

**ALLOCATION AND APPORTIONMENT OF
INCOME AND DEDUCTION OF A NET LOSS**

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Howard A. Stephenson

House Sponsor: Wayne A. Harper

LONG TITLE

General Description:

This bill amends the Revenue and Taxation title relating to the allocation and apportionment of income and the deduction of a net loss by an acquired corporation.

Highlighted Provisions:

This bill:

- ▶ amends provisions in the Multistate Tax Compact governing allocation and apportionment of income;
- ▶ requires a taxpayer to apportion business income to the state on the basis of a formula that weights the sales factor more heavily than the property or payroll factors;
- ▶ addresses the time period during which a taxpayer's election to use a certain formula to apportion business income to the state is in effect;
- ▶ addresses the amount of net loss a corporation that is acquired by a unitary group may deduct; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill has retrospective operation for a taxable year beginning on or after January 1,



28 2009.

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **59-1-801**, as renumbered and amended by Laws of Utah 1987, Chapter 3

32 **59-7-110**, as last amended by Laws of Utah 2008, Chapter 105

33 **59-7-311**, as last amended by Laws of Utah 2008, Chapter 382



35 *Be it enacted by the Legislature of the state of Utah:*

36 Section 1. Section **59-1-801** is amended to read:

37 **59-1-801. Purpose of compact -- Definitions -- Elements of income tax laws --**
38 **Division of income -- Elements of sales and use tax laws -- The commission -- Uniform**
39 **regulations and forms -- Interstate audits -- Arbitration -- Entry into force and**
40 **withdrawal -- Effect on other laws and jurisdiction -- Construction and severability.**

41 The "Multistate Tax Compact" is hereby enacted into law and entered into with all
42 jurisdictions legally joining therein, in the form substantially as follows:

43 **ARTICLE I. PURPOSES**

44 The purposes of this compact are to:

- 45 1. Facilitate proper determination of state and local tax liability of multistate taxpayers,
- 46 including the equitable apportionment of tax bases and settlement of apportionment disputes.
- 47 2. Promote uniformity or compatibility in significant components of tax systems.
- 48 3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in
- 49 other phases of tax administration.
- 50 4. Avoid duplicative taxation.

51 **ARTICLE II. DEFINITIONS**

52 As used in this compact:

- 53 1. "State" means a state of the United States, the District of Columbia, the
- 54 Commonwealth of Puerto Rico, or any territory or possession of the United States.
- 55 2. "Subdivision" means any governmental unit or special district of a state.
- 56 3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit
- 57 or agency, or person acting as a business entity in more than one state.
- 58 4. "Income tax" means a tax imposed on or measured by net income including any tax

59 imposed on or measured by an amount arrived at by deducting expenses from gross income,
60 one or more forms of which expenses are not specifically and directly related to particular
61 transactions.

62 5. "Capital stock tax" means a tax measured in any way by the capital of a corporation
63 considered in its entirety.

64 6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or
65 measured by the gross volume of business, in terms of gross receipts or in other terms, and in
66 the determination of which no deduction is allowed which would constitute the tax an income
67 tax.

68 7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of
69 ownership, possession, or custody of tangible personal property or the rendering of services
70 measured by the price of the tangible personal property transferred or services rendered and
71 which is required by state or local law to be separately stated from the sales price by the seller,
72 or which is customarily separately stated from the sales price, but does not include a tax
73 imposed exclusively on the sale of a specifically identified commodity or article or class of
74 commodities or articles.

75 8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on
76 or with respect to the exercise or enjoyment of any right or power over tangible personal
77 property incident to the ownership, possession, or custody of that property or the leasing of that
78 property from another including any consumption, keeping, retention, or other use of tangible
79 personal property, and (b) is complementary to a sales tax.

80 9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax,
81 and any other tax which has a multistate impact, except that the provisions of Articles III, IV,
82 and V of this compact shall apply only to the taxes specifically designated therein and the
83 provisions of Article IX of this compact shall apply only in respect to determinations pursuant
84 to Article IV.

85 ARTICLE III. ELEMENTS OF INCOME TAX LAWS

86 [~~Taxpayer Option, State~~] Allocation and Apportionment

87 [~~and Local Taxes~~] of Income

88 1. [~~Any taxpayer subject to an income tax whose income is subject to apportionment~~
89 ~~and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of~~

90 ~~subdivisions in two or more party states may elect to apportion and allocate his income in the~~
 91 ~~manner provided by the laws of such state or by the laws of such states and subdivisions~~
 92 ~~without reference to this compact, or may elect to apportion and allocate in accordance with~~
 93 ~~Article IV. This election for any tax year may be made in all party states or subdivisions~~
 94 ~~thereof or in any one or more of the party states or subdivisions thereof without reference to the~~
 95 ~~election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions~~
 96 ~~shall be considered separately from state taxes and the apportionment and allocation also may~~
 97 ~~be applied to the entire tax base. In no instance wherein Article IV is employed for all~~
 98 ~~subdivisions of a state may the sum of all apportionments and allocations to subdivisions~~
 99 ~~within a state be greater than the apportionment and allocation that would be assignable to that~~
 100 ~~state if the apportionment or allocation were being made with respect to a state income tax.]~~
 101 Notwithstanding Article IV, for a taxable year beginning on or after January 1, 2009, income
 102 subject to apportionment and allocation in Utah is governed by Chapter 7, Part 3, Allocation
 103 and Apportionment of Income - Utah UDITPA Provisions.

