



MEMORANDUM

TO: Phil Skinner, Chair, MTC Uniformity Committee's Finnigan Combined Filing Workgroup

FROM: Bruce Fort, Senior Counsel, Multistate Tax Commission

DATE: February 12, 2020

RE: White Paper: Providing for Consolidated or Affiliated Group Filing Elections in States Allowing or Requiring Unitary Combined Filing

During the MTC's fall 2019 Uniformity Committee meeting, the Committee considered a proposal to include an election allowing taxpayers to file returns on a consolidated group return basis. The Committee did not agree to that proposal, but it did direct MTC staff to prepare a white paper outlining the current status of consolidated filing options among the states, describing the potential benefits and drawbacks of such elections for policy makers considering combined filing legislation or corporate tax reform generally.¹

A. Executive Summary

The use of "consolidated" or "affiliated group" (as those terms are described below) filing elections is a well-accepted state tax policy tool that appears to provide significant benefits for taxpayers and administrators. States must still provide detailed guidance on a number of policy and tax accounting issues for taxpayers electing those filing options. In addition, based on the limited information available, these elections do not appear to facilitate additional income-shifting activity in states requiring water's-edge unitary combined filing.

One can assume some overall revenue reduction whenever an election is offered, since taxpayers will likely elect whatever methodology results in their lowest predicted tax liability. State administrators and auditors, however, have not reported significant differences in tax liability attributable to the election to file as a consolidated or affiliated group in lieu of unitary combined filing.

B. Overview of State Consolidated or Affiliated Group Filing Elections.

Currently, 31 states permit some sort of consolidated or affiliated group filing election as an alternative to either separate-entity filing, combined filing, or both.² Corporate taxpayers frequently

¹ This memorandum is for discussion purposes only and does not necessarily reflect the views of the MTC or its members and does not constitute legal advice.

² Alabama: Ala. Code § 40-18-39(b)(1); Alaska: Al. Stat. § 43.20.031(a); Arizona: Az. Rev. Stat. § 40-18-39(c)(1); Arkansas: A.C.A. § 26-59-805; Colorado: Colo. Rev. Stat. § 39-22-305(1); Connecticut: Conn. Stat. § 12-218(f)(d); Florida: Fla. Stat. § 220.131(c); Georgia: Ga. Code Ann. § 48-7-51; Hawaii: Haw. Reg. 18-235-9(d)(1); Indiana: Ind. Code Ann. § 6-3-4-14(b); Iowa: Iowa Code Ann. § 422.32.(1)(a); Kansas: K.S. Stat. Ann. § 79-32.142(b); Kentucky: Ky. Stat. Ann. § 141.201(2)(a); Louisiana (when required to more clearly reflect income): 47:287.480(3);

make consolidated or affiliated group elections where permitted even though the elections are usually binding for multiple years or even indefinitely (subject to discretionary administrative relief).³

1. Consolidated, Affiliated and “Nexus Consolidated” Reporting, Compared.

Initially, it should be noted that there are multiple variations on consolidated and affiliated group filing options among the states and no settled agreement on terminology for such filing options. The two terms generally refer to an option allowing related corporations to file a group return combining the incomes and apportionment factors of the entities within that filing group, where that option is not conditioned upon the existence of a *unitary business relationship* among the filing members.

a. “Affiliated Group” Reporting.

As used in this memo, an “affiliated group” election refers to a filing group based on inclusion of all commonly-owned domestic entities on the return, and may include some foreign entities with significant activity in the United States. Several states provide for this type of reporting election; it is especially prevalent in states that have adopted mandatory combined reporting in more recent years.⁴ The affiliated group may include tax havens and other foreign entities with a substantial U.S. presence.⁵

b. “Consolidated Filing Group” Reporting.

As used in this memo, a “consolidated filing” election refers to a filing group limited to the entities included or eligible to be included on the taxpayer’s federal consolidated return.⁶ The principal difference between the two methodologies is that an affiliated group will include entities with greater than 50% common ownership, while a consolidated election requires at least 80% common ownership by virtue of its reliance on the federal group definition.

c. “Nexus Consolidated” Reporting.

