STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

COMMISSIONER OF TAXATION AND FINANCE

ALBANY, NEW YORK

Pursuant to the authority contained in Tax Law sections 171, subdivision First, 697(a), 1096(a) and 1519, the Acting Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner of Taxation and Finance, hereby makes and adopts the following amendments to the Business Corporation Franchise Tax regulations, as published in Subchapter A of Chapter I of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, the Franchise Tax on Banking Corporations regulations, as published in Subchapter B of Chapter I of such Title, and the Franchise Taxes on Insurance Corporations regulations, as published in Subchapter C of Chapter I of such Title, such amendments to read as follows:

Section 1. Parts 1 through 9 of Subchapter A of Chapter I of Title 20 of the Codes, Rules and Regulations of the State of New York are repealed and new Parts 1 through 9 of Subchapter A are added to read as follows:

PART 1

IMPOSITION OF TAX

SUBPART 1-1

DEFINITIONS

Section 1-1.1. General. (Tax Law, section 208)

(a) Any term used in this Subchapter shall, unless a different meaning is clearly required, presumably have the same meaning as when used in a comparable context in:

(1) the laws of the United States relating to Federal income taxes and the Federal tax regulations

promulgated thereunder;

(2) Tax Law article 1 and the regulations promulgated thereunder;

(3) Tax Law article 9-A and the regulations promulgated thereunder; or

(4) Tax Law article 27 and the regulations promulgated thereunder.

(b) Any reference in this Subchapter to the laws of the United States shall mean the provisions of the Internal Revenue Code (IRC) and other provisions of the laws of the United States relating to Federal income taxes, as the same are effective for the taxable year. Any reference to Federal regulations shall mean the provisions of Title 26 of the Code of Federal Regulations (CFR), relating to Federal income taxes, as the same are effective for the taxable year. Any reference to article 1, article 9, article 9-A, article 22, article 27 or article 33 is a reference to those articles of the Tax Law. Any reference to a section of law that is not described as a section of a specific law is a reference to a section of the Tax Law.

Section 1-1.2. Corporation. (Tax Law, sections 208(1), 209(2-a))

(a) The term "corporation" means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, that provides a medium for the conducting of business and the sharing of its gains. An entity conducted as a corporation is deemed to be a corporation. The term "corporation" includes:

(1) a domestic international sales corporation (DISC), as defined in IRC section 992(a);

(2) a limited liability company or other business entity classified as a corporation for Federal income tax purposes, except where otherwise provided; and

(3) (i) an association, within the meaning of IRC section 7701(a)(3), a joint stock company or association, a publicly traded partnership treated as a corporation pursuant to IRC section 7704 and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other

written instrument.

(ii) The terms" joint stock company" and "association" include every unincorporated joint stock association, joint stock company or enterprise having written articles of association and capital stock divided into shares. The term "association" includes a joint stock association.

(iii) A business conducted by a trustee or trustees in which interest or ownership is evidenced by certificate or other written instrument includes, but is not limited to, an association commonly referred to as a business trust or Massachusetts trust. In determining whether a trustee or trustees are conducting a business, the form of the agreement is of significance but is not controlling. The actual activities of the trustee or trustees, not their purposes and powers, will be regarded as decisive factors in determining whether a trust is subject to tax under article 9-A. The mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds, does not constitute the conduct of a business in the case of a business conducted by a trustee or trustees.

(b) There are generally three types of corporations - domestic corporations, foreign corporations, and alien corporations.

(1) The term "domestic corporation" means a corporation incorporated by or under the laws of the state of New York.

(2) The term "foreign corporation" means a corporation that is not a domestic corporation.

(3) The term "alien corporation" means a corporation organized under the laws of a country, or any political subdivision thereof, other than the United States, or organized under the laws of a possession, territory, or commonwealth of the United States. An alien corporation is also considered a foreign corporation.

(c) Unless otherwise specified, whenever the term "corporation" is used in this Subchapter, it can refer to a taxpayer or a non-taxpayer.

Section 1-1.3. Credit cards

The term “credit cards” includes credit, bank, debit, travel and entertainment or pre-paid payment cards or products that can be presented at a physical point-of-sale terminal, electronically, or by telephone.

Section 1-1.4. Effectively connected income.

The term” effectively connected income” means income, gain, or loss that is effectively connected with the conduct of a trade or business within the United States as determined under IRC section 882 in the case of an alien corporation that under any provision of the IRC is not treated as a domestic corporation as defined in IRC section 7701. It includes income, gain, or loss that is described in section 208(9)(b) and excluded from Federal taxable income under any provision of Federal law, including under a United States treaty obligation, that would be treated, in the absence of such exclusion, as effectively connected with the conduct of a trade or business within the United States. Income, gain, or loss excluded from Federal taxable income under a United States treaty obligation will be deemed to be treated as effectively connected with the conduct of a trade or business within the United States unless such treaty prohibits state taxation of such income, gain, or loss.

Section 1-1.5. Partnership and partner. (Tax Law, section 2(6))

(a) The term “partnership” shall have the same meaning as set forth in IRC section 761(a) and 26 CFR section 1.761-1(a), whether or not the election provided for therein has been made. Also, the term "partnership" does not include a corporation within the meaning of section 1-1.2 of this Subpart.

(b) The term “partnership,” unless the context requires otherwise, includes a limited liability company or other business entity classified as a partnership for Federal income tax purposes.

(c) The term “partner” shall have the same meaning as set forth in IRC section 761(b) and shall include a member of a limited liability company classified as a partnership for Federal income tax purposes.

Section 1-1.6. Real property.

The term “real property” means land, buildings, structures, and improvements thereon. In addition, it includes shares in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold.

Section 1-1.7. Regularly traded on an established securities market.

The term “regularly traded on an established securities market,” for purposes of determining whether a REIT is a captive REIT or whether a RIC is a captive RIC, means that:

(a)(1) more than 50% of the REIT’s or RIC’s voting stock is listed during the taxable year on one or more established securities markets;

(2) trades are made on shares of the REIT’s or RIC’s voting stock on such market or markets, other than trades made in de minimis quantities, on at least 60 days during the taxable year (or one-sixth of the number of days in a short taxable year); and

(3) the number of shares of the REIT’s or RIC’s voting stock that are traded on such market or markets during the taxable year comprise at least 10% of the average number of such shares that are outstanding during such taxable year (or, in the case of a short taxable year, a percentage that equals at least 10% of the average number of shares outstanding during the short taxable year).

(b) For purposes of subdivision (a) of this section, the shares of the REIT’s or RIC’s voting stock that are traded on an established securities market located in the United States will be deemed to meet the requirements of paragraphs (2) and (3) of subdivision (a) of this section, if such shares are regularly quoted by dealers making a market in such stock. A dealer “makes a market” in stock only if the dealer in the ordinary course of a trade or business regularly and actively offers to purchase and sell such stock and, in fact, does purchase such stock from, and sell such stock to, customers that are not related corporations as defined in section 6-2.6 of this Subchapter, with respect to the dealer.

(c) The term “regularly traded on an established securities market” does not include trades made between or among related corporations, as defined in section 6-2.6 of this Subchapter.

(d) For purposes of this section, the term “established securities market” means a securities market that meets the requirements of 26 CFR 1.883-2(b).

Section 1-1.8. Non-captive REIT and non-captive RIC. (Tax Law, section 2(7) - (10))

(a) The term "non-captive REIT" means a REIT that is not a captive REIT as defined in section 2(9).

(b) The term "non-captive RIC" means a RIC that is not a captive RIC as defined in section 2(10).

Section 1-1.9. Report. (Tax Law, section 211(1))

The term "report" means a report or return of tax but does not include an estimated tax filing.

Section 1-1.10. S corporation. (Tax Law, section 208(1-A))

(a) The term "S corporation" means a corporation for which the Federal S election under IRC section 1362 is in effect for the tax year. An S corporation includes a limited liability company that is classified as an S corporation for Federal income tax purposes.

(b) The term "New York S corporation" means an S corporation subject to tax under article 9-A that has made the election under section 660(a), or that has been mandated a New York S corporation under section 660(i).

Section 1-1.11. Stock. (Tax Law, section 208(4))

(a) The term "stock" means an interest in a corporation that is treated as equity for Federal income tax purposes. The definition includes corporate equity instruments similar to stocks, such as the following: business trust certificates; units in publicly traded partnerships included in the definition of "corporation" in section 208(1); shares of a RIC; and shares in a REIT.

(b) An interest in a corporation will be deemed to be treated as equity for Federal income tax purposes under this section if such interest would be treated as equity, rather than debt, based upon relevant Federal guidance and court decisions, and upon all surrounding facts and circumstances.

(c) Generally, the determination of the Internal Revenue Service as to whether an instrument is equity will be followed, but such determination is not binding on the commissioner.

Section 1-1.12. Tangible personal property. (Tax Law, section 208(11))

The term “tangible personal property” means corporeal personal property such as machinery, tools, implements, goods, wares and merchandise. It includes audio works, audiovisual works, literary works, visual works, graphic works or games, delivered via a physical medium that are not subject to the rules for digital products under section 210-A(4). It does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property, or evidences of debt.

Section 1-1.13. Taxable year.

The term “taxable year” means, in most cases, the taxpayer's taxable year for Federal income tax purposes, or the part thereof during which the taxpayer is subject to the tax imposed by article 9-A. In the case of a report made for a fractional part of the year, taxable year means the period for which the report is made. A taxable year must be a calendar year or a fiscal year ending during a calendar year. A taxable year shall not include more than 12 calendar months except in the case of a 52-53 week period. If a taxpayer does not have a taxable year for Federal income tax purposes, the taxable year must be a calendar year, unless the commissioner authorizes the use of a fiscal year. Any reference in article 9-A or 27 or this Subchapter to the term tax year or taxable period is a reference to taxable year as defined by this section.

Section 1-1.14. Taxpayer. (Tax Law, sections 208(2), 209(3))

(a) The term “taxpayer” means any corporation that is subject to the tax imposed by article 9-A.

(b) The term “taxpayer” also includes a receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by state or Federal court, who conducts the business of a corporation. For example, a trustee who, under the authority of a Federal court, conducts the business of a corporation in bankruptcy is a taxpayer subject to tax. If the activities of the trustee are limited to the liquidation of the business and the disposition of the assets of the corporation, neither the trustee nor the corporation is subject to the franchise tax.

(c) The term “taxpayer” also includes a corporation that continues to do business after it has been dissolved or surrenders its authority to do business in New York, by proclamation or otherwise. A dissolved corporation or a corporation that surrendered its authority to do business in New York is not taxable under article 9-A if its activities are limited to the liquidation of its business and affairs, the disposition of its assets (other than in the regular course of business), and the distribution of the proceeds.

SUBPART 1-2

CORPORATIONS SUBJECT TO TAX

Section 1-2.1. Domestic corporations subject to tax. (Tax Law, section 209(1) and (8))

(a) The tax is imposed on every domestic corporation, not specifically exempt as provided in section 1-2.11 of this Subpart, for the privilege of exercising its corporate franchise, that is to say, for the mere possession of the privilege. Accordingly, a domestic corporation is subject to tax for each fiscal or calendar year, or part thereof, during which it is in existence, regardless of whether it does any business, employs any capital, owns or leases any property, maintains any office, derives any receipts from any activity in this state or engages in any activity, within or without New York State. A domestic corporation is subject to tax even though it carries on its business or derives its receipts entirely outside New York State.

(1) Example.

> A corporation is incorporated under the laws of New York State on July 1, 2021. It begins to do business on February 1, 2022, setting up its books on the basis of a calendar year. The corporation is subject to tax from July 1, 2021, to December 31, 2021, since it had the privilege of exercising its corporate franchise for that period. It is also subject to tax for the period beginning January 1, 2022.

(b)(1) A domestic corporation that is no longer doing business, employing capital, owning or leasing property in a corporate or organized capacity, or deriving receipts from activity in this state, is exempt from the fixed dollar minimum tax for tax years following its final tax year, provided that the corporation:

(i) is not doing business in New York State;

(ii) is not employing capital in New York State;

(iii) does not own or lease property in New York State in a corporate or organized capacity;

(iv) does not derive receipts from activity in New York State;

(v) does not have any outstanding article 9-A franchise taxes for its final tax year or any prior tax year; and

(vi) has filed its final article 9-A franchise tax return.

(2) A domestic corporation that meets the requirements of paragraph (1) of this subdivision:

(i) will no longer need to file any additional article 9-A franchise tax returns for taxable years or periods occurring after the period covered by its final article 9-A tax return; and

(ii) after filing its final article 9-A tax return, may seek consent to be dissolved.

(3) A domestic corporation that meets the requirements of paragraph (1) of this subdivision but does not seek consent to be dissolved under subparagraph (ii) of paragraph (2) of this subdivision will be subject to dissolution by proclamation after it has not filed article 9-A franchise tax returns for at least two years.

(4) A domestic corporation that does not meet the requirements of paragraph (1) of this subdivision and that ceases to file article 9-A franchise tax returns:

(i) will not qualify for the exemption from the fixed dollar minimum tax; and

(ii) may be issued assessments, including penalties and interest for failure to file an article 9-A franchise tax return or to pay the article 9-A franchise tax, or for failure to do both.

(5) A domestic corporation that is no longer doing business, employing capital, owning or leasing property in a corporate or organized capacity, or deriving receipts from activity in this state, as described in paragraph (1) of this subdivision, but that wishes to retain its certificate of incorporation must:

(i) continue to file article 9-A franchise tax returns;

(ii) continue to pay all applicable tax; and

(iii) not file a final return, that is, not file a return marked final.

Section 1-2.2. Foreign corporations subject to tax. General. (Tax Law, section 209(1) and (3))

(a)(1) The tax is imposed on every foreign corporation, not specifically exempt as provided in section 1-2.11 of this Subpart, whose activities include one or more of the following:

(i) doing business in New York State in a corporate or organized capacity or in a corporate form; or

(ii) employing capital in New York State in a corporate or organized capacity or in a corporate form; or

(iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form; or

(iv) maintaining an office in New York State; or

(v) deriving receipts from activity in New York State.

(b) Except as specified in section 1-2.10 of this Part, a foreign corporation engaged in New York State in any one or more of the activities described in subdivision (a) of this section is subject to tax even though its activities are wholly or partly in interstate or foreign commerce.

(c) A foreign corporation that is not subject to tax or that is exempt from tax, other than a corporation that cannot be included in a combined report under section 210-C(2)(c) and section 6-2.6 of this Subchapter, is required to be included in a combined report with a taxpayer if the combined reporting requirements are met.

(d) A foreign corporation engaged in New York State in any one or more of the activities described in subdivision (a) of this section is subject to tax regardless of whether it is authorized to do business in New York State, including after it surrenders its authority to do business.

(e)(i) A foreign corporation engaged in New York State in any of the activities described in subdivision

(a) of this section is subject to tax:

(a) for any taxable year or part of a taxable year during which it engages in any of the activities described in subdivision (a) of this section; and

(b) for any subsequent taxable year during which it engages in any of the activities described in subdivision (a) of this section.

(f) An alien corporation that under any provision of the IRC is treated as a domestic corporation as defined in IRC section 7701 or that has effectively connected income for the taxable year is subject to tax if such alien corporation is engaged in New York State in any one or more of the activities described in subdivision (a) of this section.

Section 1-2.3. Foreign corporations - partnership interests. (Tax Law, section 209(1))

(a) If a partnership is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York State, as determined pursuant to the rules under article 9-A, then all of its corporate general partners (other than corporate partners that are or would be subject to franchise tax under article 9 or 33) are subject to the tax imposed by article 9-A.

(b) A foreign corporation is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York State if:

(1) it is a limited partner of a partnership, other than a portfolio investment partnership, that is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York State and

(2) it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership. Such foreign corporations that are limited partners of such partnerships (other than corporate partners that are or would be subject to franchise tax under article 9 or 33) are subject to the tax imposed by article 9-A. A foreign corporation is engaged, directly or indirectly, in

the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership if one or more of certain factual situations, including but not limited to the following, exist during the taxable year or, except for subparagraph (i) of this subdivision, any previous taxable year:

(i) The foreign corporation has a 1% or more interest as a limited partner in a partnership and/or the basis of the foreign corporation's interest in the limited partnership, determined pursuant to IRC section 705, is more than $1 million. For purposes of determining whether the level of interest in the partnership or level of basis of the interest in the partnership is met, the percentage of interest in the partnership, and basis of interest in the partnership of members of the foreign corporation's affiliated group, of officers or directors of the foreign corporation, or of officers or directors of members of the foreign corporation's affiliated group, are added to the foreign corporation's interest in the partnership or the basis of its interest in the partnership, respectively.

(ii) An officer, employee, or director of the foreign corporation, or an officer, employee, or director of a member of an affiliated group that includes such foreign corporation or a member of such an affiliated group, is a general partner of the partnership.

(iii) The foreign corporation or a member of an affiliated group that includes the foreign corporation is a 5% or more stockholder in a general partner of the partnership.

(iv) One or more officers, employees, directors or agents of the foreign corporation, or of a member of an affiliated group that includes such foreign corporation, perform acts usually performed by a general partner.

(v) The foreign corporation becomes a limited partner after one or more officers, employees, directors or agents of such corporation, or of a member of an affiliated group that includes such foreign corporation, negotiates the terms of the partnership agreement instead of merely accepting an existing agreement.

(vi) There is substantial communication between one or more officers, employees, directors or agents of the foreign corporation, or of a member of an affiliated group that includes such foreign corporation, and the general partner regarding the business activities or affairs of the partnership.

(vii) The foreign corporation, a member of an affiliated group that includes such foreign corporation, or an officer, employee, or director of the foreign corporation or of a member of such an affiliated group, guarantees payment of one or more loans to the partnership.

(viii) The foreign corporation, a member of an affiliated group that includes such foreign corporation, or an officer, employee, or director of the foreign corporation or of a member of such an affiliated group, makes loans to the partnership.

(ix) The foreign corporation is a limited partner that for purposes of IRC section 469 is materially participating in the partnership as defined in 26 CFR 1.469-5T(e). For purposes of this subparagraph, references to taxpayer in such section 469 is deemed to mean any person, as defined in IRC section 7701(a)(1).

(x) The foreign corporation entered into the limited partnership arrangement not for a valid business or economic purpose, but for the principal purpose of avoiding or evading the payment of tax.

(c) Other factual situations, during the taxable year or any previous taxable year, to be considered as indications that a foreign corporation is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership, include the following:

(1) The foreign corporation, or a member of an affiliated group that includes such foreign corporation, sells its products and/or services to the partnership.

(2) The foreign corporation, or a member of an affiliated group that includes such foreign corporation, purchases the partnership's products and/or services.

(3) The foreign corporation, or a member of an affiliated group that includes such foreign corporation,

is engaged in a similar or identical business to that of the partnership.

(4) 50% or more of the foreign corporation's assets or those of a member of an affiliated group that includes such foreign corporation are a limited partnership interest in the partnership.

(5) The business carried on by the partnership is integrally related to the business of the foreign corporation or a member of an affiliated group that includes such foreign corporation.

(6) The foreign corporation exercises its voting rights as a limited partner to remove a general partner, to approve the sale of the partnership assets, to amend the partnership agreement or to dissolve the partnership.

(7) The foreign corporation, or a member of an affiliated group that includes such foreign corporation, is interrelated with the partnership through one or more of the following factors:

(i) common management;

(ii) common policy and directives, including policy and directives relating to legal services, assignment or transfer of executive personnel, determination and enforcement of procedures to ensure compliance with the law, salary guidelines or uniform pay scale and/or labor relations activities;

(iii) common or inter-entity use of intellectual property, such as patents, trademarks or copyrights;

(iv) common or inter-entity use of product distribution systems and/or warehousing functions;

(v) common or inter-entity use of facilities, equipment, or employees;

(vi) common or inter-entity personnel recruitment;

(vii) common or inter-entity research and development activities;

(viii) common or inter-entity marketing and/or advertising;

(ix) common or inter-entity information processing and computer support, printing, telecommunications, and/or other support services;

(x) common or inter-entity transfer or pooling of technical information;

(xi) common or inter-entity pension plans and/or insurance plans; or

(xii) common or inter-entity credit analysis and coordination of credit extension.

(d) If a limited liability company that is treated as a partnership for tax purposes, other than a limited liability company that is treated as a portfolio investment partnership, is doing business, employing capital, owning or leasing property, maintaining an office or deriving receipts from activity in New York State, then all of its members that are foreign corporations (other than foreign corporations that are or would be subject to tax under article 9 or 33) are subject to the tax imposed by article 9-A; provided, however, that if the operating agreement of such limited liability company imposes limitations on the foreign corporate member's participation in the management of the limited liability company either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law, the foreign corporate member will be subject to the rules applicable to foreign corporate limited partners set out in this section.

(e) As used in this section, the following terms have these meanings:

(1) The term "1% or more interest" means a distributive share of 1% or more of a limited partnership's income, gain, loss, deduction, or credit determined pursuant to IRC section 704.

(2) The term "inter-entity" means business activities or affairs carried on between a foreign corporation that is a limited partner of a partnership, or a member of an affiliated group that includes such foreign corporation, and such partnership.

(3) The term "affiliated group" has the same meaning as such term is defined in IRC section 1504, except that the term "common parent corporation" is deemed to mean any person, as defined in IRC section 7701(a)(1), and except that references to at least 80% in such section 1504 are read as more than 50%. IRC section 1504 is read without regard to the exclusions provided for in section 1504(b).

(4) The term "portfolio investment partnership" means a limited partnership that meets the gross

income requirement of IRC section 851(b)(2). For purposes of the preceding sentence, income and gains from commodities (not described in IRC section 1221) or from futures, forwards, and options with respect to such commodities are included in income that qualifies to meet such gross income requirement. Such commodities must be of a kind customarily dealt in on an organized commodity exchange and the transaction must be of a kind customarily consummated at such place, as required by IRC section 864(b)(2)(B)(iii). To the extent that such a partnership has income and gains from commodities (not described in IRC section 1221) or from futures, forwards, and options with respect to such commodities, such income and gains must be derived by a partnership that is not a dealer in commodities and is trading for its own account as described in IRC section 864(b)(2)(B)(ii). The term portfolio investment partnership does not include a dealer (within the meaning of IRC section 1236) in stocks or securities.

Section 1-2.4. Foreign corporation – doing business. (Tax Law, section 209(1))

(a) The term doing business is used in a comprehensive sense and includes all activities that occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

(b) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(1) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(2) the purposes for which the corporation was organized;

(3) the location of its offices and other places of business;

(4) the employment in New York State of agents, officers and employees; and

(5) the location of the actual seat of management or control of the corporation.

(c) A corporation is doing business in New York State if:

(1) it issues credit cards to at least 1,000 customers with a mailing address in New York State as of the last day of its taxable year;

(2) it has merchant customer contracts that cover at least 1,000 locations in New York State to which it remits payments for credit card transactions during its taxable year;

(3) the sum of the number of customers and the number of locations in paragraphs (1) and (2) totals at least 1,000; or

(4) the corporation itself does not meet the thresholds in paragraphs (1), (2) or (3) of this subdivision but is part of a unitary group that meets the ownership test under section 210-C and Subpart 6-2 of this Subchapter, and:

(i) it issues credit cards to at least 10 customers with a mailing address in New York State as of the last day of its taxable year; or

(ii) it has merchant customer contracts that cover at least 10 locations in New York State to which it remits payments for credit card transactions during its taxable year; or

(iii) the sum of the number of customers and the number of locations in subparagraph (i) and (ii) totals at least 10, and

(iv) the members of the unitary group that meet the requirements of either (i), (ii) or (iii) of this paragraph together meet the requirements of paragraph (1), (2) or (3) of this subdivision, other than any member that is a corporation that cannot be included in a combined report under section 210-C(2)(c) and section 6-2.6 of this Subchapter.

(d) (1) A foreign corporation doing business in New York State because it issues credit cards is deemed to be doing business for all of its taxable year or part of its taxable year from the date in such taxable year on which it issues its first credit card in New York State.

(2) A foreign corporation doing business in New York State because it issues credit cards in its first taxable year, if also doing business in the subsequent taxable year, is deemed to be doing business from the beginning of the subsequent taxable year.

Section 1-2.5. Foreign corporation – employing capital. (Tax Law, section 209(1))

The term employing capital is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as maintaining stockpiles of raw materials or inventories, or owning materials and equipment assembled for construction.

Section 1-2.6. Foreign corporation – owning or leasing property. (Tax Law, section 209(1))

(a) The owning or leasing of real or personal property within New York State constitutes an activity that subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax. Property held, stored or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

(b) Shares in a cooperative housing corporation will be deemed to be real property owned within New York State if the real property owned or leased by such corporation, as described in IRC section 216(b)(1)(B), is located in New York State.

Section 1-2.7. Foreign corporation – maintaining an office. (Tax Law, section 209(1))

A foreign corporation that maintains an office in New York State is engaged in an activity that makes it subject to tax. An office is any area, enclosure or facility that is used in the regular course of the corporate business. A salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Section 1-2.8. Foreign corporation – deriving receipts. (Tax Law, section 209(1))

(a) A foreign corporation that derives receipts from any activity in New York State is subject to tax. For purposes of this section, “New York receipts” means New York receipts as computed under this Subchapter.

(b) A corporation derives receipts from activity in New York State if its New York receipts equal or exceed $1 million.

(c) A corporation derives receipts from activity in New York State if:

(1) the corporation is part of a unitary group that meets the ownership test under section 210-C and Subpart 6-2 of this Subchapter,

(2) it has New York receipts of at least $10,000, and

(3) the total New York receipts of all the members of the unitary group that each have at least $10,000 of New York receipts is at least $1 million of such receipts.

(d) A corporation derives receipts from activity in New York State if:

(1) the corporation is a general partner of a partnership and its New York receipts, if any, when combined with the New York receipts of the partnership, total at least $1 million; or

(2) the corporation is a limited partner of a partnership, other than a portfolio investment partnership, and its New York receipts, if any, when combined with the New York receipts of the partnership, total at least $1 million, provided that the limited partner is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership; or

(3) the corporation is a member of a limited liability company that is treated as a partnership for tax purposes, other than a limited liability company that is treated as a portfolio investment partnership, the operating agreement of which does not impose limitations on the corporate member’s participation in the

management of the limited liability company either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law, and its New York receipts, if any, when combined with the New York receipts of the limited liability company, total at least $1 million; or

(4) the corporation is a member of a limited liability company that is treated as a partnership for tax purposes, other than a limited liability company that is treated as a portfolio investment partnership, the operating agreement of which imposes limitations on the corporate member's participation in the management of the limited liability company either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law, and its New York receipts, if any, when combined with the New York receipts of the limited liability company, total at least $1 million, provided that the member is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the limited liability company.

(e) For purposes of determining whether a corporation is deriving receipts from activity in New York State, a corporation's New York receipts will include such receipts from activities described in Public Law 86-272, and further described in section 1-2.10 of this Subpart.

(f) A corporation that is part of a unitary group will not be considered when determining if the standards specified in this paragraph are met if it cannot be included in a combined report under section 210-C(2)(c) and section 6-2.6 of this Subchapter.

(g) For purposes of subdivision (d) of this section, for a corporation that is a partner in one or more partnerships, and for a corporation that is a member of one or more limited liability companies treated as a partnership for tax purposes, the corporation's New York receipts include its distributive share of any New York receipts of each such partnership or limited liability company.

(h) In determining the amount of a corporation's New York receipts, merchant discount fees received by a corporation for processing credit card transactions are included in its New York receipts.

(i) A corporation will not be deemed to be deriving receipts from activity in New York State if the only New York receipts are:

(1) interest income and net gains received by a corporation from securities issued by government agencies, including but not limited to securities issued by the government national mortgage association, the Federal national mortgage association, the Federal home loan mortgage corporation, and the small business administration;

(2) interest income from Federal funds; or

(3) interest paid to the corporation directly by a federal reserve bank on reserves maintained with the federal reserve.

(j) (1) The receipts thresholds of this subdivision are subject to adjustment by the commissioner based on an annual year-end review of the Consumer Price Index by the department, as follows:

(2) In December of each year, the commissioner will calculate the average Consumer Price index for the preceding twelve months and will use that average to determine the cumulative percentage change in the Consumer Price Index.

(3) If the Consumer Price Index has changed by 10% or more from the Consumer Price Index ascertained at the time of and used by the commissioner for the purpose of making the previous adjustment in the receipts thresholds, then the commissioner will adjust the receipts thresholds as provided in clause (c) of this subparagraph. Any adjustments will apply to taxable years beginning on or after January 1 next succeeding the announcement of the adjustment. When the commissioner has adjusted the receipts thresholds as provided for in this subdivision, any reference to $1 million or $10,000 in this Part is deemed to be a reference to the receipts thresholds as adjusted.

(4) For purposes of this subdivision, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers, or the CPI-U.

(k)(1) A foreign corporation deriving receipts from activity in New York State is deemed to be deriving receipts for all of its taxable year or part of its taxable year from the date in such taxable year of its first receipt derived from activity in New York State.

(2) A foreign corporation deriving receipts from activity in New York State, if also deriving receipts in the subsequent taxable year, is deemed to be deriving receipts from the beginning of the subsequent taxable year.

Section 1-2.9. Activities deemed insufficient to subject foreign corporations to tax. (Tax Law, section 209(2) and (2-a))

(a) A foreign corporation will not be subject to tax under article 9-A because of the activities specified in paragraphs (1) through (10) of this subdivision, provided the corporation is not otherwise doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in New York State.

(1) the maintenance of cash balances with banks or trust companies in New York State;

(2) the ownership of shares of stock or securities kept in New York State in a safe deposit box, safe, vault or other receptacle rented for this purpose, or if pledged as collateral security, or if deposited in safekeeping or custody accounts with one or more banks or trust companies, or brokers who are members of a recognized security exchange;

(3) the taking of any action by any such bank or trust company or broker that is incidental to the rendering of safekeeping or custodian service to such corporation;

(4) the maintenance of an office in New York State by one or more officers or directors of the corporation who are not employees of the corporation;

(5) the keeping of books or records of a corporation in New York State, if such books or records are not kept by employees of such corporation;

(6) the participation in a trade show or shows, regardless of whether the corporation has employees or other staff present at such trade shows, provided the corporation's activity at the trade show is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside New York State for acceptance or rejection and are filled from outside New York State, and provided that such participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes;

(7) the mere acquisition of one or more security interests in real or tangible personal property located in New York State;

(8) the mere acquisition of title to property located in New York State through the foreclosure of a security interest;

(9) the mere holding of meetings of the board of directors in New York State, where such directors are not employees of the corporation; or

(10) any combination of the foregoing activities.

(b)(1) An alien corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in New York State if its activities in New York State are limited solely to investing or trading for its own account in:

(i) stocks and securities within the meaning of IRC section 864(b)(2)(A)(ii); or

(ii) commodities within the meaning of IRC section 864(b)(2)(B)(ii); or

(iii) any combination of stocks, securities and commodities described in (i) and (ii).

(2) An alien corporation that under any provision of the IRC is not treated as a domestic corporation as

defined in IRC section 7701 and does not have effectively connected income for the taxable year will not be subject to tax under article 9-A.

Section 1-2.10. Foreign corporations – Public Law 86-272.

(a) Pursuant to Public Law 86-272 (15 U.S.C.A. sections 381-384), a foreign corporation is exempt from the tax imposed by article 9-A if its activities are limited to those described in that law. Thus, to be exempt under Public Law 86-272, the activities of the corporation in New York State must be limited to one or more of the following:

(1) the solicitation of orders by employees or representatives in New York State for sales of tangible personal property, if the orders are sent outside New York State for approval or rejection and, if approved, are filled by shipment or delivery from a point outside New York State;

(2) the solicitation of orders for sales of tangible personal property by employees or representatives in New York State in the name of or for the benefit of a prospective customer of such corporation, if the customer's orders to the corporation are sent outside New York State for approval or rejection and, if approved, are filled by shipment or delivery from a point outside New York State; and

(3) the solicitation of orders via the Internet in New York State for sales of tangible personal property, if the orders are sent outside New York State for approval or rejection and, if approved, are filled by shipment or delivery from a point outside New York State.

(b) For purposes of this exemption, a corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of sales in New York State or the solicitation of orders for sales in New York State, of tangible personal property on behalf of the corporation by one or more independent contractors. A corporation will not be considered to have engaged in taxable activities in New York State by reason of maintaining an office in New York State by one or more independent contractors whose activities on behalf of the corporation in New York State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(c) The term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or in soliciting orders for the sale of tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities. The term "representative" does not include an independent contractor.

(d) In order to be exempt by virtue of Public Law 86-272, the activities in New York State of employees or representatives, or activities engaged in via the Internet, must be limited to the solicitation of orders for the sale of tangible personal property. The solicitation of orders includes offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property and those ancillary activities, other than maintaining an office, that serve no independent business function apart from their connection to the solicitation of orders. Examples of activities performed by such employees or representatives in New York State, or that are engaged in via the Internet, that are entirely ancillary to the solicitation of orders include:

(1) the use of free samples and other promotional materials in connection with the solicitation of orders;

(2) passing product inquiries and complaints to the corporation's home office;

(3) using autos furnished by the corporation;

(4) advising customers on the display of the corporation's products and furnishing and setting up display racks;

(5) recruitment, training and evaluation of sales representatives;

(6) use of hotels and homes for sales-related meetings;

(7) intervention in credit disputes;

(8) use of space at the salesperson's home solely for the salesperson's convenience. (However, see

subdivision (g) of this section as to loss of immunity for maintaining an office.);

(9) participating in a trade show or shows, provided that participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes. (However, see subdivision (g) of this section as to loss of immunity for maintaining an office.)

(e) The exemption under the provisions of Public Law 86-272 is limited to the solicitation of orders for the sale of tangible personal property and does not include the solicitation of orders for the sale of services or intangible property.

(f) Activities in New York State beyond the solicitation of orders will subject a corporation to tax in New York State unless such activities are de minimis. Activities will not be considered de minimis if such activities establish a nontrivial additional connection with New York State. Solicitation activities do not include those activities that the corporation would have reason to engage in apart from the solicitation of orders, but chooses to allocate to its New York State sales force, or to engage in via the Internet, including interacting with customers or potential customers through the corporation’s website or computer application. However, a corporation will not be made taxable solely by presenting static text or images on its website. In determining whether a corporation's activities exceed the solicitation of orders, all of the corporation's activities in New York State will be considered. Examples of activities that go beyond the solicitation of orders include:

(1) making repairs to or installing the corporation's products;

(2) making credit investigations;

(3) collecting delinquent accounts;

(4) taking inventory of the corporation's products for customers or prospective customers;

(5) replacing the corporation's stale or damaged products;

(6) giving technical advice on the use of the corporation's products after the products have been

delivered to the customer.

(g) Maintaining an office, shop, warehouse or stock of goods in New York State will make a corporation taxable. However, a corporation will not be made taxable solely by maintaining a supply of goods in New York State if such goods are used only as free samples in connection with the solicitation of orders. A corporation will be considered to be maintaining an office in New York State if the space is held out to the public as an office or place of business of the taxpayer. For example, a salesperson's house is used for business and meets the criteria to be considered a bona fide employer office for personal income tax purposes. The residence will be treated as an office of the corporation, and the corporation will be taxable.

(h) A corporation (other than a corporation that cannot be included in a combined report under section 210-C(2)(c) and section 6-2.6 of this Subchapter) may be included in a combined report required under section 210-C, even if it is exempt from taxation under article 9-A pursuant to the provisions of Public Law 86-272, as described in this section. In addition, the receipts of such a corporation will be included in determining whether a unitary group is deriving receipts from activity in this state. However, if all the members of such a unitary group are exempt from taxation under article 9-A pursuant to the provisions of Public Law 86-272, as described in this section, then the unitary group would not be required to file a combined report.

(i) Examples.

The following are examples of foreign corporations that either are exempt or not exempt from tax under this section. Each of these examples is for illustration purposes only and is intended to be applicable only to the specific activity identified in each example.

Example 1: A foreign manufacturing corporation has its factory outside New York State. Its only activity in New York State is the solicitation of orders for its products through a sales office located in New York State. The orders are forwarded to its home office outside New York State for acceptance and the merchandise is shipped by common carrier from the factory direct to the purchasers. The corporation is subject to tax.

Example 2: A foreign corporation that operates several retail stores outside New York State leases an office in New York City for the convenience of its buyers when they come to New York State. Salespeople call at the office to solicit orders. The merchandise is shipped by the sellers directly to the offices of the corporation outside New York State. The corporation is subject to tax.

Example 3: A foreign corporation sends salespeople into New York State to solicit orders. The orders must be accepted at the home office of the corporation located in another state. The corporation displays goods in New York City at a space leased occasionally and for short terms. The corporation is subject to tax.

Example 4: A foreign corporation has $950,000 of receipts from activities in New York State that consist solely of the solicitation of orders by employees in New York State for sale of tangible personal property; all the orders are sent outside New York State for approval or rejection and, if approved, are filled by shipment from a point outside New York State. The corporation also has $100,000 of New York receipts from the sale of services. The corporation is subject to tax. The corporation may not disclaim tax liability in New York State under this section, since its activities in New York State are not limited to those described in this section.

Example 5: Seven foreign corporations each have $200,000 of receipts from activity in

New York State and are part of the same unitary group that meets the ownership test under section 210-C and Subpart 6-2 of this Subchapter. Therefore, the seven corporations together exceed the $1 million receipts threshold. Three members of the group have activities in New York State that consist solely of the solicitation of orders by employees in New York State for sales of tangible personal property, which orders are sent outside New York State for approval or rejection and, if approved, are filled by shipment from a point outside New York State. These three corporations are not subject to tax in New York State because their activities are limited to those described in this section; the other four corporations are subject to tax because they are deriving receipts from activity in New York State and their activities are not limited to those described in this section. The seven corporations are required to file in a combined report, which will include the receipts, net income, net gains, net losses, and net deductions of all the corporations, together with their proportionate share of the unitary group's assets and liabilities.

Example 6: A foreign corporation solicits sales of tangible personal property on its website and provides assistance to customers by posting a list of static frequently asked questions ("FAQs") and answers on the corporation's website. Since this activity is de minimis under this section, the corporation is exempt from tax under article 9-A.

Example 7: A foreign corporation regularly provides assistance to its customers after its products have been delivered, either by email or electronic "chat" that customers initiate by clicking on an icon on the corporation's website. For example, the corporation regularly advises customers on how to use products after the products have been delivered. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 8: A foreign corporation solicits and receives online applications for its branded credit card via the corporation's website. The issued cards will generate interest income and fees for the corporation. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 9: A foreign corporation's website invites viewers in New York State to apply for non-sales positions with the corporation. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and résumé. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 10: A foreign corporation places Internet "cookies" onto the computers or other electronic devices of is customers. These cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 11: The same facts as example 10 except that the cookies gather customer information that is used only for purposes entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the corporation's website, and to remind customers what products they have considered during previous sessions. The cookies perform no other function, and these are the only types of cookies delivered by the corporation to the computers or other devices of its customers. Since this activity is entirely ancillary to the solicitation of orders for sales of tangible personal property, the corporation, under the facts of this example, is exempt from tax under this section.

Example 12: A foreign corporation remotely fixes or upgrades products previously purchased by its customers by transmitting code or other electronic instructions to those products via the Internet. Since this does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 13: A foreign corporation offers and sells extended warranty plans through its website to New York State customers who purchase the corporation's products. Since this activity involves selling, or offering to sell, a service that is not entirely ancillary to the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 14: A foreign corporation contracts with a marketplace provider that facilitates the sale of the corporation's products on the provider's online marketplace. The marketplace provider maintains inventory, including some of the corporation's products, at fulfillment centers in New York State. Since this activity involves the maintenance of the corporation's products in New York State, the corporation is not exempt from tax under this section.

Example 15: A foreign corporation that sells tangible personal property via the Internet also contracts with New York State customers to stream videos and music to electronic devices for a fee. Since this activity involves streaming, which does not constitute the sale of tangible personal property, the corporation is not exempt from tax under this section.

Example 16: A foreign corporation offers for sale only items of tangible personal property on its website. The website enables customers to search for items, read product descriptions, select items for purchase, choose among delivery options, and pay for the items. The corporation does not engage in any activities in New York State that are not described in this example. Since the corporation engages exclusively in activities in New York State that either constitute solicitation of orders for sales of tangible personal property or are entirely ancillary to solicitation, the corporation is exempt from tax under this section.

Section 1-2.11. Corporations not subject to tax. (Tax Law, sections 3, 8, 13, 209(4), (9), (10) and (12))

(a) A corporation that is subject to any of the following taxes is not subject to tax under article 9-A:

(1) transportation and transmission corporations and associations subject to tax under sections 183 and 184;

(2) farmers, fruit growers and other like agricultural corporations organized and operated on a cooperative basis subject to tax under section 185 for tax years prior to January 1, 2018;

(3) continuing section 186 taxpayers subject to tax under former section 186 as it was in effect on December 31, 1999;

(4) insurance corporations subject to the franchise taxes on insurance corporations imposed by article 33, including health maintenance organizations required to obtain a certificate of authority under article 44 of the Public Health Law;

(5) cooperative corporations described in subdivision 1 or 2 of section 77 of the Cooperative Corporations Law;

(6) captive REITs included in a combined report under article 33; and

(7) captive RICs included in a combined report under article 33.

(b) The following corporations are exempt from taxation under article 9-A:

(1) limited-profit housing companies organized pursuant to article 2 of the Private Housing Finance Law;

(2) limited-dividend housing companies organized pursuant to article 4 of the Private Housing Finance Law;

(3) any trust company organized under a law of New York State, all of the stock of which is owned by not less than 20 savings banks organized under a law of New York State;

(4) the Urban Development Corporation and subsidiary corporations of the Urban Development Corporation. A corporation is deemed a subsidiary of the Urban Development Corporation whenever and so long as:

(i) more than one half of any voting shares of the subsidiary are owned or held by the Urban Development Corporation; or

(ii) a majority of the subsidiary's directors, trustees or members are designees of the Urban Development Corporation;

(5) domestic corporations exclusively engaged in the operation of one or more vessels in foreign commerce.

(i) The domestic corporation must operate the vessels regardless of whether it owns them or has leased them from another person or corporation. "Operation of the vessels" means the direction and supervision of the crew and of the actual movements or routes of the vessels. The commissioner generally deems the furnishing of the crew as the operation of the vessel.

(ii) A domestic corporation exclusively engaged in the operation of vessels in foreign commerce remains exempt where (a) it has investments in other domestic corporations exclusively engaged in the operation of vessels in foreign commerce or (b) average investments (other than investments in a domestic corporation qualifying for this exemption) are minimal in comparison to overall activities. Generally, where other investments are 10% or less of average total assets, these investments will be considered minimal.

(iii) A domestic corporation engaged in other activities (except as described in subparagraph (ii) of this paragraph) is not exempt. A domestic corporation is not exempt if it acts as an agent for others by selling tickets, purchasing supplies and services, providing services for others, or operating any other business (e.g., a restaurant).

(6) corporations organized other than for profit that do not have stock, or shares or certificates for stock or for shares, and that are operated on a nonprofit basis, no part of the net earnings of which inures to the benefit of any officer, director, or member, including not-for-profit corporations and religious corporations.

(i) A corporation organized other than for profit, as described in this paragraph, that is exempt from Federal income taxation pursuant to IRC section 501(a), will be presumed to be exempt from tax under article 9-A. If a corporation organized other than for profit is denied exemption from taxation under the IRC, such corporation will be presumed to be subject to tax under article 9-A.

(ii) The determination of the Internal Revenue Service, denying or revoking exemption from Federal taxation under the IRC, will ordinarily be followed.

(7) certain DISCs. A DISC will be exempt from taxation under article 9-A for any taxable year in which it:

(i) received more than 5% of its gross receipts from the sale of inventory or other property that it purchased from its stockholders; or

(ii) received more than 5% of its gross rentals from the rental of property that it purchased or rented from its stockholders; or

(iii) received more than 5% of its total receipts, other than from sales and rentals, from its stockholders.

(8) trusts that are not conducting a business (passive trusts). Where the functions of a trustee are only to hold property and to collect and distribute income, the trust is not subject to tax under article 9-A. The power to sell, invest and reinvest must be clearly and expressly limited. For example, a power to sell stock and reinvest the proceeds if the bid price of the stock drops below a certain level will not make the trust

taxable;

(9) an industrial development agency created pursuant to article 18-A of the General Municipal Law;

(10) housing development fund companies organized pursuant to the provisions of article 11 of the Private Housing Finance Law;

(11) an entity that is treated for Federal income tax purposes as a real estate mortgage investment conduit (REMIC);

(12) an organization described in paragraph (2) or (25) of IRC section 501(c);

(13) redevelopment companies organized pursuant to article 5 of the Private Housing Finance Law;

(14) a qualified subchapter S subsidiary (QSSS) corporation, provided it meets the requirements for exemption under article 9-A;

(15) a qualified settlement fund under IRC section 468B, or an entity that is treated as such for Federal purposes, or a grantor trust, either of which is used for Nazi reparations;

(16) farmers, fruit growers and other like agricultural corporations organized and operated on a cooperative basis for the purposes expressed in and as provided under the Cooperative Corporations Law, whether or not such corporations have capital stock.

Section 1-2.12. Change of classification. (Tax Law, section 209(1))

(a) A corporation subject to tax under article 9-A may, by reason of a change in the nature of its activities or a change in the ownership or control of the voting powers of its capital stock, cease to be subject to such tax and become taxable under some other article. Conversely, a corporation subject to tax under some other article may, for the same reasons, cease to be taxable thereunder and become subject to tax under article 9-A. The date on which any such change of classification becomes effective will be determined by the facts of each case.

(b) A corporation that becomes subject to tax under article 9-A during one of its fiscal or calendar years by reason of a change in classification is treated in the same manner as a corporation that became subject to tax during such year.

(c) A corporation that ceases to be subject to the franchise tax imposed by article 9-A during one of its fiscal or calendar years by reason of a change of classification is treated, insofar as article 9-A is concerned, in the same manner as a corporation that is dissolved or ceases to be taxable in New York State during such year.

Section 1-2.13. Examples.

The following are examples of foreign corporations that either are subject to tax under article 9-A because they are doing business, or employing capital, or owning or leasing property in a corporate or organized capacity, or maintaining an office or deriving receipts from activity in New York State, or are not subject to tax. Each of these examples is intended for illustration purposes only and to be applicable only to the specific activity as identified in each example.

Example 1: A foreign corporation in another state operates or is organized for the purposes of buying and selling securities. It does not maintain a physical office anywhere, other than a statutory office in the state of its incorporation. Regular and continuous purchases of securities are directed by its officers or agents located in New York State. The corporation is subject to tax.

Example 2: A foreign corporation participates in a joint venture that carries on business in this State, but the foreign corporation is not otherwise engaged in any activities in New York State. The corporation is subject to tax.

Example 3: A foreign holding corporation coordinates and supervises in New York

State activities of a subsidiary that is taxable in New York State. It also makes loans to its subsidiary and guarantees loans obtained by the subsidiary from sources other than the parent. The corporation is subject to tax.

Example 4: A foreign manufacturing corporation has its factories and offices located outside New York State. Its sole activity in New York State consists of holding or storing goods in a warehouse owned by an unrelated party. The corporation is subject to tax.

Example 5: A foreign corporation that has no office or other place of business in New York State leases automobiles to customers in New York State, with receipts from this activity equaling less than $1 million. The corporation is subject to tax.

Example 6: A foreign corporation formerly engaged in manufacturing in another state discontinues such business and transfers its office to New York State, where its activities consist solely of the acquisition of bonds and the receipt of interest on such bonds and the holding of directors' meetings. The corporation is subject to tax.

Example 7: A foreign corporation issues credit cards to 500 customers with a mailing address in New York State as of the last day of its taxable year and has contracts with merchants covering 500 locations in New York State to which it remits payments during the taxable year. Since the corporation issues credit cards to customers with a mailing address in New York State and has merchant customer contracts that cover locations in New York

State to which it remits payments for credit card transactions, and the sum of the number of customers and the number of locations is 1,000, the corporation is subject to tax.

Example 8: Three foreign corporations are part of the same unitary group that meets the ownership test under section 210-C and Subpart 6-2 of this Subchapter, all of the members of which each have at least $10,000 of receipts from activity in New York State. They are a bank, a broker-dealer, and an insurance company subject to tax under article 33. The bank and the broker-dealer together have $900,000 of receipts from activity in New York State. The insurance company has $300,000 of receipts from activity in New York State. Since the insurance company is a corporation that cannot be included in a combined report under section 210-C(2)(c) and section 6-2.6 of this Subchapter, its New York receipts will not be included for purposes of determining whether the unitary group is deriving receipts from activity in New York State. Therefore, the bank and the broker-dealer are not subject to tax in New York State .

Example 9: A foreign corporation organized as a bank in another state has interest income from Federal funds, but no other New York receipts. Since the corporation's only New York receipts are from interest income from Federal funds, the corporation is not subject to tax.

PART 2

ACCOUNTING PERIODS AND METHODS

SUBPART 2-1

ACCOUNTING PERIODS

Section 2-1.1. General. (Tax Law, sections 208(10), 209(1))

(a) Generally, for Federal income tax purposes, a taxpayer's taxable year is the same as its accounting period. In most cases, the taxable year for which the franchise tax imposed by article 9-A is to be computed and for which a franchise tax report is to be filed shall be the same as the taxpayer's taxable year for Federal income tax purposes, or that portion of the Federal taxable year for which the taxpayer is subject to the tax imposed by article 9-A. The taxable year under article 9-A generally will be the accounting period covered by the taxpayer's Federal income tax return, whether such period be a calendar year, a properly established fiscal year (which includes an accounting period consisting of 52 - 53 weeks) or an accounting period of less than 12 months as permitted or required under the IRC. If a taxpayer does not have a taxable year for Federal income tax purposes, the tax must be computed and a report must be filed for a calendar year, unless the commissioner authorizes the use of some different accounting period.

(b) The tax imposed by article 9-A is imposed for each fiscal or calendar year of the taxpayer, or any part thereof, during which the taxpayer has a corporate franchise granted by New York State or does business, employs capital, owns or leases property in a corporate or organized capacity, maintains an office, or derives receipts from activity in New York State. Therefore, for purposes of article 9-A, the taxpayer's first taxable year begins, in the case of a domestic corporation, on the date of its incorporation or, if elected, on such other date for the beginning of its corporate existence as set forth in the certificate of incorporation, not to exceed 90 days after the filing of such certificate, and ends on the last day of such fiscal or calendar year, or on the last day it is subject to the tax imposed by article 9-A, whichever comes first. In the case of a foreign corporation, the taxpayer's first taxable year begins on the date it begins to do business, employ capital, own or lease property, maintain an office, or derive receipts from activity in New York State and ends on the last day of such fiscal or calendar year, or on the last day it is subject to the tax imposed by article 9-A, whichever comes first.

Section 2-1.2. Calendar-year taxpayers. (Tax Law, section 208(10))

(a) A taxpayer that reports on the basis of a calendar year for Federal income tax purposes must report on the same basis for purposes of article 9-A. A calendar year is a period of 12 calendar months ending on December 31st, or a period of less than 12 calendar months beginning on the date a taxpayer becomes subject to tax and ending on December 31st. A calendar year also includes, in the case of a taxpayer that changes the period on the basis of which it keeps its books from a fiscal year to a calendar year, the period from the close of its last fiscal year to and including the following December 31st.