Taxpayer Option, Short Form

105 2. Each party state or any subdivision thereof which imposes an income tax shall
 106 provide by law that any taxpayer required to file a return, whose only activities within the
 107 taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible
 108 personal property, and whose dollar volume of gross sales made during the tax year within the
 109 state or subdivision, as the case may be, is not in excess of \$100,000, may elect to report and
 110 pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall
 111 produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax
 112 Commission, not more than once in five years, may adjust the \$100,000 figure in order to
 113 reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon
 114 the adoption by the commission, shall replace the \$100,000 figure specifically provided herein.
 115 Each party state and subdivision thereof may make the same election available to taxpayers
 116 additional to those specified in this paragraph.

Coverage

118 3. Nothing in this article relates to the reporting or payment of any tax other than an
 119 income tax.

ARTICLE IV. DIVISION OF INCOME

121 1. As used in this article, unless the context otherwise requires:

122 (a) "Business income" means income arising from transactions and activity in the
123 regular course of the taxpayer's trade or business and includes income from tangible and
124 intangible property if the acquisition, management, and disposition of the property constitute
125 integral parts of the taxpayer's regular trade or business operations.

126 (b) "Commercial domicile" means the principal place from which the trade or business
127 of the taxpayer is directed or managed.

128 (c) "Compensation" means wages, salaries, commissions and any other form of
129 remuneration paid to employees for personal services.

130 (d) "Financial organization" means any bank, trust company, savings bank, industrial
131 bank, land bank, safe deposit company, private banker, savings and loan association, credit
132 union, cooperative bank, small loan company, sales finance company, investment company, or
133 any type of insurance company.

134 (e) "Nonbusiness income" means all income other than business income.

135 (f) "Public utility" means any business entity (1) which owns or operates any plant,
136 equipment, property, franchise, or license for the transmission of communications,
137 transportation of goods or persons, except by pipeline, or the production, transmission, sale,
138 delivery, or furnishing of electricity, water, or steam, and (2) whose rates of charges for goods
139 or services have been established or approved by a federal, state, or local government or
140 governmental agency.

141 (g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of
142 this article.

143 (h) "State" means any state of the United States, the District of Columbia, the
144 Commonwealth of Puerto Rico, any territory or possession of the United States, and any
145 foreign country or political subdivision thereof.

146 (i) "This state" means the state in which the relevant tax return is filed or, in the case of
147 application of this article to the apportionment and allocation of income for local tax purposes,
148 the subdivision or local taxing district in which the relevant tax return is filed.

149 2. Any taxpayer having income from business activity which is taxable both within and
150 without this state, shall allocate and apportion his net income as provided in this article.

151 3. For purposes of allocation and apportionment of income under this article, a

152 taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a
153 franchise tax measured by net income, a franchise tax for the privilege of doing business, or a
154 corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax
155 regardless of whether, in fact, the state does or does not.

156 4. Rents and royalties from real or tangible personal property, capital gains, interests,
157 dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness
158 income, shall be allocated as provided in paragraphs 5 through 8 of this article.

159 5. (a) Net rents and royalties from real property located in this state are allocable to this
160 state.

161 (b) Net rents and royalties from tangible personal property are allocable to this state (1)
162 if and to the extent that the property is utilized in this state, or (2) in their entirety if the
163 taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws
164 of or taxable in the state in which the property is utilized.

165 (c) The extent of utilization of tangible personal property in a state is determined by
166 multiplying the rents and royalties by a fraction, the numerator of which is the number of days
167 of physical location of the property in the state during the rental or royalty period in the taxable
168 year and the denominator of which is the number of days of physical location of the property
169 everywhere during all rental or royalty periods in the taxable year. If the physical location of
170 the property during the rental or royalty period is unknown or unascertainable by the taxpayer,
171 tangible personal property is utilized in the state in which the property was located at the time
172 the rental or royalty payer obtained possession.

173 6. (a) Capital gains and losses from sales of real property located in this state are
174 allocable to this state.

175 (b) Capital gains and losses from sales of tangible personal property are allocable to
176 this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's
177 commercial domicile is in this state and the taxpayer is not taxable in the state in which the
178 property had a situs.

179 (c) Capital gains and losses from sales of intangible personal property are allocable to
180 this state if the taxpayer's commercial domicile is in this state.

181 7. Interest and dividends are allocable to this state if the taxpayer's commercial
182 domicile is in this state.

183 8. (a) Patent and copyright royalties are allocable to this state (1) if and to the extent
184 that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that
185 the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable
186 and the taxpayer's commercial domicile is in this state.

187 (b) A patent is utilized in a state to the extent that it is employed in production,
188 fabrication, manufacturing, or other processing in the state or to the extent that a patented
189 product is produced in the state. If the basis of receipts from patent royalties does not permit
190 allocation to states or if the accounting procedures do not reflect states of utilization, the patent
191 is utilized in the state in which the taxpayer's commercial domicile is located.

192 (c) A copyright is utilized in a state to the extent that printing or other publication
193 originates in the state. If the basis of receipts from copyright royalties does not permit
194 allocation to states or if the accounting procedures do not reflect states of utilization, the
195 copyright is utilized in the state in which the taxpayer's commercial domicile is located.

