

## Clearinghouse Rule 10-095

### **PROPOSED ORDER OF THE DEPARTMENT OF REVENUE REPEALING, RENUMBERING, RENUMBERING AND AMENDING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES**

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 1.12(5) and (6), 2.03(4), 2.08(1)(a) and (b), and 2.96(4); **renumber** Tax 1.12(8) and (10); **renumber and amend** Tax 1.12(7), (9), and (11) and 2.08(1)(intro.); **amend** Tax 1.12(3)(d) and (4)(a)(intro.), 1. to 11., 12.(intro.), and 13., 1.13(4)(a), 2.04(2)(intro.), (a) to (de), (dm)(intro.) and 1., (ds)(intro.) and 1., and (e), (3)(intro.) and (b), (4)(c) and (d), and (8)(a), (b)(intro.) and 1., and (c)(intro.) and 1., 2.08(3)(b)(intro.) and 2. and (d)(intro.) and 1., and (e)1., 2.09(1), 2.105(1), (2), (3), (4)(a)(intro.), 2., and 3. and (b), (5)(a) and (c)2., and (6)(a), 2.12(1) and (4)(b)4., 2.32(2)(g)(intro.), 2.89(4)(intro.), 2.96(1)(a) and (3)(a) and (b), and 2.98(2)(b); **repeal and recreate** Tax 2.03(1) and (3), 2.04(6), and 2.96(2); and **create** Tax 1.12(3)(cm) and (4)(a)15. to 18. and (c), 1.13(1)(c), 1.14(7), 2.08(3)(b)3., (ce), (cm), and (cs), 2.105(4)(a)1.f., 2.32(3), 2.87(1)(e), 2.89(9), 2.96(1)(am), 3.01, 3.02, and 3.03(6); **relating to** electronic funds transfer; original and amended corporation franchise and income tax returns; information returns and wage statements; returns of persons other than corporations; the recycling surcharge; estimated tax requirements; addback and disclosure of related entity expenses; pass-through entity withholding; and the dividends received deduction for corporations.

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#### *Analysis by the Department of Revenue*

**Statute interpreted:** ss. 71.01 (5g), 71.19, 71.22 (2m), 71.255, 71.63 (3m) and (3r), 71.68 (2), 71.775, 71.80 (20) and (23), 73.029, 77.982 (2), and 77.9941 (4), Stats.

**Statutory authority:** ss. 73.029 and 227.11 (2) (a), Stats.

**Explanation of agency authority:** Section 73.029, Stats., provides that the department may require electronic funds transfer only by promulgating rules. Section 227.11 (2) (a), Stats., provides that each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:** Sections Tax 2.60 to 2.67, Wisconsin Administrative Code

**Plain language analysis:** This proposed rule order does the following:

- Expands the taxes, fees, and other amounts required to be paid or deposited using electronic funds transfer (EFT) and the returns, reports, and refund claims the department may require be filed electronically.
- Incorporates the statutory provisions of 2009 Wisconsin Acts 2 and 28 into the administrative provisions of Chapters Tax 1, 2, and 3.
- Provides further interpretation and explanation of the statutory provisions for disclosure of related entity expenses and the related addition and subtraction modifications.

- Provides additional guidance with respect to the statutory provisions for pass-through entity withholding tax.

**Summary of, and comparison with, existing or proposed federal regulation:** There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule order.

**Comparison with rules in adjacent states:**

Illinois Administrative Code, title 86, sec. 100.2430, provides that addbacks are required for interest and intangible expenses paid to 80-20 companies (companies that cannot be included in unitary group because 80% or more of their activities are outside U.S.), to the extent such amounts exceed taxable dividends received.

Iowa Admin. Code r. 701-46.4(2) provides that withholding is required against income distributable to nonresident individuals.

**Summary of factual data and analytical methodologies:** The department processes hundreds of thousands of paper checks, refund claims, reports, and returns each year. Each one costs more to process and takes more staff time to handle than if submitted electronically. The department has determined that in order to operate in the most cost effective and efficient manner possible, it is necessary to expand its electronic filing and payment requirements.

In addition, this rule order has been created to incorporate and provide further interpretation, explanation, and guidance with respect to the statutory provisions of 2009 Wisconsin Acts 2 and 28 and the statutory provisions relating to related entity expenses and pass-through entity withholding.

**Analysis and supporting documents used to determine effect on small business:** The department provides methods to electronically file and pay taxes with little or no cost. In addition, an exception to the requirements to file and pay electronically for situations where an undue hardship is caused is provided in the rule. Based on this, the department has concluded that this rule order does not have a significant effect on small business.

As explained above, this proposed rule order also has been created to reflect changes in and provide further interpretation, explanation, and guidance with respect to Wisconsin's tax laws. As the rule itself does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

**Anticipated costs incurred by private sector:** This proposed rule order does not result in a significant cost to the private sector.

**Effect on small business:** This proposed rule order does not have a significant effect on small business.

**Agency contact person:** Please contact Dale Kleven at (608) 266-8253 or [dkleven@dor.state.wi.us](mailto:dkleven@dor.state.wi.us), if you have any questions regarding this proposed rule.

**Place where comments are to be submitted and deadline for submission:** Comments may be submitted to the contact person shown below no later than one week after the public hearing

on this proposed rule order is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Dale Kleven  
Department of Revenue  
Mail Stop 6-40  
2135 Rimrock Road  
P.O. Box 8933  
Madison, WI 53708-8933

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**SECTION 1.** Tax 1.12(3)(cm) is created to read:

Tax 1.12(3)(cm) “Confirmation number” means a character code uniquely identifying the successful completion of an EFT transaction.

**SECTION 2.** Tax 1.12(3)(d) and (4)(a)(intro.), 1. to 11., 12.(intro.), and 13. are amended to read:

Tax 1.12(3)(d) “Electronic funds transfer” or “EFT” means any transfer of funds initiated through a terminal, telephone, or computer or magnetic tape authorizing a financial institution to debit or credit an account ~~for next day~~ on the requested settlement date.

(4)(a)(intro.) Except as provided in sub. ~~(11)~~ (9), the department requires ~~a person who owes the taxes, fees, and other amounts as described in subds. 1. to 14. to pay or deposit the taxes, fees, and other amounts~~ 18. be paid or deposited using the EFT payment method. The following taxes, fees, and other amounts are included in the EFT payment requirement:

1. Corporate income and franchise tax estimated tax payments and tax due with the tax return when the net tax less refundable credits on the prior year’s tax return was ~~\$40,000~~ 1,000 or more. For a combined group or combined group member, “prior year’s tax return” means the prior year’s tax return of the designated agent.

2. Income tax withholding payments when the required deposits were ~~\$40,000~~ 300 or more in the prior calendar year.

3. General, county, and stadium sales and use tax when the aggregate amount due in the prior calendar year was ~~\$40,000~~ 300 or more.

4. Fermented malt beverages tax when the tax due after the adjustment for any overpayment or additional amount due for a previous period was ~~\$40,000~~ 1,000 or more in the prior calendar year.

5. Liquor or “distilled spirits and wine” tax and administrative fee when the aggregate net amount of tax and fee due in the prior calendar year was ~~\$40,000~~ 1,000 or more.

6. Cigarette tax when the net tax due before printing and shipping costs was ~~\$40,000~~ 1,000 or more in the prior calendar year.

7. Tobacco products tax when the tax due in the prior calendar year was ~~\$40,000~~ 1,000 or more.

8. Alternate fuels tax when the total tax due in the prior calendar year was ~~\$40,000~~ 1,000 or more.

9. General aviation fuel tax when the tax due in the prior calendar year was ~~\$40,000~~ 1,000 or more.

10. Motor vehicle fuel tax and petroleum inspection fee when the aggregate amount due in the prior calendar year was ~~\$40,000~~ 1,000 or more.

11. Individual and fiduciary income tax estimated tax payments when the estimated tax payments as required under s. 71.09, Stats., were ~~\$40,000~~ 2,000 or more in the prior taxable year.

12. Installment agreement payments on overdue tax accounts, if at least one of the following requirements ~~are~~ is met:

13. Income and franchise tax withholding payments of pass-through entities under s. 71.775, Stats., and composite individual income tax payments made by pass-through entities on behalf of their nonresident partners or shareholders.

**SECTION 3.** Tax 1.12(4)(a)15. to 18. and (c) are created to read:

Tax (4)(a)15. Local exposition tax when the general, county, and stadium sales and use tax is required to be paid using EFT, as provided in subd. 3.

16. Premier resort area tax when the general, county, and stadium sales and use tax is required to be paid using EFT, as provided in subd. 3.

17. Rental vehicle fee when the general, county, and stadium sales and use tax is required to be paid using EFT, as provided in subd. 3.

18. Dry cleaning facility fee when the general, county, and stadium sales and use tax is required to be paid using EFT, as provided in subd. 3.

(c) The department shall provide notification when EFT payments or deposits are required.

**SECTION 4.** Tax 1.12(5) and (6) are repealed

**Note to LRB:** Delete the notes at the end of Tax 1.12(5) and (6)

**SECTION 5.** Tax 1.12(7) is renumbered 1.12(5) and amended as renumbered to read:

Tax 1.12(5) EFT PAYMENT PROCEDURES. EFT payments or deposits shall be credited by the department directly to the payer's tax account or, for amounts described in sub.

(4) (a) 14., to the employee's delinquent tax account. The payer may use the ACH debit or ACH credit transfer option, or both, as follows:

(a) *ACH debit transfers.* 1. ACH debit transfers shall be made using ~~a touch-tone telephone, a computer with a modem or another department approved method. A toll free telephone number and voice instructions shall be provided by the department for the payer to use when initiating an ACH debit transfer via telephone~~ department approved methods or as otherwise prescribed by the department. Required payment information includes the tax type code for the tax being paid, the tax period date to which the payment should be applied, the amount of the payment, and the effective date of the payment.

2. The payer shall initiate ACH debit transfers before 4:00 p.m. central standard time or central daylight savings time, as applicable, on ~~the~~ or before the last business day prior to the prescribed due date of the payment in order for the payment to have a settlement date on or before the prescribed due date.

**Note to LRB:** Delete the note at the end of Tax 1.12(5)(a)2.

(b) *ACH credit transfers.* 1. A payer shall initiate ACH credit transfers through the payer's financial institution following directions specific to that financial institution.