(b) A taxpayer shall use a calendar year as its accounting period and report on a calendar-year basis in the following situations:

(1) the taxpayer keeps its books on the basis of a calendar year;

(2) the taxpayer keeps its books on the basis of any period ending on any day other than the last day of a calendar month, except in the case of a taxpayer that keeps its books on the basis of a 52-53 week accounting period;

(3) the taxpayer does not keep books;

(4) the taxpayer is not required to file a Federal income tax return, unless the use of a fiscal year or 52-53 week period basis of reporting has been authorized by the commissioner; or

(5) the taxpayer has made no election as to the use of either a fiscal- or calendar-year basis of reporting.

(c) Examples.

The calendar-year taxpayer's first accounting period and its first taxable year ends on December 31, 2021 in each of the following examples. The taxpayer's first report must be filed on or before April 15, 2022.

Example 1: The corporation is organized in New York State on October 22, 2021, and its certificate of incorporation is filed in the Office of the Secretary of State on the same date. The corporation becomes subject to tax on October 22, 2021, and its first accounting period and taxable year begins on that date irrespective of when the corporation starts to transact business.

Example 2: The corporation is organized in New York State on December 31, 2021, and its certificate of incorporation is filed in the Office of the Secretary of State on the same day. The corporation's first accounting period and taxable year is one day, December 31, 2021, and the corporation must file a report based on such period.

Example 3: The foreign corporation, which reports for Federal income tax purposes on a calendar-year basis, leases space for an office in New York City on February 5, 2021. Prior to February 5, 2021, the corporation did not do business, employ capital, own or lease property, maintain an office, or derive receipts from activity in New York State. The corporation hires personnel and opens its office in New York City on March 1, 2021. The corporation becomes subject to tax on February 5, 2021. Since the taxpayer reports for Federal income tax purposes on a calendar-year basis, its first taxable year for purposes of article 9-A begins February 5, 2021, and its tax is computed on the basis of an accounting period that begins January 1, 2021, and ends December 31, 2021.

Section 2-1.3. Fiscal-year taxpayers. (Tax Law, section 208(10))

(a) A taxpayer that reports on the basis of a fiscal year for Federal income tax purposes must report on the same basis for purposes of article 9-A. A fiscal year is a period not longer than 12 calendar months, or any shorter period beginning on the date the taxpayer becomes subject to tax and ending on the last day of any month other than December. A fiscal year also includes, in the case of a taxpayer that changes the period on the basis of which it keeps its books from a calendar year to a fiscal year, or from one fiscal year to another fiscal year, the period from the close of its last calendar or fiscal year up to the date designated as the close of its new fiscal year. A fiscal year also includes a 52-53 week accounting period if the taxpayer has elected such period for Federal income tax purposes.

(b) A taxpayer reporting on a fiscal-year basis must keep its books on such basis.

(c) Examples.

Example 1: A domestic corporation is incorporated in New York State on November 19, 2021. The corporation selects the fiscal-year basis of reporting and uses the date November 30th as the last day of its fiscal year. The corporation is subject to tax for the period November 19, 2021, to November 30, 2021, and must file a report for that period. The report must be filed on or before March 15, 2022.

Example 2: A foreign corporation, which reports for Federal income tax purposes on a fiscal-year basis, uses September 30th as the last day of its fiscal year. The corporation leases a store in New York City on March 1, 2021. The corporation continues to do business throughout the year 2021. Since the taxpayer reports for Federal income tax purposes on a fiscal-year basis, its first taxable year for purposes of article 9-A begins March 1, 2021, and its tax is computed on the basis of an accounting period that begins October

1, 2020, and ends September 30, 2021. The report must be filed on or before January 15, 2022.

Section 2-1.4. Taxpayers using a 52-53 week year.

(a) A taxpayer that reports on the basis of a 52-53 week accounting period for Federal income tax purposes may report on the same basis for purposes of article 9-A. A 52-53 week period must end on the same day of the week each year, and end always on whatever date that day of the week last occurs in a calendar month, or on whatever date that day of the week falls that is nearest the last day of a calendar month.

(b) If a 52-53 week accounting period is used and the period starts within seven days from the first day of any calendar month, the taxable year will be deemed to have begun on the first day of that calendar month. If a 52-53 week accounting period ends within seven days from the last day of any calendar month, the taxable year will be deemed to have ended on the last day of that month.

(c) If a taxpayer uses a 52-53 week accounting period for purposes of reporting its Federal income taxes and becomes subject to tax under article 9-A, the taxpayer may be required to file reports for two taxable years during an accounting period for which one Federal return is required.

(d) A taxable year of 52-53 weeks will be deemed a period of 12 months.

Section 2-1.5. Change of accounting period.

(a) If a taxpayer's accounting period for Federal income tax purposes is changed, the taxable year and accounting period for which the taxpayer's report is filed under article 9-A must be changed at the same time to coincide with the new Federal income tax accounting period and taxable year.

(b) Where a taxable year or accounting period of less than 12 months results from a change of accounting period, the taxpayer must file a report and pay the tax due for the period beginning from the close of the last taxable year or accounting period for which a report was required to be filed to the date designated as the close of its new accounting period or taxable year. Where a change in taxable year from or to a 52-53 week accounting period, or from one 52-53 week period to a different 52-53 week period, results in a period of either 359 days or more or 6 days or less, the tax for the 359-day-or-more period must be computed as if it were a full taxable year, and the period of six days or less must be added to and deemed part of the following taxable year. In the case of a period consisting of more than 6 days and less than 359 days, a report must be filed for such period.

(c) A taxpayer whose accounting period is changed for Federal income tax purposes is not required to apply for or obtain permission to make a similar change with respect to reports required under article 9-A. In such a case, however, the taxpayer must submit, with the first report filed for the new accounting period under article 9-A, a copy of the consent of the Commissioner of Internal Revenue to the change for Federal income tax purposes. A taxpayer that changes its accounting period for Federal income tax purposes without the prior approval of the Commissioner of Internal Revenue must submit, with the first report filed for the new accounting period under article 9-A, a statement indicating the authority for the Federal change.

(d) In the case of a taxpayer that has an established accounting period for Federal income tax purposes, no change of accounting period for purposes of article 9-A (other than one required by reason of change of the Federal accounting period as set forth in subdivision (a) of this section) will be permitted.

SUBPART 2-2

ACCOUNTING METHODS

Section 2-2.1. General. (Tax Law, section 208(9))

(a) The accounting method or basis on which business income is to be computed must be the same as the taxpayer's method of accounting for Federal income tax purposes. However, when the commissioner deems it necessary in order to properly reflect the business income of the taxpayer, the commissioner may determine the taxable year or period in which any item of income or deduction must be included, without regard to the method of accounting used by the taxpayer.

(b) In the absence of an accounting method for Federal income tax purposes, business income must be computed in accordance with the method regularly employed in keeping the books of the taxpayer, provided such method properly reflects business income. If the books of a taxpayer do not properly reflect business income, or if no books are kept, the computation of business income must be made in such manner as the commissioner deems necessary to properly reflect business income.

Section 2-2.2. Change of accounting method.

(a) If a taxpayer's method of accounting for Federal income tax purposes is changed, the accounting method employed in determining business income for purposes of article 9-A must be changed at the same time to the method approved for Federal income tax purposes. When a change of accounting method occurs, any adjustments that are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted must be taken into account to the extent they are required to be taken into account in determining the taxpayer's Federal taxable income.

(b) A taxpayer whose method of accounting is changed must submit, with its first report in which the new accounting method is used, a copy of the consent of the Commissioner of Internal Revenue, together with complete details of any adjustments with respect to items of income or deduction.

SUBPART 2-3

CESSATION PERIODS

Section 2-3.1. Cessation period. (Tax Law, section 209(1))

(a) The franchise tax is imposed for all or any part of each taxable year during which a taxpayer exercises its corporate franchise, does business, employs capital, owns or leases property in a corporate or organized capacity, maintains an office, or derives receipts from activity in New York State. Accordingly, every taxpayer is required to pay a tax measured by business income (or other applicable basis) up to the date on which it ceases to possess a franchise if a domestic corporation, or ceases to do business, employ capital, own or lease property in a corporate or organized capacity, maintain an office, or derive receipts from activity in New York State if a foreign corporation, regardless of whether or not such corporation has been granted written authority by the New York State Department of State to do business in New York State.

(b) A domestic corporation may cease to possess a franchise as a result of its dissolution, merger or consolidation into another corporation, or the revocation or annulment of its charter.

(c) A taxpayer may cease to be subject to tax under article 9-A because of a change in the nature of its activities or a change in classification. In such event, the taxpayer must pay a tax measured by business income (or other applicable basis) up to the date of the change. In some cases, a corporation may then become subject to tax under some other article of the Tax Law.

(d) A corporation that is a member of a group taxed on the basis of a combined report, and that ceases to be subject to tax under article 9-A, may, in the discretion of the commissioner, be permitted to be included in the next combined report of the group. Application for permission to report in such manner must be mailed to the commissioner. The corporation that ceases to be subject to tax under article 9-A must, at the time of such application, pay a tax of no less than the fixed dollar minimum described in section 210(1)(d).

PART 3

COMPUTATION OF TAX

SUBPART 3-1

TAX BASES

Section 3-1.1. Computation of tax. (Tax Law, section 210(1) and (1-c))

(a) Generally, a corporation subject to the tax imposed by article 9-A is required to pay a tax computed by one of the three bases set forth in this subdivision and must pay whichever results in the highest tax:

(1) the business income base tax;

(2) the capital base tax; and

(3) the fixed dollar minimum tax.

(b) A qualified homeowners association, as defined in section 210(1), is required only to pay the greater of the business income base tax or the capital base tax.

(c) For special rules concerning domestic international sales corporations (DISCs), REITs, RICs, New York S corporations, and corporate partners, see Part 9 of this Subchapter.

(d) For the computation of tax on a combined report, see Subpart 6-2 of this Subchapter.

Section 3-1.2. Business income base tax. (Tax Law, sections 210(1)(a), 209(6))

(a) (1) Generally, the business income base is the measure of the tax if such calculation results in an amount of tax greater than the capital base tax and greater than the fixed dollar minimum tax.

(2) The business income base is the corporation's total business income apportioned to New York State minus the prior net operating loss conversion subtraction and the net operating loss deduction.

(3) To compute the tax measured by the business income base, the corporation must multiply its business income base by the tax rate specified in section 210(1)(a).

(b) (1) Where a group of corporations file a combined report, the combined business income base generally is the measure of the tax if such calculation results in an amount of tax greater than the combined capital base tax and greater than the fixed dollar minimum tax that is attributable to the designated agent of the combined group.

(2) The combined business income base is the total business income of the combined group apportioned to New York State minus the prior net operating loss conversion subtraction of the combined group and the net operating loss deduction of the combined group.

(3) To compute the tax measured by the combined business income base, the combined business income

base is multiplied by the tax rate specified in section 210(1)(a).

(c) The business income base tax is not applicable to New York S corporations and DISCs.

Section 3-1.3. Capital base tax. (Tax Law, sections 209(5) and (7), 210(1) and (1-c))

(a)(1) Generally, the capital base is the measure of the tax if such calculation results in an amount of tax that is greater than or equal to the business income base tax and greater than the fixed dollar minimum tax.

(2) The capital base is the portion of the corporation's total business capital apportioned to New York State.

(3) To compute the tax measured by the capital base, the corporation must multiply its capital base by the tax rate specified in section 210(1)(b).

(b) (1) Where a group of corporations file a combined report, the combined capital base is the measure of the tax if such calculation results in an amount of tax greater than or equal to the combined business income base tax and greater than the fixed dollar minimum tax that is attributable to the designated agent of the combined group.

(2) The combined capital base is the combined total business capital apportioned to New York State.

(3) To compute the tax measured by the combined capital base, the combined capital base is multiplied by the tax rate specified in section 210(1)(b).

(c) The capital base tax does not apply to:

(1) a non-captive RIC;

(2) a non-captive REIT;

(3) the first two taxable years of a taxpayer that, for one or both such years, is a small business taxpayer;

(4) a New York S corporation.

(d) For purposes of subdivision (c) of this section, a small business taxpayer, as defined in section 210(1)(f), is required only to pay the higher of the business income base tax or the fixed dollar minimum tax in its first two taxable years. A combined group may qualify as a small business taxpayer if the combined group satisfies the requirements to be a small business taxpayer specified in section 210(1)(f)(i), (ii) and (iv) and each member of the combined group satisfies the requirement in section 210(1)(f)(iii).

Section 3-1.4. Fixed dollar minimum tax. (Tax Law, section 210(1)(d))

(a) Generally, the fixed dollar minimum is the measure of the tax if such calculation results in an amount of tax that is greater than or equal to the business income base tax and greater than or equal to the capital base tax. The amount of the fixed dollar minimum tax determined in section 210(1)(d) varies by the amount of New York receipts and the type of taxpayer.

(b) (1) Where a group of corporations files a combined report, the fixed dollar minimum tax attributable to the designated agent generally is the measure of the tax for the combined group if such calculation results in an amount of tax greater than or equal to the combined business income base tax and greater than or equal to the combined capital base tax. In addition, the tax on a combined report must include the fixed dollar minimum tax for each member of the combined group that is a taxpayer, other than the designated agent. Any corporation included in the combined report that is not a taxpayer is not required to pay a fixed dollar minimum tax.

(2) Each taxpayer member of the combined group, including the designated agent, must compute its own fixed dollar minimum tax based on its own New York receipts. Such receipts must be computed on a separate company basis and determined without the consideration of intercorporate eliminations or deferrals.

(c) For purposes of calculating the fixed dollar minimum tax, New York receipts are the receipts included in the numerator of the apportionment factor for the taxable year.

SUBPART 3-2

GENERAL RULES

Section 3-2.1. Correcting distortions of income or capital. (Tax Law, section 211(5))

(a) In case it shall appear to the commissioner that any agreement, understanding or arrangement exists between the corporation and any other corporation or any person or firm, whereby the activity, business, income or capital of the corporation within New York State is improperly or inaccurately reflected, the commissioner is authorized in the commissioner's discretion to adjust items of income (including gains and losses), deductions, and capital. In addition, the commissioner is authorized in the commissioner's discretion to disregard assets and the receipts derived therefrom in computing the business apportionment fraction or the MCTD apportionment percentage, provided that any income directly traceable thereto is also excluded from entire net income (ENI) so as to equitably determine the tax.

(b) The commissioner may include in the ENI of any taxpayer the fair profits that, but for an agreement, arrangement or understanding as described in subdivision (a) of this section, the taxpayer might have derived from any transaction:

(1) where the taxpayer conducts its activity or business under any agreement, arrangement, or understanding in such manner as either directly or indirectly to benefit its members or stockholders, or any of them, or any person or persons directly or indirectly interested in such activity or business, by entering into any transaction at more or less than a fair price that, but for such agreement, arrangement or understanding, might have been paid or received thereof; or

(2) where the taxpayer, a substantial portion of the voting power of whose capital stock is owned or controlled either directly or indirectly by another corporation, enters into any transaction with such other corporation on such terms as to create an improper loss or net income.

(c) Where any taxpayer owns or controls, directly or indirectly, more than 50% of the voting power of the capital stock of another corporation subject to tax under section 1502-A and 50% or less of whose gross receipts for the taxable year consist of premiums, the commissioner may include in the ENI of the taxpayer, as a deemed distribution, the amount of the net income of the other corporation that is in excess of its net premium income.

Section 3-2.2. Adjusting tax bases to period covered by report. (Tax Law, sections 208(9)(h), 210(2))

(a) Entire net income (ENI).

(1) Except in the case of a New York S termination year, if the ENI required to be reported under article 9-A is for a period different from the period covered by the taxpayer's Federal income tax return, the taxpayer's ENI must be prorated to correspond with the period covered by the report under article 9-A. The prorated ENI is computed as follows:

(i) adjust Federal taxable income to arrive at ENI in the manner set forth in section 3-3.1 of this Part;

(ii) multiply ENI by the number of calendar months, or major parts thereof, covered by the report under article 9-A; and

(iii) divide the result by the number of calendar months, or major parts thereof, covered by the return for Federal income tax purposes. Other exempt income and investment income must be similarly prorated.

(2) Examples.

Example 1: A calendar year taxpayer was organized in 2017 under the laws of another state where it carried on its business. It began doing business in New York State on March 14, 2022. It files its return for Federal income tax purposes for the calendar year 2022 and its Federal taxable income was $70,000. In computing its ENI for the period March 14, 2022, to December 31, 2022, its Federal taxable income of $70,000 for the calendar year 2022 is first adjusted as required by section 3-3.1 of this Part. The taxpayer’s ENI after those adjustments was $78,000. That ENI must be multiplied by 10 (the number of months from March to December) and the product divided by 12, resulting in a prorated ENI of $65,000.

Example 2: Same facts as in Example 1, except that the taxpayer began doing business in New York State on March 20, 2022. The ENI of $78,000 must be multiplied by 9 and the product divided by 12, resulting in a prorated ENI of $58,500.

(3) The method of computing ENI set forth in paragraph (1) of this subdivision applies to taxpayers reporting on either a calendar year or a fiscal year basis for Federal income tax purposes.

(b) Business and investment capital. If a period covered by a report under article 9-A is other than 12 calendar months, the amount of business capital and the amount of investment capital are each determined by multiplying its average value, by the number of calendar months, or major parts thereof, included in that period, and dividing the product by 12.

(1) Example.

A foreign corporation began to do business in New York State on June 10, 2022, and reports on a calendar year basis. The average value of its total investment capital for that year was $60,000, and the average value of its total business capital was $240,000. The amount of each class of capital, for purposes of computing the tax for taxable year 2022, is determined by multiplying each of the above amounts by seven (the number of months from June to December) and dividing the product by 12, resulting in investment capital of $35,000 and business capital of $140,000.

(c) Fixed dollar minimum tax. If the taxable period covered by a report under article 9-A is less than 12 months, the amount of New York receipts used to determine the amount of the fixed dollar minimum tax is determined by dividing the amount of the receipts for the period covered by the report by the number of months, or major parts thereof, in that period and multiplying the result by 12. In addition, the amount of fixed dollar minimum tax determined under section 210(1)(d)(1) shall be reduced by:

(1) 25% if the period for which the taxpayer is subject to tax is more than six months but not more than nine months, or

(2) 50% if the period for which the taxpayer is subject to tax is not more than six months.

(3) Example.

> A foreign corporation began to business in New York State on May 10, 2022, and reports on a calendar year basis. During the period from May 10, 2022, through December 31, 2022, its New York receipts is \$2,500,000. The amount of the receipts used to determine its fixed dollar minimum is \$3,750,000, which is determined by dividing 2,500,000 by 8 and multiplying the result by 12. The fixed dollar minimum tax when New York receipts are \$3,750,000 is \$1,500. Because the period covered by the report is more than 6 months but less than 9 months, the amount of the fixed dollar minimum tax is reduced by 25% to 1,125.

(d) Whenever the tax base is prorated for a tax period of less than 12 months, the business apportionment fraction must be determined pursuant to section 210-A and this Subchapter, using only those receipts, net income, net gain and other items for the period for which it is subject to tax in New York State. This short period BAF must be applied to business income and business capital that have been prorated to represent business income and business capital for the period for which the corporation is subject to tax in New York State as required by this section. With such short period report, a corporation must submit complete details showing how it computed amounts using the rules for this section for the period it is subject to tax in

New York State, if for less than a full year. If, in the opinion of the commissioner, the prorated business income or prorated business capital for the period for which the corporation is subject to tax in New York State does not properly reflect the business income or business capital for such period, the commissioner may determine business income or business capital solely on the basis of the corporation’s business income or business capital during such period.

Section 3-2.3. Fair market value.

(a) The fair market value (FMV) of any asset owned by the taxpayer is the price at which a willing seller, not compelled to sell, will sell and a willing purchaser, not compelled to buy, will buy.

(b) The FMV, on any date, of stocks, bonds and other securities regularly traded on an exchange, or in an over-the-counter market, is the mean between the highest and lowest selling prices on that date. If there were no sales on the valuation date, such value is the mean between the highest and the lowest selling prices on the nearest date, within a reasonable time, on which there were sales. If actual sales within a reasonable time are not available, the FMV is the mean between the bona fide bid and asked prices on the valuation date or the nearest date within a reasonable time.

(c) If the actual sales prices or bona fide bid and asked prices within a reasonable time are not available, or if, by reason of the character or extent of the taxpayer's investments or for any other reason, such prices are not truly indicative of value, the FMV is ascertained as follows:

(1) in the case of shares of stock, on the basis of the issuing corporation's net worth, earning power, book value, dividends paid, and all other relevant factors;

(2) in the case of bonds and other securities, by giving consideration to various factors, including the soundness of the security, the interest yield, and the date of maturity.

(d) If a taxpayer consistently computes the FMV of its stocks, bonds and other securities on some other basis, such as the last selling price on the valuation date, such method of valuation may be accepted by the commissioner. In all such cases, a complete explanation of the method of valuation must be included with the report.

Section 3-2.4. Average value. (Tax Law, section 210(2))

(a) In determining average value, the taxpayer must use fair market value (FMV) for real property and marketable securities and must use the value shown on the balance sheet included with its Federal tax return for personal property other than marketable securities. If the taxpayer is not required to include a balance sheet in its Federal income tax return, it must use the value for personal property other than marketable securities that it would have used if it had been required to include a balance sheet with its Federal income tax return. In the case of an alien corporation that under any provision of the IRC is not treated as a "domestic corporation" as defined in IRC section 7201, only amounts that are effectively connected with the United States trade or business are included. However, corporations more than 50% directly or indirectly owned or controlled by the taxpayer (or combined group) must be valued using the equity method of accounting in accordance with generally accepted accounting principles (GAAP), provided the value cannot be less than zero. The equity method of accounting calls for each such corporation to be valued based on the average value of its owner's equity account per its balance sheet. Allowance must be made for variations in the amount of assets held by the taxpayer during the period covered by the report, as well as for variations in market prices. Average value generally is computed on a quarterly basis where the taxpayer's usual accounting practice permits such computation. However, at the option of the taxpayer, a more frequent basis (such as a monthly, weekly or daily average) may be used. Where the taxpayer's usual accounting practice does not permit a quarterly or more frequent computation of average value, a semiannual or annual computation may be used where no distortion of average value will result. If, because of variations in the amount or value of any class of assets, it appears to the commissioner that averaging on an annual, semiannual or quarterly basis does not properly reflect average value, the commissioner may require averaging on a more frequent basis. Any method of determining average value that is adopted by the taxpayer on any report and accepted by the commissioner may not be changed on any subsequent report without the prior consent of the commissioner.

(b) Generally, the value of assets must be determined without reduction for liabilities. However, if a taxpayer's assets include reverse repurchase agreements and/or securities borrowing agreements, then the sum of the FMV of these assets must be reduced, but not below zero, by the sum of the FMV of all repurchase agreements and/or securities lending agreements included in the taxpayer's liabilities.

(1) Examples.

Example 1: A taxpayer owns shares of common stock of X Corporation. The FMVs, during the period covered by its report, on a quarterly basis, were as follows:

(1) at the end of first quarter, it owned no shares;

(2) at the end of second quarter, it owned no shares;

(3) at the end of third quarter, it owned no shares; and

(4) at the end of fourth quarter, it owned 100 shares with a value of $100 a share.

The average value during the period covered by the report, on a quarterly basis, of the taxpayer's holdings of X Corporation's common stock would be $2,500, computed as follows:

Fair market values of stock

End of 1st quarter	0
End of 2nd quarter	0
End of 3rd quarter	0
End of 4th quarter	$10,000

Total	$10,000

Average Value: 10,000 ÷ 4 = $2,500

Example 2: The taxpayer's inventories and their values during the period covered by its report, on a quarterly basis, were as follows:

(1) at the end of first quarter, 1,000 tons with a value of $2 a ton;

(2) at the end of second quarter, 2,000 tons with a value of $2 a ton;

(3) at the end of third quarter, 2,000 tons with a value of $3 a ton; and

(4) at the end of fourth quarter, 1,000 tons with a value of $2 a ton.

The average value of the taxpayer's inventories during the period covered by the report, computed on a quarterly basis, would be $3,500, computed as follows:

Value of inventories	
End of 1st quarter	$2,000
End of 2nd quarter	$4,000
End of 3rd quarter	$6,000
End of 4th quarter	$2,000
Total	$14,000

Average Value: 14,000 ÷ 4 = $3,500

Example 3: The taxpayer did not dispose of or acquire any part of its plant or equipment during the period covered by its report. The values of its plant and equipment were as follows:

(1) at the beginning of the year, the value was $800,000; and

(2) at the end of the year, the value was $780,000.

The average value of the taxpayer's plant and equipment during the period covered by its report, computed on the basis of the average values at the beginning end and end of such period, would be

$790,000, computed as follows:

Beginning of year	$800,000
End of year	$780,000
Total	$1,580,000

Average Value: = 1,580,000 ÷ 2 = $790,000

Section 3-2.5. Use of dollar amounts in computing tax. (Tax Law, section 171(19))

(a) Any amount required to be included in a report may be entered at the nearest whole dollar amount. This does not apply to the items that must be taken into account in making the computations necessary to determine such amount. For example, each sale must be taken into account at its exact amount, including cents, in computing the amount to be included in the franchise tax report. However, the total amount to be included in the franchise tax report may be entered at the nearest whole dollar amount. A taxpayer may elect not to use whole dollar amounts by reporting all amounts in full, including cents.

(b) For the purpose of the computation to the nearest dollar, a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case the amount (determined without regard to the fractional part of a dollar) shall be increased by one dollar.

(1) Example.

Exact amount	To be reported as
$500,000.49	$500,000.00
$500,000.50	$500,001.00

$500,000.51	$500,001.00

Section 3-2.6 Federal changes. (Tax Law, sections 211(3), 1083(c)(7), and 1087(c)(1)).

If the taxpayer files a report or an amended report as required by section 211(3) with respect to an increase or a decrease in Federal taxable income or Federal tax, or with respect to a change, correction or renegotiation of tax that is treated in the same manner as if it were a deficiency or overpayment for Federal income tax purposes, or with respect to a computation or re-computation of tax that is treated in the same manner as if it were a deficiency or overpayment for Federal income tax purposes, the amount of tax attributable to the Federal change, correction or renegotiation, or the computation or re-computation means the amount determined by recomputing each of the alternative tax bases for measuring the tax imposed under article 9-A, taking into account the item or items resulting in the Federal change, correction or renegotiation, or the computation or re-computation for the taxable year. Such amount shall be computed without change to the business apportionment factor (BAF).

SUBPART 3-3

ENTIRE NET INCOME

Section 3-3.1. Definition of entire net income (ENI). (Tax Law, section 208(9))

(a) (1) Entire net income means total net income from all sources. The starting point for the computation of ENI is Federal taxable income, which generally means taxable income as defined in IRC section 63 ("taxable income"). After determining the amount of Federal taxable income, it must be adjusted by the addition and subtraction modifications as required by the provisions of section 208(9) and, to the extent necessary, further described in this Subpart.

(2) "Federal taxable income" is presumed to be the same as

(i) the taxable income the taxpayer is required to report to the Internal Revenue Service; or

(ii) the taxable income that the taxpayer would have been required to report to the Internal Revenue Service, if it had not made an election under Subchapter S of Chapter One of the IRC; or

(iii) the taxable income that the taxpayer, in the case of a corporation that is exempt from Federal income tax (other than the tax on unrelated business taxable income imposed under IRC section 511) but is subject to tax under article 9-A, would have been required to report to the Internal Revenue Service but for such exemption; or

(iv) the income, gain, or loss that is effectively connected with the conduct of a trade or business within the United States, as determined under IRC section 882, in the case of an alien corporation that under any provision of the IRC is not treated as a domestic corporation as defined in IRC section 7701.

(v) For purposes of computing ENI, federal taxable income must be determined without taking into account the minimum amount of taxable income specified in IRC section 860E.

(3) The amount of any specific exemption or credit allowed in any law of the United States imposing any tax on or measured by the income of corporations is not allowed in computing ENI. The income actually reported or the income actually determined for Federal income tax purposes is not necessarily the same as the taxable income that was required to be reported for Federal income tax purposes under the provisions of the IRC. Generally, the determination of the Internal Revenue Service as to Federal taxable income is followed, but it is not binding on the commissioner or the taxpayer.

(b) Each corporation included in a Federal consolidated group must compute its Federal taxable income for purposes of article 9-A as if such corporation had computed its Federal taxable income on a separate basis for Federal income tax purposes. Provided, however, in the case of a member of a selling consolidated group, as defined in IRC section 338(h)(10), with respect to which an election under such section 338(h)(10) has been made, Federal taxable income shall not include any gain or loss on the sale or exchange of stock of a target corporation that is not recognized by virtue of such election, but only if such member files on a combined report with such target corporation for the period including the acquisition date, as such term is defined in IRC section 338(h)(2).

(c) Combined reports. In computing combined entire net income, the combined group will generally be treated as a single corporation. All intercorporate dividends must be eliminated (except dividends from a DISC or a former DISC not exempt from tax under article 9-A or dividends from a captive REIT included in the combined report if the group is utilizing the subtraction modification in section 208(9)(t). In addition, all other intercorporate transactions must be deferred in a manner similar to the United States treasury regulations relating to intercompany transactions under IRC section 1502. In computing combined ENI, contributions should be deducted and intercorporate profits should be treated in a manner similar to US treasury regulations for consolidation purposes.

(d) ENI may be affected by a net capital loss carried from another taxable year for Federal income tax purposes pursuant to IRC section 1212. (For the rules for calculating a capital loss and a capital loss carry back and carry forward for New York purposes, see Subpart 3-7 of this Part).

Section 3-3.2. Taxable year in which income or deduction is included in ENI (Tax Law, section 208(9)(d))

(a) In general, the method of accounting used in computing taxable income for Federal income tax purposes is used in computing ENI. However, whenever the commissioner deems it necessary in order to properly reflect the ENI of the taxpayer, the commissioner may determine the taxable year or period in which any item of income or deduction shall be included, without regard to the method of accounting used by the taxpayer for Federal income tax purposes.

(b) Examples.

Example 1: A taxpayer has a contract for the construction of a building and the subsequent installation of equipment in that building. The contract covers a period in excess of one taxable year. The taxpayer keeps its books so as to reflect the total income derived from the contract in the taxable year in which the contract is finally completed, and reports its Federal taxable income accordingly. The commissioner may require the taxpayer to report the income from the contract on the basis of the percentage of completion in each taxable year, or some other appropriate basis.

Example 2: A foreign corporation sells its New York State real estate on an installment basis, and terminates its taxable status in New York State in the year of the sale. The full profit on the sale must be included in entire net income in the year of the sale.

Example 3: A foreign corporation sells its New York State real estate on an installment basis and terminates its taxable status in New York State in a subsequent taxable year prior to the receipt of all of its installment payments. The profit included in the remaining installment payments for the sale must be included in ENI in the year it terminates its taxable status in New York State.

Section 3-3.3. Subtraction modifications for community banks and thrifts. (Tax Law, section 208(9)(r), (s) and (t))

(a) Captive REIT modification.

(1) A corporation that is a small thrift institution or qualified community bank, both as defined in section 208(9)(s), that maintained a captive REIT on April 1, 2014, must utilize the REIT subtraction provided for in this subdivision in any taxable year it maintained such captive REIT on the last day of the tax year. Such

corporation maintained a captive REIT if it owned, directly or indirectly, more than 50% of the voting stock of such captive REIT on the required date. The REIT subtraction is equal to 160% of the dividends paid deductions allowed to that captive REIT for the taxable year for Federal income tax purposes.

(2) When computing the combined business income base, there is no elimination of intercompany dividends received from the combined captive REIT by any member of the combined group in any taxable year in which the subtraction modification described in this subdivision is utilized.

(3) A combined group that includes a small thrift institution or qualified community bank is not allowed to utilize the subtraction modification for qualified residential loan portfolios described in subdivision (b) of this section or the subtraction modification for qualified community banks and small thrifts described in subdivision (c) of this section in any taxable year in which such thrift institution or community bank owns the captive REIT referred to in paragraph (1) on the last day of the taxable year.

(b) Subtraction modification for qualified residential loan portfolios.

(1) A corporation that is a thrift institution, as defined in section 208(9)(r)(3), or a qualified community bank, as defined in section 208(9)(s)(2), that maintains a qualified residential loan portfolio as defined in paragraph (2) of this subdivision is allowed as a deduction in computing ENI the amount, if any, by which:

(i) 32% of its ENI determined without regard to this subtraction modification exceeds; (ii) the amounts deducted by the taxpayer pursuant to IRC sections 166 and 585 less any

amounts included in Federal taxable income because of a recovery of a loan.

(2) Qualified residential loan portfolio. A corporation maintains a qualified residential loan portfolio if at least 60% of the amount of the total assets at the close of the taxable year of the thrift institution or qualified community bank consists of the assets described in clauses *(a)* through *(l)* of subparagraph (i) of this paragraph, with the application of the rule in clause *(m)* of subparagraph (i) of this paragraph. At the election of the corporation, such percentage shall be applied based on the average assets outstanding during the taxable year, in

lieu of the close of the taxable year. The corporation can elect to compute an average using the assets measured on the first day of the taxable year and on the last day of each subsequent quarter, or month or day during the taxable year. This election may be made annually.

(i) Assets:

(a) cash, which includes cash and cash equivalents, including cash items in the process of collection, deposit with other financial institutions, including corporate credit unions, balances with Federal reserve banks and Federal home loan banks, Federal funds sold, and cash and cash equivalents on hand. Cash shall not include any balances serving as collateral for securities lending transactions;

(b) obligations of the United States or of a state or political subdivision thereof, and stock or obligations of a corporation that is an instrumentality or a government sponsored enterprise of the United States or of a state or political subdivision thereof;

(c) loans secured by a deposit or share of a member;

(d) loans secured by an interest in real property that is (or from the proceeds of the loan, will become) residential real property or real property used primarily for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, or loans secured by stock in a cooperative housing cooperation that entitles the stockholders to occupy for dwelling purposes a specified unit in the building owned by the cooperative housing corporation pursuant to a proprietary lease of that unit. For purposes of this clause, residential real property includes single or multi-family dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis;

(e) property acquired through the liquidation of defaulted loans described in clause *(d)* of this subparagraph;

(f) any regular or residual interest in a REMIC, as defined in IRC section 860D, but

only in the proportion that the assets of such REMIC consist of property described in clauses *(a)* through *(e)* of this paragraph, except that if 95% or more of the assets of such REMIC are assets described in clauses *(a)* through *(e)* of this subparagraph, the entire interest in the REMIC will qualify;

(g) any mortgage-backed security that represents ownership of a fractional undivided interest in a trust, the assets of which consist primarily of mortgage loans, if the real property that serves as security for the loans is (or from the proceeds of the loan, will become) the type of property described in clause *(d)* of this subparagraph and any collateralized mortgage obligation, the security for which consists primarily of mortgage loans that maintain as security the type of property described in clause *(d)* of this subparagraph;

(h) certificates of deposit in, or obligations of, a corporation organized under a state law that specifically authorizes such corporation to insure the deposits or share accounts of member associations;

(i) loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities;

(j) loans made for the payment of expenses of college or university education or vocational training;

(k) property used by the taxpayer in support of business that consists principally of acquiring the savings of the public and investing in loans; and

(l) loans for which the taxpayer is the creditor and that are wholly secured by loans described in clause *(d)* of this subparagraph.

(m) The value of accrued interest receivable and any loss-sharing commitment or another loan guaranty by a governmental agency will be considered part of the basis in the loans to which the accrued interest or loss protection applies.

(ii) For purposes of clause *(d)* of subparagraph (i) of this paragraph:

(a) if a multifamily structure securing a loan is used in part for nonresidential use purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80% of the property's planned use (measured, at the taxpayer's election, by using square footage or gross rental revenue, and determined as of the time the loan is made), and

(b) loans made to finance the acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if there is a reasonable assurance that the property will become residential real property within a period of three years from the date of acquisition of such land; but this clause shall not apply for any taxable year unless, within such three-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause *(f)* of subparagraph (i) of this paragraph, any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding item under principles like the principle of such clause *(f)*, except that if such REMICs are part of a tiered structure, they shall be treated as one REMIC for purposes of such clause *(f)*.

(3) Combined groups.

(i) In the case of a combined report, the deduction provided for in this subdivision will be computed on a combined basis. For purposes of calculating this subtraction, the ENI of the combined reporting group shall be multiplied by a fraction, the numerator of which is the average total assets of all the thrift institutions and qualified community banks included in the combined report and the denominator of which is the average total assets of all the corporations included in the combined report.

(ii) The determination of whether the combined group maintains a qualified residential loan portfolio will be made by aggregating the assets of the thrift institutions and qualified community banks that are members of the combined group.

(4) A taxpayer or, in the case of a combined group, a combined group claiming the subtraction modification described in this subdivision is not allowed to utilize the captive REIT subtraction modification

described in subdivision (a) of this section or the subtraction modification for community banks and small thrifts described in subdivision (c) of this section.

(c) Subtraction modification for community banks and small thrifts.

(1) A corporation that is a qualified community bank or a small thrift institution, both as defined in section 208(9)(s), is allowed a deduction in computing ENI equal to the amount computed as follows:

(i) Multiply the corporation's net interest income from loans during the taxable year by a fraction, the numerator of which is the gross interest income during the taxable year from qualifying loans and the denominator of which is the gross interest income during the taxable year from all loans.

(ii) Multiply the amount determined in subparagraph (i) of this paragraph by 50%. This product is the amount of the deduction allowed under this paragraph.

(2) Net interest income from loans means gross interest income from loans less gross interest expense from loans, provided the result cannot be less than zero. Gross interest expense from loans is determined by multiplying gross interest expense by a fraction, the numerator of which is the average total value of loans owned by the thrift institution or community bank during the taxable year and the denominator of which is the average total assets of the thrift institution or community bank during the taxable year.

(3) A qualifying loan is a loan that meets the conditions specified in subparagraphs (i) and (ii) of this paragraph. A loan that meets the definition of a qualifying loan in a prior taxable year (including years prior to 2015) remains a qualifying loan in taxable years during and after which such loan is acquired by another member of the same combined group.

(i) The loan is originated by the qualified community bank or small thrift institution or is purchased by the qualified community bank or small thrift institution immediately after its origination in connection with a commitment to purchase made by the bank or thrift institution prior to the loan's origination.

(ii) The loan is a small business loan or a residential mortgage loan, the principal amount of which loan is $5 million or less, and either the borrower is located in this state and the loan is not secured by real property, or the loan is secured by real property located in New York. A loan is secured by real property located in New York if, at the time the real property loan is originated, more than 50% of the fair market value (FMV) of property used to secure the loan is located in New York.

(a) For purposes of this paragraph, a small business loan means a loan made to an active business that, in its immediately preceding taxable year, had an average number, determined on a quarterly basis, of full-time employees of 100 or fewer, not including general executive officers, and total gross receipts of not greater than $10 million. A business qualifies as an active business if the average value, determined on a quarterly basis, of its loans, Federal, state and municipal debt, asset backed securities and other government agency debt, corporate bonds, reverse repurchase agreements and securities borrowing agreements, Federal funds, stocks and partnership interests, physical commodities and other financial instruments that it owns does not exceed 50% of the average value of its total assets. In the event that the active business applies for the loan in its first year of operations, satisfaction of the requirements in the preceding two sentences is determined by the employees, receipts and assets of the business on the date of the loan application. In addition, the business may not be part of an affiliated group, as defined in IRC section 1504, unless the group itself would have met, as a group, the active business, employee and the gross-receipts requirements. A loan made to an entity that meets these requirements to be a small business at the time of the filing of the loan application is deemed to be a small business loan throughout the term of such loan.

(b) For purposes of this paragraph, a residential mortgage loan is a loan described in clause *(d)* of subparagraph (i) of paragraph (2) of subdivision (b) of this section.

(4) Examples.

Example 1: A retail clothing business located in New York submits an application for a loan from a qualified community bank on February 1, 2021. The bank determines that, during the 2020 tax year, the business had an average number of 30 employees, and that for the same tax year the business's gross receipts were $3 million and its assets consisted entirely of inventory (valued at $75,000) and bank deposits (valued at $25,000). The bank further determines that the business is not part of an affiliated group. The loan is a qualifying loan for purposes of this subtraction modification.

Example 2: The business in example 1 submits an application for a second loan from the same community bank on February 1, 2022. The bank determines that, during the 2021 tax year, the business had an average number of 40 employees, and that for the same tax year the business's gross receipts were $4 million. The bank further determines that for the 2016 tax year the business was part of an affiliated group; and that during that tax year the members of the affiliated group together had an average number of 90 employees, and total gross receipts were $9 million. The loan is a qualifying small business loan for purposes of this subtraction modification.

Example 3: A partnership submits an application for a loan from a qualified community bank on February 1, 2022. The bank determines that, during the 2021 tax year, the partnership had no employees and its gross receipts were $2 million for the year. The bank also determines that its assets consist of corporate stock that has an average value equal to $40 million and land that has an average value equal to $10 million. The partnership holds the corporate stock for investment. The partnership is not an active business because more than 50% of its assets are financial investments. Therefore, the loan is not a qualifying loan for purposes of this subtraction modification because it is not a small business loan.

Example 4: Jane Smith, a resident of New York, submits an application to a small thrift for a residential mortgage loan of $1 million to purchase a second home in Massachusetts. Ms. Smith will use both the Massachusetts property and her primary residence in New York to secure the mortgage loan. At the time the loan is originated, the FMV of the New York property is $700,000 and the FMV of the Massachusetts property is $300,000. Since more than 50% of the loan is secured by real property in New York, the entire loan is considered secured by real property in New York. As such, the loan is a qualifying loan for purposes of this subtraction modification.

(5) In the case of a combined report, the subtraction modification described in this subdivision must be computed separately for each qualified community bank or small thrift institution included in the combined report. The sum of such amounts is the amount of the deduction allowed under this paragraph.

(6) A taxpayer or, in the case of a combined group, a combined group claiming the subtraction modification provided for in this subdivision is not allowed to utilize the captive REIT subtraction modification described in subdivision (a) of this section or the subtraction modification for qualified residential loan portfolios described in subdivision (b) of this section.

(d) For purposes of determining if a corporation is a qualified community bank or small thrift institution, the average value determined under section 3-2.4 of the taxpayer's assets or, if the taxpayer is included in a combined report, the combined group's assets determined under section 210-C, must not exceed $8 billion. Such assets will be included only if the income, loss or expense of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of entire net income for the taxable year.

(e) For purposes of all other assets used in this section, the following rules shall apply:

(1) Total assets are those assets that are properly reflected on a balance sheet, computed in the same manner as is required by the banking regulator of the taxpayers included in the combined return. Total assets include leased real property that is not properly reflected on a balance sheet.

(2) Assets will only be included if the income or expenses of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of the combined group's ENI for the taxable year. Assets will not include deferred tax assets and intangible assets identified as goodwill.

(3) Tangible real and personal property, such as buildings, land, machinery, and equipment shall be valued at cost. Leased real property that is not properly reflected on a balance sheet will be valued at the annual lease payment multiplied by eight. Intangible property, such as loans and investments, shall be valued at book value exclusive of reserves.

(4) Intercorporate stockholdings and bills, notes and accounts receivable and payable, and other intercorporate indebtedness between the corporations included in the combined report shall be eliminated.

(5) Average assets are computed using the assets measured on the first day of the taxable year, and on the last day of each subsequent quarter of the taxable year or month or day during the taxable year.

Section 3-3.4. Royalty modification. (Tax Law, section 208(9)(o))

In computing ENI, section 208(9)(o) provides that a corporation that is not included in a combined report with a related member (as that term is defined in subparagraph (1) of that paragraph) must add back royalty payments directly or indirectly paid, accrued or incurred in connection with one or more direct or indirect transactions with one or more related members during the taxable year to the extent deductible in calculating Federal taxable income. The addback will not apply if the corporation establishes by clear and convincing evidence of the form and type specified by the commissioner that one of three exceptions specified in section 208(9)(o)(2)(B)(i)-(iii) applies. For purposes of verifying that the corporation meets an exception to the addback, the corporation is required to retain and produce upon request an unredacted copy of the tax return filed with the applicable taxing authority of the related member for each transaction in question. The corporation is also required to supply an English translation of each non-English tax return required to be produced, including a translation of foreign currency to U.S. dollars. In addition, the addback will not apply if the corporation and the commissioner agree in writing to the application or use of alternative adjustments or computations.

SUBPART 3-4

INVESTMENT CAPITAL AND INVESTMENT INCOME

Section 3-4.1. Definition of investment capital. (Tax Law, section 208(4) and (5))

(a) The term “investment capital” means investments described in paragraphs (1), (2) or (3) of this subdivision, as further described in this Subpart.

(1) Stocks that satisfy the criteria in subparagraphs (i) through (v) of this paragraph shall be referred to as “actual investment capital”.

(i) The stocks satisfy the definition of a capital asset under IRC section 1221 at all times during the taxable year in which the taxpayer owned the stocks.

(ii) The stocks are held for investment by the corporation for more than one year. For purposes of determining the length of the holding period, the principles of IRC section 1223 shall be followed under the circumstances described in that section.

(iii) The dispositions of the stocks are, or would be, treated by the corporation as generating long-term capital gains or losses under the IRC.

(iv) If the stocks are acquired on or after January 1, 2015, the stocks have never been held for sale to customers in the regular course of business at any time after the close of the day on which they were acquired.

(v) The stocks are clearly identified in the corporation's records as held for investment in the manner described in section 3-4.3 of this Subpart.

(2) Stocks acquired during the taxable year that meet the criteria in subparagraphs (i), (iii), (iv), and (v) of paragraph (1) of this subdivision that have been held as investment by the corporation for one year or less at the time the corporation files its original report for the taxable year and are still held at such time shall be referred to as "presumed investment capital".

(3) In the case of a corporation incorporated and commercially domiciled outside of New York State, stocks not described in paragraph (1) or (2) of this subdivision, debt obligations, and other securities shall be "constitutionally protected investment capital" if the income or gain from such stocks, debt obligations, and other securities cannot be apportioned to New York State as the result of United States constitutional principles. In the case of a combined report, commercial domicile shall be determined on an entity by entity basis.

(b) Stock in a corporation that is conducting a unitary business with the taxpayer or any corporation included in a combined report with the taxpayer, stock in a corporation included in a combined report with the taxpayer pursuant to the commonly owned group election, and stock issued by the taxpayer or any corporation included in a combined report with the taxpayer will not constitute investment capital. For purposes of this section, if one corporation owns or controls, directly or indirectly, less than 20% of the voting power of the stock of a second corporation, that second corporation will be presumed to not be conducting a unitary business with the first corporation.

(c) If a corporation is a partner in a partnership and the corporation is using the aggregate method to compute its tax, the corporation's proportional part of the stock owned by the partnership may qualify as investment capital if requirements for investment capital specified in subdivision (a) of this section are satisfied at the partnership level and the partnership and corporate partner are not unitary with the corporation that issued the stock.

(d) The amount of investment capital is determined as follows:

(1) ascertain the average value of each item of investment capital;

(2) ascertain the net value of each such item by subtracting from the average value of each such item the average liabilities that are directly or indirectly attributable to that item; and

(3) add the net values so arrived at.

(4) Provided, if the sum determined in paragraph (3) is less than zero, then the amount of investment capital is deemed to be zero.

(e) Investment capital does not include any investments in stock the income from which is excluded from entire net income pursuant to the provisions of section 208(9)(c-1). Investment capital will be computed without regard to liabilities directly or indirectly attributable to such investments, but only if air carriers organized in the United States and operating in the foreign country or countries in which the corporation has its major base of operations and in which it is organized, resident or headquartered (if not in the same country as its major base of operations) are not subject to any tax based on or measured by capital imposed by such foreign country or countries, or any political subdivision thereof, or, if taxed, are provided an exemption, equivalent to that provided for herein, from any tax based on or measured by capital imposed by such foreign country or countries and from any such tax imposed by any political subdivision thereof.

Section 3-4.2. Constitutionally protected investment capital. (Tax Law, section 208(5)(e))

In the case of a corporation incorporated and commercially domiciled outside New York State, the United States Constitution prohibits the state from apportioning income or gain from intangible assets when such income or gain lacks a sufficient connection to activities or presence in the state by the corporation. For example, the income or gain from an intangible asset (i.e., a debt obligation or other security) is apportionable where the underlying activities of the recipient of the intangible income and the source of the income constitute a unitary business; or where the intangible asset or the income from the intangible asset serves an operational function in the taxpayer's business. Whether an intangible asset serves an operational function depends on the nature of the asset's use and its relation to the corporation and the corporation's activities in the state. For example, an intangible asset would serve an operational function if the asset is held to meet currently identified needs of the business, including, but not limited to, the use of the asset's income stream to pay the business's operating expenses or finance the business's functions.

Section 3-4.3. Investment capital identification procedures. (Tax Law, section 208(5)(a)(v))

(a) Identification requirement. To qualify as investment capital, an investment in stock must be clearly identified in the corporation's records as stock held for investment in the same manner as required under IRC section 1236(a)(1) for the stock of a dealer in securities (whether or not the corporation is a dealer in securities). The identification requirements described in this section do not apply to constitutionally protected investment capital.

(b) Dealers in Securities. In the case of a corporation that is a dealer in securities subject to IRC section 1236, the identification requirement in subparagraph (v) of paragraph (1) of subdivision (a) of section 3-4.1 of this Subpart will be satisfied only if the stocks are clearly identified in the corporation's records as stock held for investment under IRC section 1236(a)(1). However, any stock purchased by a corporation that is a dealer in securities pursuant to an option will meet the identification requirement only if the option also is clearly identified in the corporation's records as held for investment under IRC section 1236(a)(1). Identification under any other IRC section, including IRC section 475, or under any section of New York law or regulation, will not satisfy the identification requirement.

(c) All corporations other than dealers in securities. In the case of corporations that are not dealers in securities subject to IRC section 1236, the identification requirement in subparagraph (v) of paragraph (1) of subdivision (a) of section 3-4.1 of this Subpart will be satisfied only if the stocks are recorded in an account that:

(1) is maintained specifically for purposes of identifying such stocks as held for investment for investment capital purposes;

(2) is separate from any account maintained for stock held for sale to customers; and

(3) is maintained in a separate account in the corporation's books of account for recordkeeping purposes; or in a separate depository account maintained by a clearing company as nominee for the corporation; and

(4) discloses:

(i) the name of the stock;

(ii) the identifying number of the stock according to either the Committee on Uniform Securities Identification Procedures (CUSIP) or the CUSIP International Numbering System (CINS), as appropriate; and

(iii) if the stock is sold, the date of the sale, the number of shares sold in the sale, and the price at which the stock or the option, respectively, is sold; and

(5) is established in such a manner as to readily identify the length of time that the stock is owned.

(d)(1) Except as otherwise provided in this subdivision, for corporations other than dealers in securities, the stocks must be identified in the manner described in subdivision (c) of this section before:

(i) October 1, 2015, for stocks acquired prior to October 1, 2015; or

(ii) the close of the day on which the stock was acquired for stock acquired on or after October 1, 2015.