196 9. All business income shall be apportioned to this state by multiplying the income by a
197 fraction~~[, the numerator of which is the property factor plus the payroll factor plus the sales~~
198 ~~factor and the denominator of which is three]~~ that may include as the numerator of the fraction
199 the property factor, the payroll factor, the sales factor, or the sum of two or more of these
200 factors.

201 10. The property factor is a fraction, the numerator of which is the average value of the
202 taxpayer's real and tangible personal property owned or rented and used in this state during the
203 tax period and the denominator of which is the average value of all the taxpayer's real and
204 tangible personal property owned or rented and used during the tax period.

205 11. Property owned by the taxpayer is valued at its original cost. Property rented by the
206 taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual
207 rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from
208 subrentals.

209 12. The average value of property shall be determined by averaging the values at the
210 beginning and ending of the tax period but the tax administrator may require the averaging of
211 monthly values during the tax period if reasonably required to reflect properly the average
212 value of the taxpayer's property.

213 13. The payroll factor is a fraction, the numerator of which is the total amount paid in

214 this state during the tax period by the taxpayer for compensation and the denominator of which
 215 is the total compensation paid everywhere during the tax period.

216 14. Compensation is paid in this state if:

217 (a) the individual's service is performed entirely within the state;

218 (b) the individual's service is performed both within and without the state, but the
 219 service performed without the state is incidental to the individual's service within the state; or

220 (c) some of the service is performed in the state and (1) the base of operations or, if
 221 there is no base of operations, the place from which the service is directed or controlled is in
 222 the state, or (2) the base of operations or the place from which the service is directed or
 223 controlled is not in any state in which some part of the service is performed, but the individual's
 224 residence is in this state.

225 15. The sales factor is a fraction, the numerator of which is the total sales of the
 226 taxpayer in this state during the tax period and the denominator of which is the total sales of the
 227 taxpayer everywhere during the tax period.

228 16. Sales of tangible personal property are in this state if:

229 (a) the property is delivered or shipped to a purchaser, other than the United States
 230 government, within this state regardless of the f.o.b. point or other conditions of the sale; or

231 (b) the property is shipped from an office, store, warehouse, factory, or other place of
 232 storage in this state and (1) the purchaser is the United States government, or (2) the taxpayer is
 233 not taxable in the state of the purchaser.

234 17. ~~§→ [Sales, other than sales of tangible personal property, are in this state if:~~

235 ~~——(a) the income-producing activity is performed in this state; or~~

236 ~~——(b) the income-producing activity is performed both in and outside this state and a
 237 greater proportion of the income-producing activity is performed in this state than in any other~~

238 ~~state, based on costs of performance.] Whether a receipt, rent, royalty, or sale in connection with
 238a other than tangible personal property is considered to be in this state is determined in
 238b accordance with Section 59-7-319. ←§~~

239 18. If the allocation and apportionment provisions of this article do not fairly represent
 240 the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the
 241 tax administrator may require, in respect to all or any part of the taxpayer's business activity, if
 242 reasonable:

243 (a) separate accounting;

244 (b) the exclusion of any one or more of the factors;

245 (c) the inclusion of one or more additional factors which will fairly represent the
246 taxpayer's business activity in this state; or

247 (d) the employment of any other method to effectuate an equitable allocation and
248 apportionment of the taxpayer's income.

249 ARTICLE V. ELEMENTS OF SALES AND USE TAX LAWS

250 Tax Credit

251 1. Each purchaser liable for a use tax on tangible personal property shall be entitled to
252 full credit for the combined amount or amounts of legally imposed sales or use taxes paid by
253 him with respect to the same property to another state and any subdivision thereof. The credit
254 shall be applied first against the amount of any use tax due the state, and any unused portion of
255 the credit shall then be applied against the amount of any use tax due a subdivision.

256 Exemption Certificates, Vendors May Rely

257 2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or
258 other exemption certificate or other written evidence of exemption authorized by the
259 appropriate state or subdivision taxing authority, the vendor shall be relieved of liability for a
260 sales or use tax with respect to the transaction.

261 ARTICLE VI. THE COMMISSION

262 Organization and Management

263 1. (a) The Multistate Tax Commission is hereby established. It shall be composed of
264 one "member" from each party state who shall be the head of the state agency charged with the
265 administration of the types of taxes to which this compact applies. If there is more than one
266 such agency the state shall provide by law for the selection of the commission member from
267 the heads of the relevant agencies. State law may provide that a member of the commission be
268 represented by an alternate but only if there is on file with the commission written notification
269 of the designation and identity of the alternate. The attorney general of each party state or his
270 designee, or other counsel if the laws of the party state specifically provide, shall be entitled to
271 attend the meetings of the commission, but shall not vote. Such attorneys general, designees,
272 or other counsel shall receive all notices of meetings required under paragraph 1 (e) of this
273 article.

274 (b) Each party state shall provide by law for the selection of representatives from its
275 subdivisions affected by this compact to consult with the commission member from that state.

276 (c) Each member shall be entitled to one vote. The commission shall not act unless a
277 majority of the members are present, and no action shall be binding unless approved by a
278 majority of the total number of members.

279 (d) The commission shall adopt an official seal to be used as it may provide.

