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HOUSE BILL NO. 1109

Offered January 8, 2020

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A BILL to amend and reenact §§ 58.1-3, 58.1-406, and 58.1-443 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 3 of Title 58.1 an article numbered 11, consisting of sections numbered 58.1-424 through 58.1-429, and by adding a section numbered 58.1-441.1, relating to corporate income tax; combined reporting requirements; disclosure.

Patron—Hudson

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-3, 58.1-406, and 58.1-443 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 3 of Title 58.1 an article numbered 11, consisting of sections numbered 58.1-424 through 58.1-429, and by adding a section numbered 58.1-441.1 as follows:

§ 58.1-3. Secrecy of information; penalties.

A. Except in accordance with a proper judicial order or as otherwise provided by law, the Tax Commissioner or agent, clerk, commissioner of the revenue, treasurer, or any other state or local tax or revenue officer or employee, or any person to whom tax information is divulged pursuant to this section or § 58.1-512 or 58.1-2712.2, or any former officer or employee of any of the aforementioned offices shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation. Such prohibition specifically includes any copy of a federal return or federal return information required by Virginia law to be attached to or included in the Virginia return. This prohibition shall apply to any reports, returns, financial documents or other information filed with the Attorney General pursuant to the provisions of Article 3 (§ 3.2-4204 et seq.) of Chapter 42 of Title 3.2. Any person violating the provisions of this section is guilty of a Class 1 misdemeanor. The provisions of this subsection shall not be applicable, however, to:

1. Matters required by law to be entered on any public assessment roll or book;
2. Acts performed or words spoken, published, or shared with another agency or subdivision of the Commonwealth in the line of duty under state law;
3. Inquiries and investigations to obtain information as to the process of real estate assessments by a duly constituted committee of the General Assembly, or when such inquiry or investigation is relevant to its study, provided that any such information obtained shall be privileged;
4. The sales price, date of construction, physical dimensions or characteristics of real property, or any information required for building permits;
5. Copies of or information contained in an estate's probate tax return, filed with the clerk of court pursuant to § 58.1-1714, when requested by a beneficiary of the estate or an heir at law of the decedent or by the commissioner of accounts making a settlement of accounts filed in such estate;
6. Information regarding nonprofit entities exempt from sales and use tax under § 58.1-609.11, when requested by the General Assembly or any duly constituted committee of the General Assembly;
7. Reports or information filed with the Attorney General by a Stamping Agent pursuant to the provisions of Article 3 (§ 3.2-4204 et seq.), when such reports or information are provided by the Attorney General to a tobacco products manufacturer who is required to establish a qualified escrow fund pursuant to § 3.2-4201 and are limited to the brand families of that manufacturer as listed in the Tobacco Directory established pursuant to § 3.2-4206 and are limited to the current or previous two calendar years or in any year in which the Attorney General receives Stamping Agent information that potentially alters the required escrow deposit of the manufacturer. The information shall only be provided in the following manner: the manufacturer may make a written request, on a quarterly or yearly basis or when the manufacturer is notified by the Attorney General of a potential change in the amount of a required escrow deposit, to the Attorney General for a list of the Stamping Agents who reported stamping or selling its products and the amount reported. The Attorney General shall provide the list within 15 days of receipt of the request. If the manufacturer wishes to obtain actual copies of the reports the Stamping Agents filed with the Attorney General, it must first request them from the Stamping Agents pursuant to subsection C of § 3.2-4209. If the manufacturer does not receive the reports pursuant to subsection C of § 3.2-4209, the manufacturer may make a written request to the Attorney General, including a copy of the prior written request to the Stamping Agent and any response

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59 received, for copies of any reports not received. The Attorney General shall provide copies of the
60 reports within 45 days of receipt of the request.

