**Officers, 2024-2025**

**Mollie L. Miller**
**Chair**
*Fresenius Medical Care North America*

**Jamie S. Laiewski**
**Vice Chair**
*Charter Communications*

**Karen DiNuzzo-Wright**
**Secretary & Treasurer**
*Walmart Inc.*

**Michael F. Carchia**
**Immediate Past Chair**
*Capital One Services, LLC*

**Robert J. Tuinstra, Jr.**
**Past Chair**
*Corteva Agriscience*

**Arthur J. Parham, Jr.**
**Past Chair**
*Entergy Services, LLC*

**Amy Thomas Laub**
**Past Chair**
*Nationwide Insurance Company*

**Patrick J. Reynolds**
**President**
*Council On State Taxation*

**Directors**

**Madison J. Barnett**
*The Coca-Cola Company*

**C. Benjamin Bright**
*HCA Healthcare, Inc.*

**Lani J. Canniff**
*Ameriprise Financial, Inc.*

**Susan Courson-Smith**
*Pfizer Inc.*

**Kathryn S. Friel**
*Entergy Services, LLC*

**Damian B. Hunt**
*Amazon*

**Laura James**
*Kimberly-Clark Corporation*

**Jeffrey A. Langer**
*The Home Depot*

**Stephen J. LaRosa**
*Alexion Pharmaceuticals, Inc.*

**Jonathan M. Mieritz**
*Corteva Agriscience*

**Toni Mincic**
*Lumen Technologies*

**John H. Paraskevas**
*Exxon Mobil Corporation*

**Michael R. Raley**
*VF Corporation*

**Patrick A. Shrake**
*Cargill, Incorporated*

**Kyle Snedaker**
*Conagra Brands, Inc.*

**Andrew H. Solomon**
*Stagwell, Inc.*

**Beth L. Sosidka**
*AT&T Services, Inc.*

**Archana Warner**
*Constellation Energy Corporation*

**Karl Frieden**
*VP/General Counsel*
(202) 484-5215
kfrieden@cost.org

**Leonore F. Heavey**
*Senior Tax Counsel*
(202) 484-5221
lheavey@cost.org

October 2, 2025

Chair James Eldridge
Chair Adrian Madaro
Joint Committee on Revenue

*Via Email*

**Re: COST's Opposition to H.3110 and S.2033 – Taxation of Foreign-Source Income without Foreign Factor Representation**

Dear Chair Eldridge, Chair Madaro, and Members of the Joint Committee:

On behalf of the Council On State Taxation (COST), we respectfully submit this testimony in opposition to H.3110 and S.2033, identical bills that would generally include 50% of foreign source income (FSI) in the Massachusetts corporate income tax (CIT) base without allowing any foreign factor representation in the corporate apportionment formula.[1] Currently, Massachusetts includes only 5% of FSI in the CIT base.[2] This legislation would increase by ten-fold the share of FSI included in the Massachusetts CIT base without any commensurate decrease in the Massachusetts apportioned share of total income if the sales factor denominator reflected the foreign sales that contributed to the generation of the FSI. COST opposes the proposed legislation because (contrary to its subtitle): it has nothing to do with "combatting offshore tax avoidance;" places U.S. multinational corporations (MNCs) at a competitive disadvantage relative to foreign MNCs; and is likely unconstitutional, putting at significant risk any revenues raised by the proposed legislation.

## About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 500 major corporations engaged in interstate and international business. COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many COST members have operations in Massachusetts that would be negatively impacted by this legislation.

[1] When we discuss the Massachusetts CIT, we are referring to the "net income" tax portion of the corporate excise imposed under M.G.L. chapter 63. H.3110 and S.2033 would similarly expand the personal income tax base under M.G.L. c. 62.

[2] Under M.G.L. c. 63 sec. 1, 5% of foreign dividends and 5% of I.R.C. section 951A global intangible low-taxed income (GILTI) are currently included in Massachusetts CIT base.

## The Proposed Legislation Is Unrelated to "Combatting Offshore Tax Avoidance"

H.3110/S.2033 (hereinafter referred to as "H.3110" or "the proposed legislation") describes itself as "An Act combatting offshore tax avoidance." But the proposed legislation has nothing to do with combatting offshore tax avoidance or profit shifting. Rather, H.3110 would expand by ten-fold the amount of FSI included in the Massachusetts CIT base without providing either apportionment relief (foreign sales factor inclusion in the corporate apportionment denominator) or a credit for taxes paid on the same income to foreign jurisdictions. Thus, Massachusetts would include FSI in its CIT base regardless of whether it is earned in low-tax or high-tax foreign countries. This approach is completely contrary to the design of federal and international tax reforms that address international profit shifting by imposing a global minimum tax (GMT) only on low-taxed income earned in foreign nations.[3]

