



**Multistate Tax Commission
Proposed Model Statute for Combined Reporting**

December 2018 Discussion Draft

Section 1. Definitions.

A. "Person" means any individual, firm, partnership, general partner of a partnership, limited liability company, registered limited liability partnership, foreign limited liability partnership, association, corporation (whether or not the corporation is, or would be if doing business in this state, subject to [state income tax act]), company, syndicate, estate, trust, business trust, trustee, trustee in bankruptcy, receiver, executor, administrator, assignee or organization of any kind.

B. "Taxpayer" means any person subject to the tax imposed by [state corporate income tax act].

C. "Corporation" means any corporation as defined by the laws of this state, or organization of any kind treated as a corporation for tax purposes under the laws of this state, wherever located, which if it were doing business in this state would be a "taxpayer." The business conducted by a partnership which is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation's distributive share of the partnership income, inclusive of guaranteed payments to the extent prescribed by regulation.

D. "Partnership" means a general or limited partnership, or organization of any kind treated as a partnership for tax purposes under the laws of this state.

E. "Internal Revenue Code" means Title 26 of the United States Code of [date] [and amendments thereto] without regard to application of federal treaties unless expressly made applicable to states of the United States.

F. "Unitary business" means a single economic enterprise that is made up either of separate parts of a single business entity or of a commonly controlled group of business entities that are sufficiently interdependent, integrated and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. [Drafter's note: This portion of the definition is drafted to follow MTC Reg. IV.1.(b)., defining a "unitary business." A state that does not wish to define unitary business in this manner should consider alternative language. In addition, this MTC Regulation defining unitary business includes a requirement of common ownership or control. A state which treats ownership or control requirements separately from the unitary business requirement will need to make additional amendments to the statutory language.] Any business conducted by a partnership shall be treated as conducted by its partners, whether directly held or indirectly held through a series of partnerships, to the extent of the partner's distributive share of the partnership's income, regardless of

the percentage of the partner's ownership interest or the percentage of its distributive or any other share of partnership income.

A business conducted directly or indirectly by one corporation is unitary with that portion of a business conducted by another corporation through its direct or indirect interest in a partnership if the conditions of the first sentence of this section 1.F. are satisfied, to wit: there is a synergy, and exchange and flow of value between the two parts of the business and the two corporations are members of the same commonly-controlled group.

G. “Combined group” means the group of all persons whose income and apportionment factors are required to be taken into account pursuant to Section 2.A. or 2.B. in determining the amount of a taxpayer’s income that is properly apportioned to this state [and each taxpayer’s share of that income].

H. Combined Report. “Combined report” refers to the schedules which are attached to the tax return, of one or more taxpayers, which reports the taxpayer’s income from sources within this state under the combined reporting method.

H. “United States” means the 50 states of the United States, the District of Columbia, and United States’ territories and possessions.

I. “Tax haven” means a jurisdiction that, during the tax year in question has no or nominal effective tax on the relevant income and:

- (i) has laws or practices that prevent effective exchange of information for tax purposes with other governments on taxpayers benefiting from the tax regime;
- (ii) has tax regime which lacks transparency. A tax regime lacks transparency if the details of legislative, legal or administrative provisions are not open and apparent or are not consistently applied among similarly situated taxpayers, or if the information needed by tax authorities to determine a taxpayer’s correct tax liability, such as accounting records and underlying documentation, is not adequately available;
- (iii) facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy;
- (iv) explicitly or implicitly excludes the jurisdiction’s resident taxpayers from taking advantage of the tax regime’s benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction’s domestic market; or
- (v) has created a tax regime which is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial/other services sector relative to its overall economy.

Section 2. Requirement to File a Combined Report.

A. A taxpayer engaged in a unitary business with one or more other corporations shall file a combined report which includes the income and apportionment factors of all corporations that are members of the unitary business, unless an election is made to file on a water’s edge basis as provided under Section 5, and includes such other information as required by the Director.

B. The Director may, by regulation, require the combined report [to] 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 the entire unitary business. 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 to this state.

