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## MEMORANDUM

**VIA TELECOPY (707-258-6252)**

DATE: February 11, 1999 FILE: 666666666  
TO: Alan H. Friedman  
FROM: John S. Warren *JSW*  
RE: Proposed Definition of Contribution/Dependency Test

I have the following comments to offer on your 2/9/99 draft:

1. The order of "contribution" and "dependency" is the reverse of that stated in Edison California Stores, which was "... is dependent upon or contributes to." If the Edison opinion is going to be cited as the foundation for the test, I suggest we call it the "Dependency/Contribution Test."
2. "Entity" and "segment" aren't defined in your draft, and for that reason you were impelled to add a footnote so that people will understand that we are not talking about combination at this point. I suggest that we adopt a set of definitions that can be used as a preamble not only in this statement of the Contribution/Dependency Test but also in the anticipated statements of the Three Unities Test and the Mobil Factors Test. The draft regulation we were studying in 1996-97 contained very good definitions of "business segment," "business entity" and "enterprise" in Section I.B. I recommend that we adopt them for our present purposes.
3. Your draft does not really answer the disjunctive vs. conjunctive issue. The 1996-97 draft regulation came out squarely for the disjunctive, and I found that objectionable. I firmly believe that for the test to produce a constitutional result in all cases, it must require that the contribution and dependency flow both ways, and I think the courts see it that way. I will cite just a couple of examples from Minnesota and Kansas, states which use the contribution/dependency test:

"A multistate business is a unitary business when the operations in one state benefit and in turn are benefited by the operations conducted in another state or states. . . . The test of whether a business is unitary is whether its various parts are interdependent and of mutual benefit so as to form one business

unit rather than separate business entities and not whether the operating experience of the parts is the same in all places.”  
Western Auto Supply Co., 71 N.W. 2d 79.

“The essential test to be applied is whether or not the operation of the portion of the business within the state is dependent upon or contributory to the operation of the business outside the state. . . . Stated another way, the test is whether a business’ various parts are interdependent and of mutual benefit so as to form one business rather than several business entities and not whether the operating experience of the parts is the same in all places.” Crawford Mfg. Co., 304 P.2d 504, 510.

I would like to see this “stated another way” language incorporated into our draft.