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SENATE BILL 1

**53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**

INTRODUCED BY

Peter Wirth

AN ACT

RELATING TO TAXATION; REQUIRING COMBINED REPORTING FOR A  
UNITARY GROUP; ADDING AND AMENDING DEFINITIONS IN THE CORPORATE  
INCOME AND FRANCHISE TAX ACT; REPEALING SECTION 7-2A-8.4 NMSA  
1978 (BEING LAWS 1983, CHAPTER 213, SECTION 13, AS AMENDED).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 7-2A-2 NMSA 1978 (being Laws 1986,  
Chapter 20, Section 33, as amended) is amended to read:

"7-2A-2. DEFINITIONS.--For the purpose of the Corporate  
Income and Franchise Tax Act and unless the context requires  
otherwise:

A. "affiliated group" means ~~[that term as it is  
used in the Internal Revenue Code]~~ one or more chains of  
corporations, not including corporations that are qualified to  
do business but are not otherwise doing business in this state,

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1 that are connected through stock ownership, not including  
2 nonvoting stock that is limited and preferred as to dividends,  
3 with a common parent corporation that meet the following  
4 requirements:

5 (1) at least eighty percent of the stock of  
6 each of the corporations in the group, excluding the common  
7 parent corporation, is owned by one or more of the other  
8 corporations in the group; and

9 (2) the common parent directly owns at least  
10 eighty percent of the stock of at least one of the corporations  
11 in the group;

12 B. "bank" means any national bank, national banking  
13 association, state bank or bank holding company;

14 C. "base income" means that part of the taxpayer's  
15 income defined as taxable income and upon which the federal  
16 income tax is calculated in the Internal Revenue Code for  
17 income tax purposes plus, for taxable years beginning on or  
18 after January 1, 1991, the amount of the net operating loss  
19 deduction allowed by Section 172(a) of the Internal Revenue  
20 Code, as that section may be amended or renumbered, and claimed  
21 by the taxpayer for that year; "base income" also includes  
22 interest received on a state or local bond;

23 D. "common ownership" means the direct or indirect  
24 control or ownership of more than fifty percent of the  
25 outstanding voting stock, ownership of which shall be

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1 determined pursuant to Section 1563 of the Internal Revenue  
2 Code, of:

3 (1) a parent-subsidiary controlled group as  
4 defined in Section 1563 of the Internal Revenue Code, except  
5 that fifty percent shall be substituted for eighty percent;

6 (2) a brother-sister controlled group as  
7 defined in Section 1563 of the Internal Revenue Code; or

8 (3) three or more corporations each of which  
9 is a member of a group of corporations described in Paragraph  
10 (1) or (2) of this subsection, and one of which is:

11 (a) a common parent corporation included  
12 in a group of corporations described in Paragraph (1) of this  
13 subsection; and

14 (b) included in a group of corporations  
15 described in Paragraph (2) of this subsection;

16 ~~[D-]~~ E. "corporation" means corporations, joint  
17 stock companies, real estate trusts organized and operated  
18 under the Real Estate Trust Act, financial corporations and  
19 banks, other business associations and, for corporate income  
20 tax purposes, partnerships and limited liability companies  
21 taxed as corporations under the Internal Revenue Code;

22 ~~[E-]~~ F. "department" means the taxation and revenue  
23 department, the secretary of taxation and revenue or any  
24 employee of the department exercising authority lawfully  
25 delegated to that employee by the secretary;

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1           ~~[F-]~~ G. "fiscal year" means any accounting period  
2 of twelve months ending on the last day of any month other than  
3 December;

4           H. "foreign corporation" means a corporation that  
5 is not incorporated or organized under the laws of this state;

6           I. "foreign operating company" means a corporation  
7 if:

8                   (1) the corporation is incorporated in the  
9 United States;

10                   (2) the corporation is not a corporation that  
11 qualifies for the Puerto Rico and possession tax credit  
12 pursuant to Section 936 of the Internal Revenue Code;

13                   (3) at least eighty percent of the  
14 corporation's business activity is conducted outside the United  
15 States, as measured by means of the factors ordinarily  
16 applicable pursuant to the Uniform Division of Income for Tax  
17 Purposes Act; and

18                   (4) as calculated in accordance with the  
19 Uniform Division of Income for Tax Purposes Act, the  
20 corporation has:

21                           (a) at least one million dollars  
22 (\$1,000,000) of payroll located outside the United States; and

