

Senate Bill No. 541

(By Senator McCabe)

[Introduced February 17, 2011; referred to the Committee on
Economic Development; and then to the Committee on Finance.]

10 A BILL to amend and reenact §11-24-13f of the Code of West
11 Virginia, 1931, as amended, relating to taxation; and
12 providing for clarification of the entities to be included in
13 a water's-edge group for corporation net income tax purposes.

14 *Be it enacted by the Legislature of West Virginia:*

15 That §11-24-13f of the Code of West Virginia, 1931, as
16 amended, be amended and reenacted to read as follows:

17 **ARTICLE 24. CORPORATION NET INCOME TAX.**

18 **§11-24-13f. Water's-edge reporting mandated absent affirmative**
19 **election to report based on worldwide unitary**
20 **combined reporting basis; initiation and**
21 **withdrawal of worldwide combined reporting**
22 **election.**

23 (a) *Water's-edge reporting.* --

24 Absent an election under subsection (b) of this section to

1 report based upon a worldwide unitary combined reporting basis,
2 taxpayer members of a unitary group shall determine each of their
3 apportioned shares of the net business income or loss of the
4 combined group on a water's-edge unitary combined reporting basis.
5 In determining tax under this article and article twenty-three of
6 this chapter on a water's-edge unitary combined reporting basis,
7 taxpayer members shall take into account all or a portion of the
8 income and apportionment factors of only the following members
9 otherwise included in the combined group pursuant to section
10 thirteen-a of this article:

11 (1) The entire income and apportionment factors of any member
12 incorporated in the United States or formed under the laws of any
13 state, the District of Columbia or any territory or possession of
14 the United States;

15 (2) The entire income and apportionment factors of any member,
16 regardless of the place incorporated or formed, if the average of
17 its property, payroll and sales factors within the United States is
18 twenty percent or more;

19 (3) The entire income and apportionment factors of any member
20 which is a domestic international sales corporation as described in
21 Internal Revenue Code Sections 991 to 994, inclusive; a foreign
22 sales corporation as described in Internal Revenue Code Sections
23 921 to 927, inclusive; or any member which is an export trade
24 corporation, as described in Internal Revenue Code Sections 970 to

1 971, inclusive;

2 (4) Any member not described in subdivision (1), (2) or (3) of
3 this subsection shall include its business income which is
4 effectively connected, or treated as effectively connected under
5 the provisions of the Internal Revenue Code, with the conduct of a
6 trade or business within the United States and, for that reason,
7 subject to federal income tax;

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

19 (6) Any member that earns more than twenty percent of its
20 income, directly or indirectly, from intangible property or
21 service-related activities that are deductible against the business
22 income of other members of the water's-edge group, to the extent of
23 that income and the apportionment factors related thereto. For
24 purpose of this subdivision, income of a member shall not include

1 receipts from transactions giving rise to intangible expense or
2 interest expense of other members which meet the conditions
3 described either in paragraph (A), (B), (C) or (D) of subdivision
4 (3) of subsection (c), or in paragraph (A), (B), (C) or (D) of
5 subdivision (3) of subsection (d), section four-b of this article;
6 and

7 (7) The entire income and apportionment factors of any member
8 that is doing business in a tax haven defined as being engaged in
9 activity sufficient for that tax haven jurisdiction to impose a tax
10 under United States Constitutional standards. If the member's
11 business activity within a tax haven is entirely outside the scope
12 of the laws, provisions and practices that cause the jurisdiction
13 to meet the criteria set forth in the definition of a tax haven,
14 the activity of the member shall be treated as not having been
15 conducted in a tax haven.

16 (b) *Initiation and withdrawal of election to report based on*
17 *worldwide unitary combined reporting. --*

18 (1) An election to report West Virginia tax based on worldwide
19 unitary combined reporting is effective only if made on a timely
20 filed, original return for a tax year by every member of the
21 unitary business subject to tax under this article. The Tax
22 Commissioner shall develop rules governing the impact, if any, on
23 the scope or application of a worldwide unitary combined reporting
24 election, including termination or deemed election, resulting from

1 a change in the composition of the unitary group, the combined
2 group, the taxpayer members and any other similar change.

3 (2) The election shall constitute consent to the reasonable
4 production of documents and taking of depositions in accordance
5 with the provisions of this code.

6 (3) In the discretion of the Tax Commissioner, a worldwide
7 unitary combined reporting election may be disregarded, in part or
8 in whole, and the income and apportionment factors of any member of
9 the taxpayer's unitary group may be included in or excluded from
10 the combined report without regard to the provisions of this
11 section, if any member of the unitary group fails to comply with
12 any provision of this article.

13 (4) In the discretion of the Tax Commissioner, the Tax
14 Commissioner may mandate worldwide unitary combined reporting, in
15 part or in whole, and the income and apportionment factors of any
16 member of the taxpayer's unitary group may be included in or
17 excluded from the combined report without regard to the provisions
18 of this section, if any member of the unitary group fails to comply
19 with any provision of this article or if a person otherwise not
20 included in the water's-edge combined group was availed of with a
21 substantial objective of avoiding state income tax.

22 (5) A worldwide unitary combined reporting election is binding
23 for and applicable to the tax year it is made and all tax years
24 thereafter for a period of ten years. It may be withdrawn or

1 reinstated after withdrawal, prior to the expiration of the ten-
2 year period, only upon written request for reasonable cause based
3 on extraordinary hardship due to unforeseen changes in state tax
4 statutes, law or policy and only with the written permission of the
5 Tax Commissioner. If the Tax Commissioner grants a withdrawal of
6 election, he or she shall impose reasonable conditions necessary to
7 prevent the evasion of tax or to clearly reflect income for the
8 election period prior to or after the withdrawal. Upon the
9 expiration of the ten-year period, a taxpayer may withdraw from the
10 worldwide unitary combined reporting election. Withdrawal must be
11 made in writing within one year of the expiration of the election
12 and is binding for a period of ten years, subject to the same
13 conditions as applied to the original election. If no withdrawal
14 is properly made, the worldwide unitary combined reporting election
15 shall be in place for an additional ten-year period, subject to the
16 same conditions as applied to the original election.

17 (c) For purposes of determining the tax imposed by article
18 twenty-three of this chapter, the term "income", as used in this
19 section, shall be interpreted to mean the tax base or capital, as
20 applicable, for purposes of the tax imposed under article twenty-
21 three of this chapter.

NOTE: The purpose of this bill is to make a technical correction clarifying which entities are to be included in a water's edge group for purposes of the corporation net income tax.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.