118th MAINE LEGISLATURE

FIRST SPECIAL SESSION-1997

Legislative Document **No. 1819**

H.P. 1282 House of Representatives, April 17, 1997

An Act to Modernize Maine's Financial Institution Franchise Tax.

Reference to the Committee on Taxation suggested and ordered printed.

JOSEPH W. MAYO, Clerk

Presented by Representative TRIPP of Topsham. (GOVERNOR'S BILL)
Cosponsored by Representative KERR of Old Orchard Beach, Senator: RUHLIN of Penobscot.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 36 MRSA §5206, as amended by PL 1985, c. 783, §§33 and 34, is further amended to read:

§5206. Franchise tax on financial institutions

A tax is imposed for each calendar year or fiscal year ending during that calendar year upon the franchise or privilege of doing business in this State of every ~~taxable entity as defined in section 5206-B, subsection 4~~ financial institution that has Maine net income or Maine assets. The tax ~~shall be~~ is the sum of the following:

1. Franchise tax on Maine net income. One percent of the financial institution's Maine net income ~~for those taxable entities, as defined in section 5206-B, subsection 3,~~;

2. Franchise tax on Maine assets. Eight cents per $1,000 of the financial institution's Maine assets~~, for those taxable entities, as defined in section 5206-B, subsection 2,~~; and

3. Credit against tax. In each taxable year in which a financial institution sustains a book net operating loss, a credit ~~shall~~ must be allowed against the franchise tax on assets under subsection 2. The credit ~~shall~~ must be computed by multiplying the book net operating loss by the applicable franchise tax rate imposed by subsection 1. The total amount of any ~~such~~ credit allowed ~~shall~~ may not exceed the franchise tax on assets due under subsection 2. In any tax year in which there is excess credit, the excess credit ~~shall~~ must be carried forward for no more than the next 5 tax years and ~~can~~ may be applied against the tax computed under subsections 1 and 2.

Sec. 2. 36 MRSA §5206-A, as repealed and replaced by PL 1983, c. 842, §3, is repealed.

Sec. 3. 36 MRSA §5206-B, as amended by PL 1995, c. 628, §§36 and 37 and affected by §39, is repealed.

Sec. 4. 36 MRSA §§5206-D and 5206-E are enacted to read:

§5206-D. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Affiliated group. "Affiliated group" means a group of 2 or more corporations or financial institutions in which more than 50% of the voting stock of each member corporation or financial institution is directly or indirectly owned by a common owner or owners, either corporate or noncorporate, or by one or more of the member corporations or financial institutions.

2. Billing address. "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year or on a later date in the taxable year when the customer relationship began and the address where any notice, statement or bill relating to a customer's account is mailed.

3. Borrower or credit card holder located in this State. "Borrower or credit card holder located in this State" means:

A. A borrower, other than a credit card holder, that is engaged in a trade or business that maintains commercial domicile in this State; or

B. A borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this State.

4. Commercial domicile. "Commercial domicile" means the place from which trade or business is principally managed and directed.

5. Compensation. "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

6. Credit card. "Credit card" means a credit, travel or entertainment card.

7. Credit card issuer's reimbursement fee. "Credit card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card.

8. Financial institution. "Financial institution" means:

A. A financial institution authorized to do business in this State as defined in Title 9-B, section 131, subsection 17-A, including, without limitation, a trust company;

B. A bank, savings bank, industrial bank, savings and loan association or any other entity, excluding a credit union as defined in Title 9-B, section 131, subsection 12 that accepts deposits that are insured by an agency of the Federal Government;

C. A bank holding company, as defined in the federal Bank Holding Company Act of 1956, 12 United States Code, Section 1841, or a savings and loan holding company, as defined in the National Housing Act, 12 United States Code, Section 1701; or

D. A corporation more than 50% of the voting stock of which is owned, directly or indirectly, by any one or more of the organizations defined in paragraph A, B or C or by a credit union as defined in Title 9-B, section 131, subsection 12.

9. Loan. "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, or the purchase, in whole or in part, of the extension of credit from another. Loans include participations, syndications and leases treated as loans for federal income tax purposes. Loans do not include properties treated as loans under the Code, Section 595; futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest-bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC or other mortgage-backed or asset-backed security; and other similar items.

