

830 CMR: DEPARTMENT OF REVENUE

830 CMR 63.00: TAXATION OF CORPORATIONS

830 CMR 63.32B.2: *Combined Reporting*

(1) *Purpose; General Rule; Relationship to Other Rules; Outline.*

- (a) *Purpose.* The purpose of this 830 CMR 63.32B.2 is to provide rules for the combined reporting of income as required by M.G.L. c. 63, § 32B. The M.G.L. c. 63, § 32B reporting requirement recognizes that a unitary business can be conducted not only through separate divisions of a single corporation but also through corporations related by common ownership such that in either instance, in the case of a multi-state business, it is appropriate and constitutionally permissible to apportion the resulting income of the unitary business even if that income arises from activities conducted outside the state. A combined report is a computational schedule that is generally required to be filed when a corporation that is subject to tax under M.G.L. c. 63 is engaged in a unitary business with one or more other corporations that are required to be included in a combined report under M.G.L. c. 63, § 32B. In such cases, in the case of a multi-state business, the combined report is required to calculate the corporation's taxable net income derived from the unitary business as its share, attributable to the commonwealth, of the apportionable income or loss of the combined group engaged in the unitary business.
- (b) *General Rule.* In general, a corporation is required to file a combined report when it is subject to tax under M.G.L. c. 63 and is engaged in a unitary business with one or more other corporations that are required to be included in a combined report pursuant to M.G.L. c. 63, § 32B. In such cases, if any member of the group has income from the activities of the group's unitary business that is taxable in another state, the taxable member shall calculate its taxable net income derived from such unitary business as its apportioned share of the income or loss of the combined group engaged in the unitary business, determined in accordance with such combined report. The combined report shall be filed with the taxpayer's tax return, as further explained in 830 CMR 63.32B.2, and shall include the income and apportionment information of all corporations that are members of the combined group and such other information as required by the Commissioner. The composition of the combined group and the computation of the taxable member's income and its apportionment formula are explained by 830 CMR 63.32B.2. A combined report is also required in cases where a taxpayer corporation is engaged in a unitary business with one or more corporations and no member of the combined group has income from the activities of the group's unitary business that is taxable in another state. In some cases a taxpayer may make an election to treat as its combined group all corporations that are members of its Massachusetts affiliated group, as defined in 830 CMR 63.32B.2(2), on such terms and in keeping with such requirements as are further explained by 830 CMR 63.32B.2. The requirement to file a combined report is *not* dependent upon an evidentiary showing that there is a distortion of income between corporations that are related by common ownership or that there is a lack of arm's length pricing in transactions between such corporations.

(c) *Relationship to Other Rules.*

1. *Application of Combined Reporting.* The corporations that are included in a combined group, including the taxable member or members of such group, generally retain their separate identities under M.G.L. c. 63 for purposes of determining the income measure of the corporate excise to be applied to the taxable members' share of the combined group's taxable income. Consequently, in determining the corporate excise income tax on such taxable income, the rules of M.G.L. c. 63 generally apply to determine the computation of such income and the apportionment formulas, as applicable, of the taxable members of the group, subject to modifications pursuant to M.G.L. c. 63, § 32B or 830 CMR 63.32B.2, as well as the rate of tax to be applied to the taxable members' apportioned income derived from the group.
2. *Continued General Application of M.G.L. c. 63.* The combined reporting requirement does not disregard the separate identity of an individual taxable member of a combined group for purposes of M.G.L. c. 63 generally. Therefore, a taxable member may have tax attributes or tax consequences apart from those determined through the means of a combined report. For example, in any case where no affiliated group election is made, a taxable member of a combined group may have, in addition to its apportionable share of the combined group's unitary business income, allocable or apportionable income from activities that were conducted by the taxpayer and not as part of the combined group's unitary business. In these cases, the taxpayer corporation shall be subject to tax on such other income under the general rules as set forth in M.G.L. c. 63.
3. *Application of Non-income Measure.* The combined reporting rules provide a method for determining the share of taxable net income derived by a taxable member of a combined group from the group's unitary business activities (or Massachusetts affiliated group activities in the instance of an affiliated group election). These rules do not dispense with the requirement that certain corporations are required to pay the minimum corporate excise or the non-income measure of the corporate excise as determined under M.G.L. c. 63, § 39. A member of a combined group that is subject to the non-income measure must separately calculate that measure under the rules that apply thereto. In some instances payment of the non-income measure is required even when a corporation is not subject to tax on its income either through the means of a combined report or otherwise. For example, a corporation that would otherwise be subject to the income measure but for the application of Public Law 86-272 is nonetheless required to pay either the greater of the minimum excise or the non-income measure.
4. *Revocation of Election under Prior M.G.L. c. 63, § 32B.* Pursuant to the enactment of M.G.L. c. 63, § 32B by St. 2008, c. 173, the prior version of M.G.L. c. 63, § 32B has been repealed. Therefore, any taxpayer election that was made pursuant to prior M.G.L. c. 63, § 32B and 830 CMR 63.32B.1, is revoked for tax

years beginning on or after January 1, 2009 and any such prior election shall have no further effect except as set forth in 830 CMR 63.32B.2.

(d) *Outline.* 830 CMR 63.32B.2 is organized as follows:

1. Purpose; General Rule; Relationship to Other Rules; Outline
2. Definitions
3. Unitary Presumptions and Inferences
4. Corporations to Be Included in a Combined Report
5. Water's Edge or Worldwide Parameters of a Combined Report
6. Determination of Taxable Income of Taxable Member of a Combined Group
7. Apportionment of Income Computation; Tax Computation Where No Apportionment
8. Net Operating Loss Carry Forwards
9. Credits
10. Affiliated Group Election
11. Principal Reporting Corporation; Liability
12. Tax Returns; Taxable Year; Fiscalization; Partial Years
13. No Limit on Other Authority
14. Effective Date

(2) *Definitions.*

Affiliated Group, a Massachusetts affiliated group as defined by 830 CMR 63.32B.2(2), unless the context requires differently.

Affiliated Group Election, an election by a taxable member on behalf of itself and its affiliates to treat as its combined group all corporations that are members of its Massachusetts affiliated group, on such terms and in keeping with such requirements as are further explained by 830 CMR 63.32B.2 and such forms or other notices as are issued by the Department. *See* 830 CMR 63.32B.2(10).

Affiliated Group Income, the aggregate taxable net income or loss of the group members of a Massachusetts affiliated group for a taxable year in which an affiliated group election is in effect, which is to be apportioned (or attributed under 830 CMR 63.32B.2(7)(k)) to the members of the group pursuant to the affiliated group election made by such group, whether in the absence of the application of the affiliated group election some or all of any such apportioned income would have been allocable to a particular state.

Code, the federal Internal Revenue Code as amended and in effect for the taxable year.

Combined Group, a group of two or more corporations related by common ownership including one or more corporations that are subject to tax on their income under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A that are required to be included in a combined report pursuant to M.G.L. c. 63, § 32B, as enacted by St. 2008, c. 173, because the corporations are engaged in a unitary business. A combined group specifically includes or excludes certain types of corporations as described at 830 CMR 63.32B.2(4). The combined group shall consist of the one or more taxable members of the group, irrespective of their place of

incorporation or formation, and the additional non-taxable members of such group as determined under 830 CMR 63.32B.2(5). In the case of an affiliated group election, the term “combined group” refers to the Massachusetts affiliated group to which the election applies.

Combined Group’s Taxable Income, the aggregate taxable net income or loss, subject to apportionment and derived from a unitary business or the aggregate taxable income or loss of a Massachusetts affiliated group in the case of an affiliated group election, in either case as reported on a combined report of every taxable member and non-taxable member of the combined group.

Combined Report, a schedule or schedules, as required by M.G.L. c. 63, § 32B, as enacted by St. 2008, c. 173, and 830 CMR 63.32B.2 or such other rules as the Commissioner may establish, which are to be attached to a taxpayer’s tax return and that report the income and apportionment information of all corporations that are members of the taxpayer’s combined group, as well as any supporting information, as required by the Commissioner.

Commissioner, the Commissioner of the Massachusetts Department of Revenue or the Commissioner’s duly authorized representative.

Commonly Owned or Common Ownership, where more than 50% of the voting control of one or more corporations or other entities, as applicable in the context, is directly or indirectly owned by one or more common owners, whether corporate or non-corporate, subject to the following specific rules and examples.

- (a) *Direct and Indirect Voting Control, and Tiered Ownership*. If the same person (and/or any related persons) holds directly or indirectly more than 50% of the voting control of a corporation (a “parent corporation”), that person shall be considered to hold indirectly any stock or other interest in ownership or control in a lower-tier corporation (a “subsidiary corporation”) that is directly or indirectly held by the parent corporation. Thus, by way of illustration, a parent corporation and any one or more corporations (whether or not in a direct chain) connected through direct or indirect stock ownership, where more than 50% of the voting control of each subsidiary corporation is directly or indirectly owned by a corporation (and/or any related persons), are treated as commonly owned or under common ownership, and subject to inclusion in a combined group.

Example 1. Corporation A, a widely-held publicly-traded corporation, owns 51% of the stock of Corporation B; B owns 51% of Corporation C; and C owns 60% of Corporation D. Corporations A, B, C, and D are all treated as commonly owned or under common ownership, and subject to inclusion in a combined group.

Example 2. Same facts as in Example 1, except Corporation C owns 40% of Corporation D, with another 20% of D being owned by an individual who owns 100% of Corporation A. All of Corporations A, B, C, and D are, again, treated as commonly owned or under common ownership, and subject to inclusion in a combined group. D is treated as commonly owned through the aggregation of C’s 40% ownership in D and the related individual’s 20% ownership in D.

(b) *Related Versus Unrelated Owners.*

1. Two or more corporations, where stock representing more than 50% of the voting control of each corporation is owned directly or indirectly by the same person (and/or any related persons), whether corporate or non-corporate, are treated as commonly owned or under common ownership, and subject to inclusion in a combined group. A common owner or owners need not be members of the combined group.

Example 3. Individual (W) owns 51% of Corporation A, 60% of Corporation B, and 100% of Corporation C. Corporations A, B, and C are all treated as commonly owned or under common ownership, and subject to inclusion in a combined group. The same conclusion would be reached if W owned 35% of B and W's husband, a related person, owned 25% of B, so that together W and her husband owned 60% of B.

Example 4. Foreign corporation (F) owns 100% of the stock of Corporation A (organized in the U.S.) and of Corporation B (also organized in the U.S.). A and B each directly or indirectly own various corporate subsidiaries in separate chains leading up to A and B, where the voting control of each subsidiary is more than 50%-owned by a higher-tier corporation in the chain. A and B and all of their respective direct and indirect subsidiaries are treated as commonly owned or under common ownership, and subject to inclusion in a single combined group. Assuming that no worldwide election is made and that F is not a foreign corporation that would be included in a "water's edge" combined group under 830 CMR 63.32B.2(5)(b)1.b. or c., F itself would not be subject to inclusion in such combined group.

2. Two or more corporations shall not be treated as commonly owned or under common ownership, and subject to inclusion in a combined group, solely because such corporations have one or more *unrelated* owners in common, where aggregation of the ownership of such unrelated owners would be necessary in order to represent more than 50% of the voting control of any of such corporations.

Example 5. Individual I-1 owns stock representing 40% of the voting control of Corporation A and stock representing 20% of the voting control of Corporation B. Individual I-2 owns 30% of A and 45% of B. I-1 and I-2 are not related persons, and A and B are not otherwise related persons. A and B are not treated as commonly owned or under common ownership, and thus are not subject to inclusion in a combined group.

- (c) Two or more corporations that are "stapled entities" are treated as commonly owned or under common ownership, and subject to inclusion in a combined group. Stapled entities are entities where, by reason of their form of ownership, or restrictions on transfer of ownership, or other terms or conditions (whether existing by operation of law, by written contract, or otherwise), in the case of a transfer of one or more ownership interests, more than 50% of the voting control of each entity is required to be transferred.

- (d) A group of corporations under common ownership may be engaged in one or more unitary businesses.

Example 6. Assume the same facts as in Example 4. Both A and B and all of their direct and indirect subsidiaries are engaged in unitary business X. In addition, A and all of its subsidiaries are engaged in unitary business Y, but B and its subsidiaries are not engaged in unitary business Y. Assuming that an affiliated group election is not made, A and B and all of their respective direct and indirect subsidiaries would be included in a combined group with respect to unitary business X, and A and all of its direct and indirect subsidiaries would be included in a combined group with respect to unitary business Y.

- (e) *Related Parties; Constructive Ownership.* In determining whether a person is a related person or is considered to hold stock or other ownership or control interests in an entity that is directly held by another person, the constructive ownership rules described in Code § 318 shall generally apply, to the extent not inconsistent with the rules or requirements described in this definition or elsewhere in 830 CMR 63.32B.2, except that:

1. in applying Code § 318(a)(2), if a partnership, estate, trust or corporation owns, directly or indirectly, more than 50% of the voting control of a corporation, it shall be considered to own all of the stock or other ownership or control interests in such corporation, and
2. if a person has an option to acquire stock or other ownership interests in an entity, such stock or other ownership interests shall be treated as owned by such person only to such extent as determined by the Commissioner as necessary to prevent tax avoidance.

- (f) In determining common ownership, the Commissioner may take into account any plan or arrangement, whether existing by operation of law, by contract, or otherwise, for bestowing or shifting ownership or voting control, in addition to the terms of any actual stock ownership or control.

- (g) 830 CMR 63.32B.2(2)Commonly owned(a) through (f) shall be subject to the rules addressing partners and partnership interests that are described in 830 CMR 63.32B.2(2)Unitary Business or the rules set forth elsewhere in 830 CMR 63.32B.2.

Consolidated Return, a return of income filed with the federal government pursuant to Code § 1501 by an affiliated group as determined under Code § 1504.

Corporation, a business corporation within the meaning of M.G.L. c. 63, § 30, whether or not organized in Massachusetts. For taxable years beginning prior to January 1, 2009, a “corporation” refers to either a foreign or domestic business corporation, utility corporation, financial institution, or insurance company, depending upon the context, as determined under the pertinent provisions of M.G.L. c. 63 in effect for such years.

Credit, any tax credit that a corporation may apply against its excise under the pertinent provisions of M.G.L. c. 63.

Disregarded Entity, a disregarded entity within the meaning of M.G.L. c. 63, § 30.

Federal Consolidated Group, an affiliated group as defined in Code § 1504 that has filed a consolidated return of income under Code § 1501.

Massachusetts Affiliated Group, an affiliated group as defined in Code § 1504 that participates in the filing of a federal consolidated return except that the Massachusetts affiliated group shall also include all corporations that are under common ownership that are includable in a combined group under 830 CMR 63.32B.2(4)(b) and (5)(b) irrespective as to whether such corporations are engaged in one or more unitary businesses and irrespective whether such corporations are included in more than one consolidated return filed by more than one federal consolidated group. *See also* 830 CMR 63.32B.2(10)(a) through (c). For example, in cases where the common ownership standard is met, a Massachusetts affiliated group shall include all corporations incorporated in the United States or formed under the laws of the United States, any state, the District of Columbia or any territory or possession of the United States that are commonly owned, directly or indirectly, by any member of such affiliated group. Also, a Massachusetts affiliated group shall include any other commonly owned corporation, regardless of the place of its incorporation or formation, that has property, payroll, and sales factors within the United States that average 20% or more. Further, a Massachusetts affiliated group shall include any other commonly owned corporation, regardless of place of incorporation or formation, that earns more than 20% of its income, directly or indirectly, from intangible property or service-related activities, the costs of which generally are deductible for federal income tax purposes, whether currently or over a period of time, against the business income of other members of the group, but in this case only to the extent of that income and the apportionment factors that relate to that income.

Net Operating Loss, a net operating loss within the meaning of M.G.L. c. 63, § 30.5.

Non-taxable Member, a member of a combined group that is not subject to tax on its income under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A. A non-taxable member that is not subject to income tax under said sections may nonetheless be subject to the non-income measure of the corporate excise as determined under M.G.L. c. 63, § 39.

Partnership, a partnership within the meaning of M.G.L. c. 63, § 30.

Principal Reporting Corporation, the taxable member of a combined group that reports the income of the combined group and otherwise acts as the agent of the members of the group, as further described at 830 CMR 63.32B.2(11).

Taxable Member, a member of a combined group that is subject to tax on its income under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A, other than a corporation described in M.G.L. c. 63, § 38Y.

Unitary Business, a group of two or more corporations related by common ownership that are sufficiently interdependent, integrated or interrelated through their activities so as to provide mutual benefit and produce a significant sharing or exchange of value among them or a significant flow of value between the separate parts. This sharing, exchange or flow of value to a corporation located in this state provides the constitutional basis to apportion the resulting income of the unitary business even if that income arises from activities conducted outside the state. The term unitary business shall be construed to the broadest extent permitted under the Constitution of the United States. Any business conducted by a partnership shall be treated as the business of the partners, whether the partnership interest is 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 magnitude of the partner's ownership interest or its distributive share of partnership income. Moreover, a business conducted directly or indirectly by one corporation is unitary with that portion of a business conducted by another, commonly-owned corporation through its direct or indirect interest in a partnership if the activities conducted by the former corporation and the partnership are unitary regardless of the magnitude of the partner's ownership interest or its distributive or any other share of partnership income. A group of corporations related by common ownership may be engaged in more than one unitary business.

Example. The following example provides an illustration of the partnership rules included in the definition of a "unitary business." X, Y, Z and U are corporations with the following relationships. X owns 55% of Y and Z. U is unrelated to X, Y and Z. Y and U own, respectively, 30% and 70% of partnership P. X, Y and Z are each engaged in discrete businesses that are not unitary with one another. Z is engaged 100% in the manufacture of widgets. P is engaged 100% in the distribution of Z's widgets, a business that is unitary with the business of Z. P's widget business is treated as the business of Y to the extent of Y's distributive share of P's income, 30%. Therefore, Z is engaged in a unitary business with Y to this extent.

Worldwide Election, an election by a taxable member of a combined group on behalf of all of the members of such group engaged in a unitary business to treat as its combined group for purposes of 830 CMR 63.32B.2 all members that are engaged in such unitary business, wherever located, on such terms and in keeping with such requirements as are further explained by 830 CMR 63.32B.2 and such forms or other notices as are issued by the Department. See 830 CMR 63.32B.2(5).

(3) *Unitary Presumptions and Inferences.*

(a) *General.* Without limiting the scope of a unitary business, 830 CMR 63.32B.2(3)(b) through (f) set forth certain presumptions and inferences concerning whether and when two or more corporations under common ownership will be deemed to be engaged in a unitary business. 830 CMR 63.32B.2(3)(b) through (f) do not purport to set forth all of the *indicia* of a unitary business, as that determination is to be made pursuant to U.S. constitutional principles.

(b) *Likely Unitary Situations.* Without limiting the scope of a unitary business as determined in other situations, business activities conducted by corporations under common ownership that are in the same general line of business, such as a multistate

grocery chain, will generally constitute a unitary business. Business activities conducted by corporations under common ownership that comprise different steps in a vertically structured business will almost always constitute a unitary business. For example, a business engaged in the exploration, development, extraction, and processing of a natural resource and the subsequent sale of a product based upon the extracted natural resource, is engaged in a single unitary business.

- (c) *Newly-acquired and Newly-formed Entities.* In the tax year in which the common ownership standard is first met by reason of one of the transactions described in 830 CMR 63.32B.2(3)(c)1. and (c)2., the rebuttable presumptions stated in 830 CMR 63.32B.2(3)(c)1. and (c)2. shall apply. These presumptions may be rebutted by the taxpayer or the Commissioner by the presentation of clear and cogent evidence showing that the corporations in question either are, or are not, engaged in a unitary business, as the case may be.
1. Where a voting interest is directly or indirectly acquired by or in a taxpayer, or by or in a member of a taxpayer's combined group, that results in achieving for the first time common ownership, it shall be presumed that the acquiring and acquired corporations are not engaged in a unitary business for purposes of the tax reporting period of the combined reporting group that includes the acquisition. This presumption against unity shall not apply where the combined group and the acquired corporation were previously engaged in a relationship described in 830 CMR 63.32B.2(3)(b) apart from meeting the common ownership standard.
 2. Where a taxpayer, or one or more members of the taxpayer's combined group, forms a new corporation it shall be presumed that the formed corporation(s) is engaged in a unitary business with the forming corporation(s) from the date of its formation.
- (d) *Passive Holding Companies.* A passive parent holding company that directly or indirectly controls one or more operating company subsidiaries engaged in a unitary business shall be deemed to be engaged in a unitary business and includable in a combined report with the subsidiary or subsidiaries. An intermediate passive holding company shall be deemed to be engaged in a unitary business with the parent and subsidiary or subsidiaries and includable in a combined report with them.
- (e) *Sharing of Intellectual Property; Intercompany Financing.* Transfers or sharing of technical information or intellectual property, such as patents, copyrights, trademarks and service marks, trade secrets, processes or formulas, know-how, research, or development, provide evidence of a unitary relationship when the information or property transferred or shared is significant to the businesses' operations. Similarly, a unitary relationship is indicated when there is significant common or intercompany financing, including the guarantee by, or the pledging of the credit of, one or more business entities for the benefit of another business entity or entities, if the financing activity serves an operational purpose.

(f) *Relevance of Market-based or “Arm’s Length” Pricing to Intercompany Transactions.* One *indicia* of a unitary business conducted between corporations related by common ownership is sales, exchanges, or transfers of products, services and/or intangibles between such corporations. When such evidence exists this evidence is not negated by the use of market-based or “arm’s length” pricing as to the transactions by the corporations in question.

(4) *Corporations to Be Included in a Combined Report.*

(a) *General.* In general, where a corporation subject to tax under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A, is engaged in a unitary business with one or more other corporations that are related by common ownership, the taxpayer corporation must determine its tax liability based upon the income and apportionment information of all corporations included in the combined group through the means of a combined report. In some cases, the taxable member or members of a combined group may make an election to treat their Massachusetts affiliated group as the combined group and to file a combined report on that basis. *See* 830 CMR 63.32B.2(10). Irrespective as to whether an affiliated group election is made, not every type of corporation is required to be included in a combined group and therefore to have its tax attributes included in a combined report. The rules for included and excluded corporations are set forth in 830 CMR 63.32B.3.2(4)(b) and (c).

(b) *Included Corporations.* Corporations that are required to be included in a combined group and therefore required to be included in a combined report filed by a taxable member of a combined group shall include all entities of the kind that are subject to tax or would be subject to tax if doing business in the commonwealth, under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A, and entities described in M.G.L. c. 63, §§ 20 through 29E, including so-called “captive” insurance companies, if such entities do not qualify for treatment as a life insurance company as defined in Code § 816 or an insurance company subject to tax imposed by Code § 831. Each such corporation is included in a combined group and the resulting combined report filing, as stated, irrespective of whether the corporation is actually subject to tax under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A. Consequently, for example, an S corporation is subject to tax under M.G.L. c. 63, § 32D and included in a combined group irrespective as to whether in any given year it actually has a tax liability under M.G.L. c. 63, § 32D. Also, the corporations to be included in a combined group include a real estate investment trust (REIT) as referenced under Code §§ 856 through 859, and a regulated investment company (RIC) as referenced under Code §§ 851 through 855. However, a corporation is only required to be included in a combined group with one or more other corporations if, *inter alia*, it is related with such corporations by common ownership. Therefore, for example, in many cases the ownership of a REIT or a RIC may not meet this standard.