2. In order for the payment to have a settlement date on or before the prescribed due date, ACH credit transfers shall be initiated in time for the payer's financial institution to settle the funds transfer on or before the due date of the payment.

**SECTION 6.** Tax 1.12(8) is renumbered 1.12(6)

**SECTION 7.** Tax 1.12(9) is renumbered 1.12 (7) and amended as renumbered to read:

Tax 1.12(7) EVIDENCE OF EFT PAYMENT. A payer receives a trace number or confirmation number for each EFT transaction. The trace number or confirmation number given to the payer during the EFT transaction and included as part of the ACH entry is the payer's confirmation of payment or deposit and shall provide proof of the date and amount of the payment or deposit.

**SECTION 8.** Tax 1.12(10) is renumbered 1.12(8)

**Notes to LRB:** 1) Insert the following note at the end of Tax 1.12(8)(b):

**Note:** See s. Tax 2.67 (4) for rules applicable to a combined group with respect to late fees, penalties, and interest.

2) Amend the example at the end of Tax 1.12(8)(c) as follows:

**Example:** ~~If the~~ The prescribed due date falls on a Monday ~~which that~~ is also memorial day, ~~an~~ An ACH debit transfer must be initiated ~~on or before~~ before 4:00 p.m. of the following preceding Friday, so that the transfer may have a settlement date on Tuesday, ~~when the payment is revised~~ due date. A payer using an ACH credit transfer must work with the financial institution to initiate the transfer in time to settle on or before the revised payment due date.

**SECTION 9.** Tax 1.12(11) is renumbered 1.12(9) and amended as renumbered to read:

Tax 1.12(9) EXCEPTION TO EFT REQUIREMENT. (a) The secretary of revenue may waive the requirement to use the EFT payment method when the secretary determines that the requirement causes an undue hardship, if the person otherwise required to use EFT does all of the following:

1. Requests the waiver in writing using Form EFT-102, *Electronic Filing or Electronic Payment Waiver Request*.

**Note to LRB:** Amend the note at the end of Tax 1.12(9)(a)1. as follows:

**Note:** ~~Written waiver requests~~ Form EFT-102 should be e-mailed to DORWaiverRequest@revenue.wi.gov, faxed to (608) 264-7776, or addressed to EFT Unit Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8949, Madison, WI 53708-8949. Form EFT-102 may be obtained at <http://www.revenue.wi.gov/html/formpub.html>, under either "Tax Return Information" or "Tax Return Guidelines."

2. Clearly indicates why the requirement causes an undue hardship.

3. Is current in all return and report filings and tax payments.

(b) In determining whether the EFT requirement causes an undue hardship, the secretary of revenue may consider the following factors:

1. Unusual circumstances which may prevent the payer from using the EFT method.

**Note to LRB:** Amend the examples at the end of Tax 1.12(9)(b)1. as follows:

**Examples:** Examples of unusual circumstances include:

1) The person does not have access to a ~~touch-tone~~ telephone or computer.  
2) The person is physically unable to use a ~~touch-tone~~ telephone or computer.  
3) The telephone system available to the person is incompatible with the department's telephone system used for EFT ~~registration or~~ payments, deposits, or both.

2. Any other factor which the secretary determines is pertinent.

**Note to LRB:** Amend the note at the end of Tax 1.12(9) as follows:

**Note:** Section Tax 1.12 interprets ss. 71.01 (8r), 71.255(7)(b), 71.42 (3m), 71.63 (1m) and (5m), 71.65 (3) (a), 73.029, 77.58 (1m), 77.61 (14), 77.96 (5m), 78.12 (5), 78.55 (5m), 139.01 (5m), 139.30 (8m) and 139.75 (5m), Stats.

**SECTION 10.** Tax 1.13(1)(c) is created to read:

Tax 1.13(1)(c) A power of attorney or other written authorization executed by a designated agent of a combined group is considered executed by each member of the combined group with respect to combined returns within the scope of the power of attorney or other written authorization.

**Note to LRB:** Delete the note at the end of Tax 1.13(3)(a)

**SECTION 11.** Tax 1.13(4)(a) is amended to read:

Tax 1.13(4)(a) Power of attorney forms are available from the Wisconsin department of revenue's web site or from any Wisconsin department of revenue office. The Wisconsin form, Form A-222, is similar to the federal power of attorney form, Form 2848.

**Note to LRB:** Replace the notes at the end of Tax 1.13(4) with the following:

**Note:** Forms may be obtained from the department of revenue's web site at [www.revenue.wi.gov](http://www.revenue.wi.gov).

**Note:** Section Tax 1.13 interprets ss. 71.78(4)(e), 71.255(7)(b), 72.06, 77.61(5)(b)5.a., 77.76(3), 78.80(3), 139.11(4), 139.38(6) and 139.82(6), Stats.

**SECTION 12.** Tax 1.14(7) is created to read:

Tax 1.14(7) COMBINED GROUPS. To the extent a notice of additional assessment of income or franchise tax, or any other notice under sub. (1), results from amounts required to be included in a combined return under s. 71.255, Stats., any act described in this section which is executed by the designated agent of the combined group is considered an act executed by all members of the combined group.

**Notes to LRB:** 1) Amend the note at the end of Tax 1.14(6) as follows:

**Note:** Section Tax 1.14 interprets ss. 66.0615 (1m) (f) 2., 71.255(7)(b), 71.80 (18), 71.88 (1), 71.90 (1), 77.59 (6), 77.61 (14), 77.76 (2), 77.982 (2), 77.991 (2), 77.9941 (4), 77.9951 (2), 77.9964 (2), 78.67, 78.69, 139.094, 139.11 (2m), 139.355, 139.38 (2m), 139.83, 139.835, 139.93 (1) and 168.12 (9), Stats.

2) Replace the first note at the end of Tax 2.01 with the following:

**Note:** Forms may be obtained from the department of revenue's web site at [www.revenue.wi.gov](http://www.revenue.wi.gov).

3) Replace the first note at the end of Tax 2.02 with the following:

**Note:** Forms may be obtained from the department of revenue's web site at [www.revenue.wi.gov](http://www.revenue.wi.gov).

**SECTION 13.** Tax 2.03(1) and (3) are repealed and recreated to read:

Tax 2.03(1) FORMS. The department shall provide official forms for filing franchise or income tax returns and credit claims. Except as provided in s. Tax 2.09 or as otherwise approved by the department, tax returns and credit claims shall only be filed using the forms prescribed by the department.

(3) FILING RETURNS. (a) Except as provided in par. (b) and s. Tax 2.67 (2) (b), all forms and information required to be filed or furnished by corporations shall be filed or furnished by providing the information requested on the appropriate forms, signing the returns or forms as appropriate and submitting them by one of the following means:

1. Filing them by the use of electronic means as prescribed by the department.
2. Mailing them to the address specified by the department on the form or in the instructions.
3. Delivering them to the department or to the destination that the department or the department of administration prescribes.

(b) 1. The department may require the franchise or income tax return of a corporation be filed electronically. The department shall provide notification at least 90 days prior to the due date of the first franchise or income tax return required to be filed electronically of the requirement to file electronically. This paragraph does not apply to combined returns subject to the electronic filing requirement in s. Tax 2.67 (2) (b).

2. The secretary of revenue may waive the requirement to file the franchise or income tax return of a corporation electronically when the secretary determines that the requirement causes an undue hardship, if the person does all of the following:

a. Requests the waiver in writing using Form EFT-102, Electronic Filing or Electronic Payment Waiver Request.

**Note:** Form EFT-102 should be e-mailed to [DORWaiverRequest@revenue.wi.gov](mailto:DORWaiverRequest@revenue.wi.gov), faxed to (608) 264-7776, or addressed to Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8949, Madison, WI 53708-8949. Form EFT-102 may be obtained at <http://www.revenue.wi.gov/html/formpub.html>, under either "Tax Return Information" or "Tax Return Guidelines."

b. Clearly indicates why the requirement causes an undue hardship.

3. In determining whether the electronic filing requirement causes an undue hardship, the secretary of revenue may consider the following factors:

a. Unusual circumstances that may prevent the person from filing electronically.

**Example:** The person does not have access to a computer that is connected to the Internet.

b. Any other factor that the secretary determines is pertinent.

(c) If the return is a combined return, an officer of the designated agent corporation shall sign the combined return. Signing a return includes the process of electronically signing the return See ss. Tax 2.03, 2.60, and 2.67 for additional rules relating to combined returns.

**SECTION 14.** Tax 2.03(4) is repealed

**Notes to LRB:** 1) Delete the first note at the end of Tax 2.03(4)

2) Amend the second note at the end of Tax 2.03(4) as follows:

**Note:** Section Tax 2.03 interprets ss. 71.24 (1), (1m)<sub>1</sub> and (3), 71.255(1)(b) and (7), 71.365 (4) and (5), 71.44 (1) (a) and (c) and (1m)<sub>1</sub> and 71.80 (18), Stats.



**SECTION 15.** Tax 2.04(2)(intro.), (a) to (de), (dm)(intro.) and 1., (ds)(intro.) and 1., and (e), (3)(intro.) and (b), and (4)(c) and (d) are amended to read:

Tax 2.04(2)(intro.) Under ss. 71.65 (2), 71.71 (2), 71.72 and 71.80 (20), Stats., all persons carrying on activities within this state, whether taxable or not under ch. 71, Stats., are required to file with the department, on federal form W-2 or 1099-R, or on Wisconsin form 9b or other forms approved by the department, ~~or on magnetic media or in other machine-readable form~~, a statement of certain payments made within the preceding calendar year. As provided in sub. (6), the department may require such statement be filed electronically. For individuals who are residents of Wisconsin, the statement shall set forth the salaries, wages, bonuses, commissions, annuities, pensions, retirement pay, fees or other remuneration paid for services whether subject to withholding or not. For individuals who are nonresidents, the statement shall include all payments for the performance of personal services in Wisconsin, whether subject to withholding or not, except retirement plan distributions identified in s. Tax 3.085 as being exempt from Wisconsin income tax. A copy of federal form 1099 may be filed in lieu of Wisconsin form 9b. The following shall also apply with respect to compensation for services:

(a) All payments which are wages within the definition under s. 71.63 (6), Stats., regardless of amount, shall be reported on federal form W-2 ~~or on magnetic media or in other machine-readable form~~. As provided in sub. (6), the department may require such form be filed electronically.

