

Proposed Statutory Language on Reporting Options for Non-resident
Members of Pass-through Entities with Withholding Requirement
Adopted December 18, 2003

Section 1. Definitions.

- A. “Pass-through entity” means a corporation that for the applicable tax year is treated as an S Corporation under [IRC §1362(a), or State Tax Code §], and a general partnership, limited partnership, limited liability partnership, trust, or limited liability company that for the applicable tax year is not taxed as a corporation [for federal tax purposes] [under the state’s check-the-box regulation];
- B. “Member” means [*optional additional language: an individual who is*] a shareholder of an S corporation; a partner in a general partnership, a limited partnership, or a limited liability partnership; a member of a limited liability company; or a beneficiary of a trust;
- C. “Nonresident” means an individual who is not a resident of or domiciled in the state, a business entity that does not have its commercial domicile in the state, and a trust not organized in the state.

Section 2. Composite Return Authorized.

- A. A pass-through entity may file a composite income tax return on behalf of electing nonresident members reporting and paying income tax at the highest marginal rate provided in [state tax rate provision] on the members’ pro rata or distributive shares of income of the pass-through entity from doing business in, or deriving income from sources within, this State.
- B. A nonresident member whose only source of income within a state is from one or more pass-through entities may elect to be included in a composite return filed pursuant to this section.
- C. A nonresident member that has been included in a composite return may file an individual income tax return and shall receive credit for tax paid on the member’s behalf by the pass-through entity.

Section 3. Withholding Required.

- A. A pass-through entity shall withhold income tax at the highest tax rate provided in [section x for individuals or section y for corporations or section z for other entities] on the share of income of the entity distributed to each nonresident member and pay the withheld amount in the manner prescribed by the [tax agency]. The pass-through entity shall be liable to the [state] for the payment of the tax required to be withheld under this section and shall not be liable to such member for the amount withheld and paid over in compliance with this section. A member of a pass-through entity that is itself a pass-through entity (a “lower-tier pass-through entity”) shall be subject to this same requirement to withhold and pay over income tax on the share of

income distributed by the lower-tier pass-through entity to each of its nonresident members. The [tax agency] shall apply tax withheld and paid over by a pass-through entity on distributions to a lower-tier pass-through entity to the withholding required of that lower-tier pass-through entity.

B. A pass-through entity shall, at the time of payment made pursuant to this section, deliver to the department a return upon a form prescribed by the department showing the total amounts paid or credited to its nonresident members, the amount withheld in accordance with this section, and any other information the department may require. A pass-through entity shall furnish to its nonresident member annually, but not later than the fifteenth day of the third month after the end of its taxable year, a record of the amount of tax withheld on behalf of such member on a form prescribed by the department.

C. Notwithstanding subsection A, a pass-through entity is not required to withhold tax for a nonresident member if

(1) the member has a pro rata or distributive share of income of the pass-through entity from doing business in, or deriving income from sources within, this State of less than \$1,000 per annual accounting period;

(2) the [tax agency] has determined by regulation, ruling or instruction that the member's income is not subject to withholding; or

(3) the member elects to have the tax due paid as part of a composite return filed by the pass-through entity under Section 2; or

(4) the entity is a publicly traded partnership as defined by Section 7704(b) of the Internal Revenue Code that is treated as a partnership for the purposes of the Internal Revenue Code and that has agreed to file an annual information return reporting the name, address, taxpayer identification number and other information requested by the [tax department] of each unitholder with an income in the state in excess of \$500.