

## SENATE BILL NO. 36

INTRODUCED BY R. ERICKSON

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4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE INCLUSION OF ALL DOMESTICALLY  
5 INCORPORATED SUBSIDIARIES IN THE WATER'S-EDGE GROUP; PREVENTING INCOME-SHIFTING TO  
6 FOREIGN INTANGIBLE HOLDING COMPANIES; UPDATING THOSE COUNTRIES CONSIDERED TAX  
7 HAVENS; PROVIDING IMPACTED TAXPAYERS THE ABILITY TO RESCIND A WATER'S-EDGE ELECTION;  
8 AMENDING SECTIONS 15-31-322, 15-31-323, 15-31-324, AND 15-31-326, MCA; AND PROVIDING AN  
9 IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

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11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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13 **Section 1.** Section 15-31-322, MCA, is amended to read:

14 **"15-31-322. Water's-edge election -- inclusion of tax havens.** (1) Notwithstanding any other  
15 provisions of law, a taxpayer subject to the taxes imposed under this chapter may apportion its income under this  
16 section. A return under a water's-edge election must include the income and apportionment factors of the  
17 following affiliated corporations only:

18 (a) a corporation incorporated in the United States or formed under the laws of any state, the District of  
19 Columbia, or any territory or possession of the United States in a unitary relationship with the taxpayer and  
20 eligible to be included in a federal consolidated return as described in 26 U.S.C. 1501 through 1505 ~~that has more~~  
21 ~~than 20% of its payroll and property assignable to locations inside the United States.~~ For purposes of determining  
22 eligibility for inclusion in a federal consolidated return under this subsection (1)(a), the 80% stock ownership  
23 requirements of 26 U.S.C. 1504 must be reduced to ownership of over 50% of the voting stock directly or  
24 indirectly owned or controlled by an includable corporation.

25 (b) domestic international sales corporations, as described in 26 U.S.C. 991 through 994, and foreign  
26 sales corporations, as described in 26 U.S.C. 921 through 927;

27 (c) export trade corporations, as described in 26 U.S.C. 970 and 971;

28 (d) foreign corporations deriving gain or loss from disposition of a United States real property interest  
29 to the extent recognized under 26 U.S.C. 897;

30 (e) a corporation in a unitary relationship with the taxpayer incorporated outside the United States if over

1 50% of its voting stock is owned directly or indirectly by the taxpayer or common foreign parent and if more than  
 2 20% of the average of its payroll and property is assignable to a location inside the United States; ~~or~~

3 (f) a corporation that is in a unitary relationship with the taxpayer and that earns more than 20% of its  
 4 income, directly or indirectly, from intangible property or service-related activities that are deductible against the  
 5 business income of other members of the water's-edge group, to the extent of that income and the apportionment  
 6 factors related to that income; or

7 ~~(f)(g)~~ a corporation that is in a unitary relationship with the taxpayer and that is incorporated in a tax  
 8 haven, including Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize,  
 9 Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Turks and Caicos Islands, Dominica,  
 10 Gibraltar, Grenada, Guernsey-Sark-Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, ~~Maldives~~,  
 11 Malta, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherlands, Netherlands Antilles, Niue, Panama,  
 12 Samoa, San Marino, Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, ~~Tonga~~, U.S.  
 13 Virgin Islands, and Vanuatu.

14 (2) The department shall report biennially to the revenue and transportation interim committee with an  
 15 update of countries that may be considered a tax haven under subsection ~~(1)(f)~~ (1)(g)."

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17 **Section 2.** Section 15-31-323, MCA, is amended to read:

18 **"15-31-323. Apportionment factors -- inclusion of tax havens.** (1) For purposes of 15-31-322(1)(a)  
 19 through ~~(1)(e)~~ (1)(f), the location of payroll and property is determined under the individual state's laws and  
 20 regulations that set forth the apportionment formulas used to assign net income subject to taxes on or measured  
 21 by net income. If a state does not impose a tax on or measured by net income, apportionment is determined  
 22 under this chapter.

23 (2) For the purposes of 15-31-322~~(1)(f)~~(1)(g), income shifted to a tax haven, to the extent taxable, is  
 24 considered income subject to apportionment."

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26 **Section 3.** Section 15-31-324, MCA, is amended to read:

27 **"15-31-324. Water's-edge election period -- consent -- change of election.** (1) A water's-edge  
 28 election may be made by a taxpayer and is effective only if every affiliated corporation subject to the taxes  
 29 imposed under this chapter consents to the election. Consent by the common parent of an affiliated group  
 30 constitutes consent of all members of the group. An affiliated corporation that becomes subject to taxes under

1 this chapter after the water's-edge election is considered to have consented to the election. The election must  
 2 disclose the identity of the taxpayer and the identity of any affiliated corporation, including an affiliated corporation  
 3 incorporated in a tax haven as set forth in 15-31-322~~(1)(f)~~(1)(g), in which the taxpayer or common foreign parent  
 4 owns directly or indirectly more than 50% of the voting stock of the affiliated corporation.

5 (2) Except as provided in subsections (3) ~~and (4)~~ through (5), each water's-edge election must be for  
 6 3-year renewable periods.

7 (3) A water's-edge election may be changed by a taxpayer before the end of each 3-year period only  
 8 with the permission of the department. In granting a change of election, the department shall impose reasonable  
 9 conditions that are necessary to prevent the avoidance of tax or clearly reflect income for the election period prior  
 10 to the change.

11 (4) A taxpayer subject to the provisions of 15-31-322~~(1)(f)~~(1)(g) who has a water's-edge election that is  
 12 in effect for tax periods beginning both before and after October 1, 2003, may rescind ~~the~~ that specific election  
 13 for any tax period beginning after October 1, 2003.

14 (5) A taxpayer subject to the provisions of 15-31-322(1)(a) or (1)(f) who has a water's-edge election that  
 15 is in effect for tax periods beginning both before and after December 31, 2008, may rescind that specific election  
 16 for any tax period beginning after December 31, 2008."

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 18 **Section 4.** Section 15-31-326, MCA, is amended to read:

19 **"15-31-326. Domestic disclosure spreadsheet -- inclusion of tax havens.** (1) The department may  
 20 require a taxpayer making a water's-edge election to submit within 6 months after the taxpayer files its federal  
 21 income tax return a domestic disclosure spreadsheet to provide full disclosure of the income reported to each  
 22 state for the year, the tax liability for each state, the method used for allocating or apportioning income to the  
 23 states, and the identity of the water's-edge corporate group and those of its United States affiliated corporations.

24 (2) The department may require a taxpayer subject to the provisions of 15-31-322~~(1)(f)~~(1)(g) to disclose  
 25 the same information for tax havens as is required for states in subsection (1)."

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 27 NEW SECTION. **Section 5. Effective date.** [This act] is effective on passage and approval.

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 29 NEW SECTION. **Section 6. Retroactive applicability.** [This act] applies retroactively, within the  
 30 meaning of 1-2-109, to tax years beginning after December 31, 2008.

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