Amendment of Bureau of Revenue Services Rule 801

BASIS STATEMENT (5 M.R.S. § 8052(5)):

Maine Revenue Services ("MRS") is proposing to amend Rule 801 ("Apportionment") to clarify the sourcing of receipts from the performance of services, including providing examples to illustrate sourcing as it applies to various categories of services. For purposes of applying a variation to apportionment, the rule clarifies the definition of compensation with respect to the use of the payroll factor by specifying that 85% of payments made to an employee-leasing company for leased employees and 100% of payments made to a temporary service company for temporary employees are included as compensation. Other formatting and technical changes are made throughout to enhance clarity.

CHANGES MADE IN RESPONSE TO COMMENTS

MRS made one change to the proposed rule in response to comments received. MRS deleted the following language that had been proposed to be included in subsection .06(F)(1): "that is, where the services are acquired or experienced." As more fully explained herein, MRS determined that the final rule is not substantially different from the proposed rule and public comments on the change are not required.

DISCUSSION OF COMMENTS RECEIVED AND RATIONALE FOR ADOPTING OR FAILING TO ADOPT SUGGESTED CHANGES (5 M.R.S. § 8052(5)):

PUBLIC COMMENT PERIOD

The proposed amended rule was posted for public comment on December 24, 2024, and a public hearing was held on February 19, 2025. The period for submitting written comments ended March 3, 2025.

LIST OF COMMENTERS

- Maine Society of CPAs ("MECPA") by Trish Brigham, Executive Director, written comments, and Mike Santo (WIPFLI), public hearing comments
- Investment Company Institute ("ICI") – Combined written comments submitted by Mike Horn, Deputy General Counsel – Tax | ICI, and Katie Sunderland, Associate General Counsel – Tax Law | ICI; Similar comments presented by Mike Horn at the public hearing
- Maine State Bar Association, Tax Law Section ("MSBA") by Olga Goldberg; written & public hearing comments

- Council on State Taxation ("COST") by Leonore Heavy, Senior Tax Counsel; written & public hearing comments
- Law Firm of Pierce Atwood by Jonathan Block; public hearing testimony only
- Maine State Chamber of Commerce ("MESCC") by Linda Caprara, Vice President of Advocacy; written & public hearing comments
- Securities Industry and Financial Markets Association ("SIFMA") by Stephanie I. Klarer, Assistant V.P., State Government Affairs, and Lindsey Weber Keljo, Head, Asset Management Group; written comments only
- Motion Picture Association ("MPA"); written comments by Josh Levin, Vice President, Northeast Region, MPA; Public hearing testimony by Brian O'Leary, Outside Counsel for MPA, and Attorney Charlie Soltan of Augusta, ME

SUMMARY OF COMMENTS AND MRS RESPONSES

The following summarizes by topic the comments received during the public comment period, including the public hearing, and provides MRS responses, including the rationale for adopting or not adopting suggested changes.

Topic #1: Several commenters questioned MRS's authority under 36 M.R.S. § 112 to enact the amendments without using the Major Substantive Rulemaking Process under 5 M.R.S. § 8072.

MECPA Comments:

> Adding the words "acquired or experienced" is not a routine technical change, as it will often result in apportionment to a different location than where the service was "received." Accordingly, any such change should go through the legislative process, as it is, in effect, an amendment to the apportionment statute. At a minimum, the rule should be classified as a major substantive rule and be subjected to legislative review.
>
> We also believe that effectively changing the statute in this manner usurps the power of the Legislature to formulate tax policy.

MSBA Comments:

> It is not clear that MRS has legislative authority to adopt the Proposed Amendments. Any changes to apportionment methodology should be approved by the Legislature, either through new legislation or through the legislative review and approval process required for major substantive rules by 5 M.R.S. § 8072.

MSCC Comments:

> In our opinion, this change is not a routine technical change but rather a major substantive change of the law. As a result, we feel this major substantive rulemaking change that should be made through legislation before the Maine Legislature.

COST Comments:

> The proposed amendment adds additional language not found in the apportionment statute that expands the sourcing rule beyond the statutory provisions to the location

"where the services are acquired or experienced" and further provides that "[s]ervices may be received by a person other than the person who contracted for or paid for the services." The decision to expand the sourcing rule with this additional language is a significant substantive change for affected taxpayers that exceeds Maine Revenue Services' administrative authority and should instead be addressed by the Maine Legislature.

ICI Comments:

MRS does not have the authority to change the statutory apportionment methodology enacted by the legislature in Subsection 16-A(A) of § 5211 or to impose new, different requirements on taxpayers. The Proposed Apportionment Rule would implement significant tax policy changes that are more suitable for legislative considerations than for agency rulemaking. Even if the amendments were suitable for agency rulemaking, they are "major substantive rules" that require legislative review.

Pierce Atwood Comments:

The proposed rule should be withdrawn. The term acquired or experienced is not the same, does not have the same meaning, as received. This is a substantive change. It's going to create endless litigation over the meaning of those terms. A change of this nature should go through the legislative process including a study of the fiscal impact of this bill, how much of a tax increase is this, or how much additional burden are taxpayers being asked to shoulder with this, or will this cause the state to lose revenue. It does not appear that analysis has been done here, and it would be done if it went through the legislative process.