(2) Under the circumstances described in subparagraphs (i) and (ii) of this paragraph that occur on or after October 1, 2015, the corporation must identify such stocks by the additional identification period end date, which is the 90th day after the measurement date specified in such subparagraphs. Only stocks owned by the corporation on the additional identification period end date will be eligible for identification under this clause.

(i) In the case of a corporation that first becomes subject to tax under article 9-A on or after October 1, 2015, the measurement date is the date that the corporation begins doing business, employing capital, owning or leasing property or maintaining an office in New York State. However, in the case of a corporation that becomes subject to tax solely because it is deriving receipts from activity in New York State, the measurement date is the date on which the corporation first has receipts within New York State of $1 million or more. In the case of a unitary group that becomes subject to tax solely because it is deriving receipts from activity in New York State, the measurement date for every corporation included in the unitary group as of the additional identification period end date is the date on which the unitary group in the aggregate first has receipts within New York State of $1 million or more.

(ii) In the case of a corporation that is not a taxpayer in New York State, has not been included in a combined report previously, and first meets the capital stock requirement to be included in a combined report with a taxpayer under section 210-C(2)(a) on or after October 1, 2015, the measurement date for that corporation is the day that corporation first meets the capital stock requirement to be included in a combined report.

(e) For stocks purchased pursuant to an option, the identification requirements and procedures specified in this section should be read as if the requirements and procedures referenced the option in addition to the stock.

(f) In the case of a combined report, each member of the combined group must follow the identification requirements and procedures specified in this section for investments in stock owned by that corporation.

(g) If a corporation is a partner in a partnership and the corporation is using the aggregate method to compute its tax, the partnership must follow the identification requirements and procedures specified in this section for investments in stock owned by the partnership to qualify as investment capital of the corporate partner. If, on or after October 1, 2015, a corporation becomes a partner in a partnership that is not a dealer for purposes of IRC section 1236, and the partnership, prior to the date the corporation becomes a partner, had not identified any stock as investment capital using the requirements and procedures specified in this section, only stock acquired by the partnership on or after the date the corporation becomes a partner may potentially qualify as investment capital.

Section 3-4.4. Presumed investment capital that fails the holding period requirement. (Tax Law, section 208(5)(d))

(a) If a corporation disposes of presumed investment capital after the filing of the original report for that tax year the corporation must determine how long such stock had been held for investment. If any such stock in fact had been held as investment for one year or less (as counted across tax years), the corporation must either:

(1) file an amended report for the taxable year in which such stock was presumed investment capital to properly classify the capital and income as business capital and income, respectively; or

(2) (i) increase its business capital in the immediately succeeding taxable year by the amount previously included in investment capital for that stock, net of any liabilities attributable to that stock (but not less than zero); and

(ii) increase its business income in the immediately succeeding taxable year by the amount of income and net gains (but not less than zero) from that stock previously included in gross investment income after the limitation in section 3-4.5(c) of this Subpart less either

(a) the safe harbor reduction amount determined in section 3-4.8 of this Subpart on the return on which this presumed investment capital was identified or *(b)* the amount of interest deductions directly or indirectly attributable to the items of investment capital that failed the presumption determined pursuant to the method in section 3-4.7 of this Subpart on the return on which this presumed investment capital was identified. No adjustment will be allowed in the immediately succeeding taxable year for excess interest deductions directly or indirectly attributable to the items of investment capital that failed the presumption that were added back to ENI in the year the presumed investment capital was included in investment capital.

(b) For purposes of paragraph (2) of subdivision (a) of this section, to determine if stocks that are presumed investment capital generated income that was claimed as investment income in the preceding tax year, the corporation shall use the ordering rules contained in section 3-4.5(b) of this Subpart. Provided that, for purposes of paragraph (3) of such subdivision, stocks that had been held as investment for more than one year, as counted across tax years, shall be considered before stocks that had been held as investment for one year or less. For stocks held for one year or less, stocks with the largest interest deductions computed pursuant to section 3-4.7 of this Subpart shall be considered first.

Section 3-4.5. Definition of investment income. (Tax Law, section 208(6))

(a)(1) Gross investment income is income from investment capital, to the extent included in entire net income (ENI). It includes dividends from investment capital, interest from investment capital, capital gains in excess of capital losses from the sale or exchange of investment capital and other income from investment capital.

(2) Investment income is gross investment income less either:

(i) interest deductions directly or indirectly attributable to investment capital or gross investment income determined in section 3-4.7 of this Subpart; or

(ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(3) Investment income cannot exceed ENI minus other exempt income.

(b) The following ordering rules shall apply when determining the make-up of investment income in a given taxable year when the investment income is subject to the gross investment income limitation as described in subdivision (c) of this section:

(1) income from constitutionally protected investment capital;

(2) income from actual investment capital; and

(3) income from presumed investment capital.

(c) Gross investment income limitation. The limitation on investment income provided for in this subdivision does not impact the value of investment capital. Gross investment income is limited to the greater of the following amounts:

(1) income from constitutionally protected investment capital; or

(2) 8% of the taxpayer's ENI or, in the case of a combined group, 8% of the combined group's ENI.

Section 3-4.6. Definition of other exempt income. (Tax Law, section 208(6-a))

(a) Controlled foreign corporation (CFC) stock and related income.

(1) CFC stock means investments in stock of a corporation that generates, or could generate, exempt CFC income.

(2) Gross exempt CFC income, as described in this subdivision, shall not constitute investment income or exempt unitary corporation dividends. Gross exempt CFC income is:

(i) except to the extent described in subparagraph (ii), income required to be included in the taxpayer's Federal gross income pursuant to IRC section 951(a) received from a corporation that is conducting a unitary business with the taxpayer, but that is not included in a combined report with the taxpayer;

(ii) the income required to be included in the taxpayer's Federal gross income pursuant to IRC section 951(a) by reason of IRC section 965(a), as adjusted by IRC section 965(b), and without regard to IRC section 965(c), received from a corporation that is not included in a combined report with the taxpayer; and

(iii) 95% of the income required to be included in the taxpayer's Federal gross income pursuant to subsection (a) of IRC section 951A, without regard to the deduction under IRC section 250, received from a corporation that is not included in a combined report with the taxpayer.

(3) Exempt CFC income is gross exempt CFC income less either:

(i) interest deductions directly or indirectly attributable to gross exempt CFC income as determined in section 3-4.7 of this Subpart; or

(ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(4) Total gross income from CFC stock is the sum of net capital gains in excess of capital losses from the sale of CFC stock plus gross exempt CFC income.

(b) Cross-article corporation stock and related income.

(1) Cross-article corporation stock means investments in stock of a corporation that is taxable under article 9 or 33, or would be taxable under article 9 or 33 if subject to tax, and is conducting a unitary business with the taxpayer, but is not included in a combined report with the taxpayer.

(2) Gross exempt cross-article dividends mean dividend income received from cross-article stock, before the reduction for interest deductions directly or indirectly attributable to gross exempt cross-article dividends as determined in section 3-4.7 of this Subpart.

(3) Exempt cross-article dividends mean gross exempt cross-article dividends, less the interest deductions directly or indirectly attributable to gross exempt cross-article dividends as determined in section 3-4.7 of this Subpart.

(4) Total gross income from cross-article corporation stock is the sum of net capital gains in excess of capital losses from the sale of cross-article stock plus gross exempt cross-article dividends.

(c) Other unitary corporation stock and related income.

(1) Other unitary corporation stock means investments in stock in a corporation that is conducting a unitary business with the taxpayer, but is not included in a combined report with the taxpayer. Other unitary corporation stock does not include cross-article stock.

(2) Gross exempt other unitary corporation dividends mean dividend income received from other unitary corporation stock, before the reduction for either (i) interest deductions directly or indirectly attributable to gross exempt other unitary corporation dividends as determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(3) Exempt other unitary corporation dividends means dividends from other unitary corporation stock less either (i) the interest deductions directly or indirectly attributable to gross exempt other unitary corporation dividends as determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(4) Total gross income from other unitary corporation stock is the sum of net capital gains in excess of capital losses from the sale of other unitary corporation stock plus gross exempt other unitary corporation dividends.

(d) General.

(1) Gross other exempt income is the sum of gross exempt CFC income, gross exempt cross-article dividends, and gross exempt other unitary corporation dividends.

(2) Other exempt income is the sum of exempt CFC income, exempt cross-article dividends, and exempt other unitary corporation dividends. Other exempt income cannot exceed entire net income.

(3) Gross other exempt income and other exempt income do not include any amounts treated as dividends pursuant to IRC section 78.

Section 3-4.7. Attribution of interest deductions. (Tax Law, section 208(6) and (6-a))

(a) Unless the safe harbor reduction election has been made as required by section 3-4.8, gross investment income and gross other exempt income must be reduced by any interest deductions allowed in computing ENI that are directly or indirectly attributable to investment capital, gross investment income, or gross other exempt income as follows:

(1) Determine the total amount of interest deductions subject to direct and indirect attribution. The total amount of interest deductions subject to direct and indirect attribution is:

(i) the amount of interest deductions included in Federal taxable income after the IRC section 163(j) limitation; less

(ii) those Federal interest deductions required to be added back to Federal taxable income in computing ENI; plus

(iii) interest deductions attributable to interest income not includable in Federal taxable income but required to be included in ENI, to the extent such expenses are not deducted for Federal tax purposes; plus

(iv) in the case of a corporation organized outside the United States that is not treated as a domestic corporation for Federal purposes, interest deductions attributable to treaty income not included in Federal taxable income that would be treated as effectively connected if not for the treaty, to the extent such expenses are not deducted for Federal tax purposes; plus

(v) in the case of a corporation organized outside the United States that is not treated as a domestic corporation for Federal purposes, interest deductions attributable to income from any state or local bond that would be treated as effectively connected income if it was not excluded from gross income by IRC section 103(a), to the extent such expenses are not deducted for Federal tax purposes.

(2) Determine the total amount of interest deductions subject to direct and indirect attribution before the IRC section 163(j) limitation. If the interest deductions are not limited by IRC section 163(j) in the current year, this paragraph does not apply; proceed to paragraph (3) of this subdivision. Otherwise, determine the total amount of interest deductions subject to direct and indirect attribution before the IRC section 163(j) limitation by performing the same computation as required by paragraph (1) of this subdivision, except that in subparagraph (i) of paragraph (1) of this subdivision use the amount of interest deductions included in Federal taxable income prior to the IRC section 163(j) limitation.

(3) Determine the amount of interest deductions that can be directly traced.

(i) The corporation or combined group must determine the portion of total interest deductions subject to direct and indirect attribution that are directly traceable, whether in whole or in part, to gross investment income or investment capital, gross exempt CFC income, gross exempt cross-article dividends, gross exempt other unitary corporation dividends, and business capital or business income.

(ii) If the corporation or combined group determines that a particular interest deduction is directly attributable to more than one type of income or capital, the corporation or combined group may apportion that interest expense between or among the types of capital and income, using any method that reasonably determines the appropriate amount.

(iii) Examples of interest deductions that are traceable in whole or in part to gross exempt other unitary corporation dividends, gross exempt CFC income, gross exempt cross-article dividends, gross investment income or investment capital, or business income or business capital include:

(a) interest incurred to purchase or carry stock of corporations that generates such income or capital;

(b) interest incurred to purchase or carry investment capital (investment capital);

(c) interest incurred to purchase or build a manufacturing plant (business capital);

(d) interest incurred to purchase or carry the stock of a combined affiliate (business capital);

(e) interest incurred by a partnership to purchase or carry investment capital that is included in a corporate partner's distributive share of income or loss from that partnership (investment capital);

(f) an interest deduction the reimbursement of which, received in the form of a management fee paid by an entity not included in the combined group of the taxpayer, is included in ENI (business capital); or

(g) interest incurred to purchase or carry reverse repurchase agreements and securities borrowing agreements (business capital). The amount of such interest deductions that is subject to direct tracing is the interest expense associated with the sum of the average fair market value (FMV) of the repurchase agreements plus the average FMV of the securities lending agreements. However, this sum is limited to the sum of the average FMV of the reverse repurchase agreements plus the average FMV of the securities borrowing agreements. Note: If the sum of the average FMV of reverse repurchase agreements and securities borrowing agreements exceed the sum of the average FMV of repurchase agreements and securities lending agreements, then all such interest deductions are directly traceable to business capital. Otherwise, use the methodology in the example in clause *(h)* of this section to compute the amount of such interest deductions directly traceable to business capital.

(h) Example.

Average FMV of repurchase agreements and security lending agreements	\$105
Average FMV of reverse repurchase agreements and security borrowing agreements	\$100

Interest deductions for repurchase agreements and security lending agreements for the year	$2
Average cost of funds ($2/$105)	1.904%
Amount of $2 interest deduction directly traceable to reverse repurchase agreements and security borrowing agreements (business capital) ($100 x 1.904%)	$1.90

(iv) Special rules for corporations utilizing a carryforward of interest deductions previously limited by IRC section 163(j). For all tax years in which a carryforward of interest deductions limited by IRC section 163(j) is subsequently deductible for Federal tax purposes, the carryforward amount deducted in subsequent taxable years cannot be included in directly traced amounts. Instead, these amounts must be indirectly traced as required in paragraph (4) of this section.

(v) Special rules for corporations impacted by the IRC section 163(j) limitation in the current year. Corporations limited by IRC section 163(j) in the current year must directly trace the total amount of interest deductions subject to direct and indirect attribution prior to the IRC section 163(j) limitation. If such amount is greater than the corporation's or combined group's total amount of interest deductions subject to direct and indirect attribution after the IRC section 163(j) limitation as determined in paragraph (1) of this subdivision, then the amount of interest deductions directly traced to a specific category of income or capital is computed by multiplying the total interest deductions subject to direct and indirect attribution after the IRC section 163(j) limitation as determined in paragraph (1) of this subdivision by a fraction, the numerator of which is the portion of interest deductions subject to direct and indirect attribution prior to the IRC section 163(j) limitation that can be directly traced to a specific category of income or capital and the denominator of which is the interest deductions subject to direct and indirect attribution prior to the IRC section 163(j) that can be directly traced to all categories of income and capital. If the amount of interest deductions prior to the IRC section 163(j) limitation that can be directly traced is less than or equal to the total amount of interest deductions subject to direct and indirect attribution after such limitation, such directly traced amounts prior to the IRC section 163(j) limitation shall be the amount of interest deductions directly traced for purposes of this paragraph.

(4) Determine the amount of interest deductions to be indirectly traced. The amount of interest deductions subject to indirect attribution is the total amount of interest deductions subject to direct and indirect attribution after the IRC section 163(j) limitation minus the total amount of interest deductions directly traced pursuant to paragraph three of this subdivision.

(5) Perform indirect tracing.

(i) To determine the amount of interest deductions indirectly attributable to gross exempt cross-article dividends, the corporation or combined group must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the cross-article stock and the denominator of which is the total average value of all the assets. If, during the taxable year, the investment in cross-article stock generates both taxable net capital gains (capital gains in excess of capital losses) and gross exempt cross-article dividends, the numerator of the fraction above must be multiplied by a fraction, the numerator of which is gross exempt cross-article dividends and the denominator of which is total gross income from cross-article stock.

(ii) To determine the amount of interest deductions indirectly attributable to gross exempt other unitary corporation dividends, the corporation or combined group must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the other unitary corporation stock and the denominator of which is the total average value of all of the assets. If, during the taxable year, the investment in other unitary corporation stock generates both taxable income from business capital (e.g., net capital gains from business capital or 5% of global intangible low-taxed income) and gross exempt other unitary corporation dividends, the numerator of the fraction above must be multiplied by a fraction, the numerator of which is gross exempt other unitary corporation dividends and the denominator of which is total gross income from other unitary corporation stock.

(iii) To determine the amount of interest deductions indirectly attributable to gross exempt CFC income, the corporation or combined group must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the CFC stock and the denominator of which is the total average value of all assets. If, during the taxable year, the investment in CFC stock generates both taxable income from business capital (e.g., net capital gains from business capital or 5% of global intangible low-taxed income) and gross exempt CFC income, the numerator of the fraction above must be multiplied by a fraction, the numerator of which is gross exempt CFC income and the denominator of which is total gross income from CFC stock.

(iv) To determine the amount of interest deductions indirectly attributable to investment capital or gross investment income, the corporation or combined group must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the investment capital and the denominator of which is the total average value of all assets.

(v) The amount of interest deductions directly or indirectly attributable to gross investment income and investment capital, gross exempt CFC income, gross exempt cross-article dividends, and gross exempt other unitary corporation dividends is the sum of the amounts computed in subparagraphs (i) through (iv) of this paragraph.

(vi) For purposes of indirect attribution, it is possible that an asset may generate more than one type of income that requires the use of the indirect attribution formulas in this section. In the event that investment capital assets generate other exempt income, such assets are included only in the indirect attribution formula for investment capital or gross investment income. If an asset generates both exempt CFC income and exempt cross-article dividends, such asset shall be included in one indirect attribution formula, which shall be determined based on the majority of the income that such asset generates.

(b) In the case of a combined report, all computations must be done as if the combined group were a single corporation, after the elimination of all intercompany transactions and activity.

(c) A corporate partner using the aggregate method to determine its tax with respect to its interest in a partnership must include its distributive share of each partnership item of receipts, income, gain, loss and deduction and the corporation's proportionate part of each asset and liability from that partnership, after the elimination of all inter-entity transactions and activity, when computing income amounts and the attribution of interest deductions.

(d) For purposes of this section, only those assets and liabilities required to be included in the valuation of business and investment capital for purposes of computing the capital base tax are included.

(e) If the numerator of a fraction measured by income is zero and the denominator of a fraction measured by income is an amount greater than zero, the respective income fraction is zero.

(f) Examples. For purposes of these examples, assume the corporation does not have to make any adjustments to its Federal interest deductions as provided for in paragraph (1) of subdivision (a) of this section. As a result, the total amount of interest deductions subject to direct and indirect attribution is the amount of interest deductions included in Federal taxable income.

(1) Examples.

Example 1: Corporation A has $120,000 in interest expense for 2018 prior to applying the IRC section 163(j) limitation, of which $100,000 is directly traced as follows:

$ 20,000 directly attributable to gross exempt unitary corporation dividends

$ 30,000 directly attributable to gross exempt CFC income

$ 10,000 directly attributable to gross investment income or investment capital

$ 40,000 directly attributable to business income or business capital

Due to the IRC section 163(j) limitation, $50,000 of interest expense is deducted at the Federal level and is, therefore, the total amount of interest deductions subject to direct and indirect attribution. The remaining $70,000 of interest expense is carried forward to subsequent years.

Since the $100,000 of total interest deductions prior to the IRC section 163(j) limitation that is directly traceable is greater than the $50,000 of total interest deductions subject to direct and indirect attribution, the amount of interest deductions directly attributed to each specific category of income or capital is determined as follows:

$50,000 x $20,000/$100,000 = $10,000 directly attributable to gross exempt unitary corporation dividends

$50,000 x $30,000/$100,000 = $15,000 directly attributable to gross exempt CFC income

$50,000 x $10,000/$100,000 = $ 5,000 directly attributable to gross investment income or investment capital

$50,000 x $40,000/$100,000 = $20,000 directly attributable to business income or business capital

There are no interest deductions subject to indirect attribution for 2018.

The $70,000 of interest expense that is limited by IRC section 163(j) in 2018 and carried forward to subsequent years is subject to indirect attribution in the subsequent tax year(s) in which the interest expense becomes deductible for Federal tax purposes.

Example 2: Corporation B has $120,000 in interest expense for 2018 prior to applying the IRC section 163(j) limitation, of which $40,000 is directly traced as follows:

$ 8,000 directly attributable to gross exempt unitary corporation dividends

$ 17,000 directly attributable to gross exempt CFC income

$ 5,000 directly attributable to gross investment income or investment capital

$ 10,000 directly attributable to business income or business capital

Due to the IRC section 163(j) limitation, $50,000 of interest expense is deducted at the Federal level and is therefore the total amount of interest deductions subject to direct and indirect attribution. The remaining $70,000 of interest expense is carried forward to subsequent years.

Since the $40,000 of total interest deductions prior to the IRC section 163(j) limitation that are directly traceable are less than the $50,000 of total interest deductions subject to direct and indirect attribution, the amount of interest deductions directly attributed to each specific category of income or capital is determined as follows:

$ 8,000 directly attributable to gross exempt unitary corporation dividends

$ 17,000 directly attributable to gross exempt CFC income

$ 5,000 directly attributable to gross investment income or investment capital

$ 10,000 directly attributable to business income or business capital

To determine the amount of interest deductions subject to indirect attribution, Corporation B must reduce the $50,000 of total interest deductions subject to direct and indirect attribution by the $40,000 of interest deductions directly traced above. The resulting $10,000 of interest deductions must be indirectly attributed. The $70,000 of interest expense that is limited by IRC section 163(j) in 2018 and carried forward to subsequent years must be indirectly attributed in the subsequent tax year(s) in which the interest expense becomes deductible for Federal tax purposes unless the 40% safe harbor election in section 3-4.8 of this Subpart is made and the taxpayer does not own exempt cross-article stock.

Section 3-4.8. Safe harbor reduction election. (Tax Law, section 208(6) and (6-a))

(a) In lieu of performing the attribution of interest deductions in section 3-4.7 of this Subpart, a corporation may elect to reduce the amount of gross investment income, gross exempt CFC income, and gross exempt other unitary corporation dividends by the safe harbor reduction amount, which is 40% of the respective gross income amount. If the corporation has gross exempt cross-article dividends, it must attribute interest deductions to such income using the methodology described in section 3-4.7 of this Subpart only as it relates to such exempt cross-article stock. In addition, the amounts of interest deductions directly attributable to gross investment income or investment capital, gross exempt CFC income, and gross exempt unitary corporation dividends are not subtracted from gross investment income, gross exempt CFC income, and gross exempt unitary corporation dividends, respectively.

(b) This election applies to gross investment income, gross exempt CFC income, and gross exempt other unitary corporation dividends. The absence of gross investment income, gross exempt CFC income, or gross exempt other unitary corporation dividends does not preclude the election being made.

(c) The election may be made or revoked by the taxpayer, or in the case of a combined group, the designated agent, by filing a tax return within the statute of limitations for each applicable tax year. Such method chosen by the taxpayer is binding on both the taxpayer and the department unless the taxpayer files an amended return within the statute of limitations for the applicable tax year to make a change.

SUBPART 3-5

BUSINESS CAPITAL

AND BUSINESS INCOME

Section 3-5.1. Definition of business capital and capital base. (Tax Law, section 208(5) and (7))

(a) (1) Business capital is all assets, other than investment capital and stocks issued by the taxpayer, less liabilities not deducted from investment capital. Business capital includes only those assets the income, loss, or expense of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed or depreciated or expensed to a nominal amount) in the computation of entire net income for the taxable year.

(2) (i) Business capital includes, but is not limited to:

(a) cash;

(b) stock in a controlled foreign corporation, except to the extent such stock qualifies as investment capital under Subpart 3-4 of this Part;

(c) cross-article corporation stock;

(d) other unitary corporation stock;

(e) reverse repurchase agreements and securities borrowing agreements, as well as the securities underlying those agreements and repurchase agreements and securities lending agreements;

(f) real property;

(g) tangible personal property; and

(h) investments in a Federal reserve bank or a Federal home loan bank.

(b) Total business capital is the sum of business capital and any presumed investment capital from the immediately preceding tax year required to be added back pursuant to section 3-4.4(a)(2) of this Part. The total business capital of the taxpayer is determined by computing the total of the average value, during the period covered by the report, of all the assets of the taxpayer, other than investment capital and stock issued by the taxpayer, less the average value of liabilities not deducted in computing investment capital.

(c) (1) The capital base is the product of total business capital and the business apportionment factor (BAF) determined under this Subchapter.

(2) In the case of a combined report, the combined capital base is the product of the combined total business capital and the BAF determined under this Subchapter. In computing combined business capital, all intercorporate stockholdings, intercorporate bills, intercorporate notes receivable and payable, intercorporate accounts receivable and payable and other intercorporate indebtedness between corporations included in the combined report must be eliminated.

Section 3-5.2. Definition of business income and the business income base. (Tax Law, sections 208(8), 210(1)(a))

(a) Business income is entire net income minus other exempt income and investment income. It also includes:

(1) interest deductions directly or indirectly attributable to gross investment income or investment capital that exceed the amount of gross investment income; and

(2) interest deductions directly or indirectly attributable to gross other exempt income that exceed the amount of gross other exempt income.

(b) Total business income is the sum of business income and income from presumed investment capital from the immediately preceding tax year required to be added back pursuant to section 3-4.4(a)(2) of this Part.

(c) (1) The business income base is equal to:

(i) the product of total business income and the business apportionment factor determined under this Subchapter; minus

(ii) the prior net operating loss conversion subtraction and the net operating loss deduction.

(2) In computing total business income of the combined group, all intercorporate dividends between corporations included in the combined report must be eliminated and all other intercorporate transactions between corporations included in the combined report must be deferred in a manner similar to the United States treasury regulations relating to intercompany transactions under IRC section 1502.

SUBPART 3-6

EXAMPLES OF INCOME AND CAPITAL

Section 3-6.1. Examples. The following are examples intended to address only the determination of whether the capital is business capital or investment capital. The examples do not address the corporation's entire tax computation, such as the apportionment of amounts deemed business income.

Example 1: Fossil Fuel Corporation ("Fossil") is a vertically integrated oil business. Fossil recently sold off 60% of its 100% ownership interest in Northwest Exploration, Inc. ("NWE"), a subsidiary engaged in oil exploration in far northern latitudes. While Fossil no longer owns a majority of NWE's stock, it remains the largest shareholder. In addition, NWE continues to operate as part of Fossil's vertically integrated oil business, benefiting from functional integration, centralized management and economies of scale.

NWE and Fossil are engaged in a unitary business but cannot be included in a combined report because they do not meet the capital stock requirement. Because Fossil and NWE are unitary, Fossil's NWE stock is other unitary corporation stock. Fossil's NWE stock is business capital because other unitary corporation stock is always business capital. In addition, the dividend income Fossil receives from NWE would constitute other unitary corporation dividends and, as such, other exempt income. Any gain on the sale of additional NWE stock by Fossil would be business income.

Example 2: NewsCo is a newspaper publisher incorporated in Delaware and commercially domiciled in Illinois that publishes local newspapers in New York and 10 other states. In 2020, anticipating a serious shortage of newspaper print, NewsCo acquires 30% of the stock of PaperCo, a paper mill company with facilities in North Carolina, Georgia and Oregon. This action is taken in an attempt to mitigate the risk of a shortage of newsprint. Based on its significant ownership share, NewsCo is given two seats on PaperCo's 15-member board of directors. No changes are made in PaperCo's senior management, and the relationship of the two businesses largely remains that of purchaser and supplier. In 2022, when it appears the newsprint shortage is over, NewsCo sells its stock in PaperCo for a gain of $80 million.

NewsCo and PaperCo are not engaged in a unitary business. They are in related but distinct lines of business, and while NewsCo owns 30% of PaperCo's stock and has two seats on the board of directors, no steps were taken toward functional integration or centralized management. However, while the two corporations are not engaged in a unitary business, NewsCo's investment in PaperCo, Inc. serves an operational function for NewsCo – that is, to facilitate NewsCo's access to newsprint during the shortage. Consequently, the PaperCo stock owned by NewsCo is not constitutionally protected investment capital.

If the stock meets all of the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stock would be considered either actual or presumed investment capital, respectively. Dividend income received from PaperCo and the $80 million gain from the sale of PaperCo's stock would be income from investment capital.

If the stock did not meet the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, then the stock would be business capital. As a result, any dividend income received from PaperCo would be business income and the $80 million gain from the sale of PaperCo's stock would be business income.

Example 3: Ore Corporation, a mining company incorporated and commercially domiciled in Utah, routinely invests its cash on hand in short-term debt instruments that yield interest income. These investments serve an operational function in Ore Corporation's business and therefore are not constitutionally protected investment capital. Consequently, these debt instruments are business capital, and the income they generate is business income.

Example 4: EquipmentCo, a manufacturer of farm equipment incorporated in Delaware and commercially domiciled in Iowa, operates sales and distribution facilities in New York State. EquipmentCo maintains a portfolio of stocks and bonds in the telecommunications sector managed to generate long-term gains. As such, its investments in telecommunications stocks and bonds are not part of EquipmentCo's unitary farm equipment business in New York State and do not serve an operational function in EquipmentCo's business. The dividend and interest income generated by the telecommunication stocks and bonds do not have the constitutionally required connection to EquipmentCo's business in New York State. The stocks and bonds qualify as constitutionally protected investment capital and the income from the stocks and bonds is income from investment capital.

Example 5: MMW, Inc. is engaged in a multistate manufacturing and wholesaling business incorporated and commercially domiciled in New Jersey. In connection with that business, it maintains a special reserve fund available for use in the case of a natural disaster or other extraordinary event. The securities in the reserve fund include both "blue chip" stocks and AAA bonds. The fund serves an operational function for MMW, Inc. – ensuring the unitary business can remain operational in the event of a natural disaster or other extraordinary event. Since the securities in the fund serve an operational function, the securities are not constitutionally protected investment capital. Because actual and presumed investment capital is limited by law to stocks, the bonds are prohibited from being investment capital and any interest income or net gains generated by those bonds is business income. In order for the stocks in the special reserve fund to be considered investment capital, the stocks must satisfy the criteria in section 3-4.1(a)(1) or (a)(2) of this Part. If the stocks are investment capital, the dividends from the stock and the net gains from the sale of the stock would be income from investment capital. If the stocks do not satisfy these criteria, the stocks would be business capital and the dividends and net gains from those stocks would be business income.

Example 6: MNO is incorporated and commercially domiciled in California. It develops software. In 2022, MNO issued a stock offering, netting $300 million. The explicitly stated purpose of the offering was to provide additional capital for the acquisition of companies and products in the same line of business as, or complementary to, MNO's line of business. Consistent with that purpose, MNO kept the funds acquired in segregated accounts. Within those accounts, MNO invested in a broad array of securities, including both stocks and bonds.

Because the explicit stated purpose of the funds and assets in the segregated accounts is clearly tied to the unitary software development business of

MNO, the funds and securities serve an operational function for all years the funds and securities are at MNO’s disposal. As such, the securities are not constitutionally protected investment capital. Because actual and presumed investment capital is limited by law to stocks, the bonds are prohibited from being investment capital and any income earned from those bonds is business income. If the stocks in the segregated accounts meet all the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stocks would be considered actual or presumed investment capital, respectively, and the dividends and net gains from the stocks would be income from investment capital. If the stocks do not satisfy all of those criteria, the stocks would be business capital and the dividends and net gains from those stocks would be business income.

Example 7: Retail Corp, incorporated and commercially domiciled in North Carolina, earns substantial revenue from its retail operations located solely within New York. It invests a large portion of the revenue in fixed income securities that are divided into three categories: (a) short-term securities held pending use of the funds in the taxpayer’s retail business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market; and (c) long-term securities held as an investment. The income generated by both types of short-term securities serves an operational function for Retail Corp. As a result, the short-term securities are not constitutionally protected investment capital. If the securities in category (a) or (b) include stocks and the stocks meet all the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stocks would be considered actual or presumed investment capital, respectively, and the dividends and net gains from the stocks would be income from investment capital. The stocks in categories (a) and (b) above that do not meet all the criteria to be considered actual or presumed investment capital and any other securities in categories (a) and (b) above are business capital and any interest income, dividends or net gains from those securities are business income. The interest income, dividends or net gains from the long-term securities in category (c) held as an investment do not have the constitutionally required connection to the retail operations in New York State. These long-term securities qualify as constitutionally protected investment capital and any interest income, dividends or net gains from the securities are income from investment capital.

Example 8: Manu Corp. is a manufacturer incorporated and commercially domiciled in California with facilities in New York and other states. In 2018, Manu Corp. purchases, at a deep discount, corporate bonds issued by Grocery, Inc., a large supermarket chain in default on its interest payments and on the verge of bankruptcy. Manu Corp. believes that Grocery, Inc. will be able to emerge from its difficulties as a viable business and that the Grocery, Inc. bonds it holds will sell at a considerably higher price at some future date. Manu Corp. sells the bonds in 2022 for a significant gain. Even though Manu Corp's investment is in corporate bonds, the nature of the investment is more akin to an investment in stock held for long-term appreciation. Manu Corp. will not be receiving interest income from the bonds or using the bonds as collateral. The bonds, therefore, are not serving an operational function. The investment in the bonds is an investment separate and apart from the unitary business of Manu Corp. The net gain on the sale of the bonds does not have the constitutionally required connection to Manu Corp's operations in New York. The bonds are constitutionally protected investment capital and the net gain is income from investment capital.

Example 9: Same facts as example 9, except that the purchaser of the Grocery, Inc. corporate bonds is FISCO, which is incorporated and commercially domiciled in Connecticut and operates a diversified financial services business. In addition to being a dealer in securities, it buys and sells securities for its own account. The purchase of the Grocery, Inc. bonds is within the scope of FISCO's unitary financial services business of buying and selling securities. Therefore, the bonds are not constitutionally protected investment capital. In the hands of FISCO, the Grocery Inc. corporate bonds are business capital and the net gain on the sale of the bonds is business income.

Example 10: VinylCo is incorporated and commercially domiciled in Delaware and is a manufacturer of rubber and vinyl products. In 2022, it purchased a 15% interest in SupplierCo, which supplies VinylCo with synthetic rubber, to obtain status as a preferred customer. In all other respects, VinylCo and SupplierCo operate independently. VinylCo and SupplierCo are not engaged in a unitary business. However, VinylCo's investment in SupplierCo serves an operational function for VinylCo by helping VinylCo to maintain an ongoing supply of synthetic rubber. As such, the stock VinylCo owns in SupplierCo is not constitutionally protected investment capital. If the stock meets all the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stock would be considered actual or presumed investment capital, respectively, and the dividends and net gains from the stock would be income from investment capital. If the stock does not satisfy all of these criteria, the stock would be business capital and the dividends and net gains from the stock would be business income.

Example 11: RDS is incorporated and commercially domiciled in Connecticut, and is principally engaged in the operation of a chain of retail department stores within and without New York State. RDS also holds stock in several corporations, including QRS Inc., which designs, develops and markets "off-the-shelf" computer programs. In 2022, RDS sells its stock in QRS Inc. which it purchased in 2014, at a $100 million net gain. Because RDS's investment in the stock of QRS Inc. was not part of RDS's unitary retail business and did not serve an operational function, the stock is constitutionally protected investment capital and the net gain is income from investment capital.

Example 12: Corporation A has entire net income (ENI) of $15,000. Included in that amount is $0 of gross other exempt income and $2,000 of gross investment income before the gross investment income limitation provided for in section 3-4.5(c) of this Part, broken down as follows:

- $1,700 from constitutionally protected investment capital; and
- $300 from actual investment capital.

The gross investment income limitation in section 3-4.5(c) of this Part provides that gross investment income is limited to greater of the income from constitutionally protected investment capital of $1,700 or 8% of ENI of $15,000, or $1,200. As a result, Corporation A has $1,700 of gross investment income in the tax year.

Corporation A elects to use the safe harbor reduction method of this Part when computing investment income and therefore reduces the $1,700 of gross investment income by 40%. The result is $1,020 of investment income claimed in the tax year.

Example 13: Same facts as example 12, except that Corporation A did not elect to use the safe harbor method election and determines it has $400 of interest deductions directly or indirectly attributable to gross investment income and investment capital.

Corporation A must reduce its gross investment income of $1,700 by $400, the total interest deductions directly or indirectly attributable to gross investment income and investment capital. The result is $1,300 of investment income claimed in the tax year.

Example 14: Corporation A has ENI of $100,000 in the 2021 tax year. Included in that amount is $0 of gross other exempt income and $20,000 of gross investment income before the gross investment income limitation in section 3-4.5(c) of this Part, broken down as follows:

- $2,000 from constitutionally protected investment capital;
- $7,000 from actual investment capital; and
- $11,000 from presumed investment capital.

The gross investment income limitation in section 3-4.5(c) of this Part provides that gross investment income is limited to the greater of the $2,000 of the income from constitutionally protected investment capital or 8% of ENI, which is $8,000. As a result, Corporation A has gross investment income of $8,000 in the 2021 tax year.

Corporation A does not elect to use the safe harbor reduction method and determines it has $1,750 of interest deductions directly or indirectly attributable to gross investment income and investment capital.

Corporation A must reduce the $8,000 of gross investment income by $1,750, the total amount of interest deductions directly or indirectly attributable to gross investment income and investment capital. The result is $6,250 of investment income claimed in the 2021 tax year.

After filing the report for the 2021 tax year, Corporation A disposes of its 2021 presumed investment capital before it is held for more than one year. Based on the ordering rules in section 3-4.5(b) of this Part, the $8,000 of gross investment income claimed in the 2021 tax year was comprised of $2,000 from constitutionally protected investment capital and $6,000 from actual investment capital. Corporation A is not subject to the requirements in section 3-4.4 of this Part because the amount of investment income claimed in the 2021 tax year, after applying the gross investment income limitation in section 3-4.5(c) of this Part, did not include income from presumed investment capital that failed to meet the holding period requirement.

Example 15: Corporation D has $50,000 in ENI in the 2021 tax year. Included in that amount is $0 of gross other exempt income and $20,000 of gross investment income before the gross investment income limitation in section 3-4.5(c) of this Part, broken down as follows:

- $3,000 from stock A that is actual investment capital;
- $2,000 from stock B that is presumed investment capital; and
- $15,000 from stock C that is presumed investment capital.

The gross investment limitation in section 3-4.5(c) of this Part provides that gross investment income is limited to the greater of income from constitutionally protected investment capital, which is $0, or 8% of ENI, which is $4,000. As a result, Corporation D has gross investment income of $4,000 in the 2021 tax year.

Corporation D does not elect to use the safe harbor reduction method and determines it has $1,170 of interest deductions directly or indirectly attributable to gross investment income and investment capital.

Corporation D must reduce its gross investment income of $4,000 by $1,170, the total amount of interest deductions directly or indirectly attributable to gross investment income and investment capital. The result is $2,830 in investment income claimed in the 2021 tax year.

After filing the report for the 2021 tax year, Corporation D disposes of Stock B after it is held for more than one year and Stock C before it is held for more than one year. Based on the ordering rules in section 3-4.5(b) of this Part, the $4,000 of gross investment income claimed in the 2021 tax year was comprised of $3,000 from Stock A (the actual investment capital) and $1,000 from Stock B (the presumed investment capital held for more than one year). Corporation D is not subject to the requirements in section 3-4.4 of this Part because the amount of investment income claimed in the 2021 tax year, after applying the gross investment income limitation in section 3-4.6(c) of this Part, did not include income from presumed investment capital that failed to meet the holding period requirement.

Example 16: InvestCo is a foreign corporation that owns a minority interest in Asset Manager, a partnership operating solely in New York State that performs a variety of investment activities. InvestCo and Asset Manager are not engaged in a unitary business. Aside from its investment in Asset Manager, InvestCo has no physical presence or activities in New York State.

In 2022, InvestCo sells its interest in Asset Manager for a gain. Because the increase in Asset Manager's value was a result of its activities within New York State and the benefits provided by New York State, InvestCo's interest in Asset Manager is not constitutionally protected investment capital. As such, the interest in Asset Manager is business capital and the gain from disposition of such interest is business income.

SUBPART 3-7

CAPITAL LOSSES

Section 3-7.1. New York investment capital gains or losses in taxable years beginning on or after January 1, 2015.

(a) Definitions.

(1) "New York investment capital gains or losses" means the amount of Federal capital gains generated or losses sustained in taxable years beginning on or after January 1, 2015, that are attributable to investment capital.

(2) "New York net investment capital gain" means the amount of New York investment capital gains in excess of New York investment capital losses for the taxable year.

(3) "New York net investment capital loss" means the amount of New York investment capital losses in excess of New York investment capital gains for the taxable year.

(b) New York investment capital gains generated or losses sustained do not include any amount of Federal capital gains generated or losses sustained in a year in which a corporation is:

(1) not a taxpayer or a member of a New York combined group under article 9-A (an article 9-A New York non-filing year);

(2) a New York S corporation (a New York S year);

(3) a non-captive REIT (a non-captive REIT filing year);

(4) a non-captive RIC (a non-captive RIC filing year); or

(5) a captive insurance company that is not a combinable captive insurance company (a non-combinable

captive insurance company filing year).

Section 3-7.2. New York business capital gains or losses in taxable years beginning on or after January 1, 2015.

(a) Definitions.

(1) "New York business capital gains or losses" means the amount of Federal capital gains generated or losses sustained in taxable years beginning on or after January 1, 2015, that are attributable to business capital.

(2) "New York net business capital gain" means the amount of New York business capital gains in excess of New York business capital losses for the taxable year.

(3) "New York net business capital loss" means the amount of New York business capital losses in excess of New York business capital gains for the taxable year.

(b) New York business capital gains generated or losses sustained do not include any amount of Federal capital gains generated or losses sustained in:

(1) an article 9-A non-filing year;

(2) a New York S year;

(3) a non-captive REIT filing year;

(4) a non-captive RIC filing year; or

(5) a non-combinable captive insurance company filing year.

Section 3-7.3. Capital losses sustained in taxable years beginning before January 1, 2015.

(a) Except as provided in subdivisions (b) and (c) of this section, a corporation subject to tax under article 9-A or article 32, or a member of a combined group subject to tax under article 9-A or article 32, that sustained a Federal net capital loss under IRC section 1212 in a taxable year beginning before January 1, 2015, shall carry back and forward such Federal net capital loss as required by this Subpart and section 18-2.5(b) of Subchapter B of this Chapter, as such provisions existed on December 31, 2014.

(b) The carryover of any amount of a Federal net capital loss that was sustained in a taxable year beginning before January 1, 2015, to a taxable year beginning after December 31, 2014, shall be governed by this Subpart.

(c) Any Federal net capital loss available for carryforward as of the end of the last taxable year beginning before January 1, 2015, shall be deemed to be a New York net business capital loss (regardless of whether such capital loss was from business capital, investment capital, or subsidiary capital as such terms were previously defined in article 9-A regulations or, to the extent relevant, article 32 regulations as such regulations existed on December 31, 2014). Such New York net business capital loss shall be carried forward to the next succeeding taxable year beginning on or after January 1, 2015, and must be applied only against New York business capital gains. Such New York net business capital loss may only be carried forward to the 5 taxable years immediately succeeding the loss year and nothing in this Subpart extends this capital loss carryforward period.

Section 3-7.4. Capital losses sustained in taxable years beginning on or after January 1, 2015.

(a) In computing the business income base, taxpayers generally start with Federal taxable income that includes capital gains in excess of capital losses without differentiation between New York investment capital gains and losses and New York business capital gains and losses. For New York State purposes, taxpayers must ensure that investment capital losses do not offset business capital gains and that business capital losses do not offset investment capital gains when calculating the business income base.

(b) A corporation or combined group, in the case of a combined report, subject to tax under article 9-A must properly classify and separate any amount of Federal capital losses and Federal capital gains, as such terms are defined in IRC section 1222, into New York business capital gains or losses and New York investment capital gains or losses. To calculate the business income base, Federal taxable income must be increased by the amount of New York net investment capital loss that offsets New York net business capital gains. Similarly, to calculate the business income base, Federal taxable income must be increased by the amount of New York net business capital loss that offsets New York net investment capital gains.

(c) For any amount of Federal capital loss sustained in an article 9-A New York non-filing year that is used on a Federal return in an article 9-A New York filing year, Federal taxable income in that New York filing year must be increased by the amount of Federal capital loss that was used from that article 9-A New York non-filing year.

(d) For any amount of Federal capital loss sustained in a New York S year that is used on a Federal return in a New York C year, Federal taxable income in that New York C year must be increased by the amount of the Federal capital loss that was used from the New York S year.

(e) For any amount of Federal capital loss sustained in a non-captive REIT filing year that is used on a Federal return in a captive REIT filing year, Federal taxable income in that captive REIT filing year must be increased by the amount of the Federal capital loss that was used from the non-captive REIT filing year.

(f) For any amount of Federal capital loss sustained in a non-captive RIC filing year that is used on a Federal return in a captive RIC filing year, Federal taxable income in that captive RIC filing year must be increased by the amount of the Federal capital loss that was used from the non-captive RIC filing year.

(g) For any amount of Federal capital loss sustained in a non-captive REIT filing year that is used on a Federal return in a year that the corporation, trust, or association fails to meet the definition and requirements of a REIT, Federal taxable income in that filing year must be increased by the amount of the Federal capital loss that was used from the non-captive REIT filing year.

(h) For any amount of Federal capital loss sustained in a non-combinable captive insurance company filing year that is used on a Federal return in a combinable captive insurance company filing year, Federal taxable income in that non-combinable captive insurance company filing year must be increased by the amount of the Federal capital loss that was used from the combinable captive filing year.

Section 3-7.5. Application of New York net capital losses.

(a) Except as otherwise provided in this Subpart, the amount of New York net business capital loss and the amount of New York net investment capital loss must be carried back to each of the 3 taxable years immediately preceding the taxable year of each such loss and, to the extent that any capital loss remains, must be carried forward to the 5 taxable years immediately succeeding the taxable year of each such loss, but only to the extent that the amount of New York net business capital loss or New York net investment capital loss does not increase or produce a net operating loss for New York State purposes. New York net business capital loss must be carried back or forward in accordance with this Subpart to offset only New York business capital gains in other taxable years, for New York State purposes. New York net investment capital loss must be carried back and forward in accordance with this Subpart to offset only New York investment capital gains in other taxable years, for New York State purposes.

(b) A New York net business capital loss or New York net investment capital loss cannot be carried back to a taxable year beginning before January 1, 2015.

(c) Except as provided in subdivision (b) of this section, a New York net business capital loss or New York net investment capital loss is carried first to the earliest of the 3 taxable years immediately preceding the tax year in which the loss was sustained. If such net capital loss is not entirely used in that tax year, the remaining amount is then carried to the second taxable year preceding the loss year, and any amount thereafter remaining is carried to the first taxable year immediately preceding the tax year in which the net capital loss was sustained. Any unused amount after the application of the carryback rules is then carried forward to the first 5 taxable years immediately succeeding the loss year. Such net capital loss is carried forward first to the taxable year immediately following the loss year and then to the next immediately succeeding taxable year or years until the loss is used up or the fifth taxable year following the loss year, whichever comes first. Any unused capital loss carryforward is forfeited after the fifth taxable year following the loss year.

(d) For purposes of determining the number of tax years to which a capital loss may be carried back or forward, the following years are counted:

(1) a New York filing year;

(2) a New York non-filing year;

(3) a New York S filing year;

(4) a non-captive REIT filing year;

(5) a non-captive RIC filing year; and

(6) a non-combinable captive insurance filing year.

(e) A corporation that reports as part of a consolidated group for Federal income tax purposes but on a separate basis for purposes of article 9-A must compute its New York net business capital loss and New York net investment capital loss as if it is filing separately for Federal income tax purposes. This requires such corporation, when computing its Federal taxable income as if it had filed its Federal tax return on a separate basis, to also compute its Federal net capital gain or loss as if it had filed separately for Federal income tax purposes. The corporation then computes its New York net investment capital gain or loss and New York net business capital gain or loss in accordance with this Subpart.

(f) In computing its tax bases, a New York State combined group is generally treated as a single corporation subject to the same Federal income tax limitations that would apply if such corporation had filed for such taxable year on a consolidated Federal income tax return with the members of the combined group. When applying this rule to the computation of combined business income, Federal taxable income must be computed as if all the corporations in the combined group had filed a Federal consolidated return including such group members. When the New York State combined group is comprised of corporations different than those that filed on the same Federal consolidated return, a re-computation of Federal taxable income is required and, as a result, a re-computation of Federal net capital gain or loss is required as if the Federal net capital gain or loss was computed by a Federal consolidated group comprised of the same members as the New York State combined group. A New York State combined group must then, for the purpose of computing its New York combined business income, compute its New York net business capital loss and New York net investment capital loss, pursuant to this Subpart, as if all the corporations included in the combined group are a single corporation.

Section 3-7.6. Rules for combined reports.

(a) In computing the New York net capital loss of corporations included in a combined report pursuant to section 210-C, the New York net capital loss of the combined group is computed in accordance with this Subpart, substituting “combined group” for “corporation”.

(b) A member leaving a combined group must compute its own share of New York net business capital loss carryover and New York net investment capital loss carryover. New York net capital loss carryover is net capital loss that may be carried back or forward as the case may be.

(1) To compute the leaving member’s share of the New York net business capital loss carryover, multiply the combined group’s New York net business capital loss carryover for the taxable year by a fraction, the numerator of which is the total New York business capital losses for that taxable year of the leaving member and the denominator of which is the total New York business capital losses for that taxable year of all members of the combined group having such New York business capital losses to the extent such capital losses are included in the capital loss carryover amount of the combined group in accordance with this section.

(2) To compute the leaving member’s share of New York net investment capital loss carryover, multiply the combined group’s New York net investment capital loss carryover for the taxable year by a fraction, the numerator of which is the total New York investment capital losses for that taxable year of the leaving member and the denominator of which is the total New York investment capital losses for that taxable year of all members of the combined group having such New York investment capital losses to the extent such capital

losses are included in the capital loss carryover amount of the combined group in accordance with this section.

(c) If a corporation is a member of a combined group for any taxable year beginning on or after January 1, 2015, and leaves that group in a later taxable year, the leaving member takes its share of the combined group's New York net business capital loss carryover and New York net investment capital loss carryover. The remaining combined group must reduce its New York net business capital loss carryover and New York net investment loss carryover by the leaving member's share of such loss carryovers. If the leaving corporation joins another combined group, its New York net business capital loss carryover is added to, or becomes, the new combined group's New York net business capital loss carryover and its New York net investment capital loss carryover is added to, or becomes, the new combined group's New York net investment capital loss carryover, subject to the rules in this Subpart. If the leaving corporation files a separate New York return, it is allowed to use its New York net business capital loss carryover or New York net investment capital loss carryover on a separate basis, subject to the rules in this Subpart.

(d) If a corporation that was subject to tax under article 9-A and was not a member of a combined group in any taxable year beginning on or after January 1, 2015, subsequently joins a combined group, that incoming member's New York net business capital loss carryover is added to, or becomes, the combined group's New York net business capital loss carryover and its New York net investment capital loss carryover is added to, or becomes, the combined group's New York net investment capital loss carryover, subject to the rules in this Subpart.

Section 3-7.7. Record keeping.

A taxpayer or a combined group that claims either a business or investment New York net capital loss carryback or carryforward must submit a copy of its Federal schedule of capital gains and losses used and a schedule of New York capital gains and losses used for the loss year and for any year(s) to which the losses are to be carried. A claim for refund based on a New York capital loss carryback or carryforward must be filed on the forms and in the manner prescribed by the commissioner.

Section 3-7.8. Examples.

The following examples illustrate the application of the rules in Subpart 3-7.

Example 1:

Corporation X incorporated and began doing business in New York (NY) on January 1, 2022. For tax year 2022, Corporation X has $5,000 of interest expense directly and indirectly attributable to investment capital. Corporation X sustained a $9,000 Federal net capital gain, comprised of a $3,000 NY net business capital loss and a $12,000 NY net investment capital gain. Corporation X had no other investment income.

