



State of New Hampshire

GENERAL COURT

CONCORD

MEMORANDUM

DATE: November 1, 2023

TO: Honorable Sherman Packard, Speaker of the House
Honorable Jeb Bradley, President of the Senate
Honorable Paul C. Smith, House Clerk
Honorable Tammy L. Wright, Senate Clerk
Honorable Chris Sununu, Governor
Michael York, State Librarian

FROM: Representative Walter Spilsbury, Chairman

SUBJECT: Final Report of the Commission on Worldwide Combined Reporting
for Unitary Businesses Under the Business Profits Tax
RSA 77-A:23-b (HB 102, Chapter 12, Laws of 2022)

Pursuant to RSA 77-A:23-b (HB 102, Chapter 12, Laws of 2022), enclosed please find the Final Report of the Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax.

If you have any questions or comments regarding this report, please do not hesitate to contact me.

I would like to thank those members of the commission who were instrumental in this study. I would also like to acknowledge all those who testified before the commission and assisted the commission in our study.

Enclosures

cc: Members of the Commission

FINAL REPORT

**COMMISSION ON WORLDWIDE COMBINED REPORTING FOR UNITARY
BUSINESSES UNDER THE BUSINESS PROFITS TAX**

RSA 77-A:23-b (HB 102, Chapter 12, Laws of 2022)

November 1, 2023

Member	Appointing Authority
Representative Walter Spilsbury, Chair	Speaker of the House
Representative Thomas Schamberg	Speaker of the House
Representative Jordan Ulery	Speaker of the House
Senator Keith Murphy	Senate President
Kevin Kennedy	Business and Industry Association
Matthew Foley	NH Society of Certified Public Accountants
Keen Wong	NH Dept. of Revenue Administration

Commission Charge and Study Purpose:

RSA 77-A:23-b Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax.

III. The commission shall study the advantages and disadvantages for the state’s economy and revenues of replacement of the current water’s edge method by the worldwide combined reporting method for reporting and apportionment of income under the business profits tax. It shall consult with national experts in both methods, including economists, business associations, and tax experts.

Process and Procedures:

Though HB 102, codified as RSA 77-A:23-b, became effective April 11, 2022, the commission got off to a slow and bumpy start. Following delays in appointments, and despite four authorized seats remaining vacant, the commission held an organizational meeting October 11, 2022 at which Representative Patrick Abrami was elected chair. Members reviewed their charge, heard an overview of the issue from Representative Schamberg, discussed potential experts to invite, and agreed to meet again on November 10th. Representative Abrami filed an interim report on October 26, 2022. By November 10, 2022, the election resulted in vacating two legislator seats and Representative Spilsbury was selected successor chair. In a light meeting, only one expert testified, after which the commission went into limbo pending a new legislative term.

Though new House appointments were made in late January 2023, a busy legislative calendar and much later appointment of the Senate’s designee, together with the summer recess, meant that the commission did not reconvene for a new organizational meeting until August 15, 2023, at which time Representative Spilsbury was elected chair. After BEA’s seat became vacant

without a successor appointment, the commission has proceeded to meet in earnest 5 times in September and October 2023, with the benefit of a quorum of 7 active members, to address the merits. The minutes of each meeting are attached.

Testimony and Record:

In this short period, the commission has assembled a substantial record, both oral and written, of history and commentary on the advantages and disadvantages of the worldwide combined reporting method (hereafter WWCR) for business taxes. All testimony and submissions presented to the commission are accessible on the General Court's website. The substantive deliberation meetings held in September and October were recorded and can be viewed in full on the General Court's you-tube channel. A comprehensive bibliography of resources gathered by the commission is attached to this report.

On September 25th, the commission's full day agenda began with a panel of three in-state advocates for this method, followed by a broad cross-section of six additional experts in the field from around the country, either in person or via video link, and concluded with two key representatives of NH DRA.

From Thomas Oppel, representing the Coalition for a Prosperous America, we heard that New Hampshire businesses may be disadvantaged under New Hampshire's current water's edge limitation on the unitary tax filing scheme relative to "foreign companies". He observes that: "Multinationals have the capacity, the global operations and the financial incentives to use accounting techniques, paper transactions and other tactics to shift profits to lower tax jurisdictions overseas" in a manner not available to purely domestic firms. He further contends that: "These techniques are legal, but they are anti-competitive and create a two-tier tax system that disadvantages home grown businesses whose activities are limited to New Hampshire and America." He believes that: "As a result, these companies pay more than their fair share to support state operations funded by business taxes" and that the New Hampshire state government may be missing out on "potentially" \$177 million in lost business profits taxes annually (citing a 2019 study by the Institute on Taxation and Economic Policy, "ITEP"). He concludes that WWCR is necessary to eliminate longstanding "significant competitive disadvantages" suffered by New Hampshire based businesses that employ "the vast majority of workers" that "are critical contributors to the economic health and quality of life in our state."

Mr. Oppel was accompanied by Dan Collins, Founder and owner of Dan Collins Painting Specialist and Selectman, Cannan ("a self-employed residential painting contractor based in the Upper Valley area.") He urged adoption of WWCR because he has "never been afforded the opportunity to shift my profits elsewhere to reduce my tax bill", which he believes puts him "at an economic disadvantage with foreign companies and multi-nationals that can take advantage of those kinds of accounting techniques." Mr. Collins, thus, argues that WWCR would create a "level playing field" and result in more state revenue accruing to municipalities such as his.

We then heard from the third member of our opening panel, Peter Garre, formerly a business profits tax auditor with the DRA. He recounted that his career as a DRA auditor began before

NH adopted the unitary combined method in 1981, at a time when “audits were conducted on separate accounting/separate entity tax returns.” He explained:

“The purpose of the unitary combined method was to counteract the profit shifting that occurs between corporate members of a group of corporations controlled by a parent corporation. Inter-company transactions occur at prices determined by internal corporate accounting departments and international accounting firms – referred to as transfer pricing.”

Mr. Garre provided extensive history of this topic both on the national scene and in New Hampshire, including his assessments of various cases, notably the 1983 *Container Corp. vs. California* case in which the U.S. Supreme Court ruled WWCR constitutional as applied to U.S. based multi-nationals. While acknowledging that the Supreme Court did not address the question of constitutionality of that scheme if applied to foreign-based multi-nationals, Mr. Garre conceded that even after enactment of WWCR in New Hampshire, it was never applied to foreign based corporations by New Hampshire:

“After New Hampshire adopted the unitary business principle in 1981, it was the policy of Lloyd Price, DRA Commissioner, that we would not employ unitary combined reporting if the subsidiary was owned by a foreign parent. As a result of this policy, foreign owned corporation[s] were allowed to continue to file separate accounting/separate entity Business Profits Tax returns.”

Indicating that he “thought that this policy was wrong”, Mr. Garre commented that: “Treating US subsidiaries owned by foreign parents one way on a separate entity basis and US subsidiaries owned by US parents another way on a worldwide basis was and is not equity for. [Sic] It does not ring true.” He noted that by the time the U.S. Supreme Court found in its 1994 *Barclay’s Bank* decision that WWCR is constitutional as applied to a foreign parent multi-national company, New Hampshire had already changed its statutes to employ the water’s edge method and “did not repeal the water’s edge method and return to the worldwide method.” He recounts that, after leaving DRA in 1997, he filed an amicus brief in the 1999 *Caterpillar vs. NH DRA* lawsuit, urging reinstatement of the WWCR method and highlights dictum from the New Hampshire Supreme Court’s decision: “We point out that the water’s edge method was adopted for the benefit of foreign businesses.” While expressing the opinion that the 1986 change by New Hampshire to the water’s edge method was a mistake, and lamenting the failure to change back to WWCR after the *Barclay’s Bank* decision, Mr. Garre goes on to assert that the ongoing use of the water’s edge method is itself unconstitutional as a violation of equal protection under the 14th Amendment of the U.S. Constitution, as it is “a bad law that discriminates”. To end this perceived discriminatory situation, he calls for either returning to the separate accounting method that was in place prior to 1981 (which he deems a bad idea) or adoption of WWCR (which he advocates), noting that he remains hopeful that a case will eventually be brought challenging the water’s edge method on either or both equal protection or commerce clause grounds.

Taken together, Messrs. Oppel, Collins, and Garre presented the commission a New Hampshire centric set of opinions in favor of removing the water’s edge limitation and moving to WWCR. It should be added that a year ago, at our November 10, 2022 hearing, we had a video link presentation from David Morse, Tax Policy Director, for the Coalition for a Prosperous America (the same organization that Mr. Oppel represents) that he entitled “Consequences of continued use of the Water’s Edge election,” which gave us a more granular and technical set of illustrations as to how transfer pricing methods might be used as a “profit shifting technique”. His presentation described a variety of other approaches to addressing this issue, including “tax

haven blacklists” or “digital advertising taxes”, as well as an Organization for Economic Cooperation and Development (OECD) “limited apportionment solution.” Mr. Morse’s presentation is also part of the commission’s record.