61 B. 1. Nothing contained in this section shall be construed to prohibit the publication of statistics so
62 classified as to prevent the identification of particular reports or returns and the items thereof or the
63 publication of delinquent lists showing the names of taxpayers who are currently delinquent, together
64 with any relevant information which in the opinion of the Department may assist in the collection of
65 such delinquent taxes. Notwithstanding any other provision of this section or other law, the Department,
66 upon request by the General Assembly or any duly constituted committee of the General Assembly,
67 shall disclose the total aggregate amount of an income tax deduction or credit taken by all taxpayers,
68 regardless of (i) how few taxpayers took the deduction or credit or (ii) any other circumstances. This
69 section shall not be construed to prohibit a local tax official from disclosing whether a person, firm or
70 corporation is licensed to do business in that locality and divulging, upon written request, the name and
71 address of any person, firm or corporation transacting business under a fictitious name. Additionally,
72 notwithstanding any other provision of law, the commissioner of revenue is authorized to provide, upon
73 written request stating the reason for such request, the Tax Commissioner with information obtained
74 from local tax returns and other information pertaining to the income, sales and property of any person,
75 firm or corporation licensed to do business in that locality.

76 2. This section shall not prohibit the Department from disclosing whether a person, firm, or
77 corporation is registered as a retail sales and use tax dealer pursuant to Chapter 6 (§ 58.1-600 et seq.) or
78 whether a certificate of registration number relating to such tax is valid. Additionally, notwithstanding
79 any other provision of law, the Department is hereby authorized to make available the names and
80 certificate of registration numbers of dealers who are currently registered for retail sales and use tax.

81 3. This section shall not prohibit the Department from disclosing information to nongovernmental
82 entities with which the Department has entered into a contract to provide services that assist it in the
83 administration of refund processing or other services related to its administration of taxes.

84 4. This section shall not prohibit the Department from disclosing information to taxpayers regarding
85 whether the taxpayer's employer or another person or entity required to withhold on behalf of such
86 taxpayer submitted withholding records to the Department for a specific taxable year as required
87 pursuant to subdivision C 1 of § 58.1-478.

88 5. This section shall not prohibit the commissioner of the revenue, treasurer, director of finance, or
89 other similar local official who collects or administers taxes for a county, city, or town from disclosing
90 information to nongovernmental entities with which the locality has entered into a contract to provide
91 services that assist it in the administration of refund processing or other non-audit services related to its
92 administration of taxes. The commissioner of the revenue, treasurer, director of finance, or other similar
93 local official who collects or administers taxes for a county, city, or town shall not disclose information
94 to such entity unless he has obtained a written acknowledgement by such entity that the confidentiality
95 and nondisclosure obligations of and penalties set forth in subsection A apply to such entity and that
96 such entity agrees to abide by such obligations.

97 6. *Nothing contained in this section shall be construed to prohibit the publication of statistics and*
98 *information in public disclosure reports so classified and redacted as to prevent the identification of*
99 *particular taxpayers pursuant to § 58.1-441.1.*

100 C. Notwithstanding the provisions of subsection A or B or any other provision of this title, the Tax
101 Commissioner is authorized to (i) divulge tax information to any commissioner of the revenue, director
102 of finance, or other similar collector of county, city, or town taxes who, for the performance of his
103 official duties, requests the same in writing setting forth the reasons for such request; (ii) provide to the
104 Commissioner of the Department of Social Services, upon entering into a written agreement, the amount
105 of income, filing status, number and type of dependents, and Forms W-2 and 1099 to facilitate the
106 administration of public assistance or social services benefits as defined in § 63.2-100 or child support
107 services pursuant to Chapter 19 (§ 63.2-1900 et seq.) of Title 63.2; (iii) provide to the chief executive
108 officer of the designated student loan guarantor for the Commonwealth of Virginia, upon written request,
109 the names and home addresses of those persons identified by the designated guarantor as having
110 delinquent loans guaranteed by the designated guarantor; (iv) provide current address information upon
111 request to state agencies and institutions for their confidential use in facilitating the collection of
112 accounts receivable, and to the clerk of a circuit or district court for their confidential use in facilitating
113 the collection of fines, penalties, and costs imposed in a proceeding in that court; (v) provide to the
114 Commissioner of the Virginia Employment Commission, after entering into a written agreement, such
115 tax information as may be necessary to facilitate the collection of unemployment taxes and overpaid
116 benefits; (vi) provide to the Virginia Alcoholic Beverage Control Authority, upon entering into a written
117 agreement, such tax information as may be necessary to facilitate the collection of state and local taxes
118 and the administration of the alcoholic beverage control laws; (vii) provide to the Director of the
119 Virginia Lottery such tax information as may be necessary to identify those lottery ticket retailers who
120 owe delinquent taxes; (viii) provide to the Department of the Treasury for its confidential use such tax

