plan, the employer must be subject to the filing with the United States Secretary of Labor requirements and to the furnishing information to participants requirements of Section 101 of the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1021).
  - (d) The administration of such plan must comply with the fiduciary responsibility requirements of Part 4 of the federal Employee Security Act of 1974 (29 U.S.C., Sections 1101-1114).
- (4) **Eligible Medical Expense.**
  - (a) Eligible medical expense means expense for the medical care of the account holder, the spouse of the account holder and the dependent children of the account holder as such term is defined in section 213(d) of the Internal Revenue Code.



- (b) Premiums paid in a health insurance policy purchased by the account holder to cover the medical expenses not covered by a health insurance plan furnished to the account holder by his employer because of the deductible feature in such plan do not qualify as eligible medical expenses. 39-22-504.6(2.4) C.R.S. notwithstanding.
- (5) **Employee.** Employee means an individual who is employed in Colorado by an employer other than the United States government and on whose, behalf a medical savings account is established.
- (6) **Employer.** Employer means an employer doing business in Colorado other than the United States government.
- (7) **Medical Savings Account.** Medical savings account means a savings account established under the provisions of section 39-22-504.7. C.R.S. to pay eligible medical expenses of the account holder, the spouse of the account holder and the dependent children of the account holder.
- (8) **Qualified Higher Deductible Health Plan.** Qualified higher deductible health plan means health insurance with a deductible feature not in excess of \$3,000 purchased by an employer for the benefit of an employee who makes deposits into a medical savings account.

**Rule 39-22-504(7). Medical Savings Accounts.**

**(1) Establishment of Medical Savings Accounts.**

- (a) On or after January 1, 1995, an employer may offer to establish medical savings accounts for his employees. Such accounts are to be established by agreement between the employer and a qualified medical savings account administrator. A separate account is to be established for each employee who elects to have a medical savings account.
- (b) If an employer does not establish a medical savings account for an employee, the employee may establish his own medical savings account by agreement with a qualified medical savings account administrator.

**(2) Contributions to Medical Savings Accounts.**

- (a) Each year a maximum of \$3,000 may be contributed to an employee's medical savings account. The contribution may be made by the employer, by the employee, or by a combination of the two. If the employer established the account and the employee is making the contribution, the employer shall withhold the contribution from the employee's wages and shall immediately transmit the amount withheld to the account administrator. The timing of the withholding and the amount of the withholding shall be by agreement between the employee and the employer.
- (b) Amounts contributed to a medical savings account by or on behalf of an employee and interest earned thereon shall be an allowable modification decreasing the employee's federal taxable income for the purpose of determining Colorado taxable income.
- (c) The employee shall elect to make contributions to a medical savings account by signing an election form provided by or approved by the Department of Revenue.

**(3) Distributions from a Medical Savings Account.**

- (a) Money may be distributed from a medical savings account for only one of three reasons:

- (i) to reimburse the eligible medical expenses of the account holder, the spouse of the account holder, or the dependent child of the account holder;
    - (ii) cashing out the balance in the account of a deceased account holder, or
    - (iii) cashing out an account holder's prior years' balance.
  - (b) Money withdrawn from a medical savings account for any reason other than the payment of eligible medical expenses of the account holder, the spouse of the account holder or the child of the account holder shall be taxable income for Colorado income tax purposes and shall be a modification increasing federal taxable income in arriving at Colorado taxable income of the account holder, the account holder's estate, or the beneficiary receiving the money, as the case may be.
- (4) Report of Account Administrator.**
- (a) The account administrator must submit an annual report to the account holder for each calendar year within 31 days after the close of the calendar year for inclusion with the account holder's income tax return.
  - (b) The annual report required by this paragraph (4) must show:
    - (i) the account holder's name and social security number;
    - (ii) the account administrator's name and Colorado income tax account number;
    - (iii) the balance in the medical savings account as of the beginning of the calendar year;
    - (iv) the contributions to the account during the calendar year;
    - (v) the distributions from the account during the calendar year to reimburse the account holder for eligible medical expenses;
    - (vi) the distributions from the account during the calendar year for other purposes;
    - (vii) the amount of interest earned by and credited to the account during the calendar year;
    - (viii) the fiduciary fees and other amounts charged to the account during the calendar year; and
    - (ix) the balance in the medical savings account as of the close of the calendar year.
  - (c) With regard to distributions from a medical savings account, distributions for the purpose of reimbursing the account holder for eligible medical expenses shall be deemed to be from the last monies contributed or credited to the account, and distributions for other purposes shall be deemed to be from the earliest contributions or credits remaining in the account at the time of the distribution.
  - (d) It shall be the responsibility of the account administrator to make an informed decision as to whether or not a distribution is made for the purpose of reimbursing an eligible medical expense.

- (5) **Portability.** An employee may move his medical savings account from one account administrator to another only upon termination of employment. This is done by directing the first administrator to transfer the funds to the second administrator. The employee cannot move the funds himself as this would cause a taxable disbursement from the account.

**Rule 39-22-516. Innovative Motor Vehicle and Innovative Truck Credits.**

**Basis and Purpose.** The bases for this rule are § 39-21-112(1), C.R.S. and § 39-22-516.7 and 516.8, C.R.S. The purpose of this rule is to provide clarification regarding the innovative motor vehicle and innovative truck credits, the conditions necessary to qualify for the credit, and the process for assigning the credit.

- (1) **Application.** This rule applies for tax years commencing on or after January 1, 2017 to both the innovative motor vehicle credit authorized by § 39-22-516.7, C.R.S. and the innovative truck credit authorized by § 39-22-516.8, C.R.S. (collectively referred to as the "Credit").
- (2) **Definitions.** As used in this rule, unless context otherwise requires:
- (a) "Date of Purchase, Lease, or Modification" means the date the Purchaser enters into a legally binding agreement to purchase, lease, or Modify a motor vehicle, truck, or trailer, provided the Purchaser takes possession of the new or Modified motor vehicle, truck, trailer, within 10 days of this date. If the Purchaser does not take possession of the new or Modified motor vehicle, truck, or trailer within 10 days of the execution of the legally binding agreement, the "Date of Purchase, Lease, or Modification" is the date the Purchaser takes possession of the new or Modified motor vehicle, truck, or trailer.
  - (b) "Financing Entity" has the same meaning as in §§ 39-22-516.7(1)(k.5) and 516.8(1)(r.5), C.R.S.
  - (c) "Modification" means a Qualifying Conversion, the installation of a Qualifying Device, or the conversion of a trailer into a Qualifying Trailer. "Modify" means to convert or alter a motor vehicle, truck, or trailer with a Modification.
  - (d) "New vehicle" means a motor vehicle or truck being transferred for the first time from a manufacturer or importer, or dealer or agent of a manufacturer or importer, to the end user or customer. A motor vehicle or truck that has been used by a dealer for the purpose of demonstration to prospective customers is considered a "New Vehicle" unless such demonstration use has been for more than one thousand five hundred miles. Any motor vehicle or truck that has been titled and registered in Colorado or any other state or jurisdiction prior to purchase or lease is not a "New Vehicle."
  - (e) "Person" has the same meaning as in § 39-21-101(3), C.R.S.
  - (f) "Purchaser" means any Person that:
    - (i) Purchases or leases a Qualifying Vehicle or Qualifying Trailer; or
    - (ii) Modifies a motor vehicle, truck, or trailer that said Person owns or is in the process of purchasing.
  - (g)
    - (i) "Qualifying Conversion" means, with respect to a motor vehicle or truck that is titled and registered in accordance with paragraph (5) of this rule:

- (A) The conversion of the motor vehicle into an “electric motor vehicle” or “plug-in hybrid electric motor vehicle” as those terms are defined in § 39-22-516.7(1)(k), C.R.S.;
  - (B) The conversion of the truck into an “electric truck” or “plug-in hybrid electric truck” as those terms are defined in § 39-22-516.8(1)(r), C.R.S.;
  - (C) A “compressed natural gas or liquefied petroleum gas conversion” as defined in §39-22-516.8(1)(g), C.R.S.;
  - (D) A “liquefied natural gas or hydrogen conversion” as defined in § 39-22-516.8(1)(i), C.R.S.; or
  - (E) The conversion of a truck with a gross vehicle weight rating of fourteen thousand pounds or greater into a “hydraulic hybrid truck” as defined in § 39-22-516.8(1)(v), C.R.S.
- (ii) For the purpose of paragraphs (2)(g)(i)(C) and (D) of this rule and §§ 39-22-516.8(1)(g) and (i), C.R.S., the term “conversion” means any alteration of a motor vehicle/engine, its fueling system, or the integration of these systems, that allows the vehicle/engine to operate on a fuel or power source different from the fuel or power source for which the vehicle/engine was originally certified by the Environmental Protection Agency. For the purpose of paragraphs (2)(g)(i)(C) and (D) of this rule and §§ 39-22-516.8(1)(g) and (i), C.R.S., the term “conversion” shall be construed in a manner consistent with 40 C.F.R. Part 85.
- (h) “Qualifying Device” means “aerodynamic technologies” or “idling reduction technologies” as defined in §§ 39-22-516.8(1)(b) or (w), C.R.S., respectively, installed on or in a truck that is titled and registered in accordance with paragraph (5) of this rule.
- (i) “Qualifying Trailer” means a clean fuel refrigerated trailer as defined in § 39-22-516.8(1)(q), C.R.S. that is titled and registered in accordance with paragraph (5) of this rule.
- (j)
- (i) “Qualifying Vehicle” means a New Vehicle that is titled and registered in accordance with paragraph (5) of this rule and that is:
- (A) An “electric motor vehicle” or “plug in hybrid electric motor vehicle” as those terms are defined in § 39-22-516.7(1)(k), C.R.S.;
  - (B) An “electric truck” or “plug-in hybrid electric truck” as those terms are defined in § 39-22-516.8(1)(r), C.R.S.;
  - (C) An “original equipment manufacturer truck that is equipped to operate on compressed natural gas or liquefied petroleum gas” as defined in §39-22-516.8(1)(f), C.R.S.; or
  - (D) An “original equipment manufacturer truck that is equipped to operate on liquefied natural gas or hydrogen” as defined in § 39-22-516.8(1)(h), C.R.S.

- (ii) For the purpose of paragraphs (2)(j)(i)(C) and (D) of this rule and §§ 39-22-516.8(1)(f) and (h), C.R.S., the term “original equipment manufacturer” includes only the equipment covered by the original certification issued by the Environmental Protection Agency for the motor vehicle or truck. For the purpose of paragraphs (2)(j)(i)(C) and (D) of this rule and §§ 39-22-516.8(1)(f) and (h), C.R.S., the term “original equipment manufacturer” shall be construed in a manner consistent with 40 C.F.R. Part 85.

(3) **Qualifying Purchases, Leases, and Modifications.**

- (a) The Credit is allowed to any Person that, in accordance with this rule and §§ 39-22-516.7 or 516.8, C.R.S.:
  - (i) Purchases or leases a Qualifying Vehicle;
  - (ii) Modifies a motor vehicle, truck, or trailer that said Person owns or is in the process of purchasing; or
  - (iii) Is a Financing Entity that accepts assignment of a Credit during the tax year pursuant to paragraph (11) of this rule.
- (b) The Credit may not be claimed by the State of Colorado or any political subdivision thereof.

(4) **Nonqualifying Purchases, Leases, and Modifications.** No credit is allowed for:

- (a) The purchase or lease of any used motor vehicle or truck;
- (b) The purchase or lease of any motor vehicle or truck previously titled and registered in Colorado, another state, or any other jurisdiction;
- (c) Any motorcycle or other motor vehicle or truck designed to travel with three or fewer wheels in contact with the ground; or
- (d) Any compressed natural gas, liquefied petroleum gas, liquefied natural gas, or hydrogen conversions that are not certified by the environmental protection agency pursuant to 40 C.F.R. Parts 85 and 86.

(5) **Titling and Registration.** The Credit is allowed only with respect to motor vehicles, trucks, and trailers the Purchaser titles and registers in Colorado in accordance with § 42-3-103, C.R.S. or, in the case of trucks and trailers registered under the international registration plan, base plated in Colorado. For the purpose of this rule, a motor vehicle, truck, or trailer with an active “Temporary Registration Permit” as defined in 1 CCR 204-10, Rule 34, 1.3 is not considered registered in Colorado.

- (a) *Purchases and leases of New Vehicles and trailers.* The purchase or lease of a motor vehicle, truck, or trailer qualifies for the Credit only if the Purchaser titles and registers the motor vehicle, truck, or trailer in accordance with this paragraph (5) in the time and manner prescribed by law. The purchase or lease of any motor vehicle or truck that was registered in any other state or jurisdiction prior to being registered in accordance with this paragraph (5) does not qualify for the credit.
- (b) *Modifications of New Vehicles.* The Modification of a New Vehicle qualifies for the Credit only if the Purchaser titles and registers the New Vehicle in accordance with this paragraph (5) in the time and manner prescribed by law.

- (c) *Modification of motor vehicles, trucks, and trailers that are not New Vehicles.* The Modification of a motor vehicle, truck, or trailer that is not a New Vehicle qualifies for the Credit only if, at the time of Modification, the Purchaser has titled and registered the motor vehicle, truck, or trailer in accordance with this paragraph (5).
- (6) **Leases.**
  - (a) Except as otherwise provided in this rule, the Credit allowed for the lease of a Qualifying Vehicle or Qualifying Trailer is allowed to the lessee and not to the lessor.
  - (b) In order to qualify for the Credit a lease must be for a term of at least two years.
  - (c) Except as provided in paragraph (6)(c)(i) of this rule, if a lessee enters into a bona fide lease agreement of not less than two years, but terminates the lease early, such early termination will not abrogate the lessee's right to any allowable Credit or require any recapture of the allowable Credit claimed for the lease.
    - (i) In the case of the early termination of a lease for a Qualifying Trailer, the Purchaser must report and repay the credit recapture amount with the Purchaser's income tax return for the tax year in which the lease is terminated. The credit recapture amount is equal to the difference between the amount of the original Credit claim and the amount of the Credit recalculated based upon the actual cost incurred for the lease prior to its termination.
- (7) **Multiple Purchasers, Lessors, and Owners.** In the case of a vehicle owned, purchased, or leased jointly by multiple Purchasers or by a partnership, S corporation, or other similar pass-through entity, the Credit allowable for the purchase, lease, or Modification may be allocated to the respective owners, partners, or shareholders in any manner they elect. The aggregate amount of the Credit allocated to such owners, partners, members, or shareholders for the purchase, lease, or Modification cannot exceed the Credit amount allowed by law for a single purchase, lease, or Modification.
- (8) **Tax Year of Credit.**
  - (a) The Credit is allowed only for the tax year that includes the Date of Purchase, Lease, or Modification.
  - (b) In the case of assignment under paragraph (11) of this rule, the Financing Entity to which the Credit is assigned shall claim the assigned credit on the Financing Entity's tax return for the tax year that contains the Date of Purchase, Lease, or Modification.
- (9) **Prohibition on Multiple Credits for Motor Vehicle, Truck, or Trailer.**
  - (a) Except as provided in § 39-22-516.7(5), C.R.S. and paragraph (9)(b) of this rule, no more than one Credit is allowed for the same motor vehicle, truck, or trailer, including for any conversion thereof.
  - (b) The limitation in paragraph (9)(a) of this rule shall not preclude the allowance of separate credits for multiple Qualifying Devices installed on or in the same truck.
- (10) **Credits for Qualifying Trailers and Qualifying Devices.**
  - (a) The Credit allowed for a Qualifying Trailer or a Qualifying Device is a percentage, as set forth in § 39-22-516.8, C.R.S., of the actual cost incurred by the Purchaser.

- (i) The actual cost incurred for the purpose of calculating the Credit for a Qualifying Device or for the purchase or conversion of a Qualifying Trailer, is defined under § 39-22-516.8(1)(a)(I), C.R.S. and is exclusive of any tax, titling and registration fees, or any other fees or charges extraneous to the direct cost of the Qualifying Device and installation thereof or for the purchase or conversion of the Qualifying Trailer.
- (ii) The actual cost incurred for the purpose of calculating the credit for the lease of a Qualifying Trailer, is defined under § 39-22-516.8(1)(a)(II), C.R.S.
- (b) The Credit(s) a Person may claim for one or more Qualifying Trailers or Qualifying Devices during the same tax year is subject to the limitations set forth in the table below.

	Limit per trailer or device	Limit per Person per tax year
Purchase or lease of Qualifying Trailer	\$7,500	None
Conversion to Qualifying Trailer	\$7,500	None
Aerodynamic technologies	\$6,000	\$50,000
Idling reduction technologies	\$6,000	\$6,000

**(11) Assignment of the Credit.**

- (a) A Purchaser who obtains financing for the purchase or lease of a Qualifying Vehicle or Qualifying Conversion may, by mutual agreement with the entity financing the purchase, lease, or conversion, assign the Credit to the Financing Entity.
- (b) For a Credit assigned under this paragraph (11) of this rule, the Financing Entity must compensate the Taxpayer for the full amount of the assigned Credit, less an administrative fee not to exceed one hundred fifty dollars that the Financing Entity may retain. Compensation must be made in the form of a cash payment, a reduction in the cash price, a capitalized cost reduction, or some similar consideration and must be reflected in the loan or lease agreement for the Qualifying Vehicle or Qualifying Conversion. Such compensation must be made effective on the date the election statement to assign the credit is executed and not applied at any subsequent date.
- (c) In order to assign the Credit the Purchaser and Financing Entity must execute an election statement on the Date of Purchase, Lease, or Modification.
  - (i) The election statement must be executed using forms prescribed by the Department. The Financing Entity must retain a copy of the election statement in its records as prescribed in § 39-21-113, C.R.S.
  - (ii) Within 30 days of its execution, the Financing Entity must submit the information contained in the election statement to the Department in the electronic form the Department prescribes.

- (A) If the Financing Entity fails to submit such information electronically within 30 days, and the Purchaser files a return claiming the Credit, in a manner consistent with statute and rule, the Credit will be allowed to the Purchaser and no Credit will be allowed to the Financing Entity. If the Financing Entity fails to submit such information electronically within 30 days, but electronically submits the required information prior to the filing of the Purchaser's return, the Credit will be allowed to the Financing Entity.
- (d) The Financing Entity must file an income tax return for the tax year containing the Date of Purchase, Lease, or Modification in order to claim the assigned Credit. If the Financing Entity is included in a combined or consolidated return, the assigned Credit must be claimed on such combined or consolidated return. A copy of the election statement assigning the Credit must be submitted with the return. The Department shall not issue a refund for the assigned Credit to the Financing Entity prior to the filing of the Financing Entity's income tax return claiming the Credit.
  - (i) Irrespective of the Financing Entity's tax year, the amount of the Credit allowed is determined by the Purchaser's tax year that includes the Date of Purchase, Lease, or Modification.
- (e) Any Credit assigned to a Financing Entity cannot be subsequently assigned to any other party, entity, or taxpayer. Only a Purchaser can assign a Credit to a Financing Entity. A Financing Entity can accept assignment of the Credit only from a Purchaser.
- (f) A Credit will not be allowed to any Financing Entity for any motor vehicle, truck, or conversion that is not a Qualifying Vehicle or Qualifying Conversion, the execution of any election statement notwithstanding. A Credit will not be allowed to any Financing Entity for a motor vehicle or truck that is not titled and registered in accordance with paragraph (5) of this rule.
- (g) The Financing Entity may authorize an agent or designee to act on its behalf to perform all functions appertaining to the assignment of the Credit.
- (h) If assignment of the Credit has been made in full compliance with the provisions of this rule and §§ 39-22-516.7 or 516.8, as applicable, the Purchaser surrenders any right to claim the Credit. Any duly assigned Credit will not be considered either a payment or an overpayment of the Purchaser's tax and will not be applied pursuant to § 39-21-108(3), C.R.S., toward any tax liability or deficiency the Purchaser owes

**Cross Reference(s)**

1. Form DR 0618 – Innovative Motor Vehicle Credit - Election Statement.
2. Form DR 0617 – Innovative Motor Vehicle Credit and Innovative Truck Credit form.
3. See §§ 39-22-516.7 and 516.8, C.R.S. for the innovative motor vehicle credit and the innovative truck credit, respectively, for tax years commencing prior to January 1, 2017.

**Rule 39-22-517. Child Care Center Investment Credit.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112 and 39-22-517, C.R.S. The purpose of this rule is to further define the tangible personal property eligible for the child care center investment credit.



(1) **General Rules.**

- (a) Any person operating a child care center, family child care home, or foster care home licensed pursuant to the provisions of sections 26-6-905 and 26.5-5-309, C.R.S., is allowed a credit against the tax imposed pursuant to article 22 of title 39, C.R.S., in an amount of twenty percent of the taxpayer's annual investment in tangible personal property to be used in the child care center, family child care home, or foster care home.
- (b) Any sole proprietorship, partnership, limited liability corporation, subchapter S corporation, or regular corporation which provides child care facilities which are incidental to their business and are licensed pursuant to sections 26-6-905 and 26.5-5-309, C.R.S., for the use of its employees is allowed a credit against the tax imposed pursuant to article 22 of Title 39, C.R.S., in an amount of ten percent of the taxpayer's annual investment in tangible personal property to be used in such child care facilities.

- (2) **Qualifying Tangible Personal Property.** For the purposes of section 39-22-517, C.R.S., tangible personal property shall only include tangible personal property purchased for use in the operation of a child care center, family child care home, or foster care home to the extent the property qualifies as depreciable property for federal income tax purposes with a determinable life that exceeds one year and the cost of such property is allowed as a deductible business expense for federal income tax purposes either as a current expense or as a deduction for depreciation. For example, if a taxpayer purchased a van which was to be used 50% of the time for the taxpayer's personal matters, 50% of the cost of the van would be qualifying tangible personal property.

**Rule 39-22-518. Colorado Capital Gain Subtraction.**

(1) **General Rule.**

- (a) For tax years beginning on or after January 1, 1999 but prior to January 1, 2010, qualified taxpayers can subtract from the federal taxable income reported on their Colorado income tax return qualifying net capital gains on certain real, tangible and intangible property (pursuant to §39-22-518(2)(b), C.R.S.) acquired on or after May 9, 1994 and held for at least five years.
- (b) For tax years beginning on or after January 1, 2010, qualified taxpayers can subtract from the federal taxable income reported on their Colorado income tax return up to \$100,000 of qualifying net capital gains on certain real and tangible personal property (pursuant to §39-22-518(2)(b), C.R.S.). Depending on the property generating the capital gain, the asset must have been acquired (1) on or after May 9, 1994 but prior to June 4, 2009, or (2) on or after June 4, 2009. The asset must be held for at least five years.

- (2) **Expanded Subtractions.** There were two expanded versions of the general rule for tax years in which State revenues exceeded limitations on state fiscal spending. These two expanded versions are:

- (a) *Subparagraph C and D.* Pursuant to §39-22-518(2)(b)(I)(C) and (D), C.R.S., the general rule was modified to eliminate the acquisition date requirement for tax years beginning on or after January 1, 1999 but prior to January 1, 2002.
- (b) *Subparagraph E and F.* Pursuant to §39-22-518(2)(b)(I)(E) and (F), C.R.S., the general rule was modified to reduce the holding period requirement to at least one year and eliminate the acquisition date requirement for tax years beginning on or after January 1, 2001 but prior to January 1, 2002.

