

July 2004

Introduced by

1 A BILL for an Act to amend and reenact sections 57-38.4-01 and 57-38.4-02 of the North  
2 Dakota Century Code, relating to inclusion of corporations in a unitary relationship and  
3 incorporated in a tax haven as part of a water's edge corporate income tax filing election; and to  
4 provide an effective date.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Section 57-38.4-01 of the North Dakota Century Code is  
7 amended and reenacted as follows:

8 **57-38.4-01. Definitions.** As used in this chapter unless the context or subject matter  
9 otherwise requires:

- 10 1. "Affiliated corporation" means a parent corporation and any corporation of which  
11 more than fifty percent of the voting stock is owned directly or indirectly by the  
12 parent corporation or another member of the water's edge group.
- 13 2. "Domestic disclosure spreadsheet" means a spreadsheet that fully discloses the  
14 income reported to each state, the state tax liability, the method used for  
15 apportioning or allocating income to the various states, and other information  
16 provided for by rules as may be necessary to determine the proper amount of tax  
17 due to each state and to identify the water's edge group.
- 18 3. "Existing corporation" means a corporation that filed a North Dakota income tax  
19 return for any year after taxable year 1979 or was a successor to or unitary with a  
20 corporation that filed a North Dakota income tax return for any year after taxable  
21 year 1979.
- 22 4. "Foreign dividends" means any dividend received by a member of the water's edge  
23 group from any affiliated corporation incorporated outside the fifty states and

- 1 District of Columbia, including amounts included in income computed under  
2 sections 951 through 954 of the Internal Revenue Code.
- 3 5. "Income from 80/20 corporations" means net book income after taxes of a  
4 corporation which is incorporated in the United States and eligible to be included in  
5 the federal consolidated return and which has twenty percent or less of its property  
6 and payroll as determined by factoring under chapter 57-38.1 assigned to locations  
7 inside the fifty states and the District of Columbia. For purposes of determining  
8 eligibility for inclusion in a federal consolidated return under this subsection, the  
9 eighty percent stock ownership requirements of section 1504 of the Internal  
10 Revenue Code shall be reduced to ownership of over fifty percent of the voting  
11 stock directly or indirectly owned or controlled by an includable corporation.
- 12 6. "New corporation" means a corporation that has not filed an income tax return in  
13 North Dakota for any year after the tax year 1979. A new corporation does not  
14 include a corporation which is a successor to or which is affiliated with a  
15 corporation that filed an income tax return in North Dakota for any year after the tax  
16 year 1979. A new corporation does not include a business reorganization or  
17 acquisition, except a corporation with no previous activity in North Dakota which  
18 acquires an existing corporation and increases and maintains the threshold activity  
19 of the existing corporation by twenty-five percent or more shall be treated as a new  
20 corporation.
- 21 7. "Tax haven" includes Andorra, Anguilla, Antigua and Barbuda, Aruba, the  
22 Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman  
23 Islands, Cook Islands, Turks and Caicos Islands, Dominica, Gibraltar, Grenada,  
24 Guernsey-Sark-Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxemburg,  
25 Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue,  
26 Panama, Samoa, Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the  
27 Grenadines, Tonga, United States Virgin Islands, and Vanuatu. The commissioner  
28 shall introduce legislation as necessary to add to the list in this subsection any  
29 country that the commissioner determines is a tax haven.
- 30 8. "Threshold activity" means the yearly average combined property and payroll in  
31 North Dakota of a corporation and its affiliates for the previous three years.