The 2022 Federal 1120 contains the following information:

Federal taxable income (FTI) before NOLD & special deduction	$150,000
State income taxes deducted	$11,000

2022 FTI income includes the following capital gains (Schedule D):

2022 NY net business capital loss	($3,000)
2022 NY net investment capital gain	$12,000
2022 Federal net capital gain	$9,000

As NY net business capital loss offsets NY net investment capital gains, FTI must be increased as follows:

FTI before NOLD & special deduction		$150,000
Increase FTI by the amount of the 2022 NY net business capital loss that offsets NY net investment capital gains	$3,000	
FTI adjusted for NY capital loss utilization ("as if" federal line 28)		$153,000

Calculation of business income base

FTI adjusted for NY capital loss utilization ("as if" federal line 28)	$153,000
Add: State income taxes deducted	$11,000
Entire net income (ENI)	$164,000
Less: Investment income ($12,000 investment capital gain less $5,000 of attributable interest expenses)	$7,000
Business income	$157,000

Corporation X has a NY net business capital loss of $3,000 available for carryforward from 2022.

Example 2:

Corporation X incorporated and began doing business in NY on January 1, 2011. For tax year 2014, it sustained a $75,000 NY net business capital loss. Corporation X has NY business capital gains and losses and uses the NY net business capital loss sustained in tax year 2014 as follows:

Tax Year	2011	2012	2013	2014	2015	2016	2017	2018	2019
NY net business capital gains or loss	$3,000	$6,000	$9,000	($75,000)	$12,000	$10,000	$15,000	$13,000	$5,000
NY net business capital loss carryback to 2011	($3,000)			$3,000					
NY net business capital loss carryback to 2012		($6,000)		$6,000					
NY net business capital loss carryback to 2013			($9,000)	$9,000					
NY net business capital loss carryforward to 2015				$12,000	($12,000)				
NY net business capital loss carryforward to 2016				$10,000		($10,000)			
NY net business capital loss carryforward to 2017				$15,000			($15,000)		
NY net business capital loss carryforward to 2018				$13,000				($13,000)	
NY net business capital loss carryforward to 2019				$5,000					($5,000)
NY net business capital loss	$0	$0	$0	($2,000)	$0	$0	$0	$0	$0

The $2,000 remaining of the NY net business capital loss sustained in tax year 2014 is forfeited after tax year 2019 and cannot be carried forward to any tax year beginning on or after January 1, 2020 as it cannot be carried forward more than five years succeeding the loss year.

Example 3:

For tax year 2014, Corporation X has a $9,000 Federal net capital loss available for carryforward. While the $9,000 Federal net capital loss is comprised of a $2,000 business capital loss, a $6,000 investment capital loss and a $1,000 subsidiary capital loss (not treated as a deduction directly attributable to subsidiary capital), the entire loss is treated as a NY net business capital loss in tax years beginning on or after January 1, 2015. The Federal net capital loss is applied as follows in tax year 2015:

The 2015 Federal 1120 contains the following information:

FTI before NOLD & special deduction	$150,000
State income taxes deducted	$15,000

2015 FTI includes the following capital gains/losses (Schedule D):

2015 NY business capital gains	$4,000
2015 NY investment capital gains	$7,000
Less: 2014 NY net business capital loss forward	($9,000)
Total 2015 Federal capital gains after Federal capital loss carryforward	$2,000

Since the FTI computation allows the $7,000 NY investment capital gain to be partially offset by the $9,000 carryforward of NY net business capital loss, FTI must be re-computed as follows:

2015 FTI before NOLD & special deduction		$150,000
2014 Federal capital loss carried forward to 2015	$9,000	
2014 NY net business capital loss applied against NY business capital gains	($4,000)	
Increase FTI by the amount of the 2014 NY net business capital loss applied against NY investment capital gains		$5,000
FTI adjusted for NY capital loss utilization ("as if" federal line 28)		$155,000

Calculation of business income base

FTI adjusted for NY capital loss utilization ("as if" federal line 28)	$155,000
Add: State income taxes deducted	$15,000
ENI	$170,000
Less: Investment income (investment capital gain after interest attribution)	($7,000)
Business income	$163,000

The 2014 NY net business capital loss carryforward is computed as follows:

Total 2014 NY net business capital loss	($9,000)	
Less: 2014 NY net business capital loss utilized against business capital gains in 2015	$4,000	
Total 2014 NY net business capital loss available for carry forward against business capital gains		($5,000)

Example 4:

Corporation X has NY net business capital gains in tax years 2014, 2015, and 2017. In tax year 2016, it sustains a $30,000 NY net business capital loss. While NY net business capital losses are generally allowed to be carried back three taxable years, such losses cannot be carried back to a tax year beginning before January 1, 2015. As a result, the net business capital loss cannot be applied against the NY business capital gain sustained in tax year 2014. The NY net business capital loss is applied as follows:

Tax Year	2014	2015	2016	2017
NY capital loss application				
NY business capital gain/loss	$8,000	$10,000	($30,000)	$20,000
NY net business capital loss carryback from 2016 to 2015		($10,000)	$10,000	
NY net business capital loss carryforward from 2016 to 2017			$20,000	($20,000)
NY net business capital gain/loss	$8,000	$0	$0	$0

Example 5:

Corporation X sustains an $8,000 NY net investment capital loss in tax year 2020. It has no NY investment capital gains in 2017 through 2019 so the net investment capital loss cannot be carried back. It may only be applied against NY investment capital gains as follows:

Tax Year	2020		2021		2022	
	Business Capital Gain/(Loss)	Investment Capital Gain/(Loss)	Business Capital Gain/(Loss)	Investment Capital Gain/(Loss)	Business Capital Gain/(Loss)	Investment Capital Gain/(Loss)
NY net capital gain/loss	$0	($8,000)	$10,000	$3,000	$9,000	$7,000
NY net investment capital loss carryforward from 2020 to 2021		$3,000		($3,000)		
NY net investment capital loss carryforward from 2020 to 2022		$5,000				($5,000)
NY net capital gain/loss	$0	$0	$10,000		$9,000	$2,000

Example 6:

For tax year 2020, Corporation X sustained a $10,000 Federal net capital loss comprised entirely of a $10,000 NY net business capital loss. For tax year 2021, Corporation X generated an $11,000 Federal net capital gain comprised of a $6,000 NY net business capital gain and a $5,000 NY net investment capital gain. For tax year 2022, Corporation X generated a $14,000 Federal net capital gain comprised entirely of a $14,000 NY net business capital gain. It has no NY business capital gains in tax years before 2020 so the NY business capital loss cannot be carried back. Therefore, the net capital losses are applied against capital gains as follows:

Tax Year	2020		2021		2022	
	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)
NY net capital gain/loss	($10,000)	$0	$6,000	$5,000	$14,000	$0
NY net business capital loss carryforward from 2020 to 2021	$6,000		($6,000)			
NY net business capital loss carryforward from 2020 to 2022	$4,000				($4,000)	
NY net capital gain/loss	$0	$0	$0	$5,000	$10,000	$0

Example 7:

In tax year 2019, Corporation A used a $2,000 Federal net capital loss. Such capital loss is classified as a NY net investment capital loss and offsets NY business capital gains. As a result, FTI reported on the original tax year 2019 return must be increased by the amount of the NY net investment capital loss as follows:

The 2019 original Federal 1120 contains the following information:

FTI before NOLD & special deduction	$175,000
State income taxes deducted	$7,000

2019 FTI income includes the following capital gains (Schedule D):

2019 NY business capital gains	$6,000
2019 NY investment capital loss	($2,000)
2019 Federal net capital gain	$4,000

Recomputation of FTI without NY net business capital gain offset by NY net investment capital loss on original 2019 return

FTI before NOLD & special deduction	$175,000
Increase FTI by the amount of the 2019 NY investment capital loss that offset NY business capital gain	$2,000
FTI adjusted for NY capital loss utilization ("as if" federal line 28)	$177,000

For tax year 2022, Corporation A sustained a Federal net capital loss of $8,000 comprised of a $3,000 NY net business capital loss and a $5,000 NY net investment capital loss. Corporation A carries the Federal net capital loss back to the 2019 tax year and computes its 2019 FTI on the amended 2019 return as follows:

The 2019 amended Federal 1120 contains the following information:

FTI before NOLD & special deduction	$171,000
State income taxes deducted	$7,000

Amended 2019 FTI income includes the following capital gains (Schedule D):

2019 NY business capital gains	$6,000
2019 NY investment capital loss	($2,000)
2022 NY total capital loss carryback	($4,000)
2019 Federal net capital gain	$0

Example 7 (continued):

For NY purposes, the tax year 2019 NY net investment capital loss cannot offset the tax year 2019 NY business capital gain (as adjusted on the original tax year 2019 return). Additionally, Corporation A may only carry back the tax year 2022 NY net business capital loss of $3,000 to tax year 2019 as it has no NY investment capital gains in tax year 2019. Therefore, FTI must be re-computed on the amended tax year 2019 return as follows:

Recomputation of FTI without regard to federal application of capital losses	
FTI before NOLD & special deduction	$171,000
Add: 2022 Federal capital loss carryback applied against capital gains on 2019 federal return	$4,000
Add: 2019 NY investment capital loss	$2,000
Subtract: 2022 NY net business capital loss carryback	($3,000)
FTI adjusted for NY capital loss utilization ("as if" federal line 28)	$174,000

The re-computed FTI must be used in the computation of tax year 2019 business income as follows:

Calculation of business income base	
FTI adjusted for NY capital loss utilization ("as if" federal line 28)	$174,000
Add: State income taxes deducted	$7,000
ENI	$181,000
Less: Investment income	$0
Business income	$181,000

Corporation A does not have NY net capital gains in tax years 2020 or 2021 to apply against NY capital losses. As a result, at the end of tax year 2022, it has no NY net business capital loss carryforward and a $7,000 NY net investment capital loss carryforward as follows:

Calculation of balance of NY net capital loss at the end of 2022	Total NY net capital gains/losses	NY net business capital gains/losses	NY net investment capital gains/losses
Net capital loss sustained in 2022	($8,000)	($3,000)	($5,000)
Add: 2019 NY net investment capital loss	($2,000)		($2,000)
Less: 2022 NY net business capital loss carried back to 2019	$3,000	$3,000	
Less: 2022 capital loss utilized against capital gains classified as business income in 2019			$0
Balance of NY net capital loss at the end of 2022	($7,000)	$0	($7,000)

Example 8:

Corporation X was incorporated and began doing business in NY on January 1, 2019. In calendar year 2019, it sustained a $35,500 Federal net capital loss comprised of a $24,500 NY net business capital loss and an $11,000 NY net investment capital loss. These NY net capital losses cannot be carried back as the corporation did not file NY State corporation tax returns prior to tax year 2019. Corporation X has NY filing years in 2019, 2020, and 2022. Calendar year 2021 is a NY non-filing year. As a result, the 2019 NY net capital loss cannot be used in tax year 2021 but this year counts toward the five-year carryforward period. Such NY net capital losses are used as follows:

NYS Capital Loss Application Schedule							
	2019		2020		2021	2022	
	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)	Federal Capital Gain/Loss	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)
Capital Gains/Losses	($24,500)	($11,000)	$12,500	$0	$15,000	$1,000	$3,000
NY net business capital loss carryforward to 2020	$12,500		($12,500)				
NY net business capital loss carryforward to 2022	$1,000					($1,000)	
NY net investment capital loss carryforward to 2022		$3,000					($3,000)
Capital gain	$0	$0	$0	$0	$15,000	$0	$0
Net capital loss available after 2022	($11,000)	($8,000)	$0	$0	$0	$0	$0

Example 9:

Taxpayer A properly filed a combined report with members B, C and D in tax years 2020, 2021 and 2022. It has no NY net business or investment capital gains in years prior to 2020 so the NY net business capital losses and NY net investment capital losses cannot be carried back. The group applies its NY net capital losses as follows:

Combined NYS Capital Loss Application Schedule						
	2020		2021		2022	
Combined Group: A, B, C & D	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)	NY Business Capital Gain/(Loss)	NY Investment Capital Gain/(Loss)
A	($12,500)	($1,250)	$2,500	$250	$50,000	$7,250
B	$950	$95	($1,000)	($100)	($250)	$150
C	($11,250)	($1,125)	($1,500)	($150)	$6,000	($1,250)
D	($5,575)	$580	($2,500)	($250)	($3,500)	($1,100)
Total	($28,375)	($1,700)	($2,500)	($250)	$52,250	$5,050
NY net business capital loss carryforward from 2020 to 2022	$28,375				($28,375)	
NY net investment capital loss carryforward from 2020 to 2022		$1,700				($1,700)
NY net business capital loss carryforward from 2021 to 2022			$2,500		($2,500)	
NY net investment capital loss carryforward from 2021 to 2022				$250		($250)
Capital gain/loss	$0	$0	$0	$0	$21,375	$3,100

Example 10:

Corporations A, B, C and D, are calendar-year taxpayers that began doing business in tax year 2022 and properly filed as members of a combined group in tax year 2022. Corporation D leaves the ABCD combined group at the end of tax year 2022. The combined group ABCD sustained a NY net business capital loss and a NY net investment capital loss for tax year 2022. Each member of the group must compute its individual NY net capital loss carryforward separately for each type of capital loss by multiplying the total NY net capital loss carryforward by a percentage that is the individual member's contribution to that type of capital loss divided by the total capital loss for that type of capital. The individual members of the combined group compute their individual NY net business capital loss carryforward and NY net investment capital loss carryforward as follows:

Combined NYS Capital Loss Application Schedule						
	2022		Member's losses as a % of total losses of all members with losses		Member's Loss Carryforward	
Combined Group Members	Business Capital Gains/(Losses)	Investment Capital Gains/(Losses)	Business Capital Gains/(Losses)	Investment Capital Gains/(Losses)	Business Capital Gains/(Losses)	Investment Capital Gains/(Losses)
A	$25,000	$750	0%	0%	$0	$0
B	($25,000)	($200)	50%	20%	($12,500)	($50)
C	($15,000)	($500)	30%	50%	($7,500)	($125)
D	($10,000)	($300)	20%	30%	($5,000)	($75)
Combined Group ABCD	($25,000)	($250)	100%	100%	($25,000)	($250)
Capital Loss Available	($25,000)	($250)			($25,000)	($250)
Total contribution of losses	($50,000)	($1,000)				

Leaving member D takes its NY net business capital loss carryforward of $5,000 ($25,000 multiplied by 20%) and its NY net investment capital loss carryforward of $75 ($250 multiplied by 30%).

Example 11:

Corporation D, a calendar-year taxpayer, began doing business in NY in tax year 2015 and files on a stand-alone basis in tax years 2015 and 2016. Corporations A, B and C have NY non-filing years in 2015 and 2016 but in tax year 2017 file a combined report with Corporation D. Combined group ABCD sustains a NY net business capital loss in tax year 2017. The group applies its 2017 net capital loss as follows:

Combined NYS Capital Loss Application Schedule							
	2015	2016	2017	2018	2019	2020	2021
Combined Group Members	NY Business Capital Gains/ (Losses)	NY Business Capital Gains/ (Losses)	NY Business Capital Gains/ (Losses)	NY Business Capital Gains/ (Losses)	NY Business Capital Gains/ (Losses)	NY Business Capital Gains/ (Losses)	NY Business Capital Gains/ (Losses)
A	$0	$0	($4,500)	$0	$0	$0	$1,250
B	$0	$0	($250)	$0	$0	$0	$2,250
C	$0	$0	($5,500)	$0	$0	$0	$5,000
D	($12,500)	$0		$0	$0	$0	$2,500
Total	($12,500)		($10,250)	$0	$0	$0	$11,000
NY net business capital loss carryforward from 2017 to 2020			$10,250				$10,250
NY capital gain/loss	($12,500)	$0	$0	$0	$0	$0	$750

Corporation D's NY net business capital loss sustained in tax year 2015 is forfeited at the end of tax year 2020, five years after the loss year, even though there were no NY business capital gains to apply it against in tax years 2016 through 2020. Combined group ABCD's NY net business capital loss sustained in tax year 2017 is carried forward to 2021 and offsets the NY business capital gains of the combined group.

SUBPART 3-8

COMPUTATION OF THE PRIOR NET OPERATING LOSS CONVERSION (PNOLC) SUBTRACTION

Section 3-8.1. Definitions.

For purposes of this Subpart, the following terms shall have the following meaning.

(a) The term "base year" means a corporation's last taxable year beginning on or after January 1, 2014, and before January 1, 2015.

(b) The term "base year BAP" means either of the following, whichever is applicable:

(1) the corporation's, or combined group's in the case of a combined report, in the base year ("base year combined group"), business allocation percentage (BAP) for purposes of calculating entire net income (ENI) for the base year (whether or not liability was in fact based on ENI), as calculated under section 210(3)(a) as such section was in effect on December 31, 2014; or

(2) the corporation's or base year combined group's allocation percentage for purposes of calculating ENI for the base year (whether or not liability was in fact based on ENI), as calculated under section 1454 as such section was in effect on December 31, 2014.

(c) The term "base year tax rate" means the corporation's or base year combined group's tax rate for purposes of computing the tax on ENI for the base year (whether or not liability was in fact based on ENI), as calculated under either section 210(1)(a) or section 1455(a), whichever was applicable, as such sections were in effect on December 31, 2014.

(d) The term "first 2015 taxable year" means a corporation's first taxable year that began on or after January 1, 2015, and before January 1, 2016.

(e)(1) The term "small business taxpayer" means a corporation that, in the first 2015 taxable year, satisfied all of the criteria specified in subparagraphs (i), (ii), and (iii) of paragraph (2) of this subdivision as of the last day of the base year and, in the case of a combined report, means a combined group that in the first 2015 taxable year would have satisfied the criteria specified in subparagraphs (i) and (ii) of paragraph (2) of this subdivision on the last day of the base year if the group had filed a combined report in such base year, provided that each member of the combined group would have satisfied the criteria specified in subparagraph (iii) of paragraph (2) of this subdivision on the last day of the base year.

(2) The criteria that must be satisfied to qualify as a small business taxpayer are:

(i) the ENI of the corporation or the combined group for the base year before allocation was not more than $390,000 (such amount will be annualized for a base year that constitutes a short taxable year);

(ii) the total amount of money and other property that the corporation or combined group received for stock, as a contribution to capital and as paid-in surplus, was not more than $1 million as of the last day of the base year; and

(iii) the corporation was not part of an affiliated group, as defined in IRC section 1504, unless the group itself would have satisfied the requirements in subparagraphs (i) and (ii) of this paragraph if it had filed a combined report.

Section 3-8.2. Computation of the unabsorbed net operating loss (UNOL).

(a) The “unabsorbed net operating loss” (UNOL) means the unabsorbed portion of net operating loss (NOL) as calculated under section 208(9)(f) or section 1453(k-1) as such sections were in effect on December 31, 2014, that was not deductible in previous taxable years (including the base year) and was eligible for carryover on the last day of the base year, including any NOL sustained by the corporation during the base year. The computation of such UNOL is subject to the rules in subdivisions (b) through (e) of this section.

(b) To compute the UNOL, the rules in paragraphs (1) and (2) of this subdivision must be followed.

(1) Federal and New York State NOLs available for carryover. A corporation must first compute its Federal and New York State NOLs available for carryover, from taxable years beginning before January 1,

2015, as of the last day of such corporation's base year (Federal and New York State NOLs available for carryover), by applying the following rules:

(i) NOLs are carried back and carried forward to taxable years beginning before January 1, 2015, and included in the determination of deductible NOLs, as well as remaining NOLs available for carryover, subject to NOL deduction limitations, as set forth in either section 208(9)(f) and Subpart 3-8 of this Part or section 1453(k-1), whichever is applicable as such provisions were in effect and applicable on December 31, 2014. NOLs available for carryover do not include any NOLs that were deductible in a taxable year beginning prior to January 1, 2015, regardless of whether or not the corporation actually deducted the NOL. However, if the amount of NOL actually deducted in any taxable year is greater than the amount deductible, the NOL available for carryover is reduced by the excess amount deducted. When computing the amount of NOLs available for carryover, New York State NOLs must be applied against ENI to reduce ENI to zero or the greatest extent possible, regardless of the tax base on which the franchise tax was actually paid.

(ii) If the carryforward period for an NOL, as determined in subparagraph (i) of this paragraph, ends prior to, or on, the last day of the corporation's base year, no portion of such NOL is included in the NOLs available for carryover.

(2) Eligible NOL carryover amounts. After computing its Federal and New York State NOLs available for carryover, the corporation must then compute its Federal and New York State carryover amounts as of the last day of the corporation's base year (its eligible NOL carryover amounts), to be used in the computation of the UNOL, by applying the following rules and limitations in subparagraphs (i) through (v) of this paragraph.

(i) A corporation's Federal and New York State NOLs available for carryover are included in the eligible Federal and New York State NOL carryover amount, respectively, only when there is both a Federal and New York State NOL sustained in the same taxable year and available for carryover as of the last day of the corporation's base year.

(ii) A corporation's Federal NOL sustained in a separate return limitation year (SRLY) beginning before January 1, 2015, and any corresponding New York State NOL, that was not deductible in taxable years beginning before January 1, 2015, and that was available for carryover as of the last day of the corporation's base year, is included in its entirety in the eligible Federal and New York State NOL carryover amount, respectively, subject to the rules in this section.

(iii) If, under IRC section 381, a corporation, in a taxable year beginning prior to January 1, 2015, succeeded to the tax attributes, including Federal NOL carryovers, of another corporation, and the acquiring or successor corporation also succeeded to the New York State NOL carryovers of the acquired or predecessor corporation, then any such Federal and New York State NOLs that were not deductible by the acquiring or successor corporation in taxable years beginning before January 1, 2015, and that were available for carryover as of the last day of the corporation's base year, are included in their entirety in the eligible Federal and New York State NOL carryover amounts, respectively, subject to the rules in this section.

(iv) A corporation's Federal NOLs subject to the limitations imposed by IRC section 382 as a result of an ownership change (pre-change losses) that were not deductible in taxable years beginning before January 1, 2015, and that were available for carryover as of the last day of the corporation's base year, are included in the eligible Federal NOL carryover amount, subject to the rules in this section, but only to the extent that such pre-change losses, in the aggregate, that relate to such ownership change, do not exceed the amount computed as follows:

(a) the applicable annual IRC section 382 limitation for a post-change year for such ownership change, multiplied by 20; less

(b) any such pre-change losses that were deductible in taxable years beginning before January 1, 2015. Such amount shall be computed separately for each ownership change.

(v) In the case of a corporation operating on a cooperative basis under IRC section 1381 that is taxable under article 9-A or article 32 for its base year, the corporation's Federal patronage and non-patronage source NOLs, and the corporation's New York State patronage and non-patronage source NOLs, respectively, that were not deductible in taxable years beginning before January 1, 2015, and that were available for carryover as of the last day of the corporation's base year, are combined and included in the eligible Federal and New York State NOL carryover amount, respectively, subject to the rules in this section.

(c) (1) After applying all other rules and limitations in this section to compute the eligible Federal and New York State NOL carryover amount, respectively, whichever of the two eligible NOL carryover amounts (Federal or New York State) is the lesser amount is the corporation's UNOL.

(2) When subparagraph (v) of paragraph (2) of subdivision (b) of this section applies, for purposes of applying the limitation under paragraph (1) of this subdivision to eligible Federal and New York State NOL carryover amounts to compute a corporation's UNOL, a corporation's eligible Federal NOL carryover amount arising from Federal NOLs subject to IRC section 382 limitations is used to apply such limitation to any corresponding eligible New York State NOL carryover amount, and a corporation's eligible Federal NOL carryover amount arising from Federal NOLs not subject to IRC section 382 limitations is used to apply such limitation to any corresponding eligible New York State NOL carryover amount. The corporation's UNOL is then the sum of the following amounts:

(i) the lesser of the eligible Federal or New York State NOL carryover amounts arising from Federal NOLs subject to IRC section 382 limitations; and

(ii) the lesser of the eligible Federal or New York State NOL carryover amounts arising from Federal NOLs not subject to IRC section 382 limitations.

(d) In computing the UNOL of a corporation that was included in a combined report for the base year, the UNOL of the base year combined group first is computed in accordance with subdivisions (a) through (c) of this section, substituting combined group for corporation. Each corporation included in the base year combined group then must compute its own UNOL for its base year, by multiplying the base year combined group's UNOL by a percentage that represents that base year combined group member's contribution of losses to the base year combined group's UNOL. Such percentage is calculated by:

(1) dividing the total New York State NOLs of the corporation by the total New York State NOLs of all members of the combined group having such New York State NOLs (to the extent such New York State NOLs are included in the eligible New York State NOL carryover amount of the base year combined group in accordance with this section); and

(2) multiplying the result by one hundred.

Section 3-8.3. Examples.

The following examples illustrate the application of the rules and limitations as set forth in section 208(9)(f) and section 1453(k-1) and Subpart 3-8 of this Part, as such provisions were in effect on December 31, 2014, as well as the application of the rules and limitations in section 3-8.2 of this Subpart, in computing the eligible Federal and New York State (NYS) NOL carryover amounts and the amount of the UNOL for a corporation or combined group. Numbers in the examples have been rounded. To the extent the examples reference an "as if" Federal NOL, it either means that the corporation was included in a Federal consolidated return and, in order to compute its UNOL, computes its income and loss amounts "as if" it filed separately for Federal purposes or the composition of the Federal consolidated return and the New York combined group are different and in order to compute the UNOL of the combined group, the group computes its income and loss amounts "as if" the New York combined group was the Federal consolidated group.

Example 1:

ABC Company, a calendar-year taxpayer, began business in 2009 and became taxable in NYS in 2011. ABC Company's base year is calendar year 2014. ABC Company had Federal/NYS income and losses, and applied its NOLs for tax years beginning before 1/1/2015, as follows:

ABC Company	2009	2010	2011	2012	2013	2014	Eligible NOL carryover amount 12/31/2014
"As if" Federal							
Federal Taxable Income (FTI)	($1,500)	($800)	($500)	($400)	$300	$600	
NOL Carried Forward from 2009 to 2013	$300				($300)		
NOL Carried Forward from 2009 to 2014	$600					($600)	
Balance	($600)	($800)	($500)	($400)	$0	$0	($900)
NY							
Entire Net income (ENI)			($600)	($500)	$250	$400	
Balance			($600)	($500)	$250	$400	($1,100)

Computation of ABC Company's eligible NOL carryover amounts and UNOL.

A Federal NOL sustained in a tax year that ABC Company was not subject to tax in New York State (i.e. the NOLs incurred in 2009 and 2010) cannot be included in ABC Company's eligible Federal NOL carryover amount. Therefore, ABC Company's eligible Federal NOL carryover amount is ($900). ABC Company's eligible NYS NOL carryover amount is ($1,100). ABC Company's UNOL is ($900), which is the lesser of its eligible Federal NOL carryover amount and its eligible NYS NOL carryover amount.

Example 2:

XYZ Company, a calendar-year NYS taxpayer, began business in 2009 and became taxable in NYS in 2009. XYZ Company's base year is calendar year 2014. XYZ Company had Federal/NYS income and losses, and applied its NOLs for tax years beginning before 1/1/2015, as follows:

XYZ Company	2009	2010	2011	2012	2013	2014	Eligible NOL carryover amount 12/31/2014
"As if" Federal							
FTI	($1,000)	($1,200)	$600	($400)	$300	($700)	
NOL Carried Forward from 2009 to 2011	$600		($600)				
NOL Carried Forward from 2009 to 2013	$300				($300)		
Balance	($100)	($1,200)	$0	($400)	$0	($700)	($2,300)
NY							
ENI	$200	($1,000)	($300)	($100)	$400	($500)	
Balance	$200	($1,000)	($300)	($100)	$400	($500)	($1,600)

Computation of XYZ Company's eligible NOL carryover amounts and UNOL.

XYZ Company's Federal and NYS NOLs available for carryover are only included in the eligible Federal and NYS NOL carryover amount, respectively, when there is both a Federal and New York State NOL sustained in the same taxable year and available for carryover as of the last day of the corporation's base year. Thus, only the Federal NOLs sustained in 2010, 2012, and 2014 and available for carryover as of the last day of its base year are included in the eligible Federal NOL carryover amount. The Federal NOL sustained in 2009 is not included in the eligible Federal NOL carryover amount as there was no corresponding NYS NOL sustained in that year and available for carryover. The NYS NOL sustained in 2011 is not included in the eligible NYS NOL carryover amount as there was no corresponding Federal NOL sustained in that year and available for carryover. ABC Company's UNOL is ($1,600), which is the lesser of its eligible Federal NOL carryover amount and its eligible NYS NOL carryover amount.

Example 3:

Corporations L, M, N, and O are calendar-year taxpayers that began doing business in 2011 and properly filed as members of a combined group in NYS for 2011 through 2014. The combined group's base year is calendar year 2014. The combined group had Federal/NYS losses for tax years beginning before 1/1/2015, as follows:

Federal	2011 FTI	2012 FTI	2013 FTI	2014 FTI	Federal "as if" group's eligible NOL carryover amount 12/31/2014
L	($400)	$100	($200)	($920)	
M	$980	($3,000)	($500)	($2,300)	
N	($600)	$1,900	($1,400)	$140	
O	($900)	($1,100)	$700	($1,500)	
Totals	($920)	($2,100)	($1,400)	($4,580)	($9,000)
NYS Combined Group	2011 ENI	2012 ENI	2013 ENI	2014 ENI	Combined group's eligible NYS NOL carryover amount 12/31/2014
L	($500)	$500	($300)	($750)	
M	$850	($2,000)	($600)	($2,000)	
N	($600)	$2,000	($1,500)	$250	
O	($1,000)	($1,000)	$500	($1,000)	
Totals	($1,250)	($500)	($1,900)	($3,500)	($7,150)

Computation of base year combined group’s eligible NOL carryover amounts and UNOL and Corporation L’s, M’s, N’s and O's UNOL.

The base year combined group’s Federal and NYS NOLs sustained in 2011 through 2014 and available for carryover as of the last day of its base year are included in its eligible Federal and NYS NOL carryover amount, respectively, since there were both Federal and NYS NOLs sustained in each of these taxable years and available for carryover as of the last day of its base year. The resulting base year combined group’s eligible Federal NOL carryover amount is ($9,000) and its eligible NYS NOL carryover amount is ($7,150). The base year combined group's UNOL is ($7,150), which is the lesser of its eligible Federal NOL carryover amount and its eligible NYS NOL carryover amount. Each member of the base year combined group must then compute its own UNOL, by multiplying the base year combined group's UNOL amount of ($7,150) by a percentage that represents each member’s contribution of losses to the combined group’s UNOL and as illustrated below:

NYS Combined Group	2011 ENI	2012 ENI	2013 ENI	2014 ENI	Losses by Member	Member's losses as a % of total losses of all members with losses	Member's UNOL
L	($500)	$500	($300)	($750)	($1,550)	13.77%	($984)
M	$850	($2,000)	($600)	($2,000)	($4,600)	40.89%	($2,924)
N	($600)	$2,000	($1,500)	$250	($2,100)	18.67%	($1,335)
O	($1,000)	($1,000)	$500	($1,000)	($3,000)	26.67%	($1,907)
Totals	($1,250)	($500)	($1,900)	($3,500)	($11,250)	100.00%	($7,150)

Example 4:

Corporations E and F are calendar-year taxpayers that began doing business in 2011 and properly filed as members of a combined group in NYS for 2011 through 2014. The combined group's base year is calendar year 2014. The combined group had Federal/NYS income and losses, and applied its NOLs for tax years beginning before 1/1/2015, as follows:

Combined Group:	2011	2012	2013	2014	Eligible NOL carryover amount 12/31/2014
"As if" Federal					
FTI					
Combined Group:					
Corporation E	($10,000)	($7,000)	$2,000	$3,000	
Corporation F	($6,000)	$650	$150	$1,000	
Total for Federal "as if" group	($16,000)	($6,350)	$2,150	$4,000	
NOL Carried Forward from 2011 to 2013	$2,150	→	($2,150)		
NOL Carried Forward from 2011 to 2014	$4,000	→	→	($4,000)	
Balance	($9,850)	($6,350)	$0	$0	($16,200)
NY					
ENI					
Combined Group:					
Corporation E	($11,000)	($7,700)	$2,500	$4,000	
Corporation F	($4,000)	$100	($200)	$800	
Total for combined group	($15,000)	($7,600)	$2,300	$4,800	
NOL Carried Forward from 2011 to 2013	$2,150	→	($2,150)		
NOL Carried Forward from 2011 to 2014	$4,000	→	→	($4,000)	
Balance	($8,850)	($7,600)	$150	$800	($16,450)

Computation of the base year combined group's eligible NOL carryover amounts and UNOL and Corporation E's and F's UNOL. The NYS NOLs carried forward from 2011 and deductible in 2013 and 2014 are limited to the amount of the "as if" Federal NOLs carried forward from 2011 to those years. Therefore, the Federal deduction limitation would limit the group's NYS NOL deduction in 2013 and 2014 to $2,150 and $4,000 respectively. The base year combined group's Federal and NYS NOLs sustained in 2011 and 2012 and available for carryover as of the last day of its base year are included in its eligible Federal and NYS NOL carryover amount, respectively, since there were both Federal and NY State NOLs sustained in each of these taxable years and available for carryover as of the last day of the combined group's base year. The base year combined group's UNOL is ($16,200), which is the lesser of its eligible Federal NOL carryover amount and its eligible NYS NOL carryover amount. Each member of the base year combined group must then compute its own UNOL, by multiplying the base year combined group's UNOL amount of ($16,200) by a percentage that represents each member's contribution of losses to the combined group's UNOL and as illustrated below. Since 2013 is a net income year for the combined group, Corporation F's loss of ($200) in 2013 is not included in the losses by member amounts below.

Example 4 (continued):

Member	2011 NYS NOL after carry forward (see note)	2012 NYS NOL	2013 NYS NOL	2014 NYS NOL	Losses by Member	Member's losses as a % of total losses of all members with losses	Member's UNOL
E	($6,490)	($7,600)	$0	$0	($14,090)	86%	($13,932)
F	($2,360)	$0	$0	$0	($2,360)	14%	($2,268)
Totals	($8,850)	($7,600)	$0	$0	($16,450)	100%	($16,200)

NOTE: Since some of the 2011 combined NOL was deductible in 2013 and 2014, the remaining available NOL from 2011 ($8,850) is allocated to Corporations E and F based on each corporation's original loss in 2011 divided by the total combined loss for 2011 ($15,000) as follows:
Corporation E: 8,850 * (11,000/15,000) = 6,490
Corporation F: 8,850 * (4,000/15,000) = 2,360

Example 5:

During calendar tax year 2011, Corporation T filed separately in NYS and was not part of an affiliated group. In 2012, Corporation T began filing combined in NYS as a member of Group P, which consisted of Corporations Q and R, in addition to Corporation T. Group P had no Federal or NYS NOLs prior to 2012; Corporation T had no Federal or NYS NOLs prior to 2011. Group P's base year is calendar year 2014. Corporation T had an NOL for both Federal and NYS purposes in 2011, which is a Separate Return Limitation Year ("SRLY"); the SRLY NOL was not subject to IRC section 382 limitations. Corporation T and Combined Group P had Federal/NYS income and losses, and applied the NOLs for tax years beginning before 1/1/2015, as follows:

Corporation T	2011
Federal	
FTI	($250)
SRLY NOL Carried Forward from 2011 to 2012 (to Group P)	$100
Balance	($150)
NY	
ENI	($300)
NOL Carried Forward from 2011 to 2012 (to Group P)	$100
Balance	($200)

Group P	T's SRLY NOL available after carryforward 2011	2012	2013	2014	Group P's Eligible NOL carryover amounts 12/31/2014
"As if" Federal					
FTI					
Group P:					
Corporation Q		$50	($150)	$100	
Corporation R		$50	$50	$150	
Prior Combined Group Q and R gain/loss		$100	($100)	$250	
Corporation T		$100	($200)	($250)	
Total for Federal "as if" group		$200	($300)	$0	
SRLY NOL Carried Forward from 2011 (from Corp T) to 2012		($100)			
Balance	($150)	$100	($300)	$0	($450)

Example 5 (continued):

NY	T's SRLY NOL available after carryforward 2011	2012	2013	2014	Group P's Eligible NOL carryover amounts 12/31/2014
ENI					
Group P:					
Corporation Q		($200)	($100)	$50	
Corporation R		$50	$50	$50	
Prior Combined Group Q and R gain/loss		($150)	($50)	$100	
Corporation T		$300	($150)	($150)	
Total for Combined Group P		$150	($200)	($50)	
NOL Carried Forward from 2011 (from Corp T) to 2012		($100)			
Balance	($150)	$50	($200)	$0	($350)

Computation of base year Group P's eligible NOL carryover amounts and UNOL and Corporation Q's, R's, and T's UNOL. The amount of Corporation T's SRLY NOL from 2011 that can be carried forward to Group P is ($250), which is the lesser of the Federal or State NOL available and is the limitation for a loss sustained in an individual tax period being carried to a combined period. The deduction by Group P in 2012 is limited to $100, the amount of Corporation T's FTI for 2012. The NOLs remaining in 2011 and 2013 are included in Group P's eligible NYS carryover amount since there were both Federal and State NOL's sustained in each of those taxable years and available for carryover as of the last day of Group P's base year. Group P's NYS NOL sustained in 2014 ($50) is not included in the eligible carryover amount as there was no corresponding Federal NOL by Group P in that taxable year and available for carryover. Group P's UNOL is ($350) and includes the remaining loss available from the 2011 taxable period of ($150) along with ($200) from the 2013 tax period, being the lesser of the Federal or State NOL available. Each member of the base year combined Group P must then compute its own UNOL. Corporation T will have the ($150) remaining from the 2011 taxable year and its portion of the combined loss from the 2013 taxable year as determined by multiplying Group P's combined loss of ($200) by a percentage that represents each member's contribution of losses to the combined group's loss. Corporation Q will have its portion of the combined loss from the 2013 taxable year once again determined by multiplying Group P's combined loss of ($200) by a percentage that represents each member's contribution of losses to the combined group's loss and as illustrated below.

Member	2011 NYS NOL after carryforward	2012 NYS NOL	2013 NYS NOL	2014 NYS NOL	Losses by Member	Member's % of total combined losses of all members	Member's Share of Combined 2013 Loss	Member's Total UNOL
Q		$0	($100)	$0	($100)	40%	($80)	($80)
R		$0	$50	$0	$0	0%	$0	$0
T	($150)	$0	($150)	$0	($150)	60%	($120)	($270)
Totals	($150)	$0	($200)	$0	($250)	100%	($200)	($350)

Corporation T's NYS loss of $150 in 2014 is not included in the losses by member amounts above. This is because the NYS NOL sustained in that year by the combined group that included Corporation T (i.e. Group P's 2014 combined ENI of ($50)) was not included in the determination of Group P's UNOL (since, as explained above, there was no corresponding Federal NOL sustained by Group P in that taxable year and available for carryover).

Example 6:

Acme Company, a calendar-year taxpayer, began business in 2009 and became taxable in NYS in 2009. Acme Company's base year is calendar year 2014. Acme Company had a change in ownership effective January 1, 2013, subjecting its Federal losses sustained in 2009 through 2012 to IRC section 382 limitations. The ACME company's annual section 382 limitation amount is $2,500. After the change in ownership Acme Company continued to file on a separate basis for NYS purposes. Acme Company had Federal/NYS losses for tax years beginning before 1/1/2015, as follows:

	Federal NOLs subject to IRC section 382				Federal NOLs not subject to IRC section 382		Eligible NOL carryover amounts 12/31/2014	
Acme Company	2009	2010	2011	2012	2013	2014	Arising from NOLs subject to IRC section 382	Arising from NOLs not subject to IRC section 382
							(2009-2012)	(2013-2014)
"As if" Federal								
FTI	($15,000)	($10,000)	($12,000)	($20,000)	($8,000)	($5,000)		
Balance	($15,000)	($10,000)	($12,000)	($20,000)	($8,000)	($5,000)	($50,000)	($13,000)
NY								
ENI	($20,000)	($12,000)	($10,000)	($18,000)	($5,000)	($4,000)		
Balance	($20,000)	($12,000)	($10,000)	($18,000)	($5,000)	($4,000)	($60,000)	($9,000)

Computation of Acme Company's eligible NOL carryover amounts and UNOL. Since Acme Company has both Federal NOLs available for carryover that are subject to IRC section 382 limitations (from 2009 through 2012) and Federal NOLs available for carryover that are not subject to IRC section 382 limitations (from 2013 and 2014), Acme Company must separately compute its eligible Federal NOL carryover amount for each, and also must separately compute its corresponding eligible NYS NOL carryover amount for each. Acme Company's Federal NOLs available for carryover from 2009 through 2012 total ($57,000). However, due to the IRC section 382 limitation, the maximum amount of such NOLs available for carryover that can be included in its eligible Federal NOL carryover amount arising from Federal NOLs subject to IRC section 382 limitations is limited to ($50,000) which is the annual section 382 limitation amount of ($2,500) multiplied by 20, less the amount of any such NOLs actually deducted (zero in this example as 2013 and 2014 are loss years). Acme Company's Federal NOLs available for carryover from 2013 and 2014, totaling ($13,000), are not subject to section 382 limitations and are included in its eligible Federal NOL carryover amount arising from Federal NOLs not subject to IRC section 382 limitations. Acme Company's UNOL is ($59,000), which is the sum of the following amounts: (i) the lesser of the eligible Federal or NYS NOL carryover amounts arising from Federal NOLs subject to IRC section 382 limitations; and (ii) the lesser of the eligible Federal or NYS NOL carryover amounts arising from Federal NOLs not subject to IRC section 382 limitations.

Example 6 (continued):

	Arising from NOLs subject to IRC section 382 2009-2012	Arising from NOLs not subject to IRC section 382 2013-2014
Eligible Federal NOL carryover amounts (A)	($50,000)	($13,000)
Eligible NYS NOL carryover amounts (B)	($60,000)	($9,000)
Lesser of (A) and (B)	($50,000)	($9,000)
UNOL	($59,000)	

Section 3-8.4. PNOLC subtraction -- General

A corporation that has a UNOL must convert the UNOL to a PNOLC subtraction pool using the rules in section 3-8.6 of this Subpart. A taxpayer or combined group, in the case of a combined report, is then allowed a PNOLC subtraction as computed in sections 3-8.7 and 3-8.8 of this Subpart, applied before the NOL deduction, in the computation of its business income base. A taxpayer or combined group, in the case of a combined group, that is allowed a PNOLC subtraction in a taxable year, must claim that subtraction in that taxable year.

Section 3-8.5. Corporations that are not allowed a PNOLC subtraction.

The following corporations are not allowed a PNOLC subtraction:

(a) A corporation that does not have a UNOL, including a corporation that was a RIC in its base year;

(b) A corporation that had a base year BAP of zero percent, whether or not such corporation has a UNOL;

(c) A corporation that was a member of a combined group that had a base year BAP of zero percent, whether or not such corporation has a UNOL;

(d) A corporation that had a base year tax rate of zero percent, including a corporation that in its base year was a New York S Corporation, whether or not such corporation has a UNOL;

(e) A corporation that was a member of a base year combined group that had a base year tax rate of zero percent, whether or not such corporation has a UNOL;

(f) A corporation that in its base year was not a member of a combined group subject to tax under article 9-A or article 32 and that was not subject to tax itself under article 9-A or article 32, whether or not such corporation has a UNOL.

Section 3-8.6. Computation of PNOLC subtraction pool.

(a) The PNOLC subtraction pool for a taxpayer that was not a member of a combined group in its base year is computed as follows:

(1) Determine the tax value of the taxpayer’s UNOL. The tax value of the UNOL is the product of:

(i) the amount of the taxpayer's UNOL;

(ii) the taxpayer's base year BAP; and

(iii) the taxpayer's base year tax rate.

(2) Compute the PNOLC subtraction pool. Divide the tax value of the UNOL, as determined pursuant to paragraph (1) of this subdivision, by 6.5% (the conversion percentage). The result is the taxpayer's PNOLC subtraction pool.

(b) The PNOLC subtraction pool for a corporation that was a member of a combined group in its base year, whether or not the corporation was a taxpayer in its base year, is computed as follows:

(1) Determine the tax value of the corporation’s UNOL. The tax value of the corporation’s UNOL is the product of:

(i) the amount of the corporation’s UNOL;

(ii) the combined group's base year BAP; and

(iii) the combined group's base year tax rate.

(2) Compute the PNOLC subtraction pool. Divide the tax value of the corporation’s UNOL, as determined pursuant to paragraph (1) of this subdivision, by 6.5% (the conversion percentage). The result is the corporation’s PNOLC subtraction pool.

Section 3-8.7. Computation of the PNOLC subtraction.

(a) PNOLC subtraction available for use.

(1) In the case of a corporation that is not a member of a combined group, its PNOLC subtraction available for use in its first 2015 taxable year is equal to its tax period PNOLC subtraction allotment (as

described in subdivision (b) of this section) for such taxable year. The amount of PNOLC subtraction available for use in any taxable year following the corporation's first 2015 taxable year is equal to its tax period PNOLC subtraction allotment for the taxable year plus any unused PNOLC subtraction carryforward.

(2) In the case of a combined group, the PNOLC subtraction available for use in its first 2015 taxable year is the sum of the tax period PNOLC subtraction allotments for such taxable year of all members of the combined group. The amount of PNOLC subtraction available for use by a combined group in any taxable year following its first 2015 taxable year is the sum of the tax period PNOLC subtraction allotments for each such taxable year of all members of the combined group plus the sum of any unused PNOLC subtraction carryforwards of all members of the combined group.

(b) Tax period PNOLC subtraction allotment.

(1) A corporation's tax period PNOLC subtraction allotment is the percentage of its PNOLC subtraction pool that may be claimed in a taxable year as provided in paragraph (2). If a corporation cannot utilize the entire tax period PNOLC subtraction allotment in a taxable year, the unused portion for that taxable year is considered an unused PNOLC subtraction carryforward.

(2) Tax period PNOLC subtraction allotment methods.

(i) 100% allotment method for small business taxpayers. A small business taxpayer's tax period PNOLC subtraction allotment for its first 2015 taxable year is equal to 100% of its PNOLC subtraction pool. A small business taxpayer has no tax period PNOLC subtraction allotment after the first 2015 taxable year, but any unused portion of its 2015 PNOLC subtraction allotment is considered an unused PNOLC subtraction carryforward, eligible to be utilized without any allotment limitations.

(ii) 10% allotment method. For any corporation that is not a small business taxpayer or electing the 50% method in section 210(1)(a)(viii)(B)(2)(IV), the tax period PNOLC subtraction allotment is equal to 10% of its PNOLC subtraction pool in each of its first ten taxable years after the base year. There is no tax period PNOLC subtraction allotment after the tenth taxable year. Unused portions of each allotment are considered PNOLC subtraction carryforwards. Taxpayers with unused PNOLC subtraction carryforwards are eligible to use them in future periods without regard to the 10% allotment limitation.

(3) Combined groups. In the case of a combined group, each member of the group:

(i) shall compute its own tax period PNOLC subtraction allotment using the allotment method determined by its designated agent in the group's first 2015 taxable year if it was included in the combined report in the group's first 2015 taxable year; or

(ii) compute its own tax period PNOLC subtraction allotment determined by the method used in the member's first 2015 taxable year if the member was not included in a combined report in that year. The combined group's tax period PNOLC subtraction allotment in a taxable year is the sum of the tax period PNOLC subtraction allotments for all members of the combined group for the taxable year.

(c) PNOLC subtraction.

(1) For all corporations not electing the 50% allotment method, the amount of PNOLC subtraction in a given taxable year is the lesser of:

(i) the applicable PNOLC subtraction allotment plus available PNOLC subtraction carryforwards (the PNOLC subtraction available for use); or

(ii) The amount required to reduce the tax on total business income prior to the deduction of a PNOLC subtraction and net operating losses to the higher of the tax on the capital base or the fixed dollar minimum tax (the maximum amount of PNOLC subtraction to be deducted).

(2) For corporations not electing the 50% allotment method, a PNOLC subtraction may be claimed for no longer than 20 taxable years or the taxable year beginning on or after January 1, 2035 but before January 1, 2036, whichever comes first.

(d) Maximum amount of the PNOLC subtraction to be deducted.

(1) In the case of a corporation that is not a member of a combined group, the maximum amount of the PNOLC subtraction to be deducted in a taxable year is computed as follows:

(i) multiply the business income tax rate for the taxable year by the apportioned business income before the PNOLC subtraction and the net operating loss deduction for the taxable year; (ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater of the capital base tax or the fixed dollar minimum tax for the taxable year; and

(iii) divide the result in subparagraph (ii) of this paragraph by the taxpayer's business income tax rate for the taxable year.

(2) In the case of a combined report, the maximum amount of PNOLC subtraction to be deducted in a taxable year is computed as follows:

(i) multiply the business income tax rate for the taxable year by the combined apportioned business income before the PNOLC subtraction and the net operating loss deduction for the taxable year;

(ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater of the combined capital base tax or the fixed dollar minimum tax attributable to the designated agent for the taxable year; and

(iii) divide the result in subparagraph (ii) of this paragraph by the combined group's business income tax rate for the taxable year.

Section 3-8.8. Impact of combined group changes on the PNOLC subtraction.

(a) If a corporation that filed separately subsequently joins a combined group in a later taxable year, the corporation's PNOLC subtraction allotment and unused PNOLC subtraction carryforward are added to the combined group's PNOLC subtraction allotment and unused PNOLC subtraction carryforward, respectively, subject to the rules in section 210(1)(a)(viii)(B) and this Subpart.

(b) If a corporation is a member of a combined group and subsequently leaves that group in a later taxable year, the leaving member of the combined group takes its own PNOLC subtraction allotment with it to use in future taxable years. In addition, such member also takes its own share of the combined group's combined unused PNOLC subtraction carryforward, which shall be based upon its share of the combined group's PNOLC subtraction available for use in the last year it was included in the combined group. If the leaving corporation joins another combined group, its PNOLC subtraction allotment and unused PNOLC subtraction carryforward are added to the combined group's PNOLC subtraction allotment and unused PNOLC subtraction carryforward, respectively, subject to the rules in section 210(1)(a)(viii)(B) and this Subpart. If such corporation does not join another combined group, it is allowed its PNOLC subtraction allotment and unused PNOLC subtraction carryforward on a separate basis, subject to the rules in section 210(1)(a)(viii)(B) and this Subpart. The remaining combined group must reduce its unused PNOLC subtraction carryforward by the leaving member's share of such unused carryforward.

Section 3-8.9. Examples.

Example 1:

2014 Calendar Year (Base Year)
Corporations L, M, N and O are properly included in a combined report. The combined group's base year BAP is 12.50% and the group's base year tax rate is 7.1%.

2015 Calendar Year (First 2015 Taxable Year)

Corporation O files on a separate basis. It is not a small business taxpayer. To compute its PNOLC subtraction pool, Corporation O first multiplies its UNOL by its base year combined group's base year BAP and base year tax rate ($7,325 x 12.50% x 7.1%). The result of $65 is divided by the 6.5% conversion percentage to arrive at a PNOLC subtraction pool of $1,000. Since Corporation O properly elected to use the 50% allotment method, its PNOLC subtraction pool is multiplied by 50% to determine its tax period PNOLC subtraction allotment of $500 for the first 2015 taxable year. In the first 2015 taxable year, the PNOLC subtraction available for use is $500, which is equal to its tax period PNOLC subtraction allotment for that year.