Over the last decade, a global consensus has developed that new national CIT rules are needed to address the problem of low-taxed FSI. The United States pioneered the new approach in 2017 by enacting a global minimum tax (GMT) in the form of GILTI and subsequently replacing it (beginning in tax year 2026) with an expanded FSI tax base inclusion renamed as "net controlled foreign corporation tested income" (NCTI).[4] At the international level, dozens of countries have followed suit, adopting some or all of the provisions of the Organization of Economic Cooperation and Development's (OECD's) Pillar 2 GMT.[5]

The U.S. GILTI/NCTI and OECD Pillar 2 approaches both focus on establishing a GMT and taxing only the low-taxed FSI that falls below the established GMT rate. The proposed legislation in Massachusetts, however, takes a completely different approach, taxing 50% of FSI regardless of whether it is earned in the normal course of foreign operations. The proposed legislation is particularly troubling because it includes FSI in the State's CIT base using a methodology completely disconnected from the goals and design of U.S. and global tax reforms.

## The Proposed Legislation Places U.S. MNCs at a Competitive Disadvantage

H.3110 also places U.S. owned MNCs at a competitive disadvantage relative to foreign-owned MNCs. The federal provisions for including GILTI/NCTI in the tax base apply only to FSI earned by U.S. MNCs. This is not a problem at the federal level because the federal government—by providing a credit for taxes paid to other jurisdictions—largely avoids taxing FSI that is already taxed by a foreign country. Moreover, the new federal NCTI provisions that apply solely to U.S. MNCs are designed as an approximate equivalent to the Pillar 2 GMT that

---

[3] See Karl A. Frieden and Douglas L. Lindholm, "Revisiting the Debate Over State Taxation Of Foreign-Source Income," Tax Notes State (June 23, 2025).

[4] One Big Beautiful Bill Act (OBBBA), P.L. 119-21. With rolling conformity to the federal Code, if Massachusetts adopts the proposed legislation, it will conform to NCTI (in lieu of GILTI) in 2026 when NCTI takes effect. The primary change with NCTI is the elimination of the qualified business asset investment (QBAI) deduction. As a result, Massachusetts would be including 50% of FSI in its CIT base (with no QBAI deduction). Massachusetts would not pick up the change to I.R.C. sec. 250 because it is disconnected from that provision. See Frieden and Marilyn Wethekam, "The Impact of the OBBBA on State Taxation of Foreign-Source Income," *Tax Notes State* (Aug. 8, 2025).

[5] PwC's Pillar 2 Country Tracker; See also Frieden and Lindholm, *supra* note 3, at 813.

foreign nations apply to their own MNCs – creating a rough parity in international tax rates and tax bases on FSI.[6]

State taxation of GILTI/NCTI upsets this equilibrium by taxing U.S MNCs when their foreign counterparts are not taxed at the subnational level in their own countries.[7] Moreover, insult is added to injury with the bizarrely designed inclusion of FSI without any apportionment factor relief in the proposed legislation. The inclusion of FSI in both the national and subnational CIT bases in the United States places U.S. MNCs at a competitive disadvantage compared to foreign MNCs that are only taxed at the national level.

## The Proposed Legislation Is Likely Unconstitutional, Putting at Risk any Revenue Collected from Taxing FSI

The formulary apportionment methodology in H.3110 is not only unfair to Massachusetts taxpayers with FSI but is likely unconstitutional as well. The litmus test of a well-designed and constitutionally permissible apportionment method is that if a state incorporates new sources of income into the tax base, it should also include the factors that contribute to generating that income in the apportionment formula. As stated in Hellerstein's treatise *State Taxation*, "the factors that are employed to apportion income among the states should reflect the factors that produce the income being apportioned. This virtually axiomatic proposition is also a principle of constitutional law."[8] This principle was enunciated by the Supreme Court in *Container Corp.*: "The factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated."[9]

H.3110 discriminates against U.S. MNCs by applying different apportionment rules to businesses with FSI than are utilized for companies with only domestic-source income. Massachusetts uses a single-sales-factor apportionment formula. The State determines the amount of corporate income apportioned to Massachusetts by multiplying taxable income by a fraction whose numerator is Massachusetts sales and whose denominator is total sales of the water's-edge combined group. For purposes of apportioning domestic-source income, Massachusetts includes in the denominator of the sales factor all the sales (both in state and out of state) of the members of the water's-edge combined reporting group. However, for apportioning FSI, the proposed legislation does not include in the denominator of the sales factor any of the foreign sales that contribute to producing GILTI/NCTI. This inequitably results in zero foreign factor representation in the apportionment of FSI.[10]

---

[6] See Frieden and Wethekam, *supra* note 4. The new NCTI has an effective tax rate of 14% compared with the pillar 2 ETR of 15%. But, due to the elimination of the QBAI deduction, the tax base of NCTI is now broader than the Pillar 2 tax base. There are other differences that complicate the comparison, but the two provisions are much more closely aligned after the enactment of NCTI than they previously were with GILTI. Id.

