The draft apportionment rules for receipts from sales of digital products have changed since the second draft posted in October 2016. In addition to the notable changes listed below, some examples were removed to reduce redundancies and new examples were added to illustrate the new rules. Additionally, some provisions were restructured or reordered to provide for clarity. Notable changes include:

- Expanding intermediary transactions to include situations where the taxpayer makes the digital product readily available (e.g. through a website) to be accessed by the consumers
- Adding a definition of digital service to clarify when a service should be sourced under this regulation or the services and other business activities regulation
- Adding special rules for particularized transactions including addressing the sourcing of receipts from the digital facilitation of certain services
- Changing the structure to apply special rules prior to applying the hierarchy or intermediary test
- Expanding reasonable approximation to allow reasonable approximation based on general information (e.g. population) if unable to apply reasonable approximation based on customer specific information
STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

COMMISSIONER OF TAXATION AND FINANCE

ALBANY, NEW YORK

Regulation Section 4-2.3 Receipts from the Sale of, Rental of, License to Use, and Granting of Remote Access to Digital Products and Digital Services (Tax Law, Section 210-A(4)).

(a) General Principles of Application. A taxpayer’s apportionment of receipts from digital products and digital services must be consistent with the principles set out below.

(1) Receipts from the sale of, rental of, license to use, or granting of remote access to digital products and digital services are included in New York receipts if the digital product or digital service is used within New York State.

(i) The location where the digital product or digital service is used is deemed to be the location where the customer derives value from the digital product or digital service.

(ii) To determine the location where the customer derives value from the digital product or digital service, Tax Law section 210-A(4) provides various sourcing rules that apply sequentially in a hierarchy. A taxpayer must annually exercise due diligence in attempting to apply the primary sourcing rule of the customer’s primary use location, as described in subdivision (c) of this section. It may abandon such primary sourcing rule only if, after exercising due diligence, it lacks sufficient information to apply that rule, in which case it must use the location where the digital product or service is received by the customer, as described in subdivision (d) of this section.
(iii) If, after exercising due diligence, a taxpayer cannot apply the sourcing rules in subdivisions (c) and (d) of this section, it must then use the sourcing rules in subdivision (e) of this section based on the sourcing of receipts for the preceding taxable year. Lastly, if the taxpayer cannot apply the rules in subdivisions (c), (d), or (e) of this section after exercising due diligence, it must then use the rules in subdivision (f) based on the sourcing of receipts for the current year.

(iv) Taxpayers should refer to the special rules as outlined in paragraph (1) of subdivision (c) prior to determining if a transaction qualifies as an intermediary transaction. Unless a special rule applies, for intermediary transactions, a taxpayer should refer to the rules in subdivision (g) prior to applying the hierarchy.

(v) A taxpayer’s method of apportioning its receipts, including the use of a method of reasonable approximation where applicable, must reflect an attempt to comply with the regulatory standards set forth herein rather than an attempt to minimize the taxpayer’s tax liability.

(2) In exercising due diligence, the following standards apply:

(i) A taxpayer’s application of the regulatory standards set forth in this section must be based on objective criteria and should consider all sources of information reasonably available to the taxpayer at the time of filing its original tax return including, without limitation, the taxpayer’s books and records, including its contracts or agreements with its customers, kept in the ordinary course of business. Taxpayers may, in good faith, rely on information provided by their customers.
(ii) A taxpayer’s method of sourcing its receipts must be determined in good faith, applied in good faith, and applied consistently with respect to similar transactions.

(iii) A taxpayer must retain records that explain the determination and application of its method of sourcing its receipts used in completing the return, including its underlying assumptions, and must provide such records to the Commissioner upon request.

(iv) A taxpayer must update its existing systems of recording transactions or the current format of its books and records to capture the information required by these rules. It is not sufficient to rely on the fact that existing systems do not adequately capture the required information.

(v) If information is not readily available for the special rules or the general rule in paragraphs (1) and (2) of subdivision (c), taxpayers must make reasonable inquiries to a business customer to determine the information required by these rules. If the taxpayer has more than 250 business customers purchasing substantially similar digital products or digital services that would be sourced under this section and no more than 5 percent of receipts from such digital products or digital services are from that particular customer, then inquiries are not required for that customer (“inquiries safe harbor”).

(vi) Taxpayers must document the steps taken before abandoning each level of the hierarchy or step within a level of the hierarchy, such as moving from a special rule to the general rule in subdivision (c), including documentation of reasonable inquiries made.
(vii) When the Commissioner determines that the taxpayer had access to, or could have obtained upon reasonable inquiries when required, information at the time it filed its original return to apply a method of apportionment that comes earlier in the hierarchy than the method utilized by the taxpayer, the Commissioner may require the taxpayer to use such method.

(3) At any point in the hierarchy where there is a presumption, the presumption may be overcome by either the taxpayer or the Department.

(i) The presumption may be overcome by the taxpayer if the taxpayer can prove, by clear and convincing evidence, that the method it proposes to use better reflects the location where the customer derives value from the digital product or digital service. In such a case, the location to which the receipts from the digital product or digital service will be sourced will be based on the evidence accumulated by the taxpayer. If the taxpayer believes it has overcome the presumption and uses an alternative method, upon audit the Department may examine the taxpayer’s alternative method to determine if the presumption has been overcome and, if so, whether it was applied in a consistent manner for similar transactions.

(ii) The presumption may be overcome by the Department if the Department can prove, by clear and convincing evidence, that the method it proposes to use better reflects the location where the customer derives value from the digital product or digital service, and that the taxpayer had access to, or could have obtained upon reasonable inquiries when required, information at the time it filed its original return that could have been used to apply the Department’s method.
(4) Sourcing of commingled receipts.