23                           (b) at least two million dollars  
24 (\$2,000,000) of property located outside the United States;

25           ~~[G-]~~ J. "Internal Revenue Code" means the United

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1 States Internal Revenue Code of 1986, as amended;  
2 [H.] K. "net income" means base income adjusted to  
3 exclude:  
4 (1) income from obligations of the  
5 United States less expenses incurred to earn that income;  
6 (2) other amounts that the state is prohibited  
7 from taxing because of the laws or constitution of this state  
8 or the United States;  
9 (3) for taxable years that began prior to  
10 January 1, 1991, an amount equal to the sum of:  
11 (a) net operating loss carryback  
12 deductions to that year from taxable years beginning prior to  
13 January 1, 1991 claimed and allowed, as provided by the  
14 Internal Revenue Code; and  
15 (b) net operating loss carryover  
16 deductions to that year claimed and allowed;  
17 (4) for taxable years beginning on or after  
18 January 1, 1991 and prior to January 1, 2013, an amount equal  
19 to the sum of any net operating loss carryover deductions to  
20 that year claimed and allowed; provided that the amount of any  
21 net operating loss carryover from a taxable year beginning on  
22 or after January 1, 1991 and prior to January 1, 2013 may be  
23 excluded only as follows:  
24 (a) in the case of a timely filed  
25 return, in the taxable year immediately following the taxable

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1 year for which the return is filed; or

2 (b) in the case of amended returns or  
3 original returns not timely filed, in the first taxable year  
4 beginning after the date on which the return or amended return  
5 establishing the net operating loss is filed; and

6 (c) in either case, if the net operating  
7 loss carryover exceeds the amount of net income exclusive of  
8 the net operating loss carryover for the taxable year to which  
9 the exclusion first applies, in the next four succeeding  
10 taxable years in turn until the net operating loss carryover is  
11 exhausted for any net operating loss carryover from a taxable  
12 year prior to January 1, 2013; in no event may a net operating  
13 loss carryover from a taxable year beginning prior to January  
14 1, 2013 be excluded in any taxable year after the fourth  
15 taxable year beginning after the taxable year to which the  
16 exclusion first applies; and

17 (5) for taxable years beginning on or after  
18 January 1, 2013, an amount equal to the sum of any net  
19 operating loss carryover deductions to that year claimed and  
20 allowed; provided that the amount of any net operating loss  
21 carryover may be excluded only as follows:

22 (a) in the case of a timely filed  
23 return, in the taxable year immediately following the taxable  
24 year for which the return is filed; or

25 (b) in the case of amended returns or

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1 original returns not timely filed, in the first taxable year  
2 beginning after the date on which the return or amended return  
3 establishing the net operating loss is filed; and

4 (c) in either case, if the net operating  
5 loss carryover exceeds the amount of net income exclusive of  
6 the net operating loss carryover for the taxable year to which  
7 the exclusion first applies, in the next nineteen succeeding  
8 taxable years in turn until the net operating loss carryover is  
9 exhausted for any net operating loss carryover from a taxable  
10 year beginning on or after January 1, 2013; in no event shall a  
11 net operating loss carryover from a taxable year beginning: 1)  
12 prior to January 1, 2013 be excluded in any taxable year after  
13 the fourth taxable year beginning after the taxable year to  
14 which the exclusion first applies; and 2) on or after  
15 January 1, 2013 be excluded in any taxable year after the  
16 nineteenth taxable year beginning after the taxable year to  
17 which the exclusion first applies;

18 ~~[F.]~~ L. "net operating loss" means any net  
19 operating loss, as defined by Section 172(c) of the Internal  
20 Revenue Code, as that section may be amended or renumbered, for  
21 a taxable year as further increased by the income, if any, from  
22 obligations of the United States for that year less related  
23 expenses;

24 ~~[J.]~~ M. "net operating loss carryover" means the  
25 amount, or any portion of the amount, of a net operating loss

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1 for any taxable year that, pursuant to Paragraph (3), (4) or  
2 (5) of Subsection [~~H~~] K of this section, may be excluded from  
3 base income;

4 [~~K-~~] N. "person" means any individual, estate,  
5 trust, receiver, cooperative association, club, corporation,  
6 company, firm, partnership, limited liability company, joint  
7 venture, syndicate or other association; "person" also means,  
8 to the extent permitted by law, any federal, state or other  
9 governmental unit or subdivision or agency, department or  
10 instrumentality thereof;

