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| **Comparison of MTC Joyce Combined Filing Model and**  **Draft Proposed Finnigan Combined Filing Model**  **With Notes on Changes**  This document provides a side-by side comparison of the Commission’s Combined Filing model statute, which follows Joyce, and the proposed model drafted by the Finnigan combined filing work group. The Joyce model is shown on the left-hand side and the draft following Finnigan is shown on the right-hand side.  Changes highlighted in green in the Joyce model, and shown as modified in the Finnigan model, simply conform the Joyce model language to our current drafting style and terminology, or clarify but do not change the substance of provisions in the Joyce model.  Language highlighted in yellow in the Joyce model is language the work group proposes to change in order to adapt it to the Finnigan approach. The corresponding language, as changed, is also highlighted in the Finnigan draft. In some cases, language is being added to the proposed Finnigan model and is highlighted in yellow only in that model.  New substantive changes are highlighted in blue in the Finnigan draft. Two proposed alternative provisions are redlined.  Other explanatory notes have been added as well, following particular draft provisions. | |
| **Multistate Tax Commission**  **Model Statute for Combined Reporting**  *As approved by the Multistate Tax Commission August 17, 2006*  *As amended by the Multistate Tax Commission July 29, 2011*  **Section 1. Definitions.**  **A.** “Person” means an 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]. | **Multistate Tax Commission**  **Proposed Draft Model Statute for Combined Reporting**  *As of October 28, 2019*  **Section 1. Definitions.**     1. “Person” means an 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. For purposes of the [state corporate income tax act] “person” also means a combined group. 2. “Taxpayer” means a person subject to the tax imposed by [state corporate income tax act]. [DRAFTER’S NOTE: The tax imposition sections of the state code should be clear that tax is imposed on corporations as part of a group.] |
| NOTE – The Finnigan model, by defining “person” to include a combined group and “taxpayer” as a “person” subject to the corporate income tax, would treat the group as a “taxpayer.” (This is the so-called “single-entity approach” that the Uniformity Committee asked the work group to adopt.) However, as the drafter’s note above indicates—it is the state tax imposition statute—a separate state statute—that would be operative and must be consistent with this approach. | |
| **C.** “Corporation” means a 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 that is directly or indirectly held by a corporation is 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(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.] Business conducted by a partnership is 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 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., including a group properly making an election under Section 4. in determining the taxpayer’s share of the net business income or loss apportionable to this State. | 1. “Corporation” means a 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 that is directly or indirectly held by a corporation is 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. 2. “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. 3. “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. 4. “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.] Business conducted by a partnership is 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.   1. “Combined group” means the group of all persons that must file a combined return as required by Section 2.A. or 2.B, including a group properly making an election under Section 4. 2. “Combined return” means a tax return for the combined group containing information as provided in [this Act] or required by the [Director]. |
| NOTE: The language in G in the Joyce model above indicates that the “combined group” is the group whose income is taken into account in computing a “taxpayer’s” (that is, the individual corporation’s) share of income (under the Joyce method). That language is unnecessary in the Finnigan context. Instead, in keeping with Finnigan, the group files a combined return as a single taxpayer. To make this clear, the Finnigan model defines a new term – “combined return.” See also Section 2.A. below. (Staff also proposes to alphabetize the definitions and adjust any cross-references.) | |
| **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. Combined reporting required, when; discretionary under certain circumstances.**  **A.** Combined reporting required, when. A taxpayer engaged in a unitary business with one or more other corporations shall file a combined report which includes the income, determined under Section 3.C. of this act, and apportionment factors, determined under [provisions on apportionment factors and Section 3.B. of this act], of all corporations that are members of the unitary business, and such other information as required by the Director. | 1. “United States” means the 50 states of the United States, the District of Columbia, and United States’ territories and possessions. 2. “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 that 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 that 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 return; joint and several liability.**    **A.** Except as provided in Section 4, all the corporations, wherever incorporated or domiciled, that are members of a unitary business shall file a combined return as a combined group. That return must include the income and apportionment factors, determined under Section 3, and other information required by the [Director] for all members of the combined group wherever located or doing business. The combined return must be filed under the name and federal employer identification number of the parent corporation if the parent is a member of the combined group. If there is no parent corporation, or if the parent is not a group member, the members of the combined group shall choose a member to file the return. The filing member must remain the same in subsequent years unless the filing member is no longer the parent corporation or is no longer a member of the combined group. The return must be signed by a responsible officer of the filing member on behalf of the combined group members. Members of the combined group are jointly and severally liable for the tax liability of the combined group included in the combined return. |