280 (e) The commission shall hold an annual meeting and such other regular meetings as
281 its bylaws may provide and such special meetings as its executive committee may determine.
282 The commission bylaws shall specify the dates of the annual and any other regular meetings,
283 and shall provide for the giving of notice of annual, regular, and special meetings. Notices of
284 special meetings shall include the reasons therefor and an agenda of the items to be considered.

285 (f) The commission shall elect annually, from among its members, a chairman, a
286 vice-chairman, and a treasurer. The commission shall appoint an executive director who shall
287 serve at its pleasure, and it shall fix his duties and compensation. The executive director shall
288 be secretary of the commission. The commission shall make provision for the bonding of such
289 of its officers and employees as it may deem appropriate.

290 (g) Irrespective of the civil service, personnel, or other merit system laws of any party
291 state, the executive director shall appoint or discharge such personnel as may be necessary for
292 the performance of the functions of the commission and shall fix their duties and
293 compensation. The commission bylaws shall provide for personnel policies and programs.

294 (h) The commission may borrow, accept, or contract for the services of personnel from
295 any state, the United States, or any other governmental entity.

296 (i) The commission may accept for any of its purposes and functions any and all
297 donations and grants of money, equipment, supplies, materials, and services, conditional or
298 otherwise, from any governmental entity, and may utilize and dispose of the same.

299 (j) The commission may establish one or more offices for the transacting of its
300 business.

301 (k) The commission shall adopt bylaws for the conduct of its business. The
302 commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and
303 any amendments thereto with the appropriate agency or officer in each of the party states.

304 (l) The commission annually shall make to the governor and legislature of each party
305 state a report covering its activities for the preceding year. Any donation or grant accepted by
306 the commission or services borrowed shall be reported in the annual report of the commission,

307 and shall include the nature, amount, and conditions, if any, of the donation, gift, grant, or
308 services borrowed and the identity of the donor or lender. The commission may make
309 additional reports as it may deem desirable.

310 Committees

311 2. (a) To assist in the conduct of its business when the full commission is not meeting,
312 the commission shall have an executive committee of seven members, including the chairman,
313 vice-chairman, treasurer, and four other members elected annually by the commission. The
314 executive committee, subject to the provisions of this compact and consistent with the policies
315 of the commission, shall function as provided in the bylaws of the commission.

316 (b) The commission may establish advisory and technical committees, membership on
317 which may include private persons and public officials, in furthering any of its activities. Such
318 committees may consider any matter of concern to the commission, including problems of
319 special interest to any party state and problems dealing with particular types of taxes.

320 (c) The commission may establish such additional committees as its bylaws may
321 provide.

322 Powers

323 3. In addition to powers conferred elsewhere in this compact, the commission shall
324 have power to:

325 (a) study state and local tax systems and particular types of state and local taxes;

326 (b) develop and recommend proposals for an increase in uniformity or compatibility of
327 state and local tax laws with a view toward encouraging the simplification and improvement of
328 state and local tax law and administration;

329 (c) compile and publish information as in its judgment would assist the party states in
330 implementation of the compact and taxpayers in complying with state and local tax laws; and

331 (d) do all things necessary and incidental to the administration of its functions pursuant
332 to this compact.

333 Finance

334 4. (a) The commission shall submit to the governor or designated officer or officers of
335 each party state a budget of its estimated expenditures for such period as may be required by
336 the laws of that state for presentation to the legislature thereof.

337 (b) Each of the commission's budgets of estimated expenditures shall contain specific

338 recommendations of the amounts to be appropriated by each of the party states. The total
339 amount of appropriations requested under any such budget shall be apportioned among the
340 party states as follows: one-tenth in equal shares; and the remainder in proportion to the
341 amount of revenue collected by each party state and its subdivisions from income taxes, capital
342 stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the
343 commission shall employ such available public sources of information as, in its judgment,
344 present the most equitable and accurate comparisons among the party states. Each of the
345 commission's budgets of estimated expenditures and requests for appropriations shall indicate
346 the sources used in obtaining information employed in applying the formula contained in this
347 paragraph.

348 (c) The commission shall not pledge the credit of any party state. The commission may
349 meet any of its obligations in whole or in part with funds available to it under paragraph 1 (i) of
350 this article; provided that the commission takes specific action setting aside such funds prior to
351 incurring any obligation to be met in whole or in part in such manner. Except where the
352 commission makes use of funds available to it under paragraph 1 (i), the commission shall not
353 incur any obligation prior to the allotment of funds by the party states adequate to meet the
354 same.

355 (d) The commission shall keep accurate accounts of all receipts and disbursements.
356 The receipts and disbursements of the commission shall be subject to the audit and accounting
357 procedures established under its bylaws. All receipts and disbursements of funds handled by
358 the commission shall be audited yearly by a certified or licensed public accountant and the
359 report of the audit shall be included in and become part of the annual report of the commission.

360 (e) The accounts of the commission shall be open at any reasonable time for inspection
361 by duly constituted officers of the party states and by any persons authorized by the
362 commission.

363 (f) Nothing contained in this article shall be construed to prevent commission
364 compliance with laws relating to audit or inspection of accounts by or on behalf of any
365 government contributing to the support of the commission.