This was followed by a variety of out-of-state perspectives, from business advocates, tax practitioners, and academic experts, both in favor and against, that when reviewed in full placed before the commission a full range of positions, both those fortifying and those undermining the viewpoints recited above.

As had been anticipated in the commission’s interim report of a year ago, we were anxious to hear from a neutral expert who could help lay out the history of this complex issue as approached beyond New Hampshire, whether by other states, the federal government, or the courts, as well as internationally. The presentation by Walter Hellerstein, Distinguished Research Professor and Francis Shackelford Professor of Taxation Emeritus, University of Georgia School of Law, with in person testimony, a slide set and written presentation, did just that. Professor Hellerstein began by characterizing the issue before us as follows: “One of the most contentious issues in the state tax field from the mid-1970’s through the mid-1990’s was the constitutionality of worldwide combined reporting.” He laid out the ironic evolution of WWCR. After a wave of states adopted WWCR in the 1970’s and early 1980’s (ultimately 12, including New Hampshire in 1981), the U.S. Supreme Court ruled its application by a state to U.S. based multi-nationals constitutional in the 1983 *Container Corp. vs. California* case (but refrained from opining on its application to foreign-based multi-nationals), following which these states all repealed WWCR, years before the U.S. Supreme Court had a chance to revisit the matter in the 1994 *Barclay’s Bank* case and deem it constitutional also as applied to foreign-based companies. These two cases determined that neither the federal commerce clause (either as applied to interstate or foreign commerce) nor principles of preemption (either direct by congressional act or implied by virtue of contradicting important federal policy, such as speaking internationally with one voice) prevent a state from implementing WWCR. Yet no state has decided to continue doing so (with the one exception of Alaska as applied solely to oil and gas profits). As these legal arguments are intricate, one wishing to understand them better would do well to read Professor Hellerstein’s presentation and perhaps read both the *Container* and *Barclay’s* decisions. He recounts that pressure from the international community, particularly European and Japanese trading partners, along with the policies of the Reagan administration as enunciated particularly in the 1984 report of the Worldwide Unitary Taxation Working Group, chaired by the Secretary of Treasury, put significant pressure upon the states to resist adopting or retaining the WWCR scheme, with the threat of preemptive legislation from Congress to require separate accounting in conformity with the federal taxation methods. This campaign was evidently successful and no doubt heavily influenced New Hampshire’s 1986 legislative changes to adopt the water’s edge limitation. As Professor Hellerstein concludes:

“As suggested above, the states’ headlong rush to discard or restrict worldwide combined reporting did not grow out of the states’ philosophical conversion from formulary apportionment to separate accounting as the appropriate methodology of taxing a worldwide multicorporate unitary enterprise. Rather, the states yielded to economic and political pressures and the threats of multinationals, particularly foreign-based enterprises, that they would not locate new plants in states that applied the unitary method to the apportionment of their incomes, and the political threat of federal legislation that would restrict the use of worldwide apportionment to the states.”

Thus, Professor Hellerstein emphasized that arm's length separate accounting is still today the norm internationally and the method in continuous use by the IRS since the early 1930's at least, and amongst those states that still utilize combined reporting all either mandate a water's edge limitation or allow an option, but none mandate the worldwide form of combined reporting. So, even before the U.S. Supreme Court allowed WWCR, the states had abandoned it for other reasons. Intriguingly, Professor Hellerstein drew the commission's attention to a thorough review and study by the state of Indiana in 2017, which concluded that although adoption of WWCR might conceptually produce a short-term increase in revenue, companies would adapt and the long-term prospects were likely to be a net-zero, prompting Indiana's decision not to implement the proposal before them. Professor Hellerstein seemed to signal that similar study in New Hampshire or other states would be likely to reach a similar conclusion.

In support of WWCR, the commission heard two distinct perspectives, one from a tax practitioner, Dan Bucks, former Director, Montana Department of Revenue and now a consultant, and one from an academic, Darien Shanske, Marting Luther King Jr. Professor of Law, UC Davis School of Law.

Mr. Bucks indicated that in his experience multi-nationals do utilize transfer pricing techniques aggressively with a purpose of tax mitigation and that it is possible to monitor, audit and enforce unitary filing on an international basis.

Mr. Shanske opined that, although "NH raises a higher percentage of its budget from the BPT than any other state", he believes that "NH's BPT is already the best designed corporate income tax in the country because it does not just tax corporations, but all large business entities." He "consider[s] NH's BET a national model" and understands that "the level and distribution of NH's property tax is currently controversial." He describes by illustration how transfer pricing could be abused to shift profits to a low-tax jurisdiction and cites a 2022 study estimating that as much as \$300 billion of multi-national corporate profits are shifted away from the United States annually, with a putative federal tax loss of about \$60 billion; from this, he extrapolates that New Hampshire might be due to collect as much as \$140 million in additional BPT (parenthetically mentioning the ITEP projection of \$177 million) but follows with a crucial caveat: "WARNING: These estimates are inherently uncertain..." He believes it is a basic tenet of tax policy to have as broad a base as possible and suggests that just because no other state is using WWCR is inadequate reason for not defending the state's interests. Given adoption of single sales factor, he observes that: "The BPT is not triggered by physical presence in the state but by significant economic activity directed to the state." He therefore dismisses suggestions that foreign-based taxpayers might choose to leave New Hampshire, concluding: "Thus, short of refusing to make profitable sales in the state, there is no real economic action that a taxpayer can take to avoid the BPT." Professor Shanske does not dismiss arguments that WWCR "is a huge compliance burden", but he does argue that they are overblown and not insurmountable (e.g., authorizing use of "reasonable approximations" or allowing an election) and he suggests that "given the fact that there is some fixed compliance cost – it would not be unreasonable to limit WWCR to taxpayers already subject to the CAMT" (i.e., federal Corporate Alternative Minimum Tax). Acknowledging that "much of the rest of the world is at least as agitated about income shifting, he identifies a number of international initiatives (e.g., Base Erosion and Profit Shifting, "BEPS", and a pair of OECD initiatives, which will not be discussed here) that could serve as alternatives to WWCR while sharing certain attributes and purposes. Professor Shanske closed

by again expressing his respect for New Hampshire's go it alone tax policy structure ("With great success!"), insisting that "no other state would benefit more from making the right call on WWCR", even going so far as to suggest that adoption of WWCR might "cut some less efficient tax – even the rate on the BPT – and come out ahead."

All of these arguments in favor were met with vigorous opposition from several other presenters.

We heard strong opposition to WWCR from both Meredith Beeson and Alan Pasetsky of the Global Business Alliance, which "proudly represents nearly 200 American companies with a global heritage" (a list of these members was provided and is part of the commission's record). Of HB 121, they have asserted to the House Ways & Means Committee that "repeal of the water's edge provisions as proposed would not only misalign New Hampshire with all other state approaches but also be inconsistent with federal income tax and international norms." They provided a diagrammatic fact sheet presenting an array of statistics to illustrate the importance of foreign direct investment in strengthening America's economy and that of New Hampshire. For example, they state that international investment contributes to New Hampshire's economy disproportionately more than to surrounding states (i.e., 8.4% in NH, 7% in MA, 6.7% in ME, and 5.7% in VT) suggesting greater reliance in New Hampshire and correspondingly greater benefit to New Hampshire. They claim that growth in employment within New Hampshire from 2014 to 2019 based upon foreign direct investment rose at a rate of 14%, in contrast to the state's overall private sector employment growth of 7%. And they estimate that "49,800 workers in New Hampshire are employed as a result of international investment" and more particularly that foreign direct investment results in 22,100 manufacturing jobs in New Hampshire or 44% of the total generated by international investment. They further claim that: "Nationally, these international companies pay American workers an average compensation of \$84,800 annually in wages and benefits." Obviously, the point is to emphasize the strategic advantage to a state like New Hampshire of adopting business and tax policies that attract this sort of business to locate and conduct business here. In that context, their primary objections to the WWCR method were stated as follows (presented in bullet format):

- "Any state that would pursue worldwide combined reporting without a true water's edge option would be an outlier in the income taxation of multinationals, potentially creating a double taxation of income and inviting retaliation from foreign countries."
- "Every state with combined reporting respects the water's edge boundary."
- "Without a true water's edge boundary, a myriad of challenges is created for taxpayers and state tax administrators, including managing cross-border currency conversions, different accounting standards and reporting requirements, and language barriers."
- "Using the water's edge boundary, state administration of combined reporting is simpler and more efficient, making company compliance easier."
- "Any form of combined reporting may result in increases or decreases in a state's revenue, given that it may increase or reduce a taxpayer's liability, but this is especially true with worldwide combined reporting. There will also be significant audit activity and prolonged litigation exposure."