| NOTE: The language in Section 2.A. of the Joyce model (above) contemplates that the taxpayer members of the group will use information included in a combined report to compute their taxable income whereas in the Finnigan model the group computes its taxable income as a single taxpayer. Therefore, an additional provision is added to clarify the responsibility for filing the return. (This also replaces the need for Section 4 of the Joyce model, below.) | |
| **B.** Combined reporting at Director’s discretion, when. The Director may, by regulation, require that the combined report include the income and associated apportionment factors of 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 the income and associated apportionment factor denominators 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 a 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 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.  **Section 3. Determination of taxable income or loss using combined report.**  The use of a combined report does not disregard the separate identities of the taxpayer members of the combined group. Each taxpayer member is responsible for tax based on its taxable income or loss apportioned or allocated to this state, which shall include, in addition to other types of income, the taxpayer member’s apportioned share of business income of the combined group, where business income of the combined group is calculated as a summation of the individual net business incomes of all members of the combined group. A member’s net business income is determined by removing all but business income, expense and loss from that member’s total income, as provided in detail below. | **B.** The [Director] may, by regulation, require that the combined return include the income and associated apportionment factors of 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 the income and associated apportionment factors 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 a 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 part of the income and associated apportionment factors of such person be included in the taxpayer’s combined return.  With respect to inclusion of associated apportionment factors pursuant to this Section 2.B., the [Director] may require the exclusion of one or more of the factors, the inclusion of one or more additional factors that 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.  0  **Section 3. Determination of taxable income or loss for a combined group.** |
| NOTE: The Joyce model, in the provision above, makes clear that the “separate identities” of the taxpayer members are not disregarded. Under the Finnigan model, the combined group would be the taxpayer, so that this language would not be necessary. | |
| **A. Components of income subject to tax in this state; application of tax credits and post apportionment deductions.**  **i.** Each taxpayer member is responsible for tax based on its taxable income or loss apportioned or allocated to this state, which includes:  **(a)** its share of apportionable income apportioned to this State of each of the combined groups of which it is a member, determined under Section 3.B.,  **(b)** its share of any apportionable income apportionable to this State of a distinct business activity conducted within and without the state wholly by the taxpayer member, determined under [provisions for apportionment],  **(c)** its income from a business conducted wholly by the taxpayer member entirely within the state,  **(d)** its income sourced to this state from the sale or exchange of capital or assets, and from involuntary conversions, as determined under Section 3.C.ii.(g), below,  **(e)** its nonapportionable income or loss allocable to this State, determined under [provisions for allocation of nonapportoinable income],  **(f)** its income or loss allocated or apportioned in an earlier year, required to be taken into account as state source income during the income year, other than a net operating loss, and  **(g)** its net operating loss carryover or carryback. If the taxable income computed pursuant to Section 3 results in a loss for a taxpayer member of the combined group, that taxpayer member has a [state] net operating loss (NOL), subject to the net operating loss limitations, carryforward and carryback provisions of [provisions on NOLs]. Such NOL is applied as a deduction in a prior or subsequent year only if that taxpayer has [State] source positive net income, whether or not the taxpayer is or was a member of a combined reporting group in the prior or subsequent year. | **A.** **Components of income subject to tax in this state; application of tax credits and post-apportionment deductions.**  **i**. The combined group shall calculate and pay tax based on the combined group taxable income or loss apportioned or allocated to this state, which includes:  **(a)** the group’s apportionable income apportioned to this State, determined under this Section 3., [DRAFTER’S NOTE: If the combined group’s apportionable income might be subject to more than one apportionment method, e.g. when different methods are applied to different types of businesses, the state needs to provide language indicating that the group’s apportionable income may need to be divided between these businesses. Also, if the state provides that apportionment does not apply to a taxpayer (including a group) that does business entirely within the state, then the state may wish to reference that provision here.]    **(b)** the group’s income sourced to this state from the sale or exchange of capital assets and from involuntary conversions, as determined under Section 3.C.ii.(g), below,  **(c)** the group’s nonapportionable income or loss allocable to this State, determined under [provisions for allocation of nonapportionable income];  **(d)** the group’s income or loss allocated or apportioned in an earlier year, required to be taken into account as state source income during the income year, other than a net operating loss, and  **(e)** a deduction for the group net operating loss carryover or carryback subject to the provisions of Section 3.A.iii. and limits imposed by [cite to other NOL limitation provisions]. |