(b) All payments which are not wages within the definition under s. 71.63 (6), Stats., but from which Wisconsin income tax has been withheld, shall be reported on federal form W-2 or 1099-R, as appropriate, ~~or on magnetic media or in other machine-readable form~~. As provided in sub. (6), the department may require such form be filed electronically.

(c) Payments of \$600 or more which are not wages within the definition under s. 71.63 (6), Stats., and from which no Wisconsin income tax has been withheld, shall be reported on Wisconsin form 9b or federal form 1099, ~~or on magnetic media or in other machine-readable form~~. As provided in sub. (6), the department may require such form be filed electronically. However, if the payment was to an employee for whom a form W-2 is required under par. (a) or (b), the payment, regardless of amount, shall be included on form W-2.

(d) All statements required shall be filed with the department by January 31, ~~by delivering or mailing them to the department~~. Form WT-7, "Employer's Annual Reconciliation of Wisconsin Income Tax Withheld From Wages," shall accompany the statements submitted, ~~either on paper, on magnetic media or in other machine-readable form, or by electronic means prescribed by the department~~, if the employer is required to be registered to withhold Wisconsin income taxes from employees' wages.

**Note to LRB:** Replace the note at the end of Tax 2.04(2)(d) with the following:

**Note:** Forms not required to be filed electronically may be delivered in person to the department of revenue at 2135 Rimrock Road, Madison, Wisconsin or mailed to the department. Forms 9b or substitute forms filed on paper may be mailed to Wisconsin Department of Revenue, PO Box 8932, Madison, WI 53708-8932. Other forms may be mailed to Wisconsin Department of Revenue, PO Box 8920, Madison, WI 53708-8920.

(de) The department may require ~~an employer registered or required to be registered to withhold Wisconsin income taxes from employees' wages to file its Form WT-7~~ be filed by ~~electronic means~~ electronically. The department shall ~~notify the employer~~ provide notification at

least 90 days prior to the due date of the first Form WT-7 required to be filed ~~by electronic means~~ electronically of the requirement to file ~~by electronic means~~ electronically.

(dm)(intro.) The secretary of revenue may waive the requirement for ~~an employer a person~~ to file ~~by electronic means~~ Form WT-7 electronically when the secretary determines that the requirement causes an undue hardship, if the ~~employer~~ person does all of the following:

1. Requests the waiver in writing using Form EFT-102, Electronic Filing or Electronic Payment Waiver Request.

**Note to LRB:** Replace the note at the end of Tax 2.04(2)(dm)1. with the following:

**Note:** Form EFT-102 should be e-mailed to DORWaiverRequest@revenue.wi.gov, faxed to (608) 264-7776, or addressed to Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8949, Madison, WI 53708-8949. Form EFT-102 may be obtained at <http://www.revenue.wi.gov/html/formpub.html>, under either "Tax Return Information" or "Tax Return Guidelines."

(ds)(intro.) In determining whether the electronic ~~means~~ filing requirement causes an undue hardship, the secretary of revenue may consider the following factors:

1. Unusual circumstances that may prevent the ~~employer~~ person from filing ~~by electronic means~~ electronically.

**Note to LRB:** Replace the example at the end of Tax 2.04(2)(ds)1. with the following:

**Example:** The person does not have access to a computer that is connected to the internet.

(e) Sections 71.65 (5) and 71.73 (2), Stats., permit a thirty-day extension of time to file the statements described in this subsection. A written request may be ~~sent~~ mailed or faxed to the department and to be effective shall be postmarked or faxed on or before the due date of the statements. ~~The department's approval of the extension shall be attached to the statements when they are filed with the department.~~

**Note to LRB:** Replace the note at the end of Tax 2.04(2)(e) with the following:

**Note:** Written requests for extensions may be mailed to Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8902, Madison, WI 53708-8902 or faxed to (608) 264-6884.

(3)(intro.) Under ss. 71.70 and 71.80 (20), Stats., except as provided in par. (d), all persons making payments of rents and royalties of \$600 or more to individuals who are residents of Wisconsin, regardless of where the property is located, and to nonresident individuals if the property is located in Wisconsin, shall file with the department, on form 9b or an approved substitute form, ~~or on magnetic media or in other machine-readable form~~, a statement of payments made in the preceding calendar year. As provided in sub. (6), the department may require such statement be filed electronically. The following shall also apply with respect to rents and royalties:

(b) Corporations shall file the statement with the department by March 15 and payers other than corporations shall file by April 15, ~~by delivering or mailing the statements to the department.~~

**Note to LRB:** Replace the note at the end of Tax 2.04(3)(b) with the following:

**Note:** Forms not required to be filed electronically may be delivered in person to the department of revenue at 2135 Rimrock Road, Madison, Wisconsin or mailed to Wisconsin Department of Revenue, PO Box 8932, Madison, WI 53708-8932.

(4)(c) The winnings required to be reported in pars. (a) and (b) shall be reported on federal form W-2G or on an approved substitute form. As provided in sub. (6), the department may require such form be filed electronically.

(d) The statements required in pars. (a) and (b) shall be filed by January 31, ~~by delivering or mailing them to the department.~~

**Note to LRB:** Replace the note at the end of Tax 2.04(4)(d) with the following:

**Note:** Forms W-2G or substitute forms not required to be filed electronically may be delivered in person to the department of revenue at 2135 Rimrock Road, Madison, Wisconsin or mailed to Wisconsin Department of Revenue, PO Box 8920, Madison, WI 53708-8920.

**SECTION 16.** Tax 2.04(6) is repealed and recreated to read:

Tax 2.04(6) ELECTRONIC FILING REQUIREMENT. (a) Under s. 71.80(20), Stats., if a person is required to file 50 or more wage statements or 50 or more of any one type of information return with the department, the person shall file the statements or the returns electronically, by means prescribed by the department.

(b) If a payer participates in the combined federal/state filing program for forms 1099, the department shall waive the requirement to file those forms 1099 or comparable information returns electronically.

(c) The secretary of revenue may waive the requirement to file wage statements or information returns electronically when the secretary determines that the requirement causes an undue hardship, if the payer does all of the following:

1. Requests the waiver in writing at least 30 days before the due date for filing the wage statements or information returns using Form EFT-102, Electronic Filing or Electronic Payment Waiver Request.

**Note:** Form EFT-102 should be e-mailed to [DORWaiverRequest@revenue.wi.gov](mailto:DORWaiverRequest@revenue.wi.gov), faxed to (608) 264-7776, or addressed to Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8949, Madison, WI 53708-8949. Form EFT-102 may be obtained at <http://www.revenue.wi.gov/html/formpub.html>, under either "Tax Return Information" or "Tax Return Guidelines."

2. Clearly indicates why the requirement causes an undue hardship.

(d) In determining whether the electronic filing requirement causes an undue hardship, the secretary of revenue may consider the following factors:

1. Unusual circumstances that may prevent the payer from filing electronically.

**Example:** The payer does not have access to a computer that is connected to the internet.

2. Any other factor that the secretary determines is pertinent.

**SECTION 17.** Tax 2.04(8)(a), (b)(intro.) and 1., and (c)(intro.) and 1. are amended to read:

Tax 2.04(8)(a) Except as provided in par. (b), the department may require a pass-through entity to electronically file its return for nonresident withholding taxes under s. 71.775, Stats., ~~by electronic means.~~

(b)(intro.) The secretary of revenue may waive the requirement to electronically file ~~by electronic means~~ the return under par. (a) when the secretary determines that the requirement causes an undue hardship, if the pass-through entity does all of the following:

1. Requests the waiver in writing using Form EFT-102, Electronic Filing or Electronic Payment Waiver Request.

**Note to LRB:** Replace the note at the end of Tax 2.04(8)(b)1. with the following:

**Note:** Form EFT-102 should be e-mailed to DORWaiverRequest@revenue.wi.gov, faxed to (608) 264-7776, or addressed to Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8949, Madison, WI 53708-8949. Form EFT-102 may be obtained at <http://www.revenue.wi.gov/html/formpub.html>, under either "Tax Return Information" or "Tax Return Guidelines."

(c)(intro.) In determining whether the electronic ~~means~~ filing requirement causes an undue hardship, the secretary of revenue may consider the following factors:

1. Unusual circumstances that may prevent the pass-through entity from filing ~~by electronic means~~ electronically.

**Notes to LRB:** 1) Replace the first note at the end of Tax 2.04(8)(c)2. with the following:

**Note:** The requirement to file Wisconsin wage statements or information returns electronically for persons required to file 50 or more wage statements or 50 or more of any one type of information return with the department is effective January 1, 2010, as a result of the repeal and recreation of s. 71.80 (20), Stats., by 2009 Wis. Act 28.

2) Replace the first note at the end of Tax 2.05 with the following:

**Note:** Forms may be obtained from the department of revenue's web site at [www.revenue.wi.gov](http://www.revenue.wi.gov).

**SECTION 18.** Tax 2.08(1)(intro.) is renumbered 2.08(1) and amended as renumbered to read:

Tax 2.08(1) ~~For the purpose of filing income tax returns and credit claims, the secretary of revenue has designated the following forms for the use of persons other than corporations:~~ The department shall provide official forms for filing income tax returns and credit claims. Except

as provided in s. Tax 2.09 or otherwise approved by the department, tax returns and credit claims may only be filed using these official forms.

**SECTION 19.** Tax 2.08(1)(a) and (b) are repealed.

**Note to LRB:** Replace the note at the end of Tax 2.08(3)(a)3. with the following:

**Note:** The destination for delivering forms that the department or the department of administration prescribes and the type of electronic means the department prescribes for filing forms shall be stated on the forms or in the instructions, on the department's internet web site at [www.revenue.wi.gov](http://www.revenue.wi.gov) or in the department's quarterly newsletter titled "Wisconsin Tax Bulletin" or other written material.