MRS Response to Topic #1 Comments:

MRS' rulemaking authority falls under 36 M.R.S. § 112[1]. The Maine Administrative Procedure Act[2] provides, in part, that it is the Legislature and not MRS (or any other agency) that decides whether a rule is a major substantive rule.

Rules that pre-date January 1,1996, are subject "only to the procedural requirements that apply to all rules [under 5 M.R.S. § 8052] and not to the additional procedural requirements that apply to major substantive rules [under 5 M.R.S. 8071(3)(B)]." *Calnan v. Hurley*, 2024 ME 30, 22; 314 A.3d 267, 277 (text in brackets added for clarity). MRS' rule-making authority pre-dates January 1, 1996, and, therefore, it is

[1] 36 M.R.S. § 112(1) states in part: The assessor shall administer and enforce the tax laws enacted under this Title and under Title 29-A, and may adopt rules and require such information to be reported as necessary.

[2] 5 M.R.S. § 8071(1). 1. Legislative action. All new rules authorized to be adopted by delegation of legislative authority that is enacted after January 1, 1996, including new rules authorized by amendment of provisions of laws in effect on that date, must be assigned by the Legislature to one of 2 categories [e.g., either major substantive or routine technical] and subject to the appropriate level of rule-making procedures as provided in this subchapter. The Legislature shall assign the category and level of review to all rules at the time it enacts the authorizing legislation. The Legislature may assign different categories and levels of review to different types of rules authorized by the same legislation. (Text in brackets added for clarity).

subject to the general "any rule" requirement under 5 M.R.S. § 8052. Rules are "routine technical" unless otherwise designated as "major substantive" by the Legislature.

Furthermore, the Office of Attorney General ("OAG") has performed a legal pre-review of the draft rule as required by Governor's Executive Order 4-A, regarding Administrative Rulemaking, No. FY 19/20, dated March 29, 2019.[3] As of the effective date of this final rule, the OAG has also approved the final rule "as to form and legality" as required by 5 M.R.S. § 8052(7)(B).[4]

For the above reasons, MRS has declined the request to withdraw the proposed revisions to the Rule.

Topic #2: Several commenters, referring to the application date, expressed concerns that the Proposed Amendments would apply retroactively to 2010.

MECPA Comments:

> As currently drafted, the proposed apportionment amendments are retroactive to 2010. That is egregiously unfair to taxpayers who have relied on the existing rules and interpretations of the statute, and who were obviously unaware of the MRS's proposed "clarifications" at the time they filed their returns. Does MRS expect taxpayers to file amended returns going back to 2010 to reflect where services are "acquired or experienced"? That would obviously be unworkable for our members and their clients. Applying rule changes retroactively blindsides taxpayers, discourages voluntary compliance, and represents extremely poor tax policy. We strongly urge MRS to withdraw these proposed apportionment changes. However, at the very least, if the Rule is promulgated, the Rule should be amended to make clear that any apportionment changes will be applied prospectively only.

MSCC Comments:

> The rule would also apply these changes retroactively back to 2010. The nature of this retroactive change dating back years is unheard of and fundamentally unfair to taxpayers.

MSBA Comments:

> If adopted by MRS, the Proposed Amendments should apply only on a prospective basis, rather than retroactively to January 1, 2010, as currently proposed.

COST Comments (footnote omitted)**:**

---

[3] Excerpt from Governor's Executive Order 4-A, regarding Administrative Rulemaking, agencies and boards shall, "prior to issuing notice of rulemaking and submitting a proposed rule to the Secretary of State for publication pursuant to *5 M.R.S. §8052 AND §8053*, provide the Office of the Attorney General (OAG) with the opportunity to perform a legal pre-review of the proposed rule."

[4] 5 M.R.S. § 8052(7)(B) requires for final agency rules to be "approved by the Attorney General as to form and legality, as required by section 8056, within 150 days of the final date by which those comments may be submitted."

The COST Board of Directors has adopted the following policy position on retroactive tax legislation:

> Legislation imposing new or increased tax liabilities attributable to prior periods is fundamentally unfair and, in some cases, unconstitutional and thus must be avoided. Under no circumstance should legislation imposing new or increased tax liabilities be applied to any periods beginning prior to the date the legislation was enacted. Retroactive legislation or administrative pronouncements that do not impose new or increased tax liabilities may be appropriate.

The reasoning of the policy position also applies to administrative policy changes. COST therefore respectfully requests that if Maine Revenue Services (despite the administrative overreach) proceeds with changes to the apportionment rule that negatively impact taxpayers that these changes should apply prospectively.

ICI Comments (footnote omitted):

Should the Maine Revenue Service nonetheless seek to finally adopt the proposed amendments, the Proposed Apportionment Rule should not apply retroactively. Any amendments should apply prospectively or to tax years ending after the date the regulations are final.