| NOTE: The following changes above are made to adapt the Joyce model to the Finnigan approach:   * The Joyce model refers to the determination of tax items on a separate entity approach (“each taxpayer member”). The Finnigan draft would, instead, refer to the group. * With respect to paragraph (a), the Joyce model appears to assume that a single entity might be a member of more than one combined group. It is not clear how this would occur—given that the water’s edge group under this model effectively includes all worldwide members, but simply excludes certain income and factors of those members. In any case, it does not appear this language needs to be carried over into the Finnigan draft. * Paragraph (b) is applicable only in the Joyce context. The group may have income from multiple businesses that, under state law, would be subject to different apportionment rules—but this is addressed here through a drafter’s note. * Paragraph (c) appears to be a nod to states that have a rule that apportionment does not apply to a taxpayer that does business only within the state. This provision was removed but the concept is added to the drafter’s note. * Paragraph (g) was changed because the draft Finnigan model allows sharing of NOLs and the NOL provisions are set out later in the draft. | |
| **ii.** Except where otherwise provided, no tax credit or post-apportionment deduction earned by one member of the group, but not fully used by or allowed to that member, may be used in whole or in part by another member of the group or applied in whole or in part against the total income of the combined group; and a post-apportionment deduction carried over into a subsequent year as to the member that incurred it, and available as a deduction to that member in a subsequent year, will be considered in the computation of the income of that member in the subsequent year, regardless of the composition of that income as apportioned, allocated or wholly within this state. | **ii.** If the use of a tax credit or post-apportionment deduction provided in any other section of [this act] is limited to the [state] tax or [state] income attributed to a separate corporation, then, if the corporation files as part of a combined group, the limit imposed on the use of the credit or post-apportionment deduction is equal to the corporation’s share of the combined group’s [state] tax or [state] income calculated following the general provisions of Section 3.A.i. above and regulations of the Director adopted for this purpose. The corporation’s separate-entity apportionment percentage for this purpose is calculated as follows:  **(a)** the corporation’s apportionment percentage determined under [cite apportionment provisions], including in the [property, payroll and receipts factor] numerators the corporation’s separate [property, payroll and receipts, respectively] associated with the combined group’s unitary business in this state, and including in the denominator the [property, payroll and receipts] of all members of the combined group, which property, payroll and receipts are associated with the combined group’s unitary business wherever located; and  **(b)** the [property, payroll, and receipts] of a partnership is included in the determination of the partner’s apportionment percentage in proportion to a ratio the numerator of which is the amount of the partner’s distributive share of the partnership’s unitary income included in the income of the combined group in accordance with Section 3.C.ii.(c) and the denominator of which is the amount of the partnership’s total unitary income. |
| NOTE: The Joyce model, in keeping with the theory behind Joyce, treats certain tax attributes, including tax credits and NOLs, as belonging to the separate taxpayer members of the group. I the case of credits, the Joyce model effectively makes no sharing of tax credits the default rule (“Except where otherwise provided . . .”). Because the draft Finnigan model uses the single-entity approach (so that income and other items are not computed separately for each member) and therefore does not set out a separate-entity apportionment approach (contained in the Joyce model) the Finnigan model must provide a separate mechanism for limiting the sharing of tax credits—effectively incorporating the separate-entity apportionment approach solely for this purpose. This is the purpose of the language added to the Finnigan model in ii. above. | |
|  | **iii.** The combined group may take a net operating loss deduction against income allocated or apportioned to this state in a tax year under this Section 3 to offset such income, in whole or in part, to the extent the group has an available net operating loss carryover in that year.  **(a)** The combined group available net operating loss carryover in any tax year is:  **(1)** The total net operating losses of the combined group allocated or apportioned to the state in past years to the extent such losses have not been used to offset income of the group or are not otherwise limited by state law; plus  **(2)** The net operating losses of a member of the group created before that member became a part of the group, but only to the extent such losses:  **(I)** would not be subject to limitations applicable to those losses under any provision of the Internal Revenue Code or applicable federal regulations if the member were joining a federal consolidated filing group;  **(II)** were properly allocated or apportioned to this state in the year created;  **(III)** were properly attributed to the member under Section 3.A.iii if the member was part of a separate combined group when the losses were created;  **(IV)** have not been used to offset income of any taxpayer; and  **(V)** are not otherwise limited by state law; minus  **(3)** The net operating losses of a member of the combined group attributed to that member under Section 3.A.iii.