information as may be necessary to facilitate the location of owners and holders of unclaimed property, as defined in § 55.1-2500; (ix) provide to the State Corporation Commission, upon entering into a written agreement, such tax information as may be necessary to facilitate the collection of taxes and fees administered by the Commission; (x) provide to the Executive Director of the Potomac and Rappahannock Transportation Commission for his confidential use such tax information as may be necessary to facilitate the collection of the motor vehicle fuel sales tax; (xi) provide to the Commissioner of the Department of Agriculture and Consumer Services such tax information as may be necessary to identify those applicants for registration as a supplier of charitable gaming supplies who have not filed required returns or who owe delinquent taxes; (xii) provide to the Department of Housing and Community Development for its confidential use such tax information as may be necessary to facilitate the administration of the remaining effective provisions of the Enterprise Zone Act (§ 59.1-270 et seq.), and the Enterprise Zone Grant Program (§ 59.1-538 et seq.); (xiii) provide current name and address information to private collectors entering into a written agreement with the Tax Commissioner, for their confidential use when acting on behalf of the Commonwealth or any of its political subdivisions; however, the Tax Commissioner is not authorized to provide such information to a private collector who has used or disseminated in an unauthorized or prohibited manner any such information previously provided to such collector; (xiv) provide current name and address information as to the identity of the wholesale or retail dealer that affixed a tax stamp to a package of cigarettes to any person who manufactures or sells at retail or wholesale cigarettes and who may bring an action for injunction or other equitable relief for violation of Chapter 10.1, Enforcement of Illegal Sale or Distribution of Cigarettes Act; (xv) provide to the Commissioner of Labor and Industry, upon entering into a written agreement, such tax information as may be necessary to facilitate the collection of unpaid wages under § 40.1-29; (xvi) provide to the Director of the Department of Human Resource Management, upon entering into a written agreement, such tax information as may be necessary to identify persons receiving workers' compensation indemnity benefits who have failed to report earnings as required by § 65.2-712; (xvii) provide to any commissioner of the revenue, director of finance, or any other officer of any county, city, or town performing any or all of the duties of a commissioner of the revenue and to any dealer registered for the collection of the Communications Sales and Use Tax, a list of the names, business addresses, and dates of registration of all dealers registered for such tax; (xviii) provide to the Executive Director of the Northern Virginia Transportation Commission for his confidential use such tax information as may be necessary to facilitate the collection of the motor vehicle fuel sales tax; (xix) provide to the Commissioner of Agriculture and Consumer Services the name and address of the taxpayer businesses licensed by the Commonwealth that identify themselves as subject to regulation by the Board of Agriculture and Consumer Services pursuant to § 3.2-5130; (xx) provide to the developer or the economic development authority of a tourism project authorized by § 58.1-3851.1, upon entering into a written agreement, tax information facilitating the repayment of gap financing; and (xxi) provide to the Virginia Retirement System and the Department of Human Resource Management, after entering into a written agreement, such tax information as may be necessary to facilitate the enforcement of subdivision C 4 of § 9.1-401. The Tax Commissioner is further authorized to enter into written agreements with duly constituted tax officials of other states and of the United States for the inspection of tax returns, the making of audits, and the exchange of information relating to any tax administered by the Department of Taxation. Any person to whom tax information is divulged pursuant to this section shall be subject to the prohibitions and penalties prescribed herein as though he were a tax official.

