



## June 1, 2018 Deadline for Withdrawal (in certain circumstances) of the Commonly Owned Group Election made on a 2015 or 2016 Combined Return

This memorandum provides a procedure for withdrawing the commonly owned group election made on a 2015 or 2016 Form CT-3-A, *General Business Corporation Combined Franchise Tax Return* (“a combined return”) for a limited time period expiring on June 1, 2018. The procedure applies to the limited situation in which the designated agent of a combined group made a timely commonly owned group election under the circumstances described in [Limited time withdrawal procedure](#) below, on the combined group’s 2015 or 2016 return. In that specific situation only, the Tax Department will allow the designated agent to withdraw that election, but only if all the corporations in the original combined group follow all the procedures required in this memorandum by June 1, 2018.

### Background

Under Tax Law § 210-C, a group of corporations that meet the ownership requirements and are conducting a unitary business must file a combined return. The Article 9-A ownership requirements in Tax Law § 210-C(2)(a) are met when:

- a taxpayer owns or controls, either directly or indirectly, more than 50% of the voting power of the capital stock of one or more other corporations; **or**
- more than 50% of the voting power of the capital stock of a taxpayer is owned or controlled, either directly or indirectly, by another corporation; **or**
- more than 50% of the voting power of the capital stock of a taxpayer, and the capital stock of one or more other corporations, is owned or controlled, directly or indirectly, by the same interests (for example, an alien, foreign, or domestic corporation, trust, partnership or individual).

However, Tax Law § 210-C(3) allows a group of commonly owned or controlled corporations to elect to file a combined return that includes all the corporations that meet the ownership requirements stated above, whether or not the corporations are conducting a unitary business. This election is referred to as the *commonly owned group election*. The designated agent (a taxpayer) of the combined group must make the election on an original, timely filed return of the combined group. The election is irrevocable and is binding for the tax year for which it is made and for the next six tax years. The composition of the commonly owned group is subject to verification on audit.

If the election is made, all the corporations that meet the ownership requirements to be in a combined group will be treated as members of a single combined group for combined reporting purposes, **whether or not** these corporations are included in the same federal consolidated return. Corporations meeting any of the three ownership requirements with **any** taxpayer in the commonly owned group, either directly or indirectly, must be included in the

combined group when the designated agent makes the commonly owned group election<sup>1</sup>. It is not necessary for a corporation to be subject to tax on a standalone basis to be included in a combined group. Thus, the designated agent's and the other taxpayer members' parent corporations and brother-sister corporations, and their subsidiaries, are bound by the election if these entities meet the ownership requirements discussed above.

### **Transitional issue**

The department has seen several instances where the commonly owned group election was made but not all corporations that meet the Article 9-A ownership requirements for the combined group were included in the 2015 and 2016 combined returns. Instead, the corporations included in the combined group identically matched the corporations in the federal consolidated return of the corporation identified as the designated agent of the combined group for that tax year. This is directly contrary to the requirements for the commonly owned group election that all corporations meeting the ownership requirements must be included, whether or not those corporations are included in the same federal consolidated return.

As this is a new provision of law, some taxpayers may have misunderstood the filing requirements for the commonly owned group election and erroneously made the election. Since the composition of the combined group may differ significantly when all the required corporations are properly included, potentially resulting in a substantial tax change, the department has decided that it is appropriate to administratively permit the designated agent to withdraw the commonly owned group election for tax year 2015 or 2016. This withdrawal will be permitted only under the specific circumstances and in accordance with the procedure described below.

### **Limited time withdrawal procedure**

This withdrawal procedure is available **only** if:

- a combined return was filed for a combined group and the designated agent of the combined group made the commonly owned group election for the first time on the combined group's original, timely filed 2015 or 2016 return;
- the corporations included in the combined return identically matched the corporations in the designated agent's federal consolidated return for that tax year; **and**
- the 2015 or 2016 combined return did not include any other corporations that met the Article 9-A combined filing ownership requirements.

To withdraw the commonly owned group election, the designated agent **must**:

- file an amended Form CT-3-A for the first year the commonly owned group election was made, but not mark the box on Form CT-3-A, Part 1, Section C, line 5;

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<sup>1</sup> Tax Law § 210-C(2)(c) lists circumstances where a corporation is not required or permitted to be included in the combined return. These prohibitions extend to the commonly owned group election.

- mark an X in the amended return box on Form CT-3-A, page 1 and complete Form CT-3-A, Part 1, Section C, line 2a;
- include a statement that the commonly owned group election is being withdrawn based on this memorandum;
- include only those corporations that meet both the ownership requirement and the unitary business requirement, as described previously, in the combined group on the amended return;
- include an amended Form CT-60, *Affiliated Entity Information Schedule*, as well as any other required forms or attachments;
- file an amended Form CT-3-A/BC, *Member's Detail Report*, for each member of the combined group included in the amended combined return; **and**
- file these amended returns with the Tax Department by June 1, 2018.

**Note: Any attempted withdrawal made after June 1, 2018 will not be recognized.**

If the designated agent properly withdraws the commonly owned group election on its 2015 combined return and if the designated agent's 2016 combined return has already been filed, the designated agent:

- must also amend its 2016 combined return by June 1, 2018, in accordance with the instructions above to include only those corporations in the group that meet both the ownership requirements and the unitary business requirement, **and**
- may **not** make the commonly owned group election on its 2016 amended return (as the election must be made on a timely filed original return), but may make the election on a timely filed original return for the 2017 tax year or a subsequent tax year.

If the commonly owned group election was properly withdrawn for tax year 2015 by June 1, 2018 and the designated agent subsequently makes the election on a timely filed original return for tax year 2016 or a later tax year, the commonly owned group election is irrevocable (regardless of the entities included in the combined group) and will be binding for the tax year made and the next six tax years. The composition of the commonly owned group is subject to verification on audit.

All corporations that were taxpayer members included in the original combined return for 2015 and 2016, but not included in the designated agent's amended combined returns for those tax years must:

- file their own corporate franchise tax returns for those tax years by June 1, 2018, on a combined or separate basis, as applicable, **and**
- include a statement that says the commonly owned group election is being withdrawn based on this memorandum and provide the name and employer identification number of the designated agent on the original combined return for 2015 and 2016.

Nontaxpayer members of the designated agent's original combined return that were not included in its amended returns for tax years 2015 and 2016 that meet the combined filing ownership requirements and are unitary with another taxpayer for tax year 2015 and 2016 must file combined with that taxpayer for those tax years by June 1, 2018.

**Note:** A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.