(c) *Excluded Corporations.* Corporations that are not included in a combined group and therefore not included in a combined report filed thereby, irrespective as to whether they are engaged in a unitary business with a taxable member of such group, include an entity described in M.G.L. c. 63, § 38Y or an entity classified and taxed under M.G.L. c. 63, § 38B. Also, such excluded corporations include an entity described in

M.G.L. c. 63, §§ 20 through 29E, except as provided in 830 CMR 63.32B.2(4)(b) or as otherwise provided in M.G.L. c. 63.

(5) *Water's Edge or Worldwide Parameters of Combined Report.*

(a) *General Rule.* A corporation, regardless of its place of incorporation or formation, is required to file a combined report when it is subject to tax under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A and is engaged in a unitary business with one or more corporations that are required to be included in the combined report. In such cases, the taxable member or members of the combined group engaged in a unitary business may elect to determine their apportioned share of the aggregate taxable net income or loss derived from the unitary business pursuant to a worldwide election under which each taxable member shall take into account the income and apportionment factors of all the members, wherever located, includible in the combined group. However, if the taxable members of a combined group do not make this election, each taxable member shall determine its apportioned share of such income on a water's edge basis as determined under 830 CMR 63.32B.2(5)(b). The mechanics for making a worldwide election are set forth in 830 CMR 63.32B.2(5)(c).

(b) *Water's Edge Determination.*

1. If the taxable members of a combined group do not make a worldwide election, each member shall determine its share of the aggregate taxable net income or loss of the combined group on a water's edge basis under which each member shall take into account the income and apportionment information of the taxable members of the group and of those non-taxable members of the group that are described in any one or more of 830 CMR 63.32B.2(5)(b)1.a. through c.
 - a. any member incorporated in the United States or formed under the laws of the United States, any state, the District of Columbia or any territory or possession of the United States;
 - b. any member, regardless of the place of incorporation or formation, if the average of its property, payroll, and sales factors within the United States is 20% or more;
 - c. any member that earns more than 20% of its income, directly or indirectly, from intangible property or service-related activities, the costs of which generally are deductible for federal income tax purposes, whether currently or over a period of time, against the business income of other members of the group, but only to the extent of that income and the apportionment factors related thereto.

Example. W is a corporation incorporated under the laws of a foreign country that is doing business in Massachusetts and is subject to tax under M.G.L. c. 63, § 39. W is engaged in a unitary business with corporations X, Y and Z, none of which is subject to Massachusetts tax. X is a corporation incorporated under the laws of a U.S. state, Y is a corporation incorporated under the laws of a U.S.

possession and Z is a corporation that is incorporated under the laws of a foreign country. Z does not have a U.S. domestic apportionment formula of 20% or more as determined under 830 CMR 63.32B.2(5)(b)1.b. and is not subject to the provisions of 830 CMR 63.32B.2(5)(b)1.c. Further, each of the corporations, X, Y and Z, are includible within a combined group within the meaning of 830 CMR 63.32.2(4)(b). W may make an election to determine its apportioned share of the combined group's taxable income on a worldwide basis, in which case it shall take into account the additional income and apportionment information of X, Y and Z. If W does not make a worldwide election, it shall determine its apportioned share of the combined group's taxable income taking in account the additional income and apportionment information of only X and Y, and not Z. For purposes of the analysis it is not relevant whether W has a U.S. domestic apportionment formula of 20% or more as would be determined under 830 CMR 63.32B.2(5)(b)1.b., or whether W could be subject to the provisions of 830 CMR 63.32B.2(5)(b)1.c., as W is a taxable member of the combined group and said provisions apply to determine the water's edge inclusion of non-taxable members of the combined group.

2. For purposes of 830 CMR 63.32B.2(5)(b)1.b. (i.e., the determination of whether a member has average property, payroll and sales factors within the United States of 20% or more), the apportionment calculation is to be done by the corporation in question on a stand-alone basis pursuant to its applicable apportionment formula prescribed in M.G.L. c. 63, without recourse to the rules set forth in M.G.L. c. 63, § 32B or 830 CMR 63.32B.2(7). For purposes of this computation transactions with commonly owned corporations are taken into consideration, but subject to the rules set forth in M.G.L. c. 63, § 39A and M.G.L. c. 62C, § 3A. However, in any case in which such calculation is pursuant to M.G.L. c. 63, § 38, the calculation is to consist of a three-factor formula consisting of property, payroll and sales without any increased weighting of sales, irrespective as to whether the corporation would file a return under M.G.L. c. 63 generally applying a single sales factor formula or a three factor formula with a double weighted sales factor. Further, the property, payroll and sales within the United States is to be determined by including property, payroll and sales in any of the U.S. states, the District of Columbia, any territory or possession of the United States and any geographic area over which the United States has asserted jurisdiction or claimed exclusive rights with respect to the exploration of natural resources. In any case where the apportionment calculation is pursuant to M.G.L. c. 63, § 38, the rules under M.G.L. c. 63, § 38 shall generally apply, including the rules concerning the elimination of a de minimis factor pursuant to M.G.L. c. 63, § 38(g) and the regulatory rules, if any, as relevant to the corporation, promulgated pursuant to M.G.L. c. 63, § 38(j). In any case where the apportionment calculation is pursuant to M.G.L. c. 63, § 2A, the rules thereunder shall generally apply, including the rules relating to missing factors pursuant to M.G.L. c. 63, § 2A(b). In any case in which 830 CMR 63.32B.2(5)(b)1.b. and c. both apply to an individual corporation, such corporation shall be considered to be included in the water's edge combined group pursuant to 830 CMR 63.32B.2(5)(b)1.b. *See* 830 CMR 63.32B.2(5)(b)5.

3. Subject to further regulatory amendment, in applying 830 CMR 63.32B.2(5)(b)1.c., the Commissioner will take the position that said 830 CMR 63.32B.2(5)(b)1.c. is implicated where a member earns more than 20% of its gross income, directly or indirectly, from intangible property or service-related activities as further set forth in such provision. In determining whether this 20% income threshold is exceeded, items of gross income in the numerator and denominator shall not be limited to items of federal gross income. However, when 830 CMR 63.32B.2(5)(b)1.c. is implicated because the 20% income threshold is exceeded, the income of the member to be included in the combined group's taxable income under 830 CMR 63.32B.2(5)(b)1.c. shall be limited to items of federal gross income, as described in 830 CMR 63.32B.2(6)(c)2.a., as reduced by the deduction of expenses of the member that are reasonably related and not disproportionate to such items of federal gross income, as determined pursuant to such guidance as may be issued by the Commissioner. However, in no event shall income to be included in the combined group's taxable income under 830 CMR 63.32B.2(5)(b)1.c. be reduced below zero. Further, the property and payroll of the member deriving the income to be included in the determination of the combined group's taxable income are included in the computation of the combined group's apportionment formula to the extent that such property and payroll relate to such included income, whereas the intra-group sales that produced such income are eliminated for purposes of computing the combined group's apportionment formula. For purposes of 830 CMR 63.32B.2(5)(b)1.c., examples of income from intangible property or service-related activities shall include, without limitation, royalty income from the license of trademarks, patents, or other intellectual property, interest and other income from lending money, and income from management services. In any case where (i) the provisions of 63.32B.2(5)(b)1.c. would apply but for the fact that the threshold 20% income standard is not satisfied or (ii) the provisions of 830 CMR 63.32B.2(5)(b)1.c. do apply but certain items counted in satisfying the 20% income threshold are not included in the determination of the combined group's taxable income because they do not constitute federal gross income, the payment of items not included in determining the combined group's taxable income may be subject to the add back requirements of M.G.L. c. 63, §§ 31I, J and K. *See also* 830 CMR 63.32B.2(6)(c)2.a(ii).
4. The following example illustrates the application of 830 CMR 63.32B.2(5)(b)1.c. and 830 CMR 63.32B.2(5)(b)3.

Corporations L, M and N are corporations that are related by common ownership. M and N are corporations that are formed under the laws of a U.S. jurisdiction as referenced in 830 CMR 63.32B.2(5)(b)1.a. M is subject to Massachusetts tax, whereas N is not subject to Massachusetts tax. L is formed under the laws of a non-U.S. jurisdiction (i.e., L is not incorporated or otherwise formed under U.S. laws as referenced in 830 CMR 63.32B.2(5)(b)1.a.). Also, the average of L's property, payroll and sales factors within the U.S. is not 20% or more within the meaning of 830 CMR 63.32B.2(5)(b)1.b.

L is engaged in lending activity and lends to M and N. L's lending activities fund M and N's business activities and the three corporations are engaged in a unitary business (L's lending activities forge its unitary link with M and N, *see* 830 CMR 63.32B.2(3)(e)). The combined group is required to file a combined report in Massachusetts and does not make a worldwide election.

During the tax year in question, M and N deduct on their federal consolidated return a total of \$1,000,000 in interest expense paid to L. L's total gross income for the year, including the \$1,000,000 interest payments received from M and N, is \$2,000,000. The \$1,000,000 of interest from M and N is included in L's federal gross income. L has \$100,000 in costs deductible under U.S. accounting principles, which are reasonably related and not disproportionate to the \$1,000,000 of gross income items received from M and N.

Because L receives more than 20% of its gross income from its loans to M and N, L is deemed by the Commissioner to be included in a "water's edge" combined group with M and N to the extent of this gross income, \$1,000,000, and to the extent of L's expenses that are reasonably related and not disproportionate to this gross income, \$100,000. In determining the combined group's taxable income, the activities of L are considered but only to the extent that they generated said income. The intra-group interest payments by M and N to L are eliminated in the determination of the combined group's taxable income. Thus, the combined group's taxable income as calculated for the taxable year in question is not reduced for a separate deduction to M or N for such interest payments or increased for the separate income of L from the receipt of such payments. However, the combined group's taxable income is reduced by a deduction for L's \$100,000 of qualifying expenses related to its interest payments received from M and N. The property and payroll of L, to the extent that they relate to L's \$1,000,000 of interest payments from M and N are included in the computation of the group's apportionment formula (*i.e.*, for purposes of computing the apportionment percentage for M, the Massachusetts taxpayer that is included in the combined group). However, the interest payments received by L from M and N, which constitute the intra-group sales, are eliminated for purposes of computing the group's apportionment formula. It should be noted that this elimination is on account of the intra-group elimination of the payments between M and N on the one hand and L on the other, wholly apart from the fact that interest is generally excluded (except in cases in which a financial institution is included in the combined group) from the sales factor in any event. *See* 830 CMR 63.32B.2(7)(h).

5. Where a corporation would be included in a combined group both by reason of 830 CMR 63.32B.2(5)(b)1.c. and 830 CMR 63.32B.2(5)(b)1.a. or b., the corporation shall be deemed to be included in the combined group under 830 CMR 63.32B.2(5)(b)1.a or b., as applicable, such that the rules that apply to a corporation that is included in a combined group pursuant to 830 CMR 63.32B.2(5)(b)1.c. shall not apply. Thus, for example, in any case in which 830 CMR 63.32B.2(5)(b)1.b. and c. both apply to an individual corporation, such corporation shall be considered to be included in the water's edge combined group

pursuant to 830 CMR 63.32B.2(5)(b)1.b., and the rules set forth in 830 CMR 63.32B.2(5)(b)1.c. and 830 CMR 63.32B.2(5)(b)3 and 4 shall not apply. Further, the provisions of 830 CMR 63.32B.2(5)(b)1.a through c., only apply to determine the inclusion of non-taxable members of a combined group, and therefore the rules that apply to corporations that are included in the combined group pursuant to these sections do not apply to taxable members of the combined group. Thus, for example, a taxable member of a combined group that earns more than 20% of its gross income, directly or indirectly, from intangible property or service-related activities as generally described in 830 CMR 63.32B.2(5)(b)1.c. shall determine its income, expenses, and apportionment factors to be included in determining the combined group's taxable income pursuant to 830 CMR 63.32B.2(6) and (7) and not pursuant to the rules set forth in 830 CMR 63.32B.2(5)(b)1.c. and 830 CMR 63.32B.2(5)(b)3 and 4.

6. The provisions of 830 CMR 63.32B.2(5)(b) also apply for purposes of determining the inclusion of corporations in a Massachusetts affiliated group. *See* 830 CMR 63.32B.2(11).

(c) *Worldwide Election.*

1. *Mechanics for Making the Election.* A worldwide election shall be made by the principal reporting corporation of the combined group. The election shall be made on an original, timely filed return or as otherwise required in writing by the Commissioner. A return shall be considered timely if it is filed on or before the earliest due date or extended due date for the filing of the principal reporting corporation's return under M.G.L. c. 63. No return filed after this date, whether filed with an application for abatement or otherwise, shall constitute a valid worldwide election. The election, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the combined group has agreed to be bound by such election, including an agreement by each member of the group that such election shall apply to any member that subsequently enters the group and an agreement that each member continues to be bound by the election in the event that such member is subsequently the subject of a reverse acquisition as described in U.S. Treas. Reg. § 1.1502-75(d)(3).
2. *Effect of Election in Subsequent Tax Years.* A worldwide election shall be binding for and applicable to the taxable year for which it is made and for the next nine taxable years. Any corporation entering the unitary combined group after the year of the election shall be deemed to have consented to the application of the election and to have waived any objection thereto. Reverse acquisition rules based on the federal rules set forth in U.S. Treas. Reg. 1.1502-75(d)(3) shall be applied in determining whether a corporation is bound by a worldwide election.
3. *Revocation, Renewal of Election.* A worldwide election, once made, cannot be revoked until after it has been effective for ten taxable years. When an election is made it may be renewed after ten taxable years for another ten taxable years. The revocation or renewal of an election shall be made on an original, timely filed return by the combined group's principal reporting corporation or as otherwise

required in writing by the Commissioner. A revocation or a renewal shall be effective for the first taxable year after the completion of the ten taxable years for which the prior election was in place. Any revocation or renewal, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the combined group has agreed to be bound by such revocation or renewal. If a prior worldwide election is neither affirmatively revoked nor renewed after ten taxable years pursuant to the terms of 830 CMR 63.32B.2(5)(c), the election shall terminate for the subsequent taxable year, but a new worldwide election may be made for any ten-year period thereafter by election on the terms set forth in 830 CMR 63.32B.2(5)(c).

4. *Change in Reporting Method.* If either the water's edge or worldwide method was used to account for the combined group members' income and apportionment data in the preceding tax year and the other method is to be used for the combined group's combined report for the current tax year, adjustments to the income and apportionment data of the group members shall be made to prevent income and apportionment data from being omitted or duplicated, etc.
5. *Interaction with Affiliated Group Election.* A taxpayer may not make a worldwide election and an affiliated group election for the same taxable year and may not make a worldwide election for any year in which an affiliated group election is in effect. See 830 CMR 63.32B.2(10).
6. *Agreement to Provide Documents.* An election under 830 CMR 63.32B.2(5)(c) shall constitute consent to the production of documents or other information that the Commissioner reasonably requires -- for example, for purposes of verifying the appropriate members of the combined group, that the requirements of the worldwide election have been met, that the tax computation and tax reporting are proper, etc. The documents shall be provided in language and form acceptable to the Commissioner.

(6) *Determination of Taxable Income of Taxable Member of a Combined Group.*

- (a) *General Rule.* A corporation subject to tax under M.G.L. c. 63, §§ 2, 2B, 32D, 39 or 52A and included in a combined group with one or more other corporations shall file with its tax return a combined report that includes the income of all corporations that are members of the combined group and such other information as required by the Commissioner. An explanation of the components of the income of a taxable member of a combined group (for example, addressing the situation where the member may have income apart from that derived from the combined group) and the rules for determining a combined group's taxable income are set forth in 830 CMR 63.32B.2(6). If one or more members of a combined group have income from the activities of the group's unitary business that is taxable in another state (or, in the case of an affiliated group election, one or more members of the group are taxable on their income from business activity in another state), each taxable member of the combined group shall determine its net income derived from the activities of the combined group by applying its apportionment percentage as determined under 830 CMR 63.32B.2(7)

to the combined group's taxable income as determined under 830 CMR 63.32B.2(6)(c).

(b) *Components of Income of a Taxable Member of a Combined Group.*

1. *Unitary Group Members.* A taxable member's share of the unitary business income apportionable to this state of each combined group of which it is a member shall be determined by reference to a combined report filed with respect to the unitary business. The use of the combined report does not disregard the separate identities of the taxable members of the combined group. Each taxable member of a combined group engaged in a unitary business is responsible for an income-based excise that is to be determined based upon its taxable income or loss apportioned or allocated to this state, which shall include, as relevant, the taxpayer's:
 - a. share of any unitary business income apportionable to this state for each of the combined groups of which it is a member;
 - b. share of any income apportionable to this state of a distinct business activity conducted within and without the state by the taxable member and not as a part of the unitary business referenced in 830 CMR 63.32B.2(6)(b)1.a.;
 - c. income from a business conducted by the taxable member entirely within the state and not as a part of the unitary business referenced in 830 CMR 63.32B.2(6)(b)1.a.;
 - d. income or loss allocable to this State; and
 - e. net operating loss carry forward(s), including any NOL carry forward(s) of another taxable member of the combined group that the taxpayer is permitted to share, to be offset against the taxpayer's taxable net income on a post-apportioned basis as explained in 830 CMR 63.32B.2(8).

Depending upon the circumstances of any individual taxpayer, without limitation as to other possible adjustments, other items of income or adjustments to the taxpayer's apportioned net income may also apply.

2. *Massachusetts Affiliated Group Members.* In the case of an affiliated group election, each taxable member of the combined group is subject to an income-based excise. If one or more members of the affiliated group have apportionable income, the income-based excise of each taxable member of the group is to be determined based upon the member's taxable income or loss apportioned to this state, which shall be its apportioned share of the combined group's affiliated group income prior to any post-apportionment adjustments, including the application of any NOL carry forwards, *see* 830 CMR 63.32B.2(8).

3. *Relationship to Non-income Measure.* The combined reporting rules provide a method for determining the apportioned taxable net income derived by a taxable member of a combined group from the group's unitary business activities, or from the Massachusetts affiliated group's activities in the instance of an affiliated group election. However, a member of a combined group that is subject to M.G.L. c. 63, § 39, whether or not taxable on its income under M.G.L. c. 63, shall also be separately responsible for the minimum excise or a non-income-based excise as determined under M.G.L. c. 63, § 39. The non-income measure continues to be computed as it was prior to the adoption of M.G.L. c. 63, § 32B and so, for example, a corporation subject to this measure may be required to compute a stand-alone apportionment percentage for purposes of this calculation.

(c) *Rules to Determine a Combined Group's Taxable Income.* The combined group's taxable income shall be determined by applying 830 CMR 63.32B.2(6)(c)1. through 10.

1. In the case of a combined group taxable with respect to its unitary business, from the total income of the combined group, subtract any income, and add any expense or loss, other than the unitary business income, expense or loss of the combined group. In the case a combined group that has made an affiliated group election, no subtractions or additions are necessary or permitted.

2. Except as otherwise provided, the total income of the combined group is the sum of the incomes, separately determined, of each member of the combined group. The separate income of each member of the combined group shall be determined as follows:

a. *Combined Group Not Subject to a Worldwide Election.*

(i) In any case where the combined group is not reporting under a valid worldwide election, for any member, irrespective as to its place of incorporation, the income to be included in the total income of the combined group shall be the taxable net income for the corporation as determined under M.G.L. c. 63, subject to any further adjustments as required by 830 CMR 63.32B.2. In general, the taxable net income of a corporation as determined under M.G.L. c. 63, is gross income as defined under the Code, with certain Massachusetts adjustments, less the deductions (with certain Massachusetts adjustments) but not the credits that are allowable under the Code. *See, e.g.,* M.G.L. c. 63, § 30.4, 38(a) (which determine Massachusetts net income and then taxable net income for general business corporations by beginning with federal "gross income" as described in M.G.L. c. 63, § 30.3). The definition of federal gross income that is used as the starting point in determining taxable net income under M.G.L. c. 63 generally (a) includes without limitation in the case of a corporation incorporated in the United States or treated as a U.S corporation under the Code, all gross income of the corporation, wherever derived, and (b) includes in the case of a corporation that is not

incorporated in the United States and not treated as a U.S. corporation under the Code, only (1) gross income that is effectively connected with the conduct of a trade or business within the U.S. (“effectively connected income”) and (2) gross income that is derived from sources within the U.S. and that is not effectively connected income, which would include among other things items of non-effectively connected income on which the U.S. federal income tax may be collected through withholding imposed on the payers of such items. *See* Code § 882(b); *see also* Code §§ 881(a), 882(a). Therefore, any income that is effectively connected income as well as any non-effectively connected income that is U.S. source income are generally included in the determination of the taxable net income of a combined group member that is not incorporated in the United States and not treated as a U.S. corporation under the Code, whereas income that is neither U.S. source income nor effectively connected income is generally excluded from the determination of taxable net income of such member. The U.S. source income and the effectively connected income of a member to be included in the total income of the combined group shall not be reduced on account of any U.S. bilateral income tax treaty, except to the extent, if any, that such treaty results in the exclusion of an item from such member’s federal gross income as determined under the Code and thereby decreases the member’s taxable net income as determined under M.G.L. c. 63. Where a combined group member’s federal gross income taken into account in determining taxable net income is limited under the Code (or pursuant to Massachusetts adjustments), any deductions in determining taxable net income are also limited to those permitted to be taken under the Code (and any such Massachusetts adjustments) with respect to those items of gross income taken into account. *See also* 830 CMR 63.32B.2(6)(c)10. Notwithstanding the provisions of 830 CMR 63.32B.2(6)(c)2.a., in any case in which a corporation is included in a combined group solely because of the applicability of 830 CMR 63.32B.2(5)(b)1.c., the income and any related expenses of such member to be included in determining the combined group’s taxable income is determined pursuant to said 830 CMR 63.32B.2(5)(b)1.c. and 830 CMR 63.32B.2(5)(b)3. and 4.