(3) **Qualifying Attributes.**

(a) *Installment Sales.*

- (i) The applicable holding period must be met as of the sale transaction date and cannot be met by referring to the date any deferred gain is recognized.
- (ii) In cases in which the subtraction requirements applicable to the transaction year have been met, but the recognition of some or all of the gain is deferred to subsequent tax year(s), then the subtraction is allowed in the recognition year(s) for the deferred gain if the subtraction requirements applicable to the recognition year(s) were also met in the transaction year. Conversely, the subtraction will not be allowed in the recognition year(s) for deferred gain, if the deferred gain would not have met the subtraction requirements applicable to the transaction year, even though the deferred gain meets the subtraction requirements of the recognition year. Therefore, when the subtraction is allowed under either of the expanded subtraction rules because there are sufficient excess state revenues in the transaction year, and the recognition of some or all of the gain is deferred to subsequent tax year(s), a subtraction for such deferred gain is not allowed in the recognition year(s) if there are insufficient excess revenues in the recognition year(s) or the acquisition date and holding period requirements applicable to the recognition year were not met at the time of the transaction.

(b) *“Pass-Through” Entities.* A qualified taxpayer will be allowed to subtract qualifying gains passed through to the taxpayer by a partnership, S corporation, or other similar “pass-through” entity, if:

- (i) The pass-through entity holds the asset, and the taxpayer holds the ownership interest in the pass-through entity, for the required holding period (see paragraph g) below),
- (ii) The acquisition date is met by the pass-through entity (see paragraph g) below), and
- (iii) The asset that created the gain passed through to the taxpayer was either:
  - (1) 2010 and later - real or tangible property that qualifies for the subtraction;
  - (2) 2009 and earlier – (1) real or tangible personal property located in Colorado at the time of the transaction, or (2) a stock ownership interest in an entity that qualifies under §39-22-518(2)(b)(ii)(A), C.R.S. It is neither necessary nor sufficient for the pass-through entity itself to qualify under §39-22-518(2)(b)(ii)(A), C.R.S. in order to allow the subtraction for gains passed through to the taxpayer. However, gain from the sale of the partner’s, S corporation stockholder’s, or limited liability member’s ownership interest in the pass-through entity will be allowed only if the pass-through entity qualifies under §39-22-518(2)(b)(ii)(A), C.R.S

(c) The taxpayer must hold the same interest for the required holding period. For example, a taxpayer who purchased a 50% interest in property on May 10, 1994, then acquires an additional 25% interest in the property on May 15, 1998, and subsequently sells the 75% interest on May 16, 1999, can subtract only the gain attributable to the 50% interest because the 25% interest did not meet the five-year holding period.

- (d) In order to qualify under §39-22-518(2)(b)(ii)(A), C.R.S., the entity must have fifty percent or more of its property and fifty percent or more of its payroll assigned to locations within Colorado.
- (e) *Shell Entities Holding Intangible Property.* When an entity has either no property or no payroll, or either such factor is de minimis in relation to the business operations of the entity, and the majority of the entity's value is attributable to stock or other ownership interests of other entities, then the Department will apply section 18 of the Multistate Tax Compact ( §24-60-1301, et seq., C.R.S.) to evaluate whether the entity qualifies under §39-22-518(2)(b)(ii)(A), C.R.S.
- (f) *Non-Refundable / No Carry Forward.* This subtraction does not create a right to a refund or carry forward. Corporations must reduce any net operating losses created in tax years in which this subtraction is taken by the lesser of the subtraction allowed under this section or the amount of the net operating loss.
- (g) *Property Transfers Between a Pass-Through Entity and Its Members.* When determining the "qualified taxpayer" in the case of a pass-through entity, the taxpayer is considered to be the pass-through entity and the individual member in aggregate.
  - (i) The acquisition date for determining the members' holding period of property that is transferred by a pass-through entity to its members is the date the pass-through entity acquired the property. This assumes the members owned their share of the entity for the entire period that the property was owned by the pass-through entity. If any member acquired their share of the pass-through entity after the entity already owned the property, then the acquisition date of the property in the hands of the member would be the date they acquired their share of the entity.
  - (ii) The acquisition date for determining the members' holding period of property that is transferred by one member to a pass-through entity is, for the transferor, the date that member acquired the property, and, for all other members, the date of the transfer to the pass-through entity. This assumes the members owned their share of the entity for the entire period that the property was owned by the pass-through entity. If any member acquired their share of the pass-through entity after the entity already owned the property, then the acquisition date of the property in the hands of the member would be the date they acquired their share of the entity.
  - (iii) Example: Colorado property was acquired on May 1, 1994, by an individual, transferred to an S corporation on July 1, 1994, that is wholly owned by the individual, then sold by the S corporation on July 30, 1999. Therefore, the acquisition date of the asset is May 1, 1994. The holding period is May 1, 1994, through July 30, 1999. In this example the gain does not qualify as the property was acquired before May 9, 1994.
  - (iv) Example: Colorado property was acquired on October 1, 1999 by an LLC and distributed to its members on November 15, 2002. The acquisition date to be used for determining if the capital gain subtraction applies when a member sells the property is October 1, 1999.

- (v) Example: Colorado property was acquired on June 1, 2002 by an individual. The property was transferred to a partnership in which the individual was a 40% partner on July 1, 2003. The property is sold on June 15, 2008 by the partnership. The individual's holding period for the property was from June 1, 2002 through June 15, 2008, which qualifies for the capital gain subtraction. However, the other partners' holding period for the property was from July 1, 2003 through June 15, 2008, which does not meet the five year holding period for the subtraction.
- (vi) Example: Colorado property was acquired on June 1, 1992 by an individual. The property was transferred to a partnership in which the individual was a 40% partner on July 1, 2000. The property is sold on June 15, 2008 by the partnership. The individual's acquisition date for the property was June 1, 1992, which does not qualify for the capital gain subtraction. However, the other partners' acquisition date for the property was July 1, 2000, which does qualify for the subtraction.

**Rule 39-22-522. Conservation Easement Credit.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-21-113, 39-22-522, and 39-22-522.5, C.R.S. The purpose of this rule is to clarify the requirements and procedures for the conservation easement credit.

**(1) Qualified Taxpayers.**

- (a) Taxpayers qualified to claim the gross conservation easement credit (including transferees of these credits) are:
  - (i) Colorado residents,
  - (ii) C corporations,
  - (iii) Trusts,
  - (iv) Estates,
  - (v) Partners, shareholders or members of a pass-through entity donor who receive the credit from such entity, regardless of whether such individuals are Colorado residents.
- (b) Joint tenancies, tenancies in common, pass-through entities such as partnerships or S corporations, or other similar entities or groups that donate a conservation easement must allocate the credit to such entities' owners, partners, shareholders or members in proportion to their distributive shares of income or ownership percentage.
- (c) (repealed)
- (d) Individuals who are not residents of Colorado cannot claim the credit for a donation they make, or receive a credit transfer. Part-year residents may claim the credit, but only if they make the donation while they are a Colorado resident. Only a credit allocated to nonresident partners, shareholders or members of a pass-through entity may be claimed by nonresidents. Nonresident owners included in a joint tenancy, tenancy in common, and similar ownership arrangements cannot claim the credit.

- (e) A nonprofit corporation, regardless of whether it has unrelated business taxable income, may claim a gross conservation easement credit for a conservation easement donation it makes to a qualified organization; except that a nonprofit corporation that has a state governmental entity as a shareholder cannot claim such a credit.

**(2) Donor Limitations.**

- (a) A taxpayer may claim only one credit per tax year as a donor, including as a partner, shareholder, or member of a pass-through entity donor. A taxpayer cannot claim multiple credits in one year from multiple donations even if the donations are made by different pass-through entities. For the purpose of section 39-22-522(6), C.R.S., and this paragraph (2)(a):
  - (i) a credit is considered to be claimed by a donor only in the earliest tax year designated on any certificate issued by the Department of Regulatory Agencies for the donation in accordance with section 39-22-522(2.5), C.R.S.;
  - (ii) a credit is not considered to have been claimed by the donor in a tax year to which it is carried forward from a prior tax year pursuant to section 39-22-522(5)(a), C.R.S.; and
  - (iii) multiple certificates issued by the Department or Regulatory Agencies for the same donation pursuant to section 39-22-522(2.5) or (4)(a)(II.5), C.R.S., shall be considered a single credit claim.
- (b) For conservation easements donated prior to January 1, 2014, a taxpayer cannot claim a credit from a new donation if:
  - (i) In the year of the donation, the taxpayer has a carryforward credit from a prior tax year, or
  - (ii) In the year of the donation, another taxpayer has a carryforward credit from the taxpayer's prior donation.
- (c) *Amount Per Donation.*
  - (i) For donations made on or after January 1, 2000 but prior to January 1, 2003, the credit cannot exceed \$100,000 (100% of the first \$100,000).
  - (ii) For donations made on or after January 1, 2003 but prior to January 1, 2007, the credit cannot exceed \$260,000 (100% of the first \$100,000 plus 40% of the next \$400,000).
  - (iii) For donations made on or after January 1, 2007 but prior to January 1, 2015, the credit cannot exceed \$375,000 (50% of the first \$750,000).
  - (iv) For donations made on or after January 1, 2015, the total credit cannot exceed \$5,000,000 (75% of the first \$100,000 plus 50% of the next \$9,850,000) and the increments issued per year cannot exceed \$1,500,000.
  - (v) The limits in this paragraph (c) apply in aggregate to a married couple, regardless of whether they file jointly or separately, all partners, shareholders or members of a pass-through entity, and all tenants in common, joint tenants, and similar ownership arrangements that make a donation.

- (d) *Tax Credit Certificate.* Donors of conservation easements made on or after January 1, 2011 must obtain a Tax Credit Certificate from the Department of Regulatory Agencies. Each credit amount may not be claimed or used on a Colorado income tax return for a tax year commencing prior to the year designated in the certificate.
    - (i) For donations made prior to January 1, 2014, the taxpayer must establish with the Department of Revenue that their credit claim complies with all requirements of section 39-22-522, C.R.S., including the federal statutory and regulatory requirements incorporated therein, and with this regulation. The determination of whether a claimed conservation easement tax credit complies with the statutory and regulatory requirements rests with the Department of Revenue and not with the Department of Regulatory Agencies.
    - (ii) (repealed)
    - (iii) See Rules 39-22-104(3)(g) and 39-22-304(2)(f).
    - (iv) The twenty-year carryforward period will be based on the designated year of each certificate, not the year of the donation.
    - (v) (repealed)
    - (vi) The amount of the credit allowed on the Tax Credit Certificate may be further reduced if other limitations apply including, but not limited to, a reduction in the appraised or donated value of the easement made prior to January 1, 2014, a reduction of the donated value pursuant to section 39-22-522(3.7), C.R.S., and paragraph (2)(e) of this rule, or restrictions on multiple credit claims established by section 39-22-522(6), C.R.S., and paragraph (2) of this rule.
    - (vii) See paragraph (2)(a).
  - (e) If the easement property is held by the taxpayer for less than one year prior to the date of donation, the fair market value of the easement must be reduced by the gain the taxpayer would have realized had the easement been sold on the date of donation.
- (3) **Transfer of Credit.**
- (a) A taxpayer may transfer all or part of a credit to a transferee who is a qualified taxpayer as described in paragraph (1) of this regulation. The portion of the credit being transferred must not be utilized by the transferor to offset tax or to claim a refund on any income tax return.
    - (i) A pass-through entity may not be the transferee of a credit. The partners, shareholders, or members must independently qualify as transferees.
    - (ii) A pass-through entity may directly transfer a credit if:
      - (A) Each partner, shareholder or member consents to the transfer, and
      - (B) Each partner, shareholder or member could, under the restrictions of the law and this regulation, have claimed and transferred their pro rata share of the credit directly.

- (iii) Upon the death of a taxpayer, a gross conservation easement credit passes to the decedent's estate. If the decedent is the donor of the easement, the estate may use the credit to offset income tax owed by the estate or may transfer some or all of the credit according to the transfer rules. If the decedent is a transferee of the credit, the estate may use the credit to offset income tax owed by the estate but cannot transfer the credit.
- (b) A credit may be transferred only once. A transferee cannot thereafter transfer the credit to another taxpayer. Thus, a transferee cannot transfer the credit back to the donor of the easement for the donor to utilize or transfer again to another taxpayer.
- (c) If a taxpayer transfers a credit to one or more taxpayers, and any part of that credit is later disallowed by the Department of Revenue, the transferee will be held liable for the disallowed credits to the extent utilized plus any applicable penalty and interest.
- (d) *Number of Credits.*
  - (i) During tax years beginning on or after January 1, 2000, but prior to January 1, 2003, a transferee may receive and use one credit each tax year.
  - (ii) During tax years beginning on or after January 1, 2003, a transferee may receive an unlimited number of credits.
- (e) *Transfer Amount.*
  - (i) For donations made during tax years beginning prior to January 1, 2003, a minimum of \$20,000 in credit may be transferred to any one taxpayer. Credits transferred after January 1, 2003 that arise from donations made prior to that date are subject to the \$20,000 limit.
  - (ii) For donations made during tax years beginning on or after January 1, 2003, the donor may transfer any portion of the credit.
- (f) *Transfer Date.*
  - (i) From June 7, 2005 through May 28, 2018, a transfer must be completed by the due date, not including any extensions, of the transferee's income tax return on which they use the credit.
  - (ii) Beginning on or after May 29, 2018, a transfer must be completed by the extension date of the transferee's income tax return on which they use the credit.
- (g) *Limit Due to Prior Donations.*
  - (i) A taxpayer cannot receive a credit transfer during a tax year beginning on or after January 1, 2000, but prior to January 1, 2014, if, in the same year:
    - (A) The taxpayer claimed a new or carryforward credit as a donor of a conservation easement for the tax year, including as a member of a pass-through entity, regardless of whether the credit is utilized on that taxpayer's return or transferred to another taxpayer, or
    - (B) Another taxpayer has a carryforward credit from a prior donation the taxpayer made.

- (ii) A taxpayer cannot receive a credit transfer during a tax year beginning on or after January 1, 2014 if the taxpayer claimed a new credit as a donor of conservation easement for the tax year, including as a member of a pass-through entity, regardless of whether the credit is utilized on that taxpayer's return or transferred to another taxpayer.
- (h) *Tax Matters Representative.* The tax matters representative (TMR) is the person who donates the conservation easement and/or transfers the credit. A pass-through entity that donates the easement and passes the credit to, or sells the credit on behalf of, its partners, shareholders or members, is the TMR, unless the entity's status as the TMR is otherwise revoked or changed in accordance with paragraphs (3)(h)(iv), (v), and (vi).
- (i) *Representation.* The value and validity of a gross conservation easement credit held by a transferee is derived from, and dependent on, the credit generated and/or transferred by the TMR. Therefore, an adjustment of a credit, to the extent such adjustment is based on the transfer of a gross conservation easement credit ("Transfer Item Adjustment"), made by the Department of Revenue against the TMR shall also be binding on the credit held by a transferee. Final resolution of disputes between the Department of Revenue and the TMR determines the Transfer Item Adjustments and such resolution is binding on transferees of the credit.
- (ii) The TMR represents a transferee for Transfer Item Adjustments in matters including, but are not limited to:
  - (A) A donor's failure to file all required documents;
  - (B) A donor's improper claim of more than one credit per tax year;
  - (C) A donor's improper transfer of credit above the allowable or available amounts; and
  - (D) Any other such matters regarding the donation or credit that affect the value or validity of the credit, except those requirements for which the authority is granted to the Department of Regulatory Agencies or the Conservation Easement Oversight Commission for donations made on or after January 1, 2014 pursuant to section 12-61-727, C.R.S.
- (iii) The TMR does not represent a transferee in matters that are an inappropriate use of the credit by a donor or transferee, including, but not limited to:
  - (A) An out-of-state resident attempting to use a credit in violation of section 39-22-522(1), C.R.S.;
  - (B) A transferee using a transferred credit and generating his or her own credit as a donor in the same year in violation of section 39-22-522(6), C.R.S.; or,
  - (C) A transferee claiming a refund of a credit in violation of sections 39-22-522(5) and (7)(c), C.R.S.
- (iv) *Effective Date.* The rights and responsibilities of the TMR and transferee, including the right to a hearing, appeal, notification, and limitations of action set forth in sections 39-22-522(7)(i) and (j), C.R.S., apply to Transfer Item Adjustments initiated by the Department of Revenue on or after June 7, 2005.



- (v) *Changing the TMR Designation.* Any person who has claimed a credit or who may be eligible to claim a credit in relation to a TMR's conservation easement donation may petition the Department of Revenue to change the TMR's designation if the TMR:
  - (A) Is incarcerated;
  - (B) Is residing outside the United States, its possessions, or territories;
  - (C) Is deceased or, if the representative is an entity, is liquidated or dissolved;
  - (D) Is under eighteen years of age at the time the Transfer Item Adjustment is initiated by the Department of Revenue, or a court determines the person to be legally incompetent;
  - (E) Does not request a hearing for the Transfer Item Adjustment pursuant to section 39-21-103 or 104, C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for requesting a hearing;
  - (F) Does not appear at hearing or fails to adequately participate in such hearing, including by failing to file a required pleading or to appear at a scheduled conference; or
  - (G) Does not file an appeal of a final determination pursuant to sections 39-21-105 and 39-22-522.5(6), C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for filing an appeal.
- (vi) *Petition to Change TMR's Designation.*
  - (A) The petition to change the TMR's designation must be in writing and filed with the Department of Revenue.
  - (B) The petition must contain at least the following information:
    - (I) The petitioner's name, address, and tax account number;
    - (II) A statement that the petitioner is a person who has claimed a credit or who may be eligible to claim a credit in relation to the TMR's conservation easement donation, including the taxable period(s) and amount of tax in dispute;
    - (III) A summary statement of the grounds upon which the petitioner relies for changing the TMR's designation; and
    - (IV) A proposed replacement TMR, including the replacement TMR's qualifications to serve as TMR in accordance with the criteria for representation listed in paragraph (3)(h)(vii).
  - (C) The Department of Revenue may provide the TMR and transferees with notice of the petition and an opportunity to respond.

- (D) The Executive Director of the Department of Revenue will issue an order regarding the petition as soon as practicably possible.
  - (vii) *Criteria for Representation.* The Department of Revenue will determine whether a TMR is unavailable or unwilling to act as a TMR and whether a petition to change the TMR's designation should be granted. The Department of Revenue will then determine the appropriate person to serve as the TMR. Criteria to be considered when determining who will serve as the TMR includes:
    - (A) The general knowledge of the donor or transferor and any proposed replacement TMR regarding the gross conservation easement credit transfer items at issue.
    - (B) The donor's or transferor's and any proposed replacement TMR's access to the records of the conservation easement.
    - (C) The views of the transferees involved in the transaction.
  - (viii) *Statute of Limitations.* The statute of limitations of the transferor and any extension to the statute of limitations agreed to by the TMR will also apply to the transferees of the credit, but only to the extent that it applies to Transfer Item Adjustments.
- (4) **Refundable Credit.**
- (a) Taxpayers, but not transferees of such credits, may claim a refund of the conservation easement credit if state revenues are in excess of the limitation on state fiscal year spending imposed by Section 20(7)(a) of Article X of the Colorado Constitution.
  - (b) For each donation made during tax years beginning on or after January 1, 2000, but before January 1, 2003, a maximum of \$20,000 of the credit may be utilized by all taxpayers, including transferees, if any portion is to be refunded to a donor. This limit increases to \$50,000 for credits arising from donations made in tax years beginning on or after January 1, 2003.
  - (c) The limits in subparagraph (b) of this paragraph (4) apply in aggregate to a married couple, regardless of whether they file jointly or separately, and all partners, shareholders or members of a pass-through entity, tenants in common, joint tenants, or similar ownership arrangements that make a donation, if one or more such partners, shareholders, members or owners request a refund of the credit.
- (5) **Qualifying Donation.** For donations made prior to January 1, 2014, the Department of Revenue has the authority to review whether a donation qualifies for the credit as:
- (a) A perpetual conservation easement in gross on real property located in Colorado,
  - (b) A donation to a governmental entity or a charitable organization that is exempt under section 501(c)(3) of the Internal Revenue Code of 1954, as amended, and
  - (c) A charitable contribution for federal income tax purposes under the Internal Revenue Code.

**(6) Credit Carryforward.**

- (a) Any excess credit not utilized or transferred may be carried forward by the taxpayer for up to twenty years from the tax year of the return on which the credit is first claimed. A credit must be utilized in the earliest tax year possible.
- (b) A taxpayer who moves to another state after receiving a credit remains eligible to carryforward the credit.
- (c) A taxpayer may elect to abandon and not carryforward a credit by stating the abandonment on their return, thereby avoiding the prohibition against claiming a new credit set forth in paragraph (2) of this regulation.

**(7) Documentation.**

- (a) Every taxpayer who claims, transfers, passes through, carries forward, or utilizes a credit must file a return with all appropriate Colorado Gross Conservation Easement Credit Schedules for each tax year with such activity. This includes claiming a credit that has been transferred to another taxpayer, reporting that a credit will be carried forward to the following year, and reporting that a carryforward credit has been transferred for that year.
- (b) Every donor who claims a credit must attach the documents listed in this paragraph (7)(b) to their return, or submit them to the Department of Revenue at the same time the return is filed. The requirements of this paragraph (7)(b) apply without regard to whether the credit has been transferred to another taxpayer. The requirements of this paragraph (7)(b) also apply to returns filed by pass-through entities that donate a conservation easement, and the partners, shareholders or members of such entities. The Department of Revenue may waive the requirements of this paragraph (7)(b) for any taxpayer(s) in writing. The documents required are:
  - (i) All Colorado Conservation Easement Schedules required for the relevant year, including all required attachments;
  - (ii) A federal form 8283 with a summary of the qualified appraisal that meets the requirements set forth in section 39-22-522(3.3), C.R.S.;
  - (iii) For donations made on or after January 1, 2011, a copy of the Tax Credit Certificate obtained from the Department of Regulatory Agencies.

**(8) Appraisals.** Appraisals for donations made prior to January 1, 2014 are subject to review by the Department of Revenue.

- (a) The appraiser must hold a valid license as a certified general appraiser in accordance with the provisions of part 7 of article 61 of title 12, C.R.S.
- (b) The appraiser must meet all applicable education and experience requirements established by the Board of Real Estate Appraisers in accordance with section 12-61-704(1)(k), C.R.S.
- (c) A qualified appraisal for computing the gross conservation easement credit must meet requirements for claiming a federal charitable deduction for the donation of the easement.
- (d) The Department of Revenue may require a taxpayer to submit a copy of the complete appraisal upon request.

