ENGROSSED

Senate Bill No. 386

(By Senators Unger, Browning, Snyder, Kessler (Mr. President) and Palumbo)

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[Introduced January 23, 2012; referred to the Committee on the Judiciary; and then to the Committee on Finance.]

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A BILL to amend and reenact §11-24-13f of the Code of West Virginia, 1931, as amended, relating to taxation of water's-edge corporations; exempting certain income which is already exempt under certain tax treaties by federal law; clarifying the entities to be included in a water's-edge group for corporation net income tax purposes; providing certain authority to the Tax Commissioner to require reports or make adjustments; and authorizing legislative, procedural or emergency rules, as necessary.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 24. CORPORATION NET INCOME TAX.

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

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

Absent an election under subsection (b) of this section to report based upon a worldwide unitary combined reporting basis, taxpayer members of a unitary group shall determine each of their apportioned shares of the net business income or loss of the combined group on a water's-edge unitary combined reporting basis. In determining tax under this article and article twenty-three of this chapter on a water's-edge unitary combined reporting basis, 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 thirteen-a of this article:

(1) 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;

(2) 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 twenty percent or more;

(3) The entire income and apportionment factors of any member which is a domestic international sales corporation 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;

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

(5) 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 ninety percent of the maximum rate of tax specified in Internal Revenue Code Section 11;

(6) Any member that earns more than twenty 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 water's-edge group, to the extent of that income and the apportionment factors related thereto: *Provided,* That for purposes of this subdivision, if a corporation organized outside of the United States is included in a water's-edge combined group pursuant to this subdivision, and has an item of income that is exempt from United States federal income tax pursuant to the mandate of a comprehensive income tax treaty qualified under Internal Revenue Code Section 1(h)(11), that corporation shall be considered to be included in the combined group under this subdivision only with regard to any items of income described in this subdivision that are not so exempt, taking into account items of expense and apportionment factors associated with such items of nonexempt income. Nothing in this subdivision prevents the Tax Commissioner from adjusting, under any provision of this article, any deduction claimed by the payer for amounts that are excluded from the combined group's taxable income under

this subdivision. The Tax Commissioner may require the reporting of the amounts of such excluded income and the documentation of any claimed treaty exemption as conditions to be met by a payer claiming a deduction of such payments. The Tax Commissioner may issue such legislative, procedural or emergency rules as the Tax Commissioner may deem necessary for the administration of this section; and

(7) The entire income and apportionment factors of any member that is doing business in a tax haven 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 set forth in the definition of a tax haven, the activity of the member shall be treated as not having been conducted in a tax haven.

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

(1) An election to report West Virginia tax based on worldwide unitary combined reporting 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 this article. The Tax Commissioner shall develop rules governing the impact, if any, on

the scope or application of a worldwide unitary combined reporting 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.

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

(3) In the discretion of the Tax Commissioner, a worldwide unitary combined reporting 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 or excluded from 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 article.

(4) In the discretion of the Tax Commissioner, the Tax Commissioner may mandate worldwide unitary combined reporting, in part or in whole, and the income and apportionment factors of any member of the taxpayer’s unitary group may be included in or excluded from 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 article 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.

(5) A worldwide unitary combined reporting election is binding for and applicable to the tax year it is made and all tax years thereafter for a period of ten years. It may be withdrawn or reinstituted after withdrawal, prior to the expiration of the ten-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 Tax Commissioner. If the Tax Commissioner grants a withdrawal of election, he or she shall impose reasonable conditions 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 ten-year period, a taxpayer may withdraw from the worldwide unitary combined reporting election. Withdrawal must be made in writing within one year of the expiration of the election and is binding for a period of ten years, subject to the same conditions as applied to the original election. If no withdrawal is properly made, the worldwide unitary combined reporting election shall be in place for an additional ten-year period, subject to the same conditions as applied to the original election.

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