(i) When a sale is comprised of both a digital product and a digital service, both of which are sourced under this section, the receipt cannot be divided into separate components for purposes of the application of the rules in this section, and is considered to be one receipt regardless of whether the components are separately stated for billing purposes.

(ii) When a sale, rental, license to use, or granting of remote access includes both a digital product and/or digital service that would otherwise be sourced under these rules and tangible personal property commingled into one receipt, the entire receipt must be sourced as tangible personal property or rentals and royalties under the rules for Tax Law section 210-A(2)(a) and section 4-2.## of this Subpart, or Tax Law section 210-A(3) and section 4-2.## of this Subpart, as applicable. This rule does not apply to the sale, rental, license to use, or granting of remote access to a digital product and/or digital service when the tangible personal property is incidental to the digital product and/or digital service; such receipts must be sourced under these rules instead of Tax Law section 210-A(2)(a) and section 4-2.1 of this Subpart, or Tax Law section 210-A(3) and section 4-2.## of this Subpart, as applicable.

(iii) When a sale, rental, license to use, or granting of remote access includes both a digital product and/or digital service that would otherwise be sourced under these rules and a service or other business activity sourced under the rules for Tax Law section 210-A(10) commingled into one receipt, the entire receipt must be sourced as a service or other business activity under the rules for Tax Law section
210-A(10) and section 4-2.18 of this Subpart. This rule does not apply to the sale, rental, license to use, or granting of remote access to a digital product and/or digital service when the service or other business activity is incidental to the digital product and/or digital service; such receipts must be sourced under these rules instead of the rules for Tax Law section 210-A(10) and section 4-2.18 of this Subpart.

(iv) The rules for commingled receipts provided for in subparagraphs (ii) and (iii) of this paragraph do not apply if each component of the transaction is separately stated and the total receipt is reasonably allocated between the components.

(b) General Definitions. For purposes of this section, the following terms shall have the meanings indicated below.

(1) Billing address means the location indicated in the books and records of the taxpayer as the primary address with respect to a customer’s account.

(2) Location where a contract is managed by the customer means the primary location at which an employee or other representative of a customer serves as the person with responsibility for monitoring or managing the contract of sale, rental, license to use, or granting of remote access with the taxpayer.

(3) Customer means the party who enters into a transaction with the taxpayer for the purchase of, rental of, license to use, or remote access to a digital product from the taxpayer. A customer can be either an individual customer or a business customer. Only a business customer may also be an intermediary. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual customer, the taxpayer must treat the customer as a business customer.
(4) Individual customer means a customer who enters into a transaction with the taxpayer for the purchase of, rental of, license to use, or remote access to a digital product or digital service for personal use, and not for a business purpose.

(5) Business customer means a customer that is not an individual customer, including, but not limited to, a sole proprietor, S corporation, limited liability company, limited partnership, limited liability partnership, general partnership, corporation, non-profit organization, trust, the U.S. Government, any foreign, state, or local government, or any agency or instrumentality of such government.

(6) Intermediary means the business customer of a taxpayer that primarily derives the value from a digital product or digital service at the location of a consumer in an intermediary transaction.

(7) Consumer means an individual or entity, other than an intermediary, whose location is where the intermediary primarily derives value from the digital product or digital service provided by the taxpayer.

(8) Intermediary transaction means a transaction in which the location where the business customer (intermediary) primarily derives value from a digital product or digital service is the location of the consumer rather than the location of the customer itself. Such a transaction is sourced using the rules in subdivision (g) of this section. Intermediary transactions do not include digital products or digital services sourced under the special rules in paragraph (1) of subdivision (c) of this section.

(i) To be considered an intermediary transaction, the digital product or digital service, pursuant to the explicit or implicit terms of a contract or other agreement
between the taxpayer and intermediary, must meet the requirements of (a), (b) or (c):

(a) provided by the taxpayer, at the direction of the intermediary, directly to the location of the consumer;

(b) sold by the taxpayer to the intermediary, who then passes on the digital product or digital service to the location of the consumer and either:

(1) the taxpayer actively maintains or interacts with the digital product or digital service after the consumer receives it from the intermediary; or

(2) the taxpayer must be obligated to perform a substantial portion of the digital service after the digital product or other property that the service relates to is delivered by the intermediary to the location of the consumer;

(c) made readily available by the taxpayer (e.g. through a website) at the request of the intermediary to be accessed by the consumer and the taxpayer actively maintains or interacts with the digital product or digital service after the consumer receives or accesses it from the intermediary.

(9) Digital product means any property of whatever nature delivered through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media, or any combination thereof. Digital product includes, but is not limited to, an audio work, audiovisual work, visual work, electronic book or literary work, graphic work, electronic database, game, information or entertainment service, website, or digital application delivered via the means articulated in the preceding sentence or storage of
digital products. In addition, digital product includes computer software by whatever means delivered, including physical media. The term “delivered to” includes furnished, provided, or given access to.

A digital product does not include property listed in the second sentence of this paragraph delivered via any means other than those listed in the first sentence of this paragraph. Receipts from such products may be apportioned under Tax Law section 210-A(2) and section 4-2.## of this Subpart or under Tax Law section 210-A(3)(a) and section 4-2.## of this Subpart as appropriate.

A digital product does not include property listed in the second sentence of this paragraph, regardless of means delivered, if the property is incidental to the sale of a license to distribute, broadcast, or right to sublicense the work to third parties for other than personal use. Such receipt will be sourced as royalties under the rules in Tax Law section 210-A(3)(b) and 4-2.## of this Subpart.