Section 3. Determination of taxable income or loss using combined report.

A. Calculation of base income for combined reporting

~~A group of corporations filing a combined report under this section shall calculate the base income of the combined group by:~~

~~(1) computing income on a separate return basis, including additions and subtractions from [federal taxable income/federal adjusted taxable income];~~

~~(2) combining income or loss of the members included in the combined report; and~~

~~(3) making appropriate eliminations and adjustments between members included in the combined report.~~

~~For purposes of this section, if an entity does not calculate federal taxable income, then the entity's federal taxable income or loss shall be calculated based on the entity's earnings and profits as if the entity were a domestic taxpayer subject to applicable federal tax laws.³~~

The combined group's net income shall be the aggregate net income or loss of each taxable member and nontaxable member of the combined group derived from a unitary business, which shall be determined as follows:

(1) For any member incorporated in the United States, included in a consolidated federal corporate income tax return and filing a federal corporate income tax return, the income to be included in calculating the combined group's net income shall be such member's gross income, less the deductions provided under [state adjustments to base income], as if the member were not consolidated for federal tax purposes.

(2) For any member not included in a consolidated federal corporate income tax return but required to file its own federal corporate income tax return, the income to be included in calculating the combined group's net income shall be such member's gross income, less the deductions provided under [state adjustments to base income].

³Utah Version:

~~(1) corporations filing a combined report may not include intercompany sales or other intercompany transactions between the corporations included in the combined report in determining the sales factor;~~

~~(2) corporations filing a combined report under Section 59-7-402 or 59-7-403 may not include intercompany rents or other intercompany transactions between the corporations included in the combined report in determining the property factor;~~

(3) For any member not incorporated in the United States, not included in a consolidated federal corporate income tax return and not required to file its own federal corporate income tax return, the income to be included in the combined group's net income shall be determined from a profit and loss statement that shall be prepared for each foreign branch or corporation in the currency in which the books of account of the branch or corporation are regularly maintained, adjusted to conform it to the accounting principles generally accepted in the United States for the presentation of such statements and further adjusted to take into account any book-tax differences required by federal or [state] law. The profit and loss statement of each such member of the combined group and the apportionment factors related thereto, whether United States or foreign, shall be translated into or from the currency in which the parent company maintains its books and records on any reasonable basis consistently applied on a year-to-year or entity-by-entity basis. Income shall be expressed in United States dollars. In lieu of these procedures and subject to the determination of the commissioner that the income to be reported reasonably approximates income as determined under this chapter, income may be determined on any reasonable basis consistently applied on a year-to-year or entity-by-entity basis.

(4)(A) If the unitary business has income from an entity that is treated as a pass-through entity, the combined group's net income shall include its member's direct and indirect distributive share of the pass-through entity's unitary business income.

(B) The distributive share of income received by a limited partner from an investment partnership shall not be considered to be derived from a unitary business unless the general partner of such investment partnership and such limited partner have common ownership.

(5) All dividends paid by one member to another member of the combined group shall be eliminated from the income of the recipient.

(6) The principles set forth in the Treasury regulations promulgated under Section 1502 of the Internal Revenue Code, including the principles relating to deferrals, eliminations, and exclusions, shall apply to the extent consistent with the [state] combined group membership and combined unitary reporting principles. Upon the occurrence of either of the following events, deferred business income resulting from an intercompany transaction among members of a combined group shall be restored to the income of the seller and shall be included in the combined group's net income as if the seller had earned the income immediately before the event: (A) The object of a deferred intercompany transaction is: (i) Resold by the buyer to an entity that is not a member of the combined group, (ii) resold by the buyer to an entity that is a member of the combined group for use outside the unitary business in which the buyer and seller are engaged, or (iii) converted by the buyer to a use outside the unitary business in which the buyer and seller are engaged; or (B) The buyer and seller are no longer members of the same combined group, regardless of whether the members remain unitary.