366 **ARTICLE VII. UNIFORM REGULATIONS AND FORMS**

367 1. Whenever any two or more party states, or subdivisions of party states, have uniform
368 or similar provisions of law relating to an income tax, the commission may adopt uniform

369 regulations for any phase of the administration of such law, including assertion of jurisdiction
370 to tax, or prescribing uniform tax forms. The commission may also act with respect to the
371 provisions of Article IV of this compact.

372 2. Prior to the adoption of any regulations, the commission shall:

373 (a) as provided in its bylaws, hold at least one public hearing on due notice to all
374 affected party states and subdivisions thereof and to all taxpayers and other persons who have
375 made timely request of the commission for advance notice of its regulation-making
376 proceedings; and

377 (b) afford all affected party states and subdivisions and interested persons an
378 opportunity to submit relevant written data and views, which shall be considered fully by the
379 commission.

380 3. The commission shall submit any regulations adopted by it to the appropriate
381 officials of all party states and subdivisions to which they might apply. Each such state and
382 subdivision shall consider any such regulation for adoption in accordance with its own laws
383 and procedures.

384 ARTICLE VIII. INTERSTATE AUDITS

385 1. This article shall be in force only in those party states that specifically provide
386 therefor by statute.

387 2. Any party state or subdivision thereof desiring to make or participate in an audit of
388 any accounts, books, papers, records, or other documents may request the commission to
389 perform the audit on its behalf. In responding to the request, the commission shall have access
390 to and may examine, at any reasonable time, such accounts, books, papers, records, and other
391 documents and any relevant property or stock of merchandise. The commission may enter into
392 agreements with party states or their subdivisions for assistance in performance of the audit.
393 The commission shall make charges, to be paid by the state or local government or
394 governments for which it performs the service, for any audits performed by it in order to
395 reimburse itself for the actual costs incurred in making the audit.

396 3. The commission may require the attendance of any person within the state where it
397 is conducting an audit or part thereof at a time and place fixed by it within such state for the
398 purpose of giving testimony with respect to any account, book, paper, document, other record,
399 property, or stock of merchandise being examined in connection with the audit. If the person is

400 not within the jurisdiction, he may be required to attend for such purpose at any time and place
401 fixed by the commission within the state of which he is a resident; provided that such state has
402 adopted this article.

403 4. The commission may apply to any court having power to issue compulsory process
404 for orders in aid of its powers and responsibilities pursuant to this article and any and all such
405 courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order
406 shall be punishable as contempt of the issuing court. If the party or subject matter on account
407 of which the commission seeks an order is within the jurisdiction of the court to which
408 application is made, such application may be to a court in the state or subdivision on behalf of
409 which the audit is being made or a court in the state in which the object of the order being
410 sought is situated. The provisions of this paragraph apply only to courts in a state that has
411 adopted this article.

412 5. The commission may decline to perform any audit requested if it finds that its
413 available personnel or other resources are insufficient for the purpose or that, in the terms
414 requested, the audit is impracticable of satisfactory performance. If the commission, on the
415 basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a
416 particular time or on a particular schedule, would be of interest to a number of party states or
417 their subdivisions, it may offer to make the audit or audits, the offer to be contingent on
418 sufficient participation therein as determined by the commission.

419 6. Information obtained by any audit pursuant to this article shall be confidential and
420 available only for tax purposes to party states, their subdivisions or the United States.
421 Availability of information shall be in accordance with the laws of the states or subdivisions on
422 whose account the commission performs the audit, and only through the appropriate agencies
423 or officers of such states or subdivisions. Nothing in this article shall be construed to require
424 any taxpayer to keep records for any period not otherwise required by law.

425 7. Other arrangements made or authorized pursuant to law for cooperative audit by or
426 on behalf of the party states or any of their subdivisions are not superseded or invalidated by
427 this article.

428 8. In no event shall the commission make any charge against a taxpayer for an audit.

429 9. As used in this article, "tax," in addition to the meaning ascribed to it in Article II,
430 means any tax or license fee imposed in whole or in part for revenue purposes.

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ARTICLE IX. ARBITRATION

1. Whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect, notwithstanding the provisions of Article VII.

2. The commission shall select and maintain an arbitration panel composed of officers and employees of state and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party state or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the commission and to each party state or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the state or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party states or subdivisions thereof. Each party state and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The arbitration board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the commission's arbitration panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the arbitration panel. The two persons selected for the board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the arbitration panel. No member of a board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The board may sit in any state or subdivision party to the proceeding, in the state of the taxpayer's incorporation, residence, or domicile, in any state where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

462 6. The board shall give due notice of the times and places of its hearings. The parties
463 shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses.
464 The board shall act by majority vote.

465 7. The board shall have power to administer oaths, take testimony, subpoena and
466 require the attendance of witnesses and the production of accounts, books, papers, records, and
467 other documents, and issue commissions to take testimony. Subpoenas may be signed by any
468 member of the board. In case of failure to obey a subpoena, and upon application by the board,
469 any judge of a court of competent jurisdiction of the state in which the board is sitting or in
470 which the person to whom the subpoena is directed may be found may make an order requiring
471 compliance with the subpoena, and the court may punish failure to obey the order as a
472 contempt. The provisions of this paragraph apply only in states that have adopted this article.