“Nexus consolidated” reporting refers to a return combining the incomes and apportionment factors of only those commonly-owned C corporations doing business in the state and subject to the state’s taxing jurisdiction. The filing method is usually available in states permitting “separate corporate entity filing”, including 10 of the 31 states referenced in footnote 2, above.⁷ Nexus consolidated filing

Massachusetts: Mass G.L. Ch. 63, § 32(B)(g)(2), 830 CMR § 63.32B.2; Michigan: Mich. Comp. Laws § 206.691(2); Missouri: Mo. Rev. Stat. § 143.431.3; Montana (allowed in rare circumstances): Mont. Code § 15-31-141(2); New Jersey: N.J. Rev. Stat. § 54:10A-4(x); New Mexico: N.M.S.A. 1978 Comp., §§ 7-2A-2(A); 7-2A-2(F); New York: New York Tax Law § 210-C(3); North Carolina: N.C. Stat. § 105-130.14; Tennessee: Tenn. Laws Ann. § 67-4-2013(d); Ohio: (CAT Tax): Ohio Rev. Code § 5751.01(B); Oklahoma: Okla. Stat. Ann. 68, § 2367; Oregon: Or. Rev. Stat. 317.705, 307.710; Rhode Island: G.L. § 44-11-4.1(b); South Carolina: S.C. Code Ann. 412-6-5020(IX); Vermont: Vt. Stat. Ann. Title 32, § 5862(c); Virginia: Va. Code Ann. 58.1-302; Wis. Stat. § 71.255(2m)(a).

³ See, e.g., Az. Rev. Stat. 40-18-39; Ark. Reg. 26—5-1-805(d)(1). Based on a very limited number of responses from states permitting consolidated/affiliated group elections as an alternative to combined filing, the overall percentage of taxpayers utilizing those elections varied from 6% to over 30%.

⁴ See, e.g., New Jersey Rev. Stat. 5410A-4(x); Massachusetts: Mass G.L. Ch. 63, § 32(B)(g)(2); Michigan: M.C.L. § 206.603(1); New York: New York Tax Law § 210-C (3); Wis. Stat. § 71.255(2m)(a).

⁵ Conn. Stat. § 12-218(f); Mass G.L. Ch. 63, § 32(B)(g)(2); New York Tax Law § 210-C(3); Wis. Stat. § 71.255(2m)(a).

⁶ See, e.g., Rhode Island: G.L. § 44-11-4.1(b).

⁷ But see Colo. Rev. Stat. § 39-22-305(1), permitting a consolidated return for nexus entities even if one or more of those entities are also included on a mandatory combined return.

allows taxpayers to offset the current year operating income, gains, and losses among all of its commonly owned (or federally consolidated) entities doing business in the state, a significant benefit for those taxpayers.⁸ Nexus consolidated filing utilizes formulary apportionment principles to determine the amount of income earned within the state by the members of the filing group, and arms-length accounting to determine the division of income between the group and non-nexus entities. This filing methodology provides no additional means to prevent income-shifting to non-nexus entities than separate-entity reporting. Thus, it should not be seen as an alternative to mandatory unitary combined filing, or the affiliated and consolidated filing methods identified in subparagraphs (a) and (b) above. As such, nexus consolidated filing statutes are beyond the scope of this memo.

2. Consolidated or Affiliated Group Filing as an Alternative to Mandatory Combined Filing.

Under combined filing regimes, the in-state earnings of the entities doing business in the state are calculated by applying a formula (now usually based on the percentage of in-state receipts) to the combined income and losses of the entire unitary business income of the group, with a separate calculation of income subject to allocation among the members of that group.⁹ Tax liabilities are calculated in essentially the same manner for taxpayers filing under state consolidated or affiliated group elections.

Under the federal consolidated filing provisions, which form the starting point for state consolidated and some affiliated group income and tax calculations,¹⁰ almost all domestic C corporations with at least 80% common ownership must be included on a federal consolidated return if any one entity makes the election.¹¹ It is possible to “break the election” for particular entities in subsequent years, such as by inserting a partnership ownership structure between C corporations.¹² Such a change in the composition of the federal consolidated group would likely come with significant federal tax consequences, including limitations on group NOL carryforwards.