We also heard from Karl Frieden, Vice President and General Counsel, Council on State Taxation ("COST") that, while 26 states currently require combined reporting, all of them provide for the water's edge limitation (by default or election) and none requires mandatory

WWCR. He provided an informative graphic captioned “New Hampshire (and Vermont) Tax More Foreign Source Income Than Any Other State”, which indicates that no other state goes as far as to tax 50% of GILTI (i.e., Global Intangible Low-Taxed Income) and 100% of foreign dividends (i.e., dividends paid from a foreign source to a U.S. recipient, including corporate affiliate dividend transfers). He pointed out that both “GILTI and foreign dividends information may be taken from the federal return information”, so they are consistent with the primary advantage of a water’s edge combined return, specifically that the “starting point for corporate income tax is federal taxable income.” He argues that the administrative burden of complying with the state tax return is reasonable as state adjustments are then made from that point of departure; for example, state depreciation adjustments start with federal depreciation, “all data points are in U.S. dollars”, and “federal tax data may be used to compute gains and losses from the sale of assets.” In a list of serious administrative burdens that would be triggered by WWCR, the problems begin with the fact that none of the foreign entities that would be drawn into the composition of the unitary group of related companies, though they did no business with a nexus to New Hampshire, would have started with a computation of U.S. federal taxable income. Getting there may involve reasonable approximations, but includes sorting out a “mismatch of income”, “use of IFRS vs. GAAP”, and adjustments to previously taxed foreign income. Further, adjustments involving depreciation methods, net operating losses, flow through entities, and other state versus global income differences would be problematic. Currency exchange rates (which fluctuate constantly) and gain/loss computational issues would further complicate matters. Not surprisingly, all these burdens on the tax filer are mirrored in the challenges facing the tax jurisdiction’s auditors. Effectively, in an extensive list of challenges for the auditor, Mr. Frieden suggests that the talents and understanding required, the diligence required, the length of time required to complete would be daunting as the auditor would be required to understand the foreign tax structures, foreign governance rules, foreign financial accounting rules, and much more, perhaps even foreign languages. In concluding his presentation with “Policy Issues”, Mr. Frieden observed:

“Worldwide combined reporting is, by definition, complex, requiring extensive fact-finding to determine the composition of the global “unitary group” and to calculate foreign income and apportionment factors. This complexity results in unnecessary and significant compliance costs for both taxpayers and the State.”

He noted that, more than being “out of step with all other states”, there are a host of mitigating developments that adopting WWCR would be ignoring. For instance, the 2017 Tax Cuts and Jobs Act (TCJA) “includes more limited taxation of foreign source income principally through the inclusion in the corporate tax base of 50% of GILTI” and, as he previously observed, New Hampshire already does also. He also pointed to the OECD Pillar 1 and 2 proposals (that Professor Shanske had cited) as an effort on the international scene to “steer clear of any consideration of mandatory worldwide combined filing.” So, once again, emphasis was placed onto on-going international developments to address the issue of profit shifting into a context of more universal agreement and international consistency. Finally, Mr. Frieden, noting again that New Hampshire leans more on business tax revenues than any other state, and already taxes foreign source income more heavily than other states, explained:

“New Hampshire already taxes most of the foreign income of U.S. multinationals doing business in New Hampshire – on a current or deferred basis. Estimates by groups such as ITEP of potential revenue gains from adopting WWCR are highly inaccurate because of failure to take into consideration recent federal and international tax reforms and the extent foreign source income is currently taxed by the state.”

Mr. Frieden concluded by stating that, if anything, New Hampshire over-utilizes business tax and may be at risk of pushing too far.

Our final presenters were Keen Meng Wong, DRA Tax Policy Counsel, who is also a member of this commission, together with Fred Coolbroth, Jr., DRA's Director of the Audit Division, both of whom the commission asked to focus specifically on the practical aspects of implementing, monitoring, auditing, and enforcing a WWCR scheme if adopted. Both DRA representatives made it clear that the Department is neutral on the tax policy questions implicated by a WWCR proposal and remains prepared to step up and get the job done as required if WWCR is adopted. But, they explained, that does not diminish the challenges of doing so. Mr. Coolbroth essentially described that the nature and steps of a business tax audit would not change, but that the department would face the hurdle of "more of everything". This might well include more filings, more paper, maybe more filers, additional travel expense, and international field work. Challenges in the audit might include access to service documents, foreign language expertise, understanding accounting differences, translating currency conversion rates, and much more. He anticipates that DRA would need a significant head-count increase. The audit division now has 14 employees plus 1 manager, but faces a difficult recruiting environment (these positions are non-union). He would need to focus on enhancing competencies, and recruiting would confront the further challenge of finding individuals with the necessary background. He speculated that they might have to resort to out-contracting services. In response to questions from commission members, Mr. Wong submitted a supplemental memo via email on October 2nd, which is part of the commission's record, outlining in more detail what the audit process would look like step by step (same for both types of filing) and elaborated on the various aspects of the "more of everything" that they anticipate. Mr. Wong also addressed questions whether DRA had made estimates at the time that New Hampshire transitioned from WWCR to water's edge in 1986, advising that no estimates were made and as a practical matter none would have been possible given the data then available. He also provided a year-by-year chart of business tax receipts to the state by fiscal year from 1980 through 1991, though upon review members seemed to find no discernible pattern and could draw no useful conclusions other than that total business tax receipts rose sharply after 1986 but then vacillated probably reflecting the national economy (for example, a recession in 1991).

Findings:

The commission was tasked with studying the advantages and disadvantages for the state's economy and revenues that might accompany replacement of the current water's edge method by the worldwide combined reporting method for reporting and apportionment of income under the business profits tax. These neutral findings document the generally accepted considerations as understood by the commission, the mitigating factors to the key tax issues (involving transfer pricing practices of multinational businesses) identified by the commission, and the principal positions for and against the proposal.

A. Generally accepted considerations:

Through the process, the committee members came to understand and agree upon the following.

1. While New Hampshire adopted unitary combined reporting for businesses under its Business Profits Tax in 1981, it never enforced that law in respect to foreign based multinationals or foreign affiliates, and the motivations driving adoption in 1986 of the water's edge limitation were to eliminate pressing problems with the 1981 law, including discriminatory treatment and the risk of provoking federal preemption.

Both in testimony to the Commission and in member discussions, it has been asserted that adoption of the WWCR scheme would represent a return to the status quo ante of New Hampshire law from 1981 to 1986 and that there is thus a precedent for this approach in this state. The commission finds this to be incorrect as a matter of fact. Despite the statute adopted in 1981 of unitary combined reporting, a variety of factors including constitutional doubts, pending litigation, pressure from the federal government, and second thoughts, resulted in an overt and well publicized policy on the part of the New Hampshire DRA not to enforce the law as to foreign affiliates. In a letter from DRA Commissioner Lloyd M. Price, dated November 30, 1983, addressed to the federal Worldwide Unitary Taxation Working Group and Task Force, Mr. Price concluded with the following statement: "New Hampshire takes the position that since the United States Supreme Court has not yet ruled on the constitutionality of subjecting a foreign-based multinational corporation doing business in the United States to world-wide combined reporting, it will not require nor accept a petition to file a combined report from a foreign-based multinational corporation." Subsequently, when testifying before the House Ways and Means Committee on February 20, 1986, in favor of the bill that would change New Hampshire to the water's edge limitation, Price (by then ex-commissioner of DRA) stated that his administration: "right or wrong or indifferent, never did go totally worldwide. We never did tax foreign dividends from foreign parents, I mean. We never taxed foreign parents, okay?" He testified further that the DRA never once accepted a unitary tax filing from any foreign based multinational. New Hampshire's then Governor, John Sununu felt so strongly about this legislation that he appeared personally before the House Ways and Means Committee on March 5, 1986 to urge adoption of the water's edge method, noting that "the purpose of this act is to promote uniformity, compatibility and accountability in the attribution of net income of multinational business organizations for state tax purposes." He was particularly keen to avoid provoking the U.S. Congress, noting at the Senate committee's hearing on May 8, 1986, that "[we] do not want Federal preemption of the basic components of the Business Profits Tax in the State of New Hampshire." The legislative history suggests a resounding consensus that the water's edge limitation bill was needed to solve the problems then facing WWCR and it was enacted soon thereafter. Thus, effectively, New Hampshire had never implemented WWCR at the time that it was repealed.

2. Moving to worldwide combined reporting would not be constitutionally barred.

Several constitutional issues that have emerged over the past 50 years against WWCR have been alluded to in the synopsis of testimony above, but a brief summary seems warranted.

The U.S. Supreme Court has decided that an assortment of arguments under the commerce clause of the U.S. Constitution would not be a barrier to a state's use of WWCR, either as applied to U.S. based multinationals (Container case) or foreign-based multinationals (Barclays Bank case). Writing for the majority in the Container case, Justice Brennan noted colorfully:

“Allocating income among various taxing jurisdictions bears some resemblance, as we have emphasized throughout this opinion, to slicing a shadow. In the absence of a central coordinating authority, absolute consistency, even among taxing authorities whose basic approach to the task is quite similar, may just be too much to ask.” (463 U.S. 192)

The Court’s opinions dealt with the “foreign commerce clause” jurisprudence, the “inter-state commerce clause” jurisprudence, and the so-called negative commerce clause arguments rooted in principles of implied federal preemption. Arguments of preemption in the context of ensuring that the United States federal government be allowed to “speak with one voice” in matters of international relations were also dismissed. The Court further noted that the U.S. Congress has never enacted legislation that would have expressly preempted the states from adopting WWCR.