Laws and regulations should provide both taxpayers and tax administrators with certainty, clarity, and closure. Statutes of limitation on tax assessments and refunds provide certainty and closure for prior tax years (3 years or 6 years). Similarly, changes to regulations should provide certainty and closure by applying prospectively. There are sound practical reasons not to apply retroactive changes, particularly as far back as the 2010 date stated in the proposed rule. Foremost, businesses have record retention policies, which prescribe how long business records are maintained before being purged. The Proposed Apportionment Rule would apply as far back as 2010, over 14 years ago. Few businesses maintain records this long, other than certain records subject to specific regulatory retention requirements. And while many businesses retain income tax returns for 3-7 years (mirroring most statutes of limitations), and some retain them permanently, most do not keep supporting schedules, financial records and other information that may be required to reconcile the appointment (sic) methodology reflected on the business's income tax return. In addition, we note that the retroactive application of tax laws as suggested in the Proposed Apportionment Rule potentially raises due process concerns.

At a minimum, the Proposed Apportionment Rule should apply only prospectively. Permissive reliance on either prior regulations or the amended regulations would protect businesses that acted in good faith reliance on the prior rules when filing their income tax returns and apportioning income to Maine, including ICI members, many of whom have been filing income tax returns since 2010 or earlier.

SIFMA Comments (footnote omitted)**:**

We respectfully oppose the retroactive application of any rule change and submit that any change should be applied only prospectively.

The proposed changes to Rule 801 include a statement that they would apply retroactively to calendar year 2010, potentially applying to tax periods starting on or after January 1, 2010. As discussed above, the proposed changes to Rule 801 are substantive policy changes that would impact taxpayer tax determinations; they are not a technical clarification of existing law. A lengthy period of retroactivity with a substantive change and shifting tax policy approach undermines taxpayer reliance on the certainty of settled law. As reflected in the state's tax statute of limitations of 3 to 6 years for assessments and refunds, taxpayers should be afforded the certainty of settled law in positions taken based on the law and regulations in prior years.

Pierce Atwood Comments:

The rule says that it's retroactive to 2010. That's very unfair, if that's the intent. If it's not the intent, it should be clarified that this rule change should be prospectively only.

MRS Response to Topic #2 Comments:

MRS did not intend for the proposed provisions to apply retroactively, as retroactive application is not necessary for MRS enforcement of any of the proposed language in prior periods. The relevant provisions in the Proposed Rule reflect MRS' historical interpretation of the statute (*see* MRS's Response to Topic #4, below, for more detail, which notes that "MRS' interpretation of this statute on this point is shown through public records that date back to tax year 2011") and, therefore, does not require an update to the Application Date in Section 12 of the Proposed Rule. However, this does not cause the Proposed Rule provisions to be retroactive, once promulgated. Instead, for periods prior to the effective date of the adopted rule provisions, MRS will continue to reference its same, historic interpretation of the statute and, if necessary, to prior versions of the Rule that were in force during previous tax periods.

For these reasons, MRS has made no changes to the final rule related to these comments.

Topic #3: Several comments were received concerning the proposed amendment to subsection .06.F(1) which added the clause "that is, where the services are acquired or experienced. . . ." and requested it be deleted from the final rule.

MSCC Comments:

Under current law, with respect to multi-state corporations, income tax is apportioned based on Maine's single sales factor formula. With respect to income derived from services, it is based on where the service is received. The current method relies on where the service is received by the customer. This rule proposes a major change to require income from services be based on where the service is "acquired or experienced".

The determination as to when or where a service is "acquired or experienced" is not clear at all and would be very complex to figure out. What is "acquired or experienced" for

one person may have very different meaning for others. It is purely subjective. Complying with this rule would be next to impossible as there would have to be some sort of system in place to track the so-called experience. Rules need to be clear and concise so that taxpayers can understand exactly what they are required to do to comply with any rules.

MECPA Comments:

Apportioning services to the place where they are "acquired or experienced" will often not be the same place as where the services are "received." It appears to us that MRS is attempting to legislate a different apportionment formula than the one enacted by the Legislature, which is based on the location that the services are "received." Even the terms "acquired or experienced" are ambiguous and confusing. These are contradictory terms.

The proposed amendment adds additional language not found in the apportionment statute that expands the sourcing rule beyond the statutory provisions to the location "where the services are acquired or experienced" and further provides that "[s]ervices may be received by a person other than the person who contracted for or paid for the services." The decision to expand the sourcing rule with this additional language is a significant substantive change for affected taxpayers that exceeds Maine Revenue Services' administrative authority and should instead be addressed by the Maine Legislature.

COST Comments:

COST is not aware of any legislative change that supports the proposed amendments to Rule 801. The current rule reflects the text of the apportionment statute, 36 M.R.S. § 5211: "…receipts from the performance of services must be attributed to the state where the services are received." The proposed amendment adds additional language not found in the apportionment statute that expands the sourcing rule beyond the statutory provisions to the location "where the services are acquired or experienced" and further provides that "[s]ervices may be received by a person other than the person who contracted for or paid for the services." The decision to expand the sourcing rule with this additional language is a significant substantive change for affected taxpayers that exceeds Maine Revenue Services' administrative authority and should instead be addressed by the Maine Legislature.

ICI Comments:

The proposed amendments reflect MRS' exercise of a significant degree of discretionary interpretation in drafting. The original apportionment rule reflects the text of the apportionment statute, 36 M.R.S. § 5211: "…receipts from the performance of services must be attributed to the state where the services are received." The Proposed Apportionment Rule adds substantive new language to the apportionment statute, expanding the sourcing rule from not only "the state where the services are received," but also the state "where the services are acquired or experienced." In this way, the proposed amendments attempt to change the statutory standard by adopting a significant, new

interpretation as to the meaning of the word "received"—a meaning that is outside the ordinary meaning of this term and represents a significant, unauthorized interpretive leap.