- (e) The Department of Revenue may require the taxpayer to provide a second appraisal at the taxpayer's expense if the Executive Director:
    - (i) Reasonably believes that the appraisal represents a gross valuation misstatement,
    - (ii) Receives notice of such a valuation misstatement from the Division of Real Estate, or
    - (iii) Receives notice from the Division of Real Estate that an enforcement action has been taken by the Board of Real Estate Appraisers against the appraiser.
  - (f) Any second appraisal required pursuant to this paragraph (8) and section 39-22-522(3.5), C.R.S. must be prepared by a certified general appraiser who is not affiliated with the appraiser who prepared the first appraisal, is in good standing and has met qualifications established by the Division of Real Estate.
  - (g) If, upon final determination, it is determined that an appraisal submitted in connection with a gross conservation easement credit claim is a substantial or gross valuation misstatement, the Department of Revenue must submit a complaint to the Board of Real Estate Appraisers and may pursue any other penalties or remedies authorized by law.
- (9) **Requests for Documents.**
- (a) If a taxpayer has not provided a document related to the gross conservation easement credit that was required to be provided as part of the taxpayer's return, including the return itself—or, if requested by the Department of Revenue for conservation easements donated prior to January 1, 2014, a copy of the complete appraisal obtained at the time of donation—the Department may send a written request to the taxpayer or TMR for such document. Such request may be sent by certified mail. Failure to provide the requested document to the Department of Revenue within 60 days of the mailing of the Department's request shall constitute grounds for the Executive Director of the Department of Revenue to issue a notice denying the credit.
  - (b) Documents that may be requested by the Department of Revenue include, but are not limited to, all or any part of the taxpayer's return, the Tax Credit Certificate from the Department of Regulatory Agencies, the Colorado Gross Conservation Easement Credit Schedule, the Colorado Conservation Easement Donor Schedule, the federal Form 8283, a summary of the appraisal, a copy of the complete appraisal, a copy of the appraiser's affidavit submitted to the Department of Regulatory Agencies, and the recorded deed of conservation easement.
- (10) **Disallowance of Conservation Easement Tax Credits.**
- (a) *Notice to TMR and Transferee.* The Department of Revenue shall initiate a Transfer Item Adjustment to a credit by issuing to the TMR a notice setting forth the proposed adjustment, regardless of whether the state tax liability of the TMR is affected by the proposed adjustment. The Department of Revenue shall also send to each transferee a notice of the Department's proposed Transfer Item Adjustment for such transferee's credit.

- (b) *Multiple Transferees.* If there is more than one transferee of a credit, the Department of Revenue will generally allocate proportionally the Transfer Item Adjustment based on the percentage of the overall credit originally transferred to the transferees. However, the Department of Revenue may allocate the adjustment among and between the transferees in any manner appropriate to the circumstances.
  - (c) *Request for Hearing.* A request pursuant to section 39-21-103 or 104, C.R.S. for hearing on a Transfer Item Adjustment, including a Transfer Item Adjustment that results in the denial or modification of the transferee's credit, may be made only by the TMR. A transferee does not have a right to protest the Notice of Deficiency or refund change issued to the transferee (including the allocation of the adjustment between or among transferees) to the extent the adjustment is based on a Transfer Item Adjustment. If the TMR does not timely request a hearing pursuant to section 39-21-103 or 104, C.R.S., a transferee may petition the Department of Revenue to change the TMR's designation within 10 business days after the final date for requesting a hearing in accordance with paragraphs (3)(h)(v), (3)(h)(vi), and (3)(h)(vii) of this regulation. If the Department of Revenue grants the petition, the new TMR may request a hearing pursuant to section 39-21-103 or 104, C.R.S., within 30 days of the Department's order regarding the petition.
  - (d) *Notification and Request to be Admitted as Party.* The Department of Revenue will issue a notice of the hearing to the TMR and each transferee of the credit. Such notice shall advise the transferee of the right to be admitted as a party to the hearing upon the filing of a written request setting forth a brief and plain statement of the facts that entitle the transferee to be admitted and the matters to be decided. The Executive Director of the Department of Revenue may admit parties for limited purposes.
  - (e) *Transfer of Jurisdiction.* If the Executive Director of the Department of Revenue issues a final order pursuant to section 39-22-522.5(5)(b), C.R.S., finding that a case cannot reasonably be resolved through the administrative process and transferring jurisdiction of the case to the district court, the Department will not oppose waiver of surety bond or other deposit in connection with the case.
- (11) **Hearing Process.** To expedite the equitable resolution of requests for administrative hearings regarding conservation easement tax credits, avoid inconsistent determinations, and allow the Executive Director of the Department of Revenue to consider the full scope of applicable issues of law and fact, such hearings will be conducted in accordance with the following provisions:
- (a) The Executive Director of the Department of Revenue may invite the participation in the hearing of any person who has claimed a credit or who may be eligible to claim a credit in relation to the TMR's conservation easement donation. Such participation shall include the right to be admitted as a party to the hearing upon the filing of a written request in accordance with paragraph (10)(d) of this regulation.
  - (b) The Executive Director of the Department of Revenue may resolve the issues raised by the parties in phases:
    - (i) The first phase will address issues regarding the validity of the credit and any other claims or defenses touching the regularity of the proceedings;
    - (ii) The second phase will address the value of the easement; and
    - (iii) The third phase will address determinations of the tax, interest, and penalties due and apportionment of such tax liability among persons who claimed a tax credit in relation to the TMR's conservation easement donation.

- (c) Any request by a taxpayer to continue, stay, or otherwise postpone the hearing, including, but not limited to, a request for continuance to pursue mediation, shall be deemed consent by the taxpayer to enter into a written agreement with the Executive Director of the Department of Revenue to extend the time for the Executive Director to issue a final determination by a period of days equal to the requested period of postponement.
  - (d) Nothing in this section shall be construed to abrogate or diminish the ability of the taxpayer to assert any facts, make any arguments, and file any briefs and affidavits the taxpayer believes pertinent to the case.
- (12) **Final Determination and Appeal.** The Department of Revenue will issue, pursuant to section 39-21-103, C.R.S., a notice of final determination regarding the Transfer Item Adjustment(s) to the TMR and transferee of the credit. The TMR, not the transferee, may appeal the determination in accordance with sections 39-21-105 and 39-22-522.5(6), C.R.S. If the TMR does not file an appeal pursuant to sections 39-21-105 and 39-22-522.5(6), C.R.S., a transferee may petition the Department of Revenue to change the TMR's designation within 10 business days after the final date for filing an appeal, in accordance with section 39-22-522(6), C.R.S., and paragraphs (3)(h)(v), (3)(h)(vi), and (3)(h)(vii) of this regulation.
- (13) **Confidentiality.** Except as otherwise provided in section 39-21-113, C.R.S. and regulation thereunder, every tax return and all information contained therein is confidential. Section 39-21-113(17.5), C.R.S., provides an exception to the Department of Revenue's confidentiality rule for tax information relating to conservation easement tax credits. For the purposes of this exception, "cases", as used in statute, is not limited to cases in administrative hearing, in district court, or in further appellate courts, but also includes information pertinent to any disallowed conservation easement tax credit.

**Rule 39-22-526. Credit for Environmental Remediation of Contaminated Land.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112(1) and 39-22-526, C.R.S. The purpose of this rule is to clarify requirements relating to the credit for environmental remediation of contaminated land.

- (1) **General Rule.** Effective January 1, 2014, taxpayers or qualified entities that have obtained a Tax Credit Certification Letter from the Colorado Department of Public Health and Environment certifying completion of approved environmental remediation may apply the amount set forth in the Tax Credit Certification Letter as a credit or transferrable expense amount against income taxes. Except for credits carried forward from prior years, no credit is allowed for any tax year commencing on or after January 1, 2023. A credit properly claimed for a tax year commencing prior to January 1, 2023 can be carried forward to a subsequent tax year pursuant to this rule.
- (2) **Claiming the Credit.**
  - (a) The originating taxpayer that generated the credit must claim the credit no later than the tax year following the year the Tax Credit Certification Letter was issued by filing the applicable Department-issued form with their income tax return.
  - (b) If the credit amount exceeds the taxpayer's income tax due for that year, the credit may be carried forward for five years and must be applied against the income tax due for the earliest of the income tax years possible. Following the five-year carry-forward period, any remaining credit is extinguished and may no longer be used.

**(3) Transfer of a Credit.**

- (a) The originating taxpayer of the credit must transfer the credit no later than the tax year following the year the Tax Credit Certification Letter was issued, and may only transfer the portion of a credit that has not been applied against the transferor's income tax.
- (b) Only the originating taxpayer that generated the credit may transfer all or part of a credit, and the credit may be transferred only once. A transferee cannot thereafter transfer the credit, under any circumstance, to any other taxpayer or entity. Credits may only be transferred to individuals, trusts, estates, or C corporations. A pass-through entity may not purchase or otherwise be a transferee of a credit.
  - (i) Upon the death of a taxpayer, a credit passes to the decedent's estate. If the decedent is either the originating taxpayer or received the credit as a member of a pass-through entity, the estate may use the credit to offset income tax owed by the estate or may transfer some or all of the credit as allowed by statute. If the original credit holder's estate transfers the credit, the credit remains on the same carry-forward schedule (with the 5-year carry forward limitation discussed in Section 3(d) of this Rule) as the original credit holder. If the decedent is a transferee of the credit, the estate may use the credit to offset income tax owed by the estate but cannot transfer the credit.
- (c) To transfer a credit amount from the originating taxpayer to a transferee, both parties must file the appropriate Department-issued forms with their income tax returns in the year of the transfer. The forms must specify the amount of the credit that is being transferred. A transferee will only be granted the transferred credit if the transferee's stated credit amount matches the amount established on the forms filed by the originating taxpayer.
- (d) If a transferred credit amount exceeds a transferee's income tax due in the year of the transfer, the transferred credit may be carried forward for five years following the year in which the credit was originally claimed and must be applied against the income tax due for the earliest of the income tax years possible. Following the five-year carry-forward period, any remaining credit is extinguished and may no longer be used.
- (e) If the originating taxpayer transfers a credit to a transferee and that credit is later disallowed (either in full or in part), the transferee will be held liable for the disallowed credit that was utilized plus any applicable penalty and interest.

**(4) Transfer of a Transferable Expense Amount.**

- (a) A transferable expense amount must be transferred by the originating qualified entity. A qualified entity may transfer a transferable expense amount at any time prior to the due date, not including any extensions, for filing the transferee's income tax return no later than the tax year following the year the Tax Credit Certification Letter was issued. A transferable expense amount may only be transferred to individuals, trusts, estates, or C corporations. A pass-through entity may not purchase or otherwise be a transferee of a transferable expense amount.

- (b) A qualified entity is required to file the appropriate Department-issued forms with its income tax return or equivalent reporting information in the year the transferable expense amount is transferred. A transferee must also file a Department-issued form with their income tax return in the year the transfer occurs. The forms must specify the amount of the transferable expense amount that is being transferred. A transferee will only be granted a transferable expense amount if the transferee's stated credit amount matches the amount established on the forms filed by the qualified entity.
  - (c) Only the qualified entity that generated the transferable expense amount may transfer all or part of a transferable expense amount. A transferee cannot thereafter transfer the credit to any other taxpayer or entity. The only exception to the rule that a transferee of a transferable expense amount cannot transfer the credit is that a tax credit held by a transferee's estate for taxes owed by the estate may be transferred by the decedent's estate as stated in section 39-22-526(2)(c)(VI), C.R.S.
  - (d) If a transferred transferable expense amount exceeds a transferee's income tax due in the year of the transfer, the transferred transferable expense amount may be carried forward for five years following the year in which the transferable expense amount was originally claimed and must be applied against the income tax due for the earliest of the income tax years possible. Following the five-year carry-forward period, any remaining credit is extinguished and may no longer be used.
  - (e) If a qualified entity transfers a transferable expense amount to another taxpayer and that transferable expense amount is later disallowed (either in full or in part), the transferee will be held liable for the disallowed credit that was utilized plus any applicable penalty and interest.
- (5) **Tax Matters Representative.** The tax matters representative (TMR) is the person who transfers the credit or transferrable expense amount. A pass-through entity that transfers the credit to, or sells the credit on behalf of, its partners, shareholders or members, is the TMR, unless the entity's status as the TMR is revoked or otherwise changed in accordance with paragraphs (c), (d), and (e) below.
- (a) *Representation.* The value and validity of an environmental remediation credit held by a transferee is derived from, and dependent on, the credit generated and/or transferred by the TMR. Therefore, an adjustment of a credit made by the Department against the TMR shall also be binding on the credit held by a transferee. Final resolution of disputes between the Department and the TMR is binding on transferees of the credit.
  - (b) The TMR represents a transferee in matters including, but not limited to:
    - (i) Amounts expended for the approved remediation;
    - (ii) The certificate issued by the Colorado Department of Public Health and Environment;
    - (iii) Notifications and correspondence from and with the Department of Revenue;
    - (iv) Audit examinations;
    - (v) Assessments;
    - (vi) Settlement agreements; and
    - (vii) The statute of limitations.



- (c) *Effective Date.* The rights and responsibilities of the TMR and transferee, including the right to a hearing, appeal, notification, and limitations of action set for in §§ 39-22-526(1)(d)(VIII) and (IX), 39-22-526(2)(c)(VII) and (VIII), C.R.S. begin with the transfer of the credit or transferable expense amount.
- (d) *Changing the TMR Designation.* Any person who has claimed a credit or who may be eligible to claim a credit in relation to a TMR's environmental remediation, but not a transferable expense amount, may petition the Department to change the TMR's designation if the TMR:
  - (i) Is incarcerated;
  - (ii) Is residing outside the United States, its possessions, or territories;
  - (iii) Is deceased or, if the representative is an entity, is liquidated or dissolved;
  - (iv) Is under eighteen years of age, or the court determines the person to be legally incompetent;
  - (v) Does not request a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for requesting a hearing;
  - (vi) Does not appear at hearing or fails to adequately participate in the hearing process, including by failing to file a required pleading or failing to appear at a scheduled conference; or
  - (vii) Does not file an appeal of a final determination pursuant to section 39-21-105, C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for filing an appeal.
- (e) *Petition to Change TMR's Designation.*
  - (i) The petition to change the TMR's designation must be in writing and filed with the Department.
  - (ii) The petition must contain at least the following information:
    - (A) The petitioner's name, address, and tax account number;
    - (B) A statement that the petitioner is a person who has claimed a credit or who may be eligible to claim a credit in relation to the TMR's environmental remediation, including the taxable period(s) and amount of tax in dispute;
    - (C) A summary statement of the grounds upon which the petitioner relies for changing the TMR's designation; and
    - (D) A proposed replacement TMR, including the replacement TMR's qualifications to serve as TMR in accordance with the criteria for representation listed in paragraph (f) below.
  - (iii) The Department may provide the TMR and transferees with notice of the petition and an opportunity to respond.

- (iv) The Department will issue an order regarding the petition as soon as practicably possible.
- (f) *Criteria for Representation.* The Department will determine whether a TMR is unavailable or unwilling to act as a TMR based on the criteria in Section (5)(d) of this rule and whether a petition to change the TMR's designation should be granted. The Department will then determine the appropriate person to serve as the TMR. Criteria that the Department may consider when determining who will serve as the TMR includes:
  - (i) The general knowledge of the transferor and any proposed replacement TMR regarding the credit at issue.
  - (ii) The transferor's and any proposed replacement TMR's access to the records of the environmental remediation credit.
  - (iii) The views of the transferees involved in the transaction.
- (g) *Statute of Limitations.* The statute of limitations of the transferor and any extension to the statute of limitations agreed to by the TMR will also apply to the transferees of the credit.
- (6) **Disallowance of a Credit or a Transferable Expense Amount.**
  - (a) *Notice to TMR and Transferees.* When the Department disallows a credit or transferable expense amount in full or in part, the Department shall issue a notice to the TMR setting forth the proposed adjustment, regardless of whether the state tax liability of the TMR is affected by the proposed adjustment. The Department shall also send to the transferee a notice of the proposed adjustment of the transferee's credit.
  - (b) *Multiple Transferees.* If there is more than one transferee of a credit or transferable expense amount, the Department will generally allocate proportionally any proposed adjustment based on the percentage of the overall credit or transferable expense amount originally transferred to each transferee. However, the Department may allocate the adjustment among and between the transferees in any manner appropriate to the circumstances.
  - (c) *Request for Hearing.* A request for a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., can only be made by the TMR. A transferee does not have a right to protest the disallowance of a credit or transferable expense amount claimed under section 39-22-526, C.R.S. If the TMR does not timely request a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., a transferee may petition the Department to change the TMR's designation within 10 days after the final date for requesting a hearing. The rules for filing such a petition are set forth in Paragraphs 5(d), 5(e), and 5(f) of this rule. If the Department grants the petition, the new TMR may request a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., within 30 days of the Department's order regarding the petition.
  - (d) *Notification and Request to be Admitted as Party.* The Department will issue a notice of a hearing under sections 39-21-103 or 39-21-104, C.R.S., to the TMR and transferee(s) of the credit or transferable expense amount. Such notice shall advise the transferee(s) of the right to be admitted as a party to the hearing upon the filing of a written request setting forth a brief and plain statement of the facts that entitle the person to be admitted and the matters to be decided. The Department may admit parties for limited purposes.

- (7) **Final Determination and Appeal.** The Department will issue, pursuant to section 39-21-103, C.R.S., a notice of final determination to the TMR and transferee(s) of the credit or transferable expense amount. The TMR, not the transferee(s), may appeal the determination in accordance with section 39-21-105, C.R.S. If the TMR does not file an appeal pursuant to section 39-21-105, C.R.S., a transferee may petition the Department to change the TMR's designation within 10 business days after the final date for filing an appeal. The rules for filing such a petition are set forth in Paragraphs 5(d), 5(e), and 5(f) of this rule. If the Department grants the petition, the new TMR may file an appeal pursuant to section 39-21-105, C.R.S., within 30 days of the Department's order regarding the petition.
- (8) **Confidentiality.** Except as otherwise provided in section 39-21-113, C.R.S., every tax return and all information contained therein is confidential. Section 39-21-113(17.7)(b), C.R.S., provides an exception to the Department's confidentiality rule for tax information relating to a claim for a credit for the approved environmental remediation of contaminated property pursuant to section 39-22-526, C.R.S. As used in section 39-21-113(17.7)(b), C.R.S., "credit" includes both a credit claimed pursuant to section 39-22-526(1), C.R.S., as well as a credit based on a transferable expense amount claimed pursuant to section 39-22-526(2), C.R.S. As used in section 39-21-113(17.7)(b), C.R.S., "cases," is not limited to cases in administrative hearing, in district court, or in further appellate courts, but also includes information pertinent to any disallowed credit or transferable expense amount for the approved environmental remediation of contaminated property pursuant to section 39-22-526, C.R.S.

Cross References:

1. An originating taxpayer that intends to transfer a credit must file forms DR 0349 and DR 0348 with the Department of Revenue concurrently with the filing of their income tax returns.
2. A qualified entity that intends to transfer a transferable expense amount must file forms DR 0349, DR 0348 and DR 0112. A qualified entity may be required to file additional information to effectuate the transfer of the credit. For more information on the filing requirements of qualified entities, see Department Publication FYI Income 42, "Environmental Remediation of Contaminated Land Credit."

**Rule 39-22-538. Rural Primary Health Care Preceptor Credit.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1) and 39-22-538, C.R.S. The purpose of this rule is to set forth the requirements for claiming the rural health care preceptor income tax credit.

- (1) **General Rule.** For the tax years specified in section 39-22-538(3)(a), C.R.S., and subject to the limit established by section 39-22-538(3)(b)(III), C.R.S., primary health care preceptors are eligible to claim a non-refundable income tax credit of \$1,000 for a preceptorship provided by the preceptor to eligible health professional students during the applicable income tax year for which the credit is claimed. The credit must be claimed by an individual and cannot be claimed by an estate, trust, partnership, corporation, or other legal entity.
- (2) **Definitions.** For definitions of terms used in this rule, see section 39-22-538, C.R.S.
- (3) **Preceptorship.**
- (a) A primary health care preceptor is eligible for this credit if the preceptor:

- (i) provides an uncompensated mentoring experience in which a preceptor provides a program of personalized instruction, training, and supervision in a rural or frontier area of Colorado for no fewer than four consecutive or nonconsecutive working weeks or 20 consecutive or nonconsecutive business days per calendar year to eligible Colorado health professional students to enable the students to obtain their professional degree, or certification and
    - (ii) receives notification from the Department that the preceptor is eligible to claim the credit as described in paragraph (4) of this rule.
  - (b) *Uncompensated Mentoring Experience.* A primary health care preceptor is not eligible for this credit if he or she receives any form of compensation for providing a preceptorship. This includes, but is not limited to, any compensation from grants or nonprofit organizations, additional compensation provided by the preceptor's employer, or any compensation provided by the Colorado institution of higher education.
    - (i) Free continuing education courses provided to all faculty of an institution of higher education, including part-time faculty and preceptors, are not considered compensation for providing a preceptorship because the continuing education courses are provided to all faculty.
- (4) **Claiming the Credit.**
  - (a) The number of primary health care preceptors that are entitled to claim this credit each tax year is limited by section 39-22-538(3)(b)(III), C.R.S. In order to claim this credit, the preceptor must:
    - (i) Receive certification that the preceptor satisfied all requirements to receive the credit from the institution for which the preceptor teaches, whether it is an institution of higher education or a hospital, clinic, or other medical facility, or from the regional AHEC office with jurisdiction over the area in which the preceptorship took place.
    - (ii) Send an electronic copy of the completed certification to the Department by email to dor\_preceptor@state.co.us.
    - (iii) If the preceptor receives notification from the Department that the credit has been issued to the preceptor, file a Colorado income tax return and claim the credit on his or her return.
  - (b) Subject to the limit established by section 39-22-538(3)(b)(III), C.R.S., credits will be issued each tax year in chronological order based on the timestamp of the email the Department receives from the preceptor, which must include an electronic copy of the completed certification.
  - (c) The Department will send notification once a month to preceptors that their credit has been either issued or denied.
- (5) **Protest.** A preceptor cannot protest the denial of a credit based on the chronological order the certification was received by the Department. If a preceptor wishes to protest the denial of the credit, the preceptor must claim the credit on his or her return, which will be denied, and the preceptor may protest the denial of such credit after the Department denies the credit claimed on the tax return.

**Rule 39-22-539. Credit for Employer Contributions to Employee 529 Qualified State Tuition Programs.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1), 39-22-104(4)(i), and 39-22-539, C.R.S. The purpose of this rule is to detail requirements relating to the credit allowed to employers for contributions made to an employee's 529 qualified state tuition program account.

- (1) **General Rule.** For the tax periods specified in 39-22-539(3), C.R.S., and subject to the limitations established by section 39-22-539(3) and (4), C.R.S., an employer that makes a contribution to a 529 qualified state tuition program account owned by their employee is allowed a nonrefundable credit against their Colorado income tax liability.
- (2) **Employers.** For the purpose of the credit, whether a person is "doing business in the state" and therefore an "employer" as defined in section 39-22-539(2)(c), C.R.S., is determined pursuant to 1 CCR 201-2, Rule 39-22-301(1). For the purpose of section 39-22-539(2)(c), C.R.S., a "person" includes an individual, C corporation, S corporation, or partnership.
- (3) **Limitation.** A taxpayer cannot claim both a credit under section 39-22-539, C.R.S., and a subtraction under section 39-22-104(4)(i), C.R.S., for the same contribution.