- 1       ~~8-~~ 9. "Water's edge group" includes the following entities:
- 2           a. Any affiliated corporation incorporated in the United States or a possession of
- 3           the United States, as described in sections 931 through 936 of the Internal
- 4           Revenue Code. Corporations incorporated in the United States must be
- 5           eligible to be included in a federal consolidated return and must have more
- 6           than twenty percent of its property and payroll, as determined by factoring
- 7           under chapter 57-38.1, assigned to locations inside the fifty states, the District
- 8           of Columbia, and possessions of the United States. For purposes of
- 9           determining eligibility for inclusion in a federal consolidated return under this
- 10          subsection, the eighty percent stock ownership requirements of section 1504
- 11          of the Internal Revenue Code shall be reduced to ownership of over fifty
- 12          percent of the voting stock directly or indirectly owned or controlled by an
- 13          includable corporation.
- 14          b. Domestic international sales corporations, as described in sections 991
- 15          through 994 of the Internal Revenue Code, and foreign sales corporations, as
- 16          described in sections 921 through 927 of the Internal Revenue Code.
- 17          c. Export trade corporations, as described in sections 970 through 972 of the
- 18          Internal Revenue Code.
- 19          d. Foreign corporations deriving gain or loss from a disposition of a United
- 20          States real property interest to the extent recognized under section 897 of the
- 21          Internal Revenue Code.
- 22          e. Any corporation incorporated outside the United States if over fifty percent of
- 23          its voting stock is owned directly or indirectly by an affiliated corporation and if
- 24          more than twenty percent of the average of its payroll and property is
- 25          assignable to a location within the United States.
- 26          f. Any corporation that is in a unitary relationship with the taxpayer and is
- 27          incorporated in a tax haven.
- 28       ~~9-~~ 10. "Worldwide combined report" means a combined report with respect to a unitary
- 29       affiliated group irrespective of the country or countries in which any member of the
- 30       affiliated group is incorporated or conducts business activity.

1           **SECTION 2. AMENDMENT.** Section 57-38.4-02 of the North Dakota Century Code is  
2 amended and reenacted as follows:

3           **57-38.4-02. Water's edge election.** A corporation required to file a worldwide unitary  
4 combined report must do so unless it elects to apportion its income using the water's edge  
5 method.

6           1. A corporation electing to file using the water's edge method must comply with the  
7 following:

8           a. The election must be made on the return as originally and timely filed.

9           b. The corporation may not reduce taxable income for federal taxes deducted  
10 under subdivision c of subsection 1 of section 57-38-01.3.

11           c. The water's edge election is binding for five consecutive taxable years after  
12 making the election.

13           d. The corporation must file with the tax commissioner a domestic disclosure  
14 spreadsheet, after which the corporation must file a domestic disclosure  
15 spreadsheet only every third year while the election remains in effect. The  
16 commissioner may require a taxpayer subject to subdivision e to include in a  
17 domestic disclosure spreadsheet any corporation in a unitary relationship with  
18 the taxpayer and which is incorporated in a tax haven.

19           e. The election must disclose the identity of the taxpayer and the identity of any  
20 corporation that is in a unitary relationship with the taxpayer and which is  
21 incorporated in a tax haven. A taxpayer subject to additional reporting  
22 requirements under this subdivision which has a water's edge election in  
23 effect for tax periods beginning both before and after December 31, 2004,  
24 may rescind the existing election.

25           2. All corporations electing the water's edge method must include the income and  
26 apportionment factors of the water's edge group. Foreign dividends and income  
27 from 80/20 corporations must be included as follows:

28           a. An existing corporation must include fifty percent of foreign dividends and  
29 sixty percent of income from 80/20 corporations. However, an existing  
30 corporation that increases and maintains a threshold activity by twenty-five  
31 percent or more, but not by business reorganization or acquisition, is only

- 1                   required to include thirty percent of foreign dividends and thirty percent of  
2                   income from 80/20 corporations.
- 3                   b.   A new corporation must include thirty percent of foreign dividends and thirty  
4                   percent of income from 80/20 corporations.
- 5                   c.   For taxable years beginning after December 31, 1994, all corporations making  
6                   the water's edge election may reduce the inclusion to include thirty percent of  
7                   foreign dividends and thirty percent of income from 80/20 corporations.
- 8                   d.   Income shifted to a tax haven, to the extent taxable, is considered income  
9                   subject to apportionment.
- 10                  3.   In addition to the tax imposed under subsection 1 of section 57-38-30, there is  
11                  imposed an additional tax of three and one-half percent of taxable income which  
12                  must be levied, collected, and paid annually in the same manner as provided in  
13                  chapter 57-38.
- 14                  **SECTION 3. EFFECTIVE DATE.** This Act is effective for taxable years beginning after  
15                  December 31, 2004.