- (ii) In any case in which a combined group member pays, accrues or incurs an expense to a combined group member that is not incorporated in the United States and not treated as a U.S. corporation under the Code and that expense results in income to the non-U.S. corporation that is not federal gross income (in which case an intra-group elimination does not apply), that expense shall be subject to the provisions of M.G.L. c. 63, §§ 31I, 31J and 31K, if those provisions otherwise apply. This provision applies irrespective as to whether the non-U.S. corporation is included in the combined group by reason of the application of 830 CMR 63.32B.2(5)(b)1.a through c. or alternatively because the non-U.S. corporation is a taxable member of the combined group. *See also* 830 CMR 63.32B.2(13).

b. *Combined Group Subject to a Worldwide Election.*

- (i) In any case where the combined group has made, and is subject to, a valid worldwide election, (A) for any member incorporated in the United States, or treated as a U.S. corporation under the Code, the income to be included in the total income of the combined group shall be the taxable net income for the corporation as determined under M.G.L. c. 63, subject to any further adjustments as required by 830 CMR 63.32B.2, and (B) for any member not incorporated in the United States and not treated as a U.S. corporation under the Code, the income to be included in the total income of the combined group shall be determined from a profit and loss statement that shall be prepared for each foreign branch or corporation in the currency in which its books of account are regularly maintained, adjusted to conform it to the accounting principles generally accepted in the United States for the preparation of such statements and further modified to take into account any book-tax adjustments necessary to reflect federal or Massachusetts tax law. The income in cases described in 830 CMR 63.32B.2(6)(c)2.b.(i)(B) shall, except as otherwise provided in 830 CMR 63.32B.2, include all income wherever derived, and is not limited to items of U.S. source income or effectively connected income within the meaning of the Code. The profit and loss statement of each member of the combined group referenced in 830 CMR 63.32B.2(6)(c)2.b.(i)(B), and the apportionment factors related thereto, whether United States or foreign, shall be translated into or from the currency in which the parent company maintains its books and records on any reasonable basis consistently applied on a year-to-year and entity-by-entity basis. Unrealized foreign currency gains and losses shall not be taken into account. Income apportioned to this state shall be expressed in United States dollars.
- (ii) In any case where the combined group has made, and is subject to, a valid worldwide election, any member not incorporated in the United States and not treated as a U.S. corporation under the Code, may, in lieu of the procedures set forth in 830 CMR 63.32B.2(6)(c)2.b.(i), and subject to the determination of the Commissioner that the income to be reported reasonably approximates income as determined under M.G.L. c. 63, determine its income on the basis of any other reasonable method consistently applied on a year-to-year and entity-by-entity basis.
- (iii) Where the combined group has made, and is subject to, a valid worldwide election, the income to be included in the combined group's taxable income to be apportioned to the combined group members is limited to the income that derives from the combined group's unitary business.

3. If the unitary business includes income from a partnership, the income to be included in the total income of the combined group shall be the combined group member's direct and indirect distributive share of the partnership's unitary business income. Where an affiliated group election has been made and the income of the combined group includes income from a partnership, the income to be included in the total income of the combined group shall be the combined group member's direct and indirect distributive share of the partnership's aggregate income.
4. Dividends as between members of a combined group shall be treated as follows:
 - a. Dividends paid by one combined group member to another combined group member shall, to the extent those dividends are paid out of the earnings and profits of the unitary business included in the combined report, from the current or an earlier year, be eliminated from the income of the recipient. Where a member has such earnings and profits from the unitary business and also has earnings and profits that are not from the unitary business (*e.g.*, from non-business activities) or that were otherwise not included in such a combined report (*e.g.*, earnings from tax years beginning prior to January 1, 2009) and this member pays out dividends, the dividends will be deemed to be paid out of earnings and profits on a last in first out (LIFO) basis as between taxable years and on a *pro rata basis* with respect to an individual taxable year. Any dividends that are not eliminated under 830 CMR 63.32B.2(6)(c)4.a. may be eligible for a dividends received deduction under 830 CMR 63.32B.2(6)(c)4.b. Dividends received by a utility corporation from a non-utility corporation and dividends received by a financial institution from a non-financial institution are eliminated under 830 CMR 63.32B.2(6)(c)4.a. if the requirements for elimination under 830 CMR 63.32B.2(6)(c)4.a. are otherwise met.
 - b. To the extent that a member of a combined group receives a dividend from another member of a combined group and an intercompany elimination does not apply under 830 CMR 63.32B.2(6)(c)4.a., the recipient corporation may be entitled to a dividends received deduction. In these cases, if the dividend is paid out of the earnings and profits of the unitary business, the dividend is included in the combined group's income and the dividends received deduction shall be applied against the combined group's income. Alternatively, if the dividend is not paid out of the earnings and profits of the unitary business and is paid to a taxpayer member of the group, *e.g.*, as in the case of allocable income, the income is included in such recipient member's income and the dividends received deduction is applied against the separate income of such member. In general, the dividends received deduction is 95% if the dividend payer otherwise qualifies under the statute. *See* M.G.L. c. 63, §§ 1, 38(a)(1). Where the payer is an 80%-owned utility corporation and pays a dividend to another utility corporation the dividends received deduction is 100%. *See* M.G.L. c. 63, § 52A(b). There is no dividends received deduction that applies where a corporation that is not an 80%-owned utility corporation

pays a dividend to a utility corporation. See M.G.L. c. 63, § 52A(b). No dividends received deduction is available with respect to and to the extent that a dividend is eliminated under 830 CMR 63.32B.2(6)(c)4.a. Also, no dividends received deduction is allowed for a distribution from a REIT or any other distribution for which no dividends received deduction is allowed to the recipient under the applicable provisions of M.G.L. c. 63.

- c. The provisions in 830 CMR 63.32B.2(6)(c)4.a. similarly apply to a combined group where an affiliated group election has been made. However, in such cases the references in 830 CMR 63.32B.2(6)(c)4.a. to the earnings and profits of a unitary business included in a combined report are instead to the earnings and profits derived from all activities of the Massachusetts affiliated group, business activities or otherwise, as included in a combined report.
- d. The LIFO and *pro rata* rules stated in 830 CMR 63.32B.2(6)(c)4.a. do not apply where the member that pays the dividends has tax-free earnings and profits from its prior activities as a Massachusetts corporate trust (MCT) or from a predecessor or other entity that was a MCT. In such cases, any dividends paid by such member are first paid out of the tax-free MCT earnings and profits. Further, there is no dividends received deduction that applies under 830 CMR 63.32B.2(6)(c)4.b. where a combined group member has tax-free MCT earnings and profits as referenced in 830 CMR 63.32B.2(6)(c)4.d. and pays a dividend with respect to these tax-free MCT earnings and profits.
- e. The following examples illustrate the rules in 830 CMR 63.32B.2(6):

Example 1. X, Y and Z are general business corporations that are members of a combined group engaged in a unitary business in tax year 2009. X is not a taxpayer in Massachusetts, whereas both Y and Z are Massachusetts taxpayers. X owns 100% of the stock of Y, and Y owns 100% of the stock of Z. For tax year 2009, X has \$100,000 of income prior to the inclusion of any inter-company dividends, whereas Y and Z each have \$50,000 of income prior to the inclusion of any inter-company dividends. Consequently, the combined group's taxable income to be apportioned to the Massachusetts taxpayers, Y and Z, prior to the inclusion of any dividends, is \$200,000. None of the corporations have earnings and profits from sources other than the unitary business.

On December 31, 2009, Z issues a dividend of \$125,000 to Y and Y issues a dividend of \$225,000 to X. Under the LIFO rule Y eliminates \$50,000 of the dividend paid by Z because \$50,000 of the \$125,000 dividend relates to the 2009 earnings of the XYZ unitary business that are included in the combined report. Thus, Y has to account for the remaining \$75,000 of the dividend paid by Z, as that portion of the dividend relates to earnings from the unitary business that are not included in the 2009 combined report (*i.e.*, from tax years prior to 2009). Because all of the latter \$75,000 distribution is out of non-excludible earnings and profits of the unitary business, it is includible in the

XYZ combined group's taxable income and the dividends received deduction of \$71,250 (*i.e.*, 95%) is taken at that level.

X eliminates \$175,000 of its \$225,000 dividend from Y under the LIFO rule. The amount eliminated is \$175,000 because:

- (i) \$50,000 relates to Y's 2009 earnings of \$50,000 from the XYZ unitary business included in the 2009 combined report;
- (ii) \$50,000 relates to Z's 2009 earnings of \$50,000 from the XYZ unitary business included in the 2009 combined report; and
- (iii) \$75,000 relates to the dividend paid by Z to Y out of pre-2009 earnings of the XYZ unitary business that are included in the 2009 combined report.

The remaining \$50,000 of the dividend paid by Y to X relates to earnings from the XYZ unitary business that are not included in the 2009 combined report (and that were not included in a prior combined report). X has to account for the remaining \$50,000 of the dividend paid by Y and, since the \$50,000 relates to non-excludible earnings from the XYZ unitary business, this income is included in the XYZ combined group's taxable income and the dividends received deduction of \$47,500 (*i.e.*, 95%) is taken at that level.

The total taxable income of the combined group, including both the dividends and the deductions, is \$206,250.

Example 2. X, Y and Z are general business corporations that are members of a combined group engaged in a unitary business in tax year 2009. X is not a taxpayer in Massachusetts, whereas both Y and Z are Massachusetts taxpayers. X owns 100% of the stock of Y, and Y owns 100% of the stock of Z. For tax year 2010, X has \$100,000 of income prior to the inclusion of any inter-company dividends, whereas Y and Z each have \$50,000 of income prior to the inclusion of any inter-company dividends. Consequently, the combined group's taxable income to be apportioned to the Massachusetts taxpayers, Y and Z, prior the inclusion of any dividends, is \$200,000.

On December 31, 2010, Z receives a dividend from Corporation U of \$200,000. On the same day, Z pays a dividend of \$200,000 to Y. Z owns 25% of the stock of U. The business of U is unrelated to the unitary business of the XYZ group and the remaining 75% of U is owned by unrelated parties; therefore, U is not part of the XYZ unitary business. Further, the facts demonstrate that the dividend income received by Z from U is allocable to Massachusetts.

The \$200,000 dividend received by Z from U in tax year 2010 is not included in the XYZ group's 2010 unitary business income. Rather, Z must separately account for this \$200,000 as allocable income. Z is entitled to a 95% dividends received deduction of \$190,000 that it applies to the dividend income. In computing its taxable income for the year, Z will add the \$10,000

net amount from the allocable dividend to its apportioned share of the XYZ group's unitary business income.

Z has \$250,000 of current year earnings, \$50,000 of which (20% of the total) is included in the XYZ combined report for the 2010 tax year. Applying the *pro rata* dividend rule, 20% of the \$200,000 dividend paid by Z to Y, \$40,000, is deemed to be paid out of the XYZ group's unitary business income included in the 2009 combined report. Therefore, Y eliminates this \$40,000. However, Y must account for the remaining \$160,000 in dividend income received from Z. Further, this \$160,000 dividend from Z to Y retains its character to Y as income allocable to Massachusetts (and not, for example, as income derived from the XYZ unitary business). Therefore, if Y is domiciled in Massachusetts this income is allocated to Massachusetts (whereas if Y is not domiciled in Massachusetts, the \$160,000 is not taxable in Massachusetts). Assuming that the \$160,000 in dividend income is taxable to Y, Y is entitled to a 95% dividends received deduction of \$152,000 with respect to this income. In this instance, in computing its income Y would add the \$8,000 net amount to its apportioned share of the XYZ group's unitary business income.

5. Income from an intercompany transaction between members of the same combined group that relates to the unitary business of the group, or income from intercompany transactions in the case of an affiliated group election without regard to any unitary determination, shall be deferred in a manner similar to that provided in U.S. Treas. Reg. § 1.1502-13. Upon the occurrence of any of the following events, deferred 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 income earned immediately before the event, as unitary business income where no affiliated group election has been made and as affiliated group income where an affiliated group election is in effect at the time of the intercompany transaction:
 - a. the object of a deferred intercompany transaction is re-sold or otherwise disposed of by the buyer to an entity that is not a member of the combined group;
 - b. where the combined group is based upon the existence of a unitary business (*i.e.*, no affiliated group election has been made), the object of a deferred intercompany transaction is:
 - (i) re-sold 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
 - (ii) converted by the buyer to a use outside the unitary business in which the buyer and seller are engaged; or

- c. the buyer and seller are no longer members of the same combined group (including where a combined group ceases to be determined pursuant to a pre-existing affiliated group or worldwide election and the buyer and seller are no longer in a combined group for that reason).
6. A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction pursuant to Code § 170, be deducted, first from the unitary business income of the combined group with any Code § 170 income limitation applied to such group income, or, where an affiliated group election has been made, from the income of the affiliated group with said income limitation applied to such income. If the total contributions of all combined group members exceed the amount which may be deducted from the group's income, those contributions shall be allowed on a *pro rata* basis per the contributions made by each member. Any group member that has a charitable expense which may not be deducted from the group's income under 830 CMR 63.32B.2(6)(c)6. and which, where an affiliated group election has not been made, also has net income from other sources, shall deduct that expense from such other income before any allocation or apportionment and subject to a separately calculated Code § 170 limitation applied as to such other income. Any member that has a charitable deduction that is disallowed under the 830 CMR 63.32B.2(6)(c)6. shall carry forward the amount disallowed. A charitable deduction disallowed under the 830 CMR 63.32B.2(6)(c)6., but allowed as a carry forward deduction in a subsequent year, shall be treated as originally incurred in the subsequent year by the same member, and the rules of 830 CMR 63.32B.2(6)(c)6. shall apply in the subsequent year in determining the allowable deduction in that year. The carry forward shall be limited to the period provided under the Code. If a member that incurs a charitable expense subsequently leaves the combined group and enters a new combined group the same rules shall apply to the use of the charitable expense in such new group.

Example. C and D are corporations engaged in a unitary business during tax year 2009. During the 2009 tax year, C makes a charitable contribution of \$5,000 and D makes a charitable contribution of \$7,500. The total unitary business income of the CD combined group, before any charitable expense deduction, is \$50,000. The 10% Code § 170 income limitation to be applied to a charitable expense deduction is applied to the combined group's taxable income, resulting in a dollar limitation of \$5,000 (*i.e.*, 10% x \$50,000). The amount of expense allowed as a deduction, \$5,000, is allocated between C & D. Thus, \$2,000 of the contribution made by C and \$3,000 of the contribution made by D are deducted from group income, which is reduced to \$45,000. In addition to its share of the unitary business income, C has separate allocable income of \$20,000. Irrespective as to whether this separate allocable income is taxable in Massachusetts, C shall deduct \$2,000 of its charitable contribution (*i.e.*, 10%) from this separate income. C's disallowed charitable contribution deduction available for carry forward to the next tax year is \$1,000. D has separate apportionable income of \$10,000 and shall apply \$1,000 of its charitable expense (*i.e.*, 10%) against this apportionable income on a pre-apportioned basis. D's disallowed charitable contribution deduction available for carry forward to the next tax year is \$3,500.

7. Any expense of one member of the unitary group which is directly or indirectly attributable to the allocable income of another member of the unitary group shall be allocated to that other member as corresponding allocable expense, as appropriate. 830 CMR 63.32B.2(6)(c)7. does not apply in the context of an affiliated group election.
8. Capital gains or losses and Code § 1231 gains or losses from the sale or exchange of property shall be removed from the combined group's taxable income and shall be apportioned and allocated as follows under 830 CMR 63.32B.2(6)(c)8.a. through e. The combined group's taxable income that remains shall be apportioned to the taxable members of the group without regard to such capital and Code § 1231 gains or losses. However, the removal of such gains and losses from the combined group's taxable income shall not by itself have an effect upon the apportionment factors of the group or any of its members (*e.g.*, where a member has a capital gain resulting from the sale of property used in the combined group's unitary business, that gain shall be reflected in the apportionment computation of the group and the member, except as otherwise provided in M.G.L. c. 63, § 38 or the regulations thereunder or in 830 CMR 63.32B.2).
 - a. Before any netting of capital gains and losses and Code § 1231 gains and losses, the gains and losses are segregated by type (*i.e.* capital or Code § 1231) and then classified as apportionable or allocable, as the case may be.
 - b. Each taxable member's apportionable capital gains and losses and Code § 1231 gains and losses derived from the sale or exchange of property used in the combined group's unitary business (or the activities of the combined group in the case of an affiliated group election) are then aggregated and apportioned to the member using the apportionment factor applicable to such member as determined under 830 CMR 63.32B.2(7), to arrive at the member's Massachusetts gains and losses for the respective classes of income or loss.
 - c. The apportioned capital and Code § 1231 gains and losses referenced in 830 CMR 63.32B.2(6)(c)8.b. and, in the case where no affiliated group election has been made, any capital or Code § 1231 gains and losses that (i) are to be allocated to Massachusetts, (ii) are to be apportioned to Massachusetts based upon the apportionment factors of the taxpayer member only (*i.e.*, because the gains or losses derive from the separate non-unitary business activity of the member), or (iii) are derived from the sale or exchange of property used in the unitary business of another combined group and have been separately apportioned under these rules as applied to that group, are then netted by each taxable member using the rules of Code §§ 1231 and 1222, without regard to any of the member's gains or losses that are to be allocated to another state.
 - d. Any resulting Massachusetts net capital gain or ordinary income (and any ordinary loss, in a case where the netting of Code § 1231 gains and losses produces a resulting ordinary loss) of a taxable member produced by the

application of the preceding subsections shall then be added to (or, in the case of a resulting ordinary loss after netting of Code § 1231 gains and losses, subtracted from) the taxable income of that member. *See* 830 CMR 63.32B.2(6)(b)1. Any resulting Massachusetts capital loss shall not be offset against the member's taxable income and shall not be carried forward to subsequent years.

- e. In the instance where there is a fiscalized member of the combined group, the gains and losses to be aggregated and apportioned under 830 CMR 63.32B.2(6)8.b. must first be assigned to the combined group's taxable year. *See* 830 CMR 63.32B.2(12)(b) and (c). After the aggregation and apportionment under 830 CMR 63.32B.2(6)(c)8.b., the resulting Massachusetts gains and losses are then adjusted to align such gains and losses to the tax year of the taxable member to which it relates.
9. Apart from the specific rules otherwise set forth in 830 CMR 63.32B.2(6)(c), the Commissioner will generally apply the principles set forth in U.S. Treas. Reg. § 1.1502-13 as to intercompany transactions, including as to deferrals and eliminations, to the extent consistent with state combined group membership and reporting principles in general and state law as set forth in M.G.L. c. 63, § 32B and M.G.L. c. 63.
10. Apart from the specific rules otherwise set forth in 830 CMR 63.32B.2(6)(c), any expense incurred by a member of a combined group that is limited under federal law shall generally be likewise limited under Massachusetts law to the extent consistent with state combined group membership and reporting principles in general and state law as set forth in M.G.L. c. 63, § 32B and M.G.L. c. 63.

The rules set forth in 830 CMR 63.32B.2(6)(c) generally apply to determine the combined group's taxable income that is to be apportioned or, where there is no member of the combined group that has apportionable income, attributed to the taxable members of the combined group. After the apportioned or attributed Massachusetts income of the taxable members of the combined group has been determined there may be additional Massachusetts adjustments to such members' income that apply, including the application of any net operating loss carry forwards, *see* 830 CMR 63.32B.2(8).

- (d) *Federal Basis of Non-Massachusetts Taxpayer Included in a Combined Group; Election to Use Massachusetts Basis for All Assets of All Combined Group Members.* In general, when a corporation that was not previously a Massachusetts taxpayer enters or otherwise is first included in a combined group the basis of the various assets of such member will be the basis of such assets for federal income tax purposes. However, the principal reporting corporation of a combined group may elect to determine and apply a Massachusetts-adjusted basis for all assets of every member of the combined group that was not previously a Massachusetts taxpayer, including any non-taxpayer corporation that subsequently enters or otherwise is included in the combined group, provided that the corporation must possess and maintain adequate records to demonstrate the appropriate Massachusetts-adjusted basis for all such

assets. The election must be made by a combined group during the period of limitations for abatement under M.G.L. c. 62C, § 37, without taking into account the provisions of M.G.L. c. 62C, § 30, for the tax year that first includes a previously non-taxable member. The election is irrevocable and is to be made in such form and in such manner as prescribed by the Commissioner. If a taxpayer is unable to reasonably document basis adjustments pursuant to this election for any member of the group, the election will be treated as void with respect to all group members and taxable periods that are within the statute of limitations for assessment.

(7) *Apportionment of Income Computation; Tax Computation Where No Apportionment.*

(a) *General.*

1. A corporation subject to tax under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A and included in a combined group with one or more other corporations shall file with its tax return a combined report that includes the income of all corporations that are members of the combined group and such other information as required by the Commissioner. *See* 830 CMR 63.32B.2(6). Further, if one or more members of the combined group have income from the activities of the group's unitary business that is taxable in another state or, in the case of an affiliated group election one or members of the group is taxable on its income from business activity in another state, each taxable member must also include the apportionment information of all group members as required by the Commissioner. *See* M.G.L. c. 63, § 38(b). For the rules that govern when the combined group does not include any member that is taxable in another state as described in 830 CMR 63.32B.2(7)(a)1., *see* 830 CMR 63.32B.2(7)(k).
2. A taxable member of a combined group that is required to apportion its income shall determine its net income derived from the activities of the combined group by applying its apportionment percentage as determined under 830 CMR 63.32B.2(7) to the combined group's taxable income as determined under 830 CMR 63.32B.2(6)(c). Subject to the rules set forth in 830 CMR 63.32B.2(7), each member of a combined group shall separately determine its apportionment information pursuant to the apportionment provisions of M.G.L. c. 63 that apply to such member, provided however, that if an affiliated group election is not in effect, both the numerator and denominator of the apportionment factors for this purpose shall exclude any property or payroll utilized in, or sales that derive from, activity other than the unitary business. In any case in which property or payroll is utilized both in the unitary business and in activity other than that of the unitary business, the computation shall include the appropriate portion thereof. The apportionment method used by each such member depends on the classification of the individual member, *e.g.*, whether the individual member is a general business corporation, a manufacturing corporation, financial institution, utility corporation, mutual fund service corporation, etc. The apportionment provisions in 830 CMR 63.32B.2(7) shall only be applied to determine the apportionment of the unitary business income (or in the case of an affiliated group election, the affiliated group income) derived by a taxable member of a combined group from such group. Therefore, for example, these apportionment provisions do not apply to determine

the non-income measure of a combined group member subject to tax under M.G.L. c. 63, § 39, which is to be separately determined by such member under M.G.L. c. 63, § 39.