D. Notwithstanding the provisions of subsection A or B or any other provision of this title, the commissioner of revenue or other assessing official is authorized to (i) provide, upon written request stating the reason for such request, the chief executive officer of any county or city with information furnished to the commissioner of revenue by the Tax Commissioner relating to the name and address of any dealer located within the county or city who paid sales and use tax, for the purpose of verifying the local sales and use tax revenues payable to the county or city; (ii) provide to the Department of Professional and Occupational Regulation for its confidential use the name, address, and amount of gross receipts of any person, firm or entity subject to a criminal investigation of an unlawful practice of a profession or occupation administered by the Department of Professional and Occupational Regulation, only after the Department of Professional and Occupational Regulation exhausts all other means of obtaining such information; and (iii) provide to any representative of a condominium unit owners' association, property owners' association or real estate cooperative association, or to the owner of property governed by any such association, the names and addresses of parties having a security interest in real property governed by any such association; however, such information shall be released only upon written request stating the reason for such request, which reason shall be limited to proposing or opposing changes to the governing documents of the association, and any information received by any person under this subsection shall be used only for the reason stated in the written request. The treasurer

182 or other local assessing official may require any person requesting information pursuant to clause (iii) of
183 this subsection to pay the reasonable cost of providing such information. Any person to whom tax
184 information is divulged pursuant to this subsection shall be subject to the prohibitions and penalties
185 prescribed herein as though he were a tax official.

186 Notwithstanding the provisions of subsection A or B or any other provisions of this title, the
187 treasurer or other collector of taxes for a county, city or town is authorized to provide information
188 relating to any motor vehicle, trailer or semitrailer obtained by such treasurer or collector in the course
189 of performing his duties to the commissioner of the revenue or other assessing official for such
190 jurisdiction for use by such commissioner or other official in performing assessments.

191 This section shall not be construed to prohibit a local tax official from imprinting or displaying on a
192 motor vehicle local license decal the year, make, and model and any other legal identification
193 information about the particular motor vehicle for which that local license decal is assigned.

194 E. Notwithstanding any other provisions of law, state agencies and any other administrative or
195 regulatory unit of state government shall divulge to the Tax Commissioner or his authorized agent, upon
196 written request, the name, address, and social security number of a taxpayer, necessary for the
197 performance of the Commissioner's official duties regarding the administration and enforcement of laws
198 within the jurisdiction of the Department of Taxation. The receipt of information by the Tax
199 Commissioner or his agent which may be deemed taxpayer information shall not relieve the
200 Commissioner of the obligations under this section.

201 F. Additionally, it shall be unlawful for any person to disseminate, publish, or cause to be published
202 any confidential tax document which he knows or has reason to know is a confidential tax document. A
203 confidential tax document is any correspondence, document, or tax return that is prohibited from being
204 divulged by subsection A, B, C, or D and includes any document containing information on the
205 transactions, property, income, or business of any person, firm, or corporation that is required to be filed
206 with any state official by § 58.1-512. This prohibition shall not apply if such confidential tax document
207 has been divulged or disseminated pursuant to a provision of law authorizing disclosure. Any person
208 violating the provisions of this subsection is guilty of a Class 1 misdemeanor.

209 **§ 58.1-406. Allocation and apportionment of income.**

210 Any corporation having income from business activity which is taxable both within and without the
211 Commonwealth shall allocate and apportion its Virginia taxable income as provided in §§ 58.1-407
212 through 58.1-420 or, if applicable, Article 11 (§ 58.1-424 et seq.).

213 *Article 11.*

214 *Combined Reporting Requirements.*

215 **§ 58.1-424. Combined reporting requirements.**

216 *For taxable years beginning on or after January 1, 2021, applicable persons shall be subject to*
217 *combined reporting requirements as set forth in this article and implemented by the Department of*
218 *Taxation.*

219 **§ 58.1-425. Definitions.**

220 *For the purpose of this article:*

221 *"Combined group" means the group of all persons whose income and apportionment factors are*
222 *required to be taken into account pursuant to subsection A or B of § 58.1-426 in determining the*
223 *taxpayer's share of the net business income or loss apportionable to the Commonwealth.*

224 *"Corporation" means any corporation as defined by the laws of the Commonwealth or organization*
225 *of any kind treated as a corporation for tax purposes under the laws of the Commonwealth, wherever*
226 *located, which, if it were doing business in the Commonwealth, would be a "taxpayer." The business*
227 *conducted by a partnership that is directly or indirectly held by a corporation shall be considered the*
228 *business of the corporation to the extent of the corporation's distributive share of the partnership*
229 *income, inclusive of guaranteed payments to the extent prescribed by regulation.*