(10) Digital Service means a service, not otherwise addressed in Tax Law sections 210-A(1) – (3) or (5) – (9):

(i) directly related to the creation, testing, modification, enhancement, and maintenance of a digital product, regardless of the means of transmission or level of human interaction; or

(ii) that has been fully automated, uses one or more software applications in providing the service, and is delivered via the means listed in the first sentence of the definition of digital product in paragraph (9) of this subdivision. However, this does not include services where the service provider:
(a) includes an element of human interaction as part of the service, unless incidental; or

(b) offers alternative services or optional features that include human interaction and provide similar functionality to the automated service.

(c) Primary Use Location. A taxpayer must include a receipt in New York receipts when the digital product or digital service is primarily used by the taxpayer’s customer in New York.

(1) Special rules. Certain types of receipts are sourced using the rules in this paragraph. When applying the special rules in this paragraph, the specific criteria to apply the special rules will be met regardless of whether the digital product or digital service is provided directly by the taxpayer or on behalf of the taxpayer. Commissions and other receipts from the facilitation of services or other transactions are addressed in the special rules. All other receipts from digital products and digital services must be sourced using the general rule in paragraph (2) of this subdivision. If a taxpayer meets the specific criteria to apply a special rule, but does not have sufficient information to apply the rule, the taxpayer should use the rules for reasonable approximation, as provided for in paragraph (3) of this subdivision, to apply the special rule or, if the taxpayer does not have sufficient information to apply the rules for reasonable approximation to the special rule, the taxpayer must use the general rule in paragraph (2) of this subdivision.

(i) Facilitation of in-person services. Services rendered to the body of an individual or in the physical presence of an individual and, based on the nature of the service, requires the physical presence of an individual, are considered in-person services. Digital facilitation of the provision of in-person services are apportioned under the rules in this subparagraph.
(a) Digital facilitation of the provision of in-person services includes, but is not limited to: ride-sharing, facilitating ticket sales for live entertainment and athletic performances; scheduling of in-person training or lessons.

(b) The primary use location of the facilitation of in-person services is presumed to be the location where the in-person service is performed.

(c) In-person services do not include:

   (1) services that do not require significant in-person contact in order to perform, but nevertheless may include in-person contact, including, but not limited to, legal, accounting, financial and consulting services; and

   (2) the obligation to perform services or fund the performance of services that may or may not actually occur at an undetermined future date (e.g. facilitation of the purchase of insurance) is not an in-person service, although significant in-person contact may ultimately occur when the service is actually performed.

(ii) Services related to tangible personal property. Digital services that include services related to tangible personal property are sourced under the rules in this subparagraph. This includes commissions and other receipts related to the facilitation of services related to tangible personal property. Facilitation of in-person services related to tangible personal property are apportioned under the rules in this subparagraph, rather than the rules in subparagraph (i) of this paragraph.
(a) Digital services related to tangible personal property include, but are not limited to: computer troubleshooting, software installation, and facilitation of the sale of tangible personal property.

(b) The primary use location of services related to tangible personal property is presumed to be at the location where the property is received after the service is performed.

(c) The obligation to perform services or fund the performance of services that may or may not actually occur at an undetermined future date (e.g. warranty services, facilitation of the purchase of insurance) is not service related to tangible personal property, although a service may ultimately be performed on tangible personal property.

(iii) Services related to real property. Digital services related to real property, including commissions and other receipts related to the facilitation of such services, are apportioned under the rules in this subparagraph. Digital services related to real property include services that relate to the improvement or maintenance of the property and services that relate to the title, purchase, sale, rental, appraisal, assessment or basis in the property. Facilitation of in-person services related to real property are apportioned under the rules in this subparagraph, rather than the rules in subparagraph (i) of this paragraph.

(a) Digital services related to real property include, but are not limited to: security services, mortgage servicing, title searches and facilitating property or room rentals.
(b) The primary use location of the digital service related to real property is presumed to be where the real property is located.

(iv) Sales of computer software at retail locations.

(a) Receipts from the sale of prewritten, non-customized computer software sold:

(1) at a physical retail location that sells more than one type of digital product and/or a combination of digital products and other products; and

(2) the customer is physically present at the physical retail location at the time they take possession of the software or right to download such software.

(b) With respect to receipts from software sold under the conditions of the special rule described in clause (a) of this subparagraph, the receipt is apportioned to the physical retail location where the software is sold.

(2) General rule. Unless the taxpayer meets the specific criteria and has sufficient information necessary to apply the special rules set forth in paragraph (1) of this subdivision, determining the primary use location depends on whether the customer is an individual customer or a business customer.

(i) Individual customer. In the case where the taxpayer’s customer is an individual, the primary use location is presumed to be at the customer’s billing address. If the taxpayer does not have the customer’s billing address, it must use reasonable approximation, as described in paragraph (3) of this subdivision.
(ii) Business customer. In the case where the taxpayer’s customer is a business, the primary use location is presumed to be in New York to the extent the taxpayer’s books and records kept in the ordinary course of business, without regard to the billing address of the taxpayer’s customer, indicate that the customer’s use of the digital product or digital service is in New York. The digital product or digital service is primarily used at the location of a third party (i.e. the consumer) only in the case of an intermediary transaction. If the taxpayer does not have adequate information to determine where the digital product or digital service is primarily used by the customer, the taxpayer must use reasonable approximation, as described in paragraph (3) of this subdivision.

(iii) Primary use both within and without New York. Where the primary use location is in New York and at least one other location, the taxpayer should source the receipts based on the percentage of use by the customer in each primary use location.

(3) Reasonable approximation based on customer information. Where a taxpayer’s books and records kept in the ordinary course of business and reasonable inquiries to the customer when required do not provide adequate information for apportionment of a receipt from a digital product or digital service, then reasonable approximation must be used to apportion the receipt.