Corporation	UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
O	$7,325	12.50%	7.10%	6.50%	$1,000	50%	$500	$500

Corporations L, M, and N are properly included in a combined report. The combined group is not a small business taxpayer and it does not elect to use the 50% allotment method. Each member of the combined group computes its own PNOLC subtraction pool by multiplying its own UNOL by the base year combined group's base year BAP and base year tax rate. The result is then divided by the 6.5% conversion percentage to compute the member's PNOLC subtraction pool. Since the combined group is utilizing the 10% allotment method, each member's PNOLC subtraction pool is multiplied by 10% to arrive at the member's PNOLC subtraction allotment for the first 2015 taxable year. The combined group's tax period PNOLC subtraction allotment for the first 2015 taxable year of $3,505 is the sum of L, M, and N's tax period PNOLC subtraction allotments for that year. The combined group's PNOLC subtraction available for use in the first 2015 taxable year is $3,505, which is equal to the combined group's tax period PNOLC subtraction allotment for that year.

2015 Group Member	Member's UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
L	$70,000	12.50%	7.10%	6.50%	$9,558	10%	$956	$956
M	$186,700	12.50%	7.10%	6.50%	$25,492	10%	$2,549	$2,549
N	$0	12.50%	7.10%	6.50%	$0		$0	$0
Totals	$256,700				$35,050		$3,505	$3,505

Example 2:

2014 Calendar Year (Base Year)
Corporations E, F, and G are properly included in a combined report. The combined group's base year BAP is 9.5% and the group's base year tax rate is 7.1%. Corporation H is a small business taxpayer and files on a separate basis, with a base year BAP of 4.8250% and a base year tax rate of 6.5%. Corporation I was not subject to tax in New York State in the base year. Corporation J files on a separate basis, with a base year BAP of 9.75% and a base year tax rate of 7.1%.

2015 Calendar Year (First 2015 Taxable Year)

Corporations E, F, G, H, and I are properly included in a combined report. Even though Corporation H qualified as a small business taxpayer in 2014, the combined group does not qualify as one in 2015. The designated agent of the combined group does not elect to use the 50% allotment method. Each member computes its own PNOLC subtraction pool by multiplying its own UNOL by the base year BAP and base year tax rate. Corporations E, F, and G have the same base year BAP and base year tax rate as they were included in the same base year combined group. Corporation H must use its separately filed base year BAP and base year tax rate. As Corporation I was not subject to tax in the base year, it has a 0% base year BAP and 0% base year tax rate. The result is then divided by the 6.5% conversion percentage to compute the member's PNOLC subtraction pool. Since the combined group is utilizing the 10% allotment method, each member's PNOLC subtraction pool is multiplied by 10% to arrive at the member's PNOLC subtraction allotment for the first 2015 taxable year. The combined group's PNOLC subtraction allotment for the first 2015 taxable year is $2,900, which is the sum of E, F, G, H, and I's tax period PNOLC subtraction allotments for that year. The combined group's PNOLC subtraction available for use in the first 2015 taxable year is $2,900, which is equal to the tax period PNOLC subtraction allotment for that year. The combined group is able to utilize the entire PNOLC subtraction available for use so there is no carryforward of PNOLC subtraction from the first 2015 taxable year.

2015 Group Member	Member's UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
E	$115,600	9.50%	7.10%	6.50%	$11,996	10%	$1,200	$1,200
F	$28,900	9.50%	7.10%	6.50%	$2,999	10%	$300	$300
G	$57,800	9.50%	7.10%	6.50%	$5,998	10%	$600	$600
H	$165,800	4.83%	6.50%	6.50%	$8,000	10%	$800	$800
I	$0	$0	$0	$0	$0	$0	$0	$0
Total	$368,100				$28,993		$2,900	$2,900

Example 2 (continued):

Corporation J files on a separate basis and properly elects to use the 50% allotment method. To compute its PNOLC subtraction pool, Corporation J first multiplies its UNOL by its base year BAP and base year tax rate ($16,000 x 9.750% x 7.1%). The result of $111 is divided by the 6.5% conversion percentage to arrive at a PNOLC subtraction pool of $1,704. Since Corporation J properly elected to use the 50% allotment method, its PNOLC subtraction pool is multiplied by 50% to determine its tax period PNOLC subtraction allotment of $852 for the first 2015 taxable year. In the first 2015 taxable year, the PNOLC subtraction available for use is $852, which is equal to its tax period PNOLC subtraction allotment for that year. Corporation J is able to use the entire PNOLC subtraction available for use so there is no carryforward of PNOLC subtraction from the first 2015 taxable year.

Corporation	UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction
J	$16,000	9.75%	7.10%	6.50%	$1,704	50%	$852	$852

2016 Calendar Year (Second Year Following the Base Year)

Corporations E, F, G, H, I, and J are properly included in a combined report. The group has $3,752 of PNOLC subtraction available for use, which is the sum of each member's PNOLC subtraction available for use for the tax period.

2016 Group Member	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	Unused PNOLC Subtraction Carryforward from 2015 Calendar Year	2016 Calendar Year PNOLC Subtraction Available for Use
E	$11,996	10%	$1,200	$0	$1,200
F	$2,999	10%	$300	$0	$300
G	$5,998	10%	$600	$0	$600
H	$8,000	10%	$800	$0	$800
I	$0	$0	$0	$0	$0
J	$1,704	50%	$852	$0	$852
Total	$30,697		$3,752	$0	$3,752

Even though combined group E, F, G, H, I elected in 2015 to use the 10% allotment method, Corporation J is required to continue to use the 50% allotment method elected on its original, timely filed return for the first 2015 taxable year when it joined the combined group in 2016. However, if Corporation J properly revokes such election in accordance with the rules in this Subpart, it would then use the 10% allotment method in the 2016 taxable year.

Section 3-8.10. Impact of certain corporate acquisitions on the PNOLC subtraction.

In a transaction to which IRC section 381(a) applies, the acquiring corporation shall succeed to the balance of the PNOLC subtraction allotments and unused PNOLC subtraction carryforward of the distributor or transferor corporation, subject to the same restrictions and limitations on the use of the PNOLC subtraction allotments and unused PNOLC subtraction carryforward to which the distributor or transferor corporation was subject.

Section 3-8.11. Record-keeping.

A corporation or combined group with a PNOLC subtraction pool must attach to its report Form CT-3.3 and a detailed schedule showing the computation of the UNOL, amount of unused PNOLC subtraction allotment carryforward and, in the case of a combined group, each member's UNOL and amount of unused PNOLC subtraction allotment carryforward, together with all material and pertinent facts related to the taxpayer's or combined group's, if applicable, claim. Such records shall be retained during the period in which the statute of limitations for a change to the PNOLC subtraction may be made by the taxpayer or the department.

Section 3-8.12. Subsequent changes.

(a) Any change in the amount of a corporation's UNOL must be made by the corporation or the department within the statute of limitations referenced in section 1083(a), determined with regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of such time period allowed by section 1083(c)(12), for the report on which a PNOLC subtraction as computed in section 3-8.7 of this Subpart is first claimed by the corporation. Any Federal changes that are finalized after the statute of limitations described in the preceding sentence has expired will not be considered in the computation of the UNOL.

(b) Any change in the base year tax rate or base year BAP must be made within the statute of limitations referenced in section 1083(a) for the base year, determined with regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of such time period allowed by section 1083(c)(12). Any Federal changes that are finalized after the statute of limitations described in the preceding sentence has expired will not be considered in the computation of the base year tax rate or base year BAP.

(c) Except as otherwise provided in this section, if it is determined by either the department or the corporation that an error was made in the calculation or application of the UNOL or the PNOLC subtraction in a tax year or tax years for which the statute of limitations referenced in section 1083(a), as determined with regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of such time allowed by section 1083(c)(12), has expired, the corporation and the department shall be bound by the position taken by the corporation on the report or reports for such year or years as they pertain to the calculation of the UNOL and the PNOLC subtraction, and the PNOLC subtraction and the unused PNOLC subtraction carryforward shall be corrected for the taxable years for which the statute of limitations is still open and for future taxable years. In the first year in which such correction may be made, the amount of recomputed PNOLC subtraction pool shall be reduced by the amount of PNOLC subtraction that was used erroneously in the tax year or tax years for which the statute of limitations has expired. A new PNOLC subtraction allotment must be computed for the remaining years of the corporation's allotment method using the re-computed PNOLC subtraction pool, and any unused PNOLC subtraction carryforward from the tax year or tax years for which the statute of limitations has expired is disallowed.

(d) Examples.

Example 1: Taxpayer A files its 2014 report using a BAP of 15%. However, on its 2015 report, it computes its PNOLC subtraction using a base year BAP of 100%. Taxpayer A had a UNOL of $1,500,000 and a base year tax rate of 7.1%. It computed a PNOLC subtraction pool of $1,638, 461 and used the 10% allotment method in the determination of its PNOLC subtraction.

In 2015, Taxpayer A had a PNOLC subtraction of $100,000 and claimed a PNOLC subtraction carryforward of $63,846 (10% allotment of $163,846 - $100,000).

The department does not audit Taxpayer A's 2014 and 2015 reports and does not discover the discrepancy in the 2014 reported BAP and the base year BAP used in the PNOLC subtraction pool computation until it audits Taxpayer A's 2016 report in 2019, after the statute of limitations for the 2014 and 2015 tax years has expired. Taxpayer A is bound by the BAP it used on its 2014 report when computing the PNOLC subtraction pool. Thus, as part of the audit of the 2016 report, the department properly recomputes Taxpayer A's PNOLC subtraction pool using the 15% BAP Taxpayer claimed on its 2014 report. Accordingly, Taxpayer A's PNOLC subtraction pool should have been $245,769 ($1,500,000 x .15 x .071/.065). The re-computed PNOLC subtraction pool is reduced by the $100,000 used in 2015 to determine the remaining PNOLC subtraction pool of $145,769. Since Taxpayer A used the 10% allotment method and there are 9 remaining years of allotments to determine, the remaining PNOLC subtraction pool is divided by 9. The PNOLC subtraction allotment for 2016 and the next 8 tax years is $16,197. The PNOLC subtraction carryforward of $63,846 reported on its 2015 return is disallowed. As a result, Taxpayer A has a PNOLC subtraction available for use of $16,197 in the 2016 taxable year.

Example 2: On its 2014 report, Taxpayer B claims to be a qualified manufacturer and used a 0% tax rate for its entire net income base. However, on its 2015 report, it computed a PNOLC subtraction using a base year tax rate of 7.1% and the 10% allotment method. The department does not audit Taxpayer B's 2014 and 2015 reports and does not discover the discrepancy in the 2014 reported tax rate and the base year tax rate used in the PNOLC subtraction pool computation until it audits Taxpayer B's 2016 report in 2019, after the statute of limitations for the 2014 and 2015 tax years has expired. Taxpayer B is bound by the tax rate it used on its 2014 report and, as part of the 2016 audit, the department properly re-computes a PNOLC subtraction pool of $0 and denies the PNOLC subtraction in 2016. Taxpayer B is not entitled to use any PNOLC subtraction in future years.

Example 3: Same facts as Example 2, except that Taxpayer B is a small business taxpayer as defined in section 3-8.1(e)(1) of this Subpart and Taxpayer B used 100% of its PNOLC subtraction pool on its 2015 report. Because the statute of limitations for the 2015 tax year has expired, the department is bound by the taxpayer's actions in 2015 and cannot recoup the PNOLC subtraction the taxpayer used in 2015.

SUBPART 3-9

NET OPERATING LOSS AND NET OPERATING LOSS DEDUCTIONS FOR TAXABLE YEARS

Section 3-9.1. Definitions. (Tax Law, sections 210(1)(a)(ix), 210-C(4)(d))

(a)(1) "Net operating loss" (NOL) means the amount of total business income in a particular taxable year multiplied by the business apportionment factor (BAF) for that taxable year, when such total business income is less than zero. The amount of NOL cannot include any New York investment capital losses, as defined in section 3-7.1 of this Part.

(2) In the case of a combined report, the NOL is the combined business loss incurred in a particular taxable year multiplied by the combined BAF for that taxable year. The amount of combined business loss cannot include any New York investment capital losses.

(3) In the case of an alien corporation that under any provision of the IRC is not treated as a "domestic corporation" as defined in IRC section 7701, the NOL is calculated using effectively connected income as a starting point for the business income base.

(b) A "separate return year" means a taxable year of a corporation for which it files a separate return or for which it filed as a member of a different combined group.

Section 3-9.2. Net operating loss deduction. (Tax Law, sections 210, 210-C)

(a) (1) A corporation that reports as part of a consolidated group for Federal income tax purposes, but on a separate basis for purposes of article 9-A, computes its NOL and its net operating loss deduction (NOLD) as if it were filing on a separate basis for Federal income tax purposes.

(2) If the combined group is different than the consolidated group for Federal income tax purposes, then the combined group computes its NOL and NOLD as if it were filing a consolidated return for Federal income tax purposes with the combined group members.

(b) The NOLD is not limited to the Federal NOLD amount. However, such deduction is determined using the same limitations that would apply for Federal income tax purposes under the IRC and the related regulations regarding the NOLs of the acquired or merged loss companies.

(c) The NOLD that is required to be utilized in a taxable year is the amount that reduces the tax on apportioned total business income after the prior net operating loss conversion (PNOLC) subtraction and prior to the NOLD to the higher of the tax on the capital base or the fixed dollar minimum tax. In the case of a combined report, the NOLD that is required to be utilized in a taxable year is the amount that reduces the tax on apportioned total combined business income after the PNOLC subtraction and prior to the NOLD to the higher of the tax on the combined capital base or the fixed dollar minimum tax of the designated agent.

(d) (1) A corporation is allowed an NOLD in computing its business income base or, in the case of a combined report, in computing the combined group's business income base.

(2) The NOLD is the amount of NOL from one or more taxable years that is carried forward or carried back to a particular taxable year, subject to the limitations in this Subpart. In the case of a combined report, the NOLD is the aggregate amount of the combined group members' NOL from one or more taxable years that is carried forward or carried back to a particular taxable year, subject to the limitations in this Subpart.

(3) When both a PNOLC subtraction and an NOLD are being claimed for a particular taxable year, the PNOLC subtraction must be applied against the business income base before the NOLD.

(e) A corporation will not be allowed an NOLD for any NOL sustained in any of the taxable years listed in paragraph (1), (2) or (3) of this subdivision:

(1) a New York S year. The New York S year must, however, be treated as a taxable year for purposes of determining the number of taxable years to which an NOL may be carried forward or back.

(2) any taxable year beginning prior to January 1, 2015; or

(3) any taxable year in which the corporation was not subject to tax under article 9-A or not a member of a combined group subject to tax under article 9-A.

Section 3-9.3. Application of NOLs. (Tax Law, sections 210(1), 210-C)

(a) Except as otherwise provided in this Subpart, an NOL must be carried back three years preceding the taxable year of the loss (the "loss year"). However, no NOL can be carried back to a taxable year beginning before January 1, 2015. The NOL is first carried to the earliest of the three taxable years preceding the loss year. If the NOL is not entirely used to offset income in that year, the remainder is carried to the second taxable year preceding the loss year, and any remaining amount is carried to the taxable year immediately preceding the loss year. Any unused amount of NOL then remaining may be carried forward for as many as twenty taxable years following the loss year. NOLs carried forward are carried first to the taxable year immediately following the loss year and then to the next immediately succeeding taxable year or years until the NOL is used up or to the twentieth taxable year following the loss year, whichever comes first.

(b) When there are two or more NOLs, or portions thereof, to be carried back or carried forward and deducted in one particular taxable year, the earliest NOL incurred must be applied first.

(c) An NOL from a separate return year of a corporation that is filing as a new member of a combined group may not be carried back to offset income of that combined group in a taxable year in which the corporation was not a member of the combined group.

(d) In the case of a combined report, the portion of the combined NOL attributable to any member of the group that files a separate report, or to a member of a different group that files a combined report for a preceding or succeeding taxable year will be an amount bearing the same relation to the combined loss as the NOL of such corporation bears to the total NOLs of all members of the group having such losses, to the extent that such losses are taken into account in computing the combined NOL. The NOL attributable to a member filing a separate report, or as a member of a different group filing a combined return, is to be calculated by applying the business apportionment factor (BAF) of the combined group to that member's proportional share of the group's business loss. A corporation's share of the combined group's NOL may be carried back to a separate return year of such corporation to offset only that corporation's business income in such year. A NOL of a combined group may not be carried back to offset the income of a corporation that was not a member of the combined group when the loss was incurred.

(e) If the taxpayer makes the election to waive the carryback period, it shall be irrevocable for that taxable year. In the case of a combined report, the election is made by the designated agent and applies to all members of the combined group. Therefore, a member of a combined group that has elected to waive the entire carry back period may not carry back its share of the combined group's NOL to a separate return year. A separate election must be made for each loss year. Failure to affirmatively waive the entire carryback period in the manner prescribed by the commissioner means that such NOL must be carried back.

(f) If a corporation calculates a higher tax liability for a taxable year under the capital base tax or the fixed dollar minimum tax than under the business income base, it does not need to utilize an NOLD. However, the year will be treated as a taxable year for purposes of determining the number of taxable years to which an NOL may be carried forward or back.

Section 3-9.4. Overpayments and underpayments resulting from NOL carrybacks.

(a) A corporation claiming a credit or refund of franchise tax paid under article 9-A for a taxable year to which an NOL is carried back as a deduction must file an amended return for that taxable year within the statute of limitations on credit or refund pursuant to section 1087.

(b) For those instances in which an NOL is carried back and the amount of NOL is subsequently changed:

(1) The department may assess additional tax at any time that a deficiency for the taxable year of the loss can be assessed in accordance with section 1083(c)(4). This applies whether or not the NOL was affected by a change in business income or change to the BAF or both.

(2) The department may refund an overpayment at any time that a refund for the taxable year of the loss can be claimed in accordance with section 1087. This applies whether or not the NOL was affected by a change in business income or change to the business apportionment factor or both.

(3) The department will apply the rules in paragraphs (1) and (2) above to all years affected by the revised NOL amount.

Section 3-9.5. Income from discharge of indebtedness.

In a year in which the corporation has income from the discharge of indebtedness that was excluded from Federal taxable income, the corporation must reduce any New York NOLs in the same manner as provided under IRC section 108(b) and related regulations, provided reductions to Federal tax attributes that are not applicable to New York State are excluded. The amount by which the New York NOLs must be reduced is computed by multiplying the New York business apportionment factor for the year of discharge by the amount of Federal NOL that is required to be reduced.

Section 3-9.6. Carryforwards in certain corporate reorganizations and acquisitions.

(a) A "separate return limitation year" (SRLY) means any separate return year of a corporation. The carryforward of any NOL incurred by a corporation for any taxable year beginning on or after January 1, 2015, is limited after a reorganization or merger by the same principles for the limitation of the carryforward of an NOL for Federal tax purposes as required under the provisions of IRC sections 381 through 384 and related regulations and any other section of the IRC or related regulations. NOLs arising in taxable years beginning on or after January 1, 2015, and carried forward to a combined report from a SRLY may be used to reduce the combined group's apportioned business income only to the extent of the apportioned business income of the combined group attributable to the acquired loss corporation that carried forward the loss from the SRLY (SRLY limitation).

(b) NOL carryforward that is subject to limitation under IRC section 382 and related provisions. If the corporation's Federal NOL carryforward is limited in a particular year under IRC section 382, the amount of NOL carryforward allowed for New York State purposes is similarly limited. The IRC section 382 limitation adjusted for New York is the product of the annual IRC section 382 limitation and the business apportionment factor for the current tax year. In addition, if the NOLD of the combined group is less than such annual limitation in a given tax year, the annual IRC section 382 limitation adjusted for New York in the next taxable year shall be increased by such excess.

(c) The SRLY limitation described in subdivision (a) will not apply where there is an overlap with IRC section 382 as described in subdivision (b), if it would not apply for federal income tax purposes.

(d) In the event the NOLs described in subdivision (a) or (b) of this section are from the same loss year as losses of the acquiring corporation, the amount of SRLY limited carryforward under subdivision (a) or the IRC section 382 limited carryforward under subdivision (b) shall be applied before applying any other NOL against the remaining business income of the combined group.

Section 3-9.7. Examples.

The following examples assume that the corporation has (1) no PNOLC subtraction in the year and (2) at least the amount of computed NOLD required to be utilized is available for deduction. While some examples may highlight multiple rules contained in this Subpart, the introductory text of the example is intended to highlight the main rule highlighted in each such example.

Example 1:

This example is intended to highlight that New York investment capital losses must be added back in computing the business income base and any net operating loss (NOL).

Taxpayer has a Federal loss of ($500,000), which includes a ($40,000) New York investment capital loss that resulted from the sale of its investment capital. The taxpayer must adjust its Federal taxable income (FTI) to account for such loss when computing the business income base and its NOL.

Federal taxable income (loss)	($500,000)
Adjustment for New York investment capital loss	$40,000
Federal taxable income (loss) adjusted for New York investment capital loss	($460,000)

Example 2:

This example is intended to highlight that the NOLD required to be utilized is the amount that reduces the tax on the business income base to the higher of the capital base tax or the fixed dollar minimum.

Taxpayer X computes its 2020 NOLD of $6,730,769 required to be utilized as follows:

NOL Deduction Schedule	
Apportioned total business income after the PNOLC but before the NOLD	$7,500,000
Business income base tax rate	6.50%
Product of apportioned total business income after the PNOLC but before the NOLD and the business income base tax rate	$487,500
Capital base tax	$50,000
FDM	$20,000
Greater of capital base tax and FDM	$50,000
Difference between (a) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate and (b) greater of capital base tax and FDM	$437,500
Business income base tax rate	6.50%
Net operating loss deduction required to be utilized ($437,500/6.5%)	$6,730,769

Example 3:

This example is intended to highlight that the NOLD may offset income from investment capital that remains in business income due to the 8 percent of ENI limitation on gross investment income.

Taxpayer Y sustained an NOL in 2021 of ($3,750). It properly elected to waive the carryback period so the NOL is carried forward to 2022. In 2022, the gross investment income limitation reduced the amount the taxpayer was allowed to deduct as investment income from $500 to $360 (8% of $4,500). As such, $140 of income from investment capital was considered business income in 2022.

NOL Schedule		
	2021	2022
Entire net income	($5,000)	$4,500
Investment income		$360
Total business income	($5,000)	$4,140
BAF	75%	85%
Apportioned total business income after the PNOLC but before the NOLD	($3,750)	$3,519
Business income base tax rate		6.5%
Product of apportioned total business income after the PNOLC but before the NOLD and the business income base tax rate		$229
Capital base tax		$200
FDM		$75
Greater of capital base tax and FDM		$200
Difference between (a) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate and (b) greater of capital base tax and FDM		$29
Business income base tax rate		6.5%
NOLD required to be utilized		$442
NOL carryforward from 2021 to be used in 2022	$442	($442)
Balance of 2021 NOL available for carryforward after the 2022 tax year	($3,308)	

Example 4:

This example is intended to highlight how a separate filer carries back its NOL to previous years.

Company A, a calendar-year taxpayer, was incorporated and began doing business in New York as of 1/1/2019. Company A had New York income and losses as follows:

NOL Schedule				
	2019	2020	2021	2022
Apportioned total business income after the PNOLC but before the NOLD	$7,500,000	$3,500,000	($10,000,000)	$2,000,000
Business income base tax rate	6.5%	6.5%		6.5%
Product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate	$487,500	$227,500		$130,000
Capital base tax	$28,000	$25,000		$17,000
FDM	$50,000	$50,000		$50,000
Greater of capital base tax and FDM	$50,000	$50,000		$50,000
Difference between (a) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate and (b) greater of capital base tax and FDM	$437,500	$177,500		$80,000
Business income base tax rate	6.5%	6.5%		6.5%
NOLD required to be utilized (if available)	$6,730,769	$2,730,769		$1,230,769
NOL sustained			($10,000,000)	
NOL carryback from 2021 to 2019	($6,730,769) ←		$6,730,769	
NOL carryback from 2021 to 2020		($2,730,769) ←	$2,730,769	
NOL carryforward from 2021 to 2022			$538,462 →	($538,462)
Business income base	$769,231	$769,231	($10,000,000)	$1,461,538
Business income base tax	$50,000	$50,000	$0	$95,000

Example 5:

This example is intended to highlight how a combined group member computes its share of NOLs sustained in the loss year.

Taxpayers L, M, N & O began doing business and properly filed a combined report in New York in the 2021. As the combined group sustained an NOL, each member computes its share of the NOL as follows:

Computation of the NOL for Members of a Combined Group				
			(1)	(2)
Combined Group	2021 Business Income/(Losses)	Business Loss by Member	Member's business losses as a % of total business losses of all members with losses	Member's 2021 NOL (2021 Total BI*(1))
L	($750)	($750)	20.0%	($700)
M	($2,000)	($2,000)	53.3%	($1,867)
N	$250	$0	0.0%	$0
O	($1,000)	($1,000)	26.7%	($933)
Totals	($3,500)	($3,750)	100.00%	($3,500)

If taxpayers L, M, N, and O file a combined report in 2022, the NOL carryforward available for use by the group would be $3,500. However, if taxpayers L,M, and N file a combined report in 2022, the group would have an NOL carryforward available for use by the group of $2,567 ($700 + $1,867) and taxpayer O would have an NOL carryforward available for use of $933 on its separate return in 2022.

Example 6:

This example is intended to highlight how a combined group member computes its share of NOLs and how the share of such NOLs is carried back to previous years.

In taxable year 2020, Corporation A began doing business in New York and filed a separate New York State tax return. Corporations B and C also became subject to tax in taxable year 2020 and properly filed a combined report. In 2021, Corporation A was purchased by unrelated group that includes corporations B and C. The newly formed combined group A, B, and C properly files a combined New York State return and sustains an NOL in 2021. Each member of the combined group must compute its share of the NOL sustained in 2021 based on its share of the loss. Corporation A may carry back its share of the 2021 loss to its separately filed 2020 return and Corporations B and C may carry back their share of 2021 losses to the 2020 combined report filed by combined group B and C.

NOL Schedule			
	A is an unrelated separate Filer	BC Group	ABC Group
Corporation	2020	2020	2021
A	$6,000,000		($1,750,000)
B		$1,250,000	($1,275,000)
C		$250,000	($1,300,000)
Apportioned total business income after the PNOLC but before the NOLD	$6,000,000	$1,500,000	($4,325,000)
Business income base tax rate	6.50%	6.50%	
Product of apportioned total business income (loss) after the PNOLC but before the NOLD and the business income base tax rate	$390,000	$97,500	
Capital base tax	$45,000	$18,000	
FDM	$20,000	$50,000	
Greater of capital base tax and FDM	$45,000	$50,000	
Difference between (a) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate and (b) greater of capital base tax and FDM	$345,000	$47,500	
Business income base tax rate	6.50%	6.50%	
NOLD required to be utilized (if available)	$5,307,692	$730,769	

Example 6 (continued):

NOL APPLICATION			
	A is an unrelated separate Filer	BC Group	ABC Group
	2020	2020	2021
Corporation			
A	$6,000,000		($1,750,000)
B		$1,250,000	($1,275,000)
C		$250,000	($1,300,000)
Combined Apportioned Business Income after the PNOLC but before the NOLD	$6,000,000	$1,500,000	($4,325,000)
Carryback A's NOLs from 2021 to 2020	($1,750,000)		$1,750,000
Carryback B's and C's NOLs from 2021 to 2020		($730,769)	$730,769
Business income base	$4,250,000	$769,231	($4,325,000)
Balance of NOL sustained in 2021 after carryback to 2020			($1,844,231)

Corporation A carried back its share of the 2021 loss of $1,750,000 to reduce its 2020 tax. As its carryback of $1,750,000 is less than the NOLD required to be utilized (if available), Corporation A completely exhausted its 2021 NOL. While Corporations B and C carried back a portion of the 2021 NOLs, the total NOL available for carryback of $2,575,000 is greater than the NOLD required to be utilized of $730,769. As such, Corporations B and C must determine their share of NOL carryback based on their share of losses in 2021. Of the $730,769 carried back to 2020, Corporation B's share is $361,837 (1,275,000/2,575,000 *$730,769) and Corporation C's share is $368,932 (1,300,000/2,575,000 * $730,769). Corporation B's 2021 NOL carryforward is $913,163 ($1,275,000 - $361,837) and Corporation C's 2021 NOL carryforward is $931,068 ($1,300,000-$368,932).

Example 7:

This example is intended to highlight how NOLs are impacted by subsequent adjustments to the loss year as well as the time period for assessing deficiencies when an adjusted NOL is carried to other periods.

Corporation B sustains an NOL for the taxable year ending 12/31/2018 and on 10/15/2019 files its first amended 2015 CT-3 form to carryback the NOL of $50,000 to its 2015 taxable year ($100,000 business loss multiplied by a BAF of 50%). Corporation B receives a refund of $3,550 for the 2015 taxable year.
Based on a subsequent correction to the BAF by the taxpayer that changes its 2018 BAF from 50% to 80%, it is determined that the actual NOL for the taxable year ending 12/31/2018 was $80,000 ($100,000 business loss multiplied by a BAF of 80%). Corporation B files a second amended report for the 2015 taxable year in July 2020 to claim the additional refund for 2015.

In December 2020, the IRS completes their examination of Corporation B and makes their final determination. The IRS required Corporation B to recognize in 2018 a deferred receipt from undelivered sales. Corporation B files a second amended 2018 report timely to report the correction to its 2018 FTI and also amend its BAF since the Revenue Agent Report (RAR) directly impacted the 2018 BAF. As the RAR changed the 2018 NOLD, the Department calculates Corporation B's proper liability for the 2015 tax year upon receiving a copy of the RAR. As a result, Corporation B owes $1,207 for the 2015 and the Department may assess a deficiency due by the authority granted under section 1083(c)(4).

	2018		
	As Filed	First Amended	Second Amended
Total business income before RAR	($100,000)	($100,000)	($100,000)
Adjustment to federal taxable income due to RAR			$10,000
Total business income after RAR	($100,000)	($100,000)	($90,000)
BAF	50%	80%	70%
Business income base	($50,000)	($80,000)	($63,000)

2015				
	Original	First Amended	Second Amended	Third Amended
Apportioned Business Income before NOLD	$300,000	$300,000	$300,000	$300,000
2018 NOL carryback to 2015	$0	($50,000)	($80,000)	($63,000)
2015 business income base	$300,000	$250,000	$220,000	$237,000
Business income tax base current year tax rate	7.10%	7.10%	7.10%	7.10%
Business income base tax	$21,300	$17,750	$15,620	$16,827
Prepayments	$21,000	$21,300	$17,750	$15,620
Refund/Additional Tax*	$300	($3,550)	($2,130)	$1,207

PART 4

APPORTIONMENT

SUBPART 4-1

GENERAL

Section 4-1.1. Definitions. (Tax Law, sections 208(1), 210-A)

For purposes of this Part, the following definitions apply:

(a) “Billing address” means the location indicated in the books and records of the corporation as the primary address with respect to a customer’s account.

(b) (1) “Commercial domicile” is determined by the use of a hierarchy of methods for business entities referenced in subparagraphs (i) and (ii) of this paragraph. The methods must be applied sequentially and be based on the information known to the corporation or publicly or readily available information. Corporations must exercise due diligence before abandoning the first method in this hierarchy and proceeding to the second method. The hierarchy is:

(i) the seat of management and control of the business entity; and

(ii) the billing address of the business entity in the corporation’s records.

(2) Unless the corporation demonstrates the contrary, the seat of management and control is presumed to be in the United States. In the case of a business entity that is a sole proprietor, the seat of management and control is the principal place of business of the sole proprietor.

(c) (1) “Marked to market” means that a financial instrument is, under IRC section 475 or 1256, treated by the corporation as sold for its fair market value (FMV) on the last business day of the corporation’s taxable year.

(2) In the case of a corporation that is a dealer in securities, as defined in IRC section 475(c)(1), a financial instrument will not be considered to be marked to market if it:

(i) is a security, as defined in IRC section 475(c)(2); and

(ii) comes within one of the exceptions described in IRC section 475(b)(1), whether or not the corporation identifies the security under IRC section 475(b)(2).

(d) "Marked to market gain or loss" means the gain or loss recognized by the corporation under IRC section 475 or 1256 because the financial instrument is treated as sold for its FMV on the last business day of the corporation's taxable year.

(e) (1) "Registered broker or dealer" means a broker or dealer registered as such by the Securities and Exchange Commission or a broker or dealer registered as such by the Commodities Futures Trading Commission, and shall include an OTC derivatives dealer as defined under regulations of the Securities and Exchange Commission at Title 17, part 240, section 3b-12 of the Code of Federal Regulations (17 CFR 240.3b-12).

(2) In the case of a combined report, whether an entity is a registered broker or dealer is determined on a corporation-by-corporation basis.

(3) A corporation that itself is not a registered broker or dealer will not be deemed to be a registered broker or dealer because it is a partner in a partnership that is a registered broker or dealer or a member of a limited liability company that is a registered broker or dealer. Business receipts from such registered broker or dealer that are described in section 210-A(5)(b) and are passed through to the corporation because it is a partner in or member of a registered broker or dealer are apportioned using the rules in such section.

Section 4-1.2. General rules for apportionment. (Tax Law, section 210-A)

(a) All corporations must apportion within and without New York State their total business income and business capital by a business apportionment factor (BAF) that is a fraction. The numerator and denominator of the BAF includes only those receipts, net income, net gains, and other items described in section 210-A and this Subchapter that are included in the computation of entire net income for the taxable year. The numerator of the BAF is the sum of all amounts required to be included in the numerator pursuant to section 210-A and this Subchapter (New York receipts) and the denominator of the BAF is the sum of all amounts required to be included in the denominator pursuant to section 210-A and this Subchapter (everywhere receipts).

(b) The following amounts shall not be included in either New York receipts or everywhere receipts:

(1) gross income from investment capital, even if such income is included in business income pursuant to the 8% of entire net income (ENI) limitation on gross investment income.

(2) any portion of gross other exempt income generated by stock that is not marked to market.

(3) any portion of gross other exempt income generated by stock that is marked to market in instances where the taxpayer did not make the fixed percentage election for qualified financial instruments.

(4) amounts specified in section 208(9)(a) to be subtracted from federal taxable income in the computation of ENI (other than the subtractions for qualified banks provided for in section 208(9)(a)(19)).

(5) amounts specified in section 208(9)(b) to be added back to federal taxable income in the computation of ENI (other than the addition modification for alien corporations not deemed domestic under any provision of the IRC provided for in section 208(9)(b)(1) and the addition modification for dividends or interest provided for in section 208(9)(b)(2)).

(6) certain reimbursements of expenses paid for by the corporation on behalf of a customer that are received from the customer in advance or received from the customer and placed by the corporation into a separate account, provided the reimbursement does not exceed the amount of expenses, and does not exceed reimbursements received by the corporation under a cost-sharing arrangement the corporation has with another company where that cost-sharing arrangement does not include any mark-up of the expense. In the case of a cost-sharing arrangement that the corporation has with another company that includes a mark-up of expenses, only the amount of the mark-up shall be included in business receipts.

(c) Example.

> Corporation A is a professional employer organization ("PEO"). It contracts with its customers to provide a number of services, including the handling of the payment of wages, the withholding of the employees' and customers' necessary statutory taxes and unemployment insurance payments, and the remitting of such taxes and unemployment insurance payments to the Department and the Department of Labor. In order to provide these services, the PEO may have to pay out of its own account the wages of the employees and other expenses before it is reimbursed by its customers from funds in a dedicated account set up on behalf of its customers for those wages and other expenses. The amount reimbursed does not exceed the amount of expenses. These reimbursements are not considered business receipts and, therefore, are not included in New York receipts or everywhere receipts.

(d) All business receipts for the period covered by the report, computed on a cash or accrual basis according to the method of accounting used in the computation of its ENI, must be taken into account.

(e) New York and everywhere receipts shall be computed using the rules in section 210-A and this Subchapter. For certain types of receipts, the provisions of this Subchapter provide further guidance. Such rules shall be applied to each receipt, item of income, gain, or other item described in section 210-A except as otherwise provided.

(f) A corporation's method of apportioning its receipts must reflect an attempt to comply with the regulatory standards set forth herein rather than an attempt to minimize the corporation's tax liability.

(g) A corporation's application of the regulatory standards set forth in this Subchapter must be based on objective criteria and should consider all sources of information reasonably available to the corporation at the time of filing its original tax return, including, without limitation, the corporation's books and records, including its contracts or agreements with its customers, kept in the ordinary course of business. Corporations may, in good faith, rely on information provided by their customers.

(h) A corporation's method of sourcing its receipts must be determined in good faith, applied in good faith, and applied consistently with respect to similar transactions.

(i) A corporation must retain records that explain the determination and application of its method of sourcing its receipts used in completing the return, including its underlying assumptions, and must provide such records to the commissioner upon request.

(j) A corporation must take reasonable steps to update its existing systems of recording transactions or the current format of its books and records to capture the information required by these rules. It is not sufficient to rely on the fact that existing systems do not adequately capture the required information.

(k) In determining the amount of New York receipts, the corporation must consider the location during the entire time period in which the activity generating the receipts occurs.

Section 4-1.3. Lump sum payments.

(a) When a sale is comprised of both a digital product and a digital service, both of which are apportioned under Subpart 4-3 of this Part, the receipt cannot be divided into separate components for purposes of the application of the rules in such Subpart and is considered to be one receipt, regardless of whether the components are separately stated for billing purposes.

(b) Except as provided in subdivision (a) of this section, in the case of the sale of multiple assets or services in one transaction, the proceeds from the sale shall be reasonably divided among the types of assets or services sold by the corporation and the receipts or net gains from each type must be apportioned using the applicable rule in section 210-A and the applicable rules in this Subchapter. If the receipt or net gain cannot be reasonably divided, the corporation should use the rule that is the most reflective for the type of income generated. A corporation cannot use the rules for intermediary transactions provided for in sections 4-3.8 and 4-4.8 of this Subpart unless almost all of the activities carried on under the agreement are intermediary transactions. Full details regarding the sale and the division of the proceeds and gain must be submitted with the corporation's report.

(c) Examples.

Example 1: Corporation B sells all the assets of one of its divisions for a gain, which is properly reported as business income. The assets sold consisted of real property, tangible personal property, and goodwill. The portion of the gain attributable to the sale of tangible personal property shall be apportioned to New York State using the rules for net gains from the sale of tangible personal property in section 4-2.1 of this Part, the portion attributable to the sale of real property shall be apportioned to New York State using the rules for net gains from the sale of real property in section 4-2.2 of this Part, and the portion attributable to the sale of goodwill shall be apportioned to New York State using the rules for other services and other business receipts in Subpart 4-4 of this Part.

Example 2: Book Corp sells electronic books and physical books through its website. Customers purchase a bundle of both an electronic and physical book, the price of which includes a discounted price of the electronic and physical book, but the breakdown is not separately stated. For bundled purchases, the electronic book is available for immediate download by the customer and the physical book is shipped from Book Corp to the customer. Customer B, with a New York billing address, purchases a bundled purchase of an electronic and a physical book commingled into one receipt. As the receipt cannot be reasonably divided between the electronic book and the physical book, the entire receipt should be sourced as a sale of tangible personal property.

Section 4-1.4. Installment sales.

In the case of an asset sale where the proceeds of the sale are received by the seller on an installment basis as provided for in IRC section 453, the portion of the receipts or gains attributable to New York must be determined in the year of the sale by applying the apportionment rules in section 210-A and this Subchapter. The same ratio of New York receipts to everywhere receipts from the installment income for each type of asset shall be used in subsequent years to determine how much of the installment payment is included in New York receipts. The entire amount of the annual installment is included in everywhere receipts.

(a) Example.

Corporation C sells its building in New York in the 2021 tax year and has a $5,000,000 gain. It has no other sales of real property. Under the sales agreement, the proceeds of the sale will be paid to Corporation C in 5 equal annual installments. As the real property is located in New York, the entire gain is attributable to New York and $1,000,000 is included in New York receipts and everywhere receipts each year.

In tax year 2021, besides the installment gain, Corporation C has $20,000,000 of rental income from its New York property and $5,000,000 of rental income from real property located outside New York.

Corporation C has $21,000,000 of New York receipts ($1,000,000 of the gain from the New York real estate installment sale and $20,000,000 of rental income from the New York property) and $26,000,000 of everywhere receipts ($1,000,000 of the gain from the real estate installment sale and $25,000,000 of rental income from real property located within and without New York State). Its BAF for the 2021 tax year is 0.807692. In tax year 2022, beside the installment gain, Corporation C has only $2,000,000 of rental income from real property located outside of New York. Corporation C has $1,000,000 of New York receipts (its second installment of the gain from New York real property) and $3,000,000 of everywhere receipts ($1,000,000 of its second installment of gains from the sale of real property plus $2,000,000 of rental income from real property located outside New York State). Its BAF for the 2022 tax year is 0.333333.

Section 4-1.5. Apportionment on combined reports. (Tax Law, section 210-C(5))

The apportionment factor on a combined report is computed as though the corporations included in the combined report are a single corporation, unless otherwise provided, and is computed in accordance with the following principles.

(a) All intercorporate business receipts, income, gains and losses are eliminated in computing the combined group's New York receipts or everywhere receipts. Intercorporate receipts, income, gains and losses are receipts, income, gains and losses realized by any corporation included in the combined report from a transaction with any other corporation included in the combined report.

(b) Net gains (not less than zero), marked to market net gains (not less than zero), net interest income (not less than zero), and net income (not less than zero) from any respective type of asset on a combined report are computed as follows:

(1) For purposes of computing net gains (not less than zero) for all members of the combined group, the aggregate gain from the sale of one type of asset is reduced by the aggregate loss from the sale of the same type of asset subject to the same sourcing rule in section 210-A and this Subchapter, provided that the result cannot be less than zero.

(2) For purposes of computing net interest income (not less than zero) from Federal funds for all members of the combined group, the aggregate amount of interest income from Federal funds is reduced by the aggregate amount of interest expense from Federal funds, provided the result cannot be less than zero.

(c) If an apportionment rule contained in section 210-A and this Subchapter requires the use of a fraction to compute the amount included in the combined group's New York receipts, the amount included in the numerator or denominator of such fraction is determined after the intercorporate eliminations required by subdivision (a) of this section.

Section 4-1.6. Power of the Commissioner of Taxation and Finance to adjust the business apportionment factor. (Tax Law, section 210-A(11))

(a) Generally, the BAF results in a fair apportionment of the corporation's business capital and business income to New York State. However, in certain instances, the BAF may not result in a proper reflection of the taxpayer's business income or business capital in New York State and the commissioner, as an exercise of discretion or at the request of the taxpayer, is authorized to adjust the BAF in order to properly and fairly reflect the taxpayer's business income or business capital within New York. In the case of a combined report, the term "taxpayer" in this section means the combined group, and the request to adjust the BAF on the combined report must be made by the designated agent. If the BAF is adjusted, it must be calculated to produce a fair and proper apportionment of the business income and business capital of the taxpayer, or in the case of a combined report, the combined group, reasonably attributable to New York State.

(b) When it appears that the BAF does not fairly and properly reflect the business income or business capital of the taxpayer in New York State, the commissioner, as an exercise of discretion or at the request of the taxpayer, may adjust the BAF by:

(1) excluding one or more items of receipts, net income, net gain or other items included in the determination of the BAF;

(2) including one or more other items in the determination of the BAF; or

(3) any other similar or different method calculated to effect a fair and proper apportionment of the taxpayer's business income and business capital reasonably attributable to New York State.

(c) (1) Except as otherwise provided in paragraph (4) of this subdivision, a request to vary the BAF must be submitted in writing and must be submitted separately from any report to which it relates and must set forth full information on which the request is based.

(2) A taxpayer must compute its tax using the BAF determined pursuant to section 210-A and this Subchapter on its original report for a taxable year unless the commissioner has approved a written request for an adjustment to the BAF prior to the filing of the original report.

(3) A taxpayer that receives approval of its written request for an adjustment to the BAF after the filing of its original report may file an amended report using the approved method to compute its tax due.

(4) A taxpayer may file an amended report using its proposed BAF if the commissioner did not respond to the taxpayer's written request for an adjustment to the BAF before the taxpayer filed its original report. Any such amended report must be filed in accordance with procedures established by the commissioner within the period of limitation for filing such a report and must be accompanied by a full explanation and justification for the adjustments made to the BAF. The commissioner shall review the taxpayer's request, original report, and amended report to determine whether or not the alternative BAF results in a fair and proper reflection of the business income and business capital of the taxpayer.

(5) If the Audit Division commences an audit of a report of a taxpayer, the taxpayer may, during the course of that audit, make a written request that the commissioner consider, or reconsider, an alternative BAF, in which case the determination of whether or not the BAF results in a fair and proper reflection of the business income and business capital of the taxpayer will be made by the commissioner during the course of that audit.

(d) The party seeking to vary the BAF bears the burden of proof to demonstrate by clear and convincing evidence that the BAF determined pursuant to section 210-A and the applicable regulations in this Subchapter does not result in a proper reflection of the taxpayer's business income or business capital within New York State and that the proposed adjustment is appropriate. The party seeking to vary the BAF must demonstrate that application of the statutory formula attributes income or capital to New York State out of all proportion to the business transacted by the taxpayer in New York State.

(e) Examples.

For purposes of these examples, it is assumed amounts requested to be included in the BAF are properly included in business income.

Example 1: Corporation A's only office is located in New York. Corporation A invests in stocks for its own account and also performs some administrative and investment advisory services for customers located solely in New York. 95%t of its income consists of dividends and net gains from its stock holdings. The remaining 5% of its income consists of the fees it receives for the administrative and investment advisory services. The taxpayer does not make the fixed percentage election. As such, dividends and net gains from stock are not included in the numerator or denominator of the BAF unless the commissioner determines that inclusion of such dividends and net gains is necessary to properly reflect the taxpayer's business income or capital. In this instance, under the statutory formula, the receipts generating 95% of the taxpayer's income would not have any representation in the BAF. Accordingly, in order to properly reflect the taxpayer's business income, it is appropriate to include the dividends and net gains from the stock holdings in the BAF. The dividends from the stock of corporations domiciled in New York would be included in the numerator of the BAF. The net gains would be included in the numerator of the BAF to the extent that the purchasers are located in New York, provided that if the purchaser is a registered securities broker or dealer or the transaction is made through a licensed exchange, then 8% of the net gains would be included in the numerator of the BAF. The total amount of dividends and net gains would be included in the denominator of the BAF.

Example 2: Corporation B is a registered broker-dealer. The majority of its receipts are comprised of commissions derived from the execution of securities and commodities purchase or sales orders. It has an office in New York and an office in State X. These commissions are included in the numerator of the BAF if the taxpayer's records indicate the mailing address of the customer who is responsible for paying such commissions is in New York State. However, in State X, these commissions are included in the numerator of the BAF if the services are performed in State X. Corporation B is concerned that the commissions for the purchase and sale orders executed by its office in State X for customers with New York mailing addresses will be sourced to State X for purposes of State X's tax and sourced to

New York for New York purposes. Corporation B requests that New York allow a discretionary adjustment to exclude such receipts from the numerator of the BAF. This discretionary adjustment is not necessary. The fact that State X also would source commissions from New York customers to State X does not mean that inclusion of those commissions in the numerator of the New York BAF does not fairly and properly reflect Corporation B's business income in New York State.

Example 3: Corporation C is a corporate partner in Partnership X and for tax years 2015 through 2018 it computes its tax with respect to its interest in such partnership under the aggregate method. In tax year 2019, Corporation C's only activity for the year is the selling of its financial investments that results in $5,000,000 of business receipts. 75% of its business receipts, or $3,750,000, is the net gain from the sale of its partnership interest in Partnership X. Corporation C did not make the fixed percentage election. As such, net gains from the sale of a partnership interest are not included in the numerator or denominator of the BAF unless the commissioner determines that inclusion of such net gains is necessary to properly reflect the taxpayer's business income or capital. In this instance, under the statutory formula, the receipts generating 75% of the taxpayer's business receipts would not have any representation in the BAF. Accordingly, in order to properly reflect the taxpayer's business income, it is appropriate to include the net gains from the sale of Partnership X in the BAF.

Under the aggregate method, a corporate partner is treated as participating in the partnership's transactions and activities and is viewed as having an undivided interest in the partnership's assets, liabilities and items of receipts, income, gain, loss and deduction. As such, the sale of Partnership X will be treated as the sale of the underlying assets owned by Partnership X. Corporation C must reasonably divide the net gain from the sale of its interest among the types of underlying assets owned by Partnership X. The receipts or net gains from each type of asset must be apportioned using the applicable rule in section 210-A and this Subchapter for each type of asset.

Partnership X's assets consist of tangible personal property, real property, and goodwill. The portion of the gain attributable to the sale of tangible personal property is included in New York receipts if the tangible personal property is in New York State pursuant to section 4-2.1 of this Part. The portion attributable to the sale of real property is included in New York receipts if the real property is located in New York State pursuant to section 4-2.2 of this Part. The portion attributable to goodwill is included in New York receipts if the value is accumulated in New York State, based on the partnership's average business allocation percentage (BAP) from the previous three years, pursuant to section 4-4.3(e) of this Part. The net gain from the sale of the interest in Partnership X is included in everywhere receipts

Section 4-1.7. Federal changes. (Tax Law, sections 211(3), 1083, 1087)

The business apportionment factor (BAF), as determined under section 210-A and this Subchapter, upon which the taxpayer's report (or any additional assessment) was based, must not be changed during the additional period of limitation allowed in the case of non-filing of a report of a Federal change, correction or renegotiation of tax, or a computation or re-computation of tax; or in the case of a report of a Federal change, correction or renegotiation of tax, or a computation or re-computation of tax; or in the case of a deficiency based on a net operating loss carryback or a net capital loss carryback. Both the commissioner and the taxpayer are precluded from adjusting the BAF in such cases. Under the same circumstances, a petition for the redetermination of a deficiency or a notice of deficiency does not open the BAF.

SUBPART 4-2

SPECIFIC APPORTIONMENT RULES

Section 4-2.1. Receipts and net gains from the sale of tangible personal property. (Tax Law, section 210-A(2)(a))

(a) Receipts and net gains (not less than zero) from the sale of tangible personal property are included in New York receipts if paragraph (1), (2), or (3) of this subdivision applies. All receipts and net gains (not less than zero) from the sale of tangible personal property are included in everywhere receipts.

(1) The property is shipped via common or contract carrier, irrespective of whether the shipment is arranged by the corporation or the purchaser, or via the corporation's vehicle or other means of transportation, to a point in New York State. Where property is so shipped to a point outside New York State, the receipts from the sale of such property are not included in New York receipts unless the final destination of the property is a point in New York State. See subdivision (c) of this section regarding evidence of destination.