**SECTION 20.** Tax 2.08(3)(b)(intro.) and 2. are amended to read:

Tax 2.08(3)(b)(intro.) Except as provided in pars. (c) and (d), the department may require a tax return preparer or tax preparation firm that prepared the threshold number, as described in subds. 1. ~~and 2. to 3.~~, of Wisconsin individual income tax returns for the prior taxable year, to file individual income tax returns prepared by that tax return preparer or tax preparation firm ~~by electronic means~~ electronically. The department shall notify tax return preparers and tax preparation firms by October 1 of any year of the requirement to ~~use electronic means~~ file electronically. The requirement to file returns ~~by electronic means~~ electronically shall be effective beginning January 1 of the year following notification. The threshold number of returns prepared in the prior taxable year is as follows:

2. For taxable ~~year~~ years 2003 ~~and thereafter~~ through 2009, 100 or more returns.

**SECTION 21.** Tax 2.08(3)(b)3., (ce), (cm), and (cs) are created to read:

Tax 2.08(3)(b)3. For taxable year 2010 and thereafter, 50 or more returns.

(ce) Except as provided in par. (d), the department may require a composite individual income tax return filed by a pass-through entity on behalf of its nonresident partners, members, shareholders, or beneficiaries be filed electronically. The department shall provide notification at least 90 days prior to the due date of the first composite income tax return required to be filed electronically of the requirement to file electronically.

(cm) Except as provided in par. (d), the department may require the income tax return or request for a closing certificate of a trust or estate be filed electronically. The department shall provide notification at least 90 days prior to the due date of the first income tax return or closing certificate required to be filed electronically of the requirement to file electronically.

(cs) Except as provided in par. (d), the department may require the income tax return of a partnership be filed electronically. The department shall provide notification at least 90 days prior to the due date of the first income tax return required to be filed electronically of the requirement to file electronically.

**SECTION 22.** Tax 2.08(3)(d)(intro.) and 1. and (e)1. are amended to read:

Tax 2.08(3)(d)(intro.) The secretary of revenue may waive the requirement to file ~~by electronic means~~ electronically when the secretary determines that the requirement causes an

undue hardship, if the ~~tax return preparer or tax preparation firm~~ person otherwise required to file by electronic means does all of the following:

1. Requests the waiver in writing using Form EFT-102, Electronic Filing or Electronic Payment Waiver Request.

**Note to LRB:** Replace the note at the end of Tax 2.08(3)(d)1. with the following:

**Note:** Form EFT-102 should be e-mailed to DORWaiverRequest@revenue.wi.gov, faxed to (608) 264-7776, or addressed to Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, PO Box 8949, Madison WI 53708-8949. Form EFT-102 may be obtained at <http://www.revenue.wi.gov/html/formpub.html>, under either "Tax Return Information" or "Tax Return Guidelines."

(e)1. Unusual circumstances that may prevent the person from filing ~~by electronic means~~ electronically.

**Notes to LRB:** 1) Replace the example at the end of Tax 2.08(3)(e)1. with the following:

**Example:** The person does not have access to a computer that is connected to the internet.

2) Replace the first note at the end of Tax 2.08(3)(e)2. with the following:

**Note:** Forms not required to be filed electronically may be delivered in person to the Department of Revenue at 2135 Rimrock Road, Madison, Wisconsin or mailed to the address specified on the form or in the instructions.

**SECTION 23.** Tax 2.09(1) is amended to read:

Tax 2.09(1) GENERAL. Subject to the provisions of this section, the official Wisconsin franchise or income tax forms required to be filed with the department may be reproduced and the reproductions may be filed in lieu of the corresponding official forms. Any reproduction which varies from the official version in any particular way, except as authorized in this section, shall be submitted to the department for approval before it is used. The department may reject any reproduction which is in whole or in part illegible or which is of a format that has not been approved by the department.

**SECTION 24.** Tax 2.105(1), (2), (3), and (4)(a)(intro.) are amended to read:

Tax 2.105(1) PURPOSE. This section clarifies the time periods for a taxpayer to report federal audit adjustments and federal and other state amended returns for Wisconsin franchise or income tax and ~~temporary~~ recycling surcharge purposes, and the result if a taxpayer fails to report the adjustments or amended returns.

(2) DEFINITION. In this section, "taxpayer" includes individuals, estates, trusts, partnerships, limited liability companies and corporations. For combined groups, "taxpayer" includes the designated agent of a combined group under s. 71.255(1)(a) if any member of the combined group was the subject of a federal audit adjustment or amended return.

(3)(a) Under ss. 71.76 and 77.96 (4), Stats., a taxpayer meeting the conditions described in sub. (4) shall report to the department changes or corrections made to a tax return by the

internal revenue service, or file with the department amended Wisconsin franchise or income tax returns or amended ~~temporary~~ recycling surcharge returns reporting any information contained in amended returns filed with the internal revenue service, or with another state if there has been allowed a credit against Wisconsin taxes for taxes paid to that state. If such changes, corrections, or amended returns relate to income, credits claimed or carried forward, net business losses or net business losses carried forward, capital losses or capital losses carried forward, or any other item that is required to be included in a combined report under s. 71.255(1)(b), the designated agent of the combined group shall report such changes or corrections or file amended combined returns.

**Note to LRB:** Insert the following note at the end of Tax 2.105(3)(a):

**Note:** See s. Tax 2.65 for additional rules relating to the designated agent of a combined group.

(b) Except as provided in sub. (5), the department may give notice to the taxpayer of assessment or refund within 90 days of the date the department receives the taxpayer's report of federal adjustments or amended return described in par. (a). The 90-day limitation does not apply to instances where the taxpayer files an incorrect franchise or income tax return or ~~temporary~~ recycling surcharge return with intent to defeat or evade the franchise or income tax or recycling surcharge assessment.

(4)(a)(intro.) If the federal net income tax payable, a credit claimed or carried forward, a net operating loss carried forward or a capital loss carried forward on a taxpayer's federal tax return is adjusted by the internal revenue service in a way which affects the amount of Wisconsin net franchise or income tax or ~~temporary~~ recycling surcharge payable, the amount of a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward, the taxpayer shall report the adjustments to the department within 90 days after they become final. If such adjustments relate to income, credits claimed or carried forward, net business losses or net business losses carried forward, capital losses or capital losses carried forward, or any other item that is required to be included in a combined report under s. 71.255(1)(b), the designated agent of the combined group shall report such adjustments. The following shall also apply with respect to federal adjustments:

**SECTION 25.** Tax 2.105(4)(a)1.f. is created to read:

Tax 2.105 (4)(a)1.f. For combined groups, the "finality of federal adjustments" is determined on the basis of that particular combined group member the adjustments of which ultimately affect the amount of Wisconsin net franchise or income tax or recycling surcharge payable, the amount of a Wisconsin credit, credit carryforward, net business loss, net business loss carryforward, capital loss or capital loss carried forward of the combined group to which that member belongs.

**SECTION 26.** Tax 2.105(4)(a)2. and 3. and (b), (5)(a) and (c)2., and (6)(a) are amended to read:

Tax 2.105(4)(a)2. 'Information to report to department.' The taxpayer shall submit to the department a copy of the final federal audit report issued by the internal revenue service together with any other documents or schedules necessary to inform the department of the adjustments as finally determined. The report shall be included with an amended Wisconsin return if a Wisconsin refund is being claimed and may be, but is not required to be, included with

an amended return if additional Wisconsin tax or ~~temporary~~ recycling surcharge is due or if there is no change in tax or ~~temporary~~ recycling surcharge.

3. 'Agreement with adjustments.' A taxpayer shall be deemed to concede the accuracy of the federal adjustments for Wisconsin franchise or income tax or ~~temporary~~ recycling surcharge purposes unless a statement is included with the report to the department stating why the taxpayer believes the adjustments are incorrect.

(b) *Amended returns.* If a taxpayer files an amended federal tax return and the changes on the amended federal tax return affect the amount of Wisconsin net franchise or income tax or ~~temporary~~ recycling surcharge payable, the amount of a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward, the taxpayer shall file with the department an amended Wisconsin return reflecting the same changes. A taxpayer filing an amended return with another state shall file an amended Wisconsin return if a credit has been allowed against Wisconsin taxes for taxes paid to that state and if the changes affect the amount of Wisconsin net franchise or income tax or ~~temporary~~ recycling surcharge payable, the amount of a Wisconsin credit or a Wisconsin net operating loss, net business loss or capital loss carried forward. If the changes described in this paragraph relate to income, credits claimed or carried forward, net business losses or net business losses carried forward, capital losses or capital losses carried forward, or any other item that is required to be included in a combined report under s. 71.255(1)(b), the designated agent of the combined group shall file an amended combined return. The amended Wisconsin return shall be filed within 90 days after the date the amended return is filed with the internal revenue service or other state.

(5)(a) *Assessments.* Under s. 71.77 (2), Stats., the department may make an assessment within 4 years from the date the original Wisconsin franchise or income tax return was filed. However, under s. 71.77 (7) (a), Stats., if the taxpayer reported less than 75% of the correct net income and the additional tax for the year exceeds \$200 for a joint return, or \$100 for a return other than a joint return, an assessment may be made within 6 years after the return was filed. If an assessment relates to a federal adjustment that affects a combined report, the department may issue such assessment to either the corporation whose income was adjusted for federal purposes or to the designated agent of the combined group, or both.

**Note to LRB:** Insert the following note at the end of Tax 2.105(5)(a):

**Note:** See s. Tax 2.67(4) for rules relating to the statute of limitations as applied to combined returns.

(c)2. If a taxpayer reports federal adjustments to the department after the expiration of the 4-year period for filing an amended Wisconsin return as described in par. (b), a refund based upon federal adjustments reducing the taxpayer's federal tax liability, which are applicable to the taxpayer's Wisconsin tax or ~~temporary~~ recycling surcharge liability, may still be made if notice of the refund is given to the taxpayer within 90 days of the date the department received a timely report of the federal adjustments.

(6)(a) *Adjustments and amended returns relating to taxable year 1987 and thereafter.* If a taxpayer fails to report federal adjustments or the filing of an amended federal or other state return, relating to the taxable year 1987 and thereafter, within the 90-day period described in sub. (3)(b), the department may assess additional Wisconsin franchise or income tax or ~~temporary~~ recycling surcharge relating to the adjustments or amended return within 4 years after discovery by the department.



**Note to LRB:** Amend the second note at the end of Tax 2.105(6)(b) as follows:

**Note:** Section Tax 2.105 interprets ss. 71.255(1) and (7), 71.75(2), 71.76, 71.77(2) and (7) and 77.96(4), Stats.

**SECTION 27.** Tax 2.12(1) and (4)(b)4. are amended to read:

Tax 2.12(1) SCOPE. This section applies to amended Wisconsin franchise or income tax returns, including amended combined returns, amended partnership returns, amended recycling surcharge returns and amended farmland preservation credit and homestead credit claims.