(i) Definition. Reasonable approximation based on customer information is an alternative method used to determine the location or locations at which a customer primarily uses a digital product or digital service in instances in which:
(a) the location or locations where the digital product or digital service is primarily used and/or the percentage of use attributable to each location as a share of the total use cannot be determined, or

(2) obtaining the primary use location or locations and/or the percentage of use attributable to each location as a share of the total use would require the taxpayer to expend undue effort and expense beyond the standard amount of due diligence as required by this section; and

(b) the taxpayer has sufficient information to reasonably approximate the primary use location or locations and/or the percentage of use attributable to each location as a share of the total use.

(ii) Application of reasonable approximation based on customer information.

(a) A taxpayer must use all available information in its books and records, including information obtained upon reasonable inquiries where required, and information publicly available about the location or locations where its actual customers primarily use the digital product or service.

(b) When a taxpayer is required under this subparagraph to reasonably approximate, the taxpayer must use a method that is intended to approximate where the customer primarily uses the digital product or digital service.

(c) Sourced receipts method. In any instance where a taxpayer can ascertain the location or locations where a substantial portion of similar receipts are sourced ("sourced receipts"), but not all of such receipts, and
the taxpayer reasonably believes, based on all available information, that the geographic distribution of the remainder of such receipts is substantially similar to that of the sourced receipts, it may source such receipts in the same proportion as its sourced receipts (sourced receipts method). If the taxpayer reasonably believes, based on all available information, that the geographic distribution of the remainder of such receipts is different from that of the sourced receipts, and otherwise lacks sufficient information to use reasonable approximation, it must source such receipts under paragraph (4) of this subdivision.

(d) In any case in which a taxpayer uses a method of approximation to apportion its receipts and the Commissioner determines that the method of approximation employed by the taxpayer is not reasonable, the Commissioner may substitute a method of approximation that the Commissioner determines is appropriate.

(e) In any case in which the Commissioner determines that a taxpayer’s method of approximation is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the Commissioner may require that the taxpayer apply its method of approximation in a consistent manner.

(f) In any case in which, after reasonable inquiries are made when required, the taxpayer does not have sufficient information based on its actual customers to use reasonable approximation, the taxpayer must source such receipts under paragraph (4) of this subdivision.
(4) Reasonable approximation based on general information. Where, after meeting the
requirements of due diligence, a taxpayer lacks sufficient information to use the rules in
paragraphs (1) through (3) of this subdivision, as applicable, to apportion its receipts, the
taxpayer must use reasonable approximation based on general information.

(i) Definition. Reasonable approximation based on general information is an
alternative method used to determine the location at which a customer primarily
uses the digital product or digital service in instances in which the general
population or a subset of the general population reasonably reflects the
geographic distribution of the customer’s primary use location.

(ii) Application of reasonable approximation based on general information.

(a) A taxpayer must use statistical information based on the general
population or a subset of the population (such as a specific demographic)
of the entire country or a region of the country that reasonably
approximates the population of customers who primarily use the digital
product or digital service.

(b) When a taxpayer is required under this subparagraph to reasonably
approximate based on general population or a subset of population, the
taxpayer must use a method that is intended to approximate where the
customer derives value from the digital product or digital service.

(c) In any case in which the Commissioner determines that the taxpayer’s
method of approximation is not reasonable, the Commissioner may
substitute the use of a method that the Commissioner determines is
appropriate.
In any case in which the Commissioner determines that the taxpayer’s method of approximation is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the Commissioner must require that the taxpayer apply its method of approximation in a consistent manner.

In any case in which the taxpayer does not have sufficient information to reasonably approximate based on general information, the taxpayer must instead source its receipts under the next level of the hierarchy, where the digital product or digital service is received, as described in subdivision (d) of this section.

Examples of where the digital product or digital service is primarily used. For purposes of these examples it can be assumed that the taxpayer has met all the requirements of due diligence unless otherwise provided.

Example 1: Book Corp sells electronic books and physical books through its website. When an individual customer purchases only an electronic book, it is available for immediate download by the customer. When an individual customer purchases only a physical book, the book is shipped to the customer. Customers may also purchase a bundle of both an electronic and physical book, the price of which includes a discounted price of the electronic and physical book but the breakdown is not separately stated. For bundled purchases, the electronic book is available for immediate download by the customer and the physical book is shipped from Book Corp to the customer.

Customer A, with a New York billing address, purchases an electronic book from Book Corp and downloads it onto his e-reader. Purchases of electronic books from Book Corp
are considered digital products that are sourced under these rules. Therefore, Book Corp includes the receipt from the electronic book purchase in New York receipts because this purchase was made by an individual customer with a billing address located in New York. Book Corp includes the receipt from Customer A in everywhere receipts.

Customer B, with a New York billing address, purchases a bundled purchase of an electronic and a physical book commingled into one receipt. Bundled purchases of electronic and physical books commingled into one receipt are sourced as tangible personal property under the rules for section Tax Law 210-A(2)(a) and section 4-2.## of this Subpart.