(b) , below, that have not been used to offset income and are not otherwise limited by state law, as of the date that member is no longer part of the combined group.  **(b)** For purposes of applying the provisions of this Section 3.A.iii. a combined group must attribute losses apportioned or allocated to this state in any tax year to the members of the group as follows:    **(1)** To each member of the group that had a loss under Section 3.C.ii, the portion of the group loss determined by multiplying that loss by a fraction, the numerator of which is the member’s loss, and the denominator of which is the total loss of all the members that had losses; plus  **(2)** To each member of the group that had a nonapportionable loss allocated to this state, but only to the extent that such loss contributed to the total combined group loss reported to the state in that year.  **(3)** Losses attributed to combined group members are deemed to have been used to offset income through the deduction allowed in Section A.i.(e) by applying a pro-rata reduction to the losses of all combined group members in each year, starting with the earliest year. In no case shall members be attributed total losses under this Section 3.A.iii.(b) in excess of the loss reported to this state by the combined group in the tax year. |
| NOTE: The provisions above address the treatment of NOLs under the Finnigan draft. Whereas the Joyce model prohibits NOL sharing among the group members, the Finnigan draft would allow sharing. The draft therefore must provide limitations on the sharing of NOLs which are contained in the provisions above. In addition, the work group produced a white paper on the subject of NOL sharing and related limitations. | |
| **B. Determination of taxpayer’s share of the business income of a combined group apportionable to this State.**  The taxpayer’s share of the business income apportionable to this State of each combined group of which it is a member is the product of:  **i.** the business income of the combined group, determined under Section 3.C., and  **ii.** the taxpayer member’s apportionment percentage, determined under [provisions on apportionment factors], including in the [property, payroll and receipts factor]numerators the taxpayer’s [property, payroll and receipts, respectively,] associated with the combined group’s unitary business in this state, and including in the denominator the [property, payroll and receipts] of all members of the combined group, including the taxpayer, which property, payroll and receipts are associated with the combined group’s unitary business wherever located. The [property, payroll, and receipts] of a partnership are included in the determination of the partner's apportionment percentage in proportion to a ratio the numerator of which is the amount of the partner's distributive share of partnership’s unitary apportionable income included in the income of the combined group in accordance with Section 3.C.ii.(c). and the denominator of which is the amount of the partnership’s total unitary apportionable income. | **B. Determination of State share of apportionable income of combined group.**  **i.** The State share of apportionable income of the combined group included in the combined group income required to be reported to this state is the product of:  **(a)** the apportionable income of the combined group, determined under Section 3.C, and  **(b)** an apportionment percentage determined pursuant to [cite state allocation and apportionment rules], including [property, payroll, and receipts] of the combined group sourced to this state pursuant to [cite state allocation and apportionment rules] and associated with the combined group’s unitary business in this state in the numerator, and including [property, payroll, and receipts] of the combined group wherever located and associated with the combined group’s unitary business in the denominator.  **ii.** In calculating the apportionment percentage in Section 3.B.i.(b), [property, payroll, and receipts] of a partnership are included in the determination in proportion to a ratio the numerator of which is the amount of the distributive share of the partnership’s unitary apportionable income included in the income of the combined group in accordance with Section 3.C.ii.(c) and the denominator of which is the amount of the partnership’s total unitary apportionable income. |
| NOTE: The Joyce model uses the separate-entity apportionment approach. The Finnigan draft uses the single-entity apportionment approach (a combined apportionment factor). In addition to the changes to adapt the Finnigan approach, a change is proposed to the Joyce language in both versions to specify that the percentage of the partnership factors to be included in the apportionment factors is based on the partnership’s unitary *apportionable* income attributed to the partner (or group). | |