(4)(b)4. A claim for refund of an overpayment attributable to a capital loss carryback may be filed by a corporation, or designated agent of a combined group, within 4 years after the due date, or extended due date, for filing the return for the taxable year of the capital loss that is carried back.

**Notes to LRB:** 1) Insert the following note at the end of Tax 2.12(4)(b)4.:

**Note:** For combined groups, see s. Tax 2.61(c) for rules applicable to capital gains and losses.

2) Insert the following note at the end of Tax 2.12(4)(b)5.:

**Note:** For combined groups, refer to s. Tax 2.65 for rules applicable to the designated agent of a combined group.

3) Insert the following cross reference at the end of Tax 2.12(6)(d):

**Cross Reference:** See s. Tax 2.67(2)(e) for rules relating to amended returns for combined groups.

4) Amend the second note at the end of Tax 2.12(6)(d) as follows:

**Note:** Section Tax 2.12 interprets ss. 71.255(1), (4), and (7), 71.30 (4), 71.738 (2), 71.74, 71.75, 71.76, 71.77, 71.80 (18) and 77.96 (4), Stats.

5) Amend the note at the end of Tax 2.32(1) as follows:

**Note:** For any taxable year, a recycling surcharge is imposed on: (a) individuals, estates, trusts, statutory employees and partnerships that have at least \$4,000,000 in gross receipts from a trade or business for the taxable year; (b) corporations and insurers that have at least \$4,000,000 in gross receipts from all activities for the taxable year; and (c) individuals, estates, trusts and partnerships engaged in farming that have at least ~~\$1,000,000~~ \$4,000,000 in gross receipts from farming for the taxable year.

**SECTION 28.** Tax 2.32(2)(g)(intro.) is amended to read:

Tax 2.32(2)(g)(intro.) “Gross receipts of individuals, estates, trusts and statutory employees” means the total receipts or sales from all trade or business activities other than farming, reportable by those natural persons or entities for federal income tax purposes, before any deduction for returns and allowances or any other business expenses. Gross receipts include any of the following:

**SECTION 29.** Tax 2.32(3) is created to read:

(3) COMBINED GROUPS. The recycling surcharge applies to each member of a combined group separately. See s. Tax 2.82 for rules pertaining to the imposition and calculation of the recycling surcharge for combined group members.

**Note to LRB:** Amend the example at the end of Tax 2.66(3)(c) as follows:

**Example:** Combined Group AB consists of Member A and Member B. Group AB filed a combined return for calendar year 2010. The 2010 return includes \$30,000 of net tax attributable to Member A's items and \$20,000 attributable to Member B's items, including \$5,000 attributable to B's separate entity items. The 2010 combined return also includes \$10,000 of net tax from the separate entity items of Corporation C, which would be a combined group member except that none of its items are subject to combination under the water's edge rules. If Group AB is not eligible to base its estimated taxes on its 2009 net tax under the provisions of par. (b), Group AB's required estimated tax payments for purposes of its 2010 combined return are ~~\$60,000~~ 54,000 (=  $(\$30,000 + \$20,000 + \$10,000) \times 90\%$ ).

**SECTION 30.** Tax 2.87(1)(e) is created to read:

Tax 2.87(1)(e) For combined group members, the designated agent is charged with this responsibility.

**Notes to LRB:** 1) Insert the following note at the end of Tax 2.87(1)(e):

**Note:** See s. Tax 2.65 for rules relating to the designated agent.

2) Amend the note at the end of Tax 2.87(3) as follows:

**Note:** Section Tax 2.87 interprets ~~ss.~~ ss. 71.255(7)(b) and 71.82 (2) (b), Stats.

**SECTION 31.** Tax 2.89(4)(intro.) is amended to read:

Tax 2.89(4)(intro.) **DUE DATES OF INSTALLMENT PAYMENTS FOR CORPORATIONS.** For short taxable years, corporations, or the designated agent as provided in s. Tax 2.65(3)(a)5., shall make estimated tax installment payments on or before the 15th day of each of the following months:

**SECTION 32.** Tax 2.89(9) is created to read:

Tax 2.89(9) **COMBINED GROUPS.** For purposes of estimated tax requirements, a combined group of corporations under s. 71.255(1)(a), Stats., or a commonly controlled group under s. 71.255(2m), Stats., shall be treated as if it were a single corporation.

**Notes to LRB:** 1) Insert the following note at the end of Tax 2.89(9):

**Note:** See s. Tax 2.66 for rules relating to the payment of estimated taxes by combined groups.

2) Insert the following cross references at the end of Tax 2.89(9):

**Cross References:** See s. Tax 2.60 for combined reporting definitions relating to this section. See s. Tax 2.63 for rules relating to the controlled group election under s. 71.255(2m), Stats. See s. Tax 2.65 for rules relating to the designated agent. See s. Tax 2.66 for rules relating to the payment of estimated taxes by combined groups.

3) Move the second note at the end of Tax 2.89(8)(b)3. to the end of Tax 2.89(9) and amend the note as follows:

**Note:** Section Tax 2.89 interprets ss. 71.09(9), 71.255(7), and 71.29(5), Stats.

**SECTION 33.** Tax 2.96(1)(a) is amended to read:

Tax 2.96(1)(a) *General.* Except as provided in ~~par.~~ pars. (am) and (b), corporation franchise or income tax returns, ~~forms 4, 41, 5 and 5S~~ are due on or before the 15<sup>th</sup> day of the 3rd month following the close of a corporation's taxable year ~~and form 4T is due on or before the 15th day of the 5th month following the close of the corporation's taxable year~~ unless an extension of time for filing has been granted.

**SECTION 34.** Tax 2.96(1)(am) is created to read:

Tax 2.96(1)(am) For tax exempt corporations with unrelated business taxable income, the franchise or income tax return is due on or before the 15<sup>th</sup> day of the 5<sup>th</sup> month following the close of the corporation's taxable year unless an extension of time for filing has been granted.

**SECTION 35.** Tax 2.96(2) is repealed and recreated to read:

Tax 2.96(2) EXTENSIONS. (a) *Automatic extension.* For corporation franchise or income tax returns, an automatic extension is allowed for a period of 7 months or until the original due date of the corporation's corresponding federal return, whichever is later. If any extension is obtained for federal purposes, that extension also applies for Wisconsin purposes and is further extended for another 30 days after the federal due date. A copy of federal extension form 7004, or other federal extension form, if applicable, shall be attached to any Wisconsin franchise or income tax return filed under extension, even if the extension was not requested for federal purposes.

(b) *Combined returns.* For corporations required to use combined reporting under s. 71.255, Stats., any extension granted to the designated agent of the combined group is considered granted to each corporation in the combined group.

(c) *Estimated tax payment.* A taxpayer who desires to minimize interest charges during the extension period may pay the estimated tax liability on or before the original due date of the franchise or income tax return. The estimated tax liability includes the recycling surcharge imposed under s. 77.93, Stats.

**Note:** See s. Tax 2.66 for rules relating to the payment of estimated taxes by combined groups.

**SECTION 36.** Tax 2.96(3)(a) and (b) are amended to read:

Tax 2.96 (3)(a) *Regular interest.* Except as provided in par. (b), additional tax due with the complete return and the ~~temporary~~ recycling surcharge imposed under s. 77.93, Stats., which are not paid by the original due date are subject to interest at 12% per year during the

extension period and 11/2% per month from the end of the extension period until the date of payment.

**Note to LRB:** Delete the note at the end of Tax 2.96(3)(a)

(b) *Delinquent interest.* If 90% of the tax shown on the return, ~~form 4, 4I, 5 or 5S,~~ is not paid by the ~~15th day of the 3rd month or, for form 4T, by the 15th day of the 5th month beginning after the end of the taxable year~~ unextended due date of the return, the difference between that amount and the estimated taxes paid along with any interest due is subject to interest at 1 ½ % per month until paid regardless of any extension granted for filing the return. The tax shown on the return includes the ~~temporary~~ recycling surcharge imposed under s. 77.93, Stats.

**Note to LRB:** Delete the notes at the end of Tax 2.96(3)(b) and (c)

**SECTION 37.** Tax 2.96(4) is repealed

**Notes to LRB:** 1) Insert the following cross reference at the end of Tax 2.96:

**Cross Reference:** See s. Tax 2.60 for combined reporting definitions relating to this section. See s. Tax 2.65 for rules relating to the designated agent. See s. Tax 2.66 for rules relating to the payment of estimated taxes by combined groups. See s. Tax 2.67 for rules relating to the filing of a combined return.

2) Amend the note at the end of Tax 2.96 as follows:

**Note:** Section Tax 2.96 interprets ss. 71.24 (7), 71.255(7), and 71.44 (3), Stats.

**SECTION 38.** Tax 2.98(2)(b) is amended to read:

Tax 2.98(2)(b) If a corporation, designated agent of a combined group, or an individual desires to make the election after having filed a Wisconsin income tax return for the preceding taxable year, the casualty loss may be claimed by filing an amended Wisconsin return for that year. ~~To simplify the filing of an amended return, Wisconsin form 4X may be used by corporations and Wisconsin form 1X may be used by individuals.~~

**Note to LRB:** Amend the fourth and fifth notes at the end of Tax 2.98(2)(b) as follows:

**Note:** Tax 2.98 explains some federal provisions relating to disaster area losses and how the Wisconsin law for individuals conforms to the federal law, however, it does not explain all the details regarding casualty losses. Internal Revenue Service Publication ~~549~~ 547, entitled "~~Condemnations and Business Casualties and Thefts,~~ Casualties, Disasters, and Thefts" may be helpful in understanding such details as how to deduct a casualty loss, what to do if the loss exceeds income, how to adjust the basis of property damaged or replaced, how to report the amount received from insurance or other sources, and related casualty loss problems.