The proposed amendments then add new language, including that "[s]ervices may be received by a person other than the person who contracted for or paid for the services." This language is also not found in the apportionment statute. Rather, it reflects MRS' novel interpretation of the statute. . . .

The Proposed Apportionment Rule would create a significant, untenable new compliance burden for asset managers. First, the proposed amendments would make Maine apportionment rules an outlier among the other states of the United States. It would create a sourcing rule in Maine that exists in no other state. Like many states' apportionment statutes, Maine's apportionment statute provides that receipts from services are sourced to the state where those services are "received."[5] However, as discussed above, the proposed amendment expands the word "received" to encompass the location where services are "experienced." No other state requires service receipts to be sourced based on "experience." Rather than promoting uniformity among states to facilitate compliance, Maine would instead be an outlier, substantially increasing ICI members' compliance burden.

MSBA Comments:

The Proposed Amendments reflect MRS's new, substantive interpretation of Section 5211(16-A)(A). For example, the proposal would expand the sourcing regulation to source service receipts to the state where the services are "received, … acquired or experienced."

Tax regulations should increase clarity and certainty for taxpayers seeking to comply with Maine tax laws, but expanding the term "received" to also mean "experienced" could instead make corporate income tax compliance more burdensome for some service providers. No other U.S. state with a corporate income tax sources service receipts to the location where services are experienced. Adoption of sourcing based on experience would make Maine an outlier, increasingly (sic) corporate tax compliance burden only for service providers operating or doing business in Maine.

SIFMA Comments (footnotes omitted):

States generally adopt two market-based approaches to sourcing receipts from services—"place of delivery" sourcing and "benefit received" sourcing, which in many situations can be different locations. In adopting their sourcing statutes, states typically define which of these approaches they use to avoid confusion. For instance, Massachusetts adopts a place of delivery sourcing regime, while other jurisdictions expressly adopt benefit received regimes. With each state's approach, the respective legislature and tax agency frequently adopt detailed provisions addressing nuances of applying the chosen policy approach to services sourcing.

[5] 36 M.R.S. § 5211(16-A)(A).

Maine's proposed rule amendment would be inconsistent with the statute because it would implement both approaches to sourcing services, whereas the statute requires place of delivery sourcing. The statute requires that "receipts from the performance of services must be attributed to the state where the services are received," and when that location is not easily determined additional provisions look to the place of a customer's trade or business (i.e., place of delivery sourcing).

As currently drafted, the proposed rule uses the terms "acquired" and "experienced" to define where a service is received. Since those terms are not synonymous, they appear to contradict one another in the proposed rule as well as serve to contradict the statute. For example, the use of the term "acquired" indicates that a taxpayer should look to the location where a service is delivered to a customer—the place of delivery method—while use of the term "experienced" appears to look to where a customer benefits from a purchased service—the benefit received method. By requiring sourcing at the location to where the service is "acquired or experienced," the proposed regulation could look to both the location where the benefit of a service is received as well as the location where a service is delivered. This opens the possibility of applying different sourcing rules for similarly situated taxpayers and renders the proposed rule internally inconsistent...

SIFMA and SIFMA AMG are concerned that the proposed rule would create uncertainty on the correct approach to comply with Maine's tax laws, and, because the rule appears to apply both the delivery and benefits received methods simultaneously, may allow the Department to apply either approach dependent upon which method is most favorable to the state.

MRS Response to Topic #3 Comments:

Generally, receipts from the performance of services must be attributed to the state where the services are received. 36 M.R.S. § 5211(16-A)(A).

By adding the clause to the end of the first sentence of Rule 801 subsection .06.F(1) ("that is, where the services are acquired or experienced"), MRS did not intend to add to or limit the statutory meaning of the term "received." Instead, MRS intended to demonstrate that "plain meaning" definitions may be utilized when appropriate to help clarify the term "received." *See Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68, at P22 ("When interpreting a statute, we look to the 'plain meaning of the statutory language to give effect to the Legislature's intent, and only if the statute is ambiguous will we look beyond that language to examine other indicia of legislative intent, such as legislative history.'"); *see also Apex Custom Lease Corp. v. State Tax Assessor*, 677 A.2d 530, 533 (Me. 1996) ("In construing a statutory term that is undefined in the statute itself, our primary obligation is to determine its *plain meaning*. We often rely on the definitions provided in *dictionaries* in making this determination.")(citations omitted)(emphasis added); and Merriam-Webster.com Dictionary, Merriam-Webster (defining "receive" to mean to "acquire, experience." https://www.merriam-webster.com/dictionary/receive (def. 5(c)).