11 O. "return" means any tax or information return,  
12 including a water's edge or worldwide combined report,  
13 declaration of estimated tax or claim for refund, including any  
14 amendments or supplements to the return, required or permitted  
15 pursuant to a law subject to administration and enforcement  
16 pursuant to the Tax Administration Act and filed with the  
17 secretary or the secretary's delegate by or on behalf of any  
18 person;

19 [~~L-~~] P. "secretary" means the secretary of taxation  
20 and revenue or the secretary's delegate;

21 [~~M-~~] Q. "state" means any state of the United  
22 States, the District of Columbia, the commonwealth of Puerto  
23 Rico, any territory or possession of the United States or  
24 political subdivision thereof or any political subdivision of a  
25 foreign country;

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1           [N-] R. "state or local bond" means a bond issued  
2 by a state other than New Mexico or by a local government other  
3 than one of New Mexico's political subdivisions, the interest  
4 from which is excluded from income for federal income tax  
5 purposes under Section 103 of the Internal Revenue Code, as  
6 that section may be amended or renumbered;

7           [Θ-] S. "taxable year" means the calendar year or  
8 fiscal year upon the basis of which the net income is computed  
9 under the Corporate Income and Franchise Tax Act and includes,  
10 in the case of the return made for a fractional part of a year  
11 under the provisions of that act, the period for which the  
12 return is made;

13           [P-] T. "taxpayer" means any corporation subject to  
14 the taxes imposed by the Corporate Income and Franchise Tax Act  
15 or a unitary group filing a combined return pursuant to Section  
16 7-2A-8.3 NMSA 1978; [and

17           [Q-] U. "unitary [~~corporations~~] group" means [~~two or~~  
18 ~~more integrated corporations, other than any foreign~~  
19 ~~corporation incorporated in a foreign country and not engaged~~  
20 ~~in trade or business in the United States during the taxable~~  
21 ~~year, that are owned in the amount of more than fifty percent~~  
22 ~~and controlled by the same person and for which at least one of~~  
23 ~~the following conditions exists:~~

24                   ~~(1) there is a unity of operations evidenced~~  
25 ~~by central purchasing, advertising, accounting or other~~

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1 ~~centralized services;~~

2 ~~(2) there is a centralized management or~~  
3 ~~executive force and centralized system of operation; or~~

4 ~~(3) the operations of the corporations are~~  
5 ~~dependent upon or contribute property or services to one~~  
6 ~~another individually or as] a group of corporations, including~~  
7 ~~a captive real estate investment trust, but not including an S~~  
8 ~~corporation, that:~~

9 (1) are related through common ownership; and

10 (2) by a preponderance of the evidence as  
11 determined by a court of competent jurisdiction or the  
12 department, are economically interdependent with one another as  
13 demonstrated by the following factors:

14 (a) centralized management;

15 (b) functional integration; and

16 (c) economies of scale;

17 V. "water's edge combined report" means a report  
18 combining the income and activities of:

19 (1) all members of a unitary group that are:

20 (a) corporations organized or  
21 incorporated in the United States, including those corporations  
22 qualifying for the Puerto Rico and possession tax credit  
23 pursuant to Section 936 of the Internal Revenue Code; and

24 (b) corporations organized or  
25 incorporated outside of the United States meeting the threshold

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1 level of business activity; and

2 (2) an affiliated group electing to file a  
3 water's edge combined report pursuant to Subsection B of  
4 Section 7-2A-8.3 NMSA 1978; and

5 W. "worldwide combined report" means the  
6 combination of the income and activities of all members of a  
7 group of corporations irrespective of the country in which the  
8 corporations are incorporated or conduct business activity."

9 SECTION 2. Section 7-2A-8.3 NMSA 1978 (being Laws 1983,  
10 Chapter 213, Section 12, as amended) is amended to read:

11 "7-2A-8.3. COMBINED [RETURNS] REPORTS.--

12 A. A unitary [~~corporation~~] group that is subject  
13 to taxation under the Corporate Income and Franchise Tax Act  
14 [~~and that has not previously filed a combined return pursuant~~  
15 ~~to this section or a consolidated return pursuant to Section~~  
16 ~~7-2A-8.4 NMSA 1978 may elect to file a combined return with~~  
17 ~~other unitary corporations as though the entire combined net~~  
18 ~~income were that of one corporation; provided, however, that~~  
19 ~~for taxable years beginning on or after January 1, 2014, a~~  
20 ~~unitary corporation that provides retail sales of goods in a~~  
21 ~~facility of more than thirty thousand square feet under one~~  
22 ~~roof in New Mexico shall file a combined return with other~~  
23 ~~unitary corporations as though the entire combined net income~~  
24 ~~were that of one corporation. The return filed under this~~  
25 ~~method of reporting shall include the net income of all the~~