**Rule 39-22-543. Wildfire Mitigation Measures Credit.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1) and 39-22-543, C.R.S. The purpose of this rule is to explain the requirements for the wildfire mitigation measures credit and to provide examples.

- (1) **General Rule.** For the tax periods specified in section 39-22-543, C.R.S. and subject to the provisions of section 39-22-543, C.R.S., landowners may claim a non-refundable income tax credit for a percentage of the cost of wildfire mitigation measures performed on their privately-owned land in Colorado.
- (2) **Paid Out-of-Pocket Expenses.** A cost eligible for the credit must be an actual out-of-pocket expense incurred and paid by the landowner primarily for wildfire mitigation measures.
  - (a) *Examples.*
    - (i) A landowner who hires and pays a third-party contractor to cut down trees as a wildfire mitigation measure has incurred and paid an out-of-pocket expense.
    - (ii) A landowner who personally cuts down trees as a wildfire mitigation measure has not incurred or paid an out-of-pocket expense for their time and labor.
    - (iii) A landowner who purchases a chainsaw primarily for performing wildfire mitigation measures has incurred and paid an out-of-pocket expense.
- (3) **Costs Incurred Primarily for Non-Wildfire Mitigation Purposes.** Any cost must be for property or services primarily used for wildfire mitigation measures.
  - (a) *Examples.*
    - (i) Purchases of an all-terrain vehicle, truck, tractor, or trailer are not eligible for the credit, even though the landowner may use these items to perform wildfire mitigation measures, if these items are not primarily used for wildfire mitigation measures. Similarly, rental charges for the items identified, above, would be

eligible for the credit if the landowner primarily uses the rented items to perform wildfire mitigation measures.

- (ii) Costs for landscaping that are primarily for aesthetic purposes, such as installation of a patio, lawn, garden or similar landscaping, but also serve as a fire break or other wildfire mitigation measure, are not eligible for the credit because the costs were not incurred primarily for wildfire mitigation measures.

- (4) **Ineligible Costs.** Costs that are not eligible for the credit include an inspection or certification fee, in-kind contribution, donation, incentive, or a cost sharing arrangement associated with, or grants awarded for, performing wildfire mitigation measures.

(a) *Inspection or Certification Fees.*

- (i) *Example.* The amount a landowner pays for a fire mitigation survey of their land to determine the amount of work necessary to perform wildfire mitigation measures or as means of verifying insurance compliance does not qualify as a “cost” that is eligible for the credit.

(b) *In-Kind Contributions.*

- (i) *Example.* A landowner who personally performs wildfire mitigation measures for a summer camp and who contributes the use of a chainsaw and truck as a gift to the summer camp cannot claim the value of the landowner’s personal services (because the personal service is not an actual out-of-pocket expense but rather an in-kind contribution and donation, neither of which qualify as “costs” for purposes of this rule) or the rental value for the use of the chainsaw or truck on the summer camp’s property (for the same reasons).

(c) *Donation.*

- (i) *Example.* A landowner allows without charge the use of the landowner’s trailer by a third party to perform wildfire mitigation measures. Neither the landlord nor the third party may claim the value of the donation to rent the trailer as a credit.
- (ii) *Example.* A landowner who performs wildfire mitigation services for free to a summer camp that neighbors the landowner’s property cannot claim the value of the donation as a credit.

- (d) **Cost Sharing.** Cost sharing is an arrangement by which participants, which may include landowners and non-landowners, agree to share the cost of performing wildfire mitigation measures.

- (i) *Example.* Neighboring landowners who agree to share the costs of purchasing or renting equipment for, or for hiring a third-party contractor to perform, wildfire mitigation measures on their respective private lands cannot claim their portion of such costs as a credit.

- (e) **Grants and Incentives.** A cost paid from, or reimbursed by, an incentive or grant awarded to, or made available to, a landowner to perform wildfire mitigation measures is not eligible for the credit.

- (5) **Landowner.** A taxpayer claiming the credit must be a landowner of private land located in Colorado.

- (a) *Estate in Land.* A landowner is an owner of record of a fee interest in real property (whether held solely, jointly or in common), easement, right-of-way, or other estate in real property. An easement is a non-possessory interest in real property to enter on to land and use the land, or to restrict the use of such land, for an indefinite or specific period of time, such as a right-of-way to travel across land or to use the land for recreational purposes (e.g., fishing, hunting, camping). A right-of-way typically is a type of easement. A lease is an estate in land and, therefore, a lessee is a landowner for purposes of this rule, provided that evidence of the lease is properly recorded. The lessor is also a landowner as either the owner of a fee interest in the land or as a lessee who is acting in the capacity of a sublessor.
- (b) *Taxpayer's Property Interest.* Wildfire mitigation measures must be performed on the taxpayer's property interest for the taxpayer to be eligible for the credit.
  - (i) *Examples.*
    - (A) A taxpayer who is a lessee of land owned by someone else can claim the credit for the costs they incur for wildfire mitigation measures performed on the property because the work was performed on an estate (e.g., lease) owned by the taxpayer, even though a third party owned the underlying fee interest in the land. If the lessor separately incurs costs for wildfire mitigation measures performed on the same property, they may also claim a credit for the costs they pay. However, if the lessor and lessee share the costs of the wildfire mitigation measures, they would be ineligible to claim the credit as noted in paragraph 4(d) of this rule.
    - (B) A taxpayer who pays for wildfire mitigation measures on a neighboring landowner's land for the purpose of protecting the taxpayer's land cannot claim the costs for such work because the wildfire mitigation measure was not performed on the taxpayer's land.
- (c) *Public Property.* A person who holds an easement, right-of-way, lease, or other estate in land that is owned by a governmental entity is not a landowner because the credit is available only if the wildfire mitigation measures are performed on private land, not public land.
  - (i) *Examples.*
    - (A) A sole proprietor who owns or leases a building on land owned by the government is not a landowner for purposes of this rule because the land is not private land, even though the proprietor owns a private estate (lease).
    - (B) An individual who has an easement or right-of-way on land owned by the federal Bureau of Land Management is not a landowner for purposes of this rule because the land is not private land, even though the proprietor owns a private estate (easement or right-of-way).
- (d) *Private Property Held by a Legal Entity.* A partnership, S corporation, or other similar legal entity that owns private land as an entity cannot claim the credit unless there is a dwelling on that land that is designed for residential occupancy. Additionally, an individual who holds an easement, leasehold, right-of-way, or other estate in real property owned or leased by such legal entity is a landowner for purposes of this rule.

- (i) A partnership, S corporation, or similar legal entity that has a residential dwelling on their privately-owned land may qualify for the credit only if their federal taxable income as determined by sections 703 and 1363, respectively, of the Internal Revenue Code meets the federal taxable income limitations established in section 39-22-543(4), C.R.S. Additionally, a partner or shareholder may qualify for their share of the total maximum credit only if their federal taxable income meets the limitation established in section 39-22-543(4), C.R.S.
- (ii) The total maximum credit allowed to a partnership, S corporation, or similar legal entity per tax period is subject to the limit established in section 39-22-543(4), C.R.S. A partner or shareholder may only claim their respective share of the total maximum credit allowed to the partnership, S corporation, or pass-through entity as established in section 39-22-543(4) C.R.S.

**Rule 39-22-601(1).**

- (a) In the case of a paper income tax return to be filed with the Department of Revenue, the term “make a return” as such term is used in Section 39-22-601(1), C.R.S., means the completion of the appropriate Colorado income tax return form by or on behalf of the taxpayer(s), the signing of the return form under penalty of perjury in the second degree by the taxpayer(s), and the actual physical submission of the return so completed and so signed together with any required supporting documents to the Colorado Department of Revenue.
- (b) In the case of a Colorado individual income tax return that is to be electronically submitted to the Department of Revenue, the term “make a return” as such term is used in Section 39-22-601(1), C.R.S., means the completion of the appropriate Colorado income tax return form by or on behalf of the taxpayer(s), the signing of the return form under the penalty of perjury in the second degree by the taxpayer(s), and the submission of the return form so completed and so signed to an electronic return originator who has been so licensed by the Colorado Department of Revenue as an authorized agent of the Colorado Department of Revenue to accept for filing and electronic submission, individual income tax returns to the Colorado Department of Revenue directly or indirectly through the Internal Revenue Service.
- (c) Any person who prepares a Colorado income tax return for any other person who accepts a fee for so doing is required to sign such return stating that such return is accurate, complete, and truthful as far as he knows. Such affirmation is not made under the penalty of perjury.
- (d) An electronic return originator must maintain for four years a copy of the Colorado Income Tax Return signed by the taxpayer(s) for each electronic transmission submitted by the electronic return originator.

**Rule 39-22-604. Colorado Income Tax Withholding.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1), 39-21-119(3), 39-22-103(11), and 39-22-604, C.R.S. The purpose of this rule is to clarify the requirements for employers to withhold Colorado income tax from employee wages.

- (1) **General Rule.** Except as otherwise provided in this rule, every employer making payment of wages shall withhold from such wages an amount of tax, as determined pursuant to section 39-22-604, C.R.S., and this rule, and report and remit such withheld tax in accordance with the same.
  - (a) Colorado wages subject to withholding under this rule are any wages for services performed:



- (i) either wholly or partially in Colorado by an employee who is not a Colorado resident or domiciliary, or
    - (ii) either inside or outside of Colorado or both by an employee who is a Colorado resident or domiciliary.
  - (b) The withholding requirements prescribed by section 39-22-604, C.R.S., and this rule apply to every employer making payment of Colorado wages, as defined in this paragraph (1), irrespective of whether the employer maintains a permanent place of business in Colorado.
- (2) **Definitions.** As used in this rule, unless context otherwise requires:
- (a) “Department” means the Department of Revenue.
  - (b) “Employee” and “employer” have the same meaning as given in section 39-22-604(2), C.R.S. Additionally, in accordance with section 39-22-103(11), C.R.S., in determining whether parties to a relationship are considered employer and employee subject to the provisions of this rule, due consideration shall be given to applicable sections of the Internal Revenue Code, federal rulings, and federal regulations. In general, a relationship constituting an employer-employee relationship for federal income tax wage withholding purposes will similarly constitute an employer-employee relationship for the purposes of this rule.
  - (c) “Wages” shall have the same meaning as given in section 39-22-604(2)(c), C.R.S.
- (3) **Wages Not Subject to Colorado Withholding Requirement.** No withholding is required under this rule for:
- (a) wages paid to a Colorado resident for services performed in another state that imposes income tax withholding requirements on such wages;
  - (b) any remuneration specifically excluded from the definition of wages under section 3401(a) of the Internal Revenue Code; or
  - (c) wages exempt from Colorado income tax withholding pursuant to:
    - (i) 49 U.S.C. § 11502 as compensation paid to a rail carrier Employee who is not a Colorado resident and who performs regularly assigned duties as a rail carrier Employee on a railroad in more than one State;
    - (ii) 49 U.S.C. § 40116(f) as pay of an air carrier Employee who is not a Colorado resident and who earns no more than fifty percent of his or her pay in Colorado;
    - (iii) 49 U.S.C. § 14503(a) as compensation paid to a motor carrier Employee who is not a Colorado resident and who performs regularly assigned duties in two or more States as such a motor carrier Employee with respect to a motor vehicle;
    - (iv) 50 U.S.C. § 4001(b) and section 39-22-109(2)(b), C.R.S., as compensation paid for military service to a servicemember who is not a Colorado resident or domiciliary;

- (v) 50 U.S.C. § 4001(c) as compensation paid to the spouse of a military servicemember if such spouse is not a Colorado resident or domiciliary and is in Colorado solely to be with the servicemember serving in compliance with military orders;
- (vi) section 39-22-604(2)(a), C.R.S., as compensation paid to any nonresident individual or non-domiciliary of Colorado who performs services in connection with any phase of a motion picture, television production, or television commercial for less than 120 days during the calendar year;
- (vii) sections 39-22-604(19) and 39-22-104(4)(t), C.R.S., as compensation paid to a Colorado nonresident for performing disaster-related work; or
- (viii) sections 39-22-604(20) and 39-22-104(4)(u), C.R.S., as compensation paid to an active duty servicemember in the armed forces of the United States who reacquires residency in Colorado pursuant to section 39-22-110.5, C.R.S.

**(4) Registration to Withhold Tax.**

- (a) *Opening an Account.* Every employer subject to the withholding requirements prescribed by this rule and section 39-22-604, C.R.S., shall apply for and maintain an active wage withholding account with the Department.
- (b) *Closing an Account.* An employer with an active wage withholding account who ceases to pay wages subject to withholding under this rule shall:
  - (i) promptly notify the Department of such cessation either online at [Colorado.gov/revenueonline](http://Colorado.gov/revenueonline) or by submitting the applicable Departmental form;
  - (ii) by the applicable due date established in paragraph (7)(b) of this rule submit a return for tax withheld through the date of the final wage payment along with payment of any tax due; and
  - (iii) furnish Internal Revenue Service Forms W-2 to all employees and the Department pursuant to paragraph (8) of this rule for the period from January 1 through the date of the final wage payment.

**(5) Withholding Certificate.**

- (a) On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding certificate. The employee may furnish the employer with a new withholding certificate at any time during their employment.
  - (i) Except as provided in paragraph (5)(a)(ii) of this rule, the Internal Revenue Service Form W-4, "Employee's Withholding Certificate" furnished to the Employer pursuant to section 3402 of the Internal Revenue Code shall also serve as the withholding certificate required to be furnished under this paragraph (5) and section 39-22-604(16), C.R.S. Except as otherwise provided in this rule, such certificate shall be prepared, take effect, and be subject to change in accordance with section 3402 of the Internal Revenue Code.

- (ii) In addition to Internal Revenue Service Form W-4, an employee may elect to furnish their employer with a completed form DR 0004, "Colorado Employee Withholding Certificate". If an employee elects to furnish their employer with a completed form DR 0004, pursuant to this paragraph (5)(a)(ii), such form shall, along with their IRS Form W-4, serve as the withholding certificate required to be furnished under this paragraph (5) and section 39-22-604(16), C.R.S.
  - (b) In accordance with this paragraph (5)(b), the Department may adjust the withholding amount required for an employee and the withholding allowance used in the calculation thereof.
    - (i) Upon written request from the Department or as directed by guidance published by the Department, an employer shall provide to the Department a copy of any withholding certificate furnished to the employer by an employee..
    - (ii) Prior to making any adjustment, the Department shall notify the employee that the certificate previously filed by that employee is being examined. The employee shall be allowed to submit, within ten days of receipt of the notice, evidence sufficient to substantiate the information reported by the employee on their withholding certificate. After reviewing any evidence submitted and any other pertinent information, if the Department finds the certificate filed by the employee to be defective, the Department shall notify the employer of any necessary adjustment to the employee's withholding allowance or required withholding amount. The employer shall thereafter withhold in accordance with the notice and any necessary adjustment prescribed therein.
    - (iii) An employee may request a hearing to protest any adjustment made under this paragraph (5)(b). Such hearing shall be conducted pursuant to section 39-21-103, C.R.S., and any final determination shall be appealable in district court in accordance with section 39-21-105, C.R.S.
  - (c) The employer is required to request a withholding certificate from each employee. If the employee fails to furnish such certificate, the employer must calculate withholding for such employee as if the employee had filed an Internal Revenue Service Form W-4 indicating that they were a single filer.
- (6) **Determination of Required Withholding.** The required amount of income tax to be withheld shall be computed in accordance with the formula prescribed in guidance published by the Department. The amount of wages used for computing the required amount of income tax to be withheld do not include any wages that, under paragraph (3) of this rule, are not subject to Colorado income tax withholding. The Colorado wages subject to withholding under this rule for a nonresident employee shall be determined in accordance with section 39-22-109(2), C.R.S.
- (7) **Withholding Tax Filing Periods and Due Dates.** An employer required to withhold Colorado income tax must file returns and remit tax quarterly, monthly, or weekly based upon an annual determination made pursuant to this paragraph (7).

- (a) *Determination of Status.* The determination of whether an employer is required to file and remit tax quarterly, monthly, or weekly is based initially on the employer's estimated annual Colorado income tax withholding. Thereafter, if the actual aggregate amount of Colorado income tax withholding reported by the employer for any calendar year exceeds the amount established under this paragraph (7)(a) for the employer's required filing frequency, the employer's required filing frequency shall be redetermined based upon the actual aggregate amount of Colorado income tax withholding reported by the employer for that calendar year. Any change in an employer's required filing frequency based upon a review of the aggregate amount of Colorado income tax withholding reported during a calendar year shall become effective on January 1 of the following year.
- (i) *Quarterly filing and remittance.* An employer is required to file and remit tax quarterly for the entire calendar year if the employer's annual Colorado withholding tax is less than \$7,000.
- (ii) *Monthly filing and remittance.* An employer is required to file and remit tax monthly for the entire calendar year if the employer's annual Colorado withholding tax is at least \$7,000, but not more than \$50,000.
- (iii) *Weekly filing and remittance.* An employer is required to file and remit weekly for the entire calendar year if the employer's annual Colorado withholding tax is more than \$50,000.
- (b) *Due Dates.* An employer must file returns and remit any applicable taxes on or before the due dates prescribed in this paragraph (7)(b). If an employer fails to file and remit any applicable tax within the time prescribed by this paragraph (7)(b), penalty and interest shall apply in the manner prescribed by section 39-22-604, C.R.S.
- (i) *Quarterly filing and remittance.* An employer that is required to file and remit tax quarterly must file a Colorado withholding tax return and remit the total Colorado tax due for the calendar quarter on or before the last day of the month following the close of the calendar quarter. Except as provided in paragraph (7)(b)(iv) of this rule, an employer that is required to file quarterly must file a return for each calendar quarter, even if no taxes have been withheld.
- (ii) *Monthly filing and remittance.* An employer that is required to file and remit monthly must file a Colorado withholding tax return and remit the total Colorado tax due for the month on or before the fifteenth day of the following month. Except as provided in paragraph (7)(b)(iv) of this rule, an employer that is required to file monthly must file a return for each month, even if no taxes have been withheld.
- (iii) *Weekly filing and remittance.* An employer that is required to remit tax weekly must remit the total Colorado withholding taxes accumulated as of any Friday on or before the third business day following such Friday.
- (iv) *Seasonal rule.* An employer whose business does not operate continuously throughout the year may request permission from the Department to file returns for only those periods that the business is in operation. If the Department grants such approval, the employer is not required to file returns for those months for which the business does not operate.
- (v) If the due date for filing a return and remitting tax falls upon a Saturday, Sunday, or legal holiday, the return and tax shall be deemed timely if filed and remitted on the next business day.

(8) **Annual Withholding Information Returns.**

- (a) *Statements for Employees.* On any Form W-2 an employer provides, pursuant to section 6051 of the Internal Revenue Code, to an employee who is either a Colorado resident or who performs services for the employer in Colorado, the employer shall report:
  - (i) the employee's Colorado wages including:
    - (A) in the case of an employee who is a Colorado resident, the entirety of the employee's wages except for any wages exempted from withholding pursuant to paragraph (3)(b) or (3)(c) of this rule; and
    - (B) in the case of an employee who is not a Colorado resident, the portion of the employee's wages, excluding any wages exempted from withholding pursuant to paragraph (3)(b) or (3)(c) of this rule, that are Colorado-source income as determined in accordance with section 39-22-109(2), C.R.S.; and
  - (ii) the amount of Colorado income tax deducted and withheld from the employee's wages.
- (b) *Filing Forms W-2 with the Department.* Every employer shall file with the Department any Forms W-2 reporting Colorado wages pursuant to paragraph (8)(a) of this rule. Such Forms W-2 shall be filed on or before the due date for filing such Forms W-2 pursuant to section 6071 of the Internal Revenue Code.
  - (i) *Mandatory electronic filing.* Any employer required by section 6011(e) of the Internal Revenue Code to file any Form W-2 by magnetic media shall electronically file such Form W-2 with the Department in accordance with published Departmental guidance.
  - (ii) Any Forms W-2 an employer must file pursuant to paragraph (8)(b) of this rule, but for which electronic filing is not required under paragraph (8)(b)(i) of this rule, the employer may elect to file with the Department either:
    - (A) electronically; or
    - (B) in paper form along with DR 1093, "Annual Transmittal of State W-2 Forms".
  - (iii) *Penalty for failure to file Forms W-2.* If an employer required by this paragraph (8)(b) to file Forms W-2 with the Department fails to do so within the time prescribed, the employer shall be subject to a penalty, at the discretion of the executive director, of not less than five dollars nor more than fifty dollars for each Form W-2 that is not timely filed, unless such failure is shown to have been due to reasonable cause. Any employer required by paragraph (8)(b)(i) of this rule to file Forms W-2 electronically will be deemed to have filed such forms only when the employer has filed such Forms W-2 electronically.
- (c) *Correction of Statements.*
  - (i) In the time prescribed by section 6051 of the Internal Revenue Code an Employer shall furnish a corrected Form W-2 to both the employee and the Department to show:

- (A) the correct amount of wages paid during the prior calendar year if the amount of such wages reported on a statement previously furnished to the employee for such year is incorrect; and
  - (B) the amount actually deducted and withheld as Colorado income tax if such amount is less or more than the amount reported as tax withheld on the statement previously furnished to the employee for such year.
- (9) In accordance with section 39-22-103(11), C.R.S., due consideration shall be given to federal rulings and regulations interpreting the sections of the internal revenue code cited in this rule.

**Rule 39-22-604(17). Every Person Making Payment of Winnings Within Colorado.**

Every person making payment of winnings within Colorado which are subject to withholding for federal income tax purposes shall withhold four percent of such winnings and shall submit such withholdings to the Colorado Department of Revenue as though such amounts withheld were amounts withheld from wages under the provisions of Section 39-22-604(3), Colorado Revised Statutes.

**Rule 39-22-605. Estimated Individual Income Tax.**

**(1) Net Colorado Tax Liability.**

The net Colorado tax liability for purposes of the estimated tax computation is defined as the total amount of Colorado tax, alternative minimum tax, and recapture of prior year credits minus all income tax credits other than the state sales tax refund, withholding credits, and estimated tax credits.

**(2) Required Estimated Payments.**

The annual amount required to be paid is the lesser of:

- a) 70% of actual net Colorado tax liability.
- b) 100% of preceding year's net Colorado tax liability. This subparagraph (2)(b) applies only if the preceding year was a 12-month tax year, the individual filed a Colorado return, and the individual's federal adjusted gross income for the preceding year was \$150,000 or less, or \$75,000 or less if the individual federal filing status was married separate.
- c) 110% of preceding year's net Colorado tax liability. This subparagraph (2)(c) applies only if the preceding year was a 12-month tax year and the individual filed a Colorado return.