- (b) *Determination of Factor Numerators; Sales Factor “Finnigan” Adjustment.* The numerator of the apportionment factor or factors that apply to each taxable member of a combined group shall include the property, payroll, and sales/receipts, as applicable, of such member as sourced to Massachusetts under the rules provided under M.G.L. c. 63, § 2A, 38 or 42, as applicable, subject to any adjustments provided for in 830 CMR 63.32B.2(7). Where a combined group includes one or more taxable members and one or more non-taxable members, the sales/receipts factor numerator(s) of the taxable member or members are increased in the following manner:
1. The total amount of sales or receipts sourced to Massachusetts under M.G.L. c. 63, § 2A, 38 or 42, as applicable, is determined for all non-taxable members;
 2. Each taxable member determines a fraction, the numerator of which is the sales/receipts factor numerator of such member, determined without any adjustments under 830 CMR 63.32B.2(7)(b), and the denominator of which is the sum of the sales/receipts factor numerators of all taxable members, as determined without any adjustments under 830 CMR 63.32B.2(7)(b); and
 3. For each taxable member, the total Massachusetts receipts of the non-taxable members is multiplied by the fraction described in 830 CMR 63.32B.2(7)(b)2., and the resulting product is added to the sales factor numerator, as otherwise determined, of the taxable member.
- (c) *Application of M.G.L. c. 63, § 38(f) “Throwback.”* For purposes of determining whether sales are to be sourced to Massachusetts and included in the numerator of the sales factor of a taxable member of a combined group under M.G.L. c. 63, § 38(f) (*i.e.*, as “throw back” sales), such taxable member is considered taxable in any state in which any member of its combined group is subject to tax with respect to the income derived from the group’s unitary business (or, in the case of an affiliated group election, in any state in which any member of the combined group is taxable). 830 CMR 63.32B.2(7)(c) applies only if at least one member of the combined group is entitled to apportion its income under M.G.L. c. 63 for the tax year in question.
- (d) *Determination of Factor Denominators.* The denominator of the apportionment factor or factors that shall apply to each taxable member of a combined group shall include the property, payroll, and sales/receipts, regardless of location, of the combined group as a whole. The factors of the combined group as a whole are determined by adding together the denominators of all members of the combined group, as individually determined under the rules provided in M.G.L. c. 63, § 2A, 38 or 42, subject to any adjustments provided in 830 CMR 63.32B.2(7). The denominators of the members of the combined group shall be individually determined under said rules that apply to such member, or under such rules that would apply to such member in the case of a non-taxable member assuming that such non-taxable member were subject to Massachusetts income tax. The denominators of the property and payroll factors of

the combined group as a whole shall include the property and payroll factor denominators, determined under M.G.L. c. 63, § 38, of a combined group member that either is to apply the single sales factor apportionment rules set forth under M.G.L. c. 63, § 38 or that would be required to apply these rules if such member were subject to Massachusetts income tax.

- (e) *Inclusion of Partnership Factors.* Where a taxable member of a combined group receives unitary business income through a direct or indirect ownership interest in a partnership or disregarded entity the property, payroll, and sales/receipts factors of such taxable member shall include its *pro rata* share of the factors relating to such income as attributed to the taxable member through such ownership interest. *See* 830 CMR 63.38.1(12). In the case of an affiliated group election, a taxable member of a combined group shall include in its property, payroll and sales/receipts factors its *pro rata* share of the property, payroll and sales/receipts factors relating to all income that is attributed to the taxable member through its direct or indirect ownership interest in a partnership or disregarded entity.

- (f) *Exclusion of Factors Related to Items Excluded from Federal Gross Income.* Where items of gross income are excluded from the federal gross income of a combined group member, the gross receipts to which such items of gross income are directly attributable are similarly excluded from the numerator and denominator of the member's sales factor. Also, any property or payroll (or appropriate portion thereof) that relate to such receipts are similarly excluded from the property or payroll factors of the combined group member. Thus, for example, in any case in which a combined group is not reporting under a valid worldwide election, for any member not incorporated in the United States and not treated as a U.S. corporation under the Code, the income to be included in the total income of the combined group shall be the taxable net income as determined under M.G.L. c. 63. *See* 830 CMR 63.32B.2(6)(c)2.a(i)(b). In these cases, where receipts to which any items of gross income are directly attributable are not included in the determination of such taxable net income, these receipts are similarly excluded from the numerator and denominator of the member's sales factor. Also, any property or payroll (or appropriate portion thereof) that relate to such receipts are similarly excluded from the property or payroll factors of the combined group member. Notwithstanding the provisions of 830 CMR 63.32B.2(7)(f), in any case in which a corporation is included in a combined group solely because of the applicability of 830 CMR 63.32B.2(5)(b)1.c., the income and factors of the corporation to be included in determining the combined group's taxable income are determined pursuant to 830 CMR 63.32B.2(5)(b)1.c. and 830 CMR 63.32B.2(5)(b)3. and 4.

- (g) *Intercompany Transactions.* In determining the numerator and denominator of the apportionment factors of the members of a combined group, transactions between combined group members that relate to the unitary business are generally disregarded. Also, intercompany transactions between a combined group member and a partnership whose income is included in the unitary business of the combined group are also generally disregarded where the transactions relate to the unitary business to the extent of the group member's distributive share interest in partnership income consistent with the rules set forth in 830 CMR 63.38.1(12). Where a taxable member of a combined

group has made an affiliated group election, all transactions between the members of the Massachusetts affiliated group are generally disregarded. With respect to intercompany transactions, the specific rules set forth in 830 CMR 63.32B.2(7)(g)1. through 4. also apply.

1. Intercompany sales are disregarded for purpose of the sales/receipts factors.
2. A sale by a member of a combined group to a purchaser that is not a member of the combined group is attributed to the group member that books the sale, subject to the adjustments to be made under 830 CMR 63.32B.2(7)(b). However, 830 CMR 63.32B.2(7)(g)2.a. through e. shall apply to avoid distortion of applicable apportionment formulas in the case of intra-group sales.
 - a. Where a group member making a sale to a purchaser that is not a member of the combined group previously acquired the property or services sold from another combined group member, the activities of both the member producing the property or services and the member making the sale to the non-member must be considered jointly for purposes of determining the appropriate apportionment formula of the member making the sale. For example, where a combined group member (A) manufactures property and sells all of the manufactured property, directly or indirectly, to member (B), which, in turn, resells the property to a purchaser that is not a member of the combined group, both the activities of A and the activities of B must be considered jointly to determine whether B must use the single sales factor apportionment formula applicable to manufacturers or the three-factor apportionment formula applicable to non-manufacturers. In this example, both A and B are considered to be engaged in manufacturing and the joint property, payroll, and receipts of A and B will be considered to determine whether the manufacturing activity attributed to B is substantial. For purposes of this determination, B's receipts from the sales of property manufactured by A are considered to be manufacturing receipts. If the activities of A and B considered jointly involve substantial manufacturing, as provided under M.G.L. c. 63, § 38, then B must use a single sales factor apportionment formula.
 - b. To the extent that A sells its manufactured property both to B and to other buyers, the property, payroll, and receipts of B shall be combined with the pro-rated property and payroll of A for purposes of determining whether B is engaged in substantial manufacturing. B's receipts from sales of property manufactured by A shall be considered to be manufacturing receipts of B. The property and payroll of A shall be pro-rated in the same ratio that A's sales to B bear to A's total sales.

Example 1. A unitary group is comprised of members A and B. Both A and B have nexus in Massachusetts. A manufactures widgets, all of which it then sells to B. B sells the widgets to unrelated parties. A has \$1,000 of property, \$150 of payroll and \$300 of sales (*i.e.*, the sales made to B). All of A's property, payroll, and receipts are attributable to manufacturing. B has \$50 of

property, \$150 of payroll, and \$500 of sales (*i.e.*, of property purchased from A). For purposes of apportionment, A is a manufacturing corporation using a single sales factor apportionment formula. However, as all of A's sales are to another group member, A has no applicable sales factor and none of the group's income is apportioned to A. A's activities and its property, payroll, and sales are considered together with those of B for purposes of determining whether B is a manufacturing corporation. Therefore, B is considered to be engaged in manufacturing and \$1,000/1,050 of its property, \$150/300 of its payroll, and \$500/500 of its sales (excluding the intercompany sales) are attributable to manufacturing. Applying the provisions of M.G.L. c. 63, § 38(1), B's deemed manufacturing activity is substantial. B must apportion the group's combined income to Massachusetts using a single sales factor apportionment formula. B's denominator is \$500 and its numerator is the portion of the \$500 attributable to Massachusetts sales.

Example 2. Same facts as in example one except that A has \$1,000 of sales, \$300 of which are to B and \$700 are to unrelated parties. B has \$2,000 of sales, \$500 of which relate to goods purchased from A and \$1,500 relate to goods purchased from unrelated vendors that are then resold. A uses a single sales factor apportionment formula. Its sales factor denominator is \$2700 (excluding \$300 of intercompany sales) and its numerator is the portion of its \$700 in direct sales that are attributable to Massachusetts customers. B is also deemed to be engaged in substantial manufacturing because A's manufacturing activity is attributed to B and 25% (*i.e.*, \$500/2,000) of its sales are manufacturing sales, which satisfies the "substantial manufacturing" threshold. B therefore also uses a single sales factor apportionment. B's denominator is \$2,700 and its numerator is the portion of its \$2,000 in sales that are attributable to Massachusetts sales.

Example 3. Same facts as example two except that only B has nexus in Massachusetts. B continues to use a single sales factor apportionment formula. B's denominator remains \$2,700. B's numerator is the sum of its numerator in example 2 and A's numerator in *example 2*.

- c. The provisions of 830 CMR 63.32B.2 (7)(g)2.a. and b. shall apply to sales of tangible personal property to a purchaser that is not a member of the combined group either where the member of the group making the third party sale first acquires title to the property from another member of the combined group or where one combined group member acts as the sales agent or representative for the other member with regard to the third party sale without taking title to the property.
- d. In any case where a corporation is deemed to be engaged in substantial manufacturing within the meaning of M.G.L. c. 63, § 38 pursuant to 830 CMR 63.32B.2(7)(g)2.a. and b., and such manufacturing activity occurs in Massachusetts, such corporation will similarly be deemed entitled to claim the M.G.L. c. 63, § 31A credit for the limited purpose of being able to share a M.G.L. c. 63, § 31A credit that has been generated by such other group

member. Such sharing shall be pursuant to, and subject to the requirements and limitations set forth in, 830 CMR 63.32B.2(9).

- e. In the case of sales “other than sales of tangible personal property,” *see* M.G.L. c. 63, § 38(f), between combined group members prior to a sale of such services, intangible property, etc., to a purchaser that is not a combined group member, the activities of the combined group members participating in the transaction shall be considered jointly for purposes of defining the nature of the income-producing activity and associated costs of performance when sourcing the sale under M.G.L. c. 63, § 38(f). In general, such sales between group members should not alter the sourcing of the receipt for apportionment purposes.
3. Intercompany leases of employees are disregarded for purposes of the payroll factor. Wages paid to an employee shall be attributed in the payroll factor of the group member for whom the employee is providing actual services. In the case of an employee performing services for more than one combined group member, the group shall reasonably allocate the wages of the employee among the members for whom actual services are provided.
4. Payments to a non-group member for the lease of property shall be attributed to the group member making actual use of the leased property, to the extent of such actual use. If tangible property owned by one group member is leased to another group member, the property shall be included both in the property factor of the owner at the original cost to the group member that originally acquired the property and in the property factor of the lessee, to the extent of actual use of the property by the lessee, in an amount equal to eight times the net annual rent, provided that the original cost amount used by the owner in the numerator or denominator of its property factor shall be reduced (but not below zero) by the dollar amounts included in the numerator or denominator, respectively, of lessee members within the combined group. Except as provided 830 CMR 63.32B.2(7)(g)4., leases between group members are disregarded for purposes of the property factor. For purposes of 830 CMR 63.32B.2(7)(g)4., actual use of property shall not include sublease of the property to another party. The intra-group rental of property shall be at fair market value for purposes of determining the property factors of the lessor and the lessee.

Example. A combined group includes corporation A, which owns a building with an original cost of \$10 million, and corporation B, which leases use of the building from corporation A and actually uses the one floor of the building that it leases at a fair market annual rent of \$250,000. The property is located in Massachusetts. The numerator and denominator of B’s property factor shall include \$2 million (*i.e.*, 8 x \$250,000) attributable to the intercompany lease. The numerator and denominator of A’s property factor shall include \$8 million, which equals the original cost of the building of \$10 million, reduced by the amount included in the numerator and denominator of B’s property factor.

(h) *Combined Group That Includes Financial Institutions and Non-financial Institutions.* The calculation of apportionment factors for individual financial institutions under M.G.L. c. 63, § 2A, and for individual non-financial business corporations under M.G.L. c. 63, § 38, vary in certain respects. In particular, a financial institution includes various interest and other amounts in its receipts factor under M.G.L. c. 63, § 2A, that would generally be excluded from the sales factor of a non-financial business corporation under M.G.L. c. 63, § 38. Similarly, the property factor of a financial institution includes intangible property, whereas the property factor of a non-financial business corporation is limited to tangible property. In order to provide more consistent methodology in the determination of apportionment factors where a combined group of corporations consists of at least one member that is a financial institution as defined in M.G.L. c. 63, § 1, and at least one member that is not a financial institution, the adjustments in 830 CMR 63.32B.2(7)h.1 through 4. shall be made to the numerators and denominators of the apportionment factors of the group members.

1. Any member of the combined group that is a financial institution shall adjust the numerator and denominator of its property factor so that the value of intangible property included in the factor is reduced by 80% of the amount otherwise determined under M.G.L. c. 63, § 2A.
2. Any member of the combined group that is not a financial institution shall adjust the numerator and denominator of its sales factor so that any interest or other receipts of the member described in M.G.L. c. 63, § 2A(d)(i) through (d)(xi) and otherwise excluded from the sales factor determined under M.G.L. c. 63, § 38, are added to the sales factor denominator of the member and are added to the sales factor numerator of the member to the extent such receipts are sourced to Massachusetts under M.G.L. c. 63, § 2A(d)(i) through (d)(xi).
3. In the case of a sale or deemed sale of a business, receipts from the sale of the business “good will” or similar intangible value, including without limitation “going concern value” and “workforce in place,” shall not be included in the sales factor numerators or denominators of any member.
4. The denominator of the combined group’s property, payroll, and sales/receipts factors shall be the sum of the denominators of each individual member’s respective factors, as separately determined and adjusted under 830 CMR 63.32B.2(7)(h). The denominators of the combined group’s factors shall be used by any taxable member, whether or not such member is individually classified as a financial institution, in determining its individual Massachusetts apportionment percentage.

(i) *Mutual Fund Service Corporations.*

1. A mutual fund service corporation is any corporation doing business in the commonwealth which derives more than 50% of its gross income as determined on a separate company basis from the provision, directly or indirectly, of management, distribution or administrative services to or on behalf of a regulated

investment company and from trustees, sponsors, and participants of employee benefits plans which have accounts in a regulated investment company. It must separate its gross income into two categories, mutual fund sales and non-mutual fund sales.

2. The receipts from mutual fund sales are assigned to the numerator of the sales factor in accordance with 830 CMR 63.38.7. For purposes of apportioning the income of the combined group, the mutual fund service corporation is treated as two separate members, *i.e.*, one with a mutual fund sales business and one with a non-mutual fund sales business. It must calculate two apportionment percentages using two sets of apportionment factors, one for its mutual fund sales business and one for its non-mutual fund sales business. The mutual fund business will determine its share of the combined group's income apportioned to Massachusetts using a single sales factor calculated in accordance with 830 CMR 63.38.7. The non-mutual fund business will determine its share of the combined group's income apportioned to Massachusetts using a three factor apportionment with a double weighted sales factor. The total of these amounts will be the corporation's income apportioned to Massachusetts. The Massachusetts property values and payroll expenses of the mutual fund service corporation that are directly traceable to its non-mutual fund sales business are included in the property and payroll factor numerators, respectively, used to determine the apportionment percentage of the mutual fund service corporation's non-mutual fund sales business. The Massachusetts property values and payroll expenses of the mutual fund service corporation that are not directly traceable to either its mutual fund sales business or its non-mutual fund sales business are allocated between its mutual fund sales business and non-mutual fund sales business in the same ratio that each type of sales bears to the total Massachusetts sales of the mutual fund service corporation. Sales of a non-nexus member are assigned to the mutual fund sales business and the non-mutual fund sales business of the mutual fund service corporation according to the provisions of 830 CMR 63.32B.2(7)(b). In determining whether a member of a combined group is a mutual fund service corporation, the Commissioner reserves the right to disregard or reassign transactions among combined group members as necessary to avoid the distortion of the applicable apportionment method.
- (j) *Interaction with Alternative Apportionment Rules.* Where the apportionment methods provided under M.G.L. c. 63, §§ 2A and 38 generally, are not reasonably adapted to approximate the net income from business carried on in Massachusetts, an alternative apportionment method may apply to the extent provided in M.G.L. c. 63, § 2A(g), 38(j) or 42. In general, such alternative apportionment rules affect inclusion or exclusion of particular items in the apportionment factor numerator(s) of an individual corporation and therefore do not alter the apportionment rules provided by 830 CMR 63.32B.2(7). Such alternative apportionment rules, may, however, modify the provisions of 830 CMR 63.32B.2(7) to the extent specified in alternative apportionment regulations promulgated under M.G.L. c. 63, § 38(j), or to the extent specified in agreements relating to individual taxpayers under M.G.L. c. 63, §§ 2A(g) and 42. Such modification might be necessary, for example, in the case of alternative apportionment methods adding or deleting particular types of property, payroll, or

receipts from the factors described in M.G.L. c. 63, §§ 2A and 38, or in the case of alternative apportionment methods invoking unique apportionment factors unrelated to property, payroll, or receipts. In such cases, the alternative modifications may affect the factors of the group as a whole or the factors of one or more members, to the extent specified in such alternative apportionment regulations or agreements.

(k) *Tax Computation Where No Apportionment.* Where a combined group does not have any member that has income from the activities of the group's unitary business that is taxable in another state (or, in the case of an affiliated group election, any member that is taxable on its income from business activity in another state), all of the combined group's taxable income is taxable in Massachusetts. Each member of the group must determine its share of the combined group's taxable income by multiplying such income by a fraction which is the average of the taxable member's respective shares of the unitary business:

1. owned or rented property and
2. payroll (or, in the case of an affiliated group election, the taxable member's respective share of all property and payroll), as determined under the provisions of M.G.L. c. 63 but with inter-company transactions eliminated.

If a member of the combined group is a financial institution taxable under M.G.L. c. 63, § 2, then its property for purposes of this attribution of the combined group's taxable income is calculated under the provisions of M.G.L. c. 63 § 2A, however, the property value determined under M.G.L. c. 63, § 2A for certain intangible property is reduced by 80%. *See* 830 CMR 63.32B.2(7)(h)1. The 80% reduction is not to be made when the combined group consists solely of a combined group of financial institutions. All other group members are to determine their property and payroll for purposes of this attribution of the combined group's taxable income under M.G.L. c. 63, § 38. The income separately attributed to each combined group member, when totaled, must equal 100% of the combined group's taxable income.

(l) *Examples.*

Example 1. Combined nexus and non-nexus general business corporations, where the non-nexus general business corporation has no Massachusetts sales. X, Y and Z are corporations engaged in a unitary business during tax year 2009. For taxable year 2009, X and Y are general business corporations subject to three factor apportionment with a double weighted sales factor under M.G.L. c. 63, § 38 and taxable under M.G.L. c. 63, § 39; whereas Z is a non-taxpayer corporation that would be subject to apportionment as a general business corporation under M.G.L. c. 63, § 38 and would be taxable under M.G.L. c. 63, § 39 if it were subject to tax in Massachusetts. The combined group's taxable income as determined under 830 CMR 63.32B.2(6)(c) is \$100,000. The apportionment information and factor and tax determinations of the three corporations are as follows:

a. *Apportionment Information.*

	X (nexus) Bus. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	\$5,000,000	\$1,000,000		
Everywhere property	\$17,000,000	\$1,000,000	\$2,000,000	\$20,000,000
MA payroll	\$1,000,000	\$5,000,000		
Everywhere payroll	\$2,000,000	\$5,000,000	\$1,000,000	\$8,000,000
MA sales	\$5,000,000	\$1,000,000		
Everywhere sales	\$10,000,000	\$3,000,000	\$2,000,000	\$15,000,000

b. *Apportionment Factor Computation.*

	Member X	Member Y	Member Z
Property numerator	\$5,000,000	\$1,000,000	n/a
Property denominator	\$20,000,000	\$20,000,000	n/a
Property factor	25.00%	5.00%	n/a
Payroll numerator	\$1,000,000	\$5,000,000	n/a
Payroll denominator	\$8,000,000	\$8,000,000	n/a
Payroll factor	12.50%	62.50%	
Sales numerator	\$5,000,000	\$1,000,000	n/a
Sales denominator	\$15,000,000	\$15,000,000	n/a
Sales factor	33.33%	6.67%	n/a
Apportionment %	26.04%*	20.21%*	n/a

*Three factor, double weighted sales.

c. *Tax Determination.*

	Member X	Member Y	Member Z	Total
Apportionment %	26.04%	20.21%	n/a	
Combined group TI	\$100,000	\$100,000	n/a	
Apportioned income	\$26,040	\$20,210	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	\$2,474	\$1,920	n/a	\$4,394

Example 2. Combined nexus and non-nexus general business corporations, where the non-nexus general business corporation has Massachusetts sales. The facts are the same as in example 1., except that Z has \$1,000,000 in Massachusetts sales.

Therefore, because Z is a non-nexus corporation, an additional step is required for purposes of computing the apportionment formulas of X and Y, wherein the Massachusetts sales of Z are re-attributed to X and Y. *See* 830 CMR 63.32B.2(7)(b).

a. *Apportionment Information.*

	X (nexus) Bus. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	\$5,000,000	\$1,000,000		
Everywhere property	\$17,000,000	\$1,000,000	\$2,000,000	\$20,000,000
MA payroll	\$1,000,000	\$5,000,000		
Everywhere payroll	\$2,000,000	\$5,000,000	\$1,000,000	\$8,000,000
MA sales	\$5,000,000	\$1,000,000	\$1,000,000	
Everywhere sales	\$10,000,000	\$3,000,000	\$2,000,000	\$15,000,000

b. *Apportionment Factor Computation.*

(i) *Assign Z's Massachusetts Sales to X and Y.*

	Member X	Member Y	Member Z
Nexus member MA sales	\$5,000,000	\$1,000,000	n/a
Total nexus members' MA sales	\$6,000,000	\$6,000,000	n/a
Nexus member sales %	83.33%	16.67%	n/a
Non-nexus member sales	n/a	n/a	\$1,000,000
Assigned non-nexus member sales	\$833,333	\$166,667	n/a
Sales factor numerator	\$5,833,333	\$1,166,667	n/a

(ii) *Determine Apportionment Factors.*

	Member X	Member Y	Member Z
Property numerator	\$5,000,000	\$1,000,000	n/a
Property denominator	\$20,000,000	\$20,000,000	n/a
Property factor	25.00%	5.00%	n/a
Payroll numerator	\$1,000,000	\$5,000,000	n/a
Payroll denominator	\$8,000,000	\$8,000,000	n/a
Payroll factor	12.50%	62.50%	
Sales numerator	\$5,833,333	\$1,166,667	n/a
Sales denominator	\$15,000,000	\$15,000,000	n/a
Sales factor	38.89%	7.78%	n/a
Apportionment %	28.82%*	20.76%*	n/a

*Three factor, double weighted sales.

c. *Tax Determination.*

	Member X	Member Y	Member Z	Total
Apportionment %	28.82%	20.76%	n/a	
Combined group TI	\$100,000	\$100,000	n/a	
Apportioned income	\$28,820	\$20,760	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	\$2,738	\$1,972	n/a	\$4,710

Example 3. Combined nexus and non-nexus general business and manufacturing corporations, where the non-nexus general business corporation has Massachusetts sales. The facts are the same as in *example 2.*, except that X is not a general business corporation but rather a manufacturing corporation subject to single sales factor apportionment under M.G.L. c. 63, § 38. Assume for purposes of the example that X does not sell any of its manufactured property to Y or Z such that the provisions of 830 CMR 63.32B.2(7)(g)2. are implicated.

a. *Apportionment Information.*

	X (nexus) Manuf. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	\$5,000,000	\$1,000,000		
Everywhere property	\$17,000,000	\$1,000,000	\$2,000,000	\$20,000,000
MA payroll	\$1,000,000	\$5,000,000		
Everywhere payroll	\$2,000,000	\$5,000,000	\$1,000,000	\$8,000,000
MA sales	\$5,000,000	\$1,000,000	\$1,000,000	
Everywhere sales	\$10,000,000	\$3,000,000	\$2,000,000	\$15,000,000

b. *Apportionment Factor Computation.*

(i) *Assign Z's Massachusetts Sales to X and Y.*

	Member X	Member Y	Member Z
Nexus member's MA sales	\$5,000,000	\$1,000,000	n/a
Total nexus member MA sales	\$6,000,000	\$6,000,000	n/a
Nexus member sales %	83.33%	16.67%	n/a
Non-nexus member sales	n/a	n/a	\$1,000,000
Assigned non-nexus member sales	\$833,333	\$166,667	n/a
Sales factor numerator	\$5,833,333	\$1,166,667	n/a

(ii) *Determine Apportionment Factor.*

	Member X	Member Y	Member Z
Property numerator	n/a	\$1,000,000	n/a
Property denominator	n/a	\$20,000,000	n/a
Property factor	n/a	5.00%	n/a
Payroll numerator	n/a	\$5,000,000	n/a
Payroll denominator	n/a	\$8,000,000	n/a
Payroll factor	n/a	62.50%	
Sales numerator	\$5,833,333	\$1,166,667	n/a
Sales denominator	\$15,000,000	\$15,000,000	n/a
Sales factor	38.89%	7.78%	n/a
Apportionment %	38.89%*	20.76%**	n/a

* Single factor, sales.