230 *"Internal Revenue Code" means Title 26 of the United States Code of 1986, as amended, without*
231 *regard to application of federal treaties unless expressly made applicable to states of the United States.*

232 *"Partnership" means a general or limited partnership, or organization of any kind treated as a*
233 *partnership for tax purposes under the laws of the Commonwealth.*

234 *"Person" means any individual, firm, partnership, general partner of a partnership, limited liability*
235 *company, registered limited liability partnership, foreign limited liability partnership, association,*
236 *corporation, company, syndicate, estate, trust, business trust, trustee, trustee in bankruptcy, receiver,*
237 *executor, administrator, assignee, or organization of any kind.*

238 *"Tax haven" means a jurisdiction that, during the tax year in question:*

239 *1. Is identified by the Organisation for Economic Co-operation and Development (OECD) as a tax*
240 *haven or as having a harmful preferential tax regime; or*

241 *2. Exhibits the following characteristics established by the OECD in its 1998 report titled "Harmful*
242 *Tax Competition: An Emerging Global Issue" as indicative of a tax haven or as a jurisdiction having a*
243 *harmful preferential tax regime, regardless of whether it is listed by the OECD as an uncooperative 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 a tax regime that 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 that is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial and related services sector relative to its overall economy.

"Taxpayer" means every person, corporation, partnership, organization, trust, or estate subject to taxation under the laws of the Commonwealth, or under the ordinances, resolutions, or orders of any county, city, town, or other political subdivision of the Commonwealth.

"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 is sufficiently interdependent, integrated, and interrelated through its activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among the separate parts and a significant flow of value to the separate parts. 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 there is a synergy, exchange and flow of value between the two parts of the business, and the two corporations are members of the same commonly controlled group.

§ 58.1-426. Combined reporting required, when; discretionary under certain circumstances.

A. A taxpayer engaged in a unitary business with one or more other corporations shall file a combined report that includes the income, determined under subsection D of § 58.1-427, and apportionment factors, determined under Article 10 (§ 58.1-400 et seq.) and subsection C of § 58.1-427, of all corporations that are members of the unitary business, and such other information as required by the Tax Commissioner. With respect to inclusion of associated apportionment factors pursuant to this subsection, the Tax Commissioner may require the exclusion of any one or more of the factors, the inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in the Commonwealth, 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.

B. The Tax Commissioner may, by regulation, require that the combined report include the income and associated apportionment factors of any persons that are not included pursuant to subsection 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 subsection includes authority to require combination of persons that are not, or would not be if doing business in the Commonwealth, subject to the laws of the Commonwealth.

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

§ 58.1-427. Determination of taxable income or loss using combined report.

A. 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 the Commonwealth, 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

305 removing all but business income, expense, and loss from that member's total income, as provided in
306 detail in subsections B, C, and D.

307 B. Components of income subject to tax in the Commonwealth; application of tax credits, and post
308 apportionment deductions.

309 1. Each taxpayer member is responsible for tax based on its taxable income or loss apportioned or
310 allocated to the Commonwealth, which shall include:

311 a. Its share of any business income apportionable to the Commonwealth of each of the combined
312 groups of which it is a member, determined under subsection C;

313 b. Its share of any business income apportionable to the Commonwealth of a distinct business
314 activity conducted within and without the Commonwealth wholly by the taxpayer member, determined
315 under Article 10 (§ 58.1-400 et seq.);

316 c. Its income from a business conducted wholly by the taxpayer member entirely within the
317 Commonwealth;

318 d. Its income sourced to the Commonwealth from the sale or exchange of capital or assets, and from
319 involuntary conversions, as determined under subdivision D 2 g;

320 e. Its nonbusiness income or loss allocable to the Commonwealth, determined under Article 10
321 (§ 58.1-400 et seq.);

322 f. Its income or loss allocated or apportioned in an earlier year, required to be taken into account
323 as Commonwealth source income during the income year, other than a net operating loss; and

324 g. Its net operating loss carryover. If the taxable income computed pursuant to this section results in
325 a loss for a taxpayer member of the combined group, that taxpayer member has a Virginia net
326 operating loss (NOL), subject to the net operating loss limitations and carryforward provisions. Such
327 NOL is applied as a deduction in a prior or subsequent year only if that taxpayer has Virginia source
328 positive net income, whether or not the taxpayer is or was a member of a combined reporting group in
329 the prior or subsequent year.