"Plain meaning" interpretations of "received" have been used in the application of the statute by both MRS and by the Maine Board of Tax Appeals. For example, see the following publicly available redacted Maine Board of tax Appeals Decisions:

a. Maine Board of Tax Appeals Decision, Docket No. BTA-2018-2 at 4, August 9, 2019, regarding pharmaceutical benefit management services. "Although the term 'receive' is not defined in Maine's income tax apportionment statutes, the Maine courts 'often rely on the definitions provided in dictionaries' to determine the plain meaning of terms…. The dictionary defines 'receive' as 'to take possession or delivery of [or] to undergo the impact of.'".

b. Maine Board of Tax Appeals Decision, Docket No. BTA-2020-11 at 3, Dec. 21, 2021, regarding social media advertisement services. "The dictionary defines the verb 'receive' as to 'acquire' or to 'experience.' 'Receive.' Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/receive (def. 5(c)) (last visited May 12, 2021). "Accordingly, we find that where advertisement services have been provided, they are received at the location of the Consumers to whom the advertisements were directed."

c. Maine Board of Tax Appeals Decision, Docket No. BTA-2021-1, February 8, 2022, regarding pharmaceutical benefit management services. "Because the term 'receive' is not defined in relevant statutes, we turn to the dictionary definition to determine the plain meaning of the word. *See, e.g., Apex Custom Lease Corp. v. State Tax Assessor*, 677 A.2d 530, 533 (Me. 1996). The dictionary defines the verb 'receive' as to 'acquire' or to 'experience.' 'Receive.' Merriam-Webster.com Dictionary, MerriamWebster, https://www.merriam-webster.com/dictionary/receive (def. 5(c)) (last visited May 12, 2021)."

Despite MRS's intent to provide clarity, the comments received indicate that the additional proposed language was a source of confusion. Therefore, MRS has removed the proposed language because the proposed language is not necessary to arrive at the plain meaning of the term *received*. Going forward, MRS will continue to interpret the word "received" in 36 M.R.S. § 5211(16-A)(A) according to its *plain meaning* from the dictionary, as applied by the Maine Law Court and described above. For these reasons, the clause at the end of the first sentence of Rule 801 subsection .06.F(1) is amended as follows:

> "Generally, receipts from the performance of services must be sourced to the state where the services are received ~~that is, where the services are acquired or experienced~~."

Topic #4: Commenters on the proposed addition of a sentence in the first paragraph of subsection .06.F(1) ask that it be withdrawn: "Services may be received by a person other than the person who contracted for or paid for the services."

MSBA Comments (footnote omitted)**:**

> [W]e note that many states have adopted a form of look-through apportionment for service revenue, and therefore regulatory language to implement look-through

apportionment is already available to MRS. If MRS is seeking to adopt look-through apportionment, as it appears to do in the proposed examples for advertising and cable TV services, MRS should explicitly say so in its rulemaking and MRS should seek legislative authority to adopt this methodology.

COST Comments:

COST is not aware of any legislative change that supports the proposed amendments to Rule 801. The current rule reflects the text of the apportionment statute, 36 M.R.S. § 5211: "…receipts from the performance of services must be attributed to the state where the services are received." The proposed amendment adds additional language not found in the apportionment statute that expands the sourcing rule beyond the statutory provisions to the location "where the services are acquired or experienced" and further provides that "[s]ervices may be received by a person other than the person who contracted for or paid for the services." The decision to expand the sourcing rule with this additional language is a significant substantive change for affected taxpayers that exceeds Maine Revenue Services' administrative authority and should instead be addressed by the Maine Legislature.

ICI Comments:

The proposed amendments reflect MRS' exercise of a significant degree of discretionary interpretation in drafting. The original apportionment rule reflects the text of the apportionment statute, 36 M.R.S. § 5211: "…receipts from the performance of services must be attributed to the state where the services are received." The Proposed Apportionment Rule adds substantive new language to the apportionment statute, expanding the sourcing rule from not only "the state where the services are received," but also the state "where the services are acquired or experienced." . . . .

The proposed amendments then add new language, including that "[s]ervices may be received by a person other than the person who contracted for or paid for the services." This language is also not found in the apportionment statute. Rather, it reflects MRS' novel interpretation of the statute.

MRS Response to Topic #4 Comments:

The addition of the sentence, "Services may be received by a person other than the person who contracted for or paid for the services," does not represent a new interpretation of the law by MRS. Instead, the proposed sentence describes what is required by the statute, which states that "receipts from the performance of services must be attributed to the state where the services are received." 36 MRS 5211(16-A)(A). The statute does not limit the recipient of the services to the Taxpayer's customer who paid for the service, and this concept was upheld in *Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68, *Id*. 2023 ME 68 at P35. In *Express Scripts*, the Maine Law Court rejected, via summary judgment, the taxpayer's argument that services must be sourced to the location of the customer that paid for the service. *Id*. Instead, the Maine Law Court found that the record established that claims-processing services performed by the Taxpayer were received by individual members at retail pharmacies in Maine,

and the receipts at issue, which were paid by Taxpayer's customers, were derived from the performance of these claims processing services. *Id*.