**Three factor, double weighted sales.

c. *Tax Determination.*

	Member X	Member Y	Member Z	Total
Apportionment %	38.89%	20.76%	n/a	
Combined group TI	\$100,000	\$100,000	n/a	
Apportioned income	\$38,890	\$20,760	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	\$3,695	\$1,972	n/a	\$5,667

Example 4. Combined nexus and non-nexus manufacturing and general business corporations, where a non-nexus general business corporation has Massachusetts sales and the nexus manufacturing corporation has throwback sales. X, Y, and Z are corporations engaged in a unitary business during tax year 2010. The activities of the group are such that one or more members are taxable in the six New England states plus New York and New Jersey. X and Y have activities that make them taxable in Massachusetts. Z does not have any activities that make it taxable in Massachusetts and as such Z does not have Massachusetts nexus. X is a manufacturing corporation and has its sales office in Massachusetts. X makes sales into the six New England states, New York, New Jersey, Delaware, Maryland, Florida, and Canada. The sales by X destined to Massachusetts total \$5,000,000. The sales by X destined to Florida, Maryland, and Delaware total \$500,000. The combined group's taxable income as determined under 830 CMR 63.32B.2(6)(c) is \$250,000. The apportionment information and factor and tax determinations of the three corporations are as follows:

a. *Apportionment Information.*

	X (nexus) Manuf. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	\$5,000,000	\$1,000,000		
Everywhere property	\$17,000,000	\$1,000,000	\$2,000,000	\$20,000,000
MA payroll	\$1,000,000	\$5,000,000		
Everywhere payroll	\$2,000,000	\$5,000,000	\$1,000,000	\$8,000,000
MA destination sales	\$5,000,000	\$1,000,000	\$1,000,000	
MA throwback sales*	\$500,000			
MA sales	\$5,500,000	\$1,000,000	\$1,000,000	
Everywhere sales	\$10,000,000	\$3,000,000	\$2,000,000	\$15,000,000

*Because no member of the group was taxable in Maryland, Florida or Delaware, sales made into those states are thrown back to Massachusetts and included in the numerator of the sales factor if those sales were not made by employees, agents or others connected with a sales office located outside Massachusetts. See 830 CMR 63.38.1(9)(c)2.

b. *Apportionment Factor Computation.*

(i) *Assign Z's Massachusetts Sales to X and Y.*

	Member X	Member Y	Member Z
Nexus member MA sales	\$5,500,000	\$1,000,000	n/a
Total nexus members' MA sales	\$6,500,000	\$6,500,000	n/a
Nexus member sales %	84.62%	15.38%	n/a
Non-nexus member sales	n/a	n/a	\$1,000,000
Assigned non-nexus member sales	\$846,200	\$153,800	n/a
Sales factor numerator	\$6,346,200	\$1,153,800	n/a

(ii) *Determine Apportionment Factors.*

	Member X	Member Y	Member Z
Property numerator	\$5,000,000	\$1,000,000	n/a
Property denominator	\$20,000,000	\$20,000,000	n/a
Property factor	25%	5.00%	n/a
Payroll numerator	\$1,000,000	\$5,000,000	n/a
Payroll denominator	\$8,000,000	\$8,000,000	n/a
Payroll factor	12.5%	62.50%	

Sales numerator	\$6,346,200	\$1,153,800	n/a
Sales denominator	\$15,000,000	\$15,000,000	n/a
Sales factor	42.31%	7.69%	n/a
Apportionment %	42.31%*	20.72%**	n/a

*Single factor, sales.

**Three factor, double weighted sales.

c. *Tax Determination.*

	Member X	Member Y	Member Z	Total
Apportionment %	42.31%	20.72%	n/a	
Combined group TI	\$250,000	\$250,000	n/a	
Apportioned income	\$105,775	\$51,800	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	\$10,049	\$4,921	n/a	\$14,970

Example 5. Combined nexus and non-nexus general business and financial corporations, where the non-nexus general business corporation has no Massachusetts sales. X, Y and Z are corporations engaged in a unitary business during tax year 2009. For taxable year 2009 the corporations reflect the following facts: X is a financial institution subject to three factor apportionment under M.G.L. c. 63, § 2A and taxable under M.G.L. c. 63, § 2; Y is a general business corporation subject to three factor double weighted sales factor apportionment under M.G.L. c. 63, § 38 and taxable under M.G.L. c. 63, § 39; Z is a non-nexus taxpayer corporation that would be subject to apportionment as a general business corporation under M.G.L. c. 63, § 38 and would be taxable under M.G.L. c. 63, § 39 if it were subject to tax in Massachusetts. For taxable year 2009, X, a financial institution, has \$105,000,000 in everywhere property as determined under M.G.L. c. 63, § 2A, which includes \$100,000,000 in intangible property (e.g., loans and credit card receivables). Because X is to be combined with one or more general business corporations, it must reduce the value of its intangible property by 80% for purposes of determining the group property factor. See 830 CMR 63.32B.2(7)(h). Because Y and Z are to be combined with a financial institution, they must each adjust their sales factor denominator and Y is also to adjust its sales factor numerator for purposes of determining the group sales factor by including sales that would be included in their sales factor computations if they were subject to M.G.L. c. 63, § 2A(d)(i) through (d)(xi). See 830 CMR 63.32B.2(7)(h). The combined group's taxable income as determined under 830 CMR 63.32B.2(6)(c) is \$100,000. The apportionment information and factor and tax determinations of the three corporations are as follows:

a. *Apportionment Information.*

	X (nexus) Fin. Inst.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	\$20,000,000	\$2,000,000		
MA property adjusted	\$4,000,000*	\$2,000,000		
Everywhere property	\$105,000,000	\$2,000,000	\$3,000,000	
Everywhere property adjus'd	\$25,000,000*	\$2,000,000	\$3,000,000	\$30,000,000
MA payroll	\$1,000,000	\$5,000,000		
Everywhere payroll	\$2,000,000	\$5,000,000	\$1,000,000	\$8,000,000
MA sales	\$5,000,000	\$1,000,000		
MA sales adjusted	\$5,000,000	\$1,500,000**	\$6,500,000	
Everywhere sales	\$10,000,000	\$3,000,000	\$2,000,000	\$15,000,000
Everywhere sales adjusted	\$10,000,000	\$4,000,000**	\$3,000,000	\$17,000,000

*X's Massachusetts property and everywhere property is adjusted to reduce its intangible assets by 80%; since X has \$5,000,000 in tangible assets located outside the state, in addition to \$100,000,000 in total intangible assets, its everywhere property is reduced from \$105,000,000 to \$25,000,000.

**Y and Z's Massachusetts and everywhere sales are adjusted to include sales that would be included in Y and Z's sales factor computations if it were subject to the financial institution apportionment rules set forth at M.G.L. c. 63, § 2A(d)(i) through (d)(xi).

b. *Apportionment Factor Computation.*

	Member X	Member Y	Member Z
Property numerator	\$4,000,000	\$2,000,000	n/a
Property denominator	\$30,000,000	\$30,000,000	n/a
Property factor	13.33%	6.67%	n/a
Payroll numerator	\$1,000,000	\$5,000,000	n/a
Payroll denominator	\$8,000,000	\$8,000,000	n/a
Payroll factor	12.50%	62.50%	
Sales numerator	\$5,000,000	\$1,500,000	n/a
Sales denominator	\$17,000,000	\$17,000,000	n/a
Sales factor	29.41%	8.82%	n/a
Apportionment %	18.41%*	21.70%**	n/a

*Three factor, equal weighting.

**Three factor, double weighted sales.

c. *Tax Determination.*

	Member X	Member Y	Member Z	Total
Apportionment %	18.41%	21.70%	n/a	
Combined group TI	\$100,000	\$100,000	n/a	
Apportioned income	\$18,410	\$21,700	n/a	
Tax rate	10.50%	9.50%	n/a	
Tax	\$1,933	\$2,062	n/a	\$3,995

Example 6. Combined S and C corporations with resident and non-resident shareholders. S1, S2 and C are corporations engaged in a unitary business during tax year 2009 with business activities both within and without Massachusetts. All three corporations have the same two 50% individual shareholders, one of whom, R, is a resident and one of whom, NR, is a non-resident. The gross receipts for the unitary group for tax year 2009, net of intercompany eliminations, exceeds \$6 million. S1 is a manufacturing corporation within the meaning of M.G.L. c. 63, § 38, whereas both S2 and C are general business corporations. Both R and NR have federal distributive share income from S1 and S2 and also dividend income from C. S1, S2 and C have only unitary business activity from their joint activities and, for example, none of the corporations have any allocable income. The combined group has net income of \$4,000,000. The corporations have to separately determine their income for federal income tax purposes, and as discussed below S1 and S2 have to separately determine their income to determine each shareholder's distributive share. The separately determined net income for Massachusetts and federal purposes for S1 and S2, respectively, is \$1,000,000, and for C is \$2,000,000 (*i.e.*, assume no Massachusetts and federal differences for purposes of the example). The apportionment information for the corporations is as follows:

	S1 (nexus) Manuf. Corp	S2 (nexus) Bus. corp.	C (nexus) Bus. corp.	Combined
MA property	\$20,000,000	\$12,000,000	\$4,000,000	
Everywhere property	\$60,000,000	\$24,000,000	\$20,000,000	
				\$104,000,000
MA payroll	\$1,000,000	\$5,000,000	\$100,000	
Everywhere payroll	\$2,000,000	\$5,000,000	\$2,000,000	\$9,000,000
MA sales	\$15,000,000	\$6,000,000	\$1,000,000	
Everywhere sales	\$30,000,000	\$10,000,000	\$20,000,000	\$60,000,000

M.G.L. c. 63 analysis. To determine their apportioned M.G.L. c. 63 income, the three corporations perform the same analysis as would apply in a case involving only C corporations (*see, e.g.*, 830 CMR 63.32B.2(7)(1) *Example 5*). Since S1 is a manufacturing corporation it applies a single sales factor apportionment percentage. Since both S2 and C are general business corporations, they apply a three factor apportionment percentage that includes a double weighted sales factor. Upon determining their apportioned M.G.L. c. 63 income, S1 and S2 apply the tax rate as determined under M.G.L. c. 63, § 32D, whereas C applies the tax rate as determined under M.G.L. c. 63, § 39.

	S1 (nexus) Manuf. Corp	S2 (nexus) Bus. corp.	C (nexus) Bus. corp.
Property numerator	\$20,000,000	\$12,000,000	\$ 4,000,000
Property denominator	\$104,000,000	\$104,000,000	\$104,000,000
Property factor	n/a	11.54%	3.85%
Payroll numerator	\$1,000,000	\$5,000,000	\$100,000
Payroll denominator	\$9,000,000	\$9,000,000	\$9,000,000
Payroll factor	n/a	55.56%	1.11%
Sales numerator	\$15,000,000	\$6,000,000	\$1,000,000
Sales denominator	\$60,000,000	\$60,000,000	\$60,000,000
Sales factor	25%	10%	1.67%
Apportionment %	25%	21.77%*	2.07%*
MA apportioned income	\$1,000,000	\$870,940	\$82,906

*Three factor, double weighted sales.

M.G.L. c. 62 analysis. R is taxable on federal distributive share income from S1 and S2 without any adjustment, although R may claim a credit against this distributive share income for other state income tax paid on such distributive share by R or S1 or S2. R is taxable on its dividends from C with no credit applicable. NR has federal distributive share income from S1 and S2 and is taxable on its apportioned share of this income. *See* M.G.L. c. 62, § 5A(b) (the Commissioner may adopt regulatory rules as to non-resident taxation). In the case of S1, the apportionment is done using single sales factor apportionment, whereas in the case of S2, the apportionment is done using three factor apportionment with a double weighted sales factor. NR is to file a Massachusetts non-resident return that documents its apportioned S1 and S2 income as Massachusetts source income. If either S1 or S2 had any allocable income, NR's distributive share of this allocable income would not be apportioned but rather would be either 100% taxable or non-taxable in Massachusetts depending upon whether the income is allocable to Massachusetts. Under M.G.L. c. 62, S1 and S2 must compute their net income in the same manner as they did prior to the enactment of M.G.L. c. 63, § 32B. In addition, because S1 and S2 have nonresident shareholders both S1 and

S2 must compute their own separate apportionment percentages to determine the nonresident's distributive share of Massachusetts source income from S1 and S2. S1 and S2 compute their apportionment percentages as follows:

	S1 (nexus) Manuf. Corp	S2 (nexus) Bus. corp.
Property numerator	\$20,000,000	\$12,000,000
Property denominator	\$60,000,000	\$24,000,000
Property factor	n/a	50%
Payroll numerator	\$1,000,000	\$5,000,000
Payroll denominator	\$2,000,000	\$5,000,000
Payroll factor	n/a	100%
Sales numerator	\$15,000,000	\$6,000,000
Sales denominator	\$30,000,000	\$10,000,000
Sales factor	50%	60%
Apportionment %	50%	67.50%*
Separate MA net income	\$1,000,000	\$1,000,000
MA apportioned income	\$500,000	\$675,000

*Three factor, double weighted sales.

As a Massachusetts resident, R would report R's distributive share of the total unapportioned net income of S1 and S2 on R's personal income tax return. Since R is a 50% shareholder in both corporations, R reports \$1,000,000, *i.e.*, \$500,000 from each entity. As a nonresident, NR would report NR's distributive share of the Massachusetts source income of S1 and S2 on NR's Massachusetts non-resident income tax return. Since NR is a 50% shareholder in both corporations, NR reports \$587,000, *i.e.*, \$250,000 from S1 and \$337,500 from S2.

Example 7. Combined mutual fund service corporation and nexus and non-nexus general business corporation where the non-nexus general business corporation has Massachusetts sales. X, Y and Z are corporations engaged in a unitary business during tax year 2009. For taxable year 2009, X is a mutual fund service corporation subject to single sales factor apportionment under M.G.L. c. 63, § 38. As a mutual fund service corporation, X must separate its gross income into two categories, mutual fund sales and non-mutual fund sales (*i.e.*, other sales). Therefore, for purposes of the combined group, X is treated as two separate members. X derives 80% of its gross income from mutual fund sales, and 20% of its gross income from other sales. Y is a general business corporation subject to three factor apportionment with a double weighted sales factor under M.G.L. c. 63, § 38 and taxable under M.G.L. c. 63, § 39. Z is a non-taxpayer corporation that would be subject to apportionment as a general business corporation under M.G.L. c. 63, § 38 and would be taxable under M.G.L. c. 63, § 39 if it were subject to tax in Massachusetts. Z has \$1,000,000 in Massachusetts

sales. Therefore, because Z is a non-nexus corporation, an additional step is required for purposes of computing the apportionment formulas of X and Y, wherein the Massachusetts sales of Z are re-attributed to X and Y. See 830 CMR 63.32B.2(7)(b). The combined group's taxable income as determined under 830 CMR 63.32B.2(6)(c) is \$100,000. Further, assume for purposes of the example that X does not provide mutual fund services to Y or Z such that the provisions of 830 CMR 63.32B.2(7)(g) are implicated. The apportionment information and factor and tax determinations of the three corporations are as follows:

a. *Apportionment Information.*

	X (nexus) (mut. fund)	X (nexus) (other sales)	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	\$3,000,000	\$2,000,000	\$1,000,000		
Everywhere property	\$15,000,000	\$2,000,000	\$1,000,000	\$2,000,000	\$20,000,000
MA payroll		\$850,000	\$150,000	\$5,000,000	
Everywhere payroll	\$1,600,000	\$400,000	\$5,000,000	\$1,000,000	\$8,000,000
MA sales	\$4,000,000	\$1,000,000	\$1,000,000	\$1,000,000	
Everywhere sales	\$8,000,000	\$2,000,000	\$3,000,000	\$2,000,000	\$15,000,000

b. *Apportionment Factor Computation.*

(i) *Assign Z's Massachusetts Sales to X and Y.*

	Member X (mut. fund)	Member X (other sales)	Member Y	Member Z
Nexus member MA sales	\$4,000,000	\$1,000,000	\$1,000,000	n/a
Total nexus member MA sales	\$6,000,000	\$6,000,000	\$6,000,000	n/a
Nexus member sales %	66.66%	16.67%	16.67%	n/a
Non nexus member sales	n/a	n/a	n/a	\$1,000,000
Assigned non nexus member sales	\$666,666	\$166,667	\$166,667	n/a
Sales factor numerator	\$4,666,666	\$1,166,667	\$1,166,667	n/a

(ii) *Determine Apportionment Factor.*

	Member X (mut. fund)	Member X (other sales)	Member Y	Member Z
Property numerator	n/a	\$2,000,000	\$1,000,000	n/a
Property denominator	n/a	\$20,000,000	\$20,000,000	n/a
Property factor	n/a	10.00%	5.00%	n/a
Payroll numerator	n/a	\$150,000	\$5,000,000	n/a

Payroll denominator	n/a	\$8,000,000	\$8,000,000	n/a
Payroll factor	n/a	1.88%	62.50%	n/a
Sales numerator	\$4,666,666	\$1,166,667	\$1,166,667	n/a
Sales denominator	\$15,000,000	\$15,000,000	\$15,000,000	n/a
Sales factor	31.11%	7.78%	7.78%	n/a
Apportionment %	31.11%*	6.86%**	20.77%**	n/a

* Single factor, sales.

**Three factor, double weighted sales.

c. *Tax Determination.*

	Member X (mut. fund)	Member X (other sales)	Member Y	Member Z	Total
Apportionment %	31.11%	6.86%	20.77%	n/a	
Combined group TI	\$100,000	\$100,000	\$100,000	n/a	
Apportioned income	\$31,110	\$6,860	\$20,770	n/a	
Tax rate	9.50%	9.50%	9.50%	n/a	
Tax	\$2,955	\$652	\$1,973	n/a	\$5,580

Example 8. Combined corporations where no corporation is entitled to apportion. X, Y and Z are corporations engaged in a unitary business in tax year 2009. None of the corporations can apportion their income because none of the corporations have income from business activities that are taxable in another state. Consequently, the combined group cannot apportion its income. Therefore, 100% of the combined group's taxable income is taxable in Massachusetts. The combined group's taxable income in tax year 2009 as determined under 830 CMR 63.32B.2(6)(c) is \$1,000. To determine the amount of this income that is attributed to each combined group member the following information is relevant. X is an S corporation and a manufacturing corporation with sales of \$1,000, average property of \$2,000 and a payroll of \$500. Y is a financial institution with receipts of \$2,000, average property of \$11,000 (\$10,000 of which is intangible property within the meaning of M.G.L. c. 63, § 2A) and a payroll of \$1,000. Z is a general business corporation with sales of \$1,000, average property of \$1,000 and a payroll of \$500. The computation of the respective income of the combined group members for tax year 2009, which must add up to \$1,000, is as follows:

	X S corp.	Y Fin. Inst.	Z Bus. corp.	Combined
MA property	\$2,000	\$3,000*	\$1,000	\$6,000*
Everywhere property	\$6,000	\$6,000	\$6,000	
Property factor	33.33%	50%	16.67%	
MA payroll	\$500	\$1,000	\$500	\$2,000
Everywhere payroll	\$2,000	\$2,000	\$2,000	

Payroll factor	25%	50%	25%	
Total factor percentage	58.33%	100%	41.67%	200%
Average factor	29.167%	50%	20.833%	100%
Income computation	\$291.67	\$500	\$208.33	\$1,000

* The property factor for Y includes 20% of Y's \$10,000 of intangible property (*i.e.*, \$2,000) plus \$1,000 of other property.

(8) *Net Operating Loss Carry Forwards.*

(a) *General.* For taxable years beginning on or after January 1, 2009, if the computation of a combined group's taxable income results in a taxable net loss, a taxable member of such group may carry forward its apportioned share of the loss to offset against its post apportioned taxable income derived from the combined group in a future year to the extent the carry forward and offset is consistent with the requirements and limitations set forth in M.G.L. c. 63, § 30.5 and M.G.L. c. 63 generally. A taxpayer shall determine its Massachusetts apportioned share of a combined group's taxable income prior to the deduction of any net operating loss (NOL) carry forwards for a taxable year. Further, any taxpayer that has more than one NOL carry forward derived from losses incurred in more than one tax year shall apply such carry forwards in the order that the underlying loss was incurred, with the oldest carry forward to be deducted first. Neither a financial institution taxable under M.G.L. c. 63, § 2 nor a utility corporation taxable under M.G.L. c. 63, § 52A is permitted to carry forward a net operating loss.