Example 2: Software Corp sells tax preparation software to individuals through its website. When individual customers purchase the software, Software Corp provides the software on a disk shipped to the customer’s address. Customer A purchases the software and has it shipped to her billing address in New York. Software Corp ships a box to Customer A that contains the software on a disk and a user manual explaining how the software works and troubleshooting tips. Computer software by whatever means delivered is considered to be a digital product and therefore receipts from the software are sourced under these rules. Because the product is purchased online, it does not qualify for the retail location exception. Although the sale of the software to Customer A includes the user manual, which is tangible personal property, the user manual is incidental to the actual sale of the software, and therefore the entire receipt is sourced as a digital product. It is presumed that Customer A primarily uses the software at his or her billing address which is located within New York. Software Corp includes the receipt in New York receipts and everywhere receipts.
Example 3: Develop Corp, a software development corporation located in State A, enters into a contract with a business customer, Purchaser Corp, which is physically located in both New York and State A, to develop custom software to be licensed to Purchaser Corp’s business. Develop Corp delivers the software electronically from its office in State A to Purchaser Corp. Purchase Corp will primarily use the software at the location where its employees utilize the software. Develop Corp’s books and records indicate that Develop Corp is providing Purchaser Corp 100 licenses to use the software at Purchaser Corp’s New York location and 300 licenses to use the software at Purchaser Corp’s State A location. As a result, twenty five percent of the receipt (100/400) is included in New York receipts. One hundred percent of such receipt is included in everywhere receipts.

Example 4: Movie Corp sells movies for personal use to individual customers that may either be downloaded from the internet or received via DVD, a physical medium. Customer A purchases a digital download for a movie and pays with his credit card that has a billing address in State A. Movie Corp’s receipt from Customer A’s download is a receipt from a digital product and the digital product is presumed to be primarily used at Customer A’s billing address in State A. Therefore, the receipt from this sale is not included in New York receipts. The receipt from this sale is included in everywhere receipts. Customer B purchases a DVD and requests it be shipped to an address in New York. A DVD is not one of the methods specifically provided for in Tax Law section 210-A(4) and paragraph (9) of subdivision (b) of this section, so it is not considered a digital product. Therefore, Video Corp’s receipt from Customer B is a receipt from the sale of
tangible personal property and, as such, should be sourced pursuant to the rules for Tax Law section 210-A(2)(a) and section 4-2.## of this Subpart.

Example 5: Cable TV Corp, a corporation that is located outside of New York, sells monthly subscriptions for cable television to individual customers in New York and other states. Cable TV Corp provides cable television through cables that are installed at the location of each customer’s television that will be receiving content. Cable TV Corp also has a billing address on file for each of its customers. While most of Cable TV Corp’s customers have cable installed at their billing address, a number of Cable TV Corp’s customers have cable installed at an address other than their billing address. The cable television subscription sold by Cable TV Corp is a digital product. The presumption is that a digital product is primarily used at an individual customer’s billing address. However, either Cable TV Corp or the Commissioner can overcome this presumption through clear and convincing evidence as to where the cable is installed, which better reflects where the digital product is primarily used.

Example 6: Security Corp sells cyber security software to 1,000 business customers, including a federal agency XYZ. XYZ has its headquarters located in Washington D.C., and 12 regional offices relatively similar in size located in 12 different states, one of which is New York. Security Corp generally conducts business with a person at XYZ’s headquarters, but Security Corp provides cyber security software to XYZ’s entire network, which is utilized by XYZ employees at all of the 13 locations. The books and records of Security Corp do not specify more detailed information, such as the number of computers or the distribution of licenses among the locations. Since Security Corp has over 250 business customers and not more than five percent of its receipts are from XYZ,
it is not required to make reasonable inquiries to determine where the digital product is primarily used. Security Corp chooses to exercise the inquiry safe harbor and uses reasonable approximation based on customer information to include 1/13 of the receipts from its cyber security software in New York receipts. One hundred percent of such receipts are included in everywhere receipts.

Example 7: Office Corp, an office supply retailer, has a physical store located in New York. Office Corp sells a variety of office supplies, including a multitude of prewritten computer software programs. When customers purchase items from Office Corp, they take possession of the purchased items immediately at the retail location. In the case of software purchases, customers can either purchase the software on a disk or can purchase a code to download the computer software at a later time. Office Corp’s sale of prewritten software qualifies for the special rule for sales of computer software at retail locations. Therefore, Office Corp includes the receipts from the sale of the software in New York receipts to the extent the location of the retail store is in New York. Office Corp includes one hundred percent of such receipts in everywhere receipts.

Example 8: Music Corp provides music streaming services to individual customers for a small monthly subscription fee. Customers can access Music Corp’s service through an application on their mobile devices or by visiting Music Corp’s website. Once in their account, individuals can listen to music on a variety of channels and indicate whether they like certain songs. Music Corp uses an algorithm to recommend songs to customers based on songs they have previously indicated that they like. As this service is entirely automated it meets the definition of a digital service and therefore is sourced under these rules. Music Corp uses the billing addresses of its customers to include receipts in New
York receipts to the extent that customers have billing addresses located in New York. Music Corp must include one hundred percent of its receipts from customers in everywhere receipts.

Example 9: Webapp located in State A sells subscription plans to its web-based video/voice conferencing service. This service allows its customers to hold meetings remotely using video and voice transmitted through a web browser. Meetings can be joined by attendees in multiple locations. When a customer purchases a subscription to Webapp’s service, the customer may log into its online account to use the service at any location where it can access a web browser. Customers can also use this service to conduct meetings with parties who are not subscribers simply by sending the attendee an invitation to the meeting; this can be done from any location as no specialized software is required. Webapp’s service is provided entirely online, without any human intervention by Webapp. Therefore, it is considered a digital service.

Development Studio subscribes to Webapp’s digital service and uses WebApp’s service to hold numerous meetings with its customers and employees that access the service throughout the country.

Webapp’s books and records indicate that Development Studio’s subscription for Webapp’s digital service is used by employees of Development Studio’s New York office. Webapp includes one hundred percent of this receipt in New York receipts and in everywhere receipts.