MRS' interpretation of this statute on this point is shown through public records that date back to tax year 2011. In particular, the Law Court's decision in *Express Scripts* applies to tax years 2011, 2012 and 2013. In addition, public decisions issued by the Maine Board of Tax Appeals before *Express Scripts* provide additional examples:

a. Maine Board of Tax Appeals Decision, Docket No. BTA-2018-2 at 4, August 9, 2019, regarding pharmaceutical benefit management services,applying plain meaning of the statute. "[W]e find that for Maine income tax apportionment purposes, the services provided by the Company during the period at issue were received at the location of the pharmacy where the Insureds filled each prescription. We note that the applicable statute does not require that a party receiving the benefit of the service be the same party that contracted or paid for its performance, and we will not add such a requirement to the statutory language."

b. Maine Board of Tax Appeals Decision, Docket No. BTA-2020-11 at 3-4, Dec. 21, 2021, regarding social media advertisement services. "[W]e find that where advertisement services have been provided, they are received at the location of the Consumers to whom the advertisements were directed. This is especially clear where, as here, the advertisements are selectively transmitted to Consumers based on their geographic locations. For purposes of Maine income tax apportionment, the services provided by the Company during the period at issue were received in the state where the Consumers were located, based on the plain language of the statute."

c. Maine Board of Tax Appeals Decision, Docket No. BTA-2021-1 at 3-4, February 8, 2022, regarding pharmaceutical benefit management services) "[W]e note that section 5211 does not require that the party that contracted or paid for the services also be the party that received the services, and we will not add such a requirement to the statutory language."

In response to the comments about "look-through" apportionment, this term does not appear in either Maine's apportionment statute or MRS Rule 801. As noted above, services in Maine may be received by a person other than the person who contracted for or paid for the services. *See, e.g., Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68 (rejecting, by summary judgment, the Taxpayer's argument services may only be received to the location where the contracting party contracted for and paid for such services). This is *not* a new interpretation of the law by MRS. Instead, this clarification describes what is required by the statute and supported by relevant decisions by the Maine Law Court and the Maine Board of Tax Appeals.

For the above reasons, MRS has made no changes to the final rule related to these comments.

Topic #5: Two commenters objected to the inclusion of the following amendment to the first paragraph of subsection .06(F)(1): "The determination of where services are received is based on all available facts and is not limited to the books and records of the taxpayer or any person related to the taxpayer."

MECPA Comments:

> This sentence appears to require that taxpayers maintain third-party records or information to which taxpayers may not have access when preparing their Maine

corporate income tax returns. Imposing a requirement that goes beyond the taxpayer's own records and requires obtaining the records of third parties, which may be unobtainable, to prepare tax returns would create inordinate complexity and is unworkable. Sound tax policy dictates that tax returns should be able to be produced based on information that is maintained by the taxpayer in the ordinary course of business. Preparing a tax return should not require the taxpayer to conduct investigations of its customers or other third parties.

MSBA Comments:

The Proposed Amendments include the following sentence:

> The determination of where services are received is based on all available facts and is not limited to the books and records of the taxpayer or any person related to the taxpayer.

The intent of this sentence appears to be to put taxpayers on notice that MRS may look beyond the taxpayer and its affiliates, to third parties, to determine where services are received. Therefore, without expressly stating so, this sentence appears to create a new obligation for taxpayers to obtain records or information from third parties.[5]

> (Footnote 5: See. 36 M.R.S. § 135. MRS's Audit FAQ (stating that MRS may examine "a taxpayer's books and records in order to verify the correct tax liability"). The FAQs do not provide notice that MRS may examine an unaffiliated third-party's books and records to verify the taxpayer's tax liability.)

However, taxpayers generally do not have access to and cannot obtain records of third parties in the regular course of business and may not have this information when preparing their Maine corporate income tax returns. The Proposed Amendments do not clearly address how MRS intends for taxpayers to comply with the new documentation policy or how, and under what conditions, it will be enforced.

Recommendation: the Tax Section recommends that MRS delete this sentence. At a minimum, however, the phrase "available facts" should be revised to "books and records maintained by the taxpayer in the ordinary course of business."

MRS Response to Topic #5 Comments:

The Proposed Rule addresses which facts are used to determine where to source services, and that these are not limited to those facts contained in the books and records of the taxpayer. This proposed language was included in the Proposed Rule to emphasize that, under existing law, sourcing determinations for services are not always based solely on the taxpayer's records, or a limited subset of the taxpayer's records (of which both are sometimes incorrectly asserted by taxpayers).

Generally, under existing law, MRS may use any relevant and available information, including publicly available information or information from third parties, to determine a taxpayer's tax liability. Specifically, as it pertains to apportionment, publicly available third-party information, such as

relevant population data or data on businesses or industries related to the services provided, may be used for this purpose. At times, requests to a third party to provide testimony or the production of books or other documents in the custody or control of that person, such as where customers or designees receive services, may be necessary to complete the determination of tax liability. *See,* 36 M.R.S. § 112(3). *See also* MRS Audit FAQ 5. What information will you review? ("The information reviewed depends on a variety of factors including the type of audit being conducted. Records requested from the taxpayer (in either paper or electronic form) could include: . . . "In addition to information requested from the taxpayer, we may also review information obtained from the IRS agencies and Departments of the State of Maine *and other sources*.") (Emphasis added.)

Taxpayers have the obligation to "maintain all records that are necessary to determine the correct tax liability." MRS Rule 103.02.1. The calculation of this liability is not limited to what a taxpayer chooses to gather or retain in its records. Information available from relevant sources, such as information from customers, third parties (such as those that receive services from the taxpayer), or public information may be needed to determine tax obligations. Specific to apportionment, available taxpayer records or available third-party records, such as where their customers receive services, or publicly available information, like relevant population data, may be necessary for this purpose.