Because inclusion of all 80% owned domestic C corporations is essentially mandatory for taxpayers making a federal consolidated filing election, the make-up of the states’ water’s edge combined filing group is usually similar to and often coextensive with the make-up of a state’s consolidated filing group.¹³

⁸ In Ohio, it provides taxpayers with a considerable advantage in eliminating intercompany transactions from application of the state’s CAT tax to those transactions. Ohio Rev. Code Ann. 5751.01(B).

⁹ While some states define the unitary combined group to include all corporate entities engaged in a unitary business regardless of place of incorporation or operation, known as worldwide combined reporting (WWCR), states also allow taxpayers an election to limit the scope of the combined group to domestic companies (“water’s edge” reporting).

¹⁰ Internal Revenue Code (IRC) §§ 1501-1504, and related regulations.

¹¹ See IRC § 1501 and regulation issued under IRC § 1502.

¹² IRC § 1504(b) establishes several exceptions to the otherwise inclusive nature of the federal consolidated group. A consolidated return generally cannot include Real Estate Investment Trusts (REIT’s), Regulated Investment Companies (RIC’s), and life insurance companies. All three entity types have been used as vehicles for state income shifting.

¹³ In certain circumstances, wholly owned Canadian and Mexican subsidiaries may be included in the domestic taxpayer’s consolidated return. IRC § 1504(d).

There are two significant exceptions to the general conformity between a state unitary combined group and the federal consolidated group: (1) domestic entities that are not engaged in a unitary business conducted partially within the taxing state are included in a federal consolidated return but not a combined filing return; and (2) corporations with common ownership of more than 50% but less than 80% are included in a combined filing return but not a federal consolidated return.

There are some other notable differences between federal and state combined, affiliated and consolidated filing regimes. First, most states exclude insurance companies that pay a premiums tax to the state from having to pay income tax and thus they are not included in combined returns and most states' consolidated and affiliated group returns. Second, many combined filing regimes exclude domestic "foreign operating companies" (sometimes called "80/20" companies) from the combined return, but do not appear to exclude these companies from consolidated or affiliated group returns, if they would otherwise be included. Third, states will sometimes exclude financial institutions or other types of entities subject to special apportionment formulas from combined, consolidated, and affiliated group returns of related entities not engaged in financial activities. And finally, some "water's- edge" combined filing statutes provide for the inclusion of some foreign entities on a combined report that would not be included in the federal consolidated group.¹⁴

No state *mandates* use of a consolidated or affiliated group filing (absent a finding that such a filing is necessary to prevent avoidance of tax)¹⁵ and it is debatable whether a state could do so, since the group may encompass non-unitary entities with no connection to the taxing state.¹⁶ Including the income of those non-unitary entities in the calculation of a taxpayer's income and apportionment formula could result in an overstatement of the income derived from activities within the taxing state.¹⁷ Yet it is also well-recognized that even a single entity may have income derived from non-unitary sources,¹⁸ requiring a separate allocation or apportionment of that income; similar provisions could be made for separately allocating non-unitary income of group members required to file a consolidated or affiliated group return.¹⁹

14 See, e.g., the definition of the water's edge group in the Commission's model combined filing statute. http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/Combined%20Reporting%20-%20FINAL%20version.pdf.

15 See, e.g., Kan. Stat. Ann. § 79-32,142(b); Louisiana Stat. 47:287.480(3);

16 *Allied-Signal, Inc. v. Director*, 504 U.S. 768, 791-2 (1992)(O'Connor, J., dissenting: "Only when the State seeks to tax directly the income of a nondomiciliary taxpayer's subsidiary or affiliate through combined reporting, see *Container Corp. of America v. Franchise Tax Bd.*, 463 U. S. 159, 169, and n. 7 (1983) ("must the underlying businesses of the taxpayer and its affiliate or subsidiary be unitary.").

17 See *Allied-Signal*, at 783-5. The Court rejected New Jersey's contention that it could apportion all income reported on taxpayer's federal return, regardless of connection to unitary business conducted in state, as more reflective of economic reality.