**Note:** Section Tax 2.98 interprets ss. 71.01 (6) ~~and~~, 71.22 (4), and 71.255(7)(b), Stats.

**SECTION 39.** Tax 3.01 and 3.02 are created to read:

**Tax 3.01 Addback and disclosure of related entity expenses. (1) SCOPE.** This section provides further interpretation and explanation relating to the addition and subtraction modifications and disclosure provisions in ch. 71, Stats. In general, the addback statutes provide that a taxpayer shall modify federal income to add back interest, rental, and intangible expenses and management fees that are directly or indirectly paid, accrued, or incurred to a related entity or related person. If certain tests are satisfied, the taxpayer may subsequently deduct the expenses. The addback statutes also impose a disclosure requirement for related entity expenses. Notwithstanding a taxpayer satisfying the tests allowing the deductions of related entity expenses, the department has express authority to reallocate a taxpayer's income, deductions, credits, or allowances to prevent tax evasion or to clearly reflect income. The department also has express authority to disregard transactions that lack economic substance.

**(2) DEFINITIONS.** (a) "Addback" is term used to refer to the addition and subtraction modifications and disclosure requirement required by ss. 71.05 (6) (a) 24. and (b) 45., 71.26 (2) (a) 7. and 8., 71.34 (1k) (j) and (k), 71.45 (2) (a) 16. and 17., and 71.80 (23), Stats. Where applicable, "addback" also refers to subtraction modification to a related entity pursuant to ss. 71.05 (6) (b) 46., 71.26 (2) (a) 9., 71.34 (1k) (L), and 71.45 (2) (a) 18., Stats.

(b) "Aggregate effective tax rate," for a related entity, is the sum of its effective tax rates for each state, U.S. possession, or foreign country where it is engaged in business. In determining whether a related entity is engaged in business in a state, U.S. possession, or foreign country, the legal standard set forth under s. 71.22(1r) shall apply to such other jurisdiction for purposes of applying the addback provisions.

(c) "Captive insurance company," for purposes of applying the addback provisions, means an insurer that issues any policy of insurance or reinsurance with respect to which the person insured is related under section 267 or 1563 of the Internal Revenue Code.

(d) "Captive REIT" means a real estate investment trust other than a qualified real estate investment trust under s. 71.22 (9ad), Stats.

(e) "Combined unitary income" has the same meaning as in s. Tax 2.60 (2) (e).

(f) "Effective tax rate", for a particular jurisdiction for a related entity, means the maximum tax rate imposed by that jurisdiction multiplied by the related entity's apportionment percentage, if any, computed for that particular jurisdiction.

(g) "Intangible expense" has the meaning given in s. 71.01 (5n), 71.22 (3g), 71.34 (1c), or 71.42 (1sg), Stats., as applicable.

(h) "Interest expense" has the meaning given in s. 71.01 (5s), 71.22 (3m), 71.34 (1e), or 71.42 (1t), Stats., as applicable.

(i) "Intangible property" has the meaning given in s. 71.01 (5p), 71.22 (3h), 71.34 (1d), or 71.42 (1sh), as applicable.

(j) "Management fees" has the meaning given in s. 71.01 (7v), 71.22 (6d), 71.34 (1h), or 71.42 (3c), Stats., as applicable.

(k) "Pass-through entities" include tax-option (S) corporations, partnerships, limited liability companies treated as partnerships, estates, and trusts.

(L) “Rental expenses” or “rent expenses” has the meaning given in s. 71.01 (9an), 71.22 (9an), 71.34 (1r), or 71.42 (4n), as applicable.

(m) “Related entity” or “related entities” has the meaning given in s. 71.01 (9am), 71.26 (9am), 71.34 (1p), or 71.42 (9am), Stats., as applicable. The terms include related individuals. In determining relatedness under section 267 of the Internal Revenue Code, section 267 (b) controls, which defines relationships through which taxpayers would be considered related for purposes of disallowing losses or deductions on transactions between related taxpayers. Section 707 (b) of the Internal Revenue Code, incorporated by reference into section 267, applies in determining whether partnerships and limited liability companies treated as partnerships and their respective partners are related. The stock attribution rules of section 318 (a) of the Internal Revenue Code otherwise apply for purposes of establishing indirect stock ownership and thereby determine related entities.

**Examples:** The following relationships involving partnerships and limited liability companies (LLC) constitute related entities:

1. A partnership and a partner who holds a direct or indirect capital or profits interest in that partnership of more than 50%.
2. An LLC and a member who holds a direct or indirect interest in that LLC of more than 50%.
3. Two partnerships or LLCs if a single partner or member owns, directly or indirectly, more than 50% of both entities.

(n) “Related entity expenses” refers to interest, rent, or intangible expenses, and management fees, either as an individual expense type or a combination of expense types in a transaction or series of transactions whether paid, accrued, or incurred directly or indirectly.

**Examples:** 1) Corporation A is the parent company of Corporation B and Corporation C, which are related entities. B owns intangible property that C uses in its manufacturing process. C incurs a royalty expense as a result. A purchases the goods from C that A will hold and sell as inventory. This increased cost due to the royalty is reflected in A’s cost of goods sold. The royalty portion of the cost of goods sold represents an indirect related entity expense that must be added back to A’s income.

2) Corporation A, Corporation B, Corporation C, and Corporation D are related entities. A and D have nexus in Wisconsin, but B and C do not. B is not subject to tax in any state. Previously, D owned intangible property which A used in operating its business. In a series of transactions, D transfers the intangible property to B. B then licenses the intellectual property to C, the inventory purchasing company. A purchases the inventory from C. The royalty portion of A’s cost of goods sold represents an indirect related entity expense that must be added back to A’s income.

3) Corporation O, Corporation H, and Corporation S are related entities. O, the operating company, transfers various items of intangible property to H in conformity with section 351 of the Internal Revenue Code. H enters into an agreement with S that will allow S to license H’s intangible property. S and O are related entities. S licenses the intangible property to O whereby O pays fees to S based on a percentage of sales. The intangible expense between O and S is a related entity expenses that must be added back to O’s income.

**(3) ADDITION MODIFICATION.** (a) *General.* A corporation, individual, or pass-through entity shall modify federal income for Wisconsin purposes so that related entity expenses that were paid, accrued, or incurred to a related entity are added back to income.

(b) *Taxpayers required to modify income.* The addition modification applies to any individual, corporation, or pass-through entity that has deducted or excluded under the Internal Revenue Code any amounts for related entity expenses that are directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, one or more related entities.

(c) *Interest expense.* Interest expenses include interest expenses otherwise deductible under section 163 of the Internal Revenue Code and otherwise deductible in the computation of Wisconsin adjusted gross income or Wisconsin net income. Expenses deductible as interest expenses under section 163 of the Internal Revenue Code include:

1. Interest paid or accrued within the taxable year on indebtedness.
2. Original issue discount.
3. Non-separately stated interest included in carrying charges for installment purchases.
4. Redeemable ground rents, excluding amounts paid in redemption.
5. Premiums paid or accrued for mortgage insurance.

**Example:** Taxpayer A and Taxpayer B are related and A paid, accrued, or incurred \$3,000 of original issue discount to B. Taxpayer C and Taxpayer D are related and C paid, accrued, or incurred \$3,000 of interest that have been capitalized under section 263A of the Internal Revenue Code. Taxpayer E and Taxpayer F are unrelated and E has paid, accrued, or incurred \$100,000 of indebtedness interest to F. A is required to add back \$3,000 to its income since it paid, accrued, or incurred this amount to a related entity and it is the type of interest expense deductible under section 163 of the Internal Revenue Code. C is not required to add back \$3,000 to its income since this type of interest is not the type of interest that is deductible under section 163 of the Internal Revenue Code. E is not required to add back \$100,000 since the addback provisions do not apply to unrelated taxpayers.

(d) *Rental expense.* 1. Rent expenses include expenses otherwise deductible in computing Wisconsin adjusted gross income or Wisconsin net income which are attributable to, for the use of, or for the right to use, real property, including:

a. Tangible personal property affixed to real property if the owner of the tangible personal property is the same as or related to the owner of the real property; or

b. Services rendered in connection with rented real property if the owner of the property is the same as or related to the entity providing the service.

2. For purposes of the addition modification, the method used to compute the expense and the manner in which it is reported for financial accounting purposes are immaterial.

**Example:** Amounts paid under capital leases might not be called “rent expenses” in the financial accounting records of a taxpayer, but these expenses are considered “rent expenses” for purposes of the addition modification.

(e) *Management fees.* 1. Other than services provided by the taxpayer's own employees, management fees include expenses and costs otherwise deductible in computing Wisconsin adjusted gross income or Wisconsin net income for the purchase or retention of services that pertain to any of the following:

- a. Accounts receivable.
- b. Employee benefit plans.
- c. Insurance, including self-insurance.
- d. Legal matters.
- e. Payroll.
- f. Data processing.
- g. Purchasing.
- h. Taxation.
- i. Financial matters.
- j. Securities.
- k. Accounting.
- L. Reporting on compliance matters.
- m. Similar activities.

2. Subdivision paragraphs 1.a. to 1.m. are in no way intended to and should not be construed as limiting the scope of the activities subject to this paragraph.

(f) *Intangible expenses.* 1. "Intangible expenses" include any of the following expenses to the extent they would otherwise be deductible in the computation of Wisconsin adjusted gross income or Wisconsin net income:

- a. Royalty, patent, technical, and copyright fees.
- b. Licensing fees.
- c. Losses related to, or incurred in connection directly or indirectly with, factoring transactions or discounting transactions.
- d. Amortization expenses.
- e. Other expenses, losses, or costs for, related to, or directly or indirectly in connection with acquiring, using, maintaining, managing, owning, selling, exchanging, or disposing of intangible property.

2. For a taxpayer purchasing amortizable intangible property from a related entity, the amortization expenses on that property are intangible expenses subject to the addition



modification. This also applies to any other amortizable intangible expenses paid, accrued, or incurred between a taxpayer and a related entity.

**(4) SUBTRACTION MODIFICATION.** (a) *General.* Related entity expenses paid, accrued, or incurred to a related entity may be deducted to the extent such expenses meet the requirements of s. 71.80 (23) (a), Stats., and this subsection.

(b) *Requirements.* 1. Section 71.80 (23) (a), Stats., provides that if a taxpayer added back related entity expenses, the taxpayer may then deduct such expenses if the taxpayer meets the requirements under s. 71.80 (23) (a) 3., Stats. The taxpayer shall establish it meets the requirements under s. 71.80 (23) (a) 3., Stats., by clear and convincing evidence. The taxpayer shall meet all of the following requirements:

a. The primary motivation for the transaction was one or more business purposes other than the avoidance or reduction of state income or franchise taxes.

b. The transaction changed the economic position of the taxpayer in a meaningful way apart from tax effects.

c. The expense was paid, accrued, or incurred using terms that reflect an arm's length relationship.