(7) A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction pursuant to Section 170 of the Internal Revenue Code, be subtracted first from the combined group's net income, subject to the income limitations of said section applied to the entire business income of the group. Any charitable deduction disallowed under the foregoing rule, but allowed as a carryover deduction in a subsequent year, shall be treated as originally incurred in the subsequent year by the same member and the rules of this section shall apply in the subsequent year in determining the allowable deduction for that year.

(8) Gain or loss from the sale or exchange of capital assets, property described by Section 1231(a)(3) of the Internal Revenue Code and property subject to an involuntary conversion shall be removed from the net income of each member of a combined group and shall be included in the combined group's net income as follows: (A) For each class of gain or loss, whether short-term capital, long-term capital, Section 1231 of the Internal Revenue Code gain or loss, or gain or loss from involuntary conversions, all members' business gain

and loss for the class shall be combined, without netting among such classes, and each class of net business gain or loss shall be apportioned to each member under subsection (b) of this section; and (B) Any resulting income or loss apportioned to this state, as long as the loss is not subject to the limitations of Section 1211 of the Internal Revenue Code, of a taxable member produced by the application of subparagraph (A) of this subdivision shall then be applied to all other income or loss of that member apportioned to this state. Any resulting loss of a member apportioned to this state that is subject to the limitations of said Section 1211 shall be carried forward by that member and shall be treated as short-term capital loss apportioned to this state and incurred by that member for the year for which the carryover applies.

(9) Any expense of any member of the combined group that is directly or indirectly attributable to the income of any member of the combined group which is non-apportionable, exempt from taxation by this state, or which income this state is prohibited from taxing pursuant to the laws or Constitution of the United States, shall be disallowed as a deduction for purposes of determining the combined group's apportionable net income.

(10) The amount of income or loss apportioned to this state by the unitary group shall be adjusted by the total amount of income or loss allocated to this state pursuant to [state allocation rules].

Commented [BJF1]: The workgroup voted to eliminate this provision. But some reference to allocated income treatment may be necessary for income determinations and determining NOL carryover amounts

(11) A net operating loss sustained by the combined group in a combined report year is allocated among the members of the group that reported losses on their pro forma Federal 1120s, after elimination of intercompany transactions between members of the combined unitary group and appropriate allocations. The amount allocated to each member will be determined by dividing that member's loss (after elimination of intercompany transactions) by the total losses (after elimination of intercompany transactions) of all members of the combined unitary group in that tax year. To the extent the net operating losses are not used by the group during the years the corporation is part of the group, the group's net operating losses allocated to a corporation that is a member of the group may be claimed by the corporation in the tax years after the corporation ceases to be a part of the group. Net operating loss carryforwards will be considered used in order beginning with the earliest tax year. If more than one corporation brought net operating losses from the same tax year into the combined unitary group and a portion of the losses from that year is used, the amount of used net operating losses will be prorated among the members bringing losses from that year based on the ratio of each member's losses to the total losses carried forward from that year.

(12) The eligibility for and calculation of a tax credit amount is determined at the separate entity level but can be used against the group income. Any unused carryforward of a tax credit earned by a member of the combined unitary group remains with that entity if that entity is no longer a member of the combined group or the group is no longer required to file a combined return. This is applicable whether the credit was earned by the entity before becoming a member of the combined group or while a member of the combined group.

Commented [BJF2]: South Carolina's NOL rule

B. Calculation of Apportionment Factors for Combined Group

Commented [BJF3]: Finnigan language

A unitary business that files a combined report shall use an apportionment formula that combines the [property, payroll, and receipts] of all of the unitary group members before calculating the factors.

The receipts factor is a fraction, the numerator of which is the total sales of all the members of the combined group in this State during the tax period, and the denominator of which is the total sales of all the members of the combined group everywhere during the tax period.

For purposes of determining whether receipts are in this state and included in the numerator of the receipts factor, all receipts of the combined group properly assigned to this state under this section shall be included in the receipts factor numerator for this state if any member of the combined group is taxable in this state. In addition, a taxpayer shall be considered taxable in another state for purposes of calculating the receipts factor if any member of the combined group is taxable in that state.

Section 4. Water's-edge election: initiation and withdrawal.

