Multistate Tax Commission

Proposed Model Statute for Combined Reporting

As approved by the Multistate Tax Commission August 17, 2006

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(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 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
taxpayer’s share of the net business income or loss apportionable to this State.

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

I. “Tax haven” means a jurisdiction that, during the tax year in question:

i. is identified by the Organization for Economic Co-operation and Development (OECD)
as a tax haven or as having a harmful preferential tax regime, or

ii. exhibits the following characteristics established by the OECD in its 1998 report entitled
Harmful Tax Competition: An Emerging Global Issue as indicative of a tax haven or as a
jurisdiction having a harmful preferential tax regime, regardless of whether it is listed by the
OECD as an un-cooperative tax haven:

(a) has no or nominal effective tax on the relevant income; and

(b) (1) has laws or practices that prevent effective exchange of information for tax
purposes with other governments on taxpayers benefiting from the tax regime;

(2) 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;

(3) 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;

(4) 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

(5) 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.

B. Combined reporting at Director’s discretion, when. The Director may, by regulation, require the combined report include the income and associated apportionment factors of any persons that are not included pursuant to Section 2.A., but that are members of a unitary business, in order to reflect proper apportionment of income of entire unitary businesses. Authority to require combination by regulation under this Section 2.B. includes authority to

require combination of persons that are not, or would not be if doing business in this state,
subject to the [State income tax Act].

In addition, if the Director determines that the reported income or loss of a taxpayer engaged in a
unitary business with any person not included pursuant to Section 2.A. represents an avoidance
or evasion of tax by such taxpayer, the Director may, on a case by case basis, require all or any
part of the income and associated apportionment factors of such person be included in the
taxpayer’s combined report.

With respect to inclusion of associated apportionment factors pursuant to Section 2.B., the
Director may require the exclusion of any one or more of the factors, the inclusion of one or
more additional factors which will fairly represent the taxpayer's business activity in this State,
or the employment of any other method to effectuate a proper reflection of the total amount of
income subject to apportionment and an equitable allocation and apportionment of the taxpayer's
income.

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.

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 shall include:

(a) its share of any business income apportionable 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 business 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 of business income],

(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 nonbusiness income or loss allocable to this State, determined under [provisions for allocation of non-business 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.

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.

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 shall be 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 sales factor]numerators the taxpayer’s [property, payroll and sales, respectively,] associated with the combined group’s unitary business in this state, and including in the denominator the [property, payroll and sales] of all members of the combined group, including the taxpayer, which property, payroll and sales are associated with the combined group’s unitary business wherever located. The [property, payroll, and sales] of a partnership shall be 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 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.

C. Determination of the business income of the combined group.

The business 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
any income, and add any expense or loss, other than the business 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 shall be 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 shall be 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 shall be 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) Adjustments shall be made to the profit and loss statement 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) Adjustments shall be made to the profit and loss statement 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, shall be translated into the currency in which the parent
company maintains its books and records.

(E) Income apportioned to this state shall 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) If a unitary business includes income from a partnership, the income to be included in
the total income of the combined group shall be 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 shall, 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, be eliminated from the
income of the recipient. This provision shall 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, business income from an intercompany transaction between members of the same combined group shall be deferred in
a manner similar to 26 CFR 1.1502-13. Upon the occurrence of any of the following events,
deferred business income resulting from an intercompany transaction between members of a
combined group shall be restored to the income of the seller, and shall be apportioned as
business income 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 unitary.

(f) A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction pursuant to Internal Revenue Code Section 170, be
subtracted first from the business income of the combined group (subject to the income

limitations of that section applied to the entire business income of the group), and any remaining amount shall then be treated as a nonbusiness expense allocable to the member that incurred the expense (subject to the income limitations of that section applied to the nonbusiness income of that specific member). 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 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, shall be removed from the total separate net income of each member of a combined group and shall be 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' business gain and loss for the class shall be combined (without netting between such classes), and each class of net business gain or loss separately apportioned to each member using the member's apportionment percentage determined under Section 3.B., above.

(2) Each taxpayer member shall then net its apportioned business gain or loss for all classes, including any such apportioned business gain and loss from other combined groups, against the taxpayer member's nonbusiness 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 nonbusiness items allocated to another state.

(3) Any 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 shall then be applied to all other state source income or loss of that member.

(4) Any resulting state source loss of a member that is subject to the limitations of

Section 1211 shall be carried forward [or carried back] by that member, and shall be treated as state source short-term capital loss incurred by that member for the year for which the carryover [or carryback] applies.

(h) Any expense of one member of the unitary group which is directly or indirectly attributable to the nonbusiness or exempt income of another member of the unitary group shall be allocated to that other member as corresponding nonbusiness or exempt expense, as appropriate.

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 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 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 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 business 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 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 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 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 shall be in place for an
additional 10 year period, subject to the same conditions as applied to the original election.