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1 ~~unitary corporations. Transactions among the unitary~~  
2 ~~corporations may be eliminated by applying the appropriate~~  
3 ~~rules for reporting income for a consolidated federal income~~  
4 ~~tax return. Any corporation that has filed an income tax~~  
5 ~~return with New Mexico pursuant to Section 7-2A-8.4 NMSA 1978~~  
6 ~~shall not file pursuant to this section unless the secretary~~  
7 ~~gives prior permission to file on a combined return basis.~~

8 ~~B. Once corporations have reported net income~~  
9 ~~through a combined return for any taxable year, they shall~~  
10 ~~file combined returns for subsequent taxable years, so long~~  
11 ~~as they remain unitary corporations, unless the corporations~~  
12 ~~elect to file pursuant to Section 7-2A-8.4 NMSA 1978 or~~  
13 ~~unless the secretary grants prior permission for one or more~~  
14 ~~of the corporations to file individually.~~

15 ~~C. For taxable years beginning on or after~~  
16 ~~January 1, 1993, no unitary corporation once included in a~~  
17 ~~combined return may elect, or be granted permission by the~~  
18 ~~secretary, for any subsequent taxable year to separately~~  
19 ~~account pursuant to Paragraph (4) of Subsection A of Section~~  
20 ~~7-2A-8 NMSA 1978.~~

21 ~~D. Notwithstanding Subsection A of this section,~~  
22 ~~a unitary corporation shall not be required to file a~~  
23 ~~combined return pursuant to this section if that unitary~~  
24 ~~corporation:~~

25 ~~(1) has operations in New Mexico at~~

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1 ~~facilities that do not provide retail sales of goods; and~~  
2 ~~(2) employs at least seven hundred fifty~~  
3 ~~employees in New Mexico at such facilities]~~ shall file a  
4 water's edge combined report or a worldwide combined report.

5 B. A group of corporations that are not otherwise  
6 a unitary group may elect to file a water's edge combined  
7 report if each member of the group is doing business in this  
8 state, part of the same affiliated group and qualified to  
9 file a federal consolidated return pursuant to Section 1501  
10 of the Internal Revenue Code. If an affiliated group elects  
11 to file a water's edge combined report, each corporation  
12 within the affiliated group that is doing business in this  
13 state shall file a combined report. Corporations that elect  
14 to file a water's edge combined report shall not thereafter  
15 elect to file a separate return without the consent of the  
16 department.

17 C. A unitary group may elect to file a worldwide  
18 combined report. Corporations electing to file a worldwide  
19 combined report may not thereafter elect to file a return on  
20 a basis other than a worldwide combined report without the  
21 consent of the department.

22 D. A group filing a water's edge or worldwide  
23 combined report shall calculate unadjusted income of the  
24 combined group by:

25 (1) computing unadjusted income on a

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1 separate return basis;

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

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

6 E. If an entity does not calculate federal  
7 taxable income, then unadjusted income shall be calculated  
8 based on the applicable federal tax laws.

9 F. For purposes of apportionment under the  
10 Uniform Division of Income for Tax Purposes Act:

11 (1) corporations filing a water's edge or  
12 worldwide combined report may not include intercompany sales  
13 or other intercompany transactions between the corporations  
14 included in the combined report in determining the sales  
15 factor;

16 (2) corporations filing a water's edge or  
17 worldwide combined report may not include intercompany rents  
18 or other intercompany transactions between the corporations  
19 included in the combined report in determining the property  
20 factor; and

21 (3) the amounts of the numerators in this  
22 state of the property, payroll, and sales factors of an  
23 out-of-state business, as defined in Section 7-1-83 NMSA  
24 1978, that are directly related to disaster- or emergency-  
25 related work during a disaster period shall not be included

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in the apportionment fraction of the group."

SECTION 3. REPEAL.--Section 7-2A-8.4 NMSA 1978 (being Laws 1983, Chapter 213, Section 13, as amended) is repealed.

SECTION 4. APPLICABILITY.--The provisions of this act apply to taxable years beginning on or after January 1, 2017.