Example 10: Website Corp designs custom software and Web applications for use by various businesses. Travel Corp, located in State A, operates hotels in New York and other states and rents rooms to its customers. Travel Corp wants to make the ability to
book a room accessible to its customers via the internet, so Travel Corp contracts with Website Corp to design a custom website using Travel Corp’s name and methodology, which will allow Travel Corp’s customers to book hotel rooms online for a fee. Under the contract, Travel Corp will pay Website Corp a flat annual fee to maintain and host the website. Website Corp is providing a digital service related to the facilitation of a room rental which is a digital service related to real property. As Website Corp receives a flat annual fee it must use reasonable approximation based on customer information to apportion the receipt to the various real property locations. Therefore, Website Corp multiples the receipt it receives from Travel Corp by a fraction, the numerator of which is the number of rooms rented in New York via the website and the denominator of which is the number of rooms rented everywhere via the website. One hundred percent of such receipt is included in everywhere receipts.

Example 11: Room Corp operates a website that acts as a digital marketplace to facilitate the short-term rental of apartments and houses between individual homeowners and individuals looking for short-term rentals. Individual homeowners are able to list their homes on Room Corp’s website and will pay Room Corp a small commission if someone books their property via Room Corp’s website. In return Room Corp provides a variety of services to the homeowners automatically via their website such as payment processing, liability insurance, and ID verification of renters. The digital service Room Corp is providing is related to the facilitation of a real property rental which is a digital service related to real property. Therefore, Room Corp must include the receipts from facilitating real property rentals in New York receipts to the extent the real property is
located in New York. One hundred percent of receipts are included in everywhere receipts.

Example 12: Ticket Corp operates a website that allows individuals to purchase tickets to various live events. Sports Corp enters into a contract with Ticket Corp to list tickets for its sporting events on Ticket Corp’s website and Ticket Corp retains a small commission for every ticket that is purchased through its website. Ticket Corp’s fully automated website is providing the digital service of facilitating the purchase of an in-person service because the ticket sales are for a live sporting event that meets the definition of in-person service. Therefore, Ticket Corp should source its receipts from the commissions it receives for facilitating in-person services to the location of the venue hosting the event.

Example 13: Game Co, an online gaming company based in New York, sells monthly subscriptions to individual customers. The majority of Game Co’s customers do not pay with a credit card. They instead use an online payment transfer service to pay their monthly subscription fee, and therefore do not provide Game Co with a billing address. To subscribe, individuals need to only provide a first name, screen name, password, and online payment information. As such, Game Co does not have enough information to determine the primary use location and, because Game Co’s customers are individuals, Game Co does not need to make reasonable inquiries as to individuals’ billing addresses. Although Game Co does not have address information for most of its subscribers, it can use IP address information to determine where the individual customers log into the website. Therefore, Game Co can use this information to reasonably approximate based on customer information the primary use location of its game and must include receipts from subscribers logging into its game from IP addresses located within New York in
New York receipts. Game Co includes 100% of such receipts in everywhere receipts.

Example 14: Marketplace Corp (the taxpayer) hosts a website that facilitates the sale of various items of tangible personal property by unrelated individuals. Marketplace Corp does not take title to any of the tangible property posted on its website. Item sellers can create accounts on Marketplace Corp’s website and list items for sale. Individual buyers can visit Marketplace Corp’s website to view pages containing items that item sellers are offering for sale. Marketplace Corp makes these pages readily available for consumer access at the request of the item sellers. Marketplace Corp receives two primary revenue streams from the item sellers: (1) a small fee for listing a new item on Marketplace Corp’s website, regardless of whether it sells; and (2) a small commission for every sale made via Marketplace Corp’s website. Both revenue streams are services related to tangible personal property and, therefore, the special rule applies. Marketplace Corp receives the first revenue stream directly from the item seller when the item seller lists the item on Marketplace Corp’s website. In fact, Marketplace Corp receives this receipt regardless of whether the item is sold or the seller removes it from the website without a sale. Therefore, although it is a service related to tangible personal property, Marketplace Corp does not have information on where the tangible personal property is received by a buyer because it has not yet been, and may never be sold. Furthermore, the service Marketplace Corp provided to generate this receipt is complete at the time the item is listed and there is not yet a consumer in the transaction so this receipt is not generated in an intermediary transaction. Receipts from listing fees are included in New York receipts using the general rule based on the primary use location of
the item seller. Marketplace Corp includes all receipts from listing fees generated via its website in everywhere receipts.

In contrast, Marketplace Corp is receiving the second revenue stream from item sellers at the time the tangible personal property is sold and, as such, Marketplace Corp has information on where the tangible personal property will be delivered to the consumer. Marketplace Corp includes receipts from its second revenue stream for commissions in New York receipts to the extent the commission was received for facilitating the sale of tangible personal property delivered into New York. Marketplace Corp includes all receipts from commissions received via its website in everywhere receipts.

(d) Where the Digital Product or Digital Service is Received.

(1) When a taxpayer, after exercising due diligence, cannot determine or reasonably approximate the business customer’s primary use location for a digital product or digital service, it should include the receipt in New York receipts when the digital product or digital service is received by the customer within New York.

(2) The location where the digital product or digital service is received is presumed to be the location at which the contract of sale is managed by the customer. If the taxpayer cannot determine the location where the contract of sale is managed by the customer, then the location where the digital product is received is presumed to be the billing address of the customer. If, after applying due diligence, the taxpayer does not have adequate information to determine where the digital product or digital service is received, the taxpayer must apply the next level of the hierarchy, based on the sourcing of receipts for the preceding taxable year, as described in subdivision (e) of this section.
(3) Examples of where the digital product is received. For purposes of this example it can be assumed that the taxpayer has met all the requirements of due diligence unless otherwise provided.