A. Water's-edge election.

Subject to the requirements of Section 4.B., the combined group may elect to determine their apportioned business income or loss pursuant to a water's-edge election. Under such election, the combined group shall take into account all or a portion of the income and apportionment factors of only the following members otherwise included in the combined group pursuant to Section 2, as described below:

i. the entire income and apportionment factors of any member incorporated in the United States or formed under the laws of any state, the District of Columbia, or any territory or possession of the United States;

ii. the entire income and apportionment factors of any member, regardless of the place incorporated or formed, if the average of its property, payroll, and sales factors within the United States is 20 percent or more;

iii. the entire income and apportionment factors of any member which is a domestic international sales corporation as described in Internal Revenue Code Sections 991 to 994, inclusive; a foreign sales corporation as described in Internal Revenue Code Sections 921 to 927, inclusive; or any member which is an export trade corporation, as described in Internal Revenue Code Sections 970 to 971, inclusive;

iv. any member not described in [Section 5.A.i.] to [Section 5.A.iii.], inclusive, shall include the portion of its income derived from or attributable to sources within the United States, as determined under the Internal Revenue Code without regard to federal treaties, and its apportionment factors related thereto;

v. any member that is a "controlled foreign corporation," as defined in Internal Revenue Code Section 957, to the extent of the income of that member that is defined in Section 952 of Subpart F of the Internal Revenue Code ("Subpart F income") not excluding lower-tier subsidiaries' distributions of such income which were previously taxed, determined without regard to federal treaties, and the apportionment factors related to that income; any item of income received by a controlled foreign corporation shall be excluded if such income was subject to an effective rate of income tax imposed by a foreign country greater than 90 percent of the maximum rate of tax specified in Internal Revenue Code Section 11;

vi. any member that earns more than 20 percent of its income, directly or indirectly, from intangible property or service related activities that are deductible against the apportionable income of other members of the combined group, to the extent of that income and the apportionment factors related thereto; and

vii. the entire income and apportionment factors of any member that is doing business in a tax haven, where "doing business in a tax haven" is defined as being engaged in activity sufficient for that tax haven jurisdiction to impose a tax under United States constitutional standards. If the member's business activity within a tax haven is entirely outside the scope of the laws, provisions and practices that cause the jurisdiction to meet the criteria established in Section 1.I., the activity of the member shall be treated as not having been conducted in a tax haven.

B. Initiation and withdrawal of election

i. A water's-edge election is effective only if made on a timely-filed, original return for a tax year by the combined group. The Director shall develop rules and regulations governing the impact, if any, on the scope or application of a water's-edge election, including termination or deemed election, resulting from a change in the composition of the unitary group, the combined group, the taxpayer members, and any other similar change.

ii. Such election shall constitute consent to the reasonable production of documents and taking of depositions in accordance with [state statute on discovery].

iii. In the discretion of the Director, a water's-edge election may be disregarded in part or in whole, and the income and apportionment factors of any member of the taxpayer's unitary group may be included in the combined report without regard to the provisions of this section, if any member of the unitary group fails to comply with any provision of [this act] or if a person otherwise not included in the water's-edge combined group was availed of with a substantial objective of avoiding state income tax.

iv. A water's-edge election is binding for and applicable to the tax year it is made and all tax years thereafter for a period of 10 years. It may be withdrawn or reinstated after withdrawal, prior to the expiration of the 10 year period, only upon written request for reasonable cause based on extraordinary hardship due to unforeseen changes in state tax statutes, law, or policy, and only with the written permission of the Director. If the Director grants a withdrawal of election, he or she shall impose reasonable conditions as necessary to prevent the evasion of tax or to clearly reflect income for the election period prior to or after the withdrawal. Upon the expiration of the 10 year period, a taxpayer may withdraw from the water's edge election. Such withdrawal must be made in writing within one year of the expiration of the election, and is binding for a period of 10 years, subject to the same conditions as applied to the original election. If no withdrawal is properly made, the water's edge election shall be in place for an additional 10 year period, subject to the same conditions as applied to the original election.