**(3) Submitting Payments.**

- a) Estimated tax payments are due on the 15th day of the 4th, 6th, 9th month and 1st month of the following tax year. Payments will be first credited against the earliest quarterly installment due for the tax year regardless of when the payment is received.
- b) Withholding credits and state sales tax refund are treated as if 25% of such credits and refund was paid in each quarter unless the taxpayer establishes the dates on which the amounts were actually withheld. Wage withholding and other withholding credits can be treated separately when determining whether to allocate 25% to each quarter or whether to allocate the credit to the quarter in which the amount was actually paid.

**(4) Annualized Income Installment Method.**

- a) Taxpayers who do not receive income evenly during the year may elect to use the annualized income installment method to compute their estimated tax payments but only if they elected annualized installments for the payment of their federal income tax.
- b) The required installment payment on each due date will be:
  - (i) the Colorado tax liability computed by annualizing the income received during the months of the tax year ending on the last day of the month before the due date for the installment payment, multiplied by
  - (ii) the applicable percentage listed below, minus
  - (iii) the total of any earlier installment payments made for the tax year.

<b>Installment Due date</b>	<b>Income annualized from</b>	<b>Income annualized through</b>	<b>Applicable percentage</b>
4/15	1/1	3/31	17.5%
6/15	1/1	5/31	35%
9/15	1/1	8/31	52.5%
1/15	1/1	12/31	70%

- (c) A schedule and explanation of the allocation methodology must be made available to the Colorado Department of Revenue upon request in order to use this annualized method.

**(5) Farmers and Fisherman.**

- (a) Farmer or fisherman means an individual whose gross income from farming or fishing is at least 2/3 of their total gross income for the tax year or the preceding tax year.
- (b) The required annual amount to be paid by a farmer or fisherman is the lesser of:
  - (i) 50% of actual net Colorado tax liability, or
  - (ii) 100% of preceding year's net Colorado tax liability. This subparagraph (5)(b) applies only if the preceding year was a 12-month tax year and the individual filed a Colorado return)
- (c) Estimated tax payments from a farmer or fisherman are due in a single payment by January 15 of following tax year.

**(6) Estimated Tax Penalty.**

- (a) The estimated tax penalty will be assessed if the required estimated tax payments are not paid in a timely manner. The penalty will be the appropriate Colorado income tax interest rate multiplied by the amount of the underpayment for each quarter multiplied by the underpayment period.
- (b) The estimated tax penalty will not be assessed if any of the following conditions are met:
  - (i) If the net Colorado tax liability minus any prepayments and credits, other than the estimated tax payments and credits, is less than \$1,000.

- (ii) If the taxpayer was a full-year resident for the preceding 12-month tax year and the net Colorado tax liability in that year was — 0-.
    - (iii) If the taxpayer is a farmer or fisherman and files a return with full payment of any tax due by March 1 of the following tax year.
  - (c) If the tax return is filed and any tax due is paid by January 31 of the following tax year, no penalty will be computed based on any underpayment of the fourth quarter installment payment.
- (7) **Joint Returns.**
- (a) Taxpayers who file a joint federal declaration of estimated tax must file a joint Colorado payment. Payment must be submitted under the same primary social security number used when the income tax return is filed.
  - (b) If a joint estimated tax payment is made but separate returns are filed, the estimated tax payments may be divided between the two taxpayers in any manner they desire. In the case of a disagreement between the spouses on how to claim the payments where each spouse claims 100% of the payments or together they claim over 100% of the payments, the payments will be divided in the same proportion as the net Colorado tax liability. If neither spouse has a tax liability, the payments will be split 50% for each spouse. If one spouse claims less than the allocation formula provides, then that spouse will only be credited with the payments that were claimed and the other spouse will receive the balance of the payments.

**Rule 39-22-606. Estimated Corporate Income Tax.**

- (1) **Colorado Tax Liability.** The Colorado tax liability for purposes of the estimated tax computation is defined as the total amount of Colorado tax plus the recapture of prior year credits less all income tax credits other than withholding credits and estimated tax credits.
- (2) **Required Estimated Payments.** The required annual amount to be paid is the lesser of:
  - (a) 70% of actual Colorado tax liability, or
  - (b) 100% of preceding year's Colorado tax liability, but only if:
    - (i) The preceding year was 12 month tax year, and
    - (ii) The corporation filed a Colorado return, and
    - (iii) The corporation is not defined under section 6655 of the federal IRS code as a large corporation. Large corporations can base their first quarter estimated tax payment on 25% of the previous year's tax liability. However, future payments must be based on the actual tax liability for the current tax year and any underpayment occurring in the first quarter as a result of this estimation must be repaid with the second quarterly payment
- (3) **Submitting payments.**
  - (a) Estimated tax payments are due on the 15th day of the 4th, 6th, 9th and 12th month of the tax year. Payments is due for a short tax year on the 15th day of the 4th, 6th, 9th months, whichever applies, plus a final payment on the 15th day of the last month of tax year.



- (b) Each required installment payment must be 25% of the required annual payment. Payments will be first credited against the earliest quarterly installment due for the tax year regardless of when the payment is received.
- (c) In the case of a short tax year:
  - (i) If three payments are required, each required installment payment must be 33% of the required annual payment.
  - (ii) If two payments are required, each required installment payment must be 50% of the required annual payment.
  - (iii) If one payment is required, the payment must be 100% of the required annual payment.
- (4) **Annualized Income Installment Method.**
  - (a) Taxpayers who do not receive income evenly during the year may elect to use the annualized income installment method to compute their estimated tax payments if they elected annualized installments or adjusted seasonal installments for payment of their federal income tax.
  - (b) The required installment payment on each due date will be:
    - (i) the Colorado tax liability computed by annualizing the income received during the months of the tax year ending on the last day of the month before the due date for the installment payment, multiplied by
    - (ii) the applicable percentage listed below, minus
    - (iii) the total of any earlier installment payments made for the tax year.

<b>Installment Due date</b>	<b>Income annualized from</b>	<b>Income annualized through</b>	<b>Applicable percentage</b>
4/15	1/1	3/31	17.5%
6/15	1/1	5/31	35%
9/15	1/1	8/31	52.5%
12/15	1/1	11/31	70%

These dates must be adjusted accordingly for fiscal year filers.

- (c) If tax is computed by apportioning income, apportionment factors must be computed for each quarter in order to use the annualized income installment method. Use of estimated or prior year factors will not be accepted.
- (d) A schedule and explanation of the allocation methodology must be made available to the Colorado Department of Revenue upon request in order to use the annualized method.

(5) **Estimated Tax Penalty.**

- (a) The estimated tax penalty for C corporations will be assessed if the required estimated tax payments are not paid in a timely manner. The penalty will be the appropriate Colorado income tax interest rate times the underpayment for each quarter times the underpayment period.
- (b) No penalty is due if the Colorado tax liability is less than \$5,000.
- (c) If a short taxable year is involved, the income must be placed on an annual basis, in which case the \$5,000 requirement for filing estimated tax payments will be the same as for a full-year taxpayer.

**Rule 39-22-608. Due Date for Filing Income Tax Returns and Payments.**

(1) **Weekends and Legal Holidays.**

- (a) When an income tax filing due date falls on a Saturday, Sunday or a legal holiday, returns will be considered to have been filed on the due date if they are filed on the next Department of Revenue business day.
- (b) The due date of any Colorado income tax return, associated tax payment, or extension payment for a tax year ending December 31 that is due on April 15, or on April 16 or April 17 under subparagraph a) above, will be extended to coincide with the federal due date if the Internal Revenue Service has extended the federal income tax due date due to the observance of Emancipation Day in the District of Columbia.

This extension also applies to estimated income tax payments, estimated severance tax payments, and individual non-business consumer use tax that are otherwise due on April 15. This extension does not apply to wage withholding payments.

- (2) **Extension of Time to File Income Tax Return.** All taxpayers will be allowed an automatic six month extension of time for filing their income tax returns. However, interest on any net tax liability due will be assessed and penalty may also be due if the taxpayer has not complied with Rule 39-22-621.2(j).

**Rule 39-22-621(2)(j).**

**Good cause.** Except as noted, the taxpayer must make an affirmative showing of all facts in order to prove good cause.

**Returns filed under extension:** The failure to file penalty described in C.R.S. 39-22-621(2)(a) will not be due if a taxpayer files his or her tax return within the extension period.

Unless specifically waived by the Department for good cause, the failure to pay penalty described in C.R.S. 39-22-621(2)(b) will be due if:

- (1) the taxpayer has not paid at least ninety percent of his or her net tax liability into the Department of Revenue as of the original due date of the return, or
- (2) the taxpayer does not file by the extension due date, or
- (3) the taxpayer does not pay all of the net tax due with the taxpayer's filed return.

Interest will be assessed on any net tax liability due with a return filed under extension, for the period from the original due date until payment is made.

Net tax liability means the total Colorado income tax liability for the tax year reduced by all credits other than prepayment credits.

Prepayment credits are credits for income tax paid by the taxpayer (including income tax withheld from the taxpayer's wages) before the original due date of the return.

Cross References:

Extension of time to file return: C.R.S. 39-22-608(2), Rule 39-22-608(2)(b)

Interest: C.R.S. 39-22-621(1)

The taxpayer must make an affirmative showing of all facts alleged in order to prove reasonable cause.

#### **Rule 39-22-622. Income Tax Refund Interest.**

**Basis and Purpose.** The bases of this rule are §§ 39-21-112(1), 39-21-110, and 39-22-622, C.R.S. The purpose of this rule is to clarify the circumstances under which interest is paid on income tax refunds.

- (1) Refund interest paid on all income tax returns, including amended returns, is controlled by § 39-22-622, C.R.S. A refund will include interest at the rate specified in § 39-21-110.5, C.R.S. plus a 5% refund penalty if the refund is not issued within the following time frames, unless an exception to the refund interest applies.
- (2) **Time Frames.**
  - (a) *Calendar Year Filer.* For any calendar year return filed on or before the original due date of the return (excluding any extension of time to file) that is filed in:
    - (i) January, the refund must be made within 14 days from the date the return is filed.
    - (ii) February, the refund must be made within 21 days from the date the return is filed.
    - (iii) March, the refund must be made within 28 days from the date the return is filed.
    - (iv) April, the refund must be made within 45 days of receipt. The date of receipt for any return filed in April is deemed to be May 1 for the purpose of computing interest.
  - (b) For income tax returns filed after May 1, including amended returns, in the calendar year the return is due, the refund must be made within 45 days from the date the return is filed.
  - (c) *Fiscal Year Filer.* For any fiscal year return, the months established in (2)(a) shall be the first, second, third and fourth months, respectively, following the close of the fiscal year.
    - (i) For fiscal years that do not end at the end of the month, the months described in (2)(a) shall be the first thirty, sixty, ninety, and one hundred twenty days, respectively, following the close of the fiscal year.

**(3) When a Return is Filed.**

- (a) A return is “filed” on the date the Department physically or electronically receives the return. The calculation of interest shall be from the due date of the refund until the date the refund is mailed or the date a financial institution holding state funds is directed to transfer funds to the taxpayer. If the “filed”, “paid”, or “made” date (as those terms are used in § 39-22-622, C.R.S.) is on a weekend or legal holiday, then such date is extended to the next day that is not a weekend or legal holiday.
- (b) If the processing of a return is delayed for one or more reasons outlined in paragraph (4), below, then the “filed” date is the date the event is resolved. For example, a return which contains an erroneous ID number is not “filed” until the correct ID is obtained by the Department.

**(4) Exceptions.** Refund interest will not be paid if the delay is caused by any of the following:

- (a) Mathematical or clerical errors on the return when filed, including, but not limited to, misspelled names, calculation errors, missing required documentation or certifications, unclaimed or overclaimed payments, and erroneous, illegible, or otherwise unprocessable tax account ID numbers, including “applied for” designations.
- (b) Unforeseen delays caused by the failure of the processing equipment, including physical equipment and electronic processing systems.
- (c) A review to verify the accuracy of the return. However, such review does not include any review initiated as a result of a Department data entry error. A review to verify the accuracy of the return is an audit of the return, but is not an audit of the taxpayer for the tax year as referenced in §§ 39-21-107(2) or 39-22-601(6)(g), C.R.S.
- (d) The return includes a Colorado job growth incentive tax credit and the Department is awaiting confirmation from the Colorado Office of Economic Development and International Trade that the taxpayer is eligible for such credit.
- (e) The return includes an enterprise zone credit and the Department is awaiting confirmation from the Colorado Office of Economic Development and International Trade that the taxpayer is eligible for such credit.
- (f) A suspicion of identity theft or refund-related fraud.

**(5)** Refunds initially exempt from refund interest under paragraph (4), above, may receive full or partial refund interest and penalty if, after the error correction or review is completed, the refund is delayed more than the time frames defined in paragraph (2), above.

**(6) Excessive Prepayments.**

- (a) If the total prepayments (withholding, estimated payments, extension payments, TABOR refund, and other payments) are more than double the amount of the tax liability, then no refund interest will be paid on any refund, except as allowed in subparagraph 6(c), below.
- (b) If an amended return or claim for refund reduces the net tax liability or increases the prepayments, no refund interest will be paid on any refund if the total prepayments and prior payments are more than double the amount of the amended tax liability, except as allowed in subparagraph 6(c), below.

- (c) If the taxpayer establishes that the prepayment was made incident to a bona fide and orderly discharge of an actual liability, or a liability reasonably assumed to be imposed by law, then interest will be paid.

**Rule 39-22-627. Temporary Adjustment of Income Tax Rate of Income Tax.**

**Basis and Purpose:** The statutory bases for this rule are sections 39-21-112(1), 39-22-104(1.7), 39-22-301(1)(d), and 39-22-627, C.R.S. The purpose of this rule is to adjust the Colorado income tax rate in accordance with section 39-22-627, C.R.S.

- (1) Pursuant to section 39-22-627, C.R.S., the Colorado income tax rate for the tax imposed on individuals, estates, trusts, and corporations pursuant to sections 39-22-104(1.7) and 39-22-301(1)(d)(I)(I) and (J), C.R.S., is reduced to four and one-half percent for:
  - (a) tax years commencing on or after January 1, 2019, but prior to January 1, 2020; and
  - (b) tax years commencing on or after January 1, 2021, but prior to January 1, 2022.

**Rule 39-22-652. Definitions.**

**(1) Federal Transactions.**

- (a) A transaction described in either §39-22-652(5)(a) (federal listed transaction) or (7) (federal reportable transaction), C.R.S., is a “Federal Transaction” for purposes of these rules if:
  - (i) the taxpayer is required by federal law to file an IRS Form 8886, or a successor form, or amendment to such form with respect to the transaction, and
  - (ii) files or is included in, or is required to file or be included in, a Colorado income tax return, including a consolidated and/or combined Colorado income tax return and such Colorado tax return reflects a Colorado Tax Benefit deriving from such transaction.

**(2) Colorado Listed Transactions.**

- (a) For purposes of a Colorado Listed Transaction, the following terms apply:
  - (i) A captive real estate investment trust (“REIT”) or captive regulated investment company (“RIC”) is referred to in these rules as a “Captive Entity.”
  - (ii) A more than fifty percent beneficial owner includes any entity that is controlled by the more than fifty percent beneficial owner of a Captive Entity, any of which, individually or collectively, is referred to in these rules as the “Owner.”
  - (iii) “Transaction” for purposes of a Colorado Listed Transaction includes, but is not limited to:
    - (1) a transaction by which the Owner creates or acquires a controlling interest in a Captive Entity, or

- (2) transactions by, among, or between the Owner and Captive Entity, and includes dividend distributions by the Captive Entity to or from an Owner, management service fees charged by or to an Owner to or from a Captive Entity, rental payments paid to a captive REIT by an Owner, loans by or to the Owner to or by the Captive Entity and repayment of those loans, interest payments paid by or to a Captive Entity to or from the Owner, and capital contributions to the Captive Entity by the Owner.
- (iv) “Colorado Tax Benefit” is a tax consequence that may reduce a taxpayer’s Colorado income tax liability by affecting the amount, timing character, or source of any item of income, gain, expense, loss, or credit, including deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or absence of adjustments to the basis in property, or status as an entity exempt from federal or state income taxation. A Colorado Tax Benefit includes a tax benefit applied at the federal level or to another state’s income tax or other similar tax, but the consequence of which flows through to reduce Colorado income tax liability.
- (b) A transaction described in either §39-22-652(5)(b) or (c), C.R.S. is a “Colorado Listed Transaction” for purposes of these rules if:
  - (i) it is a transaction between the Owner and Captive Entity, and
  - (ii) the Owner or Captive Entity files, or is included in, or is required to file or be included in, a Colorado income tax return, including a consolidated and/or combined Colorado income tax return and such Colorado tax return reflects a Colorado Tax Benefit. An Owner, Captive Entity, and a material advisor do not have a disclosure obligation under subsections 653 or 656 of these rules with respect to a Colorado Listed Transaction if such income tax return does not reflect a Colorado Tax Benefit.
- (c) *Example.* Retail Store operates a retail business in a building owned by Captive REIT and is located in Colorado. The commercial domicile of Captive REIT is in Delaware. Retail Store pays rent to Captive REIT. Captive REIT distributes rental income received from Retail Store to Corporation A, which redistributes the income as a stock dividend to Holding Company. Holding Company has the controlling interest in both Retail Store and Corporation A and its commercial domicile is in Delaware. Corporation A has the controlling interest in Captive REIT and its commercial domicile is in Bermuda. Corporation A is not required to file a Colorado income tax return and is not includable in a Colorado combined income tax return because it does not have more than twenty percent of its property in the United States. See, §39-22-303(8), C.R.S. Retail Store’s Colorado taxable income is reduced by the rental payments made to Captive REIT. Holding Company receives a Colorado Tax Benefit because the tax consequence of its ownership of controlling interests in Captive REIT, Corporation A, and Retail Store is the reduction of Colorado income tax otherwise due by Holding Company’s group retail operation in Colorado. Retail Store also receives a Colorado Tax Benefit because its Colorado taxable income is reduced by its rental payments to Captive REIT.

**Rule 39-22-653. Taxpayer Disclosure of Reportable and Listed Transactions.**

**(1) Content of Disclosure of Federal Transactions.**

A taxpayer who is required to disclose to the department a Federal Transaction shall file with the Department a copy of the entire IRS form 8886, or any successor form, and any amendments to the original filing of said form, that the taxpayer files, or should have filed, with the Internal Revenue Service.

**(2) Content of Disclosure of Colorado Listed Transactions.**

A taxpayer who is required to disclose to the department a Colorado Listed Transaction shall file with the department a Taxpayer's Colorado Listed Transaction Disclosure Statement. The contents of the statement shall include the name and address (mailing and physical location) of each Captive Entity, the name and address (mailing and physical location) of the Owner, the Captive Entity's estimated total assets and estimated total income earned prior to dividend distribution for the tax year in which the disclosure is first due. A taxpayer who is required to disclose a transaction that is reportable under both subsections 1 and 2 of this rule shall file IRS form 8886.

**(3) Disclosure by a Pass-through Entity or More Than Fifty Percent Owner.**

A taxpayer who is (a) a partner, member, or shareholder (a "pass-through member") of a pass-through entity, (b) a Captive Entity, or (c) an entity controlled by the more than fifty percent beneficial owner of a Captive Entity, and who is required to file a disclosure statement pursuant to subsection 1 or 2, above, satisfies its disclosure obligation if the pass-through entity or more than fifty percent beneficial owner is required to disclose under subsection 1 or 2 of this rule, files on behalf of such taxpayer an Internal Revenue Service form 8886 or a Taxpayer Colorado Disclosure Statement, as the case may be, that contains all information that would have been disclosed had the pass-through member, Captive Entity, or entity controlled by the more than fifty percent beneficial owner, filed such a disclosure statement, and the taxpayer does not have reasonable grounds to believe that the disclosure filed on its behalf is not materially incomplete or inaccurate.

(a) *Known or Potential Federal Tax Benefits of Pass-Through Members.* A pass-through entity that does not know the federal tax benefit that inures to the pass-through member has adequately disclosed a pass-through member's federal tax benefit if the pass-through entity discloses the potential federal tax benefit(s) that may inure to the pass-through member. If the pass-through entity does not have sufficient information on which to disclose the potential federal tax benefit, the pass-through entity cannot file a disclosure statement on behalf of such pass-through member. This subsection 3(a) does not apply to an Owner, Captive Entity, or a taxpayer listed in subsection 4, below, because the taxpayer in such cases is presumed to have access to the information necessary to disclose the known tax benefit of those other entities on behalf of whom the disclosure statement is filed.

**(4) Taxpayer Included in a Colorado Combined Report or Consolidated Return.**

A taxpayer that is included, or are required to be included, in a combined and/or consolidated Colorado income tax return and that is required to make a disclosure under subsections 1 or 2, above, satisfies the disclosure requirements of this rule if an IRS form 8886 or Colorado Taxpayer Disclosure Statement, as the case may be, that contains all information that would have been disclosed had the taxpayer separately filed such disclosure statement, is filed with the combined and/or consolidated return on behalf of all such taxpayer.