| **C. Determination of the apportionable income of the combined group.**  The apportionable income of a combined group is determined as follows:  **i.** From the total income of the combined group, determined under Section 3.C.ii., subtract income, and add expense or loss, other than the apportionable income, expense or loss of the combined group.  **ii.** Except as otherwise provided, the total income of the combined group is the sum of the income of each member of the combined group determined under federal income tax laws, as adjusted for state purposes, as if the member were not consolidated for federal purposes. The income of each member of the combined group is determined as follows:  **(a)** For any member incorporated in the United States, or included in a consolidated federal corporate income tax return, the income to be included in the total income of the combined group is the taxable income for the corporation after making appropriate adjustments under [state tax code provisions for adjustments to taxable income].  **(b) (1)** For any member not included in Section 3.C.ii.(a), the income to be included in the total income of the combined group is determined as follows:  **(A)** A profit and loss statement 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.  **(B)** The profit and loss statement must be adjusted to conform it to the accounting principles generally accepted in the United States for the preparation of such statements except as modified by this Section 3.C.ii.(b).  **(C)** The profit and loss statement must be adjusted to conform it to the tax accounting standards required by the [state tax code]  **(D)** Except as otherwise provided by regulation, the profit and loss statement of each member of the combined group, and the apportionment factors related thereto, whether United States or foreign, must be translated into the currency in which the parent company maintains its books and records.  **(E)** Income apportioned to this state must be expressed in United States dollars.  **(2)** In lieu of the procedures set forth in Section 3.C.ii.(b)(1), above, and subject to the determination of the Director that it reasonably approximates income as determined under [the State tax code], any member not included in Section 3.C.ii.(a) may determine its income on the basis of the consolidated profit and loss statement which includes the member and which is prepared for filing with the Securities and Exchange Commission by related corporations. If the member is not required to file with the Securities and Exchange Commission, the Director may allow the use of the consolidated profit and loss statement prepared for reporting to shareholders and subject to review by an independent auditor. If above statements do not reasonably approximate income as determined under [the State tax code] the Director may accept those statements with appropriate adjustments to approximate that income. | **C. Determination of the apportionable income of the combined group.**  The apportionable income of a combined group is determined as follows:  **i.** From the total income of the combined group, determined under Section 3.C.ii., subtract income, and add expense or loss, other than the apportionable income, expense or loss of the combined group.  **ii.** Except as otherwise provided, the total income of the combined group is the sum of the income of each member of the combined group determined under federal income tax laws, as adjusted for state purposes, as if the member were not consolidated for federal purposes. The income of each member of the combined group is determined as follows:  **(a)** For any member incorporated in the United States, or included in a consolidated federal corporate income tax return, the income to be included in the total income of the combined group is the taxable income for the corporation after making appropriate adjustments under [state tax code provisions for adjustments to taxable income].  **(b) (1)** For any member not included in Section 3.C.ii.(a), the income to be included in the total income of the combined group is determined as follows:  **(A)** A profit and loss statement 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.  **(B)** The profit and loss statement must be adjusted to conform it to the accounting principles generally accepted in the United States for the preparation of such statements except as modified by this regulation.  **(C)** The profit and loss statement must be adjusted to conform it to the tax accounting standards required by the [state tax code]  **(D)** Except as otherwise provided by regulation, the profit and loss statement of each member of the combined group, and the apportionment factors related thereto, whether United States or foreign, must be translated into the currency in which the parent company maintains its books and records.  **(E)** Income apportioned to this state must be expressed in United States dollars.  PROPOSED (b)(1): For any member not included in Section 3.C.ii.(a), the income to be included in the total income of the combined group is determined from a profit and loss statement prepared for that member in the currency in which its books of account are regularly maintained, provided this profit and loss statement is subject to an independent audit, adjusted to conform it to the accounting principles generally accepted in the United States for the preparation of such statements and further modified to take into account any book-tax adjustments necessary to reflect federal or [state] tax law. Income so computed includes all income wherever derived and is not limited to items of U.S. source income or effectively connected income within the meaning of the Internal Revenue Code. The income and related apportionment factors that are denominated in a foreign currency must also be translated into U.S. dollars on a reasonable basis consistently applied year-to-year and entity-by-entity. Unrealized foreign currency gains and losses are not recognized. Income apportioned to this state is to be expressed in U.S. dollars.  **(2)** In lieu of the procedures set forth in Section 3.C.ii.(b)(1), above, and subject to the determination of the Director that it reasonably approximates income as determined under [the State tax code], the combined group may determine the income for any member not included in Section 3.C.ii.(a) on the basis of the consolidated profit and loss statement which includes the member and which is prepared for filing with the Securities and Exchange Commission by related corporations. If the member is not required to file with the Securities and Exchange Commission, the Director may allow the use of the consolidated profit and loss statement prepared for reporting to shareholders and subject to review by an independent auditor. If above statements do not reasonably approximate income as determined under [the State tax code] the Director may accept those statements with appropriate adjustments to approximate that income.  PROPOSED (b)(2): In lieu of the procedures set forth in Section 3.C.ii.(b)(1) or in any case where it is necessary to fairly and consistently reflect the income and apportionment factors of foreign operations included in the unitary business, the [Director] may provide for other procedures to reasonably approximate the income and apportionment factors of members with foreign operations. |