18 See *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16 (2008).

19 See *Barclay's Bank, PLC v. Franchise Tax Board*, 512 U.S. 298, 311, fn. 10 (1994)(In rejecting the contention that California's worldwide combined reporting regime improperly subjected a foreign entity to the state's taxing jurisdiction, the Court noted that the foreign entity's income and apportionment factors were only being used to more accurately reflect the income of the domestic taxpayer doing business within the state.).

C. Policy Considerations for Allowing a Consolidated or Affiliated Filing Group Election as an Alternative to Mandatory Unitary Combined Filing.

1. Real and Perceived Benefits.

The principal benefit to allowing a consolidated or affiliated group filing election is the elimination of uncertainty over whether certain entities should be included in a combined return. The analysis of which entities should be included or excluded from the combined return can, at least at the edges, be fact intensive. That analysis may also include factors that may appear to be subjective in nature, and in particular, the role of centralized management in determining whether separate entities or even divisions of a single entity are engaged in a unitary business.²⁰ By eliminating the unitary business test from the determination of what entities may file a group return, taxpayers can continue to enjoy the advantages of netting current year income and losses inherent in combined reporting with arguably less administrative expense. States retain the advantage of utilizing a broad tax base that limits taxpayers' ability to employ many common domestic income-shifting strategies.

Because a consolidated or affiliated filing group return is not limited by the unitary business principle, the application of a single apportionment formula to what may be diverse businesses may result in an overstatement or understatement of the amount of taxable income generated within the state. That is, under these elections both the states and taxpayers can be seen as having agreed to forgo a degree of accuracy in ascertaining the amount of in-state income generation in favor of expedience, convenience, and predictability of outcomes.

The elective nature of these filing methods may allow legislatures somewhat more latitude in making policy choices that might otherwise run afoul of due process and commerce clause restraints on taxing income generated beyond a state's border. In particular, several states have specified that taxpayers must apportion all income included in the federal consolidated base, notwithstanding the lack of a unitary connection to the state.²¹ The distinction between apportionable and non-apportionable income in the Uniform Division of Income for Tax Purposes Act (UDITPA) was intended to reflect the application of unitary business principles to a taxpayer's multi-jurisdictional income.²² It seems more than defensible then to dispose of the distinction in the context of an election that disregards the unitary business principle in calculating income.

²⁰ It should be noted that the frequently heard complaints about the alleged arbitrary or unpredictable nature of unitary combined filing determinations do not find a great deal of support in modern state tax case law. The majority of contested "unitary business" determinations involve the apportionment or allocation of non-operational income such as dividends or capital gains, where the entity's inclusion on a combined return may be unrelated to whether the income stream relates to the unitary business conducted in the taxing state. See, e.g., *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16 (2008); *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992).

²¹ See, e.g., Mass. G.L. Ch. 63, § 32B(g)(ii); Mich. C. L. § 206.603(3); New York Tax Law § 210-C(3)(a); Wis. Stat. § 71.255(2m)(a).

²² See, e.g., *Hoechst-Celanese v. Franchise Tax Board*, 25 Cal. 4th. 513 (2001).

Arguably, the elective nature of a consolidated or affiliated group return gives the states broader latitude to include all federally taxable income amounts (with the likely exception of U.S. Obligations) in the tax base without fear of a constitutional challenge based on claims of extra-territorial taxation.²³

2. Possible Drawbacks of Allowing Consolidated and Affiliated Group Filing Elections.

There is some potential that the consolidated filing election in particular may allow income shifting to non-consolidated entities. We previously noted that RIC's, REIT's and life insurance companies cannot be consolidated under IRC 1504(b). And in limited circumstances, it may be possible for a related group of corporations to file two or more federal consolidated returns for the same year, although that appears to be an uncommon practice. And in theory, a taxpayer contemplating a significant capital gain could choose to break its federal consolidated group election to isolate the entity reporting that gain. But as discussed under paragraph 4, below, based on the limited information available to us, it does not appear that the states allowing these filing elections have encountered systematic attempts to "game the system" in that manner.