(2) The possession of the property is transferred to a purchaser or purchaser's designee at a point

in New York State, unless the final destination of the property is a point outside New York State. Where possession of the property is transferred in New York State, it is presumed that the final destination is a point in New York State unless there is sufficient evidence to demonstrate that the final destination is a point outside New York State. See subdivision (c) of this section regarding evidence of destination.

(3) The possession of the property is transferred to a purchaser or purchaser's designee at a point outside New York State, where the final destination of the property is a point in New York State. Where possession of the property is transferred outside New York State, it is presumed that the final destination is a point outside New York State unless there is sufficient evidence to demonstrate that the destination is a point in New York State. See subdivision (c) of this section regarding evidence of destination.

(b) (1) To compute a gain or loss from the sale of tangible personal property, the corporation must subtract its adjusted basis in the tangible personal property from the sale price of the tangible personal property. If the sale price exceeds the adjusted basis, the result is a gain. If the sale price is less than the adjusted basis, the result is a loss.

(2) To determine the amount of net gains from sales of tangible personal property to be included in the numerator and denominator of the BAF, the corporation first must subtract the sum of all losses computed under paragraph (1) of this subdivision from the sum of all gains computed under such paragraph (1). If the result is equal to or less than zero, no amount is included in New York receipts and everywhere receipts. If the total amount of net gains (not less than zero) from sales of tangible personal property located in New York exceeds the net gains (not less than zero) from sales of tangible personal property located within and without New York State, the amount included in New York receipts is limited to the amount included in everywhere receipts.

(c) Examples of the types of evidence that ordinarily will be sufficient to demonstrate the final destination of property include:

(1) a bill of lading or other shipping document designating the final destination location, regardless of

the F.O.B. point, and

(2) a purchase invoice designating the final destination location.

(d) For rules relating to receipts from sales of tangible personal property traded as commodities, see section 4-2.10 of this Subpart.

(e) Examples.

Example 1: Retail Corporation operates an online clothing store that serves the United States. Customers purchase clothing via the website and the clothing is shipped to the customer's home. Receipts from the sale of clothing shipped to locations within New York State are included in New York receipts. Receipts from the sale of clothing shipped to locations within and without New York State are included in everywhere receipts.

Example 2: Corporation A operates a car rental business in New York State and elsewhere in the United States. To keep its inventory up-to-date and make room for newer models, Corporation A sells some of its fleet of cars every year. The net gain (not less than zero) from these sales, which is properly reported as business income, shall be apportioned to New York State to the extent that the final destination of the cars sold is in New York. 100% of the net gains (not less than zero) are included in everywhere receipts. However, the amount included in New York receipts is limited to the amount included in everywhere receipts.

Section 4-2.2. Net gains from the sale of real property. (Tax Law, section 210-A(2)(d))

(a) Net gains (not less than zero) from the sales of real property located in New York are included in New York receipts. Net gains (not less than zero) from sales of real property located within and without New York

State are included in everywhere receipts.

(b) For each sale of real property, the corporation must compute a gain or loss from the sale by subtracting its adjusted basis in the real property from the sale price of the real property. If the sale price exceeds the adjusted basis, the result is a gain. If the sale price is less than the adjusted basis, the result is a loss.

(c) To determine the amount of net gains from sales of real property to be included in the numerator and denominator of the BAF, the corporation first must subtract the sum of all losses computed under subdivision (b) of this section from the sum of all gains computed under subdivision (b). If the result is equal to or less than zero, no amount is included in New York receipts and everywhere receipts. If the total amount of net gains (not less than zero) from sales of real property located in New York exceeds the net gains (not less than zero) from sales of real property located within and without New York State, the amount included in New York receipts is limited to the amount included in everywhere receipts.

Section 4-2.3. Receipts from rents and royalties. (Tax Law, section 210-A(3))

(a)(1) Receipts from rentals of real and tangible personal property located in New York State are included in New York receipts. 100% of receipts from rentals of real and tangible personal property are included in everywhere receipts.

(2) Receipts from rentals include all amounts received by the corporation for the use of or occupation of tangible personal property or real property, whether or not such property is owned by the corporation.

(3) Gross receipts from real and tangible personal property that is subleased from the corporation must be included in the BAF.

(4) The amount of receipts from the rental of motor vehicles and other rolling stock, such as trucks or construction equipment, included in New York receipts is the product of such receipts and a fraction. Such fraction may be based on miles operated in New York State compared to total miles operated, time operated in

New York State compared to total time operated, number of pickup and delivery locations in New York State compared to the total of such locations, or any other method that fairly apportions such receipts to New York State. 100% of the receipts from the rental of motor vehicles and other rolling stock, such as trucks or construction equipment, are included in everywhere receipts. Omnibus operations while engaged in school bus operations must be disregarded in computing the amount of New York receipts and everywhere receipts.

(5) Examples.

Example 1: Corporation W receives $20,000 from its customer to provide transportation by omnibus from a location in New York State to a location outside of New York. Such transportation is not for school bus operations. 25% of the miles traveled by Corporation W's omnibus are in New York, 5 miles in New York State out of a total 20 miles. Corporation W must include $5,000 in New York receipts (25% x $20,000). $20,000 is included in everywhere receipts.

Example 2: Corporation X receives $500 from customer A and $300 from customer B for short-term automobile rentals. Customer A picks up the automobile at Corporation X's New York location and returns it to such location. As both the pickup and return locations are in New York State for customer A, the $500 from customer A is included in New York receipts and everywhere receipts. Customer B picks up the automobile at Corporation X's New York location but returns it to Corporation X's location outside of New York State. As half of the pickup and return locations are in New York State, half of the receipts from customer B, $150, is included in New York receipts and $300 is included in everywhere receipts. Corporation X has a total of $650 of New York receipts, $500 from customer A and $150 from customer B. It has $800 in everywhere receipts, $500 from customer A and $300 from customer B.

(b)(1) Receipts from the use in New York State of patents, copyrights, trademarks, licenses, and similar intangibles are included in New York receipts. 100% of receipts from the use of patents, copyrights, trademarks, licenses, and similar intangibles are included in everywhere receipts.

(2) These receipts include, but are not limited to:

(i) all amounts received by the corporation for the use of patents, copyrights, trademarks, licenses, and similar intangibles, whether or not such patents, copyrights, trademarks, licenses, and similar intangibles were issued to or are owned by the corporation and whether or not characterized as royalties; and

(ii) amounts received from the use of copyrights for audio works, audiovisual works, visual works, graphic works, or games by whatever means delivered.

(3) A patent, copyright, trademark, license, and similar intangible is used in New York State to the extent that the activities generating the fees paid for the use of the patent, copyright, trademark, license, or similar intangible are carried on in New York State. If, after exercising due diligence, the corporation lacks sufficient information in its books and records to determine where the activities are carried on, it may use a reasonable method to estimate such location based on third party information (if available) or population.

(4) Examples.

Example 1: Network Corp sells a license to broadcast its network to Cable Corp for a set fee. Under the licensing agreement, Cable Corp is allowed to bundle Network Corp's network with other content and sell the bundle to individual subscribers for a monthly fee set by Cable Corp. Even though the content is digitally delivered to Cable Corp by Network Corp, the delivery means is incidental to the sale of a license to distribute, broadcast or sublicense. As such, Network Corp's receipts are apportioned under this section to the location where the license is used, which is presumed to be the location where the network is available for viewing.

Network Corp's books and records indicate the location of Cable Corp's viewers. The amount of New York receipts is determined by multiplying such receipts by a fraction, the numerator of which is the number of subscribers in New York State and the denominator of which is the total number of subscribers within and without New York State.

Example 2: Network Corp sells a license to distribute its movie to Streaming Corp for a set fee. Under the licensing agreement, Streaming Corp is allowed to add the movie to its library of movies and other programming offered by the streaming service. Streaming Corp sells monthly subscriptions to view all of its content to individual viewers for a fee set by Streaming Corp. Although the movie is digitally delivered by Network Corp to Streaming Corp, the means of delivery is incidental to the sale of a license to distribute, broadcast or sublicense the movie. As such, Network Corp's receipts are apportioned under this section to the location where the license is used, which is presumed to be the location where the movie is available for viewing. If Network Corp's books and records do not indicate the location of Streaming Corp's viewers, it must use a reasonable method to approximate the subscriber location.

Section 4-2.4. Net income from qualified financial instruments for corporations other than non-captive

REITs and non-captive RICs. (Tax Law, section 210-A(5)(a))

The following rules apply to corporations that are not subject to section 9-4.3 of this Subchapter.

(a)(1) A qualified financial instrument means any financial instrument that meets the following criteria:

(i) the instrument is described in one of the specified clauses of section 210-A(5)(a)(2) clause: (A) - loans, (B) - Federal, state and municipal debt, (C) - asset backed securities and other government agency debt, (D) - corporate bonds, (G) - stock or partnership interest, (H) - other financial instruments, or (I) - commodities; and

(ii) the instrument has been marked to market in the taxable year.

(2) (i) If a corporation has marked to market any instrument described in clause (A), (B), (C), (D), or (I) of section 210-A(5)(a)(2), then any other financial instrument described in the same clause that has not been marked to market also is a qualified financial instrument in the taxable year. Each of these clauses is one type of financial instrument.

(ii) The determination of qualified financial instrument is done separately for stocks and partnership interests described in section 210-A(5)(a)(2)(G). Stocks are one type of financial instrument and partnership interests are another type of financial instrument. If a corporation has marked to market a stock, then any other stock that has not been marked to market also is a qualified financial instrument in the taxable year. If a corporation has marked to market a partnership interest, then any other partnership interest that has not been marked to market also is a qualified financial instrument in the taxable year.

(iii) If a corporation has marked to market a specific financial instrument described in section 210-A(5)(a)(2)(H), then only a financial instrument of the same type also is a qualified financial instrument in the taxable year. Therefore, some types of financial instruments described in section 210-A(5)(a)(2)(H) may be qualified financial instruments while other types of financial instruments subject to such clause may be nonqualified financial instruments.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subdivision, the following financial instruments always will be nonqualified financial instruments:

(i) loans secured by real property;

(ii) loans not secured by real property, if the only loans the corporation has marked to market are loans secured by real property;

(iii) stock that is investment capital;

(iv) stock that is not marked to market and generates other exempt income, with respect to that other exempt income;

(v) partnership interests that do not meet the definition of security in IRC section 475(c); and

(vi) instruments the receipts from which are subject to section 210-A(5)(b)(2) and (6).

(4) If a corporation is included in a combined report, the determination of whether a financial instrument is a qualified financial instrument is made as though all corporations included in the combined report are a single corporation. Thus, if one corporation in the combined group marks to market a specific type of financial instrument, then all such financial instruments of that type reported by every member of the combined group are considered qualified financial instruments.

(5) If a corporation is a partner in a partnership and is computing its tax with respect to its interest in the partnership using the aggregate method as described in section 9-2.3 of this Subchapter, and the partnership marks to market a type of financial instrument, the corporation is deemed to have marked to market that type of financial instrument for purposes of determining if that type of financial instrument is a qualified financial instrument.

(b) Except as provided in subdivision (c) of this section, the amount of receipts, net income (not less than zero) and net gains (not less than zero) from qualified financial instruments included in New York receipts or everywhere receipts is determined using the sourcing method contained in section 210-A(5)(a)(2) and as further described in this Subpart.

(c) (1) A taxpayer, or the designated agent in the case of a combined report, may elect the fixed percentage method to include 8% of net income from qualified financial instruments in New York receipts and 100% of all net income from qualified financial instruments in everywhere receipts (whether or not such net income would otherwise be included in the New York receipts or everywhere receipts pursuant to the provisions of section 210-A(5)(a)(2). Net income from qualified financial instruments is the sum of:

(i) net gains (not less than zero) from each type of qualified financial instrument that would be subject to the same sourcing method in section 210-A(5)(a)(2) and this Subchapter if not for the fixed percentage method;

(ii) marked to market net gains (not less than zero) from each type of qualified financial instrument that would be subject to the same sourcing method in section 210-A(5)(a)(2) and this Subchapter if not for the fixed percentage method election;

(iii) net income (not less than zero) from each type of qualified financial instrument that would be subject to the same sourcing method in section 210-A(5)(a)(2) and this Subchapter if not for the fixed percentage method; and

(iv) receipts from each type of qualified financial instrument.

(2) The fixed percentage method election must be made annually and may only be made on an original, timely filed report, determined with regard to extensions of time for filing. Any fixed percentage method election made on a report that is filed late will be invalid and ineffective.

(3) (i) Once the fixed percentage method election has been made in the manner required in paragraph (2) of this subdivision for a taxable year, it is binding on the taxpayer and the Department for that taxable year and cannot be revoked or overridden for that taxable year.

(ii) In the case of a combined report, the fixed percentage method election must be made by the designated agent. It is binding on all members of a combined group and the Department for that taxable year and cannot be revoked or overridden for that taxable year.

(4) If the fixed percentage election has been made, other exempt income, as defined in section 208(6-a) and section 3-4.6 of this Subchapter, generated by a stock that is marked to market will be re-classified as business income and will be included in New York and everywhere receipts as provided in this subdivision.

(5) A partnership cannot make the fixed percentage method election.

(d) In the case of a combined report, net income from qualified financial instruments included in the combined group's New York receipts and everywhere receipts is the sum of:

(i) net gains (not less than zero) from each type of qualified financial instrument that would be subject to the same sourcing method in section 210-A(5)(a)(2) and this Subchapter if not for the fixed percentage method for all members of the combined group;

(ii) marked to market net gains (not less than zero) from each type of qualified financial instrument that would be subject to the same sourcing method in section 210-A(5)(a)(2) and this Subchapter if not for the fixed percentage method election for all members of the combined group;

(iii) net income (not less than zero) from each type of qualified financial instrument that would be subject to the same sourcing method in section 210-A(5)(a)(2) and this Subchapter if not for the fixed percentage method for all members of the combined group; and

(iv) receipts from each type of qualified financial instrument for all members of the combined group.

(e) Examples.

For purposes of the following examples, it is assumed that the corporations do not have investment capital or other exempt income generated by stock that is not marked to market.

Example 1: Corporation X, a dealer in securities, elects to use the fixed percentage method in the manner required by subdivision (c) of this section to determine the amount of its net income (not less than zero) from qualified financial instruments to include in its New York receipts or everywhere receipts. It owns and marks to market an unsecured loan. However, Corporation X was not required, under IRC section 475, to mark to market the loan, because the loan was acquired by Corporation X in the ordinary course of its business and is not being held for sale by Corporation X. Since the loan comes within this exception to the general rule that requires dealers in Securities to use the mark to market accounting method for such securities, the loan will be deemed to not to have been marked to market for purposes of Corporation X's election to use the fixed percentage method. The loan will be deemed not to have been marked to market even if Corporation X fails to identify the loan as meeting the exception to the general rule. Also, since the loan is deemed to not have been marked to market, as that term is defined in these regulations, no other loan that has not been marked to market by Corporation X will be a qualified financial instrument in the taxable year. These unsecured loans are nonqualified financial instruments. The amount of any receipts and net gains from these assets that are included in New York or everywhere receipts is determined using the sourcing rule in section 210-A(5)(a)(2)(A) and section 4-2.5 of this Subpart.

Example 2: Corporation X owns and marks to market unsecured loan A, corporate bond B, and stock C. In addition, it owns unsecured loan D, unsecured loan E, corporate bond F, corporate bond G, stock H, loan I secured by real property, and loan J secured by real property, but does not mark to market these instruments. Corporation X elects to use the fixed percentage method in the manner required by subdivision (c) of this section to determine the amount of net income (not less than zero) from qualified financial instruments included in New York receipts or everywhere receipts.

The following instruments are considered qualified financial instruments: unsecured loans A, D and E; corporate bonds B, F, and G; and stocks C and H. The amount of net income (not less than zero) from qualified financial instruments included in New York receipts or everywhere receipts is determined using the rules for the fixed percentage method. Loans I and J secured by real property are nonqualified financial instruments. Therefore, the amount of receipts and net gains (not less than zero) from these instruments included in Corporation X's New York receipts or everywhere receipts is determined using the sourcing method in section 210-A(5)(a)(2) and this Subpart.

Example 3: Corporations Y and Z are properly included in a combined report. Corporation Y owns and marks to market loans secured by real property, corporate bonds, and interests in publicly traded partnerships. Corporation Z owns unsecured personal loans, stocks, and corporate bonds, but does not mark to market these financial instruments. Corporation Y, the designated agent, elects to use the fixed percentage method in the manner required by subdivision (c) of this section to determine the amount of the combined group's net income (not less than zero) from qualified financial instruments to include in the combined group's New York receipts or everywhere receipts. The following instruments are qualified financial instruments in the combined report of Corporations Y and Z: Corporation Y's corporate bonds and interests in publicly traded partnerships and Corporation Z's corporate bonds. The amount of receipts, net gains (not less than zero), and net income (not less than zero) from these instruments included in the combined group's New York receipts or everywhere receipts is determined using the rules for the fixed percentage method. Corporation Y's loans secured by real property are always considered nonqualified financial instruments. In addition, Corporation Z's unsecured loans are nonqualified financial instruments because the only loans that are marked to market by either corporation are loans secured by real property and Corporation Z's stocks are nonqualified financial instruments because neither corporation marked to market stocks. Therefore, the amount of such receipts and net gains (not less than zero) from Corporation Y's loans secured by real property and Corporation Z's unsecured loans included in the combined group's New York receipts or everywhere receipts is determined using the sourcing method outlined in section 210-A(5)(a)(2) and this Subpart.

Example 4: Corporation X elects to use the fixed percentage method in the manner required by paragraph (2) of subdivision (c) of this section to determine the amount of its net income (not less than zero) from qualified financial instruments to include in its New York receipts or everywhere receipts.

It has $1,000 in dividends from Stock A, ($200) loss from the sale of Stock B, $750 gain from the sale of corporate bond C that was sold through a licensed exchange, $25,000 gain from the sale of corporate bond D that was not sold through a registered securities broker or dealer or through a licensed exchange, $10,000 of marked to market gains from stock, and ($2,500) marked to market losses from stock. Corporation X marks to market its stocks and bonds. Therefore, stocks and bonds constitute qualified financial instruments.

Corporation X has $34,250 of net income (not less than zero) from qualified financial instruments included in everywhere receipts broken down as follows:

- $1,000 of dividends from stock;
- $0 of gains from sales of stock (as the loss is limited to zero);
- $750 of gains from sales of bonds sold through a licensed exchange or registered securities broker or dealer;
- $25,000 of gains from sales of bonds not sold through a licensed exchange or registered securities broker or dealer; and
- $7,500 of marked to market net gains from stock ($10,000 minus $2,500).

Corporation X includes $2,740 (8% multiplied by $34,250) from qualified financial instruments in its New York receipts. Since Corporation X only has net income (not less than zero) from qualified financial instruments, the result is a BAF of 0.080000.

Example 5: Corporations R and S are properly included in a combined report, with Corporation R identified as the designated agent. Corporation R elects to use the fixed percentage method in the manner required by subdivision (c) of this section to determine the amount of the combined group's net income (not less than zero) from qualified financial instruments to include in New York receipts and everywhere receipts.

Corporation R owns and marks to market stock A, stock B, bond D issued by State D, and unsecured loan H. Corporation S owns stock C, treasury bill E, bond F issued by New York State, and unsecured loan G, but does not mark to market these instruments. Although Corporation S does not mark to market its stock, government issued debt, and unsecured loan, these instruments still are qualified financial instruments because the determination is done as though all the corporations properly included in the combined report are a single corporation.

In addition, corporation R owns loan I secured by real property in State Y and Corporation S owns loan J secured by real property in New York and an interest in widely held partnership K. Since Corporation S does not mark to market its interest in widely held partnership K and Corporation R does not own and mark to market any interests in publicly traded or widely held partnerships, the interest in partnership K is a nonqualified financial instrument.

The income, gains, or losses from qualified financial instruments for Corporations R and S is broken down as follows:

- $200 of dividends from stock A;
- $750 of dividends from stock B;
- ($300) loss from the sale of stock C;
- ($500) loss from the sale of State D bond;
- $700 gain from the sale of State Q bond;
- $150 of interest from treasury bill E;
- $100 gain from the sale of New York State bond F;
- $600 of interest from unsecured loan G;
- $1,000 gain from the sale of unsecured loan H; and
- $400 of marked to market net gains from stock.

The combined group includes $3,400 of net income (not less than zero) from such qualified financial instruments in everywhere receipts broken down as follows:

- $950 of dividends from stock;
- $0 of gains from sales of stock (as the loss is limited to zero);

- $200 of gains from sales of other state bonds (100% of the net gain is included when the fixed percentage election is made, as opposed to 50% of the net gain under the sourcing method in section 210-A[5][a][2][B]);
- $150 of interest from treasury bills;
- $100 of gains from sales of New York State bonds;
- $600 of interest from unsecured loans;
- $1,000 of gain from unsecured loans; and
- $400 of marked to market net gains from stock.

The combined group includes $272 ($3,400 multiplied by 8 percent) of net income from qualified financial instruments in the combined group's New York receipts.

The amount of income, gains, and losses from nonqualified financial instruments for Corporations R and S is:

- $300 gain from the sale of loan I secured by real property in State Y ($0 is included in the combined group's New York receipts and $300 is included in the combined group's everywhere receipts as the real property is not located in New York State);
- $250 gain from the sale of loan J secured by real property in New York ($250 is included in both the combined group's New York receipts and everywhere receipts as the real property is located in New York State);

- $400 gain from the sale of widely held partnership K domiciled in New York ($0 is included in both the combined group's New York receipts and everywhere receipts as these gains are excluded from the BAF); and
- $200 of marked to market net gains from loans secured by real property ($91 is included in the combined group's New York receipts, determined by multiplying the $200 of marked to market net gains by the ratio of net gains from actual sales of loans secured by real property located in New York to net gains from actual sales of all loans secured by real property [$250/$550]. $200 is included in the combined group's everywhere receipts).

The combined group includes $341 of income and net gains from nonqualified financial instruments in its New York receipts and $750 of income and net gains from nonqualified financial instruments in its everywhere receipts.

The combined group has a total of $613 of New York receipts ($272 from qualified financial instruments and $341 from nonqualified financial instruments) and $4,150 of everywhere receipts ($3,400 from qualified financial instruments and $750 from nonqualified financial instruments). The result is the combined group's BAF is 0.147711.

Section 4-2.5. Interest income and net gains from loans. (Tax Law, section 210-A(5)(a)(2)(A))

(a) (1) A loan secured by real property means that real property constitutes 50% or more of the aggregate value of the collateral used to secure a loan, when valued at fair market value (FMV), as of the time the loan is originated.

(2) Interest income from loans secured by real property located within New York State shall be included in New York receipts. If one or more of the properties that secure the loan are located outside of New York, the amount of interest income from such loan included in New York receipts is the product of such interest income and a fraction, the numerator of which is the FMV of real property located in New York State used to secure the loan and the denominator of which is the FMV of all real property used to secure the loan. All interest income from loans secured by real property shall be included in everywhere receipts.

(3) (i) The amount of net gains (not less than zero) from sales of loans secured by real property included in New York receipts is the product of net gains from all loans secured by real property and a fraction, the numerator of which is gross proceeds from sales of loans secured by real property located within New York State and the denominator of which is gross proceeds from sales of loans secured by real property located within and without New York State. Net gains (not less than zero) from all loans secured by real property computed in subparagraph (iii) of this paragraph shall be included in everywhere receipts.

(ii) For each sale of a loan secured by real property, the corporation shall compute a gain or loss from the sale by subtracting the carrying cost of the loan from the sale price of the loan. If the sale price exceeds the carrying cost, the result is a gain. If the sale price is less than the carrying cost, the result is a loss.

(iii) To determine the amount of net gains from sales of loans secured by real property, the corporation shall subtract the sum of all losses computed in subparagraph (ii) of this paragraph from the sum of all gains computed in subparagraph (ii) of this paragraph. If the result is equal to or less than zero, no amount is included in New York receipts and everywhere receipts.

(iv) Gross proceeds shall be determined after the deduction of transactional costs incurred to acquire the loan, but shall not be less than zero. The transactional costs incurred to acquire the loan shall not include the carrying cost of the loan.

(v) If one or more of the properties that secure the loan are located outside of New York, the amount of gross proceeds from loans secured by real property within New York State is the product of all such gross proceeds and a fraction, the numerator of which is the FMV of real property located in New York State used to secure the loan and the denominator of which is the FMV of all real property used to secure the loan.

(b) (1) A loan not secured by real property means that less than 50% of the aggregate value of the collateral used to secure a loan, when valued at FMV as of the time the loan is originated, is real property.

(2) Interest income from loans not secured by real property is included in New York receipts if borrower's location as of the time the loan is originated is in New York State. All interest income from loans not secured by real property is included in everywhere receipts. If the borrower is an individual, the borrower's location is the borrower's billing address in the records of the lender. If the borrower is a business entity, the borrower's location is the borrower's commercial domicile.

(3)(i) The amount of net gains (not less than zero) from sales of loans not secured by real property included in New York receipts is the product of net gains from all loans not secured by real property and a fraction, the numerator of which is gross proceeds from sales of loans not secured by real property to purchasers located within New York State and the denominator of which is gross proceeds from sales of loans not secured by real property to purchasers located within and without New York State. Net gains (not less than zero) from the sale of loans not secured by real property computed in subparagraph (iii) of this paragraph shall be included in everywhere receipts.

(ii) For each sale of a loan not secured by real property, the corporation shall compute a gain or loss from the sale by subtracting the carrying cost of the loan from the sale price of the loan. If the sale price exceeds the carrying cost, the result is a gain. If the sale price is less than the carrying cost, the result is a loss.

(iii) To determine the amount of net gains from sales of all loans not secured by real property, the corporation shall subtract the sum of all losses computed in subparagraph (ii) of this paragraph from the sum of all gains computed in subparagraph (ii) of this paragraph. If the result is equal to or less than zero, no amount shall be included in New York receipts and everywhere receipts.

(iv) Gross proceeds shall be determined after the deduction of transactional costs incurred to acquire the loan, but shall not be less than zero. The transactional costs incurred to acquire the loan shall not include the carrying cost of the loan.

(c) The determinations of the type of loan, FMV of real property, and borrower's location are made at the time the loan is originated, and will be redetermined only if the loan is refinanced.

(d) For purposes of this section, the term carrying costs means the expenses associated with holding the loan.

(d) Examples.

Example 1: Corporation X has interest income from loans secured by real property of $5,000, broken down as follows:

- $2,500 from Loan N secured by real property located in New York;
- $1,500 from Loan O secured by real property located outside of New York; and
- $1,000 from Loan P secured by property located in New York and another state.

The $2,500 of interest income from Loan N is included in New York receipts because the property used to secure the loan is located within New York State. The $1,500 of interest income from Loan O is not included in New York receipts because the property used to secure the loan is not in New York State.

Because the property used to secure Loan P is located within and without New York State, Corporation X must determine the FMV of the properties at the time the loan was originated when determining the portion of such interest income to include in New York receipts. At the time the loan was originated, the FMV of the New York property was $200,000 and the FMV of the property located outside of New York was $300,000. Therefore, Corporation X includes $400 ($200,000/$500,000 x $1,000) of the interest income from loan P in New York receipts.

Corporation X includes $2,900 of interest income from loans secured by real property in New York receipts and $5,000 interest income from loans secured by real property in everywhere receipts.

Example 2: Corporation Y's sale of Loans N and O, secured by real property within and without New York State, during the taxable year are broken down as follows:

- Loan N, secured only by real property in New York, was sold for $300,000. After deducting its carrying cost of the loan from the sale price, Corporation Y computes a loss of $1,000 from Loan N; and
- Loan O, secured by real property in New York and another state, was sold for $200,000. After deducting its carrying cost of the loan from the sale price, Corporation Y computes a gain of $1,500 from Loan O.

Corporation Y has net gains from loans secured by real property of $500, because the $1,000 loss from Loan N offsets the $1,500 gain from Loan O.

To determine the amount of net gains from loans secured by real property to include in New York receipts, Corporation Y must determine the gross proceeds from sales of loans secured by real property in New York and total gross proceeds from loans secured by real property within and without New York State.

As the property used to secure Loan O is located within and without New York State, Corporation Y first determines that the FMV at the time the loan was originated of the New York property was $200,000 and the property located outside of New York was $300,000. Therefore, the New York property is 40% ($200,000/$500,000) of the total FMV of all the properties used to secure Loan O.

The gross proceeds from loans secured by real property New York State of $380,000 is the sum of $300,000 from loan N and $80,000 from Loan O ($200,000 gross proceeds x 40 percent). The total gross proceeds of loans secured by real property located within and without New York State is $500,000. Corporation Y's gross proceeds fraction of $380,000/$500,000 (or 76 percent) is used to determine the portion of net gains from loans secured by real property in New York. Corporation Y includes $380 of net gains from loans secured by real property in New York receipts (76% x $500). $500 of net gains from loans secured by real property is included in everywhere receipts.

Example 3: Taxpayer D makes multiple loans not secured by real property to Corporation E, domiciled in State X. Each loan is executed by a separate division of Corporation E and the divisions are located in State Y, State Z, and New York State. The interest income earned by Taxpayer D on these loans is not included in New York receipts because Corporation E's commercial domicile is State X. All such interest income is included in everywhere receipts.

Example 4: Taxpayer E earns interest income from a loan not secured by real property that it made to Corporation F, domiciled in New York at the time the loan is originated. The interest income is included in New York receipts because Corporation F's commercial domicile is New York State. Five years after the loan is originated, the commercial domicile of Corporation F changes from New York State to State X. The interest income continues to be included in New York receipts because Corporation F's commercial domicile at the time the loan was originated was New York State. All such interest income is included in everywhere receipts.

Section 4-2.6. Interest income and net gains from asset backed securities and other government agency debt. (Tax Law, section 210-A(5)(a)(2)(C))

(a) (1) 8% of interest income from:

(i) asset backed securities or other securities issued by government agencies, including but not limited to securities issued by the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Small Business Administration; or

(ii) asset backed securities issued by other entities, is included in New York receipts.

(2) 100% of all such interest income subject to paragraph 1 of this subdivision is included in everywhere receipts.

(b)(1)(i) 8% of net gains (not less than zero) from sales of:

(*a*) asset backed securities or other securities issued by government agencies; or

(*b*) asset backed securities that are sold through a registered securities broker or dealer or through a licensed exchange, is included in New York receipts.

(ii) 100% of all such net gains (not less than zero) subject to subparagraph (i) of this paragraph is included in everywhere receipts.

(2) The amount of net gains (not less than zero) from sales of asset backed securities not referenced in paragraph (1) of this subdivision included in New York receipts is the product of net gains from the sale of all such asset backed securities and a fraction, the numerator of which is gross proceeds from sales of such asset backed securities to purchasers located within New York State and the denominator of which is gross proceeds from sales of such asset backed securities to purchasers located within and without New York State. Net gains (not less than zero) from the sale of such asset backed securities is included in everywhere receipts.

(c) (1) For each sale of an asset backed security, the corporation shall compute a gain or loss from the sale by subtracting its adjusted basis in such security from the sale price of such security. If the sale price exceeds the adjusted basis, the result is a gain. If the sale price is less than the adjusted basis, the result is a loss.

(2) To determine the amount of net gains from sales of the asset backed securities referenced in paragraph (1) of subdivision (b) of this section, the corporation shall subtract the sum of all losses from the sale of such asset backed securities from the sum of all gains from the sale of such asset backed securities. If the result is

equal to or less than zero, no amount is included in New York receipts and everywhere receipts.

(3) To determine the amount of net gains from sales of the asset backed securities referenced in paragraph (2) of subdivision (b) of this section, the corporation shall subtract the sum of all losses from the sale of such asset backed securities from the sum of all gains from the sale of such asset backed securities. If the result is equal to or less than zero, no amount is included in New York receipts and everywhere receipts.

(d) If the purchaser is an individual, the individual is located in New York State if the corporation's records indicate the purchaser's billing address in the records of the corporation is in New York State. If the purchaser is a business entity, the business entity is located in New York State if its commercial domicile is in New York State.

(e) Gross proceeds shall be determined after the deduction of transactional costs incurred to acquire the asset backed security, but shall not be less than zero. The transactional costs incurred to acquire the asset backed security shall not include the corporation's adjusted basis.

Section 4-2.7. Interest income and net gains from corporate bonds. (Tax Law, section 210-A(5)(a)(2)(D))

(a) Interest income from corporate bonds is included in New York receipts if the commercial domicile of the issuing corporation is in New York. All interest income from corporate bonds is included in everywhere receipts.

(b)(1) 8% of net gains (not less than zero) from sales of corporate bonds sold through a registered securities broker or dealer or through a licensed exchange is included in New York receipts. 100% of all such net gains (not less than zero) is included in everywhere receipts.

(2) The amount of net gains (not less than zero) from sales of corporate bonds, other than bonds sold through a registered securities broker or dealer or through a licensed exchange, included in New York receipts is the product of net gains from the sale of all such bonds and a fraction, the numerator of which is gross proceeds

from sales of such bonds to purchasers located within New York State and the denominator of which is gross proceeds from sales of such bonds to purchasers located within and without New York State. Net gains (not less than zero) from the sale of such bonds shall be included in everywhere receipts.

(c) (1) For each sale of a bond, the corporation shall compute a gain or loss from the sale by subtracting the adjusted basis in such bond from the sale price of such bond. If the sale price exceeds the adjusted basis, the result is a gain. If the sale price is less than the adjusted basis, the result is a loss.

(2) To determine the amount of net gains from sales of corporate bonds sold through a registered securities broker or dealer or through a licensed exchange, the corporation shall subtract the sum of all losses from the sale of such bonds from the sum of all gains computed from the sale of such bonds. If the result is equal to or less than zero, no amount is included in New York receipts and everywhere receipts.

(3) To determine the amount of net gains from sales of corporate bonds, other than bonds sold through a registered securities broker or dealer or through a licensed exchange, the corporation shall subtract the sum of all losses from the sale of such bonds from the sum of all gains from the sale of such bonds. If the result is equal to or less than zero, no amount shall be included in New York receipts and everywhere receipts.

(4) If the purchaser is an individual, the individual is located in New York State if the individual's billing address in the records of the corporation is in New York State. If the purchaser is a business entity, the business entity is located in New York State if its commercial domicile is in New York State.

(5) Gross proceeds shall be determined after the deduction of transactional costs incurred to acquire the corporate bond, but shall not be less than zero. The transactional costs incurred to acquire the corporate bond shall not include the corporation's adjusted basis in the bond.

Section 4-2.8. Net interest income from reverse repurchase agreements and securities borrowing agreements. (Tax Law, section 210-A(5)(a)(2)(E))

(a) 8% of net interest income (not less than zero) from reverse repurchase agreements and securities borrowing agreements is included in New York receipts. Net interest income (not less than zero) from reverse repurchase agreements and securities borrowing agreements is included in everywhere receipts.

(b) Net interest income from reverse repurchase agreements and securities borrowing agreements is determined for purposes of this section after the deduction of the interest expense from the corporation's repurchase agreements and securities lending agreements, but cannot be less than zero. For this calculation, the amount of such interest expense is the interest expense associated with the sum of the value of the corporation's repurchase agreements where it is the seller/borrower plus the value of the corporation's securities lending agreements where it is the securities lender, provided such sum is limited to the sum of the value of the corporation's reverse repurchase agreements where it is the purchaser/lender plus the value of the corporation's securities lending agreements where it is the securities borrower.

(c) Example.

> Corporation A has $4,000 of interest income from reverse repurchase agreements and $5,000 of interest expense from repurchase agreements. Corporation A also has $6,000 of interest income from securities borrowing agreements and $3,000 of interest expense from securities lending agreements for the same year. To determine the amount of net interest income from these transactions, Corporation A must reduce the sum of the interest income from reverse repurchase agreements and securities borrowing agreements by the sum of the interest expense from repurchase agreements and securities lending agreements. The result is $2,000 ($4,000 + $6,000 - $5,000 -$3,000) of net interest income from reverse repurchase and securities borrowing agreements that is included in everywhere receipts. Corporation A must also report $160

(8% of $2,000) in New York receipts.

Section 4-2.9. Net interest income from Federal funds. (Tax Law, section 210-A(5)(a)(2)(F))

(a) 8% of net interest income (not less than zero) from Federal funds is included in New York receipts. The net interest income (not less than zero) from Federal funds is included in everywhere receipts.

(b) Net interest income from Federal funds is determined after the deduction of interest expense from Federal funds. Interest income from Federal funds means interest income paid by another institution in the Federal reserve system for borrowing the corporation's funds deposited at a Federal reserve bank. Interest expense from Federal funds includes the interest paid by the corporation to another institution in the Federal reserve system for the use of the other institution's funds deposited at a Federal reserve bank.

(c) Interest paid to the corporation directly by the Federal reserve on reserves maintained at a Federal reserve bank does not constitute interest income from Federal funds for purposes of this section and is apportioned under the rules for other financial instruments.

Section 4-2.10. Net income from commodities. (Tax Law, section 210-A(5)(a)(2)(I))

(a) (1) The amount of net income (not less than zero) from all commodities included in New York receipts or everywhere receipts is determined separately for sales of all commodities actually delivered and sales of commodities where delivery does not actually occur.

(i) The amount of net income (not less than zero) included in New York receipts from sales of commodities actually delivered is the product of such net income (not less than zero) and a fraction, the numerator of which is the amount of gross receipts from sales of all commodities actually delivered to points within New York State and the denominator of which is the amount of all gross receipts from sales of commodities actually delivered.

(ii) The amount of net income (not less than zero) included in New York receipts from commodities where delivery does not actually occur is the product of such net income (not less than zero) and a fraction, the numerator of which is the amount of gains from sales of commodities where delivery does not actually occur to purchasers located in the state and the denominator of which is the amount of gains from all sales of commodities where delivery does not actually occur. 100% of net income (not less than zero) from sales of commodities actually delivered is included in everywhere receipts. 100% of net income (not less than zero) from sales of commodities where delivery does not actually occur is included in everywhere receipts.

(2) Net income (not less than zero) is determined by subtracting the cost to acquire or produce all commodities from the gross proceeds from the sale of commodities, provided the result cannot be less than zero. The cost to acquire or produce all commodities includes the purchase price of commodities and all transaction costs associated with the acquisition or production of the commodities.

(3) Example.

Corporation A, a separate article 9-A filer, makes sales of commodities where the commodities are actually delivered and sales of commodities where delivery does not actually occur.

Sales of commodities actually delivered.

Corporation A has receipts from sales of commodities where the commodities are actually delivered broken down as follows:

- $200 of gross receipts from gold sold to purchasers in states other than New York State, but delivered to New York State;
- $700 of gross receipts from gold sold to purchasers located in New York State, but delivered to states other than New York State;
- $100 of gross receipts from silver sold to purchasers located in New York State, but delivered to states other than New York State; and
- $1,000 of gross receipts from electricity sold to purchasers located in

New York State and delivered to points within New York.

Corporation A incurred the following costs to acquire or produce the commodities where the commodities are actually delivered:

- $715 for gold;
- $85 for silver; and
- $400 for electricity.

Corporation A uses the sourcing rule contained in section 210-A(5)(a)(2)(I) and this section to determine the amount of net income (not less than zero) to include in its New York receipts or everywhere receipts.

Corporation A first determines the amount of gross receipts from sales of commodities where the commodities are actually delivered, which is $2,000 ($200 plus $700 plus $100 plus $1,000). Next, Corporation A determines the total cost it incurred to acquire or produce such commodities, which is $1,200 ($715 plus $85 plus $400). The result is Corporation A has $800 of net income from sales of commodities that are actually delivered.

The amount of net income from the sales of commodities actually delivered that is included in New York receipts is the net income from such sales multiplied by a fraction, the numerator of which is the amount of gross receipts from sales of commodities actually delivered to points within New York State and the denominator of which is the amount of gross receipts from sales of commodities actually delivered. Corporation A multiplies its net income of $800 by 60% ($1,200/$2,000), and the product is $480, which Corporation A must include in its New York receipts. All $800 of net income from sales of commodities actually delivered is included in everywhere receipts.

Sales of commodities where delivery does not actually occur.

Corporation A has gains and losses from sales of commodities that are not actually delivered in the following amounts:

- $100 of gains from gold sold to purchasers located in New York State;
- ($200) of losses from gold sold to purchasers located in New York State;
- $500 of gains from gold sold to purchasers located in states other than New York State;
- $ 400 of gains from corn sold to purchasers located in states other than New York State; and
- ($300) of losses from corn sold to purchasers located in states other than New York State.

Corporation A first determines the amount of net income from sales of commodities that are not actually delivered, which is $500 ($100 - $200 + $500 + $400 - $300). Next, it determines the amount of gains from such sales, which is $1,000 ($100 - $0 + $500 + $400 - $0).

The amount of net income to be included in New York from the sales of commodities that are not actually delivered is determined by multiplying such net income by a fraction, the numerator of which is the amount of gains from sales to purchasers located within New York State of commodities that are not actually delivered and the denominator of which is the amount of gains from sales within and without New York of commodities that are not actually delivered. Corporation A multiplies its $500 of net income by 10% ($100/$1,000). The result is $50 included in New York receipts. All $500 of net income is included in everywhere receipts.

Total sales of commodities.

Corporation A includes $530 ($480 + $50) of net income from commodities in its New York receipts and $1,300 ($800 + $500) of net income from commodities in its everywhere receipts.

(b) (1) In the case of a combined report, the amount of net income (not less than zero) of the combined group from commodities included in the combined group's New York receipts or everywhere receipts is determined separately for sales of commodities actually delivered and sales of commodities where delivery does not actually occur.

(i) The amount of net income (not less than zero) for all members of the combined group included in the combined group's New York receipts from sales of commodities actually delivered is the product of such net income (not less than zero) and a fraction, the numerator of which is the amount of gross receipts from sales of all commodities actually delivered to points within New York State for all members of the combined group and the denominator of which is the amount of all gross receipts from sales of commodities that are actually delivered for all members of the combined group.

(ii) The amount of net income (not less than zero) for all members of the combined group included in the combined group's New York receipts from commodities where delivery does not actually occur is the product of such net income (not less than zero) and a fraction, the numerator of which is the amount of gains for all members of the combined group from sales of commodities where delivery does not actually occur to purchasers located in New York State, and the denominator of which is the amount of gains for all members of the combined group from all sales of commodities where delivery does not actually occur. 100% of net income (not less than zero) from sales of commodities for all members of the combined group where delivery does not actually occur is included in the combined group's everywhere receipts.

(2) Net income (not less than zero) is determined by subtracting the cost to acquire or produce all commodities from the gross proceeds from the sale of commodities, provided the result cannot be less than zero. The cost to acquire or produce all commodities is the amount paid to purchase or produce the commodity. The cost to acquire or produce all commodities includes the purchase price of commodities and all transaction costs associated with the purchase of the commodities.

(c) For purposes of this section, the term commodity has the same meaning as in subparagraphs (A), (B), and (C) of IRC section 475(e)(2).

(d) For rules pertaining to sales of tangible personal property that is not traded as a commodity, see section 4-2.1 of this Subpart.

Section 4-2.11. Marked to market net gains. (Tax Law, section 210-A(5)(a)(1) and (2)(J))

(a) If the taxpayer or designated agent, in the case of a combined group, has made the fixed percentage method election in the manner required by subdivision (c) of section 4-2.4 of this Subpart, then 8% of marked to market net gains (not less than zero) from each type of qualified financial instrument is included in New York receipts and 100% of such marked to market net gains are included in everywhere receipts.

(b) If the taxpayer or designated agent, in the case of a combined group, has not made the fixed percentage method election, then the amount of marked to market net gains from qualified financial instruments included in New York receipts and everywhere receipts is determined using the rules set forth in paragraphs (1), (2) and (3) of this subdivision. The amount of marked to market net gains (not less than zero) from instruments that are not qualified financial instruments included in New York receipts or everywhere receipts is also determined using the rules set forth in paragraphs (1), (2) and (3) of this subdivision.

(1) Marked to market net gains (not less than zero) from stocks are not included in New York receipts or everywhere receipts, unless the commissioner has required the corporation's net gains from sales of stocks be included in the apportionment factor. Marked to market net gains (not less than zero) from partnership interests are not included in New York receipts or everywhere receipts, unless the commissioner has required that the corporation's net gains from the sale of partnership interests be included in the apportionment factor.

(2) The amount of marked to market net gains (not less than zero) from each type of financial instrument included in New York receipts is determined by multiplying the marked to market net gains (not less than zero) from each such type of financial instrument by a fraction, the numerator of which is the net gains from actual sales of that type of financial instrument included in New York receipts determined under the applicable clause of section 210-A(5)(a)(2) and regulations in this Subchapter and the denominator of which is the net gains from actual sales of that type of financial instrument included in everywhere receipts determined under the applicable clause of section 210-A(5)(a)(2) and the regulations in this Subchapter. Marked to market net gains (not less than zero) from the financial instruments subject to the rules in this paragraph are included in everywhere receipts.

(3) If there are no actual sales of a type of financial instrument that is marked to market or if the

corporation has an overall net loss from the actual sale of that type of financial instrument, the amount of marked to market net gains (not less than zero) from that type of financial instrument included in New York receipts is determined by multiplying the marked to market net gains (but not less than zero) from that type of financial instrument by a fraction, the numerator of which is the sum of the amount of receipts included in New York receipts under clauses (A) - (I) of section 210-A(5)(a)(2) and subclause (ii) of section 210-A(5)(a)(2)(J), and the denominator of which is the sum of the amount of receipts included in the everywhere receipts under clauses (A) - (I) of section 210-A(5)(a)(2) and subclause (ii) of section 210-A(5)(a)(2)(J). 100% of marked to market net gains (not less than zero) for which the amount to be included in New York receipts is determined under this paragraph are included in everywhere receipts.

Section 4-2.12. Interest income, net gains, and other income from other financial instruments. (Tax Law, section 210-A(5)(a)(2)(H))

(a) Interest income, net gains (not less than zero), and other income (not less than zero) from other financial instruments includes interest income, net gains, and other income from financial instruments that are not described in the rules for section 210-A(5)(a)(2)(A)-(G), (I), and (J) and the regulations in this Subchapter.

(b) Interest income from other financial instruments includes, but is not limited to, interest income on:

(1) deposit accounts;

(2) money market accounts;

(3) debt issued by a country, or political subdivision thereof, other than the United States; and

(4) reserves maintained with the Federal Reserve.

(c) Interest income from other financial instruments is included in New York receipts if the payor is located in New York State. 100% of such interest income is included in everywhere receipts.

(c) (1) For purposes of this section, an individual, as payor or purchaser, is located in New York State if its billing address is in New York State; and a business entity, as payor or purchaser, is located in New York

State if its commercial domicile is in New York State.

(2) The location for a government entity, as payor or purchaser, is dependent on the type of government entity. For example, when the payor is a foreign country, the payor would be wholly located outside of New York State, and when the payor is part of a federal banking system that operates multiple banks throughout the United States, the payor would be located in New York State to the extent of the percentage of banks in New York State.

(d) (1) For each sale of a financial instrument apportioned under this section, the corporation shall compute a gain or loss from the sale by subtracting the adjusted basis in such financial instrument from the sale price of such financial instrument. If the sale price exceeds the adjusted basis, the result is a gain. If the sale price is less than the adjusted basis, the result is a loss.

(2) To determine the amount of net gains from sales of each type of financial instrument apportioned under this section, the gains from sales of a type of other financial instrument are reduced by the losses from sales of that same type of other financial instrument, provided the result cannot be less than zero. If the result is equal to or less than zero, no amount is included in New York receipts and everywhere receipts. The computation is done for each type of instrument so that gains from one type of financial instrument cannot offset losses from another type of financial instrument.

(3) (i) The amount of net gains (not less than zero) from sales of a type of other financial instrument included in New York receipts is the product of net gains from the sales of that type of other financial instrument and a fraction, the numerator of which is gross proceeds from sales of that type of financial instrument to purchasers located within New York State and the denominator of which is gross proceeds from sales of that type of financial instrument to purchasers located within and without New York State. Net gains (not less than zero) from the sale of that type of other financial instrument is included in everywhere receipts.

(ii) Gross proceeds shall be determined after the deduction of transactional costs incurred to acquire the financial instrument, but shall not be less than zero. The transactional costs incurred to acquire the financial instrument shall not include the corporation's adjusted basis.

(e) Other income (not less than zero) from other financial instruments includes, but is not limited to, substitute payments in lieu of dividends and income received from stock of the Federal reserve bank.

(f) Examples.

Example 1: Taxpayer A earns $2,000,000 of interest income on deposits on accounts at the New York State branch and the State X branch of a bank whose commercial domicile is located in State Y. No interest income is included in New York receipts because the commercial domicile of the bank is State Y. The $2,000,000 of interest income is included in everywhere receipts.

Example 2: Taxpayer B receives $1,500 of income from Money Market Fund M. The commercial domicile of Money Market Fund M is State X. No interest income is included in New York receipts because the commercial domicile of Money Market Fund M is in State X. The $1,500 of income is included in everywhere receipts.

Example 3: Taxpayer C maintains reserves at its required Federal Reserve Bank. These funds generate $1,000 of interest income that is not considered interest income from Federal funds. Only one of the twelve Federal Reserve Banks is located in New York. As a result, 1/12 of the interest income is included in New York receipts. All $1,000 of interest income is included in everywhere receipts.

Example 4: As a member of the Federal Home Loan Bank (FHLBank), Taxpayer D is required to invest in the FHLBank. During the taxable year, Taxpayer D receives $10,000 of income from this investment. Only one of the eleven Federal Home Loan Banks is located in New York. As a result, while $10,000 is included in everywhere receipts, only 1/11 of the that amount, or $909, is included in New York receipts.

Example 5: Taxpayer E receives $2,000 of substitute payments in lieu of dividends from its stock of Corporation X, domiciled in state Y. No substitute payments in lieu of dividends are included in New York receipts because the payor, Corporation X, is domiciled in State Y. All $2,000 of such payments are included in everywhere receipts.

Example 6: Taxpayer F owns debt issued by Country X, debt issued by Country Y, debt issued by Country Z, foreign currency swaps for the currency A, and foreign currency swaps for currency B. Taxpayer F has two types of other financial instruments – debt issued by other countries and foreign currency swaps. Any gains from sales of debt issued by other countries may be reduced only by losses from sales of debt issued by other countries and any gains from sales of foreign currency swaps may be reduced only by losses from sales of foreign currency swaps.

Section 4-2.13. Brokerage commissions. (Tax Law, section 210-A(5)(b)(1))

(a) In the case of a registered securities broker or dealer, receipts constituting brokerage commissions derived from the execution of purchase or sale orders for securities or commodities for customers shall be deemed to be generated within New York State if the corporation's records indicate the mailing address of the customer who is responsible for paying such commissions is in New York State.

(b) Example.

> Broker X earns $10,000 in brokerage commission income from investment advisor Y to execute trades for investment fund Z. Investment advisor Y is responsible for paying the commission to Broker X but passes on the brokerage commission expense to its investors in the form of fees. Broker X's records indicate that the mailing address of investment advisor Y is within New York State and investment fund Z's mailing address is in state A. Because Investment advisor Y is the customer responsible for paying the brokerage commission to Broker X and its mailing address in Broker X's records is in New York State, $10,000 is included in both New York receipts and everywhere receipts.