(b) *Sharing of NOL Carry Forwards.*

1. A taxable member of a combined group that has a NOL carry forward that derived from a loss incurred from the activities of the combined group in a taxable year beginning on or after January 1, 2009, may share the NOL carry forward with the other taxable members of the group as provided in 830 CMR 63.32B.2(8). The taxable member that has a NOL carry forward must first deduct the carry forward against its post apportioned Massachusetts taxable net income derived from the combined group, if any. Then, to the extent the taxpayer has excess NOL carry forward, it may share that excess with the other taxable members of the combined group that were members of the combined group during the year in which the underlying loss was incurred in the manner described in 830 CMR 63.32B.2(8)(b)2., provided, however, that the excess NOL carry forward may not be shared with either a financial institution taxable under M.G.L. c. 63, § 2 or a utility corporation taxable under M.G.L. c. 63, § 52A. A taxable member of the combined group that was not a member of a combined group during the taxable year in which the activities of the group resulted in a net operating loss is not subsequently entitled to share in the use of the NOL carry forward.
2. The other taxable members of a combined group may use the taxable member's NOL carry forward as referenced in 830 CMR 63.32B.2(8)(b)1. to offset against their apportioned Massachusetts taxable net income derived from the combined

group to the extent that they have such net income. In such cases, the other taxable members of the combined group must first deduct any NOL carry forwards that they individually possess, derived from losses that they previously incurred, before applying any excess NOL carry forward of any other combined group member. The NOL carry forwards of a taxable member of a combined group, including any carry forwards that a member seeks to share with the other taxable members of its combined group, shall be applied in the order that the underlying loss was incurred, with the oldest carry forward to be deducted first. Where a taxable member has an excess NOL that can be shared with more than one taxpayer group member such excess NOL must be allocated among those other members eligible to share in such NOL in a manner that is proportionate to the respective amounts of apportioned income from the combined group that each such eligible group member has for the taxable year in which such excess NOL is to be shared after applying each such group member's own NOLs. In all cases, the use of the NOL carry forwards by the other taxable members of the combined group must be consistent with the requirements and limitations that govern the use of NOL carry forwards under M.G.L. c. 63, § 30.5. and M.G.L. c. 63 generally, including the requirement that the oldest NOLs must be utilized first. Any amount of a NOL carry forward that is subsequently deducted by any taxable member of a combined group shall reduce the amount of the NOL that may subsequently be carried forward by the taxpayer that originally incurred the loss.

- (c) *Ownership of NOL Carry Forward; Situation Where Carry Forward Owner Leaves Combined Group.* NOLs shall be carried forward from year to year separately by the individual taxpayer that originally incurred the underlying loss and therefore remain the tax attribute of that member, although such carry forwards may be shared in some cases with the other taxable members of a combined group as noted in 830 CMR 63.32B.2(8). Consequently, in any case in which a taxable member of a combined group ceases to be a member of the combined group, for whatever reason, any NOL carry forward owned by such taxpayer is no longer available for use by the other taxable members of the combined group with which the taxpayer was previously affiliated. In such cases, if the taxpayer becomes a member of a new combined group, the taxpayer may not share the NOL carry forward with the taxable members of its new combined group unless one of the taxable members of the new combined group was also a member of the taxpayer's combined group during the year the loss was incurred and all the other requirements referenced in 830 CMR 63.32B.2(8) are met. Where a taxpayer that has a NOL carry forward becomes a member of a new combined group, the change of ownership rules set forth in Code § 382 as applied under Massachusetts law may apply, though any amount of NOL carry forward that cannot be applied because of these limitations may be carried forward consistent with the rules and limitations of 830 CMR 63.32B.2(8)(c). *See* 830 CMR 63.30.2(11). In the event that a member of a combined group has a NOL carry forward and subsequently takes part in a merger or consolidation, the NOL carry forward will be lost if, for example, the member liquidates or terminates as a result of the merger or consolidation. *See* 830 CMR 63.30.2(11). In the case of a S Corporation owning a QSub that was then treated with the QSub as a single corporation by reason of St. 2008, c. 173, for tax years beginning on or after January 1, 2009, the NOL carry

forward of the S corporation and/or the QSub shall be treated as the NOL carry forward of the single corporation. *See* 830 CMR 63.30.3.

- (d) *Pre-2009 NOL Carry Forwards.* Where a taxable member of a combined group has a NOL carry forward that derives from a loss incurred in a taxable year beginning prior to January 1, 2009, the carry forward shall remain available to be deducted by the taxpayer that incurred the loss in a subsequent tax year as permitted under Massachusetts law as in effect during the year that the loss was incurred, subject to the limitation set forth in 830 CMR 63.32B.2(8)(f). Consequently, such NOL carry forwards as allowed under M.G.L. c. 63, § 30.5(b) may only be deducted by the taxpayer that incurred the loss and cannot be shared by the taxpayer with the other taxable members of its combined group. Further, as neither a financial institution taxable under M.G.L. c. 63, § 2 nor a utility corporation taxable under M.G.L. c. 63, § 52A was entitled to a NOL carry forward under the law in effect prior to January 1, 2009, such taxpayers cannot carry forward a NOL derived from a loss that was incurred for a taxable year beginning prior to January 1, 2009. For taxable years beginning prior to January 1, 2009 a taxpayer's NOL carry forward was to be "grossed up" to reflect a pre-apportionment calculation, by dividing the amount of any unused loss by the taxpayer's apportionment percentage from the year in which the loss was incurred. However, to apply such a carry forward to apportioned income that derives from the activity of a combined group for a taxable year beginning on or after January 1, 2009, the taxable member of the group must first convert the NOL carry forward to a post-apportionment calculation. Therefore, in the case of a NOL carry forward that derives from a loss incurred in the taxpayer's 2008 taxable year, the taxable member of a combined group shall carry forward the loss to its 2009 taxable year on a 2008 post-apportioned basis. Also, in the case of a NOL carry forward that derives from a loss incurred in the taxpayer's 2007 taxable year or an earlier taxable year, any remaining carry forward from such year shall be multiplied by the taxpayer's apportionment percentage from that year for purposes of being carried forward by the taxpayer to its 2009 tax year, or thereafter.
- (e) *Carry Forwards from Prior to Inclusion in a Combined Group.* Where a taxpayer corporation that was not previously a member of a combined group enters a pre-existing combined group or becomes part of a new combined group with one or more other corporations, the corporation may continue to deduct any NOL carry forwards that it has from prior taxable years against its apportioned income as derived from the combined group, subject to the limitation set forth in 830 CMR 63.32B.2(8)(f). However, in such cases a taxpayer's pre-combination NOL carry forward was to be "grossed up" to reflect a pre-apportionment calculation, by dividing the amount of any unused loss by the taxpayer's apportionment percentage from the year in which the loss was incurred. To apply such a carry forward to apportioned income that derives from the activity of a combined group for a taxable year beginning on or after January 1, 2009, the taxable member of the group must first convert the NOL carry forward to a post-apportionment calculation. To do so, the taxpayer must multiply the remaining NOL carry over from any individual pre-combination year by the taxpayer's apportionment percentage from that year.

(f) *Limitation on Use of Pre-combination NOL.*

1. Where a taxable member of a combined group is carrying forward a NOL from a year or years beginning prior to January 1, 2009, or from a year or years in which the corporation was not a member of a combined group, the use of the corporation's pre-apportionment NOL from such year(s) is limited to the amount of the current year combined group taxable income that would be apportioned to the member as determined by using:
 - a. the dollar amounts of the member's Massachusetts apportionment factor numerators in the year(s) in which the loss was incurred (determined, in the case of the sales factor, by excluding all 'throwback sales' other than destination sales 'thrown back' in the year of the loss from jurisdictions in which no member of the combined group is subject to tax in the year the NOL deduction is taken) and
 - b. the current year group denominators.

In the case of NOL carry forward from two or more such years, the Massachusetts apportionment factor numerators shall be averaged for all such loss years, weighting the factors for each loss year in accordance with the amount of the loss carried forward to the current year calculated on a post-apportionment basis, and the resulting average Massachusetts property, payroll, and sales factor numerators shall be divided by the current year group denominators to determine an apportionment percentage. The apportionment percentage thus determined shall be multiplied by the current year combined group taxable income. The product is the maximum current year income of the member that may be offset in the taxable year by its pre-combination NOL carry forward, subject to any other applicable loss carry forward limitation. The Commissioner may disregard material transactions among affiliated entities on or after November 1, 2008, to the extent that such transactions would affect the limitation under 830 CMR 63.32B.2(8)(f).

2. For purposes of the application of the limitation set forth in 830 CMR 63.32B.2(8)(f)1., the dollar amounts of a member's Massachusetts apportionment factor numerators in years when losses were incurred may, at the election of the combined group, be increased in proportion to any over-all growth in Massachusetts property and payroll for all combined group members between the year of the loss and the tax year, commencing on or after January 1, 2009, for which a pre-2009 loss carry forward is claimed. Under this method, the dollar amount of all Massachusetts property and payroll for all combined group members, including all predecessor entities in existence in the year that the loss was incurred, regardless of prior year ownership of any predecessor entities, are totaled for each apportionment factor and are compared to the total dollar amounts of Massachusetts property and payroll in the year in which the carry forward is claimed. The dollar amounts of Massachusetts property, payroll, and sales for an individual corporation described in 830 CMR 63.32B.2(8)(f)1. in a particular loss year are then increased or decreased in proportion to the combined group's

Massachusetts increase or decrease for each apportionment factor. A taxpayer electing this methodology must recalculate the dollar amount of Massachusetts property and payroll for each factor using this methodology and must apply the methodology for purposes of calculating NOL carry forward limitations under 830 CMR 63.32B.2(8)(f)1. to all group members with pre-2009 loss carry forwards. In the case of NOL carry forward from two or more loss years, the limitation in 830 CMR 63.32B.2(8)(f)1. must be calculated by adjusting the prior numerators to reflect the change in Massachusetts activity separately for each loss year, before applying the weighted average methodology otherwise described in 830 CMR 63.32B.2(8)(f)1.

3. In no event may the NOL deduction from the taxpayer's apportioned share of the combined group's taxable income exceed the amount of income actually apportioned to the taxpayer using current year apportionment factor numerators.

(g) *Relationship to Allocable Losses and Loss Carry Forwards, and to Other Apportionable Losses and Carry Forwards.* The determination of an allocable loss, see M.G.L. c. 63, § 38(b), is determined separately from the determination of the combined group's taxable income or loss, as to an individual taxpayer on a separate company basis. A taxpayer that has an allocable loss or an allocable loss carry forward may offset the loss first against its allocable income and then against its post-apportioned income derived from a combined group. An allocable loss or allocable loss carry forward is a separate company loss that can only be used by the taxpayer that incurred the loss and cannot be shared. Therefore, a taxpayer that has an allocable loss to carry forward must carry forward that allocable loss separately from a post-apportioned NOL carry forward derived from the activities of a combined group. Similarly, if a combined group member has an apportioned loss from business activities other than from the activities of a combined group, this loss and any loss carry forward resulting therefrom is a separate company loss and may only be used by the taxpayer that incurred the loss and cannot be shared. In general, a taxpayer must apply its oldest carry forward losses first irrespective as to whether they are derived from a separate company loss (allocated or apportioned) or from the apportioned loss derived from the activities of a combined group. However, with respect to any tax year from which the taxpayer has both a separate company loss carry forward and an apportioned loss carry forward derived from the activities of a combined group it must apply the separate company loss carry forwards first against separate company income and vice versa.

(h) *Examples.* (In these examples, it is assumed under the particular facts unless otherwise stated that the dollar amounts of the Massachusetts apportionment factor numerators of the corporations remain constant for the years discussed, so that the limitation in 830 CMR 63.32B.2(8)(f) does not restrict the use of the NOL carry forwards).

Example 1. X and Y are commonly owned taxpayer corporations during the three year period 2007-2009. X is a general business corporation taxable under M.G.L. c. 63, § 39, whereas Y is a financial institution taxable under M.G.L. c. 63, § 2. For taxable year 2007, X has a 20% apportionment and an apportioned loss of \$10,000, which

“grosses up” to a pre-apportionment NOL of \$50,000 (\$10,000 divided by .20) to carry forward. Y also has a loss for tax year 2007, but because it is a financial institution it cannot carry forward this loss. In taxable year 2008, X again has an apportionment percentage of 20%, but has no taxable income, whereas Y has apportioned taxable income of \$20,000. Although X has a NOL carry forward of \$50,000 from 2007 in taxable year 2008 that NOL carry forward cannot be shared with Y. In tax year 2009, the two corporations are engaged in a unitary business. In conducting their 2009 unitary business, the XY combined group has combined income of \$100,000, and X and Y have respective apportionment percentages of 20% and 10%. Therefore, X and Y’s respective share of the 2009 combined group’s taxable income is \$20,000 and \$10,000. X has a pre-apportioned NOL carry forward of \$50,000 from 2007 that must be converted into a post apportionment computation for purposes of X using this NOL as a deduction against its 2009 income. To accomplish this conversion, X multiplies its \$50,000 2007 carry forward by its 2007 apportionment percentage of 20%, resulting in a carry forward of \$10,000. Consequently X has a \$10,000 2007 NOL carry forward that can be applied against its \$20,000 of income for the 2009 tax year. X has no remaining carry forward from 2007 that can be brought forward into 2010.

Example 2. X, Y and Z are commonly owned taxpayer corporations taxable under M.G.L. c. 63, § 39 during the three year period 2008-2010. For taxable year 2008, X, Y and Z file as a combined group under the predecessor version of M.G.L. c. 63, § 32B, which has been repealed for taxable years beginning after January 1, 2009. X has an apportioned loss of \$100,000 for 2008 and Y and Z have apportioned income, respectively, of \$25,000 and \$50,000. Consequently, in 2008 \$75,000 of X’s loss is used to offset the apportioned income of Y and Z and \$25,000 remains to be carried forward. In tax year 2009, the three corporations are engaged in a unitary business. In conducting their 2009 unitary business, the XYZ combined group has a combined loss of \$80,000, and X, Y and Z have respective apportionment percentages of 25%, 20% and 10%. Consequently, X, Y and Z have an apportioned share of the combined group’s loss for 2009 that is, respectively, \$20,000, \$16,000 and \$8,000. In 2010 the XYZ combined group remains unchanged and has combined taxable income of \$300,000, and X, Y and Z have respective apportionment percentages of 33.4%, 5% and 10%. Therefore, X, Y and Z’s respective share of the 2010 group’s income is, respectively, \$100,000, \$15,000 and \$30,000. The Massachusetts income and loss attributes for the XYZ group for tax years, 2009-2010, is computed as follows:

Tax year 2009

Combined Entity	<u>Income</u>	<u>App%</u>	<u>MA Income</u>	<u>2009 NOL to carry forward</u>	<u>2008 NOL carry forward</u>
X	(\$80,000)	25%	(\$20,000)	(\$20,000)	(\$25,000)
Y	(\$80,000)	20%	(\$16,000)	(\$16,000)	n/a
Z	(\$80,000)	10%	(\$8,000)	(\$8,000)	n/a

Tax year 2010

Entity	Combined <u>Income</u>	<u>App%</u>	<u>MA Income</u>	NOL carry <u>forward used</u>	Taxable <u>Income</u>
X	\$300,000	33.34%	\$100,000	\$45,714*	\$54,286
Y	\$300,000	5%	\$15,000	\$15,000**	\$0
Z	\$300,000	10%	\$30,000	\$8,286***	\$21,714

* X applies its entire NOL carry forward from 2008, \$25,000. X also applies its entire NOL carry forward from 2009, \$20,000. X also uses \$714 of Y's NOL carry forward from 2009, which is determined based upon its percentage of the income of X and Z after each corporation applies its own NOLs (\$55,000/\$77,000 multiplied by Y's \$1,000 excess NOL).

** Y applies \$15,000 of its NOL carry forward from 2009; it has \$1,000 of NOL carry forward from 2009 that remains to share with X and Z.

*** Z applies its entire NOL carry forward from 2009, \$8,000, plus Z applies \$286 of Y's excess NOL carry forward from 2009, which is determined based upon its percentage of the income of X and Z after each corporation applies its own NOLs (\$22,000/\$77,000 multiplied by \$1,000).

Example 3. X, Y and Z are commonly owned taxpayer corporations taxable under M.G.L. c. 63, § 39 during the three year period 2008-2010. For taxable year 2008, X, Y and Z file as a combined group under the predecessor version of M.G.L. c. 63, § 32B. X has an apportioned loss of \$150,000 for 2008 and Y and Z have apportioned income, respectively, of \$10,000 and \$5,000. Consequently, in 2008 \$15,000 of X's loss is used to offset the apportioned income of Y and Z and \$135,000 remains to be carried forward. In tax 2009, the three corporations are engaged in a unitary business. In conducting their 2009 unitary business, the XYZ combined group has a combined loss of \$20,000, and X, Y and Z have respective apportionment percentages of 10%, 50% and 10%. Consequently, X, Y and Z have an apportioned share of the combined group's loss for 2009 that is, respectively, \$2,000, \$10,000 and \$2,000. In 2010 the XYZ combined group remains unchanged and has combined taxable income of \$100,000, and X, Y and Z have respective apportionment percentages of 10%, 50% and 10%. Therefore, X, Y and Z's respective share of the group's 2010 income is, respectively, \$10,000, \$50,000 and \$10,000. The Massachusetts income and loss attributes for the XYZ group for tax years, 2008-2010, is computed as follows:

Tax year 2009

Entity	Combined <u>Income</u>	<u>App%</u>	<u>MA Income</u>	2009 NOL to <u>carry forward</u>	2008 NOL <u>carry forward</u>
X	(\$20,000)	10%	(\$2,000)	(\$2,000)	(\$135,000)
Y	(\$20,000)	50%	(\$10,000)	(\$10,000)	n/a
Z	(\$20,000)	10%	(\$2,000)	(\$2,000)	n/a

Tax year 2010

Entity	Combined		MA Income	NOL carry forward used	Taxable Income
	Income	App%			
X	\$100,000	10%	\$10,000	\$10,000*	\$0
Y	\$100,000	50%	\$50,000	\$11,667**	\$38,333
Z	\$100,000	10%	\$10,000	\$ 2,333***	\$7,667

* X has \$135,000 of carry forward from 2008 to apply. It applies \$10,000 of its 2008 carry forward to eliminate its 2010 taxable income, leaving it with \$125,000 to carry forward for its use in subsequent years. None of X's 2008 carry forward can be shared with Y or Z. X also has \$2,000 of NOL carry forward from 2009 remaining, which can be shared with Y and Z.

** Y applies its \$10,000 NOL carry forward from 2009; Y also uses \$1,667 of X's NOL carry forward from 2009 (which unlike X's 2008 NOL carry forward can be shared), which is determined based upon its percentage of the income of Y and Z after each corporation applies its own NOLs (\$40,000/\$48,000 or 5/6).

*** Z applies its entire NOL carry forward from 2009, \$2,000; Z also uses \$333 of X's NOL carry forward from 2009, which is determined based upon its percentage of the income of Y and Z after each corporation applies its own NOLs (\$8,000/\$48,000 or 1/6).

Example 4. Y and Z are corporations taxable under M.G.L. c. 63, § 39 that are engaged in a unitary business during the three year period 2009-2011. For taxable year 2009, the YZ combined group's taxable income is \$100,000 and the apportionment percentage of Y and Z is 10%, and 5% respectively. Z also has an allocable loss of \$20,000 that derives from an activity that is unrelated to the combined group's unitary business. The apportioned taxable income of Y and Z derived from the combined group prior to the deduction of any losses is \$10,000 and \$5,000, respectively. Z applies its allocable loss, \$20,000, against its apportioned share of the combined group's taxable income, \$5,000 and has a remaining loss of \$15,000 to carry forward. Z's \$15,000 loss carry forward is an allocable loss, and therefore cannot be shared with Y in the 2009 tax year or any future tax year.

For taxable year 2010, the YZ combined group has a net loss of \$50,000 and the apportionment percentage of Y and Z is 10% and 6%, respectively. Therefore, Y and Z generate NOL carry forwards of \$5,000 and \$3,000, respectively. Because these carry forwards are derived from the operation of the combined group's unitary business, Y and Z may share these NOLs with each other in future years. Z also has allocable income from 2010 of \$5,000. Z's allocable loss from 2009, \$15,000, is deducted from its allocable income from 2010, \$5,000, up to the limit specified in M.G.L. c. 63, § 30.5 (*i.e.*, in this case, reducing Z's taxable income to zero). Z retains the remainder of its 2009 allocable NOL derived from 2009, *i.e.*, \$10,000, which Z can carry forward and use against its own income (but which cannot be shared with Y) in future years.

For taxable year 2011, the YZ combined group has net income of \$200,000 and the apportionment percentage of Y and Z is 10% and 4%, respectively. Therefore, Y and Z's apportioned share of the combined group's taxable income is \$20,000 and \$8,000, respectively. Neither Y nor Z has any allocable income or loss in 2011. Y applies its NOL carry forward previously derived from the activities of the YZ combined group, \$5,000, against its \$20,000 in 2011 apportioned income from such group, and thereby reduces this income to \$15,000. Z must first apply its NOL carry forward previously derived from the activities of the YZ combined group, \$3,000, to reduce its \$8,000 in 2011 apportioned income from such group, and thereby reduces this income to \$5,000. Subsequently, Z may apply \$5,000 of its allocable NOL against its remaining 2011 apportioned income from the YZ group, thereby reducing this income to zero. Z retains the remainder of its 2009 allocable NOL, *i.e.*, \$5,000, which Z can carry forward and use against its own income (but which cannot be shared with Y) in future years.

Example 5. Y is a manufacturing corporation taxable in Massachusetts that applies single sales factor apportionment for the tax years 2007-2009. Y has an available NOL from tax year 2007 of \$40,000 calculated on a pre-apportionment basis. In 2007 Y had Massachusetts destination sales of \$45,000 and sales subject to throwback of \$55,000, for a total numerator of \$100,000. Also, in 2007 Y had a sales factor denominator of \$200,000 and therefore a resulting apportionment percentage of 50%. In 2008, Y is a Massachusetts taxpayer that has no taxable income or loss. In 2009 Y is a member of a combined group engaged in a unitary business with corporation Z. The YZ combined group's 2009 taxable income is \$100,000 and Y has a 2009 apportionment percentage, calculated under 830 CMR 63.32B.2(7), of 8%. Therefore, Y's 2009 apportioned share of the combined group's taxable income is \$8,000. The denominator of the YZ combined group's 2009 sales factor is \$1,000,000. Also, the group is taxable in every state so none of Y's 2007 sales would be considered sales shipped to non-nexus states for throwback purposes if made by Y in 2009.

To calculate the amount of its 2007 NOL that is available to be used in tax year 2009, Y multiplies its pre-apportionment 2007 NOL by its 2007 apportionment percentage ($40,000 \times 50\%$), which results in Y having a post-apportionment NOL available from 2007 of \$20,000. To calculate the limit on the amount of its 2007 NOL that Y may use in the 2009 tax year, Y must re-determine its 2007 sales factor numerator, excluding sales thrown back to Y in 2007 to the extent those sales were shipped to purchasers in states in which the YZ combined group is taxable in the 2009 tax year. Y's 2007 numerator as re-determined for this purpose is \$45,000. Therefore, the limit on the amount of Y's 2007 NOL which may be used by Y in tax year 2009 is Y's revised 2007 numerator divided by the YZ combined group's 2009 denominator times the YZ combined group's taxable income (*i.e.*, $45,000/1,000,000 \times \$100,000 = 4.5\%$ of \$100,000 or \$4,500.). Consequently, Y may use \$4,500 of its 2007 post apportionment NOL against its 2009 apportioned share of the YZ combined group's taxable income and, upon so doing, has \$3,500 of taxable net income. Y then has \$15,500 of post-apportioned NOL from 2007 remaining to carry forward to future years.