**Rule 39-22-656. Material Advisor Disclosure of Reportable or Listed Transactions.**

**(1) Colorado Disclosure Statement for Federal Transactions and Colorado Listed Transactions.**

- (a) *Federal Transactions.* A material advisor, who is required to file with the Internal Revenue Service pursuant to United States Department of the Treasury Regulation 26 C.F.R. § 301.6111-3, as effective on August 3, 2007 (hereinafter "Treasury Regulation § 301.6111-3") a disclosure statement with respect to a Federal Transaction described in Department Rule 39-22-652, shall file with the Department a complete copy of the IRS form 8918, or any successor form, and amendments thereto, that the material advisor filed, or should have filed, with the Internal Revenue Service.
- (b) *Colorado Listed Transactions.*
  - (i) Except as otherwise noted below, the provisions of Treasury Regulation §301.6111-3 shall apply to a material advisor with respect to a Colorado Listed Transaction.
  - (ii) The following provisions of Treasury Regulation § 301.6111-3 are modified as follows:
    - (A) "Listed transaction," as defined in subsection 3(c)(2) of the Treasury Regulation § 301.6111-3 means a Colorado Listed Transaction.
    - (B) "Tax" or "Federal tax" means Colorado income tax.
    - (C) The gross income threshold set forth in subsection 3(b)(3) of Treasury Regulation § 301.6111-3 applies and without regard to the state in which the gross income is earned.
  - (iii) The following provisions of Treasury Regulation §301.6111-3 shall not apply with respect to a Colorado Listed Transaction:
    - (A) Subsections 3(b)(2)(i)(B) and (D),
    - (B) Subsections 3(b)(2)(ii)(B) through (D),
    - (C) Subsection 3(b)(4)(i)(B),
    - (D) Subsections 3(c)(1) and (13),
    - (E) The form and content of the disclosure statement set forth in subsection 3(d)(1); except, provisions of said subsection relating to an incomplete form (i.e., Material Advisor's Colorado Listed Transactions Disclosure Statement) and the requirement to amend such form apply,
    - (F) Time for providing disclosure set forth in subsection 3(e) and (f) (see, subsection (c) of Department Rule 39-22-656(c), below, for applicable deadlines), but the remaining provisions of subsection (3(e) (regarding time period to file amended disclosures) and (f) (regarding designation agreements) shall apply,
    - (G) Subsection 3(h) (regarding rulings), and
    - (H) Subsection 3(i).
  - (iv) *Content of Disclosure.* A material advisor shall, with respect to a Colorado Listed Transaction, file a Material Advisor's Disclosure Statement, which shall include the following:



- (A) Material advisor's name, identifying number, telephone number, mailing address; contact person's name, title, and telephone number. If the material advisor is party to a designation agreement, the name(s), address(es), telephone number(s), contact name(s) and telephone number(s) of the other parties to the agreement.
  - (B) Names, including trade names, if any, mailing and physical location addresses of the Owner and of the Captive Entity.
  - (C) A description of the material aid, assistance, or advice provided.
  - (D) Signature of the material advisor and the following attestation: "I declare that I have examined this statement, and to the best of my knowledge and belief, it is true, correct, and complete."
  - (E) For a Colorado Listed Transaction that is also a Federal Transaction, the material advisor shall file a complete copy of IRS form 8918, or any successor form, and amendments thereto that the material advisor filed, or should have filed, with the Internal Revenue Service, and shall not file a Material Advisor's Colorado Listed Transaction Disclosure Statement.
- (v) *Retention of Information.* A material advisor shall, with respect to a Colorado Listed Transaction, retain, for a period of seven years from the date the person first becomes a material advisor, any records in the material advisor's possession or control regarding the following items:
- (A) The role of any other entity(ies) or individual(s) known or reasonably believed to have provided material aid, assistance, or advice to the transaction and the name, address, identifying number (if known), and telephone of such entity(ies) or individual(s).
  - (B) Whether a related entity or individual, an entity or individual without Colorado income tax nexus, a tax-exempt entity, and/or an entity that is not includable in a Colorado combined return is needed in order to obtain the intended tax benefit created by the transaction, and, if so, the name of each such entity or individual, a description of the role of each individual or entity and the name of the individual's or entity's country of existence, state of incorporation and/or state of commercial domicile if a particular country or state (including a particular type of country or state, e.g., separate filing state or combined reporting state) is required to obtain the intended tax benefit.
  - (C) Whether, in order to obtain the intended tax benefit, the income, or gain from the transaction, is allocated directly or indirectly to an individual or entity that has a net operating loss and/or unused loss or credit and, if so, a description of the role of each individual or entity in the transaction.
  - (D) A description or copy of the financial instruments used in the transaction.
  - (E) A description or explanation of the intended tax benefit created by the transaction in each year.
  - (F) The state and federal tax code section(s) used to claim the tax benefit(s) generated by the transaction

- (G) A description of the transaction(s) for which material aid, assistance, or advice, was provided, including the following:
  - (I) the nature of the expected tax treatment and expected tax benefits created by the transaction for all affected years,
  - (II) the years the tax benefits are expected to be claimed,
  - (III) the role of the entities or individuals identified in subsection A, above,
  - (IV) the role of the financial instruments identified in subsection D, above,
  - (V) a description of how the state and federal tax code section(s) identified in subsection F, above, are applied and how they allow the taxpayer to obtain the desired tax treatment.
- (c) *Time for Providing a Disclosure Statement.*
  - (i) The material advisor must, with respect to a Federal Transaction or Colorado Listed Transaction, file the applicable disclosure statement within six months of the date the transaction is entered into by the taxpayer. If the person is not a material advisor (see, Treasury Regulation § 301.6111-3(b)(4)) until after the six month period, then the disclosure statement is due the month following the month in which the person first becomes a material advisor.
  - (ii) The material advisor is not required to file in any subsequent year a disclosure statement for the same or substantially similar transaction, unless the material advisor becomes aware of facts that indicate the disclosure statement is materially incorrect or incomplete. The material advisor shall file an amended disclosure statement on the last day of the month following the quarter in which the material advisor knew or should have known the facts that necessitate the filing of an amended disclosure statement.
  - (iii) *Filing a Disclosure Statement.* Disclosure statements shall be filed with the:

Colorado Department of Revenue  
Field Audit Section  
720 S. Colorado Boulevard  
Suite 400N  
Denver, Colorado 80246
- (2) **Effective Date.** A material advisor shall file a disclosure statement concerning a transaction for which the material advisor provides material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out such transaction and such material aid, assistance, or advice is provided by the material advisor on or after May 9, 2009 or the transaction with respect to which the material aid, assistance or advice is provided, occurs on or after May 9, 2009, even though the material aid, assistance, or advice is provided prior to such date.

- (3) **Incorporation by Reference.** United States Department of the Treasury Regulation 26 C.F.R. §301.6111-3, as effective on August 3, 2007 ("Treasury Regulation § 301.6111-3") is hereby incorporated by reference. This Rule 39-22-656 does not incorporate later amendments to or editions of Treasury Regulation § 301.6111-3. A copy of Treasury Regulation § 301.6111-3 has been provided to the state publications depository and distribution center. Treasury Regulation § 301.6111-3 may be examined at any state publications depository library. Additionally, the Department shall maintain certified copies of the complete text of Treasury Regulation § 301.6111-3, which shall be available for public inspection during regular business hours. Certified copies of the material incorporated shall be provided at cost upon request. Any member of the public wishing to obtain or examine a copy of Treasury Regulation § 301.6111-3 may contact the:

Colorado Department of Revenue  
Office of Tax Policy Analysis  
1881 Pierce Street  
Lakewood, CO 80214

**Rule 39-22-1001. Voluntary Contributions.**

**Basis and Purpose.** The bases for this rule are §§ 39-21-112, 39-22-701 et seq., 39-22-801 et seq., and 39-22-1001 et seq., C.R.S. The purpose of this rule is to limit the aggregate amount a taxpayer can voluntarily contribute to programs appearing on the Colorado individual income tax return.

The aggregate amount a taxpayer can voluntarily contribute to programs appearing on the Colorado individual income tax return pursuant to article 22 of title 39, C.R.S. is limited to the overpayment reflected on the taxpayer's return, reduced by any amount that must first be credited toward an unpaid debt or liability pursuant to § 39-21-108(3), C.R.S.

**Rule 39-22-2003. State Sales Tax Refund.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1), 39-22-2001, 39-22-2002, and 39-22-2003, C.R.S. The purpose of this rule is to publish the amount of any state sales tax refund when there are sufficient excess state revenues under the Taxpayer's Bill of Rights (TABOR), as required by section 39-22-2002(7), C.R.S.

- (1) The state sales tax refund available to qualified individuals is listed below for recent income tax years, according to the filing status and modified adjusted gross income reported on the Colorado income tax return.

(a) 2016 - 2020: No refund available.

(b) 2021:

Modified Adjusted Gross Income	\$44,000 or less	\$44,001 - \$88,000	\$88,001 - \$139,000	\$139,001 - \$193,000	\$193,001 - \$246,000	\$246,001 or more
Single Filer Refund	\$37	\$49	\$56	\$68	\$74	\$117
Joint Filer Refund	\$74	\$98	\$112	\$136	\$148	\$234

(c) 2022:

Modified Adjusted Gross Income	\$48,000 or less	\$48,001 - \$95,000	\$95,001 - \$151,000	\$151,001- \$209,000	\$209,001- \$268,000	\$268,001 or more
Single Filer Refund	\$153	\$208	\$234	\$285	\$300	\$486
Joint Filer Refund	\$306	\$416	\$468	\$570	\$600	\$972

**Rule 39-22-2005. Refund of Remaining Excess Revenues from State Fiscal Year 2022-2023 Only.**

**Basis and Purpose.** The bases for this rule are sections 39-21-112(1) and 39-22-2005, C.R.S. The purpose of this rule is to publish the amount of the refund allowed by section 39-22-2005, C.R.S., for the tax year commencing on January 1, 2023.

(1) For the income tax year beginning on January 1, 2023, the amount of the identical individual refund calculated pursuant to section 39-22-2005(2), C.R.S., is:

(a) in the case of a qualified individual filing a single return, \$800; and

(b) in the case of two qualified individuals filing a joint return, \$1,600.

**Rule 39-22-2102. Colorado Affordable Housing Tax Credit.**

**Basis and Purpose.** The bases for this rule are § 39-21-112(1) and § 39-22-2102, C.R.S. The purpose of this rule is to provide clarification for pass-through entities making an allocation of the Colorado affordable housing credit, as well as to establish when the carryforward period begins for the credit.

(1) **Allocating the Credit for Pass-Through Entities.**

(a) The owner of a qualified development project receiving an allocation of a Colorado affordable housing credit may allocate the credit among its partners, shareholders, members, or other qualified taxpayers in any manner agreed to by such persons. The owner must submit with the Colorado Partnership or S Corporation Return their Colorado State Affordable Housing Tax Credit Allocation Certificate ("Allocation Certificate") along with a schedule detailing how the credit is allocated ("Allocation Schedule"). In addition, the owner shall send to the Department of Revenue the following information:

(i) The name(s) and federal taxpayer identification number(s) of the owner,

(ii) The address of the property for which the credit is received,

(iii) The name and federal taxpayer identification number of the qualified taxpayers who receive an allocation of the credit,

(iv) The total amount of credit allocated to all qualified taxpayers,

(v) The amount of credit each qualified taxpayer received,

(vi) The tax year in which the credit was allocated to each qualified taxpayer and the amount allocated to such qualified taxpayer for each such year, and

(vii) The amount of credit claimable in each year.

- (b) Each partner, shareholder, member or other qualified taxpayer must attach a copy of the Allocation Certificate and the Allocation Schedule to their Colorado income tax return. Once the partners, shareholders, members or other qualified taxpayers claim the credits on their respective income tax returns, the allocation cannot be amended for that tax year.
  - (c) If the qualified taxpayer is a pass-through entity, then, to the extent that the owner's records reflect such information, the owner shall identify by name and federal taxpayer number the qualified taxpayer(s) of such pass-through entity and their taxpayer identification number and beginning credit allowances.
- (2) **Carryforwards.** Any amount of credit not applied to a qualified taxpayer's tax liability may be carried forward up to eleven years from the tax year in which the allocation was made. An allocation is made when the Authority issues the Allocation Certificate to the owner of a qualified development after a qualified development is placed in service. The credit must be applied first to the earliest years possible. Any amount of credit not used during this carryforward period shall not be refunded to the taxpayer.

**Rule 39-22-2103(1). Recapture — Waiver of Statute to Avoid Immediate Assessment.**

- (a) Where any recapture of credit claimed under 39-22-2103, C.R.S. is created by the sale of the property interest by the original owner, the liability for payment of the recapture tax may be tolled when the taxpayer that claimed the tax credit executes and signs a waiver of the statute of limitations for assessment for the tax year that recapture would be due, extending the period of assessment of the recapture tax until one year after the expiration of the credit compliance period under § 39-22-2101(3), C.R.S.

## Special Rules – Income Tax

### Special Rule 1A. Airlines – Single Sales Factor Apportionment.

The following special rule is established in respect to the allocation and apportionment of income for airlines.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to subsection a) and apportion its business income using the sales factor set forth in subsection d), below. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.
  - (a) **In General.** An airline that has income from sources both within and without Colorado shall determine income in accordance with this rule. Income shall first be categorized as to “business” or “nonbusiness” income pursuant to Rule 39-22-303.5–1. Nonbusiness income will be directly allocated to specific states in accordance with §39-22-303.5 C.R.S. Business income will be apportioned to those states in which business is conducted based on the apportionment factor(s) as set forth in this rule.
  - (b) **Definitions:**
    - (i) *“Business and Nonbusiness Income.”* For definitions and rules for determining business and nonbusiness income, see Rule 39-22-303.5–1.
    - (ii) *“Value”* of owned real and tangible personal property shall mean its original cost.
    - (iii) *“Cost of aircraft by type”* means the average original cost or value of aircraft by type that are ready for flight.
    - (iv) *“Original cost”* means the initial federal tax basis of the property plus the value of capital improvements to such property, except that, for this purpose, it shall be assumed that Safe Harbor Leases are not true leases and do not affect the original initial federal tax basis of the property.
    - (v) *“Average value”* of the property means the amount determined by averaging the values at the beginning and ending of the income year, but the department may require the averaging of monthly values during the income year if such averaging is necessary to reflect properly the average value of the airline's property.
    - (vi) The *“value”* of rented real and tangible personal property means the product of eight (8) times the net annual rental rate.
    - (vii) *“Net annual rental rate”* means the annual rental rate paid by the taxpayer.
    - (viii) *“Property used during the income year”* includes property which is available for use in the taxpayer's trade or business during the income year.
    - (ix) *“Aircraft ready for flight”* means aircraft owned or acquired through rental or lease (but not interchange) which are in the possession of the taxpayer and are available for service on the taxpayer routes.

- (x) *“Transportation revenue”* means revenue earned by transporting passengers, freight and mail as well as revenue earned from other charges associated with transportation such as baggage fees, sales of food and drink, pet crate rentals, etc.
  - (xi) *“Arrivals” and “Departures”* means the number of times that an aircraft lands or takes off at an airport in revenue service.
  - (xii) *“Arrivals and departures in this State”* means the number of times that an aircraft lands or takes off in revenue service at an airport located in this State.
  - (xiii) *“Revenue”* means gross sales or gross receipts, unless otherwise required by context.
- (c) **Apportionment of Business Income.** The same method in the reporting of items for all factors must be consistent for both the numerator and denominator. For tax years beginning on or after January 1, 2009, the taxpayer shall apportion business income using only the sales factor.
- (d) **The Sales Factor.** The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year and the denominator of which is the total sales of the taxpayer within and without this state during the taxable year. The denominator is the transportation revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer and miscellaneous sales of merchandise, etc. Proceeds and net gains or losses from the sale of aircraft and passive income items, such as interest, rental income, and dividends, shall not be included in the denominator. The numerator of the sales factor is the total revenue of the taxpayer in the State during the income year. Airtime, arrivals, and departures by type of aircraft shall be used in computing revenue attributable to this State derived from hauling passengers, freight, and mail. Receipts from the other business activities shall be included in the numerator in accordance with the statute. In determining the numerator of the sales factor, revenue for hauling passengers, freight, mail, and excess baggage shall be attributed to this State using the “aircraft ready for flight” ratio, which is calculated as follows:
- (i) The ratio which the air miles of the taxpayer's aircraft flew in this State bears to the total air miles ramp to ramp of such aircraft everywhere by type of aircraft times the denominator cost or value of each type of aircraft, weighted at 40%.
  - (ii) The ratio of arrivals and departures in this State bears to the total arrivals and departures everywhere by type of aircraft times the denominator cost or value of each type of aircraft, weighted at 60%.
- If records of actual revenue by type of aircraft are not maintained, the total revenue shall be divided into passenger and freight (which shall include express, excess baggage and mail) revenue and allocated to aircraft type on the ratio of the revenue passenger ton-miles and revenue freight (which shall include express, excess baggage and mail) ton-miles of such type, respectively.
- (e) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

**Special Rule 2A. Contractors – Single Sales Factor Apportionment.**

The following special rule applies to contractors who elect to report income using the completed contract method; provided, however, that, with respect to contracts with a gross revenue of \$100,000 or less, such rules shall apply only at the option of the taxpayer.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to §39-22-303.5(5) C.R.S. and apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.

- (a) **In General.** A contractor who has income from sources both within and without Colorado and elects to report income using the completed contract method shall determine income in accordance with this rule. Net income shall first be categorized as to “business” or “non-business” and non-business income will be directly allocated to specific states in accordance with §39-22-303.5(5) C.R.S. and the rules thereunder. Gross profits from completed contracts, business administrative income and business administrative expense will be apportioned to those states in which business is conducted based on the sales factor as set forth in this rule. The amount of net income subject to tax by Colorado will be the sum of (1) the gross profit from completed contracts apportioned to Colorado less business administrative expense apportioned to Colorado plus (2) other business income apportioned to Colorado that is not directly attributable to completed contracts plus (3) the amount of non-business income allocated to Colorado.

(b) **General Definitions.**

- (i) **“Job”** means a long-term contract entered into to build, construct, install or manufacture which will not be completed within the tax year in which it is entered into. As used in this rule, a “job” will refer to only those contracts where a taxpayer elects to report income using the completed contract method.
- (ii) **“Job Revenue”** means gross revenue recorded on the books in accordance with generally accepted accounting principles. Billings shall be adjusted for overbillings or underbillings whenever applicable.
- (iii) **“Job Costs”** means costs recorded on the books as being paid or accrued that are directly attributable to a specific job.
- (iv) **“Job Profit or Loss”** means the gross profit or loss attributable to a specific job, which is determined by subtracting “Job Costs” from “Job Revenue”.
- (v) **“Gross Profit Apportioned to Colorado”** means Colorado's share of the sum of “Job Profits and Losses” of all jobs completed during a specific tax period.
- (vi) **“Administrative Expense Apportioned to Colorado”** means Colorado's share of expense not directly attributable to a specific job.
- (vii) **“Revenue”**, unless otherwise required by context means gross sales or gross receipts.

- (c) **Business and Non-business Income.** For definitions and rules for determining business and non-business income, see Rule 39-22-303.5–1.

- (d) **Apportionment Factor.** The taxpayer shall apportion business income using the sales factor.



- (i) **The Sales Factor.** The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year. All revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer is included in the denominator of the sales factor. The numerator of the sales factor is the total revenue of the taxpayer in this state during the tax year. When determining the denominator and numerator of the sales factor, revenue directly attributable to contract jobs shall be included in the tax year on the basis of progress billings and receipts from completed and incomplete contracts. When determining the numerator, the typical computation is:

Total contract price for all jobs completed in this state during the tax year.

Plus

Total progress payments billed or received for all incomplete jobs in this state at the end of the tax year

Less

Total progress payments billed or received in prior tax years for the above completed and incomplete jobs in this state

Equals

Total revenue directly attributable to all jobs in this state during the tax year.

Add

Revenue from other business activities in this state not directly attributable to jobs.

Equals

Numerator of Sales Factor

The denominator of the sales factor would be computed in the same manner for all jobs everywhere and includes all other revenue from business activities not directly attributable to contract jobs.

- (e) **Apportionment of Income and Expense.** Once the sales factor has been determined, income and expense shall be apportioned to this state as set forth in this rule.
- (i) *Gross Profit.* The gross profit of each and all jobs completed during the tax year shall be apportioned to Colorado by the sales factor.
- (ii) *Administrative Expense.* Administrative expense not directly attributable to jobs and not directly related to allocated income shall be apportioned to Colorado by the sales factor.
- (iii) *Other Business Income.* Other business income not directly attributable to jobs shall be apportioned to Colorado by the sales factor.

(f) **Colorado Taxable Income.**

Gross profit apportioned to Colorado from all jobs completed during the tax year

Less

Administrative expense apportioned to Colorado

Plus

Other business income apportioned to Colorado not directly related to jobs

Equal

Total taxable income apportioned to Colorado

Add

Non-business income allocated to Colorado

Equals

Colorado Taxable Income

- (g) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

**Special Rule 3A. Publishing – Single Sales Factor Apportionment.**

When a person in the business of publishing, selling, licensing or distributing newspapers, magazines, periodicals, trade journals or other printed material has income from sources both within and without this state, the amount of business income from sources within this state from such business activity shall be determined using the apportionment and allocations rules set forth below.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.
- (a) **In General:** Except as specifically modified by this rule, when a person in the business of publishing, selling, licensing or distributing newspapers, magazines, periodicals, trade journals or other printed material has income from sources both within and without this state, the amount of business income from sources within this state from such business activity shall be determined pursuant to §39-22-303.5, C.R.S., and, where applicable, §39-22-303.5(4)(d), C.R.S. and rules adopted thereunder.

- (b) **Allocation of non-business income.** Income shall first be categorized as to “business” or “nonbusiness” income pursuant to Rule 39-22-303.5–1 and nonbusiness income will be directly allocated to specific states in accordance with §39-22-303.5(5) and rules thereunder. Business income will be apportioned to those states in which business is conducted based on the apportionment factor as set forth in this rule. The amount of net income subject to tax by Colorado will be the sum of (1) the amount of nonbusiness income allocated to Colorado plus (2) the amount of business income attributable to Colorado.
- (c) **Definitions:** The following definitions are applicable to the terms contained in this rule, unless the context clearly requires otherwise.
  - (i) *“Print or printed material”* includes, without limitation, the physical embodiment or printed version of any thought or expression including, without limitation, a play, story, article, column or other literary, commercial, educational, artistic or other written or printed work. The determination of whether an item is or consists of print or printed material shall be made without regard to its content. Printed material may take the form of a book, newspaper, magazine, periodical, trade journal or any other form of printed matter and may be contained on any medium or property.
  - (ii) *“Purchaser” and “Subscriber”* mean the individual, residence, business or other outlet which is the ultimate or final recipient of the print or printed materials. Neither of such terms shall mean or include a wholesaler or other distributor of print or printed material.
- (d) **Apportionment of Business Income.**
  - (i) **Sales Factor Denominator.** The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year. The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts that may be otherwise excluded.
  - (ii) **Sales Factor Numerator.** The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to, the following:
    - (1) Gross receipts derived from the sale of tangible personal property, including printed materials, delivered or shipped to a purchaser or a subscriber in this state.
    - (2) Except as provided in subparagraph (3) of this paragraph, gross receipts derived from advertising and the sale, rental or other use of the taxpayer's customer lists or any portion thereof shall be attributed to this state as determined by the taxpayer's “circulation factor” during the tax period. The circulation factor shall be determined for each individual publication by the taxpayer of printed material containing advertising and shall be equal to the ratio that the taxpayer's in-state circulation to purchasers and subscribers of its printed material bears to its total circulation to purchasers and subscribers everywhere.

The circulation factor for an individual publication shall be determined by reference to the rating statistics of reputable ratings services, provided that the sources selected are consistently used from year to year for such purpose. If none of the foregoing sources are available, or, if available, none is in form or content sufficient for such purposes, then the circulation factor shall be determined from the taxpayer's books and records.

The circulation factor shall fairly reflect the ratio that the taxpayer's in-state circulation to purchasers and subscribers of its printed material bears to its total circulation to purchasers and subscribers everywhere.

- (3) When specific items of advertisements can be shown, upon clear and convincing evidence, to have been distributed solely to a limited regional or local geographic area in which this state is located, the taxpayer may petition, or the executive director may require, that a portion of such receipts be attributed to the sales factor numerator of this state on the basis of a regional or local geographic area circulation factor and not upon the basis of the circulation factor provided by subparagraph d)ii)(2). Such attribution shall be based upon the ratio that the taxpayer's circulation to purchasers and subscribers located in this state of the printed material containing such specific items of advertising bears to its total circulation of such printed material to purchasers and subscribers located within such regional or local geographic area. This alternative attribution method shall be permitted only upon the condition that such receipts are not double counted or otherwise included in the numerator of any other state.
  - (4) Except as provided for in §39-22-303.5(4)(d), C.R.S. regarding publishers of magazines or periodicals, if the purchaser or subscriber is the United States Government or if the taxpayer is not taxable in a State, the gross receipts from all sources, including the receipts from the sale of printed material, from advertising, and from the sale, rental or other use of the taxpayer's customer's lists, or any portion thereof that would have been attributed by the circulation factor to the numerator of the sales factor for such State, shall be included in the numerator of the sales factor of this State if the printed material or other property is shipped from an office, store, warehouse, factory, or other place of storage or business in this State.
- (2) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

#### **Special Rule 4A. Railroads – Single Sales Factor Apportionment.**

The following special rule is established in respect to railroads.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to §39-22-303.5(5), C.R.S. and rules thereunder and apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.