Section 4-2.14. Receipts from credit cards and similar activities. (Tax Law, section 210-A(5)(c)(1)-(3))

(a) Receipts received by issuer banks from credit card receivables constituting interest, and fees and penalties in the nature of interest and service charges and fees from credit cards are included in New York State receipts if the mailing address of the card holder in the records of the issuer bank is in New York State. All such receipts are included in everywhere receipts.

(b) In the event that credit card receivables are purchased from an issuer bank, the purchaser shall include such receipts in New York receipts if the mailing address of the card holder in the records of the purchaser is in New York State. All such receipts are included in everywhere receipts.

(c) Receipts from merchant discounts are included in New York receipts if the merchant is located within New York State. 100% of receipts from merchant discounts are included in everywhere receipts. In the case of a merchant with locations both within and without New York State, only receipts from merchant discounts attributable to sales made from locations within New York State are included in New York receipts.

It shall be presumed that the location of the merchant is the address of the merchant shown on the invoice submitted by the merchant to the corporation.

Section 4-2.15. Receipts received by credit card processors. (Tax Law, section 210-A(5)(c)(4))

(a) For purposes of this Part, the following definitions shall apply:

(1) Credit card processor means an entity, whether it is a corporation or an unincorporated entity, that derives 50% or more of its gross receipts from any or all of the following: credit card authorization processing, clearing processing, settlement processing, and volume-based activities. In the case of a combined report, whether an entity is a credit card processor is determined on a corporation-by-corporation basis. The apportionment rules described in this section and section 210-A(5)(c)(4) shall apply only to those receipts generated by the entities in the combined report that qualify as credit card processors.

(2) Authorization processing means the routing of transaction data from a merchant to an acquirer bank or from an acquirer bank to an issuer bank for approval or rejection and the routing of that approval or rejection back to the originating party. Authorization includes the various data enhancement and security services the credit card processor performs on the transaction data during the process of routing the data between the acquirer bank and the issuer bank.

(3) Clearing processing means the service of processing of a batch of hundreds or thousands of previously-authorized transactions to determine the net amounts due to or from issuer banks and acquirer banks.

(4) Settlement processing means the service of delivering instructions for the actual movement of funds between issuer banks and acquirer banks that reflects the amounts determined to be due to or from each entity during clearing processing.

(5) Credit card processor’s network means the hardware and software that enable a credit card processor to facilitate the transfer of financial transaction information to and from issuer banks and acquirer banks and, in the case of a third-party processor, to and from merchants, including by any of the following: receiving,

processing, and relaying such financial transaction information.

(6) Volume-based activities means services that are charged to customers measured on the dollar volume or number of credit card transactions, but not those activities described elsewhere in this subdivision.

(7) Access point means a physical location at which a credit card processor's customers access or may access the credit card processor's network.

(8) Percent of New York State access points means the number of access points located in New York State divided by the total number of access points in the United States.

(9) Acquirer bank means a financial institution that contracts with merchants to accept payments by credit card.

(10) Issuer bank means a financial institution that issues credit cards to account holders.

(b) (1) Except as provided for in paragraph (2) of this subdivision, the amount of receipts from authorization processing, clearing processing, and settlement processing earned by credit card processors included in New York receipts is the product of all such receipts and the percent of the credit card processor's New York State access points that could generate receipts subject to this paragraph. All such receipts are included in everywhere receipts.

(2) If the credit card processor is a third-party processor and, after exercising due diligence, cannot identify the access points for its authorization, clearing, and settlement processing transactions on behalf of issuer banks or acquirer banks, the amount of receipts from those transactions earned from banks with billing addresses, kept in the normal course of the credit card processor's operations, in New York State shall be included in New York receipts. All such receipts are included in everywhere receipts.

(c) (1) Except as provided for in paragraph (2) of this subdivision, the amount of all other receipts, including receipts from volume-based activities, received by credit card processors not specifically addressed in subdivisions (1) through (9) of section 210-A shall be included in New York receipts by multiplying the total amount of such other receipts by the average percentage of:

(i) 8%; and

(ii) the percent of the credit card processor's New York State access points.

(2) If the credit card processor is a third-party processor that uses the provisions of paragraph (2) of subdivision (b) of this section, then the amount of all other receipts, including receipts from volume-based activities, received by such credit card processor not specifically addressed in subdivisions (1) through (9) of section 210-A included in New York receipts shall be determined by multiplying the total amount of such other receipts by the average percentage of:

(i) 8%; and

(ii) the percent of its customers with billing addresses in New York State.

(d) If it shall appear that the receipts included in New York receipts pursuant to this section do not accurately reflect the locations where such receipts of the credit card processor are earned because the credit card processor has receipts arising from activities outside of the United States, then the credit card processor is authorized to calculate New York receipts pursuant to this section based on the New York State percentage of total access points, which shall be calculated by dividing the number of access points physically located in New York State by the total number of access points used to generate the receipts being apportioned under this section. The corporation bears the burden of proof to demonstrate that applying the apportionment rules contained in subdivisions (b) and (c) of this section do not result in an accurate apportionment of the receipts subject to the rules in this section within New York State.

Section 4-2.16. Receipts from railroad, trucking and omnibus businesses. (Tax Law, section 210-A(6))

(a) The amount of receipts received by a corporation from its conduct of a railroad business (including surface railroad, whether or not operated by steam, subway railroad, elevated railroad, palace car, or sleeping car), trucking business or omnibus business included in New York receipts is determined by multiplying the amount of receipts from such business by a fraction, the numerator of which is the number of revenue miles operated within New York State and the denominator of which is the total number of revenue miles operated. All such receipts are included in everywhere receipts.

(b) Revenue miles operated while an omnibus is engaged in school bus operations must be disregarded in computing the fraction.

(c) For purposes of this section, revenue mile is the transportation for consideration of passengers or freight for the distance of one mile. It does not include *nonrevenue miles*, such as deadheading (driving an unladen truck).

Section 4-2.17. Receipts from the sale of advertising. (Tax Law, section 210-A(8))

(a) Receipts from the sale of advertising encompass the following activities:

(1) Receipts from providing advertising space or time in or on a medium for dissemination to the public or part of the public, whether such medium is for sale or for free consumption. Examples include:

(i) the sale of printed page space in a magazine, newspaper, or other similar periodical;

(ii) the sale of space on or in directories, bulletins, phone books, restaurant placemats, cash register receipts, maps, or any other similar medium;

(iii) the posting of material on billboards, buildings, or vehicles;

(iv) the sale of time in radio or television broadcasts; or

(v) the sale of space on a Web page, regardless of the method of compensation paid by the advertiser to the Web site host.

(2) Receipts received for providing an advertising or marketing service.

For purposes of this paragraph, an advertising or marketing service includes:

(i) consultation on and development of advertising or marketing campaigns; or

(ii) securing placement of advertising or marketing materials in various forms of media.

(b) Apportionment of receipts from the sale of advertising.

(1) The amount of receipts from the publishing of advertising in newspapers or periodicals included in New York receipts is determined by multiplying such receipts by a fraction, the numerator of which is the number of newspapers and periodicals containing such advertising delivered to points within New York State and the denominator of which is the total number of newspapers and periodicals delivered to points within and without New York State. 100% of such receipts are included in everywhere receipts.

(2)(i) The amount of receipts from the sale of space on other physical media included in New York receipts is determined by multiplying such receipts by a fraction, the numerator of which is the number of New York State locations of such media and the denominator of which is the total number of locations within and without New York State. 100% of such receipts are included in everywhere receipts.

(ii) If the physical media is rolling stock, such as buses, vans, or automobiles, the numerator of the fraction in subparagraph (i) is the number of miles operated within New York State and the denominator is the number of total miles operated within and without New York State.

(iii) Examples.

Example 1: Billboard Company owns 15 roadside billboards, 5 in New York State and 10 in State A. For a fee, Billboard Company will post advertisements from unrelated businesses for a determined length of time. It receives $150,000 from Selling Corp to allow advertisements on each of its billboards. Billboard Company must determine the amount of receipts included in New York receipts according to the ratio of billboards in New York State to all billboards. Therefore, it includes $50,000 (1/3 x $150,000) in New York receipts. All $150,000 is included in everywhere receipts.

Example 2: Bus Company allows businesses to post advertisements on the exterior and interior of its vehicles. It receives $7,000 from Company A, $4,000 from Company B, and $14,000 from Company C to have its vehicles display ads for those businesses. Bus Company knows the mileage within and without New York State for each of the vehicles containing the ads. Buses containing ads for Company A travel 30,000 miles in New York State out of a total of 60,000 miles (50% of its miles in New York). Buses containing ads for Company B travel 14,000 miles in New York State out of a total of 70,000 miles (20% of its miles in New York). Buses containing ads for Company C travel 40,000 miles, exclusively in New York State (100% of its miles are in New York). Bus Company must include $18,300 in New York receipts, which is the sum of $3,500 from Company A (50% multiplied by $7,000), $800 from Company B (20% multiplied by $4,000), and $14,000 from Company C. All $25,000 is included in everywhere receipts.

(3) The amount of receipts from the sale of advertising time in radio or television broadcasts included in New York receipts is determined by multiplying such receipts by a fraction, the numerator of which is the number of listeners or viewers in New York State and the denominator of which is the total number of listeners or viewers within and without New York State. 100% of such receipts are included in everywhere receipts.

(4) (i) The amount of receipts from the sale of advertising not described above and furnished, provided, or delivered to, or accessed by the viewer or listener through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media or any combination thereof included in New York receipts is determined by multiplying such receipts by a fraction, the numerator of which is the number of

listeners or viewers in New York State and the denominator of which is the total number of listeners or viewers within and without New York State. 100% of such receipts are included in everywhere receipts.

(ii) If, after exercising due diligence, the corporation lacks sufficient information to apply subparagraph (i) of this paragraph, it may use a reasonable method to estimate the numbers of listeners or viewers to include in the numerator and denominator of the fraction described in subparagraph (i) of this paragraph. Such method should be based on data available to the corporation either as part of its operations, such as metrics or information for account holders, subscribers, or page or advertisement hits, or under the terms of the contract with the entity seeking to place the ad, such as any contractual obligations to identify ad recipients or to target the ad to specific demographics.

(iii) In any case in which a corporation uses a method of estimation to determine the amounts for the numerator and denominator of the fraction described in subparagraph (i) of this paragraph and the commissioner determines that the method employed by the corporation is not reasonable, the commissioner may substitute a method that the commissioner determines is appropriate. In this instance, the corporation bears the burden of demonstrating that the method the commissioner prescribes is not reasonable.

(iv) In any case in which the commissioner determines that a corporation's method is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the commissioner may require that the corporation apply its method in a consistent manner.

(v) Example.

> Web Corp provides digital advertisements for various retail corporations on its website. Its books and records capture a variety of advertising metrics for each ad placed, which include, but are not limited to, the number of times an ad is viewed by an IP address, the number of unique IP addresses that view an ad, and the number of times Web Corp's users

click on an ad and are directed to the retailer's website based on the users' IP address.

Web Corp enters into an agreement with Retail Corp A to provide digital advertisements for Retail Corp A on Web Corp's website. Pursuant to the agreement, Web Corp will receive payment each time the advertisement is viewed, regardless of whether the ad is viewed from the same location multiple times or whether the Web Corp's users click on the advertisement or not. As the receipt is earned based on the number of views, the amount of receipts from Retail Corp A included in New York receipts is determined by multiplying the total receipts by a fraction, the numerator of which is the total number of views of the advertisement in New York State and the denominator is the total view of the advertisements. 100% of such receipts are included in everywhere receipts.

Web Corp enters into an agreement with Retail Corp B to provide digital advertisements for Retail Corp on Web Corp's website. Pursuant to the agreement, Web Corp will receive payment each time Web Corp's users click on the advertisement and are directed to Retail Corp B's website. No payment is received by Web Corp if the ad is just viewed on Web Corp's website. As the receipt is based on the number of times the ad is clicked on, the amount of Web Corp's receipts from Retail Corp B included in New York receipts is determined by multiplying the total receipts by a fraction, the numerator of which is the total number of times that Retail Corp B's ad is clicked on in New York State and the denominator is the total number of times Retail Corp B's ad is clicked on. The location where an ad is clicked on is based upon the IP address. 100% of such receipts are included in everywhere receipts.

(c) Apportionment of receipts from advertising services.

(1) The amount of receipts from the provision of advertising or marketing services (e.g., the creation and/or implementation of an advertising or marketing campaign) included in New York receipts is determined by multiplying such receipts by a fraction, the numerator of which is the number of intended targets of such advertising or marketing in New York State and the denominator of which is the total number of intended targets ("the intended target fraction"). 100% of such receipts are included in everywhere receipts.

(2) To determine the proper ratio of New York State to everywhere targets for the intended targets fraction, a corporation must primarily rely on statistics and information that are compiled or utilized as part of the market research and advertising strategy developed by the corporation for its customer. If no such statistics or information are available, a corporation may then use other sources of information that attempt to determine the location of the intended targets.

(i) In any case in which a corporation uses a method to determine the location of the intended targets and the commissioner determines that the method employed by the corporation is not reasonable, the commissioner may substitute a method that the commissioner determines is appropriate. In this instance, the corporation bears the burden of demonstrating that the method the commissioner prescribes is not reasonable.

(ii) In any case in which the commissioner determines that a corporation's method is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the commissioner shall require that the corporation apply its method in a consistent manner.

(iii) Examples.

Example 1: Advert Corp is hired by Blower Corp to develop an advertising and marketing plan to increase sales of Blower Corp's snow blowers in the Northeast, which is a sales region defined by Blower Corp. In developing the campaign, Advert Corp obtains information from Blower Corp about the locations of Blower Corp's shipments of its units to retailers and, in some cases, directly to consumers in the Northeast sales region. The ratio of shipments to New York State locations to shipments to all Northeast locations is a reasonable method of determining the distribution of the intended targets of Advert Corp's advertising and marketing strategy. Advert Corp should multiply the receipt it receives from Blower Corp by this ratio to determine the amount of the receipt to include in New York receipts. 100% of such receipts are included in everywhere receipts.

Example 2: Advert Corp is hired by Finance Corp to produce a nationwide advertising campaign to create demand for Finance Corp's new investment product marketed to retirees. Finance Corp will not divulge location information about any of its account holders, except to say that it has account holders in every state. Advert Corp has access to information that shows the distribution of Americans of or nearing retirement age in each state. Advert Corp should multiply the receipts it receives from Finance Corp by the ratio of such Americans in New York State to all such Americans to determine the amount of the receipt to include in New York receipts. 100% of such receipts are included in everywhere receipts.

Example 3: AdCo works with local businesses to create printed advertisements that appear on paper placemats at restaurants. Businesses pay AdCo to design the ads and to secure their inclusion on placemats. Once the content and design of the ad is agreed upon, AdCo works with a printing company that produces the placemats to ensure that the ad appears on the printed placemats and that it meets the design and content specifications. As part of AdCo's responsibilities in providing this service, it determines the locations where the printed placemats will be delivered. AdCo receives a receipt from Landscaper Co to create an ad to be included on placemats. AdCo determines that the placemats will be delivered to Restaurant Company, which has 3 restaurants in New York State and 1 in State B (4 total restaurants). AdCo must include 75% of the receipts earned from Landscaper Co for designing and securing the ad on the placemats in its New York receipts. 100% of such receipts are included in everywhere receipts.

(3) Where a lump sum is received by the corporation as payment for advertising or marketing services and such advertising or marketing services consists of a combination of activities including the creating of the advertising or marketing campaign and the actual purchase of advertising space or time, the corporation must allocate the lump sum among each of the types of activities based on both the costs of purchasing the advertising or marketing space or time and the intended targets of the advertising or marketing or by some other reasonable method. Full details must be submitted with the corporation's report.

(i) Example.

Advert Corp is hired by School Supply Corp to develop an advertising and marketing plan to increase sales of students' school supplies at its retail stores. The campaign will use newspapers ads, television commercials, and in-store promotions. Advert Corp will receive one lump sum for the entire advertising and marketing campaign. It first determines how to allocate the lump sum among the various advertising strategies by multiplying the lump sum by a fraction, the numerator of which is the cost of employing the particular medium, (i.e., the cost of placing ads in newspapers), and the denominator of which is the total cost of employing all the forms of media outreach (i.e., the sum of the cost of ad buys in newspapers, ad buys on television, and deploying in-store promotions).

To determine the amount of each allocated amount of the lump sum to be included in New York receipts, the amount of each allocated amount of the lump sum is then multiplied by its own intended target fraction as described in paragraph (1) of this subdivision. Thus, for newspaper ad buys, the allocated amount of the lump sum included in New York receipts is based on the ratio of the New York State circulation of the newspapers containing the ad buys to the total circulation of such newspapers where the inserts will appear. For the television ad buys, the allocated amount of the lump sum included in New York receipts is based on the ratio of viewers in New York State to the total number of viewers within the region where the ad buys will be broadcast. For the in-store promotions, the allocated amount of the lump sum included in New York receipts is based on the ratio of New York State stores engaging in the promotions to all stores engaging in the promotions. 100% of such receipts are included in everywhere receipts.

SUBPART 4-3

RECEIPTS FROM THE SALE OF, RENTAL OF,

LICENSE TO USE, AND GRANTING OF REMOTE ACCESS

TO DIGITAL PRODUCTS AND DIGITAL SERVICES

Section 4-3.1. Definitions.

For purposes of this Subpart, the following terms shall have the meanings indicated below.

(a) Consumer means an individual or entity whose location is where the business customer derives value from the digital product or digital service provided by the corporation.

(b) Customer means the party who enters into a transaction with the corporation for the purchase of, rental of, license to use, or remote access to a digital product from the corporation. A customer can be either an individual customer or a business customer. In any instance in which the corporation, acting in good faith, cannot reasonably determine whether the customer is an individual customer, the corporation must treat the customer as a business customer.

(1) Individual customer means a customer who enters into a transaction with the corporation for the purchase of, rental of, license to use, or remote access to a digital product or digital service for personal use, and not for a business purpose.

(2) Business customer means a customer that is not an individual customer, including, but not limited to, a sole proprietor, S corporation, limited liability company, limited partnership, limited liability partnership, general partnership, corporation, non-profit organization, trust, the U.S. Government, any foreign, state, or local government, or any agency or instrumentality of such government.

(c) Digital product means any property of whatever nature delivered, furnished, provided, or given access to through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media, or any combination thereof (hereinafter referred to as digitally delivered). Digital product includes, but is not limited to, an audio work, audiovisual work, visual work, electronic book or literary work, graphic work, electronic database, game, information or entertainment service, website, or digital application that is digitally delivered (unless digital delivery is incidental to the sale of a license to distribute, broadcast, or right to sublicense the work to third parties for other than personal use). In addition, digital product includes computer software by whatever means delivered, including physical media. Further, digital product includes the storage of any property that constitutes a digital product.

(d) Digital service means a service not otherwise addressed in section 210-A(1) – (3) or (5) – (9). It does not include a service related to an asset described in section 210-A(5). A digital service must be:

(1) directly related to the creation, testing, modification, enhancement, and maintenance of a product that must be digital in nature with no comparable non-digital form, regardless of the means of transmission or level of human interaction; or

(2) that has been fully automated, uses one or more software applications in providing the service, and is delivered via the means listed in the first sentence of the definition of digital product in subdivision (c) of this section. However, this does not include services where the service provider:

(i) includes an element of human interaction as part of the service, unless incidental; or

(ii) offers alternative services or optional features that include human interaction and provide similar functionality to the automated service.

(e) Intermediary transaction means a transaction where the business customer derives value from a digital product or digital service at the location of the consumer rather than the location of the business customer itself. Such a transaction is sourced using the rules for intermediary transactions in section 4-3.8 of this Subpart. Intermediary transactions do not include digital products or digital services sourced under the special rules in section 4-3.3 of this Subpart.

(1) To be considered an intermediary transaction, the digital product or digital service, pursuant to the explicit or implicit terms of a contract or other agreement between the corporation and business customer, must meet the requirements of subparagraph (i), (ii) or (iii) of this paragraph:

(i) it must be provided by the corporation, at the direction of the business customer, directly to the consumer;

(ii) it must be sold by the corporation to the business customer, who then passes on the digital product or digital service to the consumer and either:

(a) the corporation actively maintains or interacts with the digital product or digital service after the consumer receives it from the business customer; or

(b) the corporation must be obligated to perform a substantial portion of the digital service after the digital product or other property that the service relates to is delivered by the business customer to the consumer; or

(iii) it must be made readily available by the corporation (e.g., through a website) at the request of the business customer to be accessed by the consumer and the corporation actively maintains or interacts with the digital product or digital service after the consumer receives or accesses it from the business customer.

(f) Location where a contract is managed by the customer means the primary location at which an employee or other representative of a customer serves as the person with responsibility for monitoring or managing the day-to-day execution of the contract of sale, rental, license to use, or granting of remote access with the corporation.

Section 4-3.2. General Principles.

(a) Receipts from the sale of, rental of, license to use, or granting of remote access to digital products and digital services are included in New York receipts if the location where the customer derives value from the digital product or digital service, according to the hierarchy of methods set forth in section 210-A and paragraphs (1) through (4) of subdivision (b) of this section, is in New York State. The corporation must exercise due diligence under each method described in subdivision (b) of this section before rejecting it and proceeding to the next method in the hierarchy, and it must base its determination on information known to the corporation or information that would be known to the corporation upon reasonable inquiry. 100% of such receipts are included in everywhere receipts.

(b) The hierarchy of methods referenced in paragraphs (1) through (4) of this subdivision used to apportion the receipt from the digital product or digital service must be applied sequentially. A corporation may abandon a method only if, after exercising due diligence, it lacks sufficient information to apply that method.

(1) A corporation must apportion the receipt to the customer's primary use location ("primary use location method"; see sections 4-3.3 through 4-3.6 of this Subpart).

(2) A corporation must apportion the receipt to the location where the digital product or service is received by the customer ("where received method"; see section 4-3.7 of this Subpart).

(3) The corporation must apportion the receipt from that digital product or service to New York State in the same way as receipts from that type of digital product or service were sourced in the preceding taxable year ("preceding taxable year method"; see section 4-3.9 of this Subpart).

(4) The corporation must apportion the receipt from that digital product or service to New York State in the same way as its receipts from other digital products or services in the current taxable year are apportioned using the primary use location method and the where received method referenced in paragraphs (1) and (2) of this subdivision ("current taxable year method"; see section 4-3.10 of this Subpart).

(c) Corporations should refer first to the special rules for primary use location in section 4-3.3 of this Subpart prior to determining if a transaction qualifies as an intermediary transaction. Unless a special rule in section 4-.3.3 of this Subpart applies, a corporation then should determine if the rules for intermediary transactions in section 4-3.8 of this Subpart apply before applying the other rules in this Subpart.

(d) In exercising due diligence, the following standards apply:

(1) (i) In applying the rules under this Subpart, if the required information is not readily available to the corporation, the corporation must make reasonable inquiries to a business customer to determine the information required by these rules.

(ii) If the corporation has more than 250 business customers purchasing substantially similar digital products or digital services as purchased by the particular customer that would be sourced under this Subpart and no more than 5% of receipts from such digital products or digital services are from that particular customer, then the primary use location of the digital product or digital service is presumed to be the customer's billing address ("business address presumption").

(2) Corporations must document the steps taken before abandoning each method of the hierarchy or step within a method of the hierarchy, such as moving from a special rule for determining primary use location to the general rule for determining primary use location, including documentation of reasonable inquiries made.

(3) When the commissioner determines that the corporation had access to, or could have obtained upon reasonable inquiries when required, information at the time it filed its original return to apply a method of apportionment that comes earlier in the hierarchy than the method utilized by the corporation, the commissioner may require the corporation to use such method.

(e) If there is a presumption in applying a method in the hierarchy, the presumption may be overcome by either the corporation or the Department.

(1) The presumption may be overcome by the corporation if the corporation can prove, by clear and convincing evidence, that the method it proposes to use better reflects the location where the customer derives value from the digital product or digital service. In such a case, the location to which the receipts from the

digital product or digital service will be sourced will be based on the evidence accumulated by the corporation. If the corporation believes it has overcome the presumption and uses an alternative method, upon audit the Department may examine the corporation's alternative method to determine if the presumption has been overcome and, if so, whether it was applied in a consistent manner for similar transactions.

(2) The presumption may be overcome by the Department if the Department can prove, by clear and convincing evidence, that the method it proposes to use better reflects the location where the customer derives value from the digital product or digital service, and that the corporation had access to, or could have obtained upon reasonable inquiries when required, information at the time it filed its original return that could have been used to apply the Department's method.

Section 4-3.3. Special rules for determining primary use location.

(a) In applying the primary use location method of the hierarchy, a corporation must determine first if the type of receipt must be sourced using the special rules in this section. The specific criteria to apply the special rules may be met whether the digital product or digital service is provided directly by the corporation or on behalf of the corporation. The special rules apply to the receipts described in subdivisions (b) through (e) of this section. If a corporation meets the specific criteria to apply a special rule, but does not have sufficient information to apply the rule, the corporation should use the rules for reasonable approximation in section 4-3.5 or 4-3.6 of this Subpart to apply the special rule. However, if the corporation does not have sufficient information to apply the rules for reasonable approximation to the special rule, then the special rule no longer applies.

(b) Facilitation of in-person services. Services that are rendered to the body of an individual or in the physical presence of an individual and, based on the nature of the services, require the physical presence of an individual, are considered in-person services. Receipts from digital facilitation of the provision of in-person services are apportioned under the special rule in this subdivision.

(1) Digital facilitation of the provision of in-person services includes, but is not limited to, ride-sharing; facilitating ticket sales for live entertainment and athletic performances; and scheduling of in-person training or lessons.

(2) The primary use location of the facilitation of in-person services is presumed to be the location where the in-person service is performed.

(3) In-person services do not include:

(i) services that do not require significant in-person contact in order to perform, but nevertheless may include in-person contact, including, but not limited to, legal, accounting, financial and consulting services; and

(ii) the obligation to perform services or fund the performance of services that may or may not actually occur at an undetermined future date (e.g., facilitation of the purchase of insurance) is not an in-person service, although significant in-person contact may ultimately occur when the service is actually performed.

(c) Services related to tangible personal property. Receipts from digital services that include services related to tangible personal property are sourced under the special rule in this subdivision. This includes commissions and other receipts related to the facilitation of services related to tangible personal property. Receipts from the facilitation of in-person services related to tangible personal property are apportioned under the special rule in this subdivision, rather than the special rule in subdivision (b) of this section for the facilitation of in-person services.

(1) Digital services related to tangible personal property include, but are not limited to: computer troubleshooting, software installation, and facilitation of the sale of tangible personal property.

(2) The primary use location of services related to tangible personal property is presumed to be at the location where the property is received after the service is performed.

(3) The obligation to perform services or fund the performance of services that may or may not actually occur at an undetermined future date (e.g., warranty services, facilitation of the purchase of insurance) is not a service related to tangible personal property, although a service may ultimately be performed on tangible personal property.

(d) Services related to real property. Receipts from digital services related to real property, including commissions and other receipts related to the facilitation of such services, are apportioned under the special rule in this subdivision. Digital services related to real property include services that relate to the improvement or maintenance of the property and services that relate to the title, purchase, sale, rental, appraisal, assessment or basis in the property. Receipts from the facilitation of in-person services related to real property are apportioned under the special rule in this subdivision, rather than the special rule in subdivision (b) of this section for facilitation of in-person services.

(1) Digital services related to real property include, but are not limited to: security services, mortgage servicing, title searches and facilitating property or room rentals.

(2) The primary use location of the digital service related to real property is presumed to be where the real property is located.

(e) Sales of computer software at retail locations.

(1) Receipts from the sale of prewritten, non-customized computer software sold at a physical retail location that sells more than one type of digital product and/or a combination of digital products and other products, where the customer is physically present at the physical retail location at the time they take possession of the software or right to download such software, are apportioned under the special rule in this subdivision.

(2) With respect to receipts from software sold under the conditions of this special rule, the receipt is apportioned to the physical retail location where the software is sold.

Section 4-3.4. General rule for determining primary use location.

Unless the corporation meets the specific criteria and has sufficient information necessary to apply the special rules in section 4-3.3 of this Subpart, determining the primary use location depends on whether the customer is an individual customer or a business customer.

(a) Individual customer. In the case where the corporation's customer is an individual, the primary use location is presumed to be at the customer's billing address. If the corporation does not have the customer's billing address, it must use reasonable approximation.

(b) Business customer.

(1) Except in instances where the business address presumption applies, the primary use location of the corporation's business customer is presumed to be in New York State to the extent the information in the corporation's books and records kept in the ordinary course of business, other than the billing address of the corporation's customer, indicate that the customer's use of the digital product or digital service is in New York State. Where the primary use location is in New York State and at least one other location, the corporation should source the receipts based on the percentage of use by the customer in each primary use location.

(2) The digital product or digital service is primarily used at the location of a third party (i.e., the consumer) only in the case of an intermediary transaction.

(3) If the corporation does not have adequate information to determine where the digital product or digital service is primarily used by the customer, the corporation must use reasonable approximation.

Section 4-3.5. Reasonable approximation based on customer information.

(a) Where a corporation's books and records kept in the ordinary course of business and reasonable inquiries to the customer when required do not provide adequate information to determine the customer's primary use location of a digital product or digital service, then reasonable approximation based on customer information must be used to determine primary use location.

(b) Definition. Reasonable approximation based on customer information is an alternative method used to determine the location or locations at which a customer primarily uses a digital product or digital service in instances in which:

(1) (i) the location or locations where the digital product or digital service is primarily used and/or the percentage of use attributable to each location as a share of the total use cannot be determined, or

(ii) obtaining the primary use location or locations and/or the percentage of use attributable to each location as a share of the total use would require the corporation to expend undue effort and expense beyond the due diligence required by this Subpart; and

(2) the corporation has sufficient information to reasonably approximate the primary use location or locations and/or the percentage of use attributable to each location as a share of the total use.

(c) Application of reasonable approximation based on customer information.

(1) A corporation must use all available information in its books and records, including information obtained upon reasonable inquiries where required, and information publicly available about the location or locations where its actual customers primarily use the digital product or service.

(2) When a corporation is required under this section to reasonably approximate, the corporation must use a method that is intended to approximate where the customer primarily uses the digital product or digital service.

(3) Sourced receipts method. In any instance where a corporation can ascertain the location or locations where a substantial portion of similar receipts are sourced ("sourced receipts method"), but not all of such receipts, and the corporation reasonably believes, based on all available information, that the geographic distribution of the remainder of such receipts is substantially similar to that of the sourced receipts, it may source such receipts in the same proportion as its sourced receipts (sourced receipts method). If the corporation reasonably believes, based on all available information, that the geographic distribution of the remainder of such receipts is different from that of the sourced receipts, and the corporation otherwise lacks

sufficient information to use reasonable approximation either under this section or under section 4-3.6 of this Subpart, it must next attempt to source such receipts to where the digital product or service is received using the where received method (see section 4-3.7 of this Subpart).

(4) In any case in which a corporation uses a method of approximation to apportion its receipts and the commissioner determines that the method of approximation employed by the corporation is not reasonable, the commissioner may substitute a method of approximation that the commissioner determines is appropriate. In this instance, the corporation bears the burden of demonstrating that the method the commissioner prescribes is not reasonable.

(5) In any case in which the commissioner determines that a corporation's method of approximation is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the commissioner may require that the corporation apply its method of approximation in a consistent manner.

(6) In any case in which, after reasonable inquiries are made when required, the corporation does not have sufficient information based on its actual customers to use reasonable approximation, the corporation must next attempt to source such receipts using the rules for reasonable approximation based on general information.

Section 4-3.6. Reasonable approximation based on general information.

(a) Where, after meeting the requirements of due diligence, a corporation lacks sufficient information to use the rules for reasonable approximation based on customer information to determine the customer's primary use location of a digital product or digital service, the corporation must use reasonable approximation based on general information.

(b) Definition. Reasonable approximation based on general information is an alternative method used to determine the location at which a customer primarily uses the digital product or digital service in instances in which a general information measurement, such as the general population, a subset of the general population, or some other general metric, reasonably reflects the geographic distribution of the customer's primary use location.

(c) Application of reasonable approximation based on general information.

(1) A corporation must use statistical information, based on an appropriate metric, that reasonably approximates where the customers primarily use the digital product or digital service.

(2) In any case in which the commissioner determines that the corporation's method of approximation is not reasonable, the commissioner may substitute another general information measurement that the commissioner determines is appropriate. In this instance, the corporation bears the burden of demonstrating that the method the commissioner prescribes is not reasonable.

(3) In any case in which the commissioner determines that the corporation's method of approximation is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the commissioner shall require that the corporation apply its method of approximation in a consistent manner.

(d) In any case in which the corporation does not have sufficient information to reasonably approximate based on general information, the corporation must instead source its receipts to where the digital product or service is received using the where received method (see section 4-3.7 of this Subpart).

Section 4-3.7. Where received method.

(a) If, after exercising due diligence, a corporation cannot determine or reasonably approximate the business customer's primary use location for a digital product or digital service, it should use the where received method and include the receipt in New York receipts when the digital product or digital service is received by the customer within New York State.

(b) The location where the digital product or digital service is received is presumed to be the location at which the contract of sale is managed by the customer. If the corporation cannot determine the location where the contract of sale is managed by the customer, then the location where the digital product is received is presumed to be the billing address of the customer. If, after exercising due diligence, the corporation does not have adequate information to determine where the digital product or digital service is received, the corporation must apply the preceding taxable year method (see section 4-3.9 of this Subpart).

Section 4-3.8. Rules for intermediary transactions.

(a) In the case of intermediary transactions, in applying the primary use location method or the where received method of the hierarchy, the location where the receipt is apportioned is based on the location of the consumers, rather than the business customer. If the corporation uses reasonable approximation based on the sourced receipts method to source its receipts from an intermediary transaction, it may apply that method taking only transactions with that particular business customer into consideration.

(b) In determining the primary use location or where the digital product or service is received for an intermediary transaction, the corporation is required to make inquiries to the business customer, but not to the consumers, regardless of the number of business customers the corporation has or the percentage of receipts the corporation receives from any one business customer, in order to determine the amount of receipts to apportion to New York State based on the location of the consumers. Such inquiries may be fulfilled by the business customer providing information from its books and records to the corporation that demonstrates the relevant information.

(c) If, after exercising due diligence, the corporation has inadequate information to determine the location of the consumers, the corporation should determine the primary use location or the location where the digital product or service is received based on the business customer. If, after exercising due diligence, the corporation has inadequate information to determine either the location of either the consumers or the business customer, the corporation then must use the preceding taxable year method (see section 4-3.9 of this Subpart).

(d) This section does not apply in instances where the business address presumption applies. In instances where the business address presumption applies, the receipts shall be sourced to the billing address of the business customer.

Section 4-3.9. Preceding taxable year method.

If, after exercising due diligence, the corporation does not have adequate information to use the where received method, the corporation must use the preceding taxable year method and apportion the receipt based on how receipts from the sales of that type of digital product or digital service were apportioned in the preceding taxable year. The amount included in New York receipts for the current taxable year is determined by multiplying such receipts by a fraction, the numerator of which is the amount included in New York receipts from the sales of that type of digital product or digital service in the preceding taxable year and the denominator of which is the amount included in everywhere receipts from all such sales of that type of digital product or digital service in the preceding taxable year. This method of the hierarchy cannot apply in a corporation's first taxable year. A corporation that cannot use this method must use the current taxable year method (see section 4-3.10 of this Subpart).

Section 4-3.10. Current taxable year method.

If, after exercising due diligence, the corporation does not have adequate information to use the preceding taxable year method to apportion the receipt, the corporation must use the current taxable year method to apportion the receipt based on the apportionment in the current taxable year of receipts from digital products and digital services that can be apportioned using the primary use location method and the apportionment in the current taxable year of receipts from digital products and digital services using the where received method. The amount included in New York receipts for the current taxable year is determined by multiplying such receipts by a fraction, the numerator of which is the amount included in New York receipts from all digital products and digital services that are apportioned using the primary use location method and the where received method for the current taxable year and the denominator of which is the amount included in everywhere receipts from digital products and digital services that are apportioned using the primary use location method and the where received method for the current taxable year.

Section 4-3.11. Examples.

For purposes of these examples, it can be assumed that the corporation has met all the requirements of due diligence, unless otherwise provided, and that the business address presumption does not apply.

Example 1: Software Corp sells tax preparation software to individuals through its website. When individual customers purchase the software, Software Corp provides the software on a disk shipped to the customer's address. Customer A purchases the software and has it shipped to her billing address in New York State. Software Corp ships a box to Customer A that contains the software on a disk and a user manual explaining how the software works and troubleshooting tips. Computer software by whatever means delivered is considered to be a digital product and therefore receipts from the software are sourced under the rules in this Subpart. Because the product is purchased online, it does not qualify for the special rule for computer software sold at a retail location. Although the sale of the software to Customer A includes the user manual, which is tangible personal property, the user manual is incidental to the actual sale of the software and, therefore, the entire receipt is sourced as a digital product. It is presumed that Customer A primarily uses the software at the billing address, which is located within New York State. Software Corp includes the receipt in New York receipts and everywhere receipts.

Example 2: Develop Corp, a software development corporation located in State A, enters into a contract with a business customer, Purchaser Corp, which is physically located in both New York and State A, to develop custom software to be licensed to Purchaser Corp's business. Develop Corp delivers the software electronically from its office in State A to Purchaser Corp. Purchaser Corp will primarily use the software at the location where its employees utilize the software. As no special rules apply to this receipt, Develop Corp must use its books and records to determine where the software will be primarily used. Based on Develop Corp's records, it is providing Purchaser Corp 100 licenses to use the software at Purchaser Corp's New York State location and 300 licenses to use the software at Purchaser Corp's State A location. As a result, 25% of the receipt (100/400) is included in New York receipts. 100% of such receipt is included in everywhere receipts.

Example 3: Movie Corp sells movies for personal use to individual customers that either may be downloaded from the internet or received via DVD, a physical medium. Customer A purchases a digital download for a movie (a digital product) and pays with a credit card that has a billing address in State A. As no special rules apply, Movie Corp must use its books and records to determine where the movie will be primarily used. The general rule presumes that the digital product is primarily used at Customer A's billing address in State A. Therefore, the receipt from this sale is not included in New York receipts. The receipt from this sale is included in everywhere receipts.

Customer B purchases a DVD and requests it be shipped to an address in New York State. A DVD is not one of the methods of delivery specifically provided for in section 210-A(4), so the movie on a DVD is not considered a digital product. Therefore, Video Corp's receipt from Customer B is a receipt from the sale of tangible personal property and, as such, should be sourced pursuant to the rules for receipts from the sale of tangible personal property.

Example 4: Cable TV Corp, a corporation that is located outside of New York State, sells monthly subscriptions for cable television to individual customers in New York State and other states. Cable TV Corp provides cable television through cables that are installed at the location of each customer's television that will be receiving content. Cable TV Corp also has a billing address on file for each of its customers. While most of Cable TV Corp's customers have cable installed at their billing address, a number of Cable TV Corp's customers have cable installed at an address other than their billing address. The cable television subscription sold by Cable TV Corp is a digital product. As no special rules apply, the general rule presumes that the digital product is primarily used at an individual customer's billing address. However, either Cable TV Corp or the commissioner can overcome this presumption through clear and convincing evidence as to where the cable is installed, which better reflects where the digital product is primarily used.

Example 5: Security Corp sells cyber security software to 200 business customers, including a Federal agency XYZ. XYZ has its headquarters located in Washington D.C., and 12 regional offices relatively similar in size located in 12 different states, one of which is New York State. Security Corp generally conducts business with a person at XYZ's headquarters, but Security Corp provides cyber security software to XYZ's entire network, which is utilized by XYZ employees at all of the 13 locations. As no special rules apply, Security Corp must use its books and records to determine the primary use location of the software. After making reasonable inquiries to Federal agency XYZ, it does not have more detailed information, such as the number of computers or the distribution of licenses among the locations. Security Corp uses reasonable approximation based on customer information to include 1/13 of the receipts from its cyber security software in New York receipts. Security Corp incudes 100% of such receipts in everywhere receipts.

Example 6: Office Corp, an office supply retailer, has physical stores located in New York and other states. Office Corp sells a variety of office supplies, including a multitude of prewritten computer software programs. When customers purchase items from Office Corp, they take possession of the purchased items immediately at the retail location. In the case of software purchases, customers can either purchase the software on a disk or can purchase a code to download the computer software at a later time. Office Corp's sale of prewritten software qualifies for the special rule for sales of computer software at retail locations. Therefore, Office Corp includes the receipts from the sale of the software in New York receipts to the extent the sales are made at the retail stores located in New York State. Office Corp includes 100% of such receipts in everywhere receipts.

Example 7: Music Corp provides music streaming services to individual customers for a monthly subscription fee. Customers can access Music Corp's service through an application on their mobile devices or by visiting Music Corp's website. Once in their account, individuals can listen to music on a variety of channels and indicate whether they like certain songs. Music Corp uses an algorithm to recommend songs to customers based on songs they have previously indicated that they like. As this service is entirely automated, it meets the definition of a digital service and therefore is sourced under the rules in this Subpart. As no special rules apply, Music Corp must use the general rule to determine the primary use location of its streaming services. Therefore, the primary use location is presumed to be at the billing addresses of its customers. To the extent that customers have billing addresses located in New York State, receipts from such customers are included in New York receipts. Music Corp must include 100% of its receipts from customers in everywhere receipts.

Example 8: Webapp located in State A sells subscription plans to its web-based video/voice conferencing service. This service allows its customers to hold meetings remotely using video and voice transmitted through a web browser. Meetings can be joined by attendees in multiple locations.

When a customer purchases a subscription to Webapp's service, the customer may log into its online account to use the service at any location where it can access a web browser. Customers also can use this service to conduct meetings with parties who are not subscribers simply by sending the attendee an invitation to the meeting; this can be done from any location as no specialized software is required. Webapp's service is provided entirely online, without any human intervention by Webapp. Therefore, it is considered a digital service.

Development Studio subscribes to Webapp's digital service and uses WebApp's service to hold numerous meetings with its customers and employees that access the service throughout the country.

As no special rules apply, Webapp must use its books and records to determine the primary use location of its digital service. It determines that Development Studio's subscription for Webapp's digital service is used by employees of Development Studio's New York State office. Webapp includes 100% of this receipt in New York receipts and in everywhere receipts.

Example 9: Website Corp designs custom software and Web applications for use by various businesses. Travel Corp, located in State A, operates hotels in New York and other states and rents rooms to its customers. Travel Corp wants to make the ability to book a room accessible to its customers via the internet, so Travel Corp contracts with Website Corp to design a custom website using Travel Corp's name and methodology, which will allow Travel Corp's customers to book hotel rooms online for a fee. Under the contract, Travel Corp will pay Website Corp a flat annual fee to maintain and host the website. Website Corp is providing a digital service related to the facilitation of a room rental, which is a digital service related to real property. As Website Corp receives a flat annual fee, it must use reasonable approximation based on customer information to apportion the receipt under the special rule for digital services related to real property to the various real property locations. Therefore, Website Corp multiplies the receipt it receives from Travel Corp by a fraction, the numerator of which is the number of rooms rented in New York State via the website and the denominator of which is the number of rooms rented everywhere via the website. Website Corp includes 100% of such receipt in everywhere receipts.

Example 10: Room Corp operates a website that acts as a digital marketplace to facilitate the short-term rental of apartments and houses between individual homeowners and individuals looking for short-term rentals. Individual homeowners are able to list their homes on Room Corp's website and will pay Room Corp a small commission if someone books their property via Room Corp's website. In return Room Corp provides a variety of services to the homeowners automatically via their website, such as payment processing, liability insurance, and ID verification of renters. The digital service Room Corp is providing is related to the facilitation of a real property rental that is a digital service related to real property. Therefore, Room Corp must include the receipts from facilitating real property rentals in New York receipts to the extent the real property is located in New York State. Room Corp must include 100% of the receipts in everywhere receipts.

Example 11: Ticket Corp operates a website that allows individuals to purchase tickets to various live events. Sports Corp enters into a contract with Ticket Corp to list tickets for its sporting events on Ticket Corp's website and Ticket Corp retains a small commission for every ticket that is purchased through its website under this contract. Ticket Corp's fully automated website is providing the digital service of facilitating the purchase of an in-person service because the ticket sales are for a live sporting event and a live sporting event meets the definition of in-person service. Therefore, Ticket Corp should source its receipts from the commissions it receives for facilitating in-person services to the location of the venue hosting the event.

Example 12: Game Co, an online gaming company based in New York State, sells monthly subscriptions to individual customers. The majority of Game Co's customers do not pay with a credit card. They instead use an online payment transfer service to pay their monthly subscription fee and, therefore, do not provide Game Co with a billing address. To subscribe, individuals need to provide only a first name, screen name, password, and online payment information. As such, Game Co does not have enough information to determine the primary use location and, because Game

Co's customers are individuals, Game Co does not need to make reasonable inquiries as to individuals' billing addresses. Although Game Co does not have address information for most of its subscribers, it can use IP address information to determine where the individual customers log into the website. Therefore, Game Co can use this information to reasonably approximate based on customer information the primary use location of its game and must include receipts from subscribers logging into its game from IP addresses located within New York State in New York receipts. Game Co includes 100% of such receipts in everywhere receipts.

Example 13: Marketplace Corp hosts a website that facilitates the sale of tangible personal property by unrelated individuals. Marketplace Corp does not take title to any of the tangible property posted on its website. Item sellers can create accounts on Marketplace Corp's website and list property for sale. Individual buyers can visit Marketplace Corp's website to view pages containing tangible property that item sellers are offering for sale. Marketplace Corp makes these pages readily available for consumer access at the request of the item sellers. Marketplace Corp receives two primary revenue streams from the item sellers: (1) a small fee for listing tangible property on Marketplace Corp's website, regardless of whether it sells; and (2) a small commission for every sale of tangible property made via Marketplace Corp's website. Both revenue streams are services related to tangible personal property and, therefore, the special rule applies.

Marketplace Corp receives the first revenue stream directly from the item seller when the item seller lists the tangible property on Marketplace Corp's website. In fact, Marketplace Corp receives this receipt regardless of whether the property is sold or the seller removes it from the website without a sale. Therefore, although it is a service related to tangible personal property, Marketplace Corp does not have information on where the tangible personal property is received by a buyer because, at the time the fee is received by Marketplace Corp, the property has not yet been and, in fact, may never be, sold. Furthermore, the service Marketplace Corp provided to generate this receipt is complete at the time the tangible property is listed and there is not yet a consumer in the transaction, so this receipt is not generated in an intermediary transaction. Receipts from listing fees are included in New York receipts using the general rule based on the primary use location of the item seller. Marketplace Corp includes all receipts from listing fees generated via its website in everywhere receipts.

In contrast, Marketplace Corp is receiving the second revenue stream from item sellers at the time the tangible personal property is sold and, as such, Marketplace Corp has information on where the tangible personal property will be delivered to the consumer.

Marketplace Corp includes receipts from its second revenue stream for commissions in New York receipts to the extent the commission was received for facilitating the sale of tangible personal property delivered into New York State. Marketplace Corp includes all receipts from commissions received via its website in everywhere receipts.

Example 14: Software Corp sells case management software to 200 large corporations. Business Corp purchases software from Software Corp to be installed on laptops used by Business Corp's employees. The contract between Business Corp and Software Corp is managed at Business Corp's office in State A, but Business Corp's employees spend the majority of their time working throughout the country, including in New York. As no special rules apply, Software Corp must use its books and records to determine where the software will be primarily used. Software Corp's books and records do not provide any information on the amount of time that Business Corp's employees spend working in other states to determine where the software is primarily used. Because Software Corp only has 200 customers, it must ask Business Corp where its employees utilize the software. Business Corp is not able to provide such information, nor would population information be relevant to software used by Business Corp's employees in internal operations. Therefore, Software Corp does not have adequate information to determine the primary use locations or reasonably approximate such locations. It must source the receipt to where the digital product is received, which is presumed to be at the location where the contract is managed. Business Corp manages the contract with Software Corp at its office in State A; therefore, the receipt is not included in New York receipts. Software Corp must include 100% of the receipt in everywhere receipts.

Example 15: Sales Corp provides only one type of digital product to approximately 200 business customers. In tax year 2021, all of its receipts were sourced under this Subpart and, as a result, 45% of Sales Corp's receipts were included in New York receipts. In tax year 2022, Sales Corp continues to provide only one type of digital product to its customers. At the end of tax year 2022, Sales Corp's computer system crashes and it is unable to recover information it had obtained on where the digital product was primarily used. Upon reasonable inquiries to its known customers, Sales Corp still cannot obtain information on where the digital products were primarily used or determine where they were received. Therefore, under the preceding taxable year method, Sales Corp includes 45% of its 2022 receipts in New York receipts. Sales Corp includes 100% of receipts from this type of digital product in everywhere receipts.

Example 16: Taxpayer A has $10,000 in receipts from a new type of digital product. After exercising due diligence, Taxpayer A cannot determine where the digital product is primarily used or where it was received. Further, because this is a new type of digital product, it cannot use the preceding taxable year method. Therefore, under the current taxable year method, Taxpayer A must determine the portion of the $10,000 to include in New York receipts based on the apportionment of the receipts for all its other digital products and digital services using the primary use location method and the apportionment of the receipts for all its other digital products and digital services using the where received method. In the current taxable year, Taxpayer A has $65,000 in digital products receipts and $85,000 in digital services receipts sourced using the primary use location method and the where received method, of which $75,000 (or 50 percent) are New York receipts. Therefore, Taxpayer A includes 50% of the $10,000, or $5,000, of receipts from the new type of digital product in New York receipts. Taxpayer A includes 100% of receipts from the new type of digital product in everywhere receipts.

Taxpayer B also has $10,000 in receipts from a new type of digital product that, after exercising due diligence, it cannot source using either the primary use method or the where received method. However, unlike Taxpayer A, Taxpayer B has been able to source all its other receipts from digital products and digital services using the primary use location method and has determined that 40 percent of all those other receipts are New York receipts. Therefore, under the current taxable year method, $4000, or 40%, of the receipts from this new digital product are included in Taxpayer B's New York receipts. Taxpayer B includes 100% of the receipts from the new type of digital product in everywhere receipts.

Example 17: App Design Corp (the taxpayer), a corporation located in State B, provides mobile phone application ("app") design services to its customer, Bank Corp (the business customer), which has branches located in New York and other states. Bank Corp contracts with App Design Corp to have App Design Corp design an app that will be readily available for free download by any of Bank Corp's account holders (the consumers) via a digital marketplace. App Design Corp also will provide periodic updates to ensure the app runs smoothly and the information transmitted through the app is secure. App Design Corp is receiving receipts from Bank Corp in an intermediary transaction because App Design Corp is making its digital product readily available to consumers at the request of Bank Corp, and App Design Corp maintains involvement with the app after consumers download it. As no special rule for determining primary use location applies, App Corp must determine where Bank Corp primarily uses the digital service, which is at the location where the consumers download and use the app.