Example 6. Same facts as in *example 5.* except that Y also has an NOL carry forward from the 2008 tax year determined on a pre-apportioned basis of \$30,000. In 2008 Y had destination sales of \$60,000, throwback sales of \$20,000 and a sales factor denominator of \$240,000. Y's apportionment percentage for 2008 was 33.33%.

To determine the limit on the amount of its pre-combination NOL carry forward that it may use in tax year 2009, Y must first determine how much of its NOL carry forward is available from each of the two tax years 2007 and 2008 on a post-apportionment basis. Y's post-apportionment NOL from 2007 is \$20,000, and using its applicable 2008 apportionment factor, Y determines that its post apportionment NOL from 2008 is \$10,000. Also, Y's re-determined numerator for 2007 is \$45,000 (*See example 5*) and its re-determined numerator for 2008 (excluding throwback to states in which the group has nexus in the current year) is \$60,000. Y must use the weighted average of these numerators ($\frac{2}{3}$ of the 2007 numerator plus $\frac{1}{3}$ of the 2008 numerator) to calculate its limitation under 830 CMR 63.32B.2(8)(f). The weighted average is \$50,000. The YZ combined group's 2009 denominator is \$1,000,000 and the YZ combined group's 2009 taxable income is \$100,000 so the limit on the amount of pre-combination NOL which Y may use in tax year 2009 is \$5,000 (*i.e.*, $50,000/1,000,000 \times \$100,000 = 5\%$ of \$100,000 or \$5,000.). Y uses \$5,000 of its 2007 NOL and has \$15,000 of its 2007 NOL (on a post-apportionment basis) available to carry forward to the following year. Y uses none of its 2008 NOL and has \$10,000 of 2008 post apportionment NOL to carry forward to the following year. Y's taxable net income after the NOL deduction is \$3,000.

Example 7. Same facts as in *example 6.* except that Y and Z have increased their total Massachusetts property and payroll from tax year 2007 to tax year 2009 and, because this is so, the YZ combined group elects to apply the provisions of 830 CMR 63.32B.2(8)(f)2. to determine the limit on pre-combination NOL carry forwards that may be used by the group members (assume for purposes of the example, however, that Z has no pre-combination NOL carry forwards). The increase in the Massachusetts property and payroll of Y and Z from 2007 to 2009 was 50%. The increase in the Massachusetts property and payroll of Y and Z from 2008 to 2009 was 25%. Y's re-determined 2007 numerator is \$45,000 (*See example 5.*), increased by 50% to reflect the increase in the Massachusetts property and payroll of Y and Z from 2007 to 2009 for a revised figure of \$67,500. Y's re-determined 2008 numerator is \$60,000 (*See example 6.*), increased by 25% to reflect the increase in the Massachusetts property and payroll of Y and Z from 2008 to 2009 for a revised figure of \$75,000. Applying the weighted average rule ($\frac{2}{3}$ for 2007, $\frac{1}{3}$ for 2008 based on the amount of NOL available), Y's average numerator for the pre-combination loss years is \$70,000 and therefore the limit on its pre-combination losses that may be used is \$7,000. Y will use \$7,000 of the 2007 NOL carry forward and has \$13,000 remaining to carry forward to the following year. Y uses none of the 2008 NOL carry forward and has \$10,000 available to carry forward to the following year.

(9) *Credits.*

- (a) *General; Possible Sharing of Credits within a Combined Group.* In general, a tax credit generated by a taxpayer belongs to that taxpayer and can be applied against the excise of that taxpayer and in some cases against the excise of the affiliates of the taxpayer, subject to the rules that govern the use of the credit. Further, pursuant to M.G.L. c. 63, § 32B, for tax years beginning on or after January 1, 2009, a credit that may be validly claimed by a taxable member of a combined group and that is attributable to the combined group's unitary business may be shared with the other taxable members of the combined group to the extent such sharing of the credit is consistent with the statutory requirement for claiming the credit, taking into account the nature of the business and activities of each of the taxable members that seek to share the credit. Thus, for example, in the case of an investment tax credit (ITC) that is generated by a taxable member of a combined group pursuant to M.G.L. c. 63, § 31A for a taxable year beginning on or after January 1, 2009, such credit may be applied against the excise due from one or more other taxable members of the combined group if the qualified property is used in the combined group's unitary business and such other taxable members could have validly claimed a credit under M.G.L. c. 63, § 31A, *e.g.*, as a manufacturing corporation. For purposes of the preceding sentence, a taxable member seeking to share the M.G.L. c. 63, § 31A credit shall be deemed to meet the standard that it could have validly claimed a credit under M.G.L. c. 63, § 31A for the taxable year if it is deemed to be engaged in manufacture for such year pursuant to 830 CMR 63.32B.2(7)(g)2.d. Also, in the case of a research credit that is generated by a taxable member of a combined group pursuant to M.G.L. c. 63, § 38M, for a taxable year beginning on or after January 1, 2009, such credit may be applied against the excise due from one or more other taxable group members if the credit derives from the unitary business of such group and the other taxable group members are corporations taxable under M.G.L. c. 63, § 39 or § 32D. In the case of a group of corporations for which an affiliated group election has been made, a credit that is validly claimed by a taxpayer in the combined group may be shared with the other taxable members of such group irrespective as to whether the combined group members sharing the credit are all engaged in a unitary business to the extent such sharing of the credit is consistent with the statutory requirement for claiming the credit, as discussed in 830 CMR 63.32B.2(9)(a).
- (b) *Application of Current Year Credits.* In any case where a taxpayer's credit can be shared among the taxable members of the taxpayer's combined group, the credit must first be applied against the excise of the taxpayer that generated the credit consistent with the requirements and limitations that apply to such credit. If the taxpayer has more credit than it may use against its own excise, such excess credit may be applied against the excise of the other taxable members that are eligible to share the credit, again consistent with the requirements and limitations that apply to such credit, provided however that each of such other taxable members must first use its own credits, including any credits carried forward from prior years. In general, the credit conferred under M.G.L. c. 63, §§ 31A and 38N are each subject to a 50% annual limitation and the credit conferred under M.G.L. c. 63, § 38M is subject to a 75% annual limitation (*i.e.*, the credit may not reduce the taxpayer's excise for the year by

more than 50% or 75%, respectively, as the case may be), although the first \$25,000 of the M.G.L. c. 63, § 38M credit is not subject to any percentage limitation. A credit may be applied against a taxpayer's income or non-income measure determined under M.G.L. c. 63, § 39. However, under no circumstance may a general business corporation subject to tax under M.G.L. c. 63, § 39 reduce its excise to less than the minimum corporate excise as determined under M.G.L. c. 63, § 39.

Example 1. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. These corporations have an income measure excise as determined under M.G.L. c. 63, § 39, before the application of any credits, of \$10,000, \$20,000 and \$10,000, respectively. X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A. Y is a research and development corporation within the meaning of M.G.L. c. 63, § 31A that would be entitled to ITC if it made a qualified acquisition thereunder. Z is a corporation that is not referenced within the meaning of M.G.L. c. 63, § 31A that would not be able to claim the ITC under M.G.L. c. 63, § 31A even it acquired property as referenced therein. In tax year 2009, X purchases equipment to be used in the XYZ unitary business that generates \$15,000 of ITC. Also, during tax year 2009, Y engages in activity as part of the unitary business that entitles it to \$45,000 of research credit under M.G.L. c. 63, § 38M. The credits for the group are determined as follows:

Tax year 2009

Entity	Excise	Credit generated	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	\$10,000	\$15,000	\$5,000	n/a	\$4,544	\$456	\$8,581
Y	\$20,000	\$45,000	\$18,125	\$1,419	n/a	\$456	\$13,269
Z	\$10,000	n/a	n/a	n/a	\$9,062	\$938	\$0

X must use its ITC first, which results in it claiming \$5,000 of ITC. X is then able to share any excess research credit of Y. X's research credit limitation is \$9,062. (X's tax was \$10,000 and the group's overall tax was \$40,000 and so X contributed to 25% of the group's tax. Accordingly 25% of the \$25,000 research credit limitation is applied to X. Thus 25% multiplied by the \$25,000 credit limitation or \$6,250 plus 75% of the remaining tax of \$3,750 or \$2,812 equals X's available research credit of \$9,062.) However, the research credit is further limited to \$4,544 so that the tax due by X is at least \$456. Y must use its research credit first against its own excise. Y's available research credit for 2009 is \$18,125 (50% of the \$25,000 group limitation plus 75% of the remaining tax.). In addition, since Y, like X, is a corporation that is entitled to claim an ITC under M.G.L. c. 63, § 31A, Y may share in X's ITC. The ITC is limited to 50% of Y's excise, and in this case is further limited so that Y's excise does not fall below \$456. Therefore, Y can use \$1,419 of X's ITC. Z may share Y's research credit. Z's share of Y's research credit is 25% of the group's \$25,000 limitation plus 75% of any remaining excise.

(c) *Carry Forward of Credits: Post-2009 and Pre-2009 Credits.*

1. *General: Post-2009 Credits.* In general, a taxpayer that does not use the full amount of a credit generated in a taxable year may carry forward the amount of credit not used consistent with the statutory requirements for applying the credit. Where a taxpayer generates a credit for a taxable year beginning on or after January 1, 2009, the taxpayer may carry forward the portion of such credit that is not taken by the taxpayer and the other taxable members of the taxpayer's combined group. Any such credit that is carried forward by the taxable member may only be shared with a member of the taxpayer's current combined group that, in addition:
 - a. was a member of the taxpayer's combined group during the year (*i.e.*, a tax year beginning on or after January 1, 2009) that the credit was generated or
 - b. is a successor in whole or part to one or more combined group members from such prior post-2008 tax year such that there is 100% continuity of ownership as between the successor corporation and one or more corporations that were in the combined group during such prior year.

The requirements for sharing the carry forward of a credit that is generated for a taxable year beginning on or after January 1, 2009 are the same as those for sharing such a credit in the year that the credit was generated. That is, if the credit is attributable to the combined group's unitary business, the credit carry forward may be shared with the other taxable members of the combined group to the extent such sharing is consistent with the statutory requirement for claiming the credit, as discussed in 830 CMR 63.32B.2(9)(b) through (c). As in the case of the application of a credit for the tax year in which the credit was generated, a credit carry forward must first be applied against the excise of the taxpayer that generated the credit, and then any excess credit may be applied against the excise of the other taxable members of the combined group that may share the credit, in each case consistent with the requirements and limitations that apply to the credit.

Example 2. Same facts as in *example 1*. One year later, in tax year 2010, it remains the case that X, Y and Z are engaged in a unitary business. Also, it remains the case that X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A; Y is a research and development corporation within the meaning of M.G.L. c. 63, § 31A; and Z is a corporation that is not referenced within the meaning of M.G.L. c. 63, § 31A and that would not be able to claim the ITC under M.G.L. c. 63, § 31A even if it acquired property as referenced therein. X has an excise of \$2,000, Y has an excise of \$4,000 and Z has an excise of \$10,000. X also has \$8,581 of ITC credit carry forward that may be shared with Y but not Z (the credit carry forward cannot be shared with Z because Z was not able to claim an ITC in tax year 2009). Y has a research credit carry forward of \$13,269 that can be shared with both X and Z since the credit derived from the unitary business conducted by Y with both X and Z in 2009, and also in 2010 both X and Z are members of Y's combined group and are both corporations taxable under M.G.L. c. 63, § 39. None of the corporations have any additional credits for 2010. The credits for the group are calculated as follows:

Tax year 2010

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	\$2,000	\$8,581	\$1,000	n/a	\$544	\$456	\$7,581
Y	\$4,000	\$13,269	\$3,544	n/a	n/a	\$456	-
Z	\$10,000	n/a	n/a	n/a	\$9,181	\$819	-

X must use its ITC carry forward against its own excise first, which results in it claiming \$1,000 of ITC. X is then able to share any excess research credit of Y. There is no research credit limitation because the entire group's excise is less than \$25,000. Y must use its research credit first against its own excise. Y may claim \$3,544 of research credit and reduce its excise to \$456. X may use \$544 of Y's research credit to reduce its excise to \$456. Z may also share Y's research credit. Z is able to claim the remaining \$9,181 of Y's research credit. Z's excise is reduced to \$819.

Example 3. Same facts as in *example 2.*, except that Y separates part of its operations into a new taxpayer corporation, N, which it forms as a wholly owned subsidiary on January 1 of 2011, and N becomes part of the XYZ combined group as of that date. N and Y are both research and development corporations within the meaning of M.G.L. c. 63, § 31A that would be able to claim ITC thereunder. X has an excise of \$2,000, Y has an excise of \$4,000, Z has an excise of \$10,000, and N has an excise of \$4,000. The credits for the group are determined as follows:

Tax year 2011

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from Y	Excise post credit	Carry forward credit
X	\$2,000	\$7,581	\$1,000	n/a	n/a	\$1,000	\$2,581
Y	\$4,000	n/a	n/a	\$2,000	n/a	\$2,000	-
Z	\$10,000	n/a	n/a	n/a	n/a	\$10,000	-
N	\$4,000	n/a	n/a	\$2,000	n/a	\$2,000	-

X may share its ITC credit carry forward with Y and N, both of which are entitled to reduce their excise by 50% consistent with the rules for claiming an ITC. Y can share X's ITC because it is entitled to claim an ITC during tax year 2011 and also was a member of Z's combined group during 2009, the tax year that the ITC was generated. N can share X's ITC because it is entitled to claim an ITC during tax year 2011 and also, though it was not a member of the XYZ combined group in the tax year that the ITC was generated, N is a successor in part to Y, which was a combined group member during 2009, and also there is 100% continuity of ownership as between Y and N.

Example 4. Same facts as in *example 2* (with X possessing an ITC carry forward from the unitary business activities of the XYZ combined group from tax year 2009), except that Z acquires 100% of the voting shares of a new taxpayer corporation, V, on January 1 of 2011. V is not engaged in a unitary business with X, Y or Z during 2011. However, the principal reporting corporation of the XYZ unitary group makes an affiliated group election for 2011. V is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A that would be entitled to claim ITC if it made a qualified acquisition thereunder. V has an income measure excise for tax year, 2011, of \$4,000. X may not share any of its remaining ITC carry forward from tax year 2009 with V as V was not a part of the XYZ combined group in the tax year that the credit was generated.

2. *Pre-2009 Credits.* In the case of a credit that was generated by a taxpayer for a taxable year beginning prior to January 1, 2009, a credit carry forward may be applied in a subsequent tax year consistent with the statutory rules that applied to such credits in the year the credit was generated. Consequently, in tax years beginning on or after January 1, 2009, such a credit carry forward may be shared by the taxpayer that generated the credit with one or more taxable members of its combined group only if such sharing is consistent with the statutory rules that applied to the credit in the year that the credit was generated and, if those rules required the filing of a combined return of income under the predecessor version of M.G.L. c. 63, § 32B for the credit to be shared, only if the taxpayer that generated the credit and the other members seeking to share the credit jointly filed such a return for the last tax year beginning prior to January 1, 2009. Thus, for example, in the case of a carry forward of a research credit generated by a taxable member of a combined group pursuant to M.G.L. c. 63, § 38M for a taxable year beginning prior to January 1, 2009, such carry forward may be applied against the excise due from one or more other members of the combined group if the credit relates to the group's unitary business and the other taxable members seeking to share the credit and the taxable member that generated the credit filed a combined return of income under the predecessor version of M.G.L. c. 63, § 32B in the last tax year beginning prior to January 1, 2009. In contrast, since a credit generated pursuant to M.G.L. c. 63, § 31A could not be shared by corporations in tax years beginning prior to January 1, 2009, a credit carry forward of a M.G.L. c. 63, § 31A credit cannot be shared by combined group members in taxable years beginning on or after January 1, 2009.

Example 5. X, Y and Z are commonly owned taxpayer corporations taxable under M.G.L. c. 63, § 39 during the two year period 2008-2009. For taxable year 2008, X, Y and Z file as a combined group under the predecessor version of M.G.L. c. 63, § 32B, which has been repealed for taxable years beginning on or after January 1, 2009. X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A and has an ITC carry forward from 2008 of \$10,000. Y is a research and development corporation within the meaning of M.G.L. c. 63, § 31A and has a research credit carry forward from 2008 of \$20,000. Z is a corporation that is not referenced within the meaning of M.G.L. c. 63, § 31A and would not be able to claim the ITC under that M.G.L. c. 63, § 31A even if it acquired property as referenced therein. In 2009, the

three corporations are engaged in a unitary business within the meaning of current M.G.L. c. 63, § 32B, and have an income measure excise as determined under M.G.L. c. 63, § 39, before the application of any credits, of \$10,000, \$20,000 and \$10,000, respectively. The credits for the group are determined as follows:

Tax year 2009

Entity	Excise	'08 credit carry forward	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	\$10,000	\$10,000	\$5,000	n/a	\$1,875	\$3,125	\$5,000
Y	\$20,000	\$20,000	\$18,125	n/a	n/a	\$1,875	-
Z	\$10,000	n/a	n/a	n/a	n/a	\$10,000	-

X must use its ITC first and can offset 50% of its excise with its ITC. Therefore X uses \$5,000 of its ITC. Y must use its research credit first against its own excise. Y's research credit limitation is \$18,125 so it must use this amount first. (Y's research credit limitation is \$12,500 plus \$5,625. Since Y's liability is 50% of the group's liability Y is allocated 50% of the \$25,000 credit limitation or \$12,500 plus 75% of the excise remaining in excess of the \$12,500 limitation or 75% of \$7,500). Y's research credit can be shared with X since both X and Y, as combined group members under former M.G.L. c. 63, § 32B, were able to share the credit during the tax year that it was generated, 2008, and also in 2009 both X and Z are members of Y's combined group and are both corporations taxable under M.G.L. c. 63, § 39. Therefore, X can share in Y's remaining research credit of \$1,875. However, X may not share any of its remaining ITC generated in 2008 with either Y or Z, as during tax year 2008 the M.G.L. c. 63, § 31A credit could only be used by the corporation that generated it. Z does not take any credit in this example, but had X not used any of Y's research credit Z could have claimed it. Alternatively, X and Z could have each taken a portion of Y's excess research credit. X has a carryover ITC of \$5,000.

- (d) *Ownership of a Credit: Situation Where Credit Owner Leaves Combined Group.* Although a credit and a credit carry forward may sometimes be shared among the taxable members of a combined group as discussed in 830 CMR 63.32B.2(9)(a) through (c), the credit nonetheless remains the property of the taxpayer that initially generated the credit. Consequently, in any case in which a taxable member of a combined group ceases to be a member of the combined group, for whatever reason, any credit carry forward owned by such taxpayer is no longer available for use by the other taxable members of the combined group with which the taxpayer was previously affiliated. In such cases, if the taxpayer becomes a member of a new combined group, the taxpayer may not share the credit with the taxable members of its new combined group unless one of the taxable members of the new combined group was also a member of the taxpayer's combined group during the year that the credit was generated and all the other requirements set forth in 830 CMR 63.32B.2(9) are met. Where a taxpayer that has a credit carry forward becomes a member of a new combined group, the change of ownership rules set forth in Code § 383 as applied under Massachusetts law may apply, though any amount of credit carry forward that cannot be applied because of these limitations may be carried forward consistent with the rules and limitations discussed in 830 CMR 63.32B.2(9)(c). In the event that a

member of a combined group has a credit carry forward and subsequently takes part in a merger or consolidation the credit carry forward will be lost if, for example, the member liquidates or terminates as a result of the merger or consolidation. In the case of a S Corporation owning a QSub that was then treated with the QSub as a single corporation by reason of St. 2008, c. 173, for tax years beginning on or after January 1, 2009, the credit carry forward of the S corporation and/or the QSub shall be treated as the credit carry forward of the single corporation. *See* 830 CMR 63.30.3.

Example 6. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A. Y is a research and development corporation within the meaning of M.G.L. c. 63, § 31A that would be entitled to ITC if it made a qualified acquisition thereunder. Z is a corporation that is referenced within the meaning of M.G.L. c. 63, § 31A that would have been able to claim the ITC under M.G.L. c. 63, § 31A if it acquired property as referenced therein. X has an ITC carry forward from tax year 2009 that it can carry forward to 2010. In tax year 2010 all of the stock of X is sold to taxpayer corporation N. X is engaged in a unitary business with corporation N in tax year 2010 (although it is presumed under 830 CMR 63.32B.2(3)(b) that X is not engaged in a unitary business with N, assume that the presumption is rebutted). X has \$5,000 of ITC carry forward, which derived from a credit that it generated in 2009. N, like X, is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A that would be entitled to claim a credit thereunder. In 2010, X and N have an income measure excise as determined under M.G.L. c. 63, § 39, before the application of any credits, of \$5,000 and \$5,000, respectively. N does not generate any credit in 2010 and has no credit carry forward. X may apply \$2,500 of its ITC credit carry forward against its \$5,000 2010 excise and reduce that excise to \$2,500 (*i.e.*, by 50%). X may not share its remaining \$2,500 of ITC carry forward with N, as it was not engaged in a unitary business with N at the time that it generated the ITC. Also, as X is no longer a member of a unitary group with Y and Z and departed that unitary group with its ITC credit carry forward, neither Y nor Z can use the credit carry forward that belongs to X in tax year 2010.

Tax year 2010

Entity	Excise	Carry forward	Own credit used	Shared from X	Excise post credits	Carry forward credit
X	\$5,000	\$5,000	\$2,500	n/a	\$2,500	\$2,500
N	\$5,000	n/a	n/a	n/a	\$5,000	-

Example 7. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A. Y is not a corporation that would be entitled to ITC if it made a qualified acquisition thereunder. X has an ITC carry forward from tax year 2009 that it can carry forward to 2010. In tax year 2010 all of the stock of X and Y is sold to taxpayer corporation N, which is a member of a combined group with corporation O. X and Y are engaged in a unitary business with corporations N and O in tax year 2010 (although it is presumed under 830 CMR 63.32B.2(3)(b) that X and Y are not engaged in a unitary business with N and O for the tax period after the acquisition, assume that

this presumption is rebutted). N and O were engaged in a unitary business in tax year 2009. N has an ITC carry forward in 2010 of \$10,000 that derives from a credit that N generated in 2009, during which year O was also entitled to claim an ITC.