The New Hampshire Supreme Court’s decision in the 1999 Caterpillar case found that the NH DRA’s differential treatment of foreign affiliates from U.S. taxable entities under the water’s edge method was not unconstitutional discrimination under the federal commerce clause, stating:

“In sum, we reject the plaintiffs' argument that New Hampshire's apportionment formula unconstitutionally discriminates between foreign and domestic subsidiaries in a unitary business. The nature of the water's edge formula requires that foreign subsidiaries be treated differently from domestic subsidiaries: most significantly, the latter's income is subject to taxation while the former's income is not. The plaintiffs do not allege that this differential treatment is unconstitutional, yet they seek to avoid the incidental effects that flow from it. They fail, however, to meet their burden in proving discrimination.

Although New Hampshire's unitary apportionment formula may not apportion income perfectly, the Federal Constitution does not require "mathematical exactitude," only a "rough approximation." (144 NH 261-262)

Dictum in the Court’s decision that the water’s edge method was “adopted for the benefit of foreign businesses” has been presented for the proposition that the water’s edge method favors foreign affiliates, but actually the record shows that the move to the water’s edge was motivated to alleviate discriminatory treatment of U.S. based multinationals and that the water’s edge limitation benefits both U.S. based and foreign based multinationals equally. In either case, the New Hampshire Supreme Court was unwilling to find a constitutional problem in any differential treatment that the statute might involve.

The only other constitutional argument that emerged in our review was the suggestion that New Hampshire’s use of the water’s edge limitation might run afoul of the 14th Amendment’s equal protection clause, but that seems far-fetched. Indeed, this not raised as a problem with WWCR as the view was that WWCR is neutral as between U.S.-based and foreign-based corporations. We would note, though, that the predicament in New Hampshire between 1981 and 1986, when a WWCR scheme was in the statutes but not being enforced as to foreign-based multi-nationals, may indeed have presented equal protection and other constitutional issues, but that predicament was very much part of what motivated the 1986 legislation to adopt the water’s edge limitation. In other words, adoption of the water’s edge limitation specifically served to ensure that the law applied equally to both domestic based and foreign-based multi-nationals and we agree that our current law does not seem inherently discriminatory. We conclude that there is no evident federal constitutional issue that would prevent adoption of WWCR nor is there any that would force New Hampshire to do so.

3. Transfer pricing exists.

Transfer pricing occurs in multinational businesses both large and small, and is a mechanism for determining arm's length pricing in related-party transactions. Related parties include not only parties within the same legal entity group, but also parties which have a link of direct or indirect control, including control over the board of directors.

It must be emphasized that transfer pricing is not inherently bad. In fact, it is actually necessary and even mandatory. It is common in distributing the economic burdens for shared economic benefits across a range of affiliated entities of a variety of expenses or investments incurred for research and development, intellectual property, shared brand development and marketing, and a broad range of other expenditures, particularly intangibles. These are the same sort of benefits procured at a cost from non-affiliated or arm's length suppliers of goods and services. A clear analogy can be found in the normal practices of franchise operations in which the franchisee contractually commits to share in a variety of expenses and investments made by the franchisor.

Transactions between related parties should observe the arm's length principle. As such, prices charged in related party transactions should not differ from prices charged in third party transactions under comparable circumstances (i.e., market value).

The U.S. transfer pricing regulations under Internal Revenue Code section 482 seek to ensure that appropriate amounts of income of a multinational enterprise are subject to U.S. taxation. A majority of foreign taxing authorities maintain their own guidelines related to transfer pricing and / or conform to the transfer pricing standards put forth by the Organization for Economic Cooperation and Development ("OECD"). Collectively, these regulations aim to prevent the shifting of profits to lower tax jurisdictions and avoid international double taxation.

4. Transfer pricing may create an unlevel playing field.

Even with the multitude of rules and regulations and continued focus of taxing authorities worldwide on the transfer pricing policies of multinational businesses, there is a perceived shifting of profits via abusive transfer pricing schemes out of the United States tax base and into low-taxed foreign jurisdictions. It is unknown, and likely unknowable, what levels and amounts of abusive transfer pricing and profit shifting exists. However, taxing authorities are proactively responding to these challenges. For example, the OECD has led the Base Erosion and Profit Shifting ("BEPS") project since 2013 that aims to close gaps in international taxation for multinational business that allegedly avoid taxation or reduce tax burden by engaging in abusive transfer pricing schemes.

As a result, transfer pricing may create an uneven playing field / inequity between wholly domestic and multinational businesses. It does not seem apparent, however, that it creates any differentiation between U.S. based multinationals versus foreign based multinationals. With that being said, the state's taxation of foreign dividends along with inclusion of deemed dividends under certain anti-deferral provisions appears to address, to an unknown degree, the perceived issue of abusive transfer pricing for multinational businesses with investments in foreign subsidiaries.

5. New Hampshire currently taxes foreign income generated by businesses subject to the Business Profits Tax.

New Hampshire currently taxes the foreign income earned by business subject to the Business Profits Tax by two means:

- a. When foreign dividends are received.
- b. When deemed foreign dividends are recognized under certain anti-deferral provisions of the Internal Revenue Code, such as (i) the “subpart F” rules of Internal Revenue Code section 951 and (ii) the Global Intangible Low-Taxed Income (“GILTI”) rules under Internal Revenue Code section 951A.

While the foreign income is included in the New Hampshire tax base for business profits tax purposes, taxpayers may be allowed certain modifications that reduce the total amount of tax paid on the foreign income. For example, the denominator in the apportionment methodology applied to foreign dividends from unitary sources includes the payor’s foreign sales, which results in a reduced apportionment factor applied against the foreign dividend income in determining the includible amount for purposes of the business profits tax.

6. The revenue impact of changing to the worldwide combined reporting method is unknown and probably unknowable.

Computation of the revenue impact of the change to the worldwide reporting method is complex and includes a comparison of the tax generated by the state’s current method of taxation of foreign income to the tax to be generated under the proposed worldwide reporting method.

However, the revenue impact of this change is not currently determinable due to the following:

- a. The New Hampshire Department of Revenue Administration is not currently able to determine the amount of tax generated by the state’s current method of taxing foreign income.
- b. It is unknown the amount of foreign income / losses that would be included in the expanded tax base under the worldwide combined reporting method.
- c. It is unknown the dilutive impact on the apportionment factor for business profits tax purposes, as foreign sales would now be included in the denominator of the sales factor for all multinational businesses.

7. At least four other states in the past half dozen years or so have evaluated proposals to adopt WWCR and have rejected those proposals.

Indiana decided in 2017, issuing a lengthy study, to forego WWCR, with the observation (as noted by Professor Hellerstein) that, though it might increase tax revenues in the short term, those gains were almost certain to be fleeting and result in no net gain over the longer term. A recent Minnesota House bill that would have adopted WWCR passed the House but died in the Senate (without hearing or discussion in Senate committees), removed during negotiations of an

omnibus tax bill. Maine studied implementation of WWCR as an option, issuing a brief 7-page report this summer, explaining that there is no advantage to the state of offering such an option as the taxpayer would inevitably elect whichever alternative method resulted in lower tax liability. And Rhode Island, which remains a separate filing jurisdiction, recently contemplated whether to adopt unitary filing with formulary apportionment, with little discussion of the merits of mandatory worldwide reporting, and issued a lengthy report explaining its decision to leave its current regime unchanged. In short, there has been no movement towards WWCR in the 40 or so years since the U.S. Supreme Court’s Container decision and there is no momentum on the part of any state in that direction today.

8. The Commission has heard of no workable methodology for effectively estimating the potential state tax revenue to be gained from WWCR and has concluded that any estimates of which we are aware represent broad conjecture without a sound factual foundation.

As cited several times in testimony and submissions, the Institute on Taxation and Economic Policy (“ITEP”) published an article in January 2019, entitled “A Simple Fix for a \$17 Billion Loophole”, which asserts that the foregone tax revenues resulting from “profit shifting” techniques might be about \$177 million annually for the state of New Hampshire. Conversely, the Tax Foundation has published a series of articles opposing WWCR, in which it has rebutted the methodologies employed by ITEP. For example, on May 23, 2023, they published an article entitled, “The Faulty Revenue Estimate Behind Minnesota’s Consideration of Worldwide Combined Reporting”, in which they dissect and rebut the ITEP approach step-by-step. On September 20, 2023, specifically noting the proposal being considered in New Hampshire by this Commission, Tax Foundation published an article on the subject entitled, “Leave Worldwide Combined Reporting in the ‘80s, Where It Belongs.” We will avoid further characterizing the arguments made in these articles, leaving them to be read and understood on their own merits, but suffice to say that there is no consensus on how a state might even rationally approach an effort to estimate the impact on potential tax revenues of implementing WWCR.

B. Potential mitigating factors:

Between recent federal tax law changes and the advancements of the efforts of the OECD BEPS project, there are a multitude of factors that help to mitigate and / or remove the benefits received by multinational businesses engaging in abusive transfer pricing schemes.

