ORDER OF THE DEPARTMENT OF REVENUE REPEALING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 2.955 (4) (f); **amend** Tax 2.955 (2) (b), (3) (b), and (4) (intro), (b) (intro), 1., 2., and 3., (c), and (d); **repeal and recreate** Tax 2.955 (4) (e)**;** and **create** Tax 2.955 (2) (c) and (3) (e) and (Example) and (f) and (Example); **relating to** the credit for tax paid to another state.

The scope statement for this rule, SS 003-20, was approved by the Governor on January 24, 2020, published in Register No. 770A1 on February 3, 2020, and approved by the Secretary of Revenue on March 17, 2020.

Analysis by the Department of Revenue

Statutes interpreted: 71.07 (7), 71.08 (5), 71.21 (6) (a), and 71.365 (4m) (a), Stats.

Statutory authority: ss. 71.80 (1) (c) and 227.11 (2), Stats.

Explanation of agency authority: Under s. 71.80 (1) (c), Stats., the department may make such regulations as it shall deem necessary in order to carry out chapter 71 of the Wisconsin Statutes, relating to income and franchise taxes.

Section 227.11 (2), Stats., provides statutory rule-making authority as follows:

(a) "Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..."

(b) "Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules …"

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: Pass-through entities electing to pay Wisconsin tax on income at the entity level under sec. 71.21(6)(a) or 71.365(4m)(a), Wis. Stats., may claim a credit for net taxes paid by the entity on the same income taxable in another state as provided in sec. 71.07(7)(b)3., Wis. Stats. The proposed rule adds references to these laws, adds examples, and clarifies that a Wisconsin resident may not claim a credit for taxes paid by an electing pass-through entity. In addition, references to Wisconsin minimum tax are removed as minimum tax no longer applies for Wisconsin for taxable years beginning on or after January 1, 2019, pursuant to sec. 71.08(5), Wis. Stats., as created by 2017 Wisconsin Act 59.

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.

Comparison with rules in adjacent states: The department is not aware of a similar rule in an adjacent state.

Summary of factual data and analytical methodologies: 2017 Wisconsin Act 368 created an election for partnerships and tax-option (S) corporations to pay Wisconsin income or

franchise taxes at the entity level. When the election is made, these entities are allowed a credit on their Wisconsin income or franchise tax return for the net taxes paid to another state on the same income. The rule needs to be updated to account for these situations. No other data or analytical methodologies were used in the preparation of this proposed rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: This rule order makes changes to reflect current law and current department policy. It makes no policy or other changes having an effect on small business.

Anticipated costs incurred by private sector: This proposed rule does not have a fiscal effect on the private sector, as no changes to existing policies are being made.

Effect on small business: This proposed rule does not affect small business, as no changes to existing policies are being made.

Agency contact person: Please contact Jen Chadwick at (608) 266-8253 or jennifer.chadwick@wisconsin.gov, 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 the date on which the public hearing on this proposed rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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SECTION 1. Tax 2.955 (2) (b) is amended to read:

Tax 2.955 (2) (b) Except as provided in subs. (2m) and (3), an income tax credit may be claimed by a Wisconsin resident shareholder, partner, or member in a tax−option (S) corporation, partnership, or limited liability company for any net minimum tax, income tax, or franchise tax paid by that shareholder, partner, or member to another state on or measured by income of the tax−option (S) corporation, partnership, or limited liability company.

SECTION 2. Tax 2.955 (2) (c) is created to read:

Tax 2.955 (2) (c) Except as provided in subs. (2m) and (3), an income or franchise tax credit may be claimed by a tax-option (S) corporation, partnership, or limited liability company which makes an election to be taxed at the entity level under s. 71.21 (6) (a) or 71.365 (4m) (a), Stats., for any net minimum tax, income tax, or franchise tax paid by that entity to another state upon income of the entity and net minimum tax, income tax, or franchise tax paid by that entity to another state upon income of the entity on behalf of its Wisconsin resident shareholders, partners, and members on a combined or composite return filed with the other state.

SECTION 3. Tax 2.955 (3) (b) is amended to read:

Tax 2.955 (3) (b) Minimum tax, ~~or~~ income tax, or franchise tax paid to another state on income not considered ~~neither~~ taxable income for Wisconsin tax purposes ~~nor a tax preference item in the computation of the Wisconsin minimum tax~~.

SECTION 4. Tax 2.955 (3) (e) and (Example) and (f) and (Example) are created to read:

Tax 2.955 (3) (e) Minimum tax, income tax, or franchise tax paid to another state by a Wisconsin resident individual on income derived from a tax-option (S) corporation, partnership, or limited liability company that elects to be taxed on the income at the entity level under s. 71.21 (6) (a) or 71.365 (4m) (a), Stats.

Example: A Wisconsin resident shareholder in a tax-option (S) corporation pays income tax to Iowa on her proportionate share of income from the corporation that is reportable and taxable on both her Wisconsin and Iowa income tax returns for the same taxable year. The tax-option (S) corporation elects to be taxed at the entity level under s. 71.365 (4m) (a), Stats., and files and pays Wisconsin franchise tax. The Wisconsin resident shareholder may not claim a credit for net income tax paid to Iowa since the income from the tax-option (S) corporation is not taxable on her Wisconsin income tax return.