330 C. Determination of taxpayer's share of the business income of a combined group apportionable to
331 the Commonwealth.

332 The taxpayer's share of the business income apportionable to the Commonwealth of each combined
333 group of which it is a member shall be the product of (i) the business income of the combined group,
334 determined under subsection D, and (ii) the taxpayer member's apportionment percentage, determined
335 under Article 10 (§ 58.1-400 et seq.), including in the property, payroll, and sales factor numerators, as
336 applicable, the taxpayer's property, payroll, and sales, respectively and as applicable, associated with
337 the combined group's unitary business in the Commonwealth, and including in the denominator the
338 property, payroll, and sales, as applicable, of all members of the combined group, including the
339 taxpayer, which property, payroll, and sales, as applicable, are associated with the combined group's
340 unitary business wherever located. The property, payroll, and sales, as applicable, of a partnership shall
341 be included in the determination of the partner's apportionment percentage in proportion to a ratio the
342 numerator of which is the amount of the partner's distributive share of the partnership's unitary income
343 included in the income of the combined group in accordance with subdivision D 2 c and the
344 denominator of which is the amount of the partnership's total unitary income.

345 D. Determination of the business income of the combined group.

346 The business income of a combined group is determined as follows:

347 1. From the total income of the combined group, determined under subdivision 2, subtract any
348 income and add any expense or loss, other than the business income, expense, or loss of the combined
349 group.

350 2. Except as otherwise provided, the total income of the combined group is the sum of the income of
351 each member of the combined group determined under federal income tax laws, as adjusted for state
352 purposes, as if the member were not consolidated for federal purposes. The income of each member of
353 the combined group shall be determined as follows:

354 a. For any member incorporated in the United States, or included in a consolidated federal
355 corporate income tax return, the income to be included in the total income of the combined group shall
356 be the taxable income for the corporation after making appropriate adjustments under Article 10
357 (§ 58.1-400 et seq.).

358 b. (1) For any member not included in subdivision 2 a, the income to be included in the total income
359 of the combined group shall be determined as follows:

360 (a) A profit and loss statement shall be prepared for each foreign branch or corporation in the
361 currency in which the books of account of the branch or corporation are regularly maintained.

362 (b) Adjustments shall be made to the profit and loss statement to conform it to the accounting
363 principles generally accepted in the United States for the preparation of such statements except as
364 modified by this regulation.

365 (c) Adjustments shall be made to the profit and loss statement to conform it to the tax accounting
366 standards required by Title 58.1.

(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 subdivision 2 b (1) and subject to the determination of the Tax Commissioner that it reasonably approximates income as determined under Title 58.1, any member not included in subdivision 2 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 Tax Commissioner 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 Title 58.1, the Tax Commissioner 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 that 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 C.F.R. § 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 (i) resold by the buyer to an entity that is not a member of the combined group, (ii) resold 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 (iii) 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 unitary business shall consider the combined gross receipts and combined income from all sources of all members under subsection C 2 of this section, including eliminating entries for transactions among the members under subdivision C 2 e of this section.

g. A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction pursuant to § 170 of the Internal Revenue Code, 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.

h. Gain or loss from the sale or exchange of capital assets, property described by § 1231(a)(3) of the Internal Revenue Code, 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, § 1231 of the Internal Revenue Code, 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 subsection C.

(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 the Commonwealth, using the rules of §§ 1231 and 1222 of the Internal Revenue Code, without regard to any of the taxpayer member's gains or losses from the sale or exchange of capital assets, § 1231 property, and involuntary conversions that 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 § 1211 of

428 the Internal Revenue Code) of a taxpayer member produced by the application of the preceding
429 subsections shall then be applied to all other state source income or loss of that member.

430 (4) Any resulting state source loss of a member that is subject to the limitations of § 1211 of the
431 Internal Revenue Code shall be carried forward by that member, and shall be treated as state source
432 short-term capital loss incurred by that member for the year for which the carryover applies.