For example, the Tax Cuts and Jobs Act of 2017 (“TCJA”) introduced several mitigating measures, such as:

1. Reduction of federal tax rate for C-Corporations from 35% to 21%.

TCJA reforms lowered the corporate federal tax rate from 35 percent in 2017, then amongst the highest in the OECD, to 21 percent as of 2023, in line with the average of OECD participants. This reduction in corporate tax rate reduces the benefit recognized by multinational business in shifting profits offshore. The commission presumes that this has acted as a material disincentive.

2. Introduction of GILTI provisions to discourage profit shifting.

GILTI is a minimum tax targeted at earnings generated by foreign subsidiaries that is intended to approximate the income from intangible assets (such as patents, trademarks, and copyrights) held outside of the United States. Specified U.S. shareholders of certain defined foreign businesses must include GILTI in their gross income annually. GILTI is calculated as the total active income earned by certain defined foreign businesses that exceeds 10 percent of the foreign businesses' depreciable tangible property.

A corporation (but not other businesses) can generally deduct 50 percent of the GILTI and claim a foreign tax credit for 80 percent of foreign taxes paid or accrued on GILTI. Thus, if the foreign tax rate is zero, the effective US tax rate on GILTI will be 10.5 percent (half of the regular 21 percent corporate rate because of the 50 percent deduction). If the foreign tax rate is 13.125 percent or higher, there will be no US tax after the 80 percent credit for foreign taxes.

The GILTI provisions ensure that a minimum level of tax is paid on the earnings generated by foreign subsidiaries, reducing the benefit recognized by multinational business in shifting profits offshore. As noted above, GILTI is currently included in the tax base for purposes of the business profits tax. This is certainly a further disincentive.

C. Items in support and against the adoption of worldwide combined reporting:

The commission identified the following positions for and against the proposal.

For the proposal:

The primary position in support of adoption of the proposed legislation centered on the theory that worldwide combined reporting would ensure that all businesses with a New Hampshire tax presence would be on a level playing field, eliminating any perceived advantage received by multinational businesses due to their transfer pricing practices with foreign related parties.

Against the proposal:

1. The state's removal of the worldwide combined method in 1986, and institution of the water's edge limitation on unitary businesses was intended to ensure that businesses with a New Hampshire tax presence were treated equally.
2. Adoption of WWCR would make New Hampshire an outlier, as no other state has adopted mandatory worldwide combined reporting (excepting Alaska, which applies WWCR only for oil and gas producers) and the U.S. federal tax system has always employed arm's length separate accounting, in keeping with prevailing practice internationally.
3. Adoption may risk potential decrease in foreign direct investment in the New Hampshire business community.
4. Adoption would inevitably result in a notable increase in administrative and compliance burdens on businesses, tax practitioners, and New Hampshire Department of Revenue. A shift to the worldwide combined reporting method would introduce many challenges to businesses, tax practitioners, and state auditors to ensure compliance with the new rules. The challenges include:

- a. Determination of the composition of the worldwide combined group
 - b. Computation and presentation of taxable results of non-U.S. businesses that do not currently prepare a U.S. tax return nor foreign informational filing(s), such as:
 - i. Differing tax periods
 - ii. Currency translation issues
 - iii. Discrepancy in accounting standards (e.g., US GAAP vs. IFRS)
 - c. Location of supporting records and availability of personnel.
5. It is unknown, and almost certainly unknowable, whether moving to worldwide combined reporting would result in a net revenue benefit or detriment to the state.

Analysis:

The proponents of WWCR have made a theoretical case. No concrete or quantifiable, or even anecdotal, evidence has been presented that would suggest the extent of what might be regarded as “abusive” transfer pricing practices, let alone their impact on New Hampshire’s tax revenues.

The arguments for and against the unitary business filing requirements coupled with formulary apportionment, which has been New Hampshire law since 1981, as well as the arguments for and against its application worldwide, versus being subjected to the water’s edge limitation, have not changed in the past half century, despite being continuously contentious. Though the WWCR proponents of which the commission is aware seem to prefer unitary business filing with formulary apportionment over the separate filing method with arm’s length regulation, they insist that it is discriminatory when limited to the water’s edge. There is irony in that New Hampshire’s adoption in 1986 of the water’s edge limitation was intended to eliminate discrimination then occurring between U.S. based multinationals and foreign based multinationals. The commission is unable to conclude that the differential treatment that may occur under New Hampshire’s current law is either unreasonably discriminatory, or material, to the well-being of purely domestic companies or to New Hampshire’s tax revenue or New Hampshire’s economic strength.

This is not to deny the opportunity for or existence of abusive strategies designed to shift profits to lower tax jurisdictions, but to state clearly the lack of compelling evidence of material harm. Indeed, the best analyses that we have been presented tend to demonstrate that a change to WWCR will result in winners and losers amongst multinational businesses, businesses that are winners some years and losers other years, and no way to know whether their fate will work to the benefit or to the detriment of the state’s revenues or its domestic businesses.

Beyond all the speculation lies our findings, which we believe support a view that the arguments against the proposal greatly outweigh the arguments that have been made in favor of WWCR. At the outset, it becomes obvious after study that WWCR is a grossly overbroad remedy for concerns that transfer pricing is misused for tax advantage, as it sweeps all foreign profits into

the base, regardless of whether any transfer pricing has been used, or its extent, or its alleged misuse. It thus applies tax to foreign business activity. Given New Hampshire's taxation of foreign dividends and GILTI, which do capture a measure of foreign-earned income, and given the various mitigation steps that have been adopted in recent years, we are convinced that any incentives to engage in "abusive" "profit shifting" have been reduced significantly. We are also persuaded that opportunity to make further material progress in the quest to fully eliminate those incentives must rest primarily upon the federal government, which has ongoing international and diplomatic initiatives in play. The point of departure for preparing a New Hampshire Business Profits Tax return is, after all, the federal return. Without further changes in federal business tax policy to lay the foundation for individual states to follow, New Hampshire would place itself dramatically out of step with prevailing tax practices and that would just make the challenges of getting the WWCR scheme to work effectively and efficiently all the greater.

All methods of apportionment, just like geographic or separate entity accounting, are imperfect. They are proxies, devices, methodologies for triangulating in on a fair share taxation. They all embody trade-offs and merely pointing to a flaw or limitation in any one method does not signify that any other method will achieve a better result. There will be trade-offs. There will be winners and losers amongst taxpayers. And there will be gains and losses for the state. But there is no generalization that will forecast reasonably how these will play out in practice prospectively. At the end of the discussion, on balance, the commission finds that there is insufficient evidence to make such a radical change in New Hampshire's business tax policy as WWCR given the many implications clearly present on the other side of the equation.

Recommendations:

The Commission recommends against removal of the water's edge limitation and adoption of worldwide combined reporting for unitary businesses under the Business Profits Tax. The Commission specifically recommends that pending bill HB 121 be voted inexpedient to legislate.

While the Commission does not recommend further study at this time, the Commission notes that there may in the future be alternative means available to the state of New Hampshire to address the incentives a unitary business might have to abuse transfer pricing methods for the purpose of shifting profits away from New Hampshire to lower taxed jurisdictions but believes that few would be wise without a predicate of leadership and foundation from the federal government or a wave of support, demonstrating a developing consensus, from other states.

Respectfully Submitted,

Representative Walter Spilsbury, Chair

Attachments:

Attachment A: Qualifying Statement, Keen Meng Wong and Matthew Foley

Attachment B: Minority Report, Representative Tom Schamberg

Attachment C: Commission Minutes

Attachment D: Bibliography

Qualifier to the vote to approve the Final Report of the Commission on Worldwide Combined Reporting for Unitary Business Under the Business Profits Tax (RSA 77-A:23-b)

The Department of Revenue Administration of New Hampshire (DRA) and the New Hampshire Society of Certified Public Accountants (NHSCPA), through the designees of the Commissioner of the DRA and the President of the NHSCPA, respectively, voted to approve the adoption of the Final Report of the Commission, while preserving their neutral position concerning its recommendations. The DRA and NHSCPA join the findings of the Final Report, and agree that the description of the testimony therein reflects what was presented to the Commission. The DRA and NHSCPA abstain from joining in the recommendations as provided in the Final Report and remain neutral on such issues. The DRA and NHSCPA do not believe further study is warranted, unless and until additional facts should come to the attention of the legislature beyond what has already been considered by the Commission. The DRA and NHSCPA likewise maintain their neutral position and do not take a position on HB 121. Any request for further study on this matter that may be undertaken shall be at the legislature's prerogative.

Respectfully Submitted,

Keen Meng Wong, designee for the
Commissioner of the DRA

Matthew Foley, designee for the President of the
NHSCPA

REP. TOM SCHAMBERG
WWCR COMMISSION REPORT
2023 10 30

“We point out that the water’s edge method was adopted for the benefit of foreign businesses.”¹ That was the clear and unambiguous written unanimous opinion of the New Hampshire Supreme Court in the 1999 Caterpillar decision. The change back to worldwide combined reporting is long overdue.