For the reasons above, the amendment to the first paragraph of subsection .06(F)(1) has not been further modified.

Topic #6: One commenter stated that the proposed revisions appear to contradict the presumption that if the state where services are received is not readily determinable certain sourcing rules apply.

ICI Comments:

> The proposed amendments provide no safe harbor where information about a third party's experience may not be readily available to the taxpayer. . . .
>
> Even if the added phrasing may clarify sourcing for certain services, it creates confusion with respect to sourcing for asset management services. For example, the language seems to contradict the presumption in the apportionment statute that if the state of receipt is not readily determinable, services are deemed to be received at the customer's home or, in the case of a business, the office of the customer from which the services were ordered in the ordinary course of business.

MRS Response to Topic #6 Comments:

In its responses to Comments on Topics #3 and #4 above, MRS responded in detail to comments related to where services are received (including MRS's intent to clarify the use of "acquired or experienced" as the plain meaning of "received") and to comments on the clarification that "[s]ervices may be received by a person other than the person who contracted for or paid for the services."

In addition, these proposed revisions do not alter the statutory function for sourcing services when, after comprehensive analysis and review of all relevant facts and circumstances, it is determined that the state in which services are received is not readily determinable under 36 M.R.S. § 5211(16-A)(A).

For these reasons, MRS has made no changes to the final rule related to these comments.

Topic #7: One commenter asked that all the examples be deleted from the proposed amendments.

> **MSBA Comments:**
>
> The Proposed Amendments reflect MRS's new, substantive interpretation of Section 5211(16-A)(A). For example, the proposal would expand the sourcing regulation to source service receipts to the state where the services are "received, … acquired or experienced." The Proposed Amendments also appear to add new taxpayer documentation requirements and add new examples that direct specific types of service providers to source their sources according to the examples' methodology.
>
> The new language and requirements in the Proposed Amendments are not found in a Maine tax statute. It is the Tax Section's opinion that the Proposed Amendments are therefore not clearly authorized by the general rulemaking statute, Section 112, which allows MRS to make rules "as necessary."

MRS Response to Topic #7 Comments:

The examples illustrate Maine's general rule for sourcing receipts from the provision of services under certain fact patterns. The examples follow MRS' interpretation of the law under the given fact patterns and publicly available Maine Law Court and Maine Board of Tax Appeals decisions. In addition, examples 5, 6, 7 (advertising and related services), 9 (cable tv), and 10 (pharmacy benefit management services) are directly related to these cases. *See* *Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68 at P35, (regarding pharmaceutical services; sourced to the state where members receive the service; rejecting taxpayer's argument that services must be sourced to the location of the customer that paid for the service); Maine Board of Tax Appeals Decision, Docket No. BTA-2018-2 at 4, August 9, 2019 (regarding pharmaceutical benefit management services) (services provided by the Company during the period at issue were received at the location of the pharmacy where the Insureds filled each prescription); Maine Board of Tax Appeals Decision, Docket No. BTA-2020-11 at 3, Dec. 21, 2021 (regarding social media advertisement services) (advertisement services are received at the location of the Consumers to whom the advertisements were directed.); Maine Board of Tax Appeals Decision, Docket No. BTA-2021-1, February 8, 2022 (regarding pharmaceutical benefit management services) (services provided by the Company during the period at issue were received at the location of the pharmacy where the Insureds filled each prescription).

For the reasons cited above, MRS declines to delete the examples from the proposed rule change.

Topic #8: The MPA cited the following six reasons as a basis to suggest deleting two examples in the rule with specific replacements:

1) Viewing Audience is Inconsistent with Market Sourcing
2) Viewing Audience is based on Information Broadcasters Do Not Possess
3) Technology Makes Assumptions on Audience Unreliable
4) Incorrect Assumptions About Geographic Boundaries and 'Viewers'
5) Viewing Audience Leads to Complex Audits and Legal Challenges
6) Contemporary Tax Policy Approach to Sourcing Broadcast Income

In sum, the viewing audience factor approach to sourcing program distribution and advertising fees is based on the false premise that the broadcaster's customers are the viewers watching their programming. In fact, distributors would source their programming revenue to the ultimate viewing audience, since they are their customers. Except in the case of Direct-to-Consumer programming, where our customer is the subscriber, there is no direct relationship or "privity of contract" between the broadcasters and the viewing audience. The Broadcasters simply upload their content to a satellite for licensing revenues and do not sell anything to the viewing audience nor do they know where their content is being viewed. In essence, the audience factor approach misattributes a retail market approach to taxpayers selling at wholesale.