We also assume that the demise of the "physical presence" nexus theory and the increased adoption of market-based apportionment of income from intangible property and services will give states more ability to impose tax on remote entities deriving income from the state that have, in the past, been excluded from consolidated or affiliated group filings. It should be stressed that these entities that are not part of the group return but have a filing obligation in the state are generally not relieved from filing a separate return and reporting taxes otherwise owed on that return.

Nonetheless, it is arguable that under a consolidated filing election, a state's recourse to remedies to prevent a "distortion" of tax liability may be more limited than it would be under either a mandatory separate filing or combined filing regime. State equitable apportionment statutes and other state discretionary authority to adjust income and expenses among related parties are based on the express policy decision that taxpayers should be liable for taxes on the income attributable to activity undertaken within the taxing state. Yet as previously discussed, a consolidated filing election can be seen as an agreement between taxpayers and the state to trade away some degree of accuracy in income calculation for the benefits of certainty in reporting. Again, this problem is most significant where transactions with an excluded entity give rise to income that the state would not otherwise be able to tax as part of that entity's separately filed return.

The most direct solution to this potential problem would be to re-affirm the applicability of state equitable remedies and statutory provisions intended to ensure a fair reflection of income in the statutory provisions establishing the taxpayer's ability to make an election. In particular, states should include specific authority to permit the tax commissioner to include otherwise non-consolidated entities, such as captive insurance companies or captive REITs, if necessary to prevent shifting of income

²³ Even though the consolidated and affiliated methodologies are elective, there are likely some constraints on the states' taxing authority, including the potential for discrimination against domestic or foreign commerce. And, the availability of a non-discriminatory filing method in a state was held to be insufficient to rebut a taxpayer's challenge to the constitutionality of the filing methodology it elected to use. *Conoco, Inc. v. Taxation and Revenue Dept.*, 931 P.3d 730 (N.M. 1996).

derived in the state to these entities through intercompany charges and to more clearly reflect income generated by taxpayers within the state and to prevent the evasion of tax.²⁴

3. Consolidated and Affiliated Group Filing Elections Neither Increases nor Decreases the Degree of Complexity in Group Income and Apportionment Calculations.

Simplicity in return preparation was an expected advantage of consolidated and affiliated group filing methodologies over mandatory combined filing regimes. Yet, a survey of the states' practices and regulations suggests both combined reporting rules, and consolidated and affiliated filing rules, must address similar issues including the treatment of separate or joint tax attributes such as credits, capital loss and net operating loss carryforwards, and so forth.

This complexity will affect state tax administration even where every effort is made to adhere to the federal system, since state income taxes bases will not be identical. State administrators charged with administering consolidated elections based on the federal system should accordingly have a good understanding of the federal rules.

States must also provide for adjustments for any statutory differences in the calculation of taxable income arising from excluded corporations like insurance companies paying premiums tax, state exempted income, different rules for depreciation, net operating loss carryforward rules, allowance of tax credits, charitable contributions, and so forth. To the extent the state provides for such rules in the case of combined filing, it will want to apply them in the consolidated filing context as well.

As with adjustments to taxable income, the state will also need to decide how other state tax rules apply in the consolidated or affiliated filing context, including whether the state will follow the *Joyce* or *Finnigan* methodology in computing the receipts factor for the consolidated group.

D. Consolidated and Affiliated Group Filing Elections do not Appear to Facilitate Domestic Tax Shifting or Significantly Reduce Revenues.

²⁴ The MTC's model combined reporting statute contains several provisions giving the tax commissioner authority to prevent income distortion, such as inclusion of the income and factors of an otherwise excluded entity:

The Director may, by regulation, require the combined report include the income and associated apportionment factors of any persons that are not included pursuant to Section 2.A., but that are members of a unitary business, in order to reflect proper apportionment of income of entire unitary businesses. Authority to require combination by regulation under this Section 2.B. includes authority to require combination of persons that are not, or would not be if doing business in this state, subject to the [State income tax Act].