473 8. Unless the parties otherwise agree the expenses and other costs of the arbitration
474 shall be assessed and allocated among the parties by the board in such manner as it may
475 determine. The commission shall fix a schedule of compensation for members of arbitration
476 boards and of other allowable expenses and costs. No officer or employee of a state or local
477 government who serves as a member of a board shall be entitled to compensation therefor
478 unless he is required on account of his service to forego the regular compensation attaching to
479 his public employment, but any such board members shall be entitled to expenses.

480 9. The board shall determine the disputed apportionment or allocation and any matters
481 necessary thereto. The determinations of the board shall be final for purposes of making the
482 apportionment or allocation, but for no other purpose.

483 10. The board shall file with the commission and with each tax agency represented in
484 the proceeding: the determination of the board; the board's written statement of its reason
485 therefor; the record of the board's proceedings; and any other documents required by the
486 arbitration rules of the commission to be filed.

487 11. The commission shall publish the determinations of boards together with the
488 statements of the reasons therefor.

489 12. The commission shall adopt and publish rules of procedure and practice and shall
490 file a copy of such rules and of any amendment thereto with the appropriate agency or officer in
491 each of the party states.

492 13. Nothing contained herein shall prevent at any time a written compromise of any

493 matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

494 ARTICLE X. ENTRY INTO FORCE AND WITHDRAWAL

495 1. This compact shall enter into force when enacted into law by any seven states.

496 Thereafter, this compact shall become effective as to any other state upon its enactment thereof.

497 The commission shall arrange for notification of all party states whenever there is a new
498 enactment of the compact.

499 2. Any party state may withdraw from this compact by enacting a statute repealing the
500 same. No withdrawal shall affect any liability already incurred by or chargeable to a party state
501 prior to the time of such withdrawal.

502 3. No proceeding commenced before an arbitration board prior to the withdrawal of a
503 state and to which the withdrawing state or any subdivision thereof is a party shall be
504 discontinued or terminated by the withdrawal, nor shall the board thereby lose jurisdiction over
505 any of the parties to the proceeding necessary to make a binding determination therein.

506 ARTICLE XI. EFFECT ON OTHER LAWS AND JURISDICTION

507 Nothing in this compact shall be construed to:

508 (a) affect the power of any state or subdivision thereof to fix rates of taxation, except
509 that a party state shall be obligated to implement Article III 2 of this compact;

510 (b) apply to any tax or fixed fee imposed for the registration of a motor vehicle or any
511 tax on motor fuel, other than a sales tax; provided that the definition of "tax" in Article VIII 9
512 may apply for the purposes of that article and the commission's powers of study and
513 recommendation pursuant to Article VI 3 may apply;

514 (c) withdraw or limit the jurisdiction of any state or local court or administrative officer
515 or body with respect to any person, corporation or other entity or subject matter, except to the
516 extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another
517 agency or body; or

518 (d) supersede or limit the jurisdiction of any court of the United States.

519 ARTICLE XII. CONSTRUCTION AND SEVERABILITY

520 This compact shall be liberally construed so as to effectuate the purposes thereof. The
521 provisions of this compact shall be severable and if any phrase, clause, sentence, or provision
522 of this compact is declared to be contrary to the constitution of any state or of the United States
523 or the applicability thereof to any government, agency, person, or circumstance is held invalid,

524 the validity of the remainder of this compact and the applicability thereof to any government,
 525 agency, person, or circumstance shall not be affected thereby. If this compact shall be held
 526 contrary to the constitution of any state participating therein, the compact shall remain in full
 527 force and effect as to the remaining party states and in full force and effect as to the state
 528 affected as to all severable matters.

529 Section 2. Section **59-7-110** is amended to read:

530 **59-7-110. Utah net losses -- Carryforwards and carrybacks -- Deduction.**

531 (1) The amount of Utah net loss [~~which~~] that shall be carried back or forward to offset
 532 income of another taxable year [~~shall be~~] is determined as provided in this section.

533 (2) (a) [~~A~~] Subject to the other provisions of this section, a Utah net loss from a taxable
 534 year beginning before January 1, 1994, shall be carried back three taxable years preceding the
 535 taxable year of the loss and any remaining loss shall be carried forward five taxable years
 536 following the taxable year of the loss[~~, subject to the limitations of this section~~].

537 (b) [~~A~~] (i) Subject to the other provisions of this section, a Utah net loss from a
 538 taxable year beginning on or after January 1, 1994[~~;~~] may be carried back three taxable years
 539 preceding the taxable year of the loss and carried forward 15 taxable years following the
 540 taxable year of the loss[~~, subject to the limitations of this section~~].

541 (ii) If an election is made to forego the federal net operating loss carryback, [~~the~~] a
 542 Utah net loss is not eligible to be carried back unless an election is made for state purposes.

543 (3) [~~The~~] A Utah net loss shall be carried to the earliest eligible year for which the
 544 Utah taxable income before net loss deduction, minus Utah net losses from previous years
 545 [~~which~~] that were applied or required to be applied to offset income, is not less than zero.

546 (4) (a) Except as provided in Subsection (4)[~~(a)(iii)~~](b), the amount of Utah net loss
 547 [~~which~~] that shall be carried to the year identified in Subsection (3) [~~shall be~~] is the lesser of:

548 (i) the remaining Utah net loss after deduction of any amounts of [~~such~~] the Utah net
 549 loss [~~which~~] that were carried to previous years; or

550 (ii) the remaining Utah taxable income before net loss deduction of the year identified
 551 in Subsection (3) after deduction of Utah net losses from previous years [~~which~~] that were
 552 carried or required to be carried to [~~such~~] the year[~~; and~~] identified in Subsection (3).