433 i. Any expense of one member of the unitary group that is directly or indirectly attributable to the
434 nonbusiness or exempt income of another member of the unitary group shall be allocated to that other
435 member as corresponding nonbusiness or exempt expense, as appropriate.

436 **§ 58.1-428. Designation of surety.**

437 As a filing convenience, and without changing the respective liability of the group members,
438 members of a combined reporting group may annually elect to designate one taxpayer member of the
439 combined group to file a single return in the form and manner prescribed by the Department, in lieu of
440 filing their own respective returns, provided that the taxpayer designated to file the single return
441 consents to act as surety with respect to the tax liability of all other taxpayers properly included in the
442 combined report, and agrees to act as agent on behalf of those taxpayers for the year of the election for
443 tax matters relating to the combined report for that year. If for any reason the surety is unwilling or
444 unable to perform its responsibilities, tax liability may be assessed against the taxpayer members.

445 **§ 58.1-429. Water's-edge election; initiation and withdrawal.**

446 **A. Water's-edge election.**

447 Taxpayer members of a unitary group that meet the requirements of subsection B may elect to
448 determine each of their apportioned shares of the net business income or loss of the combined group
449 pursuant to a water's-edge election. Under such election, taxpayer members shall take into account all
450 or a portion of the income and apportionment factors of only the following members otherwise included
451 in the combined group pursuant to § 58.1-426, as described below:

452 1. The entire income and apportionment factors of any member incorporated in the United States or
453 formed under the laws of any state, the District of Columbia, or any territory or possession of the
454 United States;

455 2. The entire income and apportionment factors of any member, regardless of the place incorporated
456 or formed, if the average of its property, payroll, and sales factors, as applicable, within the United
457 States are 20 percent or more;

458 3. The entire income and apportionment factors of any member that is a domestic international sales
459 corporation as described in §§ 991 to 994, inclusive, of the Internal Revenue Code; a foreign sales
460 corporation as described in §§ 921 to 927, inclusive, of the Internal Revenue Code; or any member that
461 is an export trade corporation, as described in §§ 970 to 971, inclusive, of the Internal Revenue Code;

462 4. Any member not described in subdivisions 1, 2, or 3, shall include the portion of its income
463 derived from or attributable to sources within the United States, as determined under the Internal
464 Revenue Code without regard to federal treaties, and its apportionment factors related thereto;

465 5. Any member that is a "controlled foreign corporation," as defined in § 957 of the Internal
466 Revenue Code, to the extent of the income of that member that is defined in § 952 of Subpart F of the
467 Internal Revenue Code ("Subpart F income") not excluding lower-tier subsidiaries' distributions of such
468 income that were previously taxed, determined without regard to federal treaties, and the apportionment
469 factors related to that income; any item of income received by a controlled foreign corporation shall be
470 excluded if such income was subject to an effective rate of income tax imposed by a foreign country
471 greater than 90 percent of the maximum rate of tax specified in § 11 of the Internal Revenue Code;

472 6. Any member that earns more than 20 percent of its income, directly or indirectly, from intangible
473 property or service-related activities that are deductible against the business income of other members
474 of the combined group, to the extent of that income and the apportionment factors related thereto; and

475 7. The entire income and apportionment factors of any member that is doing business in a tax haven,
476 where "doing business in a tax haven" is defined as being engaged in activity sufficient for that tax
477 haven jurisdiction to impose a tax under United States constitutional standards. If the member's business
478 activity within a tax haven is entirely outside the scope of the laws, provisions, and practices that cause
479 the jurisdiction to meet the criteria established in § 58.1-425, the activity of the member shall be treated
480 as not having been conducted in a tax haven.

481 **B. Initiation and withdrawal of election.**

482 1. A water's-edge election is effective only if made on a timely filed, original return for a tax year by
483 every member of the unitary business subject to tax under Title 58.1. The Tax Commissioner shall
484 develop rules and regulations governing the impact, if any, on the scope or application of a
485 water's-edge election, including termination or deemed election, resulting from a change in the
486 composition of the unitary group, the combined group, the taxpayer members, and any other similar
487 change.