2. This paragraph is the primary test for establishing whether related entity expenses may be deducted. The tests in pars. (d) and (e) are indicators that the test under this paragraph may have been met.

(c) *Factors indicating requirements are not met.* Factors indicating that the related entity expense does not meet the requirements under par. (b) include:

1. There was no actual transfer of funds from the taxpayer to the related entity.

**Example:** A book or journal entry alone is not considered an actual transfer of funds.

2. There was an actual transfer of funds, then the funds were substantially returned to the taxpayer, either directly or indirectly. Such return need not be immediate in order for this factor to be applicable.

3. If the transaction was entered into on the advice of a tax advisor, regardless of whether a client relationship exists or existed at the time of the advice, the advisor's fee was determined by reference to the tax savings. "Tax advisor" includes a "material advisor" under s. 71.81 (1) (b), Stats.

4. The related entity does not regularly engage in similar transactions with unrelated parties on terms substantially similar to those of the subject transaction.

5. The transaction was not entered into at terms comparable to an arm's length transaction as determined by Treas. Reg. section 1.482-1(b).

6. There was no reasonable expectation of profit from the transaction apart from the tax benefits.

7. The transaction resulted in the improper matching of income and expenses.

8. The expense for the transaction was accrued under Financial Accounting Standards Board Interpretation number 48. For purposes of this section, this factor applies to both income and franchise taxes.

9. If the related entity expense is a rental expense, the rent was paid, accrued, or incurred to a captive real estate investment trust.

10. If the related entity expense is an interest expense, additional factors specific to interest expenses include:

a. The taxpayer is not sufficiently capitalized or has no reasonable expectation to make payment on the debt underlying the interest expense.

b. There is no written contract underlying the interest expense.

c. There is a contract, but the contract does not reflect an interest obligation resulting from an arm's length transaction.

d. The interest is attributable to an unpaid charge that is not an allowable expense, a loan from a captive insurance company, a dividend note, a loan from a related entity with net business loss carryforwards or net operating loss carryforwards, or a loan from a related entity that is an intermediary set up in a jurisdiction that imposes no corporate-level income or franchise tax.

(d) *Related entity acts as a conduit.* 1. 'Requirements.' Section 71.80 (23) (a), Stats., provides that if a taxpayer added back related entity expenses, the taxpayer may then deduct such expenses if the taxpayer meets the requirements under s. 71.80 (23) (a) 1., Stats. The taxpayer shall establish it meets the requirements under s. 71.80 (23) (a) 1., Stats., by clear and convincing evidence. The taxpayer shall meet all of the following requirements:

a. The related entity to which the taxpayer paid, accrued, or incurred related entity expenses during the taxable year directly or indirectly paid, accrued, or incurred such amounts in the same taxable year to a person who is not a related entity. In this subdivision, "taxable year" means the taxable year of the taxpayer claiming the deduction for related entity expenses paid, accrued, or incurred to the related entity. The department will consider such expenses the related entity pays, accrues, or incurs to an unrelated entity by the unextended due date of the taxpayer's income or franchise tax return to be paid, accrued, or incurred within the taxpayer's "taxable year." However, such expenses that occur after the end of the taxpayer's taxable year may not then be counted again as occurring in the subsequent taxable year.

b. Except as provided in subd. 2., the related entity to which the taxpayer paid, accrued, or incurred such expenses is a holding company or a direct or indirect subsidiary of a holding company, as defined in 12 USC 1841(a) or (l) or 12 USC 1467a(a)(1)(D).

2. 'Investments of a bank, subsidiary, or affiliate.' Related entity expenses may not satisfy the test in subd. 1. b. when such expenses are paid, accrued, or incurred directly or indirectly to an entity that is organized under the laws of another jurisdiction and that primarily holds and manages investments of a bank, subsidiary, or affiliate, unless the related entity expenses satisfy the provisions in subd. 1. a.

3. 'Interest on acquisition of stock.' As specifically provided under s. 71.80 (23) (a) 1., Stats., interest expense paid, accrued, or incurred in connection with any debt incurred to

acquire taxpayer's assets or stock under section 368 of the Internal Revenue Code may not satisfy the test under this paragraph.

**Example:** Corporation A borrows money from Corporation B. No portion of the debt was used to acquire A's own stock or assets under section 368 of the Internal Revenue Code. In order to obtain the funds to loan to A, B borrows money from Bank C. A is a calendar year taxpayer, while B is on a fiscal year beginning July 1 and ending June 30. During the calendar year 2008, A accrued \$100,000 of interest expense attributable to the loan from B. In turn, B accrued \$90,000 of interest expense attributable to the loan from C during that same time period of January 1, 2008 through December 31, 2008. During the period of January 1, 2009, through March 15, 2009, B accrued \$10,000 of interest expense to C.

For purposes of determining if the test under subd. 1. a. applies to A's interest expense, B may be considered to have accrued \$100,000 of interest expense (\$90,000 + \$10,000) to C in A's 2008 taxable year. However, in A's 2009 taxable year, A cannot consider the \$10,000 of interest expense accrued by B to C during the period of January 1, 2009, through March 15, 2009 to be accrued during A's 2009 taxable year.

4. 'Allocation of expense paid to unrelated entity.' If less than 100% of the total related entity expenses paid, accrued, or incurred to the related entity from the taxpayer and all other related entities is paid, accrued, or incurred to an unrelated entity, a pro rata share of the taxpayer's related entity expenses is considered to satisfy the test under subd. 1. a.

**Example:** Taxpayer A made a \$200,000 interest payment to Taxpayer B. No portion of the underlying debt was used to acquire the taxpayer's own stock or assets under section 368 of the Internal Revenue Code. B received a total of \$800,000 of related entity interest income during A's taxable year. Of this amount, \$200,000 was from A and \$600,000 from other related entities. In A's taxable year, B paid \$400,000 of interest expense to unrelated entities. In this case, \$100,000 ( $(\$200,000/\$800,000) \times \$400,000$ ) of the interest A paid to B would be considered paid, accrued, or incurred to unrelated entities in A's taxable year.

(e) *Related entity included income in tax base.* 1. 'Requirements.' Section 71.80 (23) (a), Stats., provides that if a taxpayer added back related entity expenses, the taxpayer may then deduct such expenses if the taxpayer meets the requirements under s. 71.80 (23) (a) 2., Stats. The taxpayer shall establish it meets the requirements under s. 71.80 (23) (a) 2., Stats., by clear and convincing evidence. The taxpayer shall meet all of the following requirements:

a. The related entity was subject to tax on, or measured by, its net income or receipts in this state or any state, U.S. possession, or foreign country.

b. The related entity's tax base in such state, U.S. possession, or foreign country included the income received from the taxpayer corresponding to the related entity expenses.

c. The related entity's aggregate effective tax rate applied to such income or receipts was at least 80 percent of the taxpayer's aggregate effective tax rate.

d. The related entity is not a real estate investment trust under section 856 of the Internal Revenue Code, other than a qualified real estate investment trust.

2. 'Differing taxable years.' For both the taxpayer and the related entity, compute the aggregate effective tax rate for the taxable year that included the transaction date. If the related entity is on a taxable year that ends after the taxpayer's taxable year, the aggregate effective

tax rate shall be determined as follows:

a. If in the related entity's most recently ended taxable year the related entity was subject to a tax on or measured by net income or receipts in a state, U.S. possession, or foreign country, the related entity's aggregate effective tax rate shall be computed based on the related entity's most recently ended taxable year.

b. If the related entity was not subject to such tax for its most recently ended taxable year, the related entity shall modify the computation of the aggregate effective tax rate as provided in subd. 2. c.

c. The related entity uses 100% as the related entity's apportionment percentage and the related entity uses the statutory tax rate of the state where the related entity is incorporated, organized, formed, or, if the related entity is an individual, where the individual resides.

3. 'Items not includable in aggregate effective tax rate.' The following are not included in the computation of the aggregate effective tax rate:

a. If the related entity expense was paid, accrued, or incurred to a pass-through entity, any tax rate that is imposed at the shareholder, partner, member, or beneficiary level rather than at the pass-through entity level for that state, U.S. possession, or foreign county.

b. If the related entity is a pass-through entity, only taxes imposed at the entity level that are on or measured by net income or receipts may be included in the pass-through entity's effective tax rate for a particular jurisdiction. A pass-through entity's aggregate effective tax rate cannot include taxes imposed against the entity's shareholders, partners, members, or beneficiaries. If a pass-through entity elects to file a composite return in a jurisdiction on behalf of some or all of its shareholders, partners, members, or beneficiaries, the tax rate applicable to that composite return cannot be included in the entity's effective tax rate for that jurisdiction.

c. The tax rate of any jurisdiction where the taxpayer files with the related entity or the related entity files with another entity a combined or consolidated report or return if the report or return results in eliminating the tax effects of transactions, directly or indirectly, between either the taxpayer and the related entity or between the related entity and another entity.

4. 'Items includible in aggregate effective tax rate.' The following are included in the computation of the aggregate effective tax rate:

a. Withholding taxes, such as the one imposed by s. 71.775, Stats., paid on income distributable to owners or beneficiaries of the pass-through entity, may be considered entity-level taxes if the state, U.S. possession, or foreign country imposes the withholding as a tax on the income of the pass-through entity.

b. The Wisconsin recycling surcharge, which is imposed on partnerships and tax-option (S) corporations pursuant to s. 77.93 (1), (3), and (5), Stats.

5. 'Dividends paid deduction.' If the related entity is not taxed on some or all of its income in a state, U.S. possession, or foreign country because the entity is eligible for a dividends paid deduction under the laws of that jurisdiction, the amount of income considered to be included in its tax base in that jurisdiction is the amount of income after applying the dividends paid deduction. If the dividends paid deduction is less than 100% of the related

entity's total income, a pro rata share of its income from the transaction is deemed to be excluded from its tax base in that jurisdiction.