553 [~~(iii) in any event, the amount~~]

554 (b) (i) The amount of Utah net loss carried back from a taxable year [~~beginning on or~~

555 after January 1, 1994,] may not exceed \$1,000,000 in Utah taxable income for each [corporate]
 556 return filed under this chapter in a taxable year[; ~~any losses~~].

557 (ii) A Utah net loss in excess of \$1,000,000 may be carried forward[; ~~and~~].

558 [~~(b) any~~] (iii) A remaining Utah net loss shall be available to be carried to one or more
 559 taxable years in accordance with this section.

560 (5) (a) [~~Corporations~~] (i) A corporation acquiring the assets or stock of another
 561 corporation may not deduct any net loss incurred by the acquired corporation prior to the date
 562 of acquisition. [~~This subsection~~]

563 (ii) Subsection (5)(a)(i) does not apply if the only change in the corporation is that of
 564 the state of incorporation.

565 (b) An acquired corporation may deduct [~~its~~] the acquired corporation's net losses
 566 incurred before the date of acquisition against [~~its~~] the acquired corporation's separate income
 567 as calculated under [~~Subsection (6)~~] Subsections (6) and (7) if the acquired corporation has
 568 continued to carry on a trade or business substantially the same as that conducted before [~~such~~]
 569 the acquisition.

570 (6) For purposes of Subsection (5)(b), the amount of net loss an acquired corporation
 571 that is acquired by a unitary group may deduct is calculated by:

572 (a) subject to Subsection (7)[;]:

573 (i) for a taxable year that begins on or after January 1, 2008, but begins on or before
 574 December 31, 2011, calculating the sum of:

575 [~~(i)~~] (A) an amount determined by dividing the average value of the acquired
 576 corporation's real and tangible personal property owned or rented and used in this state during
 577 the taxable year by the average value of all of the unitary group's real and tangible personal
 578 property owned or rented and used during the taxable year;

579 [~~(ii)~~] (B) an amount determined by dividing the total amount paid in this state during
 580 the taxable year by the acquired corporation for compensation by the total compensation paid
 581 everywhere by the unitary group during the taxable year; and

582 [~~(iii)~~] (C) an amount determined by:

583 [~~(A)~~] (I) dividing the total sales of the acquired corporation in this state during the
 584 taxable year by the total sales of the unitary group everywhere during the taxable year; and

585 [~~(B)~~] (II) (Aa) for a taxable year that begins on or after January 1, 2008, but begins on

586 or before December 31, 2009, if the unitary group elects to apportion business income to this
 587 state using the method described in Subsection 59-7-311(2)~~(b)~~(c), multiplying the amount
 588 calculated under Subsection (6)(a)~~(iii)(A)~~(i)(C)(I) by two;

589 (Bb) for a taxable year that begins on or after January 1, 2010, but begins on or before
 590 December 31, 2010, multiplying the amount calculated under Subsection (6)(a)(i)(C)(I) by
 591 four; or

592 (Cc) for a taxable year that begins on or after January 1, 2011, but begins on or before
 593 December 31, 2011, multiplying the amount calculated under Subsection (6)(a)(i)(C)(I) by ten;
 594 or

595 (ii) for a taxable year that begins on or after January 1, 2012, calculating an amount
 596 determined by dividing the total sales of the acquired corporation in this state during the
 597 taxable year by the total sales of the unitary group everywhere during the taxable year;

598 (b) dividing the amount calculated under Subsection (6)(a) by the same denominator of
 599 the fraction ~~[for]~~ the unitary group uses to apportion business income to this state ~~[using the~~
 600 ~~same election for calculating that denominator that the unitary group uses]~~:

601 (i) for that taxable year; and

602 (ii) in accordance with Section 59-7-311;

603 (c) multiplying the amount calculated under Subsection (6)(b) by the business income
 604 of the unitary group for the taxable year that is subject to apportionment under Section
 605 59-7-311; and

606 (d) calculating the sum of:

607 (i) the amount calculated under Subsection (6)(c); and

608 (ii) the following amounts allocable to the acquired corporation for the taxable year:

609 (A) nonbusiness income allocable to this state; or

610 (B) nonbusiness loss allocable to this state.

611 (7) The amounts calculated under Subsection (6)(a) shall be derived in the same
 612 manner as those amounts are derived for purposes of apportioning the unitary group's business
 613 income before deducting the net loss, including ~~[a modification]~~ an adjustment made in
 614 accordance with Section 59-7-320.

615 Section 3. Section **59-7-311** is amended to read:

616 **59-7-311. Method of apportionment of business income.**

617 (1) ~~[AH]~~ For a taxable year, all business income shall be apportioned to this state by
618 multiplying the business income by a fraction calculated as provided in ~~[Subsection (2)]~~ this
619 section.

620 ~~[(2) The fraction described in Subsection (1) is calculated as follows:]~~

621 ~~[(a) for a taxpayer that does not make an election authorized by Subsection (3):]~~

622 (2) (a) Subject to the other provisions of this part, for a taxable year that begins on or
623 after January 1, 2006, but begins on or before December 31, 2009, a taxpayer shall elect to
624 calculate the fraction for apportioning business income to this state under this section using:

625 (i) the method described in Subsection (2)(b); or

626 (ii) the method described in Subsection (2)(c).