10. Loan secured by real property. "Loan secured by real property" means that 50% or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

11. Located in the State. "Located in the State":

A. In reference to a loan that is secured by real property, means that more than 50% of the fair market value of the real property is located within this State or, if more than 50% of the fair market value of the real property is not located within any one state, that the borrower is located in this State;

B. In reference to a loan that is not secured by real property, means that the borrower is located in this State;

C. In reference to a credit card receivable, means that the credit card holder is located in this State; or

D. In reference to real and tangible personal property, means that it is physically present in this State, except that transportation property is located within this State to the extent that the property is used in this State. The extent an aircraft is considered to be used in the State is determined by computing a fraction, the numerator of which is the number of landings of the aircraft in this State and the denominator of which is the total number of landings of the aircraft within and outside of the State. If the extent of the use of any transportation property within this State can not be determined, the property is considered to be used wholly in the state in which the property has its principal base of operations. A motor vehicle is considered to be used wholly in the state in which it is registered.

12. Maine assets. "Maine assets" means a financial institution's total end-of-year assets required to be reported pursuant to the laws of the United States on Internal Revenue Service Form 1120, Schedule L multiplied by the fraction obtained pursuant to section 5206-E, subsection 2.

13. Maine net income. "Maine net income" means, for any taxable year, a financial institution's net income or loss per books, as required to be reported pursuant to the laws of the United States on Internal Revenue Service Form 1120, Schedule M, Line 1 and apportioned to this State under section 5206-E.

To the extent that a financial institution derives income from a unitary business carried on by 2 or more members of an affiliated group, "Maine net income" is determined by apportioning, in accordance with section 5206-E, that part of the net income of the entire group that derives from the unitary business.

14. Merchant discount. "Merchant discount" means the fee or negotiated discount charged to a merchant by the taxpayer for privilege of participating in a program when a credit card is accepted in payment for merchandise or services sold to the card holder.

15. Participation. "Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

16. Principal base of operations. With respect to transportation property, "principal base of operations" means the place of more or less permanent nature from which the property is regulated, directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly starts the employee's work and to which the employee customarily returns in order to receive instructions from an employer, communicates with the employer's customers or other persons or performs any other functions necessary to the exercise of the employee's trade or profession.

17. Regular place of business. "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and that is continuously maintained, occupied and used by employees of the taxpayer.

18. State. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

19. Syndication. "Syndication" means an extension of credit in which 2 or more persons fund that credit and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

20. Taxpayer. "Taxpayer" means a financial institution as defined in subsection 8.

21. Transportation property. "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels and motor vehicles, as well as any equipment or containers attached to those vehicles and vessels, such as rolling stock, barges or trailers.

22. Unitary business. "Unitary business" means a business activity that is characterized by unity of ownership, functional integration, centralization of management or economies of scale.

§5206-E. Apportionment

Except as otherwise specifically provided, a financial institution that is taxable both in and outside this State shall apportion its net income as provided in this section. A financial institution is considered taxable in a state if in that state the financial institution is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax or that state has jurisdiction to subject the financial institution to a net income tax regardless of whether, in fact, the state does or does not tax the financial institution.

<u>**1. Formula applicable.** All of a financial institution's net income or loss per books, as required to be reported pursuant to the laws of the United States on Internal Revenue Service Form 1120, Schedule M, Line 1, is apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus 2 times the receipts factor and the denominator of which is 4.</u>

<u>**2. Receipts factor.** The receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this State during the taxable year and the denominator of which is the receipts of the taxpayer in and outside this State during the taxable year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor includes only those receipts described in this subsection that are included in the computation of the apportionable income base for the taxable year.</u>

<u>A. The numerator of the receipts factor includes receipts from the lease, sublease or rental of real property if the property is located in the State.</u>

<u>B. Except as described in this paragraph, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located in this State when it is first placed in service by the lessee.</u>

<u>Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is located in the State.</u>

<u>C. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans located in the State.</u>

<u>The determination of whether the real property securing a loan is located in the State must be made at the time the original agreement was made and any and all subsequent substitutions of collateral are disregarded.</u>

<u>D. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the stripped coupon rules of the Code, Section 1286.</u>

<u>The amount of net gains greater than zero from the sale of loans is determined by multiplying the net gains by a</u>

fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph C and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans.

E. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and receipts from fees charged to credit card holders, such as annual fees, if the billing address of the credit card holder is in this State.

F. The numerator of the receipts factor includes net gains greater than zero from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph E and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to credit card holders.

G. The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph E and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to credit card holders.

H. The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this State. The receipts are computed net of any credit card holder charge-backs, but are not reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its credit card holders.