| NOTE: The work group considered the language contained in state statutes that serves a similar purpose. See the chart “Comparison of Model Language on Foreign P&L” and the memo to the work group on Foreign Operations Accounting. The memo proposes to simplify and clarify the language but the work group has not yet decided whether to make changes. | |
| **(c)** If a unitary business includes income from a partnership, the income to be included in the total income of the combined group is the member of the combined group's direct and indirect distributive share of the partnership's unitary business income.  **(d)** All dividends paid by one to another of the members of the combined group are excluded to the extent those dividends are paid out of the earnings and profits of the unitary business included in the combined report in the current or an earlier year. This provision does not apply to dividends received from members of the unitary business which are not a part of the combined group.  **(e)** Except as otherwise provided by regulation, apportionable income from an intercompany transaction between members of the same combined group is deferred in a manner similar to 26 CFR 1.1502-13. Upon the occurrence of any of the following events, deferred apportionable income resulting from an intercompany transaction between members of a combined group is restored to the income of the seller, and shall be apportioned if earned immediately before the event:  **(1)** the object of a deferred intercompany transaction is  **(A)** re-sold by the buyer to an entity that is not a member of the combined group,  **(B)** re-sold 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  **(C)** converted by the buyer to a use outside the unitary business in which the buyer and seller are engaged, or  **(2)** the buyer and seller are no longer members of the same combined group, regardless of whether the members part of the unitary business.  **(f)** A charitable expense incurred by a member of a combined group, to the extent allowable as a deduction pursuant to Internal Revenue Code Section 170, is subtracted first from the apportionable income of the combined group (subject to the income limitations of that section applied to the entire apportionable income of the group), and any remaining amount is then treated as a nonapportionable expense allocable to the member that incurred the expense (subject to the income limitations of that section applied to the apportionable income of that specific member).A portion of a charitable deduction disallowed under the foregoing rule, but allowed as a carryover deduction in a subsequent year, is treated as originally incurred in the subsequent year by the same member, and the rules of this section apply in the subsequent year in determining the allowable deduction in that year.  **(g)** Gain or loss from the sale or exchange of capital assets, property described by Internal Revenue Code Section 1231(a)(3), and property subject to an involuntary conversion, is removed from the total separate net income of each member of a combined group and is apportioned and allocated as follows:  **(1)** For each class of gain or loss (short term capital, long term capital, Internal Revenue Code Section 1231, and involuntary conversions) all members' apportionable gain and loss for the class is combined (without netting between such classes), and each class of net apportionable gain or loss is separately apportioned to each member using the member's apportionment percentage determined under Section 3.B., above.  **(2)** Each taxpayer member then nets its apportioned gain or loss for all classes, including apportioned business gain and loss from other combined groups, against the taxpayer member's nonapportionable gain and loss for all classes allocated to this State, using the rules of Internal Revenue Code Sections 1231 and 1222, without regard to any of the taxpayer member's gains or losses from the sale or exchange of capital assets, Section 1231 property, and involuntary conversions which are nonapportionable items allocated to another state.  **(3)** Resulting state source income (or loss, if the loss is not subject to the limitations of Internal Revenue Code Section 1211) of a taxpayer member produced by the application of the preceding subsections is then applied to all other state source income or loss of that member.  **(4)** Resulting state source loss of a member that is subject to the limitations of Section 1211 is carried forward [or carried back] by that member, and treated as state source short-term capital loss incurred by that member for the year for which the carryover [or carryback] applies.  **(h)** Expense of one member of the combined group which is directly or indirectly attributable to the nonapportionable or exempt income of another member of the combined group shall be allocated to that other member as corresponding nonapportionable or exempt expense, as appropriate. | **(c)** If a unitary business includes income from a partnership, the income to be included in the total income of the combined group is the direct and indirect distributive share of the partnership's unitary business income allocated to any member of the combined group.  **(d)** All dividends paid by one to another of the members of the combined group are excluded to the extent those dividends are paid out of the earnings and profits of the unitary business included in the combined report in the current or an earlier year. This provision does not apply to dividends received from members of the unitary business which are not a part of the combined group.  **(e)** Except as otherwise provided by regulation, apportionable income from an intercompany transaction between members of the same combined group is deferred in a manner similar to 26 CFR 1.1502-13. Upon the occurrence of any of the following events, deferred apportionable income resulting from an intercompany transaction between members of a combined group is restored to the income of the seller, and shall be apportioned as if earned immediately before the event:  **(1)** the object of a deferred intercompany transaction is  **(A)** re-sold by the buyer to an entity that is not a member of the combined group,  **(B)** re-sold 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  **(C)** converted by the buyer to a use outside the unitary business in which the buyer and seller are engaged, or  **(2)** the buyer and seller are no longer members of the same combined group, regardless of whether the members remain part of the unitary business.  **(f)** A charitable expense incurred by a member of a combined group, to the extent allowable as a deduction pursuant to Internal Revenue Code Section 170, is subtracted first from the apportionable income of the combined group (subject to the income limitations of that section applied to the entire apportionable income of the group), and any remaining amount is then treated as a nonapportionable expense allocable to the member that incurred the expense (subject to the income limitations of that section applied to the nonapportionable income of that specific member). A portion of a charitable deduction disallowed under the foregoing rule, but allowed as a carryover deduction in a subsequent year, is treated as originally incurred in the subsequent year by the same member, and the rules of this section apply in the subsequent year in determining the allowable deduction in that year.  **(g)** Gain or loss from the sale or exchange of capital assets, property described by Internal Revenue Code Section 1231(a)(3), and property subject to an involuntary conversion, is removed from the total separate net income of each member of a combined group and is apportioned and allocated as follows:  **(1)** For each class of gain or loss (short term capital, long term capital, Internal Revenue Code Section 1231, and involuntary conversions) the apportionable gain and loss for the class is determined for the combined group (without netting between such classes), and each class of net apportionable gain or loss is separately apportioned by each member using the member’s separate-entity apportionment percentage determined under Section 3.A.ii, above.  **(2)** Each member then nets its apportioned gain or loss for all classes, , against the member's nonapportionable gain and loss for all classes allocated to this State, using the rules of Internal Revenue Code Sections 1231 and 1222, without regard to any of the member's gains or losses from the sale or exchange of capital assets, Section 1231 property, and involuntary conversions which are nonapportionable items allocated to another state.  **(3)** Resulting state source income of each member produced by the application of the preceding subsections is then included in the computation of the state source income of the combined group under Section 3.A.i.(b), without offsetting state source losses of other group members.  **(4)** Resulting state source loss of a member that is subject to the limitations of Section 1211 is carried forward [or carried back] by that member, and treated as state source short-term capital loss incurred by that member for the year for which the carryover [or carryback] applies.  PROPOSED ALTERNATIVE: Gain or loss from the sale or exchange of capital assets, property described by Internal Revenue Code Section 1231(a)(3), and property subject to an involuntary conversion, is removed from the total separate net income of each member of a combined group and is apportioned and allocated as follows:  **(1)** For each class of gain or loss (short term capital, long term capital, Internal Revenue Code Section 1231, and involuntary conversions) the apportionable and nonapportionable gain and loss for the class is determined for the combined group making appropriate eliminations, (but without netting gains and losses between such classes).  **(2)** The apportionable gains or losses for the combined group are then netted using the rules of Internal Revenue Code Sections 1231 and 1222.  **(3)** The net apportionable gains or losses for the combined group are then apportioned using the combined group’s apportionment factor.  **(4)** The group’s nonapportionable gains or losses are allocated as provided in [state allocation rules]. Nonapportionable gains allocated to the state under [this provision] are included in the state source income of the combined group under Section 3.A.i.(b) and may not be offset by any losses except for nonapportionable losses derived from the same source in the same tax year. Nonapportionable losses allocated to the state under [this provision] may only be used to offset nonapporionable gains derived from the same nonbusiness source in the same tax year.  **(5)** A resulting state source apportionable loss of the combined group is [carried forward or carried back subject to state law limitations] and treated as apportionable state source short-term capital loss for the year for which the [carryover or carryback] applies, subject to limitations under the Internal Revenue Code, including the consolidated filing rules applied to the combined group as though the combined group were the federal consolidated group.  **(h)** Expense of one member of the combined group which is directly or indirectly attributable to the nonapportionable or exempt income of another member of the combined group shall be allocated to that other member as corresponding nonapportionable or exempt expense, as appropriate. |