In 2010, N and O are manufacturing corporations and Y becomes a research and development corporation, all of whom are entitled to generate an ITC under M.G.L. c. 63, § 31A. In 2010, X, Y, N and O have an income measure excise as determined under M.G.L. c. 63, § 39, before the application of any credits, of \$5,000, \$10,000, \$5,000 and \$10,000, respectively. X may apply \$2,500 of its ITC credit carry forward against its \$5,000 excise and reduce that excise to \$2,500 (*i.e.*, by 50%). X may also share its remaining \$2,500 of ITC carry forward with Y, as it was engaged in a unitary business with Y in 2009 when it generated this credit and Y is a corporation that is entitled to claim an ITC in tax year 2010. N may apply \$2,500 of its ITC credit carry forward against its \$5,000 excise and reduce that excise to \$2,500 (*i.e.*, by 50%). N may also share \$5,000 of its remaining \$7,500 of ITC with O, as N was engaged in a unitary business with O in 2009 when it generated this credit and O is a corporation that is entitled to claim an ITC in tax year 2010. Y may apply the \$2,500 ITC carry forward that it receives from X to reduce its excise to \$7,500. O may apply the \$5,000 carry forward that it receives from N to reduce its excise to \$5,000. N has \$2,500 of ITC to carry forward to 2011.

Tax year 2010

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from N	Excise post credits	Carry forward credit
X	\$5,000	\$5,000	\$2,500	n/a	n/a	\$2,500	-
Y	\$10,000	n/a	n/a	\$2,500	n/a	\$7,500	-
N	\$5,000	\$10,000	\$2,500	n/a	n/a	\$2,500	\$2,500
O	\$10,000	n/a	n/a	n/a	\$5,000	\$5,000	-

- (e) *Investment Tax Credit and Economic Opportunity Area Credit Recapture: Recapture in General.* Where a taxpayer generates a credit pursuant to M.G.L. c. 63, § 31A or § 38N for a taxable year beginning on or after January 1, 2009, and then subsequently disposes of the property, or where the property otherwise ceases to be in qualified use within the meaning of M.G.L. c. 63, § 31A or § 38N, recapture of the credit shall be determined pursuant to M.G.L. c. 63, § 31A based upon the total credit previously taken by the taxpayer and its combined group members. This rule applies even if the taxpayer first leaves the combined group, then in a subsequent year disposes of the qualified property or otherwise causes recapture, and therefore in such subsequent tax year is no longer included in a combined group with the corporations whose use of the credit must be considered for purposes of recapture. Where a taxpayer generates a credit pursuant to M.G.L. c. 63, § 31A or § 38N for a taxable year beginning on or after January 1, 2009, there shall be no recapture if the taxpayer subsequently transfers the qualified property to another taxable member of its combined group with which the credit could be shared under the rules in 830 CMR 63.32B2(9). However, in this case, if the transferee leaves the combined group or subsequently transfers the property outside the combined group or to a member of the combined group with which the credit cannot be shared under the rules in 830 CMR 63.32B2(9) there shall be

recapture of the credit on the part of the taxpayer that generated the credit determined pursuant to M.G.L. c. 63, § 31A based upon the total credit previously taken by the combined group members. In any other case where a Massachusetts credit that is subject to recapture can be shared amongst combined group members, the recapture shall be evaluated in a similar manner.

Example 8. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A. Y and Z are a research and development corporation and manufacturing corporation, respectively, within the meaning of M.G.L. c. 63, § 31A that would be entitled to ITC if they made a qualified acquisition thereunder. Midway through tax year 2009, on July 1st, X purchases one piece of equipment with a five year life to be used in the XYZ unitary business that generates \$15,000 of ITC. During tax year 2010, X transfers the qualified equipment that generated the ITC to Z. No recapture is required on this transfer of the equipment from X to Z as Z is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A that would be entitled to ITC if it made a qualified acquisition, etc., thereunder. In tax years 2009 and 2010, corporations X, Y and Z each use annually \$2,500 of the ITC belonging to X consistent with the requirements for claiming ITC, such that all of the \$15,000 of ITC has been claimed. On June 30, 2011, Z sells the equipment that generated the ITC to an unrelated corporation. X is required to recapture 3/5's of the ITC previously taken by X, Y and Z, or \$9,000.

Example 9. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of M.G.L. c. 63, § 31A. Y and Z are a research and development corporation and manufacturing corporation, respectively, within the meaning of M.G.L. c. 63, § 31A that would be entitled to ITC if they made a qualified acquisition thereunder. Midway through tax year 2009, on July 1st, X purchases one piece of equipment with a five year life to be used in the XYZ unitary business that generates \$15,000 of ITC. In tax year 2009, corporations X, Y and Z use \$7,500 of the ITC generated by X, leaving X with a \$7,500 credit carry forward. On January 1, 2010, all of the shares of X are acquired by an unrelated corporation, N, and therefore X is no longer engaged in a unitary business with X and Y. Corporation X is not permitted to share its ITC carry forward with the acquiring corporation N, but nonetheless uses the remaining \$7,500 of this carry forward itself in 2010. On June 30, 2011, X sells the equipment that generated the ITC to N. X is required to recapture 3/5's of the ITC previously taken by X, Y and Z, or \$9,000.

(10) *Affiliated Group Election.*

- (a) *General.* A corporation, whether foreign or domestic, is required to file a combined report when it is subject to tax under M.G.L. c. 63, § 2, 2B, 32D, 39 or 52A and engaged in a unitary business with one or more corporations that are required to be included in the combined report. In such cases, the one or more taxable members of the combined group may elect for a tax year to treat as their combined group all corporations that are members of their Massachusetts affiliated group as defined by 830 CMR 63.32B.2. The election does not require the Commissioner's consent. If the

taxable members of a combined group make an affiliated group election, all of the corporations that are members of their Massachusetts affiliated group shall be treated as the members of a single Massachusetts combined group hereunder irrespective as to, for example, whether:

1. these corporations are included in more than one federal consolidated return filed by more than one federal consolidated group or
2. these corporations are engaged in one or more unitary businesses.

Upon making the election, the Massachusetts affiliated group shall calculate the combined group's taxable income and the respective taxable income of the taxable members of the group in accordance with 830 CMR 63.32B.2(6) and (7), provided that, if any group member is taxable on its income from business activity in another state in a particular tax year during the period of the election, all income of all group members for such year shall be treated as apportionable income, irrespective as to whether, for example, such income would be allocable to a particular state in the absence of the election. An affiliated group election can only be made if the Massachusetts affiliated group to which the election is to apply in the first year of application includes one or more federal affiliated groups filing a consolidated federal income tax return.

- (b) *Water's Edge Aspect: Relationship to Worldwide Election.* An affiliated group election determines the apportionable net income of a taxable member of a combined group derived from the activities of the group on a water's edge basis. Therefore, a taxable member of a combined group may not make an affiliated group election and a worldwide election for the same taxable year and may not make an affiliated group election for any tax year in which a worldwide election is in effect.
- (c) *Relationship to Federal Consolidated Election.* The membership of a combined group as determined pursuant to an affiliated group election is not limited to those corporations that are members of one or more affiliated groups under Code § 1504 that are filing a federal consolidated return. The affiliated group election shall include any corporation participating in the filing of a federal consolidated return, but the Massachusetts affiliated group is broader in several respects. For example, a Massachusetts affiliated group shall include a corporation that meets either of the two following standards even though such corporations would not be included in a federal consolidated return:
 1. any corporation regardless of the place incorporated or formed, if the average of the corporation's property, payroll, and sales factors within the United States is 20% or more, or
 2. any corporation that earns more than 20% of its income, directly or indirectly, from intangible property or service-related activities the costs of which generally are deductible for federal income tax purposes, whether currently or over a period of time, against the business income of other members of the group, but only to

the extent of that income and the apportionment factors related thereto. *See* 830 CMR 63.32B.2(5)(b)(explaining the application of these provisions).

Also, the Massachusetts affiliated group shall be determined by including all corporations that are related by common ownership applying the common ownership test described herein (*i.e.*, direct or indirect ownership of more than 50% of voting control), rather than applying the standard applicable for federal consolidated return purposes that looks to 80% control of certain stock by vote and value. Further, control of members of the Massachusetts affiliated group may be direct or indirect, and a common owner or owners may be corporate or non-corporate. For example, two or more federal consolidated groups would be combined in one Massachusetts affiliated group filing if both consolidated groups were commonly owned by a non-US corporation.

- (d) *Mechanics for Making the Election.* An affiliated group election shall be made by a taxable member of a combined group, provided, however, that where the election is to apply to one or more combined groups that filed a combined return in Massachusetts for the previous tax year, the election shall be made by a corporation that served as the principal reporting corporation of a combined group for such prior tax year. The election shall be made on an original, timely filed return or as otherwise required in writing by the Commissioner. A return shall be considered timely if it is filed by the taxpayer on or before the earliest due date or extended due date for the filing of the taxpayer's return under M.G.L. c. 63. No return filed after this date, whether filed with an application for abatement or otherwise, shall constitute a valid affiliated group election. The election, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the Massachusetts affiliated group has agreed to be bound by such election, including an agreement by each member of the group that such election shall apply to any member that subsequently enters the group and an agreement that each member continues to be bound by the election in the event that such member is subsequently the subject of a reverse acquisition as described in U.S. Treas. Reg. § 1.1502-75(d)(3).
- (e) *Effect of Election in Subsequent Tax Years.* An affiliated group election shall be binding for and applicable to the taxable year for which it is made and for the next nine taxable years. The election shall continue in place irrespective as whether a federal consolidated group to which the combined group belongs discontinues the filing of a federal consolidated return. Any corporation that enters a Massachusetts affiliated group during the time that the affiliated group election is in effect shall be included in the Massachusetts combined group beginning with the first group's tax reporting period after the corporation enters the group, and shall be considered to have consented to the application of the election and to have waived any objection to its inclusion in the combined group. Reverse acquisition rules based on the federal rules set forth in U.S. Treas. Reg. § 1.1502-75(d)(3) shall be applied in determining whether a corporation is bound by an affiliated group election.
- (f) *Revocation, Renewal of Election.* An affiliated group election, once made, cannot be revoked until after it has been effective for ten taxable years. When an election is made it may be renewed after ten taxable years for another ten taxable years, provided

however that in the case of a revocation a new election shall not be permitted in any of the three taxable years immediately following the revocation. The revocation or renewal of an election shall be made on an original, timely filed return by the principal reporting corporation of the Massachusetts affiliated group or as otherwise required in writing by the Commissioner. A revocation or a renewal shall be effective for the first taxable year after the completion of the ten taxable years for which the prior election was in place. Any revocation or renewal, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the Massachusetts affiliated group has agreed to be bound by such revocation or renewal. If a prior affiliated group election is neither affirmatively revoked nor renewed after ten taxable years pursuant to the terms of 830 CMR 63.32B.2(10), the election shall terminate for the subsequent taxable year and no affiliated group election shall apply for that year and the subsequent two taxable years. In such cases, the Massachusetts affiliated group may make a new election for a ten taxable year period commencing with the fourth taxable year after the termination on the terms set forth in 830 CMR 63.32B.2(10).

- (g) *Change in Reporting Method.* If either the unitary business standard or the Massachusetts affiliated group standard was used to account for the combined group members' income and apportionment data in the preceding tax year and the other standard is to be used for the combined group's combined report for the current tax year, adjustments to the income and apportionment data of the group members shall be made to prevent income and apportionment data from being omitted or duplicated, etc.
- (h) *Interaction with M.G.L. c. 62C, § 3A.* The purpose of the affiliated group election is to simplify the filing of returns for commonly owned corporations that are or may be involved in two or more separate unitary businesses by avoiding the fact-intensive analysis associated with determining the scope of each unitary business. The election may in application result in an increase or decrease in Massachusetts tax liability from year to year, but it is made binding for a ten year period to ensure that elections are made for purposes of simplification rather than for tax reduction. Although an affiliated group election does not require the consent of the Commissioner, in light of this legislative purpose, the Commissioner may disregard the tax effects of such an election pursuant to M.G.L. c. 62C, § 3A, where it appears, from facts available at the time of the election, that the election will not have meaningful continuing application. For example, and without limitation, the Commissioner would disregard the tax effects of an affiliated group election made in anticipation of the sale of substantially all of a business conducted in Massachusetts where a material part of the anticipated gain from the disposition would be allocated to Massachusetts in the absence of the election and where the sale results in the winding up of the seller's business in Massachusetts, such that the continued application of the affiliated group election would be anticipated to have no meaningful continuing impact in Massachusetts. Conversely, the Commissioner would not seek to disregard an otherwise proper election that results in a reduction of Massachusetts tax liability, whether or not such reduction is foreseeable at the time of the election, provided that at the time of the election the taxpayer anticipates continuing material business operations in Massachusetts subject to and affected by the filing requirements of the election.

- (i) *Agreement to Provide Documents.* An election under 830 CMR 63.32B.2(10) shall constitute consent to the production of documents or other information that the Commissioner reasonably requires, for example, for purposes of verifying the appropriate members of the group, that the requirements of the affiliated group election have been met, that the tax computations and tax reporting are proper, and for purposes of determining the revenue implications of the affiliated group election.

(11) *Principal Reporting Corporation, Liability.*

- (a) *Principal Reporting Corporation.* In the event that there are two or more taxable members of a combined group, the principal reporting corporation shall report the income of the combined group in the form and manner prescribed by the Commissioner. Except as otherwise approved in writing by the Commissioner, the principal reporting corporation shall be the taxable member of the combined group that is either the combined group's common parent corporation, or where there is no such common parent corporation or this parent corporation is not a taxable member of the combined group, the taxable member of the combined group that the group reasonably expects will have the largest amount of Massachusetts taxable net income on a recurring basis. The principal reporting corporation agrees to act as the agent on behalf of the taxable members of the combined group for all tax matters relating to the combined group, including: assessments; requesting extensions of time to file returns; making, renewing or revoking an election such as an affiliated group election or worldwide election; filing a refund claim; accepting of refunds or notices; executing waivers; and providing access to tax and other relevant records of the non-taxable members of the combined group as reasonably requested by the Commissioner. In the case of a request for an extension of time to file returns, such request shall be treated as such a request for both the combined group's income measure and each individual group member's non-income measure return.
- (b) *Liability.* Every member of a combined group, including a Massachusetts affiliated group treated as a combined group hereunder, shall be jointly and severally liable for any tax due from any member of the combined group subject to tax under M.G.L. c. 63, including any interest, additions to tax, and penalties, to the extent permitted under the Constitution of the United States. An assessment against any member of a combined group for the excise attributable to the group's income in a particular taxable year, including any interest, additions to tax, or penalties, shall be deemed to constitute an assessment against all members of the combined group for that year. If, for example, the Commissioner determines, through an inspection of returns or otherwise, that the proper amount of excise attributable to the group's income has not been assessed, she may assess such additional excise against any member of the group, regardless of whether or not that member filed a return as a member of the combined group. The latter assessment may be made under any applicable provisions of M.G.L. c. 62C at any time within the time allowed under M.G.L. c. 62C as determined for that member.

(12) *Tax returns; Taxable Year; Fiscalization; Mid-year Entry or Departure.*

(a) *Tax Returns.* Tax returns filed by taxable members of a combined group and by members of a combined group that are subject to the minimum excise or non-income measure of the corporate excise shall be filed consistent with the provisions set forth in M.G.L. c. 63 and M.G.L. c. 62C and the relevant rules set forth in 830 CMR 63.32B.2, provided, however, that the Commissioner may provide additional administrative rules and guidance and all such tax filings shall be made in the manner as prescribed by the Commissioner.

(b) *Taxable Year.*

1. *General.* The combined group's taxable year is determined as follows:
 - a. if two or more members of the group file a federal consolidated return the group's taxable year is the taxable year of the federal consolidated group (or the federal consolidated group with the most total assets, in the case where the members of the combined group file more than one federal consolidated return); and
 - b. in all other cases, the group's taxable year shall be the taxable year of the principal reporting corporation.
2. *52 to 53 Week Tax Years.* Where a corporation files federal income tax returns on the basis of an annual period which varies from 52 to 53 weeks, its taxable year shall be treated as beginning with the first day of the calendar month beginning nearest to the first day of such taxable year or ending with the last day of the calendar month ending nearest to the last day of such taxable year. *See* M.G.L. c. 63, § 30(12).

(c) *Fiscalization.*

1. *General.* If the taxable year of one or more members of a combined group does not begin or end on the same dates as the taxable year of the combined group, those members' accounting periods must be adjusted in order for the appropriate share of the combined group's unitary business income or affiliated group income, as the case may be, to be properly attributed to those members' taxable years.
2. *Calculating Members' Share of Combined Group Income for Combined Group's Tax Year.* In general, any member that has a taxable year different from that of the combined group should determine its income and apportionment data for the taxable year of the combined group by using the interim closing method described in 830 CMR 63.32B.2(12)(c)2.a. This method requires an interim closing of the books for members whose taxable year differs from that of the combined group. However, a *pro rata* method of converting income to the combined group's taxable year will be accepted in certain instances, provided that the *pro rata*

method does not produce a material misstatement of income apportioned to Massachusetts. Further, the Commissioner reserves the right to require use of the interim closing method in certain instances. Unless otherwise permitted or required by the Commissioner, the treatment of both the income and the apportionment data of any particular member must be determined based on the same method. If one method was used to account for a member's income and apportionment data in the preceding taxable year and another method will be used in the combined report for the current taxable year, adjustments to income and apportionment data of the member shall be made to prevent income and apportionment data from being omitted or duplicated.

- a. *Interim Closing Method.* Under the interim closing method, the unitary business or affiliated group income or loss attributable to a member of a combined group is determined by first calculating the income or loss from the books and records of the member for the two periods that together encompass the combined group's single taxable year. For example, if the combined group has a taxable year ending on December 31, 2009, and another member has a taxable year ended March 31, 2010, the other member determines its income from its books and records for the partial accounting periods beginning January 1, 2009 and ending March 31, 2009, and from April 1, 2009 and ending December 31, 2009. The apportionment data shall also be determined by reference to the member's books and records for the appropriate partial taxable year provided, however, in the case of the property factor, the average property owned is required to be determined using monthly averaging as described in 830 CMR 63.38.1(7)(e)3. Interim income and apportionment data from the respective partial tax years is then combined with the income and apportionment data of the taxable year of the combined group, along with the income and apportionment data of other members of the combined group for the same period, and the members' share of the combined group's taxable income for the combined group's tax year is computed.
- b. *Pro rata Method.*
 - (i) Under the *pro rata* method, the income and apportionment data of the member as adjusted to reflect the determination of income under Massachusetts law is assigned to the respective portion of the combined group's taxable year based on the ratio of months in common with the tax year of the combined group. For example, if the combined group's taxable year ends on December 31, 2010, a member whose income year ends on March 31 will include 3/12ths of its adjusted separate income and its apportionment data for its taxable year ended March 31, 2010 in the December 31, 2010 taxable year of the combined group. That member will then also include 9/12ths of its adjusted separate income and its apportionment data for its taxable year ended March 31, 2011 in the December 31, 2010 taxable year of the combined group. However, the property factor is required to be determined using monthly averaging as described in 830 CMR 63.38.1(7)(e)3.

- (ii) The income and apportionment data from the member's recomputed taxable years is then combined with the income and apportionment data of the taxable year of the combined group, along with the income and apportionment data of other members of the combined group for the same period, similarly recomputed if necessary. The combined group's taxable income is then apportioned to each of the taxable members of the combined group.
 - (iii) In the event that the *pro rata* method requires the determination of income and apportionment data of a corporation whose taxable year has not yet closed, and the information cannot be obtained in time for the other members to file an accurate return, the income and apportionment data for that period shall be estimated based on available information. If the use of actual income and apportionment data results in a material misstatement of income apportioned to Massachusetts by the combined group, the taxable members must file an amended return to reflect the change.
 - (iv) For the purpose of determining whether a re-determination of income made with respect to the *pro rata* method results in a material misstatement of income apportioned to Massachusetts by the combined group, it is presumed that there is such material misstatement where the aggregate tax liability of the combined group members that filed returns based on a *pro rata* estimate is found to have understated the aggregate correct liability for such members by the greater of \$10,000 or 10% or, where the change in the apportioned group income for any one taxable member of the group increases or decreases by more than \$100,000.
3. *Attributing Combined Group Income from Combined Group's Tax Year to Member's Tax Years.* After determining the combined group's taxable income apportioned to Massachusetts of a taxable member that is not filing its return with respect to that same taxable year, that income is then proportionately assigned to the applicable portion of that member's taxable year, based on the number of months falling within the common taxable period of the combined group.
4. *Determination of and Sharing of Credits Between Members with Different Fiscal Years.* Where members of a combined group are eligible to share credits under 830 CMR 63.32B.2(9) and the members have different tax years, no credit may be shared until the member generating the credit has filed its return for the tax year from which the credit derives. Where members engaged in a unitary business are required to determine credits on an aggregated basis (*e.g.*, as in the case of the credit provided for in M.G.L. c. 63, § 38M), the credits are determined for the tax year of the combined group and, subject to any statutory restrictions generally applicable with respect to the credit, such credits may be claimed by a taxable member on its first return filed for a period on or after the close of the combined group's taxable year.

- (d) *Partial Years.* Where a member enters the combined group after the start of the combined group's taxable year, only the income, apportionment data, and other tax attributes of the group member after it qualifies for inclusion are used to calculate and apportion the combined group's taxable income. Where a member leaves the combined group after the start of the combined group's taxable year, through a change of control or otherwise, only its tax attributes before it ceases to qualify for inclusion are used to calculate and apportion the combined group's taxable income. Whenever the income, apportionment data, and other tax attributes of one or more members of the combined group are includible for only part of the taxable year for which the combined group's taxable income is being determined and apportioned, the value of the member's owned or rented property will be reduced to reflect the ratio of the number of months for which the member's tax attributes are included in the combined group's taxable income determination and the total number of months in the combined group's taxable year.
- (13) *No Limitation on Other Authority.* Nothing in 830 CMR 63.32B.2 shall be construed to limit or negate the Commissioner's authority to make adjustments as otherwise permitted under Massachusetts law, including under M.G.L. c. 63, § 31I, 31J or 31K; M.G.L. c. 63, § 39A; and M.G.L. c. 62C, § 3A. In general, the provisions of M.G.L. c. 63, § 39A and M.G.L. c. 62C, § 3A apply with respect to transactions governed by 830 CMR 63.32B.2. The provisions of M.G.L. c. 63, §§ 31I, 31J and 31K shall not apply to transactions between corporations that are members of the same combined group to the extent such transactions are deferred or eliminated under 830 CMR 63.32B.2; in any case in which an affiliated group election has not been made, these provisions do apply as to transactions between corporations that, although under common ownership, are each a member of a separate combined group or as to transactions between corporations that are otherwise filing on a combined basis when the transaction does not relate to the unitary business.
- (14) *Effective Date.* 830 CMR 63.32B.2 shall apply to taxable years beginning on or after January 1, 2009.

REGULATORY AUTHORITY

830 CMR 63.32B.2: M.G.L. c. 14, § 6(1); M.G.L. c. 62C, § 3; M.G.L. c. 63, § 32B

REGULATORY HISTORY

Date of Promulgation: 5/29/09

Date of Emergency: 12/22/09

Date of Emergency: 3/19/10

Date of Amendment: 6/11/10

308360