- (a) **In General.** Where a railroad has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this rule. In such cases, the first step is to determine what portion of the railroad's income constitutes "business" income and which portion constitutes "nonbusiness" income under Rule 39-22-303.5-1. Nonbusiness income is directly allocable to specific states pursuant to §39-22-303.5(5), C.R.S. and rules thereunder. Business income is apportioned among the states in which the business is conducted pursuant to the apportionment factor set forth in this rule. The sum of (1) the items of nonbusiness income directly allocated to this state, plus (2) the amount of business income attributable to this state, constitutes the amount of the taxpayer's entire net income which is subject to tax by this state.
- (b) **Business and Nonbusiness Income.** For definitions, rules and examples for determining business and nonbusiness income, see Rule 39-22-303.5-1A.
- (c) **Apportionment of Business Income.**
  - (i) The Sales Factor.
    - (1) In General. The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year. All revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer that produces business income, except per diem and mileage charges that are collected by the taxpayer, is included in the denominator of the sales factor.

The numerator of the sales factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year, other than revenue from hauling freight, passengers, mail, and express, shall be attributable to this state in accordance with §39-22-303.5(4) C.R.S. and rules thereunder.
    - (2) Numerator of Sales Factor from Freight, Mail, and Express. The total revenue of the taxpayer in this state during the income year for the numerator of the factor from hauling freight, mail and express shall be attributable to this state as follows:
      - (a) All receipts from shipments which both originate and terminate within this state; and
      - (b) That portion of the receipts from each movement or shipment passing through, into, or out of this state is determined by the ratio which the miles traveled by such movement or shipment in this state bears to the total miles traveled by such movement or shipment from point of origin to destination.
    - (3) **Numerator of Sales Factor from Passengers.** The numerator of the sales factor shall include:
      - (a) All receipts from the transportation of passengers (including mail and express handled in passenger service) which both originate and terminate with this state; and

- (b) That portion of the receipts from the transportation of interstate passengers (including mail and express handled in passenger service) determined by the ratio which revenue passenger miles in this state bears to the total everywhere.
- (2) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

**Special Rule 5A. Television and Radio Broadcasting – Single Sales Factor Apportionment.**

The following special rule is established with respect to the allocation and apportionment of income from television and radio broadcasting.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to §39-22-303.5(5), C.R.S. and apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.
  - (a) **In General.** When a person in the business of broadcasting film or radio programming, whether through the public airwaves, by cable, direct or indirect satellite transmission or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to §39-22-303.5, C.R.S. and the rules issued thereunder by this state, except as modified by this rule.
  - (b) **Business and Nonbusiness Income.** For definitions, rules, and examples for determining whether income shall be classified as "business" or "nonbusiness" income, see Rule 39-22-303.5–1.
  - (c) **Definitions.** The following definitions are applicable to the terms contained in this rule, unless the context clearly requires otherwise.
    - (i) **"Film" or "film programming"** means any and all performances, events or productions telecast on television, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of video tape, disc or any other type of format or medium.

Each episode of a series of films produced for television shall constitute a separate "film" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.
    - (ii) **"Radio" or "radio programming"** means any and all performances, events or productions broadcast on radio, including but not limited to news, sporting events, plays, stories or other literary, commercial, educational or artistic works, through the use of an audio tape, disc or any other format or medium.

Each episode of a series of radio programming produced for radio broadcast shall constitute a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

- (iii) *“Release” or “in release”* means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience for which the program was created. Thus, for example, a film is placed in service when it is first publicly telecast for entertainment, educational, commercial, artistic or other purpose.

Each episode of a television or radio series is placed in service when it is first broadcast. A program is not placed in service merely because it is completed and therefore in a condition or state of readiness and availability for broadcast or, merely because it is previewed to prospective sponsors or purchasers.

- (iv) *“Rent”* shall include license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.
- (v) A *“subscriber”* to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.
- (vi) *“Telecast” or “broadcast”* (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radio waves or microwaves or by wires, lines, coaxial cables, wave guides, fiber optics, satellite transmissions directly or indirectly to viewers and listeners or by any other means of communications.
- (vii) *“United States”* means states and District of Columbia, but does not include the Commonwealth of Puerto Rico or territories and possessions of the United States.

(d) **Apportionment of Business Income.**

- (i) **In General.** The taxpayer shall apportion business income using only the sales factor. The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year.

- (ii) **The Sales Factor.**

- (1) *Sales Factor Denominator.* The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts otherwise excluded.
- (2) *Sales Factor Numerator.* The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including but not limited to the following:
  - (a) Gross receipts, including advertising revenue, from television, film, or radio programming in release to or by television and radio stations located in this state.

- (b) Gross receipts, including advertising revenue, from television, film, or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter "audience factor") that the audience for such station (or owned and affiliated stations in the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks) within the United States.

The audience factor for television or radio programming shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience. Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state.

If none of the foregoing sources are available, or, if available, none is in form or content sufficient for such purposes, then the audience factor shall be determined by the ratio that the population of this state bears to the population of the United States, as reflected in the most current population data published by the U.S. Bureau of Census, for all states which receive the broadcasts.

- (c) Gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system. If the number of subscribers cannot be accurately determined from the books and records maintained by the taxpayer, such audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose.

If none of the foregoing resources are available, or, if available, none is in form or content sufficient for such purposes, then the audience factor shall be determined by the ratio that the population of this state bears to the population of the United States as reflected in the most current population data published by the U.S. Bureau of Census for all states in which the cable system has subscribers.



- (d) The extent that the gross receipts from live television broadcasting, film, or radio programming, as determined pursuant to paragraph 1)d)ii)(2)(b) or (c) include receipts derived from broadcasts to audiences located outside the United States ("foreign-based receipts"), the total gross receipts against which the audience factor shall be applied shall be modified so that such foreign-based receipts are not used to affect the amount of receipts that are to be apportioned to the state. Such modification shall consist of deducting from total receipts, prior to the application thereto of the audience factor, that amount of receipts derived from broadcasts to audiences located outside the United States.

*Example:* XYZ Television Network Co. has gross receipts from all broadcasting of films of \$1 billion of which a total of \$200,000,000 was derived from advertising receipts and license fees attributable to releases of its films in foreign television markets and \$800,000,000 attributable to the United States market. Assuming that foreign countries into which its programming has been telecast or sold or licensed for telecast would have jurisdiction to impose their income tax upon XYZ Network Co., then its in-state gross receipts attributable to its telecasting activity would be determined as follows:

$$\$1,000,000,000 - \$200,000,000 = \$800,000,000$$

$$\$800,000,000 \times (\text{audience factor}) = \text{in-state gross receipts}$$

- (e) Receipts from the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening shall be included in the sales factor as provided in §39-22-303.5 C.R.S. and rules thereunder.
- (2) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

#### **Special Rule 6A. Trucking – Single Sales Factor Apportionment.**

The following special rule is established with respect to the apportionment of income for trucking companies.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to §39-22-303.5(5) and rules thereunder and apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.

- (a) **In General.** As used in this rule, the term “trucking company” means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. When a trucking company has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this rule. In such cases, the first step is to determine what portion of the trucking company’s income constitutes “business” income and what portion constitutes “nonbusiness” income under Rule 39-22-303.5–1. Nonbusiness income is directly allocable to specific states pursuant to the provisions of §39-22-303.5(5), C.R.S. and rules thereunder. Business income is apportioned among the states in which the business is conducted and pursuant to the apportionment factor set forth in this rule. The sum of (i) the items of nonbusiness income directly allocated to this state and (ii) the amount of business income attributable to this state constitutes the amount of the taxpayer’s entire net income which is subject to tax in this state.
- (b) **Business and Nonbusiness Income.** For definitions, rules, and examples for determining business and nonbusiness income, see Rule 39-22-303.5–1.
- (c) **Apportionment of Business Income**
  - (i) *In General.* For tax years beginning on or after January 1, 2009, the taxpayer shall apportion business income using only the sales factor.
  - (ii) *The Sales Factor*
    - (1) *In General.* The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year. All revenue derived from transactions and activities in the regular course of the taxpayer’s trade or business that produces business income shall be included in the denominator of the revenue factor.

The numerator of the sales factor is the total revenue of the taxpayer in this state during the income year. The total state revenue of the taxpayer, other than revenue from hauling freight, mail, and express, shall be attributable to this state in accordance with §39-22-303.5(4) and rules thereunder.
    - (2) *Numerator of the Sales Factor from Freight, Mail, and Express.* The total revenue of the taxpayer attributable to this state during the income year from hauling freight, mail, and express shall be:
      - (a) *Intrastate:* All receipts from any shipment which both originates and terminates within this state; and,
      - (b) *Interstate:* That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

- (d) **Records.** The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as those terms are used in this rule. Such records are subject to review by the Department of Revenue or its agents.
- (e) **Definitions.**
  - (i) "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property.
  - (ii) A "mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.
- (f) **De Minimis Nexus Standard.** Notwithstanding any provision contained herein, this rule shall not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:
  - (i) owns nor rents any real or personal property in this state, except mobile property; nor
  - (ii) makes any pick-ups or deliveries within this state; nor
  - (iii) travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the income tax year do not exceed three percent of the total mobile property miles traveled in all states by the trucking company during that period; nor
  - (iv) makes more than twelve trips into this state.
- (2) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

**Special Rule 7A. Financial Institutions – Single Sales Factor Apportionment.**

The following special rule is established to provide a uniform methodology for determining the allocation and apportionment of income for financial institutions.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to §39-22-303.5(5) C.R.S. and rules thereunder and apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.

(a) **Apportionment and Allocation.**

- (i) Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in this rule. All items of nonbusiness income (income which is not includable in the apportionable income tax base) shall be allocated pursuant to the provisions of §39-22-303.5(5), C.R.S. and rules thereunder. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in this rule.
- (ii) All business income (income that is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is the taxpayer's sales factor (as described in subsection (c) of this rule).
- (iii) The sales factor shall be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for the taxable year.

(b) **Definitions.** As used in this rule, unless the context otherwise requires:

- (i) "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year (or on such later date in the taxable year when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.
- (ii) "Borrower or credit card holder located in this state" means:
  - (1) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; or
  - (2) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state.
- (iii) "Commercial domicile" means:
  - (1) the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or
  - (2) if a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile shall be deemed for the purposes of this rule to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It shall be presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year.

- (iv) “*Credit card*” means credit, travel or entertainment card.
- (v) “*Credit card issuer’s reimbursement fee*” means the fee a taxpayer receives from a merchant’s bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card.
- (vi) “*Financial institution*” means:
  - (1) Any corporation or other business entity registered under state law as a bank holding company or registered under the Federal Bank Holding Company Act of 1956 (12 U.S.C. §1841, et seq., as amended), or registered as a savings and loan holding company under the Federal National Housing Act (12 U.S.C. 1701, as amended);
  - (2) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. sections 21 et seq.;
  - (3) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. section 1813(b)(1);
  - (4) Any bank, savings association, or thrift institution incorporated or organized under the laws of any state;
  - (5) Any corporation organized under the provisions of 12 U.S.C. sections 611 to 631;
  - (6) Any agency or branch or a foreign depository as defined in 12 U.S.C. section 3101;
  - (7) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired;
  - (8) Any corporation whose voting stock is more than fifty percent (50%) owned, directly or indirectly, by any person or business entity described in subsections (1) through (7) above other than an insurance company taxable under §10-3-209, C.R.S.;

- (9) A corporation or other business entity that derives more than fifty percent (50%) of its total gross income for financial accounting purposes from finance leases. For purposes of this subsection, a "finance lease" shall mean any lease transaction which is the functional equivalent of an extension of credit and that transfers substantially all of the benefits and risks incident to the ownership of property. The phrase shall include any "direct financing lease" or "leverage lease" that meets the criteria of Financial Accounting Standards Board Statement No. 13, "Accounting for Leases" or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles. (The reference to Financial Accounting Standards Board Statement No. 13 does not include later amendments or editions of this referenced material. Certified copies of this material are available for review in the Office of Tax Policy Analysis at the Colorado Department of Revenue at 1881 Pierce Street, Lakewood, CO 80214. Additionally, a copy of this material may be examined at any state publications depository library. For this classification to apply,
  - (a) the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent (50%) requirement; and
  - (b) gross income from incidental or occasional transactions shall be disregarded;
- (10) Any other person or business entity, other than an insurance company taxable under §10-3-209, C.R.S., that derives more than fifty percent (50%) of its gross income from activities that a person described in subsections (1) through (7) and (9) above is authorized to transact. For the purpose of this subsection, the computation of gross income shall not include income from non-recurring, extraordinary items.
- (11) The executive director is authorized to exclude any person from the application of subsection (10) upon such person proving, by clear and convincing evidence, that the income-producing activity of such person is not in substantial competition with those persons described in subsections (1) through (7) and (9) above.
- (vii) "*Loan*" means an extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.
- (viii) "*Loan secured by real property*" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.
- (ix) "*Loan servicing fees*" include all fees not in the nature of interest charged for any service or recovery of any cost in connection with a loan.

- (x) *“Merchant discount”* means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the card holder.
- (xi) *“Participation”* means an extension of credit in which an undivided ownership interest is held on a pro-rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.
- (xii) *“Person”* means an individual, estate, trust, partnership, corporation and any other business entity.
- (xiii) *“Principal base of operations”* with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled.
- (xiv) *“Real property owned”* and *“tangible personal property owned”* mean real and tangible personal property, respectively, (1) on which the taxpayer may claim depreciation for federal income tax purposes, or (2) property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or other property acquired in lieu of or pursuant to a foreclosure.
- (xv) *“Regular place of business”* means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.
- (xvi) *“Sales”* and *“Revenue”* mean gross sales or gross receipts, unless otherwise required by context.
- (xvii) *“State”* means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and territory or possession of the United States or any foreign country, except where the context otherwise requires.
- (xviii) *“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.
- (xix) *“Taxable”* means either:
  - (1) that a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax (including a bank shares tax), a single business tax, or an earned surplus tax, or any tax which is imposed upon or measured by net income; or
  - (2) that another state has jurisdiction to subject the taxpayer to any of such taxes regardless of whether, in fact, the state does or does not impose such taxes upon the taxpayer.

- (xx) *“Transportation property”* means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers or the like.

(c) **The Sales Factor.**

- (i) *General.* The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year. The method of calculating sales for purposes of the denominator is the same as the method used in determining sales for purposes of the numerator. The sales factor shall include only those sales described herein which constitute business income and are included in the computation of the apportionable income base for the taxable year.
- (ii) *Revenue from the lease of real property.* The numerator of the sales factor includes revenue from the lease or rental of real property owned by the taxpayer if the property is located within this state or revenue from the sublease of real property if the property is located within this state.
- (iii) *Revenue from the lease of tangible personal property.*
  - (1) Except as described in paragraph ii of this subsection, the numerator of the sales factor includes revenue from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.
  - (2) Revenue from the lease or rental of transportation property owned by the taxpayer is included in the numerator of the sales factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of revenue that is to be included in the numerator of this state's sales factor is determined by multiplying all the revenue from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.
- (iv) *Interest from loans secured by real property.*
  - (1) The numerator of the sales factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the sales described in this subsection are included in the numerator of the sales factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the sales described in this subsection shall be included in the numerator of the sales factor if the borrower is located in this state.



- (2) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.
- (v) *Interest from loans not secured by real property.* The numerator of the sales factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state.
- (vi) *Net gains from the sale of loans.* The numerator of the sales factor includes net gains from the sale of loans. Net gains from the sale of loans include income recorded under the coupon stripping rules of Section 1286 of the Internal Revenue Code.
  - (1) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the sales factor pursuant to subsection iv of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.
  - (2) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the sales factor pursuant to subsection v of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.
- (vii) *Revenue from credit card receivables.* The numerator of the sales factor includes interest and fees or penalties in the nature of interest from credit card receivables and revenue from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state.
- (viii) *Net gains from the sale of credit card receivables.* The numerator of the sales factor includes net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the sales factor pursuant to subsection vii of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.
- (ix) *Credit card issuer's reimbursement fees.* The numerator of the sales factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the sales factor pursuant to subsection vii of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.
- (x) *Revenue from merchant discount.* The numerator of the sales factor includes revenue from merchant discount if the commercial domicile of the merchant is in this state. Such revenue shall be computed net of any cardholder charge backs, but shall not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its card holders.

- (xi) *Loan servicing fees.*
  - (1) The numerator of the sales factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the sales factor pursuant to subsection iv of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.
  - (2) The numerator of the sales factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the sales factor pursuant to subsection v of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.
  - (3) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the sales factor shall include such fees if the borrower is located in this state.
- (xii) *Revenue from services.* The numerator of the sales factor includes revenue from services not otherwise apportioned under this section if the service is performed in this state. If the service is performed both within and without this state, the numerator of the sales factor includes revenue from services not otherwise apportioned under this section to the extent the income-producing activity is performed in this state based on cost of performance.
- (xiii) *Revenue from investment assets and activities and trading assets and activities.*
  - (1) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities shall be included in the sales factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in subparagraphs (a) and (b) of this paragraph, the sales factor shall include the amounts described in such subparagraphs.
    - (a) The sales factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.
    - (b) The sales factor shall include the amount by which interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest amounts paid in lieu of dividends, and losses from such assets and activities.

- (2) The numerator of the sales factor includes interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities described in paragraph (1) of this subsection that are attributable to this state.
  - (a) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.
  - (b) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (a) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.
  - (c) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraph (a) or (b) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (b) of paragraph (1) of this subsection by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.
  - (d) For purposes of this paragraph, average value shall be determined as follows:
    - (i) Value of property owned by the taxpayer.
      - (1) The value of tangible personal property owned by the taxpayer is the original cost or other basis of such property for Federal income tax purposes without regard to depreciation or amortization.

- (2) Loans are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a loan is charged-off in whole or in part for Federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established pursuant to regulatory or financial accounting guidelines which is treated as charged-off for Federal income tax purposes shall be treated as charged-off for purposes of this section.
  - (3) Credit card receivables are valued at this outstanding principal balance, without regard to any reserve for bad debts. If a credit card receivable is charged-off in whole or in part for Federal income tax purposes, the portion of the receivable charged-off is not outstanding.
- (ii) *Average value of tangible personal property owned by the taxpayer.* The average value of tangible personal property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable year and the value on the last day of the taxable year and dividing the sum by two. If averaging on this basis does not properly reflect average value, the executive director may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the executive director or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property within and without this state and on all subsequent returns unless the taxpayer receives prior permission from the executive director or the executive director requires a different method of determining average value.
- (3) In lieu of using the method set forth in paragraph (2) of this subsection xiii), the taxpayer may elect, or the executive director may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.
  - (a) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

- (b) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (a) of paragraph (1) of this subsection from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.
  - (c) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions (but excluding amounts described in subparagraphs (a) or (b) of this paragraph), attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (b) of paragraph (1) of this subsection by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.
- (4) If the taxpayer elects or is required by the executive director to use the method set forth in paragraph (3) of this subsection xiii), it shall use this method on all subsequent returns unless the taxpayer receives prior permission from the executive director to use, or the executive director requires a different method.
- (5) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established at the commercial domicile of the taxpayer.
- (xiv) *All other revenue.* The numerator of the sales factor includes all other revenue pursuant to the provisions of §39-22-303.5, C.R.S.
- (xv) *Attribution of certain sales to commercial domicile.* All sales which would be assigned under this section to a state in which the taxpayer is not taxable shall be included in the numerator of the sales factor, if the taxpayer's commercial domicile is in this state.

- (2) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

**Special Rule 8A. Telecommunications and Ancillary Service Providers – Single Sales Factor Apportionment.**

The following special rule is established with respect to the allocation and apportionment of income from the sale of telecommunications and ancillary services by a person that is taxable both in this state and in one or more other states.

- (1) **Single Sales Factor Apportionment.** For tax years beginning on or after January 1, 2009, a taxpayer must allocate its nonbusiness income pursuant to 39-22-303.5(5) and rules thereunder and apportion its business income using the sales factor set forth in this rule. A taxpayer cannot use this single sales factor apportionment methodology for tax years beginning before January 1, 2009.
- (a) **In General.** A telecommunications provider that has income from sources both within and without Colorado shall determine income in accordance with this rule. Income shall first be categorized as to "business" or "nonbusiness" income pursuant to Rule 39-22-303.5–1. Nonbusiness income will be directly allocated to specific states in accordance with §39-22-303.5(5) and rules thereunder. Business income will be apportioned to those states in which business is conducted based on the apportionment factor as set forth in this rules. The amount of net income subject to tax by Colorado will be the sum of (1) the amount of nonbusiness income allocated to Colorado plus (2) the amount of business income attributable to Colorado.
- (b) **Business and Nonbusiness Income.** For definitions and rules for determining business and nonbusiness income, see Rule 39-22-303.5–1.
- (c) **Definitions.**
- (i) "800 service" means a "telecommunications service" that allows a caller to dial a toll-free number without incurring a charge for the call. The service is typically marketed under the name "800," "855," "866," "877," and "888" toll-free calling, and any subsequent numbers designated by the Federal Communications Commission.
- (ii) "900 service" means an inbound toll "telecommunications service" purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service. "900 service" does not include collection services provided by the seller of the "telecommunications services" to the subscriber, or service or product sold by the subscriber to the subscriber's customer. The service is typically marketed under the name "900" service, and any subsequent numbers designated by the Federal Communications Commission.
- (iii) "Air-to-Ground Radiotelephone service" means a radio service, as that term is defined in Federal Communications Commission regulation 47 CFR 22.99 (December 30, 2005) (which is incorporated herein by reference, but such incorporation does not include later amendments to such regulation and copies of such regulation are available at the Office of the Executive Director, Colorado Department of Revenue), in which common carriers are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

- (iv) “Ancillary service” means services that are associated with or incidental to the provision of telecommunications services, including but not limited to the following subcategories: detailed telecommunications billing, directory assistance, vertical service, conference bridging service and voice mail services. The term “ancillary service” is defined as a broad range of services and is broader than the sum of the subcategories.
- (v) “Bundled transaction” means the retail sale of two or more products where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. For purposes of this special rule, a “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction. A transaction that otherwise meets the definition of a “bundled transaction” is not a “bundled transaction” if it is: (1) the “retail sale” of two products where the first product is essential to the use of the second product, and the first product is provided exclusively in connection with the second, and the true object of the transaction is the second; (2) the “retail sale” of more than one product, but the products are sourced the same under this special rule; or (3) the “retail sale” of more than one product, but the sum of the “purchase price” or “sales price” of products which are sourced differently under this special rule is de minimis.
- (vi) “Call-by-call Basis” means any method of charging for telecommunications services where the price is measured by individual calls.
- (vii) “Coin-operated telephone service” means a “telecommunications service” paid for by inserting money into a telephone accepting direct deposits of money to operate.
- (viii) “Communications Channel” means a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.
- (ix) “Conference bridging service” means an ancillary service that links two or more participants of an audio or video conference call and may include the provision of a telephone number. Conference bridging service does not include the telecommunications services used to reach the conference bridge.
- (x) “Customer” means the person or entity that contracts with the seller of telecommunications services. If the end user of telecommunications services is not the contracting party, the end user of the telecommunications service is the customer of the telecommunication service. “Customer” does not include a reseller of telecommunications service or for mobile telecommunications service of a serving carrier under an agreement to serve the customer outside the home service provider's licensed service area.
- (xi) “Customer Channel Termination Point” means the location where the customer either inputs or receives the communications.
- (xii) “Detailed telecommunications billing service” means an ancillary service of separately stating information pertaining to individual calls on a customer’s billing statement.
- (xiii) “Directory assistance” means an ancillary service of providing telephone number information, and/or address information.