| NOTE: Most of the changes to the provisions above are self-explanatory. The proposed alternative to paragraph (g), however, has only been discussed informally and at a very general level by the group.  The Joyce rule, in keeping with the logic of Joyce, treats capital losses as separate entity tax attributes and allows them to be offset only against the same entity’s capital gains. But the model would allow apportioned and allocated gains and losses to be offset.  In keeping with this general approach, the Finnigan draft would not allow netting of capital losses of one member against the capital gains of another—effectively trapping the losses at the entity level. Those losses could be carried forward and used by that member. And again, apportionable and allocable gains and losses could be offset by the same entity. This approach has been clarified by the added language in subparagraph (g)(3) (highlighted in blue).  The alternative language set out in redline above would calculate a group apportionable capital income or loss amount, effectively allowing the sharing of apportionable losses to offset apportionable gains among the group members, subject to other federal limitations. But there would be no offset of apportionable and nonapportionable gains and losses and nonapportionable losses would only be able to be used against nonapportionable gains derived from the same source in the same year. | |
| **Section 4. Designation of surety.**  As a filing convenience, and without changing the respective liability of the group members, members of a combined reporting group may annually elect to designate one taxpayer member of the combined group to file a single return in the form and manner prescribed by the department, in lieu of filing their own respective returns, provided that the taxpayer designated to file the single return consents to act as surety with respect to the tax liability of all other taxpayers properly included in the combined report, and agrees to act as agent on behalf of those taxpayers for the year of the election for tax matters relating to the combined report for that year. If for any reason the surety is unwilling or unable to perform its responsibilities, tax liability may be assessed against the taxpayer members.  **Section 5. Water’s -edge election; initiation and withdrawal.**    **A.** Water’s-edge election.  Taxpayer members of a unitary group that meet the requirements of Section 5.B. may elect to determine each of their apportioned shares of the net business income or loss of the combined group pursuant to a water’s-edge election. Under such election, taxpayer members 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 a 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 a member, regardless of the place incorporated or formed, if the average of its property, payroll, and receipts factors within the United States is 20 percent or more;  **iii.** the entire income and apportionment factors of a member which is a domestic international sales corporations 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 a member which is an export trade corporation, as described in Internal Revenue Code Sections 970 to 971, inclusive;  **iv.** for a member not described in [Section 5.A.i.] to [Section 5.A.iii.], inclusive, 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.** for a member that is a “controlled foreign corporation,” as defined in Internal Revenue Code Section 957, include 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 is 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.** for a 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 ncome of other members of the combined group, include the related income and the apportionment factors; and  **vii.** the entire income and apportionment factors of a 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 every member of the unitary business subject to tax under [state income tax code]. 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 constitutes 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 reinstituted 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 will be in place for an additional 10 year period, subject to the same conditions as applied to the original election. | **Section 4. Water’s -edge election; initiation and withdrawal.**    **A.** Water’s-edge election.  Members of a unitary group that meet the requirements of Section 4.B. may elect to file as a combined group pursuant to a water’s-edge election. Under such election, the combined group takes 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 a 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 a member, regardless of the place incorporated or formed, if the average of its property, payroll, and receipts factors within the United States is 20 percent or more;  **iii.** the entire income and apportionment factors of a member which is a domestic international sales corporations 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 a member which is an export trade corporation, as described in Internal Revenue Code Sections 970 to 971, inclusive;  **iv.** for a member not described in Section 4.A.i. to Section 4.A.iii., inclusive, 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.** for a member that is a “controlled foreign corporation,” as defined in Internal Revenue Code Section 957, include income 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 is 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.** for a 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, include the related income and the apportionment factors; and  **vii.** the entire income and apportionment factors of a 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.J., 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 members of the unitary business. The Director shall develop rules and regulations governing the impact, if any, on the scope or application of a water’s-edge election, including the procedures for election and termination or deemed election, resulting from a change in the composition of the unitary group, the combined group, the members, and any other similar change.  **ii.** Such election constitutes 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 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 reinstituted 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, the members of a combined group 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 will be in place for an additional 10 year period, subject to the same conditions as applied to the original election. |