Example 15: Software Corp sells case management software to 200 large corporations. Business Corp purchases software from Software Corp to be installed on laptops used by Business Corp’s employees. The contract between Business Corp and Software Corp is managed at Business Corp’s office in State A, but Business Corp’s employees spend the majority of their time working throughout the country, including in New York. Software Corp’s books and records do not provide any information on the amount of time that Business Corp’s employees spend working in other states to determine where the software is primarily used. Software Corp does not qualify for the inquiry safe harbor because it has only 200 customers, so it must ask Business Corp where its employees utilize the software. Business Corp is not able to provide such information, nor would population information be relevant to software used by Business Corp’s employees in internal operations. Therefore, Software Corp does not have adequate information to determine the primary use locations or reasonably approximate such locations. It must source the receipt to where the digital product is received, which is presumed to be at the location where the contract is managed. Business Corp manages the contract with Software Corp at its office in State A; therefore, the receipt is not included in New York receipts. One hundred percent of the receipt is included in everywhere receipts.

(e) Receipts for the Preceding Taxable Year.

(1) When a taxpayer, after exercising due diligence, cannot determine the amount to include in New York receipts using the methods in subdivision (c) or (d) of this section, it
should source its receipts from that digital product or digital service to New York based on the sourcing of receipts from the sales of that type of digital product or digital service for the preceding taxable year. The amount included in New York receipts for the current taxable year is determined by multiplying such receipts by a fraction, the numerator of which is the amount included in New York receipts from the sales of that type of digital product or digital service in the preceding taxable year and the denominator of which is the amount included in everywhere receipts from all such sales of that type of digital product or digital service in the preceding taxable year. This level of the hierarchy cannot apply in a taxpayer’s first taxable year beginning on or after January 1, 2015. In such tax year, a taxpayer must reject this method and move directly to the next level of the hierarchy, as described in subdivision (f).

(2) Example of receipts for the preceding taxable year. For purposes of this example it can be assumed that the taxpayer has met all the requirements of due diligence unless otherwise provided.

Example 16: Sales Corp provides only one type of digital product to approximately 200 business customers. In tax year 2017, all of its receipts were sourced using the rules in subdivision (c) of this section, and, as a result 45 percent of Sales Corp’s receipts were included in New York receipts. In tax year 2018, Sales Corp continues to provide only one type of digital product to its customers. At the end of tax year 2018, Sales Corp’s computer system crashes and it is unable to recover information it had obtained on where the digital product was primarily used. Upon reasonable inquiries to its known customers, Sales Corp still cannot obtain information on where the digital products were primarily used or determine where they were received. Therefore, Sales Corp includes
45 percent of its 2018 receipts in its 2018 New York receipts. One hundred percent of receipts from this type of digital product are included in everywhere receipts.

(f) Receipts for Current Taxable Year.

(1) When a taxpayer, after exercising due diligence, cannot determine the amount to include in New York receipts using methods in subdivision (c), (d), or (e) of this section, it must source the receipt from that digital product or digital service to New York based on the sourcing of all those current taxable year receipts for all other digital products and digital services that can be sourced using the methods in subdivisions (c) and (d) of this section. The amount included in New York receipts for the current taxable year is determined by multiplying such receipts by a fraction, the numerator of which is the amount included in New York receipts from all digital products and digital services that can be sourced using the methods in subdivisions (c) and (d) of this section for the current taxable year and the denominator of which is the amount included in everywhere receipts from digital products and digital services sourced using the methods in subdivisions (c) and (d) for the current taxable year.

(2) Example of receipts for the current taxable year. For purposes of this example it can be assumed that the taxpayer has met all the requirements of due diligence unless otherwise provided.

Example 17: Taxpayer A has $10,000 in receipts from a new type of digital product. After exercising due diligence, Taxpayer A cannot determine where the digital product is primarily used or where it was received. Therefore, Taxpayer A must determine the portion of the $10,000 to include in New York receipts based on the receipts for digital products and digital services sourced under subdivisions (c) and (d) of this section in the
current tax year. In the current tax year, Taxpayer A has $65,000 in digital products receipts and $85,000 in digital services receipts sourced under the methods outlined in subdivisions (c) and (d) of this section, of which $75,000 (or 50 percent) are New York receipts. Therefore, Taxpayer A includes 50 percent of the $10,000, or $5,000, of receipts from the new type of digital product in New York receipts. One hundred percent of receipts from the new type of digital product are included in everywhere receipts.

(g) Rules for intermediary transactions.

(1) In the case of intermediary transactions, the location where the receipt is sourced is determined using the hierarchy of methods described in subdivisions (c) and (d) of this section based on the location of the consumers, rather than the intermediary. If the taxpayer uses reasonable approximation based on the sourced receipts method to source its receipts from an intermediary transaction, it may apply that method only taking transactions with that particular intermediary into consideration.

(2) The taxpayer is required to make inquiries to the intermediary, but not to the consumers, regardless of the number of business customers the taxpayer has or the percentage of receipts from any one customer, in order to determine the amount of receipts to source using methods described in subdivisions (c) and (d) of this section. Such inquiries may be fulfilled by the intermediary providing information from its books and records to the taxpayer that demonstrates the relevant information.

(3) If, after exercising due diligence, the taxpayer has inadequate information to apply the hierarchy of rules described in subdivisions (c) and (d) of this section with reference to the location of the consumers, the taxpayer should apply the hierarchy of rules described in subdivisions (c) and (d) of this section based on the intermediary. If after exercising
due diligence, the taxpayer has inadequate information to apply the hierarchy of rules described in subdivisions (c) and (d) of this section with reference to either the consumers or the intermediary, the taxpayer must then apply the hierarchy of rules described in subdivisions (e) and (f).