- (xiv) "End user" means the person who utilizes the telecommunication service. In the case of an entity, "end user" means the individual who utilizes the service on behalf of the entity.
- (xv) "Fixed wireless service" means a telecommunications service that provides radio communication between fixed points.
- (xvi) "Home service provider" means the same as that term is defined in Section 124(5) of Public Law 106-252 (Mobile Telecommunications Sourcing Act).
- (xvii) "International" means a "telecommunications service" that originates or terminates in the United States and terminates or originates outside the United States, respectively. United States includes the District of Columbia or a U.S. territory or possession.
- (xviii) "Interstate" means a "telecommunications service" that originates in one United States state, or a United States territory or possession, and terminates in a different United States state or a United States territory or possession.
- (xix) "Intrastate" means a "telecommunications service" that originates in one United States state or a United States territory or possession, and terminates in the same United States state or a United States territory or possession.
- (xx) "Mobile telecommunications service" means the same as that term is defined in Section 124(7) of Public Law 106-252 (Mobile Telecommunications Sourcing Act).
- (xxi) "Mobile wireless service" means a telecommunications service that is transmitted, conveyed or routed regardless of the technology used, whereby the origination and/or termination points of the transmission, conveyance or routing are not fixed, including, by way of example only, telecommunications services that are provided by a commercial mobile radio service provider.
- (xxii) "Network access service" means the provision by a local exchange telecommunication service provider of the use of its local exchange network by an inter-exchange telecommunication service provider to originate or terminate the inter-exchange telecommunication service provider's traffic carried to or from a distant exchange.
- (xxiii) "Paging service" means a telecommunications service that provides transmission of coded radio signals for the purpose of activating specific pagers; such transmissions may include messages and/or sounds.
- (xxiv) "Pay telephone service" means a telecommunications service provided through any pay telephone.
- (xxv) "Place of primary use" means the street address representative of where the customer's use of the telecommunications service primarily occurs, which shall be the residential street address or the primary business street address of the customer. In the case of mobile telecommunications services, "place of primary use" shall be within the licensed service area of the home service provider.



- (xxvi) "Post-paid calling service" means the telecommunications service obtained by making a payment on a call-by-call basis either through the use of a credit card or payment mechanism such as a bank card, travel card, credit card, or debit card, or by charge made to a telephone number which is not associated with the origination or termination of the telecommunications service. A post-paid calling service includes a telecommunications service, except a prepaid wireless calling service, that would be a prepaid calling service except it is not exclusively a telecommunication service.
- (xxvii) "Prepaid calling service" means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.
- (xxviii) "Prepaid wireless calling service" means the sale of a telecommunications service that provides the right to utilize mobile wireless service as well as other non-telecommunications services including the download of digital products delivered electronically, content and ancillary services, which must be paid for in advance that is sold in predetermined units of dollars of which the number declines with use in a known amount.
- (xxix) "Private communications service" means a telecommunications service that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which such channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of such channel or channels.
- (xxx) "Product" means tangible personal property (including a digital good and standardized software) or service.
- (xxxi) "Service address" means:
  - (1) The location of the customer's telecommunications equipment, to which the customer's call is charged, and from which the call originates or terminates, regardless of where the call is billed or paid.
  - (2) If the location in subsection (1) is not known, service address means the origination point of the signal of the telecommunications services first identified by either the seller's telecommunications system or in information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.
  - (3) If the location in subsection (1) and subsection (2) are not known, the service address means the location of the customer's place of primary use.

(xxxii) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term "telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added.

(1) The term "telecommunication service" is defined as a broad range of services. The term includes, but is broader than the sum of, the following subcategories: 800 service, 900 service, fixed wireless service, mobile wireless service, paging service, prepaid calling service, prepaid wireless calling service, private communication service, value-added non-voice data service, coin-operated telephone service, international telecommunications service, interstate telecommunications service, intrastate telecommunications service, network access service and pay telephone service.

(2) The term "telecommunications service" does not include:

- (a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information;
- (b) Installation or maintenance of wiring or equipment on a customer's premises;
- (c) Tangible personal property;
- (d) Advertising, including but not limited to directory advertising.
- (e) Billing and collection services provided to third parties;
- (f) Internet access service;
- (g) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance and routing of such services by the programming service provider. Radio and television audio and video programming services shall include but not be limited to cable service as defined in 47 USC 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in Federal Communications Commission regulation 47 CFR 20.3 (December 2005). This federal regulation is incorporated herein by reference, but such incorporation does not include later amendments to or editions of such regulations. A certified copy of this regulation is available for review at the Office of Tax Policy Analysis, Colorado Department of Revenue, 1881 Pierce Street, Lakewood, CO 80214. Additionally, a copy of this material may be examined at any state publications depository library.

- (h) “Ancillary services”; or
- (i) Digital products “delivered electronically”, including but not limited to software, music, video, reading materials or ring tones.

(3) Examples of Included and Excluded Services.

Example 1. An entity provides dedicated network service to an entity which will resell that service as intrastate telecommunications service. Both entities are providing a telecommunications service.

Example 2. An entity provides an interstate telecommunications service to an internet service provider which will use that service in the provision of internet access service. The entity providing interstate telecommunications service is providing a telecommunications service. The entity providing internet access service is not providing a telecommunications service.

Example 3. An entity primarily engaged in the provision of cable television provides an interstate telecommunications service. The entity is engaged in the provision of telecommunications service.

- (xxxiii) “Value-added non-voice data service” means a service that otherwise meets the definition of “telecommunications services” in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance or routing.
- (xxxiv) “Vertical service” means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including conference bridging services.
- (xxxv) “Voice mail service” means an ancillary service that enables the customer to store, send or receive recorded messages. Voice mail service does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(d) **Apportionment - Sales Factor:** Sales of telecommunications and ancillary services in this state. The sales factor is a fraction, the numerator of which is the sales of the taxpayer in this state during the taxable year and the denominator of which is the sales of the taxpayer within and without this state during the taxable year. All revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer is included in the denominator of the sales factor. The sales factor shall include the following types of sales to the extent that such sales constitute business income.

- (i) Gross receipts from the sale of telecommunications services, other than those sourced in subsections iii) through vii), which are sold on a call-by-call basis are in this state when (1) the call originates and terminates in this state or (2) the call either originates or terminates and the service address is also located in this state.
- (ii) Gross receipts from the sale of telecommunications services, other than those sourced in subsections iii) through vii), which are sold on other than a call-by-call basis, are in this state when the customer’s place of primary use is in this state.

- (iii) Gross receipts from the sale of mobile telecommunications services, other than air-to-ground radiotelephone service and prepaid calling service, are in this state when the customer's place of primary use is in this state pursuant to the Mobile Telecommunications Sourcing Act.
- (iv) Gross receipts from the sale of pre-paid calling service, prepaid wireless calling service and post-paid calling service are in this state when the origination point of the telecommunications signal is first identified in this state by either (1) the seller's telecommunications system, or (2) information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.
- (v) Gross receipts from the sale of a private communication service are in this state:
  - (1) if such service is for a separate charge related to a customer channel termination point, when the customer channel termination point is located in this state;
  - (2) if under such service all customer termination points are located entirely within one state, when the customer channel termination points are located in this state;
  - (3) if such service is for segments of a channel between two customer channel termination points located in different states and such segments of channel are separately charged, when one of the customer channel termination points is in this state, provided however that only fifty percent of such gross receipts shall be sourced to this state; and
  - (4) if such service is for segments of a channel located in more than one state and such segments are not separately billed, when the customer channel termination points are in this state, provided however that only a percentage of such gross receipts, determined by dividing the number of customer channel termination points in the state by the total number of customer channel termination points, are in this state.
- (vi) A portion of the total gross receipts from sales of telecommunication services to other telecommunication service providers for resale is in this state in an amount determined by multiplying such total gross receipts by a fraction, the numerator of which is "total carrier's carrier service revenues" for this state and the denominator of which is the sum of "total carrier's carrier service revenues" for all states in which the taxpayer is doing business, as reported by the Federal Communications Commission in its report titled Telecommunications Revenues by State, Table 15.6, or successor reports which include such information, for the most recent year available as of the due date of the return, determined without regard to extensions.
- (vii) Gross receipts attributable to the sale of an ancillary service are in this state when the customer's place of primary use is in this state.
- (viii) Gross receipts attributable to the sale of a telecommunication or ancillary service sold as part of a bundled transaction are in this state when such gross receipts would be this state in accordance with the provisions of sections d)i) through vii).

- (1) The amount of gross receipts attributable to the sale of a telecommunication or ancillary service which is sold as part of a bundled transaction shall be equal to the price charged by the taxpayer for such service when sold separately, adjusted by an amount equal to the quotient of a) the difference between (1) the price charged by the taxpayer for the bundled transaction, and (2) the sum of the prices charged by the taxpayer for each of the included products when sold separately, and b) the number of products included in the bundled transaction;
  - (2) If the amount of such gross receipts is not determinable under subsection viii)(1), then it may be determined by reasonable and verifiable standards from taxpayer's books and records that are kept in the regular course of business for purposes including, but not limited to, non-tax purposes.
  - (ix) Gross receipts from the sale of telecommunication services which are not taxable in the State to which they would be apportioned pursuant to sections d)i) through vii), shall be excluded from the denominator of the sales factor.
- (2) **Alternative Methodologies.** If the apportionment and allocation provisions of this methodology do not fairly represent the extent of the taxpayer's activities in Colorado, the taxpayer may petition for, or the director may require, with respect to all or any part of the taxpayer's business activities, if reasonable, alternative methodologies as set forth in §39-22-303.5(7)(B), C.R.S.

#### **Special Rule 9A. Apportionment of Income for Electricity Producers.**

**Basis and Purpose.** The statutory bases for this rule are sections 39-21-112(1) and 39-22-303.6, C.R.S. The purpose of this rule is to prescribe the inclusion of certain receipts of electricity producers in the receipts factor. Notwithstanding section 39-22-303.6(1)(d), C.R.S., and pursuant to the authority granted in section 39-22-303.6(9)(a)(I), C.R.S., the Department has determined that the exclusion of certain hedging transactions from the receipts factor of electricity producers does not fairly represent the extent of an electricity producer's business activity in Colorado. Gains and losses on hedging transactions entered into to manage risks associated with the gross income electricity producers expect from their wholesale sales of electricity are best accounted for in the receipts factor as adjustments to the gross receipts from such sales. Therefore, the Department establishes the following rule prescribing the adjustment of receipts from such sales based on the income, gain, or loss from certain hedging transactions, as described in this rule.

- (1) **General Rule.** Except as provided in paragraph (3) of this rule, or as otherwise specifically allowed or required by the Executive Director pursuant to section 39-22-303.6(9), C.R.S., any income, gain, or loss from a transaction properly identified as a hedge under section 1221(b)(2)(A) or 475(c)(3) of the Internal Revenue Code shall be excluded from a taxpayer's receipts pursuant to section 39-22-303.6, C.R.S., for the purpose of apportionment.
- (2) **Definitions.** For purposes of this rule,
  - (a) "Hedging transaction" means any transaction that a taxpayer enters into in the normal course of the taxpayer's trade or business primarily to manage risk of price changes. The Department shall construe this term in a manner consistent with its use in section 1221(b)(2)(A)(i) of the Internal Revenue Code.
  - (b) "Electricity producer" means any taxpayer treated as a C corporation, S corporation, or partnership for Colorado income tax purposes, wherever resident or organized, primarily engaged in the generation and sale of electricity.

(3) **Special Rule for Including Hedging Transactions in Receipts.**

- (a) Except as provided in paragraph (3)(c) of this rule, any amount included in the receipts of an electricity producer pursuant to section 39-22-303.6(1)(d), C.R.S., from a wholesale sale of electricity shall be adjusted by the income, gain, or loss from a hedging transaction that hedged such wholesale sale of electricity if the identification requirements prescribed in this paragraph (3)(a) are satisfied. The identification requirements are met if the electricity producer's books and records clearly identify a hedging transaction as managing risk relating to a particular sale or sales of electricity, including anticipated sales, that must be included in the electricity producer's receipts pursuant to section 39-22-303.6(1)(d), C.R.S. The identification requirements are met only if identification is made at the time and in the manner consistent with 26 CFR 1.1221-2(f) and (g) (as in effect September 2021) and the taxpayer's books and records include the information necessary to determine the applicable adjustment prescribed by this paragraph (3).
- (b) The adjustment prescribed by this paragraph (3) shall be made with respect to the calculation of both the numerator and the denominator of the apportionment fraction pursuant to section 39-22-303.6(4), C.R.S. The numerator shall be adjusted to the extent that the receipts of the wholesale sale of electricity that was hedged were in Colorado as determined by section 39-22-303.6, C.R.S., and the rules thereunder.
- (c) In the case of a taxpayer filing a combined return pursuant to section 39-22-303, C.R.S., a consolidated return pursuant to section 39-22-305, C.R.S., or both, the adjustment to the receipts factor required by this paragraph (3) shall not apply unless both the income from the wholesale sale and the gain or loss from the hedging transaction that hedged that wholesale sale are included in the taxpayers' combined, consolidated, or combined and consolidated federal taxable income.

- (4) **Incorporation by Reference.** 26 CFR 1.1221-2(f) and (g) incorporated by reference in paragraph (3)(a) of this rule includes only the version that was in effect as of December 2021, and no later amendments to the incorporated federal regulation. The regulation incorporated by reference is available for public inspection during regular business hours at the Office of Tax Policy at the Department of Revenue, 1881 Pierce Street, Lakewood, CO 80214. A copy of this regulation is also available for a reasonable charge from the Department of Revenue, 1881 Pierce Street, Lakewood, CO 80214, 303-866-5627, and is available online at <https://www.govinfo.gov/content/pkg/CFR-2021-title26-vol13/pdf/CFR-2021-title26-vol13.pdf> beginning on page 309 of the linked volume of the Code of Federal Regulations.

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## **Editor's Notes**

### **History**

Regulations 39-22-103, 39-22-104, 39-22-305 eff. 04/30/2007.

Regulation 39-22-608 emer. rule expired eff. 04/26/2007.

Regulation 39-22-608 eff. 05/30/2007.

Regulation 39-22-522 eff. 11/30/2007.

Regulation 39-22-525 repealed eff. 11/30/2007.

Income Tax Special Regulations (Railroads, Airlines, Contractors, etc.) recodified under 1 CCR 201-3. Regulations. 39-22-121, 39-22-304(3)(i), 39-22-514, 39-22-522 eff. 01/01/2009.

Regulations 39-22-303.1 – 39-22-303.5.9; 39-22-303.10; 39-22-303.11(C); 39-22-305; 39-22-504(2) eff. 03/02/2009.

Regulations 39-22-652, 39-22-653, 39-22-656 eff. 03/30/2010.

Regulation 39-22-301.1 eff. 04/30/2010.

Regulations 39-22-303.5.7(A), 39-22-303.7.1, 39-22-303.7.2 eff. 06/30/2010.

Regulations 39-22-104(4)(M), 39-22-120, 39-22-121, 39-22-504(2), 39-22-514, 39-22-518, 39-22-522, 39-22-622 eff. 03/02/2011.

Regulations 39-22-303.11(A)(C)(D); 39-22-608 eff. 08/15/2011.

Regulation 39-22-522 eff. 09/01/2011.

Regulation 39-22-608(3) emer. rule eff. 10/18/2011; expired eff. 02/15/2012.

Regulations 39-22-120, 39-22-121 eff. 12/30/2011.

Regulation 39-22-104.(1.7) emer. rule eff. 11/27/2013; expired 03/27/2014.

Regulations 39-22-303.9, 39-22-303.11(D), 39-22-308 repealed eff. 03/03/2014.

Regulation 39-22-104.(1.7) eff. 05/30/2014.

Regulations 39-22-104(4), 39-22-119 eff. 08/14/2014. Regulations 39-22-103.2, 39-22-103.6, 39-22-104(4)(L), 39-22-104(4)(M)(II), 39-22-303.4 repealed eff. 08/14/2014.

Regulation 39-22-622 eff. 10/15/2014

Regulations 39-22-103(8)(A), 39-22-103(8)(B), 39-22-104(5) eff. 10/30/2014. Regulations 39-26-507.5(3) 39-26-507.5(9), 39-22-516(2.5) repealed eff. 10/30/2014.

Regulations 39-22-104(3)(G), 39-22-104(4)(M), 39-22-108, 39-22-507.6 eff. 12/16/2014. Regulation 39-22-302 repealed eff. 12/16/2014.

Regulations 39-22-121, 39-22-622 eff. 03/17/2015. Regulations 39-22-515, 39-22-516, 39-22-523, 39-22-524 repealed eff. 03/17/2015.

Regulations 39-22-507.6(1), 39-22-507.6(6) eff. 04/30/2015. Regulation 39-22-104.4 repealed eff. 04/30/2015.

Regulation 39-22-604.4. emer. rule eff. 06/03/2015; expired 10/01/2015.

Regulations 39-22-104(4)(F), 39-22-104(4)(N.5) eff. 06/30/2015.

Regulation 39-22-522 emer. rule eff. 07/15/2015; expired 11/12/2015.

Regulations 39-22-109, 39-22-110, 39-22-522, 39-22-2102 eff. 12/15/2015. Regulations 39-22-109(2), 39-22-116.2, 39-22-116.3, 39-22-2102(6) repealed eff. 12/15/2015.

Special Regulations 1A-8A recodified from 1 CCR 201-3 eff. 12/30/2015.

Regulations 39-22-604(4), 39-22-656 eff. 01/14/2016. Regulations 39-22-127, 39-22-128 repealed eff. 01/14/2016.

Regulation 39-22-126 repealed eff. 01/19/2016.

Regulation 39-22-125 repealed eff. 01/30/2016.

Regulation 39-22-604.6 emer. rule eff. 09/13/2016; expired 01/11/2017.

Regulations 39-22-622(3)(a), 39-22-622(4)(c) eff. 09/14/2016. Regulations 39-22-527, 39-22-528 repealed eff. 09/14/2016.

Regulation 39-22-604.6 emer. rule eff. 02/09/2017; expired 05/09/2017.

Regulation 39-22-109 eff. 05/15/2017.

Rule 39-22-538 eff. 07/15/2017.

Regulations 39-22-104(4)(F), 39-22-110, 39-22-303(11)(C), 39-22-305, 39-22-516 eff. 09/14/2017.

Regulation 39-22-604.5 repealed eff. 01/01/2018.

Regulation 39-22-526, Rules 39-22-104(3)(g), 39-22-304(2)(f), 39-22-604, 39-22-622 eff. 08-14-2018. Regulations 22-604.1, 39-22-604.3, 39-22-604(4) repealed eff. 08/14/2018.

Regulation 39-22-1001 eff. 11/14/2018.

Regulations 39-22-109, 39-22-119, 39-22-303.6-1 - 39-22-303.6-18, 39-22-303.7-1, 39-22-303.7-2, 39-22-303(10), 39-22-303(11)(c), 39-22-305 emer. rules eff. 12/18/2018.

Regulations 39-22-109, 39-22-119, 39-22-121, 39-22-303.5-1 - 39-22-303.5-10, 39-22-303.6-1 - 39-22-303.6-18, 39-22-303.7-1, 39-22-303.7-2, 39-22-303(10), 39-22-303(11)(c), 39-22-305, 39-22-522, 39-22-2102 eff. 04/14/2019. Regulations 39-22-303.1, 39-22-303.3, 39-22-303.5.7(A) repealed eff. 04/14/2019.

Rule 39-22-627 eff. 03/16/2020.

Rules 39-22-608-2, 39-22-609-1 emer. rules eff. 04/03/2020.

Rules 39-22-608-2, 39-22-609-1 emer. rules eff. 04/20/2020; expired 08/18/2020.

Rules 39-22-103(5.3), 39-22-303.6-1(1)(f) emer. rules eff. 06/02/2020.

Rules 39-22-103(5.3), 39-22-303.6-1(1)(f) eff. 09/30/2020.

Rules 39-22-303-1, 39-22-303(11)(f) eff. 03/02/2021. Rule 39-22-303(12)(c) repealed eff. 03/02/2021.

Rules 39-22-608-2, 39-22-609-1 emer. rules eff. 04/01/2021; expired 07/30/2021.

Rules 39-22-104(3)(g), 39-22-304(2)(f), 39-22-522 eff. 04/30/2021.

Rule 39-22-538 eff. 05/15/2021.

Rules 39-22-303.6-1(1)(i)(vi), 39-22-303.6-7(4)(d), Special Rule 9A eff. 01/30/2022.

Rules 39-22-119, 39-22-119.5, 39-22-123.5, 39-22-129, 39-22-627, 39-22-2003 eff. 03/17/2022. Rule 39-22-123 repealed eff. 03/17/2022.

Rule 39-22-120 repealed eff. 03/30/2022.

Rule 39-22-608-2 emer. rule eff. 01/12/2023.

Rule 39-22-608-2 emer. rule eff. 05/02/2023; expired 08/30/2023.

Rules 39-22-303(10), 39-22-304(3)(j), 39-22-504-1, 39-22-504-2 eff. 05/30/2023.

Rules 39-22-104(4)(n.5), 39-22-517, 39-22-538, 39-22-543, 39-22-604, 39-22-2003 eff. 08/30/2023. Rules 39-22-104(5), 39-22-301(2), 39-22-507.5(1), 39-22-507.5(2), 39-22-507.5(12), 39-22-507.6, 39-22-514, 39-22-516(2.7), 39-22-517, 39-22-517(3)(a), 39-22-517(3)(b) repealed eff. 08/30/2023.

Rule 39-22-2005 emer. rule eff. 12/08/2023.

Rules 39-22-104(3)(r), 39-22-104(4)(i), 39-22-108, 39-22-539 eff. 12/30/2023. Rule 39-22-103(5.3) repealed eff. 12/30/2023.

## **Annotations**

Regulation 39-22-622(3)(a) (adopted 02/09/2015) was not extended by House Bill 16-1257 and therefore expired 05/15/2016.