627 (b) For purposes of Subsection (2)(a), a taxpayer may elect to calculate the fraction for
628 apportioning business income as follows:

629 (i) the numerator of the fraction is the sum of:

630 (A) the property factor as calculated under Section 59-7-312;

631 (B) the payroll factor as calculated under Section 59-7-315; and

632 (C) the sales factor as calculated under Section 59-7-317; and

633 (ii) the denominator of the fraction is three~~[-and]~~.

634 ~~[(b) for a taxpayer that makes an election authorized by Subsection (3):]~~

635 (c) For purposes of Subsection (2)(a), a taxpayer may elect to calculate the fraction for
636 apportioning business income as follows:

637 (i) the numerator of the fraction is the sum of:

638 (A) the property factor as calculated under Section 59-7-312;

639 (B) the payroll factor as calculated under Section 59-7-315; and

640 (C) the product of:

641 (I) the sales factor as calculated under Section 59-7-317; and

642 (II) two; and

643 (ii) the denominator of the fraction is four.

644 ~~[(3) (a) For purposes of Subsection (2) and subject to Subsection (3)(b), for taxable~~
645 ~~years beginning on or after January 1, 2006, a taxpayer may elect to calculate the fraction for~~
646 ~~apportioning business income under this section in accordance with Subsection (2)(b).]~~

647 ~~[(b) If a taxpayer makes the election described in Subsection (3)(a), the taxpayer may~~

648 ~~not revoke the election for a period of five taxable years.]~~

649 (d) If a taxpayer elects for a taxable year that begins on or after January 1, 2006, but
650 begins on or before December 31, 2009 to calculate the fraction for apportioning business
651 income to this state using the method described in Subsection (2)(c):

652 (i) the taxpayer shall make the election on or before the due date for filing the
653 taxpayer's return under this chapter for the taxable year, including extensions; and

654 (ii) the election is in effect for the time period:

655 (A) beginning on the first day of the taxpayer's taxable year for which the taxpayer
656 makes the election; and

657 (B) ends on the last day of the taxpayer's taxable year that begins on or after January 1,
658 2009, but begins on or before December 31, 2009.

659 ~~[(e)]~~ (e) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking
660 Act, the commission may make rules providing procedures for a taxpayer to make the election
661 [described in Subsection (3)(a):] required by this Subsection (2).

662 (3) (a) Subject to the other provisions of this part, for the taxable year that begins on or
663 after January 1, 2010, but begins on or before December 31, 2010, a taxpayer shall calculate
664 the fraction for apportioning business income to this state for a taxable year as follows:

665 (i) the numerator of the fraction is the sum of:

666 (A) the property factor as calculated under Section 59-7-312;

667 (B) the payroll factor as calculated under Section 59-7-315; and

668 (C) the product of:

669 (I) the sales factor as calculated under Section 59-7-317; and

670 (II) four; and

671 (ii) the denominator of the fraction is six.

672 (b) Subject to the other provisions of this part, for the taxable year that begins on or
673 after January 1, 2011, but begins on or before December 31, 2011, a taxpayer shall calculate
674 the fraction for apportioning business income to this state for a taxable year as follows:

675 (i) the numerator of the fraction is the sum of:

676 (A) the property factor as calculated under Section 59-7-312;

677 (B) the payroll factor as calculated under Section 59-7-315; and

678 (C) the product of:

679 (I) the sales factor as calculated under Section 59-7-317; and
680 (II) ten; and
681 (ii) the denominator of the fraction is 12.
682 (c) Subject to the other provisions of this part, for a taxable year that begins on or after
683 January 1, 2012, a taxpayer shall calculate the fraction for apportioning business income to this
684 state for a taxable year as follows:
685 (i) the numerator of the fraction is the sales factor as calculated under Section
686 59-7-317; and
687 (ii) the denominator of the fraction is one.
688 Section 4. **Retrospective operation.**
689 This bill has retrospective operation for a taxable year beginning on or after January 1,
690 2009.

Legislative Review Note
as of 2-4-09 3:41 PM

Office of Legislative Research and General Counsel

Fiscal Note**S.B. 59 - Allocation and Apportionment of Income and Deduction of a Net Loss**

2009 General Session

State of Utah

State Impact

Enactment of this bill will decrease revenue to the Education Fund by \$11,000,000 in FY 2010 and \$12,000,000 in FY 2011.

	<u>2009</u> <u>Approp.</u>	<u>2010</u> <u>Approp.</u>	<u>2011</u> <u>Approp.</u>	<u>2009</u> <u>Revenue</u>	<u>2010</u> <u>Revenue</u>	<u>2011</u> <u>Revenue</u>
Education Fund	\$0	\$0	\$0	\$0	(\$12,000,000)	(\$12,000,000)
Education Fund, One-Time	\$0	\$0	\$0	\$0	\$1,000,000	\$0
Total	\$0	\$0	\$0	\$0	(\$11,000,000)	(\$12,000,000)

Individual, Business and/or Local Impact

Certain businesses with a greater proportion of sales out of state may experience a tax decrease, whereas other businesses with a smaller proportion of sales in state may experience a tax increase. Individuals and locals are unaffected.