(f) A tax-option (S) corporation, partnership, or limited liability company electing to be taxed on income at the entity level under s. 71.21 (6) (a) or 71.365 (4m) (a), Stats., if the shareholder, partner, or member pays the tax to the other state on their proportionate share of income from the entity.

Example: A partnership elects to be taxed on income at the entity level under s. 71.21 (6) (a), Stats., and pays Wisconsin income tax on income that is also taxable to Iowa for the same taxable year. A Wisconsin resident partner files and pays Iowa income tax on his proportionate share of income from the partnership. The partnership may not claim a credit for tax paid to Iowa since the partnership did not pay the Iowa income tax.

SECTION 5. Tax 2.955 (4) (intro), (b) (intro), 1., 2., and 3., (c), and (d) are amended to read:

Tax 2.955 (4) HOW TO CLAIM A CREDIT. The amount of income tax credit claimed shall be entered on the line provided for net income tax paid to other states on Wisconsin income tax return Form 1, Form 1NPR, ~~or~~ Form 2, or for tax-option (S) corporations and partnerships, Schedule 5S-ET or 3-ET. The credit may not exceed the Wisconsin net tax. To support the credit claimed, the following information shall be ~~attached to form 1 or form 1NPR~~ submitted with Wisconsin Form 1, Form 1NPR, Form 2, Form 3, or Form 5S:

(b) For a Wisconsin resident shareholder in a tax−option (S) corporation, the federal subchapter S status of which is recognized by the other state, partner in a partnership, or member in a limited liability company:

1. If a Wisconsin resident shareholder, partner, or member files an individual income tax return with that state, ~~attach~~ submit a copy of the other state's income tax return ~~to~~ with the Wisconsin income tax return.

2. If the corporation, partnership, or limited liability company files a combined or composite return with that state on behalf of its shareholders, partners, or members who are nonresidents of that state and pays the tax on their proportionate share of the income earned there, ~~attach to~~ submit with the Wisconsin income tax return either a copy of the Wisconsin Schedule 5K−1 or 3K-1 on which is shown the shareholder's, partner's, or member's share of tax paid to that state, or a letter as provided in par. (d).

3. If the corporation, partnership, or limited liability company files a corporate or partnership income or franchise tax return with that state and pays tax on or measured by income earned there that is attributable to its shareholders, partners, or members who are nonresidents of that state, ~~attach to~~ submit with the Wisconsin income tax return either a copy of the Wisconsin

Schedule 5K−1 or 3K-1 on which is shown the shareholder's, partner's, or member's share of tax paid to that state, or a letter as provided in par. (d).

(c) For a Wisconsin resident shareholder in a tax−option (S) corporation, the federal subchapter S status of which is not recognized by the other state, if the corporation pays an income or franchise tax on or measured by the income earned there, ~~attach to~~ submit with the Wisconsin income tax return either a copy of the Wisconsin Schedule 5K−1 on which is shown the shareholder's share of tax paid to that state, or a letter as provided in par. (d).

(d) If the tax−option (S) corporation, partnership, or limited liability company is not subject to Wisconsin's income or franchise tax, a Wisconsin resident shareholder, partner, or member shall ~~attach to~~ submit with the Wisconsin income tax return a letter provided by the corporation, partnership, or limited liability company in lieu of Wisconsin Schedule 5K−1 or 3K-1 as required in pars. (b) 2. and 3. and (c). The letter shall include a schedule showing the shareholder's, partner's, or member's proportionate share of the items of income taxable by that state, the adjusted gross income, and the net tax paid.

SECTION 6. Tax 2.955 (4) (e) is repealed and recreated to read:

Tax 2.955 (4) (e) For a tax-option (S) corporation, partnership, or limited liability company which makes an election to be taxed on income at the entity level under s. 71.21 (6) (a) or 71.365 (4m) (a), Stats.:

1. If the corporation, partnership, or limited liability company files a corporate or partnership income or franchise tax return with another state, submit a copy of the other state's income or franchise tax return with Wisconsin Form 3 or 5S.

2. If the corporation, partnership, or limited liability company files a combined or composite return with another state on behalf of its shareholders, partners, or members who are nonresidents of that state and pays tax on their proportionate share of the income taxable to the other state, submit a copy of the other state's combined or composite income or franchise tax return with Wisconsin Form 3 or 5S.

SECTION 7. Tax 2.955 (4) (f) is repealed.

SECTION 8. Tax 2.955 (5) (Note) is amended to read:

Tax 2.955 (5) **Note:** Section Tax 2.955 interprets s. 71.07 (7), 71.08 (5), 71.21 (6) (a), and 71.365 (4m) (a), Stats.

SECTION 9. EFFECTIVE DATE; GENERAL. This rule 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.

DEPARTMENT OF REVENUE

Dated: _____ By: _____

Peter W. Barca
Secretary of Revenue