6. 'Related Entity Has Loss or Credit Carryforwards.' For purposes of applying the test under par. (e), the related entity's aggregate effective tax rate is computed without regard to loss carryforwards or credit carryforwards. If the related entity has no tax liability in a particular state, U.S. possession, or foreign country because of its loss or credit carryforwards, the related entity's effective tax rate in that jurisdiction still remains that jurisdiction's maximum statutory tax rate multiplied by the related entity's apportionment percentage in that jurisdiction.

**Example:** Taxpayer A makes a \$500,000 interest payment to Corporation C, a related corporation. Corporation C has no other income and is engaged in business only in State X. Corporation C has a \$1,000,000 loss carryforward in State X and uses this carryforward to offset the \$500,000 related entity interest income from Taxpayer A. Therefore, Corporation C owes no tax to State X. State X has a maximum corporation income tax rate of 6.2%. Corporation C's aggregate effective tax rate would be 6.2%.

**(5) DISALLOWED RELATED ENTITY EXPENSES.** (a) *General.* A related entity may subtract income that corresponds to related entity expenses if such expenses are disallowed to the taxpayer.

(b) *Subtraction for disallowed expenses.* Except as provided in par. (f), if a taxpayer cannot deduct a related entity expense it paid, accrued, or incurred to a related entity because the expense did not meet one of the tests under sub. (4), the related entity may subtract the income that corresponds to the expense that was disallowed to the taxpayer.

(c) *Form required to substantiate income exclusion.* Unless otherwise provided by the department, both the taxpayer and the related entity shall complete the form prescribed by the department to substantiate the income exclusion. The related entity shall file the completed form prescribed by the department with its Wisconsin income or franchise tax return on which it is claiming the subtraction from income. If the related entity is not doing business in Wisconsin, neither the taxpayer nor the related entity has to complete the form prescribed by the department to substantiate the income exclusion.

(d) *Expense below disclosure threshold.* Except as provided in par. (e), the subtraction from income provided in this subsection may apply even if the disallowed related entity expense was below the threshold of \$100,000 under sub. (7) (b) 3.

(e) *Related entity income exclusion limitation.* A taxpayer may not use the form prescribed by the department to disallow related entity expenses to claim a related entity expense if all of the following conditions apply:

1. The primary motivation for the transaction was one or more business purposes other than the avoidance or reduction of state income or franchise taxes.

2. The transaction changed the economic position of the taxpayer in a meaningful way apart from tax effects.

3. The expenses were paid, accrued, or incurred using terms that reflect an arm's length relationship.

(f) *Evasion of taxes and distortion of income.* A taxpayer meeting the criteria to deduct related entity expenses under s. 71.80 (23), Stats., but fails, whether intentionally or not, to disclose such related entity expenses as prescribed, the department at its discretion may disallow the corresponding income exclusion to the related entity and allow the expense to the taxpayer.

**Example:** Taxpayer A and Taxpayer B are related entities. A's net income for the year is \$50,000 and B's net income is \$750,000. A incurred \$100,000 in interest expenses to B. Realizing there is a benefit to not disclosing the related entity expenses, A reports \$150,000 in net income, and B reports \$650,000 in net income. The department may disallow the interest income exclusion to B and allow the interest expense to A. As a result, A must report \$50,000 of net income and B must report \$750,000 of net income.

**(6) MISCELLANEOUS RULES.** (a) *Combined groups.* 1. As provided in s. Tax 2.61 (6) (a) 6., for related entity expenses paid, accrued, or incurred between combined group members, including pass-through entities owned by those members to the extent of their distributive shares of income, the addition modifications for related entity expenses under ss. 71.26(2)(a)7. and 71.45(2)(a)16., Stats., are not required to the extent the recipient of the income includes the income in the combined unitary income. The provisions under s. Tax 2.61 (6) (a) 6. only apply to corporations that are combined group members at the time of the transactions resulting in related entity expenses.

2. The addition modifications for addbacks are required in cases where related entity expenses are included in combined unitary income but the corresponding income is or was not included in the combined unitary income. To illustrate, without limiting the application of this subdivision in any way, a related entity expense paid, accrued, or incurred to a related entity that is not a combined group member is subject to the addback provisions. Likewise, a related entity expense paid, accrued, or incurred to a combined group member that excluded the corresponding income from the combined unitary income is subject to the addback provisions.

(b) *Pass-through entities.* Shareholders of a tax-option (S) corporation, members of a limited liability company treated as a partnership, partners of a general or limited partnership, and beneficiaries of trust and estates need not make an addition modification to their respective incomes in cases where their respective schedules K-1 report the related entity expenses as fully deductible.

(c) *Disregarded entities.* Transactions resulting in related entity expenses between an entity that is disregarded for Wisconsin income and franchise tax purposes and its owner need not be reported and disclosed.

(d) *Individual itemized deduction credit.* An individual who has paid, accrued, or incurred related entity expenses is not required to disclose such expenses on a form prescribed by the department if the individual reports the expenses as part of the individual's itemized deduction credit under s. 71.07 (5), Stats. An individual wishing to treat related entity expenses as business expenses shall disclose such expenses on a form prescribed by the department as applicable.

(e) *Taxpayers subject to apportionment.* If a taxpayer is subject to apportionment, the taxpayer shall report and disclose the amounts that are required to be added back before apportionment. For purposes of determining the threshold amount of \$100,000 under sub. (7) (b) 3., the taxpayer shall use the apportioned amounts. However, the taxpayer shall not multiply by the apportionment percentage those amounts of related entity expenses added back to

income that are not attributable to apportionable income. The apportionment percentage shall be recomputed after any addbacks.

**(7) ADMINISTRATION AND COMPLIANCE.** (a) *Authority to distribute or disregard.* Notwithstanding the modifications provided under ss. 71.05 (6) (b) 45., 71.26 (2) (a) 8., 71.34 (1k) (k), and 71.45 (2) (a) 17., Stats., the department has express authority under ss. 71.30 (2) and 71.80 (1) (b), Stats., to distribute, apportion, or allocate income, deductions, credits, or allowances between or among related entities in order to prevent evasion of taxes or to clearly reflect the income of the entities. Additionally, the department has express authority under ss. 71.30 (2m) and 71.80 (1m), Stats., to disregard transactions between related entities if those transactions lack economic substance. This authority is also applicable to the modifications under ss. 71.05 (6) (b) 46., 71.26 (2) (a) 9., 71.34(1k) (L), and 71.45 (2) (a) 18.

(b) *Timely disclosure.* 1. A taxpayer with related entity expenses shall disclose such expenses on or before the extended due date of return for the year in which the expenses are reported. The department is authorized to disallow related entity expenses, even if the expenses meet the conditions in s. 71.80(23)(a), Stats., and sub. (4) for failure to timely disclose such expenses. The form prescribed by the department to disclose related entity expenses shall not be accepted by the department if filed with an amended return after the extended due date. Failure to disclose or untimely disclosure by a taxpayer subjects the taxpayer and related entities to the provisions of sub. (5)(e).

2. A pass-through entity is responsible for timely disclosing related entity expenses on a form prescribed by the department. The shareholder, partner, member, or beneficiary is not responsible for disclosing related entity expenses if such expenses are passed through to them. A shareholder, partner, member, or beneficiary having related entity expenses independent of those passed through to them shall disclose such expenses on a form prescribed by the department as applicable.

3. A taxpayer is not required to disclose related entity expenses on a separate form prescribed by the department if the total interest, rent, and intangible expenses and management fees paid, accrued, or incurred to all related entities reduces the taxpayer's net income by a total amount that is equal to or less than \$100,000. If the taxpayer has related entity expenses that reduce the taxpayer's net income by more than a total of \$100,000, the taxpayer shall file and disclose such expenses on a form prescribed by the department. For multistate taxpayers, the \$100,000 threshold is determined after applying the Wisconsin apportionment percentage. If the taxpayer is a pass-through entity, the \$100,000 threshold is determined at the entity level. The fact that a taxpayer's total related entity expenses do not surpass the \$100,000 threshold amount does not preclude the department from enforcing the addback provisions against the taxpayer.

**Tax 3.02 Pass-through entity withholding. (1) PURPOSE.** This section provides additional guidance with respect to the treatment of withholding tax for pass-through entities.

**(2) CREDIT FOR NONRESIDENT ENTERTAINER, LOTTERY, AND PARI-MUTUAL WITHHOLDING.** A pass-through entity may elect to allocate nonresident entertainer, lottery, and pari-mutual withholding to its nonresident partners, members, shareholders, or beneficiaries, but only to the extent the income subject to withholding is allocated to those partners, members, shareholders, or beneficiaries. A pass-through entity may credit amounts withheld under ss. 71.64 (5) and 71.67 (4) and (5), Stats., or amounts paid or deposited under s. 71.80 (15) (b) or (c), Stats.,

against the withholding amounts required under s. 71.775 (2), Stats., to such extent, in the manner and form prescribed by the department.

**Example:** Basement Rockers is a four-member rock band. Basement Rockers is a tax-option (S) corporation and its four rock stars are the corporation's shareholders. They are nonresidents of Wisconsin. The band plays in three different venues in Wisconsin during taxable year and each venue pays the band \$10,000. For Venue 1, neither a surety bond is filed nor cash deposited. The venue withholds 6% and immediately pays the amount withheld to the department. For Venue 2, a bond is not filed, cash is not deposited, and no amounts are withheld. For Venue 3, Basement Rockers files a surety bond for 6% of the total contract price. Basement Rockers may only elect to allocate to its shareholders the amounts for Venue 1 and Venue 3.

**SECTION 40.** Tax 3.03(6) is created to read:

Tax 3.03(6) COMBINED GROUPS. The dividends elimination provisions of s. Tax 2.61(6)(e) only apply to the extent that the dividends received deduction under this section and s. 71.26(3)(j) or 71.45(2)(a)8., Stats., do not apply.

**Note to LRB:** Amend the note at the end of Tax 3.03 as follows:

**Note:** This section interprets ss. 71.22(4), 71.255(4)(f), 71.26(2) and (3)(j), 71.42(2) and 71.45(2)(a) 8., Stats.

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The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

### Initial Regulatory Flexibility Analysis

This proposed rule order does not have a significant economic impact on a substantial number of small businesses.

DEPARTMENT OF REVENUE

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Roger M. Ervin  
Secretary of Revenue

E:Rules/Batch 3 Proposed Order