[7] PwC, "Survey of Subnational Corporate Income Taxes in Major World Economies: Treatment of Foreign Source Income," prepared for the State Tax Research Institute (Nov. 2019).

[8] Jerome Hellerstein, Walter Hellerstein, and Andrew Appleby, *State Taxation*, ch. 9C, para. 9.15(1) (2022).

[9] *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983).

[10] In denying foreign factor representation, Massachusetts would not only depart from the principles of fair and constitutionally sound apportionment, but would also ignore the model rules developed and recommended by the Multistate Tax Commission for apportioning foreign-source income. Massachusetts participates as an MTC sovereignty member state. The MTC has promulgated a model statute that addresses factor representation for different categories of foreign-source income in conjunction with filing a water's-edge combined return. The MTC model combined reporting statute addresses several discrete categories of foreign-source income, including

The U.S. Supreme Court has not ruled on whether and how much foreign factor representation is constitutionally required for a state to include FSI in its CIT base. Based on the Supreme Court decisions addressing the application of the Foreign Commerce Clause, a state that discriminates against FSI as systematically as Massachusetts would under H.3110, would likely violate the foreign Commerce Clause of the U.S. Constitution. In the landmark case on FSI - *Kraft General Foods Inc. v. Iowa Department of Revenue* – the U.S. Supreme Court ruled that a state violates the foreign Commerce Clause if it includes foreign dividends, but not domestic dividends, in its income tax base.[11] A more recent U.S. Supreme Court case – *Moore v. United States*, 602 U.S. 572 (2024) – strengthens the taxpayer's position in future litigation over foreign factor representation by treating a U.S. MNC's FSI as akin to income generated by a passthrough entity.[12]

The H.3110 approach to apportioning FSI would make the Commonwealth an extreme outlier – even among states that tax FSI. Of the minority of states that currently include between 20% and 50% (none taxes more than 50%) of GILTI in the CIT base, all but two allow a taxpayer to utilize some or all of the foreign sales used to generate the FSI in the state's apportionment formula.[13] Only Minnesota (2023) and Illinois (2025), the most recent states to add GILTI to the CIT base, have enacted statutes that preclude any foreign factor representation in the state's apportionment formula. The Minnesota and Illinois statutory approaches represent the only time in state tax history where any of the larger states with a significant industrialized base have included as much as 50% of FSI in the CIT base without any foreign factor representation. Both states will spend years litigating whether their apportionment formulas pass constitutional muster, putting at risk hundreds of millions in collected state revenue.[14] If Massachusetts follows the perilous lead of Minnesota and Illinois, all the revenue raised by the proposed legislation will be in serious jeopardy awaiting the outcome of the constitutional challenge.

## Conclusion

We understand that the Massachusetts legislature is grappling with the potential decline in federal grants-in-aid associated with the budget cuts in the OBBBA. We do not, however, recommend that the State plug a potential fiscal gap with a new tax on FSI which is unsound tax policy, constitutionally impaired, untested in the courts, and a significant litigation risk.

---

subpart F income earned by foreign subsidiaries, income from so-called 80-20 corporations (with 20 percent or more of their factors in the United States), and income from foreign subsidiaries with income in designated "tax haven" countries. In each instance in which it requires foreign income inclusion, the MTC model statute requires inclusion in the taxpayer's apportionment calculation of "the apportionment factors related to that income." If the model rule is adopted, the language requires inclusion of the factors (that is, sales) of the foreign subsidiaries that generate the income in the denominators of the apportionment factors. See Multistate Tax Commission, "Proposed Model Statute for Combined Reporting," Section 5A, as amended by the MTC July 29, 2011. On foreign factor representation, see also: Frieden and Joseph X. Donovan, "Where in the World Is Factor Representation," *Tax Notes State* (Apr. 15, 2019).

[11] 505 US. 71 (1992).

[12] See Alysse McLoughlin and Kathleen M. Quinn, "Moore Gives Taxpayers a 'Gotcha' Argument in Factor Representation Cases," *Tax Notes State*, Sept. 9, 2024, p. 709. A passthrough entity is typically allowed to include the factors generated by the entity in calculating its income – the same argument that would be used by U.S. MNCs in challenging the constitutionally suspect statutory apportionment formula in H.3110.

[13] Frieden and Lindholm, *supra* note 3.

[14] Id.

COST respectfully urges members of the committee not to advance H.3110 and S.2033 or any similar legislation.

Respectfully,

Karl Frieden Leonore F. Heavey

cc: COST Board of Directors
Patrick J. Reynolds, COST President & Executive Director