THE FUNDAMENTAL QUESTION

This commission has found nothing to refute that fundamental and unchallenged fact that domestic businesses have been competing at an economic disadvantage at least since 1981 when worldwide combined reporting was adopted, but was only enforced for US based businesses, not for foreign based enterprises. Equal treatment is not just the overriding principle of taxation, it is the guiding light of the rule of law in a democracy. Yet a majority of this commission not only is prepared to ignore this inequality, even to declare that “it does not seem inherently discriminatory” to allow New Hampshire businesses to continue to operate with an unequal burden of taxation compared to foreign companies. In fact, this commission not only barely examined what should be the most important question facing it, the majority report minimizes testimony from Granite State citizens and business owners as “New Hampshire centric.”

Members have suggested they do not understand, for example, how the owner of a painting business in Canaan would benefit from ending water’s edge and adopting worldwide combined reporting (WWCR). Perhaps in the flurry of statistics and studies, and the intentional complexities of international accounting and taxation, some have lost sight of basic democratic principles.

In the first and most important instance, the existing unlevel playing field disadvantaging domestic businesses is not just unacceptable, it is unconstitutional. Echoing the Declaration of Independence, New Hampshire’s Constitution opens with a similar declaration of equality, and re-states this principle in numerous other articles throughout the rest of the document. We disagree with the majority’s argument, believing the question of the constitutionality of this inequality between domestic-owned and foreign-owned enterprises, in which the former are fully liable for their sales while the latter are able to escape much if not all liability, was not fully argued before our Supreme Court in Caterpillar in 1999.²

¹ Caterpillar Inc. v New Hampshire Department of Revenue Administration (1999)
<https://caselaw.findlaw.com/court/nh-supreme-court/1196880.html>

² In their unanimous opinion in Caterpillar, the justices note at the start, “this appeal involves only questions of federal constitutional law... whether the water’s edge apportionment formula in RSA 77-A:3 (1991) (amended

However, as noted above, that unanimous opinion could not be more dispositive regarding the inequality of the water's edge business tax scheme in finding that the "water's edge was adopted for the benefit of foreign businesses."

It is unquestioned that current law allows multi-national enterprises to use accounting techniques and paper transactions to reduce their tax liability, no matter how much business they do in the Granite State, by shifting profits to lower tax entities beyond the "water's edge," the boundaries of the United States. In fact, the IRS has a new initiative to crack down on such practices, indicating that approaches in the 2017 Tax Cut and Jobs Act and international negotiations remain insufficient to address this issue.³

Multi-nationals have the capacity, the overseas operations and the financial incentives to use accounting techniques, paper transactions and other tactics to shift profits to lower tax jurisdictions overseas, where the water's edge provisions obscure the truth from states like New Hampshire. These companies are not required to account for their operations outside the U.S. but in worldwide reporting, these companies must account for their entire enterprise, finally providing real transparency to New Hampshire on their activities within our borders.

Some commission members questioned whether such profit shifting, or the "transfer pricing" euphemism disguising the real impact of the practice as well as some multi-nationals disguise the origin of their profits, was either not as extensive or being addressed by some federal legislation. But numerous studies and continued efforts at the federal and international level belie those suggestions.⁴

Questions raised by the majority about whether there is any real impact on a domestic business without a direct foreign competitor are simply distractions. Requiring a Mom-and-Pop general store in the Granite State to fully document sales activities and pay their full tax liability, while permitting foreign enterprises to escape such documentation and full liability is clearly anti-competitive and obviously discriminatory. In addition to the competitive disadvantage facing domestic businesses, this violation of basic constitutional principles of equal treatment risks eroding basic support and compliance with a tax scheme that creates an unlevel playing field. And that can only lead to erosion of support and belief in the viability and fairness of the rule of law and, thus, all democratic institutions.

1991, 1993) violates the Commerce Clause...", Caterpillar (1999), <https://caselaw.findlaw.com/court/nh-supreme-court/1196880.html>

³ <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-businesses>

⁴ As one example, see <https://www.cbpp.org/research/federal-tax/international-tax-reform-proposals-would-limit-overseas-profit-shifting-end>

In its conclusion, the majority also seems to conflate the constitutional questions surrounding WWCR and “water’s edge.” It correctly notes that several Supreme Court decisions have made it clear that WWCR and taxation of US activities by foreign-owned enterprises are absolutely constitutional. It then dismisses the suggestion that the discriminatory taxation of domestic versus foreign companies might run afoul of the 14th Amendment’s Equal Protection clause as “far-fetched,” without any supporting arguments to back up that subjective opinion.

The majority then goes on to note that prior to 1986, New Hampshire employed a kind of WWCR, but did not enforce it as to foreign based multi-nationals. The majority opines that “water’s edge” was adopted “specifically to ensure that the law applied equally to both domestic based and foreign based multi-nationals.” However, it provides no evidence to support that contention.

But even so, that argument clearly twists the facts to support a flawed conclusion. The discrimination prior to 1986 lay not in the WWCR law itself, but in its discriminatory enforcement, which the majority concedes “may indeed have presented equal protection and other constitutional issues.” But adopting “water’s edge” served only to provide that discrimination with a false color of law, producing an outcome just as discriminatory as the prior lack of equal enforcement. The majority somehow arrives at the conclusion that “water’s edge... does not seem inherently discriminatory.” It is a contradiction buried in a faulty premise which extends to an illogical conclusion.

WHY DID NH SWITCH IN 1986?

Much has been made of the movement by most states to water’s edge in the middle of the 1980s. But Professor Hellerstein in his October 2 testimony to this commission offered the most succinct conclusion about the real reasons behind this change:

“The states’ headlong rush to discard or restrict WWCR did not grow out of the states’ philosophical conversion from formulary apportionment to separate accounting as the appropriate methodology of taxing a worldwide multicorporate unitary enterprise.

Rather, the states **yielded to economic and political pressures and the threats of multinationals, particularly foreign-based enterprises**, that they would not locate new plants in states that applied the unitary method to the appointment of their incomes, and the political threat of federal legislation that would restrict the use of worldwide apportionment by the states.” (emphasis added)

And strong support for worldwide combined reporting in use by New Hampshire prior to 1986 was made just three years earlier by then-DRA Commissioner Lloyd Price.⁵

WHAT IS THE REAL IMPACT ON DOMESTIC BUSINESSES?

It is also obvious that as our water's edge tax scheme permits foreign companies to evade their true tax liability, then either state services supported by business taxes must be reduced or domestic enterprises must pay more to sustain the current level of service or to some degree both occur.

This is the simple answer to the question of how a Canaan business owner of a residential painting company is impacted. It is not about direct competition with some foreign painting business. It is that the Canaan painter, like other domestic businesses - independent bookstores, local craft brewers, small hardware stores, Mom & Pop grocers – are all competing on an unlevel playing field that leaves them paying more than their fair share because the state is deprived of revenues to which it is entitled. This is especially true given that New Hampshire relies on business taxes for a third or more of its tax revenue, more than twice as high as any other state, even despite recent rate cuts.

Even if a court were to find the current approach is constitutional, there is no doubt that it creates an unlevel economic playing field. And those questions of economic competitiveness, equity and constitutionality are the most important arguments in favor of action to end water's edge and adopt Worldwide Combined Reporting. They should be central to this commission's report and to the consideration of this issue by the Ways and Means Committee and the House and Senate, which we presume to be "New Hampshire centric."

WILL WWCR PRODUCE MORE REVENUE?

While not as important as the preceding arguments, there is strong evidence that such an action would produce more revenue for the state of New Hampshire by enforcing a more level playing field to assure foreign companies, as well as domestic, pay what they legitimately owe based on their activities in the Granite State.

⁵ Price letter appended to the end of this report

A 2019 study by the Institute on Taxation and Economic Policy (ITEP)⁶ found that enacting worldwide combined reporting would increase state revenue by \$17 billion, including \$177 million to the State of New Hampshire. Despite some challenges to this study, mostly without the same level of research and rigor, experience in several states showed increases in revenue, including an independent study in California that arrived at a revenue increase similar to the ITEP study.⁷ Even the 2017 Indiana study mentioned by Professor Hellerstein, on which the majority also appears to lean as refuting the ITEP study, concludes that there could be a short-term increase in revenue, but the ultimate result would be “net zero.” Whether that study would apply to New Hampshire is a matter of conjecture, at best. To our knowledge, there is no evidence-based study suggesting adopting WWCR would result in a decrease in revenue from the BPT.

As noted earlier, suggestions that changes contained in recent federal legislation aimed at the “offshoring” of profits would reduce or eliminate this projected increase in revenue are unsupported by rigorous study. However, there are myriad reports – and continued federal and international efforts to go beyond the Tax Cut and Jobs Act and the international tax code changes such as Global Intangible Low-Taxed Income measure – demonstrating the problem of profit shifting is neither minimal nor has it been fully addressed.⁸

While New Hampshire’s economy indisputably benefits from foreign and multi-national companies, domestic businesses still account for about nine of every 10 jobs in the Granite State, and thus deserve a more level playing field when it comes to their tax bills.⁹ Despite this, the primary focus of this commission seemed to be more on the impact of foreign companies, particularly the idea that shifting to worldwide combined reporting could actually produce less revenue if these enterprises can use losses overseas to reduce their tax liability. But this represents a fundamental misunderstanding of WWCR.