In addition, if the Director determines that the reported income or loss of a taxpayer engaged in a unitary business with any person not included pursuant to Section 2.A. represents an avoidance or evasion of tax by such taxpayer, the Director may, on a case by case basis, require all or any part of the income and associated apportionment factors of such person be included in the taxpayer's combined report. With respect to inclusion of associated apportionment factors pursuant to Section 2.B., the Director may require the exclusion of any one or more of the factors, the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State, or the employment of any other method to effectuate a proper reflection of the total amount of income subject to apportionment and an equitable allocation and apportionment of the taxpayer's income.

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/Combined%20Reporting%20-%20FINAL%20version.pdf

Staff was unable to locate any systematic studies or analyses the revenue effects of allowing consolidated or affiliated group elections.²⁵ The inclusion of non-unitary entities in a taxpayer's federal consolidated group return could result in an understatement or overstatement of the income earned in a state, compared to results under combined reporting regimes or separate-entity filing regimes. Presumably taxpayers making such elections have concluded that the elections will save them taxes over the period for which the election is in effect, so some revenue loss might be predicted.

In the absence of any reports or studies, staff did conduct an informal survey of tax administrators and auditors in states allowing the elections that also participated in the Commission's joint audit program. We solicited opinions on the perceived effects of those filing elections on tax reporting and compliance, and information on the percentage of taxpayers utilizing the options along with any administrative and compliance problems unique to those elections. We also conferred with the Commission's corporate tax audit managers, who are uniquely positioned to compare contemporaneous tax returns for corporations using both unitary combined filing and consolidated/affiliated group filing methods in different states.

Based on this informal analysis, the availability of such elections in states that already mandate or allow "water's edge" combined filing (as an alternative to worldwide combined reporting) does not appear to materially affect corporate tax liabilities.²⁶ Our audit managers noted differences in group composition in states that required 50% common ownership and 80% common ownership, but reported that the tax effects arising from those differences were slight. Our auditors did not report any income-shifting examples that appeared to be based on the differences in group composition between water's edge combined returns and consolidated or affiliated returns.

D. Additional Considerations for Implementing Consolidated and Affiliated Group Filing Elections.

The following is a non-exhaustive list of technical issues and policy choices to consider when drafting consolidated or affiliated group filing election statutes, regulations, and instructions.

1. Composition and Nature of the Consolidated or Affiliated Filing Groups.²⁷

As discussed above, the majority of states offering an election from water's-edge combined filing have chosen the consolidated filing election, but some variations exist among the states as to how that group is defined. Most states specify that the consolidated group comprises only those entities actually filing as a federal consolidated group during the same tax year. Other states provide that the entity must have been "eligible" for inclusion in the federal group. Affiliated group elections may specify that the

²⁵ One legislature requested such a study from the state's Department of Revenue in legislation authorizing both combined and affiliated group filing, but the agency was apparently unable gather sufficient data from subsequently filed returns to complete it.

²⁶ One state did report that a taxpayer had succeeded in creating two separate federal consolidated filing groups that may have allowed it to shift income outside of the group filing in the state. The state used its discretionary authority to adjust income and expenses among related parties to challenge the taxpayer's reported tax liability to the state.

²⁷ Most tax research services include a chart-creating function that permits comparisons of common features of group filing provisions among the states. Those charts should be consulted with an understanding that terminologies may vary among state statutes.

entities included in the group include those entities that would have been eligible to join in a federal consolidated filing but for the 80% ownership requirement. More frequently, affiliated group elections will include all commonly owned domestic C corporations, and may include some foreign entities. The distinctions in scope between different reporting elections may be significant for revenue purposes, but we lacked sufficient information to gauge those differences.

The states appear to be evenly divided as to whether the consolidated or affiliated group return should include entities with different apportionment formulas.²⁸

The states vary in their treatment of the elective filing group as a single “taxpayer” or a group of taxpayers filing a consolidated or affiliated report. The distinction may affect treatment of net operating losses, tax attributes and credits unless those topics are specifically addressed. The states vary in how much guidance is provided in statutes and regulations on that topic.