I. The numerator of the receipts factor includes loan servicing fees derived from loans multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph C and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans.

In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor includes the fees if the borrower is located in this State.

J. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this section if the service is performed in this State. If the service is performed both in and outside this State and a greater proportion of the income or producing activity is performed in this State than in any other state based on cost of performance, then the numerator of the receipts factor includes receipts from services not otherwise apportioned under this section.

K. Interest, dividends, net gains greater than zero and other income from investment assets and activities and from trading assets and activities must be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options, futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to federal funds, the receipts factor includes only the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements. With respect to trading assets and securities, the receipts factor includes only the amount by which interest, dividends, gains and other income from trading assets and activities, including, but not limited to, assets and activities in the matched books, in the arbitrage book or in foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends and losses from the assets and activities.

The numerator of the receipts factor includes receipts from investment assets and activities and from trading assets and activities described in this paragraph that are attributable to this State. Receipts attributable to this State and included in the numerator are determined by multiplying all the receipts from the assets and activities by a fraction, the numerator of which is the gross income from the assets and activities that are properly assigned to a regular place of business of the taxpayer in this State and the denominator of which is the gross income from all the assets and activities.

Assets are properly assigned to a regular place of business in the State if the day-to-day decisions regarding the asset or activity occurred at a regular place of business in this State. When the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business, the asset or activity is considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, those policies and guidelines are presumed to be established at the commercial domicile of the taxpayer.

3. Property factor. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located in the State during the taxable year, the average value of the taxpayer's real and tangible personal property owned that is located in the State during the taxable year and the average value of the taxpayer's loans and credit card receivables that are located in the State during the taxable year, and the denominator of which is the average value of all such property located in and outside this State during the taxable year.

A. Real and tangible personal property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(1) The average value of property is determined by averaging the values at the beginning and ending of the tax period, but the State Tax Assessor may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(2) Loans are valued at their outstanding principal balance without regard to any reserve for bad debts. If a loan is charged off in whole or in part for federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established pursuant to regulatory or financial accounting guidelines that is treated as charged off for federal income tax purposes is treated as charged off for purposes of this section.

(3) Credit card receivables are valued at their outstanding principal balance without regard to any reserve for bad debts. If a credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the receivable charged off is not outstanding.

B. A loan is considered to be located within this State if it is properly assigned to a regular place of business of the taxpayer in this State. A loan is properly assigned to the regular place of business with which it has a preponderance of substantive contacts. A loan assigned by the taxpayer to a regular place of business outside the State is presumed to have been properly assigned if:

(1) The taxpayer has assigned, in the regular course of its business, the loan on its records to a regular place of business consistent with federal or state requirements;

(2) The assignment on its records is based upon substantive contacts of the loan to a regular place of business; and

(3) The taxpayer uses the records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

The presumption of proper assignment of a loan provided in this paragraph may be rebutted upon a showing by the State Tax Assessor, supported by a preponderance of the evidence, that the preponderance of substantive contacts regarding the loan did not occur at the regular place of business to which it was assigned on the taxpayer's records. When the presumption has been rebutted, the loan is then located within this State if the taxpayer had a regular place of business in this State at the time the loan was made and the taxpayer fails to show, by a preponderance of the evidence, that the preponderance of substantive contacts regarding the loan did not occur in this State.

C. In the case of a loan that is assigned by the taxpayer to a place outside this State that is not a regular place of business, it is presumed, subject to rebuttal by the taxpayer on a showing supported by the preponderance of evidence, that the preponderance of substantive contacts regarding the loan occurred in this State if, at the time the loan was made, the taxpayer's commercial domicile was in this State.

D. To determine the state in which the preponderance of substantive contacts relating to the loan has occurred, the facts and circumstances regarding the loan at issue are reviewed on a case-by-case basis and consideration is given to activities as the solicitation, investigation, negotiation, approval and administration of the loan. For purposes of the paragraph, the following terms have the following meanings.

(1) "Solicitation" is either active or passive. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. The activity is located at the regular place of business with which the taxpayer's employee is regularly connected or out of which the employee is working, regardless of the where the services of the employee are actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

(2) "Investigation" is the procedure by which employees of the taxpayer determine the creditworthiness of the customer as well as the degree of risk involved in making a particular agreement. The activity is located at the regular place of business with which the taxpayer's employees are regularly connected or out of which the employees are working, regardless of where the services of the employees are actually performed.