488 2. Such election shall constitute consent to the reasonable production of documents and taking of
489 depositions in accordance with the laws of the Commonwealth relating to discovery.

3. In the discretion of the Tax Commissioner, 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 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.

4. 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 Tax Commissioner. If the Tax Commissioner grants a withdrawal of election, he 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.

§ 58.1-441.1. Public disclosure report by corporations to Tax Commissioner.

A. Every corporation filing an income tax return in the Commonwealth shall make a public disclosure report to the Department on or before the fifteenth day of the fourth month following the close of every taxable year with certain information as specified in this section from such tax return or other documents on a form prepared by the Department. The public disclosure report shall be included with any forms prescribed by the Department pursuant to § 58.1-441, and the public disclosure report or any amended public disclosure report shall be retained by the Department and the Tax Commissioner as a public record; however, the public disclosure report or amended public disclosure report shall be available for public inspection only after the Department has expunged the name of the taxpayer and the location, including the street address, of the taxpayer's principal office as required in this section.

B. The forms of the public disclosure report prepared by the Department shall be made available to taxpayers required to submit such report under this section on December 1 in each taxable year prior to the taxable year in which such public disclosure report shall be submitted. Such forms shall provide cross-references to any other forms required by the Department to ensure information required in this section is reported identically.

C. In the case of corporations required to submit a public disclosure report pursuant to this section, the forms of such public disclosure report shall require reporting of the following information exactly as such information was reported to the Department on the taxpayer's income tax return:

1. The name of the taxpayer;
2. The location, including the street address, of such taxpayer's principal office;
3. The gross receipts and sales of such taxpayer;
4. The gross profit of such taxpayer;
5. Any excess tax credit or credits subject to carry over to future years, as reported to the Department or claimed on such taxpayer's income tax return;
6. All income of the taxpayer subject to apportionment under this chapter;
7. All income of the taxpayer taxable in the Commonwealth;
8. The total non-income tax assessed;
9. The total excise due;
10. The total amount of tax credit taken by the taxpayer against the excise imposed under this chapter; and

11. Any other information required by the Department and Tax Commissioner for such public disclosure report.

D. Any taxpayer required to make a public disclosure report under this section may supplement the required information under subsection C with additional information or documents on the form provided by the Department.

E. For purposes of this section, all references to a tax return or other forms or information shall refer to those submitted to or prescribed by the Department used for each taxable year beginning on and after taxable year 2020.

F. Where the amount of any item reported pursuant to this section changes, the taxpayer shall, within 30 days of the final determination of such change, file an amended public disclosure report in a form prescribed by the Department.

G. The Department and the Tax Commissioner shall make available for public inspection a list of all taxpayers who are required to file a public disclosure report pursuant to this section by April 1, 2020,

551 *and by April 1 of each taxable year thereafter.*

552 *H. Upon receipt of a public disclosure report filed pursuant to this section, the Department shall*
553 *assign the public disclosure report a number, chosen at random by the Department, which shall be used*
554 *to identify the report for purposes of public inspection of the report and any amendments thereto. A*
555 *taxpayer shall be assigned the same number for its public disclosure reports and any amendments*
556 *thereto each year. The Department and the Tax Commissioner shall make available for public inspection*
557 *the copies of all public disclosure reports and amendments thereto filed pursuant to this section only*
558 *after assigning numbers in accordance with this subsection and expunging from each copy the name of*
559 *the taxpayer and the location, including the street address, of the taxpayer's principal office. All*
560 *documents published by the Department pursuant to this section shall be made available and searchable*
561 *in electronic form.*

562 **§ 58.1-443. Worldwide consolidation or combination.**

563 Notwithstanding any other provisions of this chapter, the Department ~~shall not~~ *may* require, ~~and no~~
564 ~~corporation may elect~~, that a consolidation or combination of an affiliated group include any controlled
565 foreign corporation, the income of which is derived from sources without the United States.

566 **2. That the provisions of this act shall become effective on January 1, 2021, except that the**
567 **provisions of this act amending § 58.1-3 of the Code of Virginia and adding § 58.1-441.1 to the**
568 **Code of Virginia shall become effective beginning with taxable year 2020.**