Recommended Changes to the Proposed Regulation Examples

~~**Advertising and Related Services**~~

Broadcast Programming Services

Example 7:

~~Taxpayer Network Corp., a corporation that is based outside of Maine, sells advertising time to customers pursuant to which the customers' advertisements will run as commercials during Network Corp.'s televised programming as distributed by unrelated cable television, satellite television transmission companies, and its own broadcasts. Network Corp.'s services are received in Maine, and the performance of such services are attributed to Maine, to the extent that the audience for Network Corp.'s televised programming during which the advertisements run is in Maine.~~

Network Broadcasting Corp., a corporation based outside of Maine has two revenue streams. Network Broadcasting Corp. contracts to transmit programming to Cable Corp. Cable Corp. packages network programming from Broadcasting Corp. with channels from other broadcasters to distribute as a single offering to Cable Corp. subscribers. The fee received by Network Broadcasting Corp. from Cable Corp. is sourced 100% to Maine because that is where Cable Corp.'s commercial domicile is. Network Broadcasting Corp. earns advertising revenue from Advertiser to place Advertiser's commercial in Network's programming. The advertising revenue earned by Network Broadcasting Corp. from placing Advertiser's commercial is sourced outside of Maine because the commercial domicile of Advertiser is in a state other than Maine.

~~**Cable TV Services**~~

~~Example 9: Taxpayer Cable TV Corp., a corporation that is based outside of Maine, has two revenue streams. First, Cable TV Corp. sells advertising time to customers pursuant to which the customers' advertisements will run as commercials during Cable TV Corp.'s televised programming. Some of these customers, though not all of them, have a physical presence in Maine. Second, Cable TV Corp. sells monthly subscriptions to individual customers in Maine and in other states. Cable TV Corp.'s service of selling advertising time is received in Maine, and the receipts from the performance of such services are attributed to Maine, to the extent that the audience for Cable TV Corp.'s televised programming during which the advertisements run is in Maine. Cable TV Corp.'s subscription services are also received in Maine, and the receipts from the performance of such services are attributed to Maine, to the extent that Cable TV Corp.'s programming is received by customers in Maine.~~

Streaming Services

Broadcasting Corp.'s streaming service, which is based outside of Maine, contracts with subscribers to deliver its programming directly to the subscriber for a fixed fee. Broadcasting Corp. delivered its signal directly to its customer. Because Broadcasting Corp.'s customer is in Maine based on billing address Broadcasting Corp.'s revenue from its customer is sourced to Maine.

MRS Response to Topic #8 Comments:

As explained above in MRS's responses to Comments for Topics #3 and #4, the general rule for sourcing receipts from services under 36 M.R.S. § 5211(16-A)(A) is to the state where the services have been received; therefore, receipts are sourced to the state where the customer for the services is located only if the customer receives the service. MRS' proposed examples 7 and 9 reflect that interpretation of the statute, while the examples proposed by the MPA do not.

For these reasons, MRS declines to accept the suggested changes.

Topic #9: One commenter asked that receipts of mutual fund service providers be sourced consistent with recent rulings of the Maine Board of Tax Appeals.

SIFMA Comments:

We respectfully request that Rule 801 clarify that receipts from providing mutual fund services to a Registered Investment Company ("RIC") not be sourced to the RIC shareholders (i.e., shareholder sourcing). Rather, such services should be sourced to the location of the RIC in (sic) consistent with recent decisions issued by the Maine Board of Tax Appeals. We urge that any attempt to adopt express statutory provisions for services provided to RICs be done by the Maine legislature as the legislatures in other states have done.

MRS Response to Topic #9 Comments:

Under Maine's general sourcing rule in 36 M.R.S. § 5211(16-A)(A), all services are attributed to the state where the services are received, without exception for particular industries or types of services. The decisions by the Maine Board of Tax Appeals referred to by the Commenter have been appealed to the Maine Superior Court.

For these reasons, MRS has declined to make the suggested changes.

Topic #10: Several commenters state that the proposed revisions will increase the complexity and burden of complying with the law.

ICI comments:

> The Proposed Apportionment Rule would create a significant, untenable new compliance burden for asset managers. First, the proposed amendments would make Maine apportionment rules an outlier among the other states of the United States. It would create a sourcing rule in Maine that exists in no other state.

MSBA Comments:

> Tax regulations should increase clarity and certainty for taxpayers seeking to comply with Maine tax laws, but expanding the term "received" to also mean "experienced" could instead make corporate income tax compliance more burdensome for some service providers.
>
> No other U.S. state with a corporate income tax sources service receipts to the location where services are experienced. Adoption of sourcing based on experience would make Maine an outlier, increasingly (sic) corporate tax compliance burden only for service providers operating or doing business in Maine.

SIFMA Comments:

> The proposed regulation is a substantive change to the law that deviates from the statute, as noted above. These changes would introduce a unique tax framework that would create substantial uncertainty and place unnecessary burdens on the resources of the Department and taxpayers. By implementing a regulation that would require a taxpayer to use two different sourcing methods simultaneously will likely lead to taxpayers being forced to choose one method – or to try and implement both sourcing methods on a case-by-case basis – which will create significant bookkeeping issues, as well as create significant inefficiencies on audit. Amending the proposed regulations to more closely align with existing statute would address this issue.

MRS Response to Topic #10 Comments:

As MRS explained above, particularly in response to Topics #3, #4 and #5, the proposed revisions to the Rule do not alter the requirements of the statute, but, instead, reflect MRS' historical interpretation of the statute. Therefore, the proposed revisions do not add additional complexity or burdens related to sourcing receipts from the provision of services.

MRS has, therefore, made no changes to the final rule related to these comments.