(3) "Negotiation" is the procedure by which employees of the taxpayer and its customer determine the terms of the agreement, such as the amount, duration, interest rate, frequency of repayment, currency denomination and security required. The activity is located at the regular place of business at which the employees are working, regardless of where the services of the employees are actually performed.

(4) "Approval" is the procedure by which employees or the board of directors of the taxpayer make the final determination of whether to enter into an agreement. The activity is located at the regular place of business with which the taxpayer's employees are regularly connected or out of which the employees are working, regardless of where the services of the employees are actually performed. If the board of directors makes the final determination, the activity is located at the commercial domicile of the taxpayer.

(5) "Administration" is the process of managing the account. This process includes bookkeeping, collecting

payments, corresponding with the customer, reporting to management regarding the status of the agreement and proceeding against the borrower or the security interest if the borrower is in default. The activity is located at the regular place of business that oversees this activity.

E. For purposes of determining the location of credit card receivables, those receivables are treated as loans and are subject to the provisions of paragraph C.

F. A loan that has been properly assigned to a state, absent any change of material fact, remains assigned to that state for the length of the original term of the loan. After the length of time of the original term of the loan has expired, the loan may be properly assigned to another state if the loan has a preponderance of substantive contact with a regular place of business in that state.

4. Payroll factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both in and outside this State during the taxable year. The payroll factor includes only that compensation that is included in the computation of the apportionable income tax base for the taxable year.

A. The compensation of any employee for services or activities that are connected with the production of income that is not includable in the apportionable income base and payments made to any independent contractor or any other person not properly classifiable as an employee are excluded from both the numerator and denominator of the factor.

B. Compensation is paid in this State if any one of the following tests, applied consecutively, is met.

(1) The employee's services are performed entirely in this State.

(2) The employee's services are performed both in and outside the State, but the service performed outside the State is incidental to the employee's service in the State. For the purposes of this subsection, "incidental" means any service that is temporary to transitory in nature or that is rendered in connection with an isolated transaction.

(3) If the employee's services are performed both in and outside the State, the employee's compensation is attributed to this State:

(a) If the employee's principal base of operations is in this State;

(b) If there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this State; or

(c) If the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed, but the employee's residence is in this State.

5. Variations. If the apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the State Tax Assessor may require, in respect to all or any part of the taxpayer's business activity:

A. Separate accounting;

B. The exclusion of any one or more of the factors;

C. The inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in this State; or

D. The employment of any other method to effectuate an equitable apportionment of the taxpayer's income.

Sec. 5. 36 MRSA §5220, sub-§6, as enacted by PL 1987, c. 504, §35, is amended to read:

6. Financial institutions. Every ~~taxable-entity~~ financial institution, as defined by section ~~5206-B~~ 5206-D, ~~subsection-4,~~ ~~which~~ that is required to file a federal income tax return. The State Tax Assessor may~~,--in--his--discretion,~~ allow 2 or more ~~taxable-entities-which~~ financial institutions that are members of an affiliated group to file a consolidated return.

Sec. 6. 36 MRSA §5231, sub-§1-A, as enacted by PL 1989, c. 871, §19, is amended to read:

1-A. Federal extension. When a taxable corporation or ~~taxable entity~~ a financial institution subject to the tax imposed by chapter 819 is granted an extension of time within which to file its federal income tax return for any taxable year, the due date for filing the taxpayer's income tax or franchise tax return with respect to the tax imposed by this Part is automatically extended for an equivalent period plus 30 days.

Sec. 7. Application. This Act applies to tax years beginning on or after January 1, 1997.

SUMMARY

This bill amends the Maine financial institution franchise tax in several respects. First, a new definition of "financial institution" clarifies which institutions are subject to the tax and includes certain institutions that may not previously have been subject to the franchise tax. The tax will still apply only to those institutions that are required to file a federal income tax return, because institutions not required to file a federal income tax return will have no Maine net income and no Maine assets subject to tax. The amendments change the apportionment formula used to compute Maine net income from total net income or loss per books. The new formula adopts many features of the financial institution apportionment formula recommended by the Multistate Tax Commission. It is designed to reflect how financial institutions earn income more accurately than the corporate income tax apportionment formula that is applicable under current law. For example, loans are included in the property factor. As with the current formula, the sales or receipts factor is double-weighted. The new apportionment formula is also used to compute Maine assets from the total end-of-year assets of the financial institution.