A majority of states, including New Hampshire, currently enact domestic combined reporting in which businesses report their total activity in the U.S. and within a particular state. So if a company reports \$100 million in national sales and \$2 million in a particular state, that state then applies its business tax liability as 2% of that company’s national profits. With WWCR, the same approach would be applied to foreign enterprises. It is of course possible that a foreign company might have a bad year resulting in a global loss that reduces its overall tax liability and its bill for any particular jurisdiction. But if such a company continues to experience losses year after year, it will soon be out of business.¹⁰

⁶ <https://itep.org/a-simple-fix-for-a-17-billion-loophole/>

⁷ <https://www.cbpp.org/blog/minnesota-bill-marks-major-step-forward-in-preventing-multinational-corporations-from-shifting>

⁸ See for example <https://www.nber.org/papers/w30086> and <https://www.americanprogress.org/article/build-back-better-oecd-corporate-tax-agreement-discourage-offshoring-jobs-profits/>

⁹ Even the Global Business Alliance agrees with this figure.

¹⁰ For support on this question, see the attached letter from University of Michigan Law Professor Reuven Avi-Yonah

IMPACT ON DRA

This commission also heard testimony from the Department of Revenue Administration, which claimed a neutral position on ending water's edge and shifting to WWCR, that such a shift could cause additional auditing burdens due to currency and language differences. However, current law requires companies to rationalize currency and language. While situations may arise requiring an on-site audit to confirm or challenge a company's report, they should not be so often nor so onerous as to outweigh the equity in erasing the competitive disadvantage facing domestic enterprises.

Similarly, DRA's inability to provide an estimate of ending water's edge and adopting WWCR should be considered in its historical context. DRA similarly was unable to provide estimates on the impact of the 1986 adoption of water's edge or the recent shift from the three-factor business tax assessment to single sales factor.

IMPACT ON FOREIGN MULTI-NATIONALS

The argument that ending "water's edge" and adopting WWCR will impose additional costs and reporting burdens on foreign companies simply, to turn a phrase, doesn't hold water. ASsProfessor Reuven Avi-Yonah, the Irwin Cohn Professor of Law at the University of Michigan and the director of U of M's International Tax LLM program notes in the attached letter,¹¹ "MNCs already must calculate global income for financial reporting purposes." He goes on that MNCs "also must calculate country by country (CBC) people assets sales and taxes for purposes of CBC reporting BEPS [base erosion and profit shifting]... [and] also must calculate country by country effective tax rates for pillar 2 purposes and that calculation includes state tax burdens."

Additionally, we challenge statement #3 on page 10 of the majority report since #2 in that report notes that transfer pricing (more appropriately labeled "profit shifting") exists. Since all acknowledge that it exists (and we previously noted that the IRS is taking new steps against profit shifting suggesting it is not de minimis), there can be no argument that its existence creates an unlevel playing field for non-multinational domestic businesses.

Similarly, we believe #4 stating that "New Hampshire currently taxes foreign income generated by businesses subject to the Business Profits Tax" seriously under represents reality at best. It ignores the issue of profit shifting, ignores issues related to GILTI and obscures the potential for foreign MNCs to evade taxes if they do not repatriate dividends.

¹¹ See attached letter from Professor Avi-Yonah to Chairman Spilsbury, dated 18 October 2023, which also addresses several other questions raised by this commission and dismissed by the Professor.

GOING IT ALONE

The least persuasive argument against ending water's edge and adopting WWCR is this notion that New Hampshire would stand alone, as if the Granite State had never pursued the "road not taken" before. In fact, several expert witnesses, such as Hellerstein, Professor Shanske and Dan Bucks, former Director of the Montana Department of Revenue and former Executive Director of the Multistate Tax Commission, hailed New Hampshire's "go-it-alone" approach in business tax policy as well as other areas. One of the more prominent examples of this approach to revenue is that New Hampshire was the first state to adopt a state run lottery in the 20th Century in 1964. It has since been joined by 44 other states.

CONCLUSION

In their unanimous Caterpillar decision, the New Hampshire Supreme Court stated: "We point out that the water's edge method was adopted for the benefit of foreign corporations." How do they benefit? They benefit because they are allowed to employ the arm's length separate accounting method that is flawed and facilitates profit shifting to offshore tax havens. Profits that are not returned to the US for taxation. Under the water's edge method, US based MNCs also shift profits offshore, but those foreign profits are returned, repatriated, when dividends are paid up to the US parent and/or returned via the federal GILTI provisions. The playing field is not level. This places US-based corporations at a competitive disadvantage. The playing field is not level. US-based corporations have moved to foreign countries in tax inversions to gain the same advantage that foreign-based corporations are allowed over US-based corporations. The playing field is not level. Meanwhile, fully domestic enterprises, responsible for the lion's share of jobs in New Hampshire, have no opportunity to shift profits and so pay more than their fair share because the state is denied revenue to which it is entitled. The playing field is not level.

It is well past time to end the unconstitutional, anti-democratic, anti-free-market and immoral competitive disadvantage facing domestic business owners and the nine out of ten New Hampshire citizens they employ. This commission and this Legislature should finally eliminate the "water's edge" provision benefiting foreign companies and adopt worldwide combined reporting to put every business – domestic and foreign – on the same level playing field.

Minutes of August 15, 2023 of the NH Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax

Chair Rep Spilsbury called Commission to order at 10:03 am

This is a reorganizational meeting ; a review of past action was presented by Rep. Spilsbury.

Two new members were added to the Commission:

NH Senator Kevin Murphy

NH State Representative Jordan Ulery

In attendance on Commission were:

Rep Spilsbury

Rep Schamberg

Rep Ulery

Senator Murphy

Kevin Kennedy

Matthew Foley

Keen Wong

Motion by Rep. Ulery to nominate Rep. Spilsbury as Chair of WWCR Commission per HB 102; Seconded by Rep. Schamberg

Approved 7-0

Chair Rep. Spilsbury asked Rep. Schamberg to serve as Clerk for the commission.

Items discussed:

- Final report due November 1, 2023
- House Ways and Means retained HB 121—WWCR; awaiting WWCR Commission report before taking action or recommendation.
- Handout from Global Business Alliance
- Discussion: Impact of single sales factor on NH revenue

- Mr. Kennedy discussed GILTI

- Agreed upon next meeting dates of commission:
 - o September 25, 2023;
 - o October 2, 2023; and
 - o October 17, 2023.

- Any articles that members wish to distribute, submit to Jenn Foor

- Right now: participants on September 25 will be:
 - o Coalition for a Prosperous America
 - o Small Business Association Member
 - o COST
 - o Global Business Alliance

Adjourned 10:32 a.m.

Respectfully submitted,
Clerk Rep Tom Schamberg

Minutes of September 25, 2023 of the NH Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax

Chair Rep Spilsbury called Commission to order at 9:33 am

In attendance on Commission were:

Chair Rep Spilsbury

Clerk Rep Schamberg

Rep Ulery

Senator Murphy

Kevin Kennedy

Matthew Foley

Keen Wong

Presentations

9:36 am: Thomas P. Oppel—02 Strategies

- Dan Collins: Self-employed contractor (written testimony submitted)
- Peter Garre: Retired Business Profits Tax Auditor, NH DRA 1980-1997 (written testimony submitted)

10:21 am: Meredith Beeson—Senior Director of State Government Affairs, Global Business Alliance, noting position of Global Business Alliance and concerns and opposition to HB 121. (written testimony submitted)

- Alan Pasetky—Federal and State Tax Policy Consultant, Global Business Alliance

10:50 am: Walter Hellerstein—Distinguished Research Professor in Taxation Law and Economics and Business, oral presentation on state tax laws which are creatures of statute and principles behind them. (slide deck and written testimony submitted)

11:00 am: Dan Bucks—Consultant, Public Revenue Consulting, noting reporting and auditing, tax revenue, should be fairly administered. (*Container Corp.* and *Barclays Bank* cases submitted for consideration)

12:00 pm: Darien Shanske—Professor of Law, UC Davis School of Law, stating short case for WWCR for NH. (slide deck submitted)

1:00 pm: Karl Frieden—VP and General Counsel, Council of State Taxation, noting why NH should not adopt mandatory worldwide combined reporting. (slide deck submitted)

1:45 pm: Fred Coolbroth, Jr.—Director of the Audit Division and Keen Wong—Tax Policy Counsel, NH DRA regarding administrative considerations of adopting WWCR.

2:20 pm: Commission conversations regarding next steps and next meeting time.

2:30 pm: Adjourned

Respectfully submitted,
Clerk Rep Tom Schamberg

Minutes of October 2, 2023 of the NH Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax

Chair Rep Spilsbury called Commission to order at 10:02 am.

