



**Officers, 2017-2018**

**Amy Thomas Laub**  
Chair  
*Nationwide Insurance Company*

**Arthur J. Parham, Jr.**  
Vice Chair  
*Entergy Services, Inc.*

**Robert J. Tuinstra, Jr.**  
Secretary & Treasurer  
*E.I. DuPont De Nemours and Company*

**John J. Pydyszewski**  
Past Chair  
*Johnson & Johnson*

**Robert F. Montellione**  
Past Chair  
*Prudential Financial*

**Douglas L. Lindholm**  
President  
*Council On State Taxation*

**Directors**

**Barbara Barton Weiszhaar**  
*HP Inc.*

**Deborah R. Bierbaum**  
*AT&T*

**C. Benjamin Bright**  
*HCA Holdings, Inc.*

**Paul A. Broman**  
*BP America Inc.*

**Michael F. Carchia**  
*Capital One Services, LLC*

**Tony J. Chirico**  
*Medtronic, Inc.*

**Susan Courson-Smith**  
*Pfizer Inc.*

**Meredith H. Garwood**  
*Charter Communications*

**Tracy George**  
*The Coca-Cola Company*

**Denise J. Helmken**  
*General Mills*

**Beth Ann Kendzierski**  
*Apria Healthcare, Inc.*

**Kurt Lamp**  
*Amazon.Com*

**Hugh McKinnon**  
*Raytheon Company*

**Mollie L. Miller**  
*Fresenius Medical Care*  
*North America*

**Rebecca J. Paulsen**  
*U.S. Bancorp*

**John H. Paraskevas**  
*Exxon Mobil Corporation*

**Frances B. Sewell**  
*NextEra Energy, Inc.*

**Nikki E. Dobay**  
*Senior Tax Counsel*  
(202) 484-5221  
[ndobay@cost.org](mailto:ndobay@cost.org)

December 20, 2017

Shannon Ball  
Administrative Rules Coordinator  
Oregon Department of Revenue

Delivery Method: *via email*

**Re: Comments re Proposed OAR 150-314-0435—Sales Factor, Sales Other Than Sales of Tangible Personal Property in This State**

Dear Ms. Ball:

On behalf of the Council On State Taxation (COST), I am writing to provide comments regarding OAR 150-314-0435, which updates Oregon's apportionment rules for sales other than sales of tangible personal property, following the passage of S.B. 28. S.B. 28 moved Oregon from the cost-of-performance sourcing method to market sourcing for such sales. COST urges the Department to include a burden of proof provision applicable to when a taxpayer uses the reasonable approximation methodology, to eliminate the disclosure requirement provided in the "five percent" rule provisions, and to clarify the terms "reasonable efforts" and "substantial portion" in subsections (1)(d)(A) and (1)(e)(B), respectively.

**About COST**

COST is a nonprofit trade association consisting of approximately 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many of COST's members do a significant amount of business in Oregon.

**Inclusion of a Burden of Proof Provision Where a Taxpayer Uses a Reasonable Approximation Methodology**

The Department should include a burden of proof provision, similar to a provision the California Franchise Tax Board (FTB) recently proposed, which provides if a taxpayer uses a reasonable approximation methodology for sourcing, then the taxpayer's reasonable approximation methodology will be respected unless the Department establishes by clear and convincing evidence that the taxpayer's method is unreasonable.

Specifically, the FTB included the following language in the most recent version of its market sourcing rule:

The taxpayer's reasonable approximation method shall be used unless the Franchise Tax Board shows, by clear and convincing evidence, that such method is not reasonable. If the Franchise Tax Board shows that the taxpayer's approximation method is not reasonable, the Franchise Tax Board shall reasonably approximate the location of the receipt of the benefit of the services, the location of the use of the intangible property, or the location of the customer for sales from marketable securities.<sup>1</sup>

Although this language has not yet been officially adopted into California's rule, the language was added by the FTB following comments by COST and other taxpayer associations, including the California Taxpayers Association. COST urges the Department to include a similar provision in OAR 150-314-0435 to provide taxpayers as well as the Department greater comfort when a reasonable approximation methodology is used. Such a provision is necessary to establish a clear burden of proof and is likely to alleviate costly litigation for both taxpayers and the State.

### **Eliminate the Disclosure Requirement Provided in the "Five Percent" Rule**

Under subsection (4)(d)(C)(i), the Department requires a taxpayer to disclose certain information regarding the management of contract in other states where "the taxpayer derives more than five percent of its receipts from sales of all services from a [single] customer." The Department should eliminate this disclosure requirement, because it creates an administrative burden for taxpayers and because it could require taxpayers to disclose confidential customer information. In addition, information related to contract management activity in other states is unnecessary for the purposes of determining the taxpayer's Oregon sales.<sup>2</sup>

### **Other Suggested Clarifications**

Finally, COST suggests the following clarifications be made to OAR 150-314-0435:

- Clarify how the Department will interpret a "reasonable effort" as it is used in subsection (1)(d)(A). That provision addresses the efforts a taxpayer must use to determine how the "waterfall" or hierarchy of sourcing rules works. The Department should either define the term or include examples of what will be deemed to be a "reasonable effort."
- Clarify how the Department will interpret a "substantial portion," as it is used in subsection (1)(e)(B). That provision involves a situation where a taxpayer can identify some but not all of its receipts. COST suggests the Department either define

---

<sup>1</sup> Proposed California Code of Regulations title 18, section 25136-2(h)(2)(C), which can be found at <https://www.ftb.ca.gov/law/regs/25136-2/06162017-Draft-Text.pdf>.

<sup>2</sup> A similar requirement is also included in proposed OAR 150-314-0088, which relates to financial institutions. COST understands the comment period for that regulation has not been extended, but would suggest the Department similarly eliminate the disclosure requirement in that regulation for the reasons provided herein.

the term or include examples of what percentage of a taxpayer's receipts would not be considered a "substantial portion."

Thank each for the opportunity to provide comments on this proposed regulation, and please do not hesitate to contact me if you have any questions or if you would like to discuss these comments further.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikki E. Dobay". The signature is fluid and cursive, with the first name "Nikki" being the most prominent part.

Nikki E. Dobay

cc: COST Board of Directors  
Douglas L. Lindholm, COST President & Executive Director