2. Treatment of Non-electing or Excluded Entities:

Consideration should be given to how the election of a consolidated or affiliated group return will affect the filing obligations of any entities not included on the return. In general, entities that otherwise have a filing and tax-paying obligation in the state should not be deemed to be relieved of that obligation simply because they would not be included in the group return. Some states specify that non-consolidated taxpayers must file as separate entities. Another state appears to permit a nexus consolidated group to be treated as a single taxpayer within its combined filing group.²⁹

3. Treatment of Federally Consolidated Entities Immune from Taxation under P.L. 86-272.

Georgia’s nexus consolidation statute provides that companies protected by P.L. 86-272 must be excluded from the consolidated group. Ga. Code Ann. § 48-7-51. The same result can be inferred from most other separate-entity states’ consolidated filing rules. An argument can be made that an election to file a consolidated return in lieu of a combined return could include an election to forgo federal immunity from taxation for every member of the consolidated group.

4. Apportionment and Allocation of the Consolidated or Affiliated Group’s Income.

As discussed above, a strong argument can be made that all of the income of taxpayers making a consolidated or affiliated group election should be subject to apportionment as a policy matter, but it appears that most states do apply the same allocation and apportionment rules applicable to separate entity and combined filing taxpayers.³⁰

Most states do not appear to have addressed the application of the “*Joyce*” and “*Finnigan*” methods to consolidated and affiliated group filers. Presumably those states apply their *Joyce/Finnigan* determinations to the consolidated group’s calculation of the receipts factor as they would to combined

²⁸ See, e.g., K.S. Stat. Ann. 79-32,142(b); (excluding financial institutions and insurance companies).

²⁹ Vt. Stat. Ann., Title 32, § 5862(c).

³⁰ The inapplicability of the unitary business principle in apportioning the affiliated group’s income is set forth in Massachusetts’ statute addressing combined and affiliated reporting, Mass. G.L. Ch. 63, § 32B(g)(ii); See also, Mich. C. L. § 206.603(3); New York Tax Law § 210-C(3)(a); Wis. Stat. § 71.255(2m)(a).

filers. To the extent the elective filing group should be thought of as a single taxable entity, it would suggest that the *Finnigan* methodology is more appropriate both for including the receipts of otherwise immune entities on the apportionment factor and in determining whether the filing group is subject to tax in other states for purposes of sales throw-out and throw-back.

5. Procedures for making and withdrawing elections.

States are not entirely uniform in their procedures and requirements for making an election of consolidated or affiliated group filing. A few states require a prior notice or petition for permission to make the election.³¹ Most states do not require prior notice or permission.

Most states require that the election remain in place for at least two years,³² and some states bind taxpayers to the election for up to ten years. Several states provide that an election is binding until permission is given to withdraw it, although it is suggested permission may be freely granted. Other states reference the occurrence of a significant corporate reorganization or similar change in circumstances. Certainly, longer election periods might dissuade a taxpayer from making or revoking an election in anticipation of a major change in corporate activity or liability within the state.

6. Income Calculation Issues:

As discussed above, the use of consolidated and affiliated filing group does not seem to have greatly simplified the process of determining the group's tax liability. States allowing consolidated or affiliated group filing have found it necessary to have rules for capital loss, NOL carryforwards, and, federal interest limitations applicable to the federal consolidated group, as well as the use of state tax credits by the group..

Conclusion:

The allowance of consolidated or affiliated group elections have also proven to be popular with taxpayers seeking to avoid uncertainty over the composition of their unitary groups and has been a feature of recently enacted legislation in several states moving from separate-entity filing to combined filing regimes.

Because the federal consolidated filing election encompasses most domestic entities, we believe the allowance of a consolidated or affiliated group election should not have a material impact on revenues or compliance in water's-edge combined filing states. The limited anecdotal evidence available to us from state administrators appears to support that conclusion. Nonetheless, states should include robust anti-abuse provisions in any legislation providing for such elections, especially where income-shifting is accomplished through intercompany charges made by entities that are not otherwise subject to filing and paying tax in the state.

Consolidated and affiliate group filing elections may provide states with greater flexibility in structuring their tax policies than might be possible under mandated filing systems. The states must still address myriad administrative, accounting, income-calculation and apportionment issues in order to

³¹ See, e.g., Mont. Code § 15-31-141(2).

³² See, e.g., Fla. Stat. 220.131(2)

provide adequate guidance, but most procedures and policies may be borrowed from existing guidance for unitary combined filing returns.