

6. Unitary Business

- a. The legislation also adds Tax Law §210-C to generally require combined reporting if the taxpayer is engaged in a unitary business and a 50% common-ownership test is met.

Under current law, separate corporations are permitted or required to file combined “unitary” reports as a group. Based upon an analysis of substantial inter-corporate transactions and/or distortion, companies are included or excluded from the combined group. Under the new law, a combined report is required of corporations engaged in a unitary business, subject only to a more than 50% common-ownership test (the new law does not address pure holding companies, normally excluded from a New York combined report). The new law does not define a “unitary business,” although there is guidance in federal case law and a substantial body of non-binding jurisprudence in other states. If a taxpayer owns less than 20% of the voting stock of a corporation, it is presumed to be non-unitary.

The new law provides for a 7-year election to treat as includible in a combined group all corporations that meet a more-than-50% ownership test. In a significant departure from current law, even alien (non-United States organized) corporations, currently not includible, can be included in the combined report provided that the corporation has a permanent establishment or effectively connected income in the United States.

EisnerAmper LLP comment: While the new provisions may eliminate controversies over the currently applicable “distortion test” that measures eligibility for inclusion in a combined return against the ultimate benchmark of whether or not a combined group exhibits “distortion” of New York State income, it is clear that a new era of tax planning has dawned. Corporations should carefully examine the advantages and disadvantages of the 7-year election. Taxpayers should address the inclusion of alien corporations. In many instances, the combined group will change, making historical audit results less than predictive of future tax liability.