In attendance on Commission were:

Chair Rep Spilsbury
Clerk Rep Schamberg
Rep Ulery
Kevin Kennedy
Matthew Foley
Keen Wong

Sen. Kevin Murphy – 10:14 am

Chair reviewed the presentations of Sept. 25th from Testimony to circulated materials from all presenters. Thought it was a good cross section of those for, against and neutrals.

Chair wished to see during today's discussion where views are with each member in regard to WWCR. This would establish who's drafting Majority and Minority Report.

Chair stated next meeting would be Oct. 17 at 10 am with reports from members without getting together again before that date.

Chair stated Final Report is due by November 1. This would assist the NH House Ways & Means Committee on HB 121 which was retained dealing with WWCR.

Chair Spilsbury called upon Keen Wong of the DRA to discuss his brief write up passed out of 8 points in regard to a possible change in audit process when auditing returns filed on water's edge versus a worldwide combined basis. He expressed he did not expect the audit process to change except to see an increase in the volume of information and documents that the audit team would be reviewing. (See attachment related to Keen Wong). Discussion followed.

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There was discussion with Director of the Audit Division of the NH DRA Fred Coolbroth about procedures that could be used to enhance the providing of necessary information to satisfy audits without requiring extensive travel to companies.

At this point, Rep Ulery asked Keen Wong if a clarification of the final disposition of the Minnesota and Maine WWCR legislation pieces could be forwarded to this NH Commission.

The Chair called upon Kevin Kennedy to review his handout regarding challenges that the NHSCPA (The New Hampshire Society of CPAs). Mr. Kennedy listed 4 major areas with bullet points under each section. Mr. Kennedy felt that compliance with mandatory reporting would be costly and burdensome for practitioners and all parties including the State of NH. (See attachment related to Kevin Kennedy). Discussion followed.

As discussion and questions increased the Chair made some qualifying points
What did we think if we knew X-Y-Z to make understanding of WWCR more definitive?

Quantity of tax revenue to be raised?

The Chair pointed out there was information in the Tax Foundation 2 writeups that Commission should review in regard to revenue concepts and mitigating factors.

Rep Schamberg presented actual figures from ITEP study with a methodology about revenues and from the Fact Coalition about Disclosures of Tax Havens and Offshoring Act (S.638).

Discussion did move forth toward what is: Transfer pricing and arms-length relationship.

Mr. Kennedy provided some bullet points of pro's and con's.

Chair Spilsbury expressed the thought that the Commission was closer to being able to see if Commission had a majority for or against. Each member was asked

to indicate their possible position. There were 3 neutral positions, 3 against reporting a favorable position and 1 wishing to proceed. The Chair expressed that if all would prepare their thoughts on paper for the Oct. 17 meeting, he would write up a draft to not proceed that could have added points included before final submission to Commission and that Rep Schamberg would develop a report to proceed.

Chair Spilsbury thanked all for their open discussion.
Chair closed meeting at 12:22 pm.

Respectfully submitted,
Clerk Rep Schamberg

Minutes of October 17, 2023 of the NH Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax

Chair Rep Spilsbury called Commission to order at 10:03 am

In attendance on Commission were:

Chair Rep Spilsbury
Clerk Rep Schamberg
Rep Ulery
Senator Murphy
Kevin Kennedy
Matthew Foley
Keen Wong

Chr Spilsbury reviewed: The charge of the Commission
How the report may be shaped
Give opportunity to critique and persuade on viewpoints

5 Documents:

- a. Minutes of Oct 2 presented.
- b. Nov 1, 2023 is the due date for Commission to report to Speaker of House. The Commission should develop a skeleton outline – develop style of framework of report – Plug findings and recommendations into framework.
- c. Resources that are available online will need to be attached.
- d. Rep Schamberg has included his draft proponent for WWCR.
- e. Rep Schamberg has included bullet point summary of proponent report.

Kevin Kennedy and Mark Foley will present bullet point presentation.

Chr Spilsbury – wanted to get a sense of this meeting by asking if there has been any shift in positions. Positions have not changed by either majority or minority.

Chr Spilsbury then reviewed the charge of the Commission from 2022 in HB 102 that shall study the advantages and disadvantages and revenue implications. Chair said that Commission heard from excellent cross section of economists, a comprehensive set of views that satisfied the advantages and disadvantages of changing from Water's Edge.

Chair reviewed reports from Maine and Rhode Island on WWCR. Maine- make it optional not mandatory. Report concluded that there were difficulties. Using the optional selection left it up to the taxpayer to calculate way to pay tax.

Rhode Island had a 96 page report about using a separate entity system. RI concluded that it would stick with what they had as their tax method.

Chair finished summarizing and asked if any member of Commission had any views on the two reports. None.

Chair then asked Rep Schamberg to make his presentation his reasoning for WWCR. Rep Schamberg decided not to read his draft position but to make an oral presentation of reasoning for WWCR.

Chair asked if there were any questions.

Rep Ulery quoted a report from the Tax Foundation that gave a variety of reasons for questioning going forward with WWCR. Rep Ulery gave an example of inter workings using capital between related companies. (Go to recordings of Oct. 17, 2023 for discussion which ensued).

Chair reviewed and presented a narrative on nexus with NH, foreign multi returns, reviewed letter of Commissioner of DRA in 1983 that NH never enforced WWCR method at the time. (Go to recordings of Oct. 17, 2023, for Chair's review of counterpoints to implementing WWCR).

Rep Schamberg made counterpoints of a level playing field, constitutionality of treating domestic and foreign companies differently within the same tax bracket. (Go to recordings of Oct. 17, 2023 for Rep counterpoints).

Kevin Kennedy and Matt Foley presented a more full bullet point of advantages and disadvantages of WWCR and Water's Edge. Mr. Kennedy is going to expand bullet points with a expanded narrative. (Mr. Kennedy presented a draft of bullet points.)

Discussion on next meeting date and number of members needed for official action.

Chair called for Monday Oct. 23rd at 10 am for work session. Rep Schamberg will be out of state but will return for the Monday, October 30th meeting.

Respectfully submitted,
Clerk Rep Tom Schamberg

Minutes of October 23, 2023 of the NH Commission on Worldwide Combined Reporting for Unitary Businesses Under the Business Profits Tax

Chair Rep Spilsbury called Commission to order at 10:00 am and placed in recess awaiting a quorum.

Present at re-opening at 10:20:

Rep Spilsbury;
Rep Ulery;
Senator Murphy;
Kevin Kennedy;
Mathew Foley;
Keen Wong DRA

This was declared a Members work Session engaging in word-smithing , organization and format of the final report and definition of terms to be used commonly.

No decisions on specific wording was specified or voted upon. Long discussion on the technical meaning of the technical term "Transfer Pricing" and how it should be presented to a non-technical reader. Discussion regarding the ability to quantify what a level or "un-level playing field" in business was. Mr. Kennedy suggested that there was insufficient evidence or even ability to make such a determination.

No discussion of the editing of the proposed minority report was undertaken other than that no editing would occur.

The methodology of the Majority report was discussed in broad terms.

Meeting adjourned at 11:20am

Jordan Ulery

Minutes of October 30, 2023

Worldwide Combined Reporting Commission for Unitary Businesses Under the Business Profits Tax

In attendance: Chair Rep Spilsbury

Clerk Rep Tom Schamberg

Rep Jordan Ulery

Senator Kevin Murphy

Keen Wong, NH DRA

Mathew Foley – NH Society of Certified Public Accountants

Excused: Kevin Kennedy – BIA Representative

Chair opened Commission meeting at 10:04 am

Minutes of Oct. 2 – motion by Rep Schamberg and seconded by Senator Murphy for approval. Vote 6-0

Minutes of Oct. 17 – motion by Senator Murphy and seconded by Rep Ulery with corrections. Vote 6-0

Minutes of Oct. 23- motion by Rep Ulery and seconded by Rep Schamberg. Vote 6-0.

Chair sent out final report on Sunday and asked for comments regarding the draft. Rep Ulery thanked the Chair and DRA Rep Keen Wong for technical work in presenting draft to Commission.

Commission started review on page 8. Various edits were suggested, explanations given of purpose for particular wording.

With review of Analysis, Mr. Wong wished to have wording or an insert to comply with the position that the DRA was neutral and takes no stance. It was agreed that the DRA would cast a vote but would be able to insert position of DRA with a supplemental statement for clarification. Mr. Foley stated that he would probably also submit a supplemental statement on behalf of the NH Society of Public Accountants expressing neutral position on the recommendations. It was agreed that both parties would be able to insert neutral positions.

Motion to adopt Commission report as drafted with incorporated edits was made by Representative Ulery and seconded by Senator Murphy.

The Chair called the roll:

Keen Wong, NH DRA – yes with qualifier.

Matthew Foley - yes with qualifier.

Senator Murphy – yes

Representative Ulery – yes

Representative Schamberg – no

Chair Representative Spilsbury – yes

Motion to approve report with analysis – 5 for report – 1 against.

Chair Spilsbury concluded action of Commission on Worldwide Reporting at
11:22 am.

Respectfully submitted,

Clerk Representative Schamberg this day of Oct. 30, 2023

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