(4) Examples of intermediary transactions. For purposes of these examples it can be assumed that the taxpayer has met all the requirements of due diligence unless otherwise provided.

Example 18: App Design Corp (the taxpayer), a corporation located in State B, provides mobile phone application (“app”) design services to its customer, Bank Corp (the intermediary), which has branches located in New York and other states. Bank Corp contracts with App Design Corp to have App Design Corp design an app that will be readily available for free download by any of Bank Corp’s account holders (the consumers). App Design Corp will also provide periodic updates to ensure the app runs smoothly and the information transmitted through the app is secure. App Design Corp is receiving receipts from Bank Corp in an intermediary transaction because App Design Corp is making its digital product readily available to consumers at the request of Bank Corp, and App Design Corp maintains involvement with the app after consumers download it. Bank Corp primarily uses the digital service at the location where the consumers download and use the app.

App Design Corp cannot determine information on New York account holders who download the app based on its own books and records because it does not have information on either the primary use location or where the app is received by the consumers, and therefore App Design Corp must make reasonable inquiries to Bank Corp
for location statistics on account holders who download the app. Bank Corp cannot provide App Design Corp with any information after reasonable inquiries, so App Design Corp should look to publicly available information, such as the number of Bank Corp’s bank branches located within and without New York and use the percentage of branches in New York to reasonably approximate based on customer information the primary use location of the app.

Example 19: Website Design Corp (the taxpayer) designs and maintains websites for unrelated parties. Database Corp (the intermediary) develops an internet-based information database and enters into a contract with Website Design Corp to create a website and sell access to the database to customers (the consumers) for a small monthly fee. The contract specifies that Website Design Corp will retain a commission each month from every consumer that pays for access to the database and remit the remainder to Database Corp. Website Design Corp actively maintains and updates the website where it makes the database readily available on the internet for access by consumers at the request of Database Corp. Therefore, Website Design Corp must source its receipts from commissions based on the location of the consumers rather than the location of Database Corp. Website Design Corp uses the billing addresses of the consumers to include receipts in New York receipts to the extent that consumers have billing addresses located in New York. Website Design Corp must include one hundred percent of its receipts in everywhere receipts.

(5) Examples of transactions that are not intermediary transactions. For purposes of these examples it can be assumed that the taxpayer has met all the requirements of due diligence unless otherwise provided.
Example 20: Research Corp, a corporation located in State D, compiles a digital collection of treatises on a variety of subjects and sells a copy of its collection to University A, located in New York. However, Research Corp does not provide continuing support after the sale and, if Research Corp were to update any information, it would sell this as a separate product. Therefore, after Research Corp delivers the copy of the digital collection to University A, it maintains no interaction with the product and provides no further services in connection with the receipt. For this reason, this is not considered an intermediary transaction. Research Corp will source the receipt based on the primary use location of the copy of the digital collection by University A. Research Corp’s books and records indicate that University A will use the digital collection at its location in New York; therefore, the entire receipt is included in both New York receipts and everywhere receipts.

Example 21: Images Corp, a corporation located in State E, maintains an online database of digital images that it licenses to customers to use in a variety of publications. Receipts from the license to use the digital database are sourced under these rules. Newspaper Corp, located in New York, enters into a contract with Images Corp whereby, in exchange for a monthly flat fee, Newspaper Corp receives a license to use an unlimited number of images from Image Corp’s online database in Newspaper Corp’s print and digital publications which will be viewed by Newspaper Corp’s subscribers worldwide. Images Corp’s database is only accessible by Newspaper Corp directly and not by its subscribers so therefore, this is not an intermediary transaction. Images Corp must source the receipt it receives from Newspaper Corp to the primary use location of Newspaper Corp. Newspaper Corp uses the images it selects from the online database
when composing articles; therefore, Newspaper Corp’s primary use location is where this
editorial control is exercised. Newspaper Corp makes editorial decisions at its office
located in New York; therefore, the entire receipt is included in both New York receipts
and everywhere receipts.

Example 22: Exchange Corp, a security exchange located in New York, has contracts
with 300 brokerage firms that grant digital access to its exchange. Under the terms of the
contract, employees of the firms are able to digitally access the exchange for purposes of
purchasing or selling shares of stock on the exchange for a fee. Exchange Corp’s
contract with Trader Corp, one such brokerage firm, allows Trader Corp’s 120 traders
based in New York and 80 traders based in State A to buy and sell shares of stock on the
exchange on behalf of clients. As Exchange Corp is not a registered securities broker or
dealer, the fees it earns from allowing customers to trade on the exchange cannot be
sourced under the rules in Tax Law section 210-A(5)(b). Furthermore, as the fee is for
granting digital access to the exchange, the receipt is sourced under the rules in this
section.

This is not an intermediary transaction because Exchange Corp is not providing access to
the exchange directly to consumers at Trader Corp’s direction. Only Trader Corp’s own
employees have digital access to the exchange, not Trader Corp’s customers. For this
reason, the receipt must be sourced to the location where Trader Corp’s traders primarily
utilize the digital product. Exchange Corp does not have adequate information to
determine the exact location where the traders primarily use this digital product and,
since Exchange Corp has more than 250 business customers that pay fees for
substantially similar digital products, and no more than 5 percent of its receipts are from
Trader Corp, Exchange Corp is not required to make reasonable inquiries to Trader Corp. Therefore, Exchange Corp must use its books and records to reasonably approximate where Trader Corp’s traders primarily use the exchange. Since 60 percent of Trader Corp’s traders are based in New York, 60 percent of the receipts Exchange Corp receives from Trader Corp are included in New York receipts. One hundred percent of the receipts are included in everywhere receipts.