App Design Corp cannot determine information on New York account holders who download the app based on its own books and records because it does not have information on either the primary use location or where the app is received by the consumers and, therefore, App Design Corp must make reasonable inquiries to Bank Corp for location statistics on account holders who download the app. Bank Corp cannot provide

App Design Corp with any information after reasonable inquiries, so App Design Corp should look to publicly available information, such as the number of Bank Corp's bank branches located within and without New York State, and use the percentage of branches in New York to reasonably approximate based on customer information the primary use location of the app.

Example 18: Website Design Corp (the taxpayer) designs and maintains websites for unrelated parties. Database Corp (the business customer) develops an internet-based information database and enters into a contract with Website Design Corp to create a website and sell access to the database to individual customers (the consumers) for a small monthly fee. The contract specifies that Website Design Corp will retain a commission each month from every consumer that pays for access to the database and remit the remainder to Database Corp. Website Design Corp actively maintains and updates the website where it makes the database readily available on the internet for access by consumers at the request of Database Corp. Therefore, Website Design Corp must apportion its receipts from commissions based on the location of the consumers rather than the location of Database Corp. As no special rule for determining primary use location applies, Website Design Corp must use the general rule to determine the primary use location of its digital service. As the consumers are individuals, Website Design Corp presumes the digital product will be primarily used at the billing addresses of the consumers. To the extent that consumers have billing addresses located in New York State, receipts from such customers are included in New York receipts. Website Design Corp must include 100% of its receipts in everywhere receipts.

Example 19: Research Corp, a corporation located in State D, compiles a digital collection of treatises on a variety of subjects and sells a copy of its collection to University A, located in New York. However, Research Corp does not provide continuing support after the sale and, if Research Corp were to update any information, it would sell this as a separate product. Therefore, after Research Corp delivers the copy of the digital collection to University A, it maintains no interaction with the product and provides no further services in connection with the receipt. For this reason, this is not considered an intermediary transaction. As no special rules apply, Research Corp must use its books and records to determine if it can ascertain the primary use location of the digital collection. Research Corp's books and records indicate that University A will use the digital collection at its location in New York State; therefore, the entire receipt is included in both New York receipts and everywhere receipts.

Example 20: Images Corp, a corporation located in State E, maintains an online database of digital images that it licenses to customers to use in a variety of publications. Receipts from the license to use the digital database are apportioned under these rules. Newspaper Corp, located in New York State, enters into a contract with Images Corp whereby, in exchange for a monthly flat fee, Newspaper Corp receives a license to use an unlimited number of images from Image Corp's online database in Newspaper Corp's print and digital publications that will be viewed by Newspaper Corp's subscribers worldwide. Images Corp's database is only accessible by Newspaper Corp directly and not by its subscribers; therefore, this is not an intermediary transaction. Images Corp must apportion the receipt it receives from Newspaper Corp under the general rule to the primary use location of Newspaper Corp. Newspaper Corp uses the images it selects from the online database when composing articles; therefore, Newspaper Corp's primary use location is where this editorial control is exercised. Because Newspaper Corp makes editorial decisions at its office located in New York State, the entire receipt is included in both New York receipts and everywhere receipts.

Example 21: Exchange Corp, a security exchange located in New York, has contracts with 300 brokerage firms that grant digital access to its exchange. Under the terms of the contract, employees of the firms are able to digitally access the exchange for purposes of purchasing or selling shares of stock on the exchange for a fee. Exchange Corp's contract with Trader Corp, one such brokerage firm, allows Trader Corp's 120 traders based in New York and 80 traders based in State A to buy and sell shares of stock on the exchange on behalf of clients. As Exchange Corp is not a registered securities broker or dealer, the fees it earns from allowing customers to trade on the exchange cannot be apportioned under the rules in section 210-A(5)(b). Furthermore, because the fee is for granting digital access to the exchange, the receipt is apportioned under the rules in this Subpart. This is not an intermediary transaction because Exchange Corp is not providing access to the exchange directly to consumers at Trader Corp's direction. Only Trader Corp's own employees have digital access to the exchange. For this reason, the receipt must be apportioned to the location where Trader Corp's traders primarily utilize the digital product. Exchange Corp does not have adequate information to determine the exact location where the traders primarily use this digital product and, since Exchange Corp has more than 250 business customers that pay fees for substantially similar digital products, and no more than 5% of its receipts are from Trader Corp, Exchange Corp is not required to make reasonable inquiries to Trader Corp. Therefore, Exchange Corp must use its books and records to reasonably approximate where Trader Corp's traders primarily use the exchange. Since 60% of Trader Corp's traders are based in New York State, 60% of the receipts Exchange Corp receives from Trader Corp are included in New York receipts. Exchange Corp includes 100% of the receipts in everywhere receipts.

Example 22: Channel Corp operates a digital platform, available through Channel Corp's website or as a downloadable application, for individual subscribers to access Channel Corp's content for a monthly fee. Subscribers can subscribe either directly with Channel Corp. or through another entity.

For revenue earned directly by Channel Corp from its subscribers, it is presumed that an individual subscriber primarily accesses Channel Corp's digital content at its billing address. Therefore, receipts earned by subscribers with billing addresses in New York State are included in New York receipts. Channel Corp includes 100% of the receipts it earned from these subscribers in everywhere receipts.

Platform Corp (the business customer) operates a digital application store where individuals can download and purchase a subscription to various digital applications. Under the agreement between Channel Corp and Platform Corp, Platform Corp can sell subscriptions to Channel Corp's service in its marketplace for a fee set by Channel Corp in exchange for a commission. In addition, the agreement requires that Platform Corp receive all payments from individual subscribers for access to Channel Corp's service and must remit the fees, after retaining its commission, to Channel Corp.

While subscribers download Channel Corp's digital application from Platform Corp's platform, the subscribers access Channel Corp's service directly through its digital application to view content. Channel Corp actively maintains and updates the digital application, which is readily available for access by subscribers who pay for the service through Platform Corp. Platform Corp forwards these receipts, minus its commission, to Channel Corp. Therefore, these are receipts from an intermediary transaction and Channel Corp must apportion them based on the location of the subscribers (the consumers) rather than the location of Platform Corp. Channel Corp's books and records do not have information on the consumer's billing address. Therefore, Channel Corp must make reasonable inquiries to Platform Corp to determine where the subscribers access Channel Corp's digital application. After making such inquiries, Channel Corp still does not know the subscriber location so it reasonably approximates that location using third-party data.

Example 23: Channel Corp operates a digital platform, available through Channel Corp's website or as a downloadable application of digital content that can be accessed by users. Phone Corp sells phone subscription plans, some of which bundle access to various digital platforms of movies and TV shows operated by different providers as part of the package. Channel Corp enters into an agreement with Phone Corp (the business customer) that allows Phone Corp to bundle access to Channel Corp's digital platform in exchange for a fee set by Channel Corp. Under the agreement, Phone Corp may decide what fee to charge (or even not charge) its customers for the bundled service. After individual consumers purchase a phone plan that provides access to Channel Corp's digital content, the consumers access Channel Corp's digital platform through its website or by downloading Channel Corp's application.

Channel Corp actively maintains and updates the application, which is readily available for access by subscribers who pay for service through Phone Corp. Therefore, these are receipts from intermediary transactions and Channel Corp must apportion based on the location of the Phone Corp's users rather than the location of Phone Corp. It is presumed that the users primarily access the digital content at their billing address. Channel Corp's books and records do not contain the billing address of Phone Corp's users and, upon inquiries, Phone Corp did not provide this information. However, if Channel Corp collects location information when subscribers create an account to access Channel Corp's service, then Channel Corp may use such information to reasonably approximate use. To the extent the location is in New York State, the receipts are included in New York receipts. All receipts that Channel Corp receives from Phone Corp are included in everywhere receipts.

SUBPART 4-4

RECEIPTS FROM OTHER SERVICES AND OTHER BUSINESS ACTIVITIES

Section 4-4.1. Definitions. (Tax Law, section 210-A(10))

For purposes of this Subpart, the following terms shall have the meanings indicated below.

(a) Consumer means an individual or entity whose location is where the business customer derives value from the service or other business activity provided by the corporation.

(b) Customer means the party who enters into a transaction with the corporation for the purchase of a service or other business activity from the corporation. A customer can be an individual customer, a business customer or a passive investment customer. In any instance in which the corporation, acting in good faith, cannot reasonably determine whether the customer is an individual customer, the corporation must treat the customer as a business customer.

(1) Individual customer means a customer who enters into a transaction with the corporation for the purchase of a service or other business activity from the corporation for personal use, and not for a business purpose.

(2) Business customer means a customer that is not an individual customer or passive investment customer, including, but not limited to, a sole proprietor, S corporation, limited liability company, limited partnership, limited liability partnership, general partnership, corporation, non-profit organization, trust, the U.S. Government, any foreign, state, or local government, or any agency or instrumentality of such government.

(3) Passive investment customer means a customer that is an entity, such as a company or corporation (other than a publicly traded corporation), limited partnership, general partnership, limited liability company, limited liability partnership, or trust, that pools capital from passive investors for the purpose of trading or making investments in stocks, bonds, securities, commodities, loans, or other financial assets, but that does not otherwise conduct a trade or business. Passive investment customer does not include an investment company as defined in section 210-A(5)(d).

(c) Intermediary transaction means a transaction where the business customer derives value from a service or other business activity at the location of the consumer rather than the location of the business customer itself. Such transaction is apportioned using the rules for intermediary transactions in section 4-4.8 of this Subpart. Intermediary transactions do not include services or activities apportioned under the special rules in section 4-4.3 of this Subpart.

(1) To be considered an intermediary transaction, the service or other business activity, pursuant to the explicit or implicit terms of a contract or other agreement between the corporation and business customer, must meet the requirements of subparagraphs (i) or (ii) of this paragraph.

(i) it must be provided by the corporation, at the direction of the business customer, directly to the consumer;

(ii) it must be sold by the corporation to the business customer, who then passes on the service or other business activity to the consumer, provided the corporation must be obligated under the agreement to perform a substantial portion of the service or other business activity after the property that the service or other business activity relates to is delivered by the business customer to the consumer.

(d) Location where a contract is managed by the customer means the primary location at which an employee or other representative of a customer serves as the person with responsibility for monitoring or managing the day-to-day execution of the contract of sale with the corporation.

Section 4-4.2. General Principles.

(a) Receipts and net gains (not less than zero) from services and other business activities not otherwise enumerated in section 210-A, such as net gains (not less than zero) from the sale of intangible property, as well as receipts from the compensation for certain services, such as commissions, finder's fees, loan servicing fees, and fees for professional services are included in New York receipts if the location where the customers derives value from the service or other business activity, according to the hierarchy of methods set forth in section 210-A and paragraphs (1) through (4) of subdivision (b) of this section, is in New York State. The corporation must exercise due diligence under each method described in subdivision (b) of this section before rejecting it and proceeding to the next method in the hierarchy, and must base its determination on information known to the corporation or information that would be known to the corporation upon reasonable inquiry. 100% of such receipts are included in everywhere receipts.

(b) The hierarchy of methods referenced in paragraphs (1) through (4) of this subdivision used to apportion the receipt from the service or other business activity must be applied sequentially. A corporation may abandon a method only if, after exercising due diligence, it lacks sufficient information to apply that method.

(1) A corporation must apportion the receipt to the location where the benefit of the service or other business activity is received ("where benefit received method"; see sections 4-4.3 through 4-4.6 of this Subpart).

(2) A corporation must apportion the receipt to the delivery destination ("delivery destination method"; see section 4-4.7 of this Subpart).

(3) A corporation must apportion the receipt in the same way as those receipts from that type of other business activity or service were apportioned in the preceding taxable year ("preceding taxable year method"; see section 4-4.9 of this Subpart).

(4) A corporation must apportion the receipts from that service or other business activity to New York in the same way as its receipts from other services or business activities in the current taxable year are apportioned using the where benefit received method and delivery destination method referenced in paragraphs (1) and (2) of this subdivision ("current taxable year method"; see section 4-4.10 of this Subpart).

(c) Corporations should refer first to the special rules for determining where the benefit is received in section 4-4.3 of this Subpart prior to determining if a transaction qualifies as an intermediary transaction. Unless a special rule in section 4-4.3 of this Subpart applies, a corporation should then determine if the rules for intermediary transactions in section 4-4.8 of this Subpart apply before applying the other rules in this Subpart.

(d) In exercising due diligence, the following standards apply:

(1) (i) In applying the rules in this Subpart, if the required information is not readily available to the corporation, the corporation must make reasonable inquiries to a business customer to determine the information required by these rules.

(ii) If the corporation has more than 250 business customers purchasing substantially similar services or activities as purchased by the particular customer that would be apportioned under this Subpart and no more than 5% of receipts from such services or activities are from that particular customer, then the benefit from such service or activity is presumed to be received at the customer's billing address ("business address presumption").

(2) Corporations must document the steps taken before abandoning each method of the hierarchy or step within a level of the hierarchy, such as moving from a special rule for determining where the benefit is received to the general rule for determining where the benefit is received, including documentation of reasonable inquiries made.

(3) When the commissioner determines that the corporation had access to, or could have obtained upon reasonable inquiries when required, information at the time it filed its original return to apply a method of apportionment that comes earlier in the hierarchy than the method utilized by the corporation, the commissioner may require the corporation to use such method.

(e) If there is a presumption in applying a method in the hierarchy, the presumption may be overcome by either the corporation or the Department.

(1) The presumption may be overcome by the corporation if the corporation can prove, by clear and convincing evidence, that the method it proposes to use better reflects the location where the customer derives value from the service or other business activity. In such a case, the location to which the receipts from the service or other business activity will be apportioned will be based on the evidence accumulated by the corporation. If the corporation believes it has overcome the presumption and uses an alternative method, upon audit the Department may examine the corporation's alternative method to determine if the presumption has been overcome and, if so, whether it was applied in a consistent manner for similar transactions.

(2) The presumption may be overcome by the Department if the Department can prove, by clear and convincing evidence, that the method it proposes to use better reflects the location where the customer derives

value from the service or other business activity, and that the corporation had access to, or could have obtained upon reasonable inquiries when required, information at the time it filed its original return that could have been used to apply the Department's method.

Section 4-4.3. Special rules for determining where the benefit is received.

(a) In determining where the benefit is received, a corporation must determine first if the type of receipt must be apportioned using the special rules in this section. The specific criteria may be met whether the service or other business activity is provided directly by the corporation or on behalf of the corporation. The special rules apply to the receipts described in subdivisions (b) through (e) of this section. If a corporation meets the specific criteria to apply a special rule, but does not have sufficient information to apply the rule, the corporation should use the rules for reasonable approximation in section 4-4.5 or 4-4.6 of this Subpart to apply the special rule. However, if the corporation does not have sufficient information to apply the rules for reasonable approximation to the special rule, then the special rule no longer applies.

(b) In-Person Services. Services rendered to the body of an individual or in the physical presence of an individual and, based on the nature of the service, requires the physical presence of an individual, are considered in-person services. Receipts from in-person services are apportioned under the rule in this subdivision. In addition, receipts from the facilitation of in-person services are apportioned under the special rule in this subdivision.

(1) In-person services include, but are not limited to, medical and dental services, including medical testing and x-rays; childcare; hair cutting and salon services; live entertainment and athletic performances; modeling; and in-person training or lessons.

(2) In-person services do not include:

(i) services that do not require significant in-person contact in order to perform, but nevertheless may include in-person contact, including, but not limited to, legal, accounting, or financial and consulting services; and

(ii) the obligation to perform services or fund the performance of services that may or may not actually occur at an undetermined future date (e.g. facilitation of the purchase of insurance), although significant in person contact may ultimately occur when the service is actually performed.

(3) The benefit of in-person services is presumed to be received at the location where the in-person service is performed.

(c) Services related to tangible personal property. Receipts from services related to tangible personal property, including the facilitation of services related to tangible personal property, are apportioned under the rule in this subdivision. Receipts from in-person services related to tangible personal property are apportioned under the rule in this subdivision, rather than the special rule for in-person services.

(1) Services related to tangible personal property include, but are not limited to, repair services; dry cleaning; preparation and service of food or drink; towing; fulfillment; and equipment upgrades.

(2) The obligation to perform services or fund the performance of services that may or may not actually occur at an undetermined future date (e.g., warranty services, facilitation of the purchase of insurance) is not a service related to tangible personal property, although a service may ultimately be performed on tangible personal property.

(3) The benefit of services related to tangible personal property is presumed to be received at the location where the property is received after the service is performed.

(d) Services related to real property. Receipts from services related to real property, including the facilitation of such services, are apportioned under the rule in this subdivision. Services related to real property include services that relate to the improvement or maintenance of the property and services that relate to the title, purchase, sale, rental, appraisal, assessment or basis in the property. Receipts from in-person services related to real property are apportioned under the rule in this subdivision, rather than the special rule for in-person services.

(1) Services related to real property include, but are not limited to, architectural services, engineering services, landscaping, property maintenance, construction, demolition, security, land surveying, mortgage servicing, and real estate commissions.

(2) The benefit of a service related to real property is presumed to be received where the real property is located.

(e) Sales of intangible property. (1) With respect to the net gains (not less than zero) from the sale of intangible property not otherwise addressed in subdivisions (1) through (9) of section 210-A, the benefit of such sale is presumed to be received at the location where the value of the intangible was accumulated.

(2) Intangible property includes, but is not limited to, goodwill, copyrights, patents, trademarks, trade names, brand names, licenses, and trade secrets.

(3) The location where the value of goodwill is accumulated is determined using a three year average of the business apportionment factor (BAF) or other percentage used to apportion or allocate income to New York State of the entity that is sold, unless the facts and circumstances indicate another period of time is a better measure of where the value is accumulated.

Section 4-4.4. General rule for determining where the benefit is received.

Unless the corporation meets the specific criteria and has sufficient information necessary to apply the special rules in section 4-4.3 of this Subpart, determining where the benefit is received depends on whether the customer is an individual customer, a business customer or a passive investment customer.

(a) Individual customer. In the case where the corporation's customer is an individual, the benefit of the service or other business activity is presumed to be received at the customer's billing address. If the corporation does not have the customer's billing address, it must use reasonable approximation.

(b) Business customer.

(1) Except in instances where the business address presumption applies, the benefit of the service or other business activity is presumed to be received in New York, without regard to the billing address of the corporation's customer, if the customer receives the benefit of the service or other business activity in New York.

(2) The benefit can be received at the location of a third party (e.g., the consumer) only in the case of an intermediary transaction. A third party does not include the customer's employees, agents, officers, partners (in the case of a partnership), managing members (in the case of a limited liability company), or shareholders (in the case of a New York S corporation).

(3) Benefit received both within and without New York State. Where the customer receives the benefit in New York and at least one other location, the corporation should apportion the receipts based on the percentage of value derived by the customer in each location where benefit is received.

(c) Passive investment customer.

(1) Receipts for management, distribution, and administration services provided to a passive investment customer are apportioned under the rules provided for in this subdivision unless a special rule for determining where the benefit is received is applicable. Such receipts include amounts received directly from a passive investment customer as well as amounts received from the investors in such passive investment customer, in their capacity as such.

(2)(i) The benefit of management, distribution, and administration services provided to a passive investment customer is presumed to be received at the location of the investors in such passive investment customer unless the investor is holding the interest in the passive investment customer for a beneficial owner. If the investor is holding the interest in the passive investment customer for a beneficial owner, the benefit of such services is presumed to be received at the location of the beneficial owner.

(ii) The location of an individual investor or beneficial owner is its billing address. The location of an investor or beneficial owner that is not an individual is the investor's or beneficial owner's principal place of business. Provided, if the corporation does not know the principal place of business, the location is the investor or beneficial owner's billing address.

(iii) Management, distribution and administration services provided to a passive investment customer are apportioned to this state in proportion to the average value of the interests in the passive investment customer held by the passive investment customer's investors and beneficial owners located in this state. To calculate the average value of the interests in the passive investment customer, add the percentage of the value of the interests held by investors and beneficial owners located in this state at the beginning of the taxable year to the percentage of the value of the interests held by investors and beneficial owners located in this state at the end of the taxable year, and divide by two.

(3) If the corporation cannot determine the location in paragraph (2) of this subdivision, the benefit of management, distribution, and administration services provided to a passive investment customer is presumed to be received at the location where the contract for such services is managed by the passive investment customer.

(4) For purposes of this subdivision, the following terms shall have the following meaning:

(i) "Administration services" includes clerical, accounting, bookkeeping, data processing, internal auditing, legal and tax services performed for a passive investment customer, but only if the provider of such service or services during the taxable year in which such service or services are sold also sells management or distribution services, as defined in this paragraph, to such passive investment customer.

(ii) "Beneficial owners" means any person who made an independent decision to invest. For purposes of this definition, "independent decision to invest" means a decision to invest made by a person who was not required or committed to do so by contract, agreement, or any other arrangement, understanding, or relationship except pursuant to law. The following are not beneficial owners for purposes of this definition:

(a) Master funds, feeder funds, and similar entities that pool investors' assets. Master fund entities and feeder fund entities do not make independent decisions to invest because they are required by agreement with their limited partners, feeder funds, or other investors to invest.

(b) A shareholder of a publicly-traded corporation whose board decides to invest the corporation's excess capital into an investment vehicle. The corporation, not the shareholder, makes the independent decision to invest in an investment vehicle.

(c) A participant in a defined benefit plan. Because participants have no control over whether to invest in the defined benefit plan they are not beneficial owners.

(iii) "Distribution services" means the services of advertising, servicing investor accounts (including redemptions), and marketing or selling interests in a passive investment customer.

(iv) "Management services" means the rendering of investment advice to a passive investment customer, making determinations as to when sales and purchases of securities are to be made on behalf of a passive investment company, or the selling or purchasing of securities constituting assets of a passive investment customer, and related activities, but only where such activity or activities are performed pursuant to a contract with the passive investment customer.

Section 4-4.5. Reasonable approximation based on customer information.

(a) Where a corporation's books and records kept in the ordinary course of business and reasonable inquiries to the customer when required do not provide adequate information for apportionment of a receipt from a service or other business activity, then reasonable approximation must be used to determine where the benefit is received.

(b) Definition. Reasonable approximation based on customer information is an alternative method used to determine the location or locations at which a customer receives the benefit of a service or other business activity in instances in which:

(1)(i) the location or locations where the benefit is received and/or the percentage of benefit actually received in each location as a share of the total benefit received cannot be determined, or

(ii) obtaining the location or locations where the benefit is received and/or the percentage of benefit received in each location as a share of the total benefit received would require the corporation to expend undue effort and expense beyond the due diligence required by this Subpart; and

(2) the corporation has sufficient information to reasonably approximate the location or locations where the benefit is received and/or the percentage of benefit received in each location as a share of the total benefit received.

(c) Application of reasonable approximation based on customer information.

(1) A corporation must use all available information in its books and records, including information obtained upon reasonable inquiries where required, and information publicly available about the location or locations where its actual customers receive the benefit of the service or other business activity.

(2) When a corporation is required under this section to reasonably approximate, the corporation must use a method that is intended to approximate where the customer receives the benefit from the service or other business activity.

(3) Sourced receipts method. In any instance where a corporation can ascertain the location or locations where a substantial portion of similar receipts are sourced ("sourced receipts"), but not all of such receipts, and the corporation reasonably believes, based on all available information, that the geographic distribution of the

remainder of such receipts is substantially similar to that of the sourced receipts, it may source such receipts in the same proportion as its sourced receipts ("the sourced receipts method"). If the corporation reasonably believes, based on all available information, that the geographic distribution of the remainder of such receipts is different from that of the sourced receipts, and the corporation otherwise lacks sufficient information to use reasonable approximation either under this section or section 4-4.6 of this Subpart, it must next attempt to apportion such receipts using the delivery destination method (see section 4-4.7 of this Subpart).

(4) In any case in which a corporation uses a method of approximation to apportion its receipts and the commissioner determines that the method of approximation employed by the corporation is not reasonable, the commissioner may substitute a method of approximation that the commissioner determines is appropriate. In this instance, the corporation bears the burden of demonstrating that the method the commissioner prescribes is not reasonable.

(5) In any case in which the commissioner determines that a corporation's method of approximation is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the commissioner may require that the corporation apply its method of approximation in a consistent manner.

(6) In any case in which, after reasonable inquiries are made when required, the corporation does not have sufficient information based on its actual customers to use reasonable approximation, the taxpayer must next attempt to determine where the benefit is received using the rules for reasonable approximation based on general information.

Section 4-4.6. Reasonable approximation based on general information.

(a) Where, after meeting the requirements of due diligence, a corporation lacks sufficient information to use the rules for reasonable approximation based on customer information to determine where the customer receives the benefit of the service or other business activity, the corporation must use reasonable approximation based on general information.

(b) Definition. Reasonable approximation based on general information is an alternative method used to determine the location at which a customer receives the benefit of a service or other business activity in instances in which a general information measurement, such as the general population, a subset of the general population, or some other general metric reasonably reflects the geographic distribution of where the customer receives the benefit.

(c) Application of reasonable approximation based on general information.

(1) A corporation must use statistical information based on an appropriate measurement that reasonably approximates the location where customers receive the benefit of the service or other business activity.

(2) In any case in which the commissioner determines that the corporation's method of approximation is not reasonable, the commissioner may substitute the use of a method that the commissioner determines is appropriate. In this instance, the corporation bears the burden of demonstrating that the method the commissioner prescribes is not reasonable.

(3) In any case in which the commissioner determines that the corporation's method of approximation is reasonable, but that it has not been applied in a consistent manner with respect to similar transactions, the commissioner must require that the corporation apply its method of approximation in a consistent manner.

(d) In any case in which the corporation does not have sufficient information to reasonably approximate based on general information, the corporation must instead apportion the receipt using the delivery destination method (see section 4-4.7 of this Subpart).

Section 4-4.7. Delivery destination method.

(a) If, after exercising due diligence, the corporation cannot determine or reasonably approximate where the business customer has received the benefit of a service or other business activity, it should use the delivery destination method and include the receipt in New York receipts when the service or other business activity is delivered to the customer within New York.

(b) The location where the service or other business activity is delivered is presumed to be the location at which the contract of sale is managed by the customer. If the corporation cannot determine the location where the contract of sale is managed by the customer, then the delivery destination is presumed to be the billing address of the customer. If, after exercising due diligence, the corporation does not have adequate information to determine the delivery destination, the corporation must use the preceding taxable year method (see section 4-4.9 of this Subpart).

Section 4-4.8. Rules for intermediary transactions.

(a) In the case of intermediary transactions, in applying the where benefit received method or the delivery destination method of the hierarchy, the location where the receipt is apportioned is based on the location of the consumers, rather than the business customer. If the corporation uses reasonable approximation based on the sourced receipts method to apportion its receipts from an intermediary transaction, it must apply that method only taking transactions with that particular business customer into consideration.

(b) In determining where the benefit is received or the delivery destination, the corporation is required to make inquiries to the business customer, but not to the consumers, regardless of the number of business customers the corporation has or the percentage of receipts from any one business customer, in order to determine the amount of receipts to apportion to New York State based on the location of the consumers. Such inquiries may be fulfilled by the business customer providing information from its books and records to the corporation that demonstrates the relevant information.

(c) If, after exercising due diligence, the corporation has inadequate information to determine the location of the consumers, the corporation should determine where the benefit is received or delivery destination based on the business customer. If, after exercising due diligence, the corporation has inadequate information to determine the location of either the consumers or the business customer, the corporation must then use the preceding taxable year method (see section 4-4.9 of this Subpart).

(d) This section does not apply in instances where the business address presumption applies. In instances where the business address presumption applies, the receipts shall be apportioned to the billing address of the business customer.

Section 4-4.9. Preceding taxable year method.

If, after exercising due diligence, the corporation does not have adequate information to use the delivery destination method, it should apportion its receipts from that service or other business activity to New York using the preceding taxable year method based on the apportionment of receipts from the sales of that type of service or other business activity for the preceding taxable year. The amount included in New York receipts for the current taxable year is determined by multiplying such receipts by a fraction, the numerator of which is the amount included in New York receipts from the sales of that type of service or other business activity in the preceding taxable year and the denominator of which is the amount included in everywhere receipts from all such sales of that type of service or other business activity in the preceding taxable year. This method of the hierarchy cannot apply in a corporation's first taxable year. A corporation that cannot use this method must apportion the receipt using the current taxable year method (see section 4-4.10 of this Subpart).

Section 4-4.10. Current taxable year method.

If, after exercising due diligence, the corporation does not have adequate information to use the preceding taxable year method to apportion the receipt, the corporation must use the current taxable year method to apportion the receipt based on the apportionment in the current taxable year of receipts from other services and other business activities that can be apportioned using the where benefit received method and the apportionment in the current taxable year of receipts from other services and other business activities using the delivery destination method. The amount included in New York receipts for the current taxable year is determined by multiplying such receipts by a fraction, the numerator of which is the amount included in New York receipts from all services and other business activities that can be apportioned using the where benefit received method and delivery destination method for the current taxable year and the denominator of which is the amount included in everywhere receipts from services and other business activities apportioned using the where benefit received method and delivery destination method.

Section 4-4.11. Examples.

For purposes of these examples, it can be assumed that the corporation has met all the requirements of due diligence, unless otherwise provided, and that the business address presumption does not apply.

Example 1: Audit Corp is located in New York and provides accounting and tax services. Audit Corp contracts with Client Corp to audit the books and records of Client Corp's three locations in State A, State B and New York. Client Corp's managers of the three locations make several visits to Audit Corp to provide their respective locations' books and records to the auditors assigned to the respective audits and to address periodic inquiries. In its books and records, Audit Corp tracks the hours each of its auditors spent on the respective audits of the three locations. Audit Corp bills Client Corp for its services using the same hourly rate for each of its auditors.

Audit Corp's services are not considered an in-person service because, although there was in-person contact, it was not required for Audit Corp to be able to perform its service. Therefore, Audit Corp must apply the general rule for determining where the benefit is received. It determines the benefit is received by Client Corp at each location based on Audit Corp's books and records. The amount Audit Corp includes in its New York receipts is the hourly charge spent on audits of the New York State location. All of Audit Corp's receipts from Client Corp are included in everywhere receipts.

Example 2: Teaching Corp provides in-person seminars in New York to individuals and business customers. The seminars and the materials used in connection with the seminars are prepared outside New York, the teachers who teach the seminars include teachers that are not New York residents, and the students who attend the seminars include students that are not New York residents. Since the customers are in the same location as Teaching Corp when the service is provided, it is deemed to be an in-person service and the special rule for determining where the benefit is received applies. As such, it is presumed that the benefit is received at the location where the service is performed, which is New York State. 100% of such receipts are included in New York receipts and everywhere receipts.

Example 3: Watch Corp is a watch repair corporation with retail locations in multiple states including New York. The repair work is performed at Watch Corp's New York location. In some instances, the customer takes back possession of the watch in New York State. In other instances, the customer requests that the repaired watch be shipped to the customer's home address. Since the repair is completed on the customer's watch, which is tangible personal property, it is considered a service related to tangible personal property. Therefore, the special rule for determining where the benefit is received for services related to tangible personal property applies and it is presumed that the benefit is received at the location where the property is received after the service is performed. In those instances where the customer takes back possession of the watch in New York State, the benefit is received in New York State because the customer receives the repaired watch in New York State and the receipts for the repair work are included in New York receipts. In those instances where the watch is shipped to the customer's home address, the benefit is received in New York State only if the watch is shipped to a home address in New York. In both instances, all of the receipts are included in everywhere receipts.

Example 4: Troubleshooting Corp operates a call center located in New York State that provides troubleshooting services for use of home appliances over the telephone to individual customers located throughout the United States. The contract between Troubleshooting Corp and its customers provides that, for a fee per call, the customer can call Troubleshooting Corp and the call center employee will walk the customer through troubleshooting the appliance. Although provided over the telephone, this service includes a level of human interaction and, therefore, it is not a digital service and must be apportioned under the rules in this Subpart.

Home appliances are tangible personal property so the service Troubleshooting Corp is providing is related to tangible personal property.

Under the special rule for determining where the benefit is received for services related to tangible personal property, the benefit is presumed to be received at the location where the property is received after the service is performed. However, Troubleshooting Corp does not have information on where the tangible personal property was received by the customer or where it is currently located. It only has the billing address of its customer. Therefore, Troubleshooting Corp uses the billing addresses of its customers to reasonably approximate where the tangible personal property is located and will include receipts in New York receipts to the extent that customers have billing addresses located in New York State. Troubleshooting Corp must include 100% of its receipts from troubleshooting services in everywhere receipts.

Example 5: Law Corp, located in State C, is hired by Client Corp to handle a major litigation matter concerning the sale of its manufacturing plant located in New York State. Client Corp has manufacturing plants in New York and State B. The trial takes place in State C, which is the location of the opposing party in the lawsuit. The court documents, which are public records, reflect that the subject matter is the manufacturing plant located in New York. Because Law Corp's entire service is related to the manufacturing plant, which is real property, the special rule for determining where the benefit is received for services related to real property applies. Therefore, the benefit is presumed to be received by Client Corp at the location of the manufacturing plant. Therefore, Law

Corp must include 100% of its receipts from Client Corp in both New York receipts and everywhere receipts.

Example 6: Consulting Corp provides two main types of facility consulting services—licensing requirements and environmental compliance. Consulting Corp has 60 business customers who have hired them to obtain applicable permits and licenses and 200 business customers who have hired them to provide environmental compliance services. No more than 5% of Consulting Corp's receipts are from any particular business customer. Despite the differing subject matter, the consulting services are substantially similar enough that the business address presumption applies.

Example 7: Consulting Corp provides consulting services to determine the safety of train tracks to 200 business customers, including Train Corp. Consulting Corp provides consulting services to Train Corp in relation to a portion of train service that runs through New York and 5 other states for a flat fee. As this is a service related to real property, the special rule for determining where the benefit is received for services related to real property applies. Under that rule, the benefit is presumed to be received at the location of the property. Because the real property involved is located within six states, it is necessary to look to Consulting Corp's books and records to determine the share of the benefit received at the real property located in New York State.

Some areas of the track are more heavily traveled than others, requiring more attention, and some portions of the track require special attention, such as where signals are located. Consulting Corp's books and records indicate only the location of the tracks its services relate to and how many miles of track are located in New York State and each of the 5 other states. Upon reasonable inquiries, Consulting Corp cannot obtain additional information to determine specifically where Train Corp receives the benefit of its service. Consulting Corp should reasonably approximate based on customer information where the benefit is received by multiplying the total receipts it receives from Train Corp by a fraction, the numerator of which is the miles of track its service relates to located within New York State and the denominator of which is the total miles of track its service relates to located within and without New York State. Consulting Corp must include 100% of its receipts from Train Corp in everywhere receipts.

Example 8: Furniture Sales Corp owns showroom locations in various states and acts as a sales agent of Couch Corp. Pursuant to the agreement between the two parties, Furniture Sales Corp receives a commission on each piece of furniture it sells. A salesperson at Furniture Sales Corp's State A location received an order for a couch from a customer and, as part of the process, documents that the customer would like the couch delivered in New York State. Furniture Corp's commission is earned for a service related to tangible personal property (the couch) and the special rule for determining where the benefit is received applies. As such, the benefit of its service is presumed to be received at the location where the tangible personal property is received after the service is performed. Therefore, the commission is apportioned to the delivery address. 100% of Furniture Sales Corp's commission is included in both New York receipts and everywhere receipts.

Example 9: Architect Corp, located in New York, provides architectural services to Developer Corp, located in State A, to design the floor plan of homes to be built at one of the development sites owned by Developer Corp. Developer Corp knows the floorplan will be used at one of its developments, but Developer Corp will not know which floorplan goes to which site until it enters into contracts with homebuyers. Architect Corp is providing a service related to real property. Therefore, the special rule for determining where the benefit is received for services related to real property provides that the benefit of the service is presumed to be received at the location of the real property. As Architect Corp does not know where the real property is located to apportion the receipt based on the special rule for services related to real property and reasonable inquiries to the Developer Corp do not yield that information, it must use reasonable approximation based on customer information to determine the real property location. The books and records, including the contract with Developer Corp, indicate that Developer Corp owns two development sites, one in New York State and one in State A. Therefore, Architect Corp must use reasonable approximation to apportion the receipt between these two locations and include 50% of the receipt in New York receipts. 100% of the receipts are included in everywhere receipts.

Example 10: Retail Corp offers extended warranties on computers purchased by individual customers for personal use for a flat fee. The extended warranty covers both the computer hardware and any software installed on the computer. To utilize the warranty, customers bring the computer to any of Retail Corp's locations for repair. Once the repair is complete, customers have the choice to take back possession of the computer at Retail Corp's location where the repair was completed or request that the repaired computer be shipped to the customer's address.

The amount Retail Corp receives for the extended warranty does not separately state the portion of the receipt that is for hardware repairs (subject to the rules in this section) and software repairs (otherwise subject to the rules for receipts from digital products and digital services). As a result, the entire amount is properly apportioned under the rules in this section. The sale of the warranty is the sale of an obligation to perform a service at an undetermined future date. Therefore, the receipt does not qualify as a sale of a service related to tangible personal property and instead must be apportioned under the general rule for determining where the benefit is received. Retail Corp's customers are individuals, so the benefit is presumed to be received at the customers' billing addresses.

Retail Corp includes receipts from sales of extended warranties to customers with billing addresses in New York State in New York receipts. 100% of its receipts from the sales of extended warranties are included in everywhere receipts.

Example 11: Model Agency Corp contracts with individual models to connect the models with modeling jobs in exchange for a commission. The contract between Model Agency Corp and the model specifies the commission that Model Agency Corp receives for each modeling job it books. In addition, such contract requires that Model Agency Corp receives all payments the model is entitled to for modeling services and provides that Model Agency Corp must retain its commission from the payments and pass the remainder on to the model.

Modeling Agency Corp contracts with two such models, Model 1 who lives in New York and Model 2 who lives in State Z. Modeling Agency Corp books both models for a photoshoot in New York with ClothesCo. ClothesCo pays the models' fees to Modeling Agency Corp, which keeps a portion as its commissions and remits the remainder to the models. Although Modeling Agency Corp collected the fees from ClothesCo, it is receiving a commission from its contract with each Model.
The service provided by Modeling Agency Corp is booking the models for the photoshoot. The models are providing an in-person service to ClothesCo because they must be physically present for the photoshoot.

Therefore, the receipt received by Modeling Agency Corp is a commission for the facilitation of an in-person service. Therefore, the special rule for determining where the benefit is received for in-person services provides that the benefit is presumed to be received at the location where the in-person service is performed, which is the location of the photoshoot. The commissions Model Agency Corp receives from Model 1 and Model 2 are included in New York receipts. 100% of its receipts from commissions it receives are included in everywhere receipts.

Example 12: Statistics Corp provides data compilation and analysis services that will be used in policymaking for TUV, a Federal government agency, which has regional offices throughout the United States. Statistics Corp's only contact with TUV is with its main office located in State A, and Statistics Corp does not know the locations of TUV's other offices, nor which of TUV's offices focus on policymaking and which focus on direct client services. After reasonable inquiries, Statistics Corp does not have any additional information as to which regional offices will use the data compilation and analysis services. Furthermore, a general information measurement such as population information would not be relevant because the compilation and analysis services are used by employees rather than the general public. Because no special rules for determining where the benefit is received apply and Statistics Corp does not have adequate information to determine where the benefit is received, or even to apply reasonable approximation, Statistics Corp is required to apportion the receipts based on the delivery destination of its services. Since the contract of sale is managed by TUV's main office in State A, the receipts are not included in New York receipts. 100% of the receipts are included in everywhere receipts.

Example 13: Sales Corp provides only one type of service to approximately 200 business customers and the service is not subject to the special rules for determining where the benefit is received. In tax year 2021, all of its receipts were apportioned under this Subpart , and, as a result 45% of Sales Corp's receipts were included in New York receipts. In tax year 2022, Sales Corp continues to provide only one type of service to its customers. At the end of tax year 2022, Sales Corp's computer system crashes and it is unable to recover information it had obtained on where the benefit of its services were received or where the services were delivered. Upon reasonable inquiries to its known customers, Sales Corp still cannot obtain information on where the benefits were received or where the services were delivered. Therefore, using the preceding taxable year method, Sales Corp must include 45% of its 2022 receipts in New York receipts. 100% of receipts are included in everywhere receipts.

Example 14: Taxpayer A has $10,000 in receipts from a new type of service subject to this Subpart. Since the service is not subject to any of the special rules for determining where the benefit is received, Taxpayer A must exercise due diligence to determine where the customer received the benefit or where the service was delivered. As Taxpayer A cannot determine those locations, it must determine the portion of the $10,000 to include in New York receipts based on the current taxable year method. In the current tax year, Taxpayer A has $80,000 in other business receipts apportioned using the where benefit received method, of which $20,000 is included in New York receipts. In addition, Taxpayer A has $70,000 in other business receipts apportioned using the delivery destination method, of which $55,000 are New York receipts. Therefore, under the current taxable year method, Taxpayer A would include 50% of the $10,000, or $5,000, of receipts from the new type of service in New York receipts. 100% of receipts from the new type of service are included in everywhere receipts.

Taxpayer B also has $10,000 in receipts from a new type of service that, after exercising due diligence, it cannot source using either the where benefit received method or the delivery destination method. However, unlike Taxpayer A, Taxpayer B has been able to source all its receipts from other business activities using the where benefit received method and has determined that 40 percent of all those other receipts are New York receipts. Therefore, under the current taxable year method, $4000, or 40%, of the receipts from this new service are included in Taxpayer B's New York receipts. Taxpayer B includes 100% of the receipts from the new type of digital product in everywhere receipts.

Example 15: Loan Corp (the taxpayer) is based in New York and operates offices whereby individuals and businesses can discuss loan options and obtain a loan from unrelated lenders. Loan Corp also will service the loans it procures. Bank Corp (the business customer) enters into a contract with Loan Corp whereby Bank Corp will pay Loan Corp a fee to procure borrowers (consumers) and a fee to handle servicing of loans financed by Bank Corp. Loan Corp handles all interactions with the consumers, who have no contact or interaction with Bank Corp directly.

Loan Corp assists a business consumer in obtaining a mortgage loan from Bank Corp to purchase an office building in State C. Because this service is related to real property, Loan Corp must use the special rule for determining where the benefit is received for services related to real property. The benefit of both the procurement fee and the servicing fee is presumed to be received at the location of the real property.

Loan Corp assists an individual who is a resident of State D, in obtaining a personal loan from Bank Corp. Loan Corp sends monthly bills to the borrower during the term of the loan. Loan Corp's receipts from Bank Corp for procuring the borrower and servicing the loan is an intermediary transaction because, pursuant to its contract, Loan Corp is providing a service at the direction of Bank Corp directly to the location of the consumer. These receipts are not included in New York receipts because the individual's billing address is in State D. 100% of such receipts are included in everywhere receipts.

Example 16: Debt Collection Corp (the taxpayer) has offices in New York and State A. Student Loan Corp (the business customer), which is located in State C, enters into a contract with Debt Collection Corp whereby Student Loan Corp will pay Debt Collection Corp a fee to collect outstanding debt owed to Student Loan Corp by borrowers (consumers). Debt Collection Corp communicates with borrowers by phone and email, and collects outstanding debt directly from borrowers who make debt payments online to Debt Collection Corp. After retaining a portion of the payment as its fee, Debt Collection Corp remits the remainder of the collected money to Student Loan Corp electronically. Despite the electronic means to perform its work and transfer funds, the service has not been fully automated and there is a non-incidental level of human interaction, thus Debt Collection Corp's activities do not satisfy the definition of a digital service. Therefore, the receipt is to be apportioned using the rules in this Subpart. Debt Collection Corp is providing a service to Student Loan Corp, who instructs Debt Collection Corp to collect from borrowers on its behalf. This service is provided directly to the location of the consumers at Student Loan Corp's direction, which meets the definition of an intermediary transaction. Therefore, Debt Collection Corp must apportion the receipt from the fee earned from Student Loan Corp to the location of the consumers.

Debt Collection Corp uses the billing addresses of the consumers to include receipts in New York receipts to the extent that consumers have billing addresses located in New York. Debt Collection Corp must include 100% of its receipts from the service provided to Student Loan Corp in everywhere receipts.

Example 17: Credit Score Corp has a contract with Credit Card Corp to provide credit rating services to Credit Card Corp for individuals applying for credit cards. Credit Card Corp receives all credit rating services at its corporate office in State A where it makes determinations on whether or not to issue credit cards to applicants. Applicants from all over the country submit applications to Credit Card Corp, who then provides information about the applicants to Credit Score Corp to receive a credit rating. Credit Score Corp issues the rating for each applicant to Credit Card Corp, who utilizes this information to make a determination as to whether or not Credit Card Corp will issue the applicant a credit card. This is not an intermediary transaction because the service is provided by Credit Score Corp directly to Credit Card Corp and is not passed on to the applicants applying for the credit cards. Because Credit Card Corp utilizes the service entirely in State A, where it makes credit determinations on credit card applications, Credit Score Corp does not include the receipt in New York receipts. 100% of such receipt is included in Credit Score Corp’s everywhere receipts.

Example 18: Production Corp enters into a contract with Cable Network Corp to provide the service of producing a made-for-television movie. Production Corp delivers the television production to Cable Network Corp's New York State office, which is the office location responsible for contracting for the production and determining its usage. The production service receipt is not considered an intermediary transaction because the production service is not provided by Production Corp directly to Cable Network Corp's consumers at the direction of Cable Network Corp and the production service is completed prior to Cable Network Corp determining if and when the production will be aired.

As Cable Network Corp receives the benefit of this service at its New York State office, the entire receipt is included in both New York receipts and everywhere receipts.

Example 19: Credit Ratings Corp, located in New York, has a contract with Debt Issuer Corp whereby Credit Ratings Corp opines, via the assignment of a letter grade, on the creditworthiness of Debt Issuer Corp's debt obligation. The rating does not constitute a recommendation of the suitability of an investment for any particular investor. Credit Ratings Corp may issue the rating via press release, which allows potential investors to consider the rating/letter grade. Credit Ratings Corp also includes the rating in its database of ratings on its website, which allows for public viewing. However, the principal element of the service is the development of the rating; any dissemination via digital means is incidental to such service. Therefore, the receipt is apportioned under the rules in this Subpart. Furthermore, this service does not constitute an intermediary transaction because the rating is not provided by Credit Ratings Corp directly to individual investors at Debt Issuer's direction. In addition, the rating is not provided to Debt Issuer Corp to pass along directly to individual investors. For this reason, the receipt must be apportioned to the location at which Debt Issuer Corp receives the benefit of the service. Credit Rating Corp's books and records indicate that the rating is being sought on the advice of Debt Issuer's corporate finance division, which is responsible for overall fiscal strategy and execution and is located in State A. Therefore, the receipt is not included in Credit Rating Corp's New York receipts. 100% of such receipt is included in Credit Rating Corp's everywhere receipts.

PART 5

CREDITS AGAINST TAX

SUBPART 5-1

INVESTMENT TAX CREDIT

Section 5-1.1. General. (Tax Law, section 210-B(1)(a))

(a) A corporation is allowed an investment tax credit against the tax imposed by article 9-A with respect to qualified tangible personal property and other tangible property, including buildings and structural components of buildings that were acquired, constructed, reconstructed or erected after December 31, 1968.

(b) A corporation must claim the investment tax credit for the first taxable year in which the property becomes qualified property.

(c) The investment tax credit shall not reduce the tax to less than the fixed dollar minimum tax. If the corporation has an excess investment tax credit after reducing the tax due to the fixed dollar minimum tax or otherwise pays tax on the fixed dollar minimum, the excess credit may be carried over to the fifteen taxable years immediately following such taxable year and may be deducted from the corporation's tax for such year or years. Provided, in lieu of the carryover, a corporation may elect to treat the excess credit as an overpayment of tax to be credited or refunded if it qualifies for such treatment under section 210-B(1)(d).

(d) A corporation must submit a Claim for Investment Tax Credit on Form CT-46 when claiming the credit.

Section 5-1.2. Qualified and nonqualified tangible personal property. (Tax Law, section 210-B(1)(b))

(a) The term "qualified tangible personal property" means tangible property that satisfies the requirements set forth in section 210-B(1)(b)(i).

(b) The term "nonqualified tangible personal property" means tangible personal property that is not qualified tangible personal property. It includes, but is not limited to, the following:

(1) Tangible personal property and other tangible property, including buildings, and structural components of buildings, that a corporation leases to any other person or corporation. For purposes of the preceding sentence, any contract or agreement to lease or rent or for a license to use such property will be considered a lease. However, in cases where production property is leased in form and the lessee is in fact the beneficial owner and entitled to take Federal depreciation on the property and the property qualifies, the lessee may be entitled to take the investment tax credit. The use of a qualified film production facility by a qualified production company is not considered a lease of that facility to that company.

(2) Retail equipment, office furniture, and office equipment.

(3) Excavating and road building equipment.

(4) Transportation equipment used on public roads.

(5) Property used to transport raw materials to the raw materials warehouse or finished goods to customers.

(6) Public warehouses used to store the corporation's goods.

(7) Property principally used in the production or distribution of electricity, natural gas after extraction from wells, steam, or water delivered through pipes and mains.

Section 5-1.3. Meaning of other terms. (Tax Law, section 210-B(1)(b)(ii))

For purposes of the investment tax credit, the following terms have these meanings:

(a) The term "manufacturing" means the process of working raw materials into wares suitable for use or that gives new shapes, new quality or new combinations to matter that already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment.

(b) The term "property" used in the production of goods includes machinery, equipment or other tangible property that is principally used in the repair and service of other machinery, equipment or other tangible property used principally in the production of goods and includes all facilities used in the production operation, including storage of material to be used in production and of the products that are produced. Since property and equipment used to store raw materials and finished goods are included in the meaning of manufacturing, property and equipment at the raw material warehouse and at the finished goods warehouse of a manufacturer qualify, provided that the property and equipment are principally used in storing the raw materials or finished goods. Property used for transportation of goods during the manufacturing process qualifies.

(c) The term "principally used" means more than 50%. A building or addition to a building is principally used in production where more than 50% of its usable business floor space is used in storage and production. Floor space used for bathrooms, cafeterias and lounges is not usable business floor space. Space used for offices, accounting, sales and distribution is not used in production. Dual purpose machinery is principally used in production when it is used in production more than 50% of its operating time.

Section 5-1.4. Re-computation of investment tax credit on property disposed of or property that ceases to qualify. (Tax Law, section 210-B(1))

(a) If property on which investment tax credit has been claimed is disposed of or ceases to be in qualified use prior to the end of its useful life, the difference between the credit taken and the credit allowed for actual use must be added back to the tax otherwise due in the year of disposition or disqualification.

(b) The amount of investment tax credit to be added back is computed as follows:

(1) divide the total number of months in qualified use of the property by the total number of months of useful life;

(2) multiply the amount computed in paragraph (1) of this subdivision by the amount of the credit claimed on the property to ascertain the credit allowed for actual use;

(3) subtract the credit allowed for actual use from the credit claimed on the property to determine the amount of investment tax credit to be added back; and

(4) add the amount to be added back to the tax due for the year the property was disposed of or ceases to qualify.

(c) A disposition of qualified property includes:

(1) a sale of the property;

(2) a liquidation other than as part of a statutory merger or consolidation; see subdivision (e) of this section for the exception;

(3) a legal dissolution of the corporation;

(4) a trade-in of the property;

(5) a gift of the property;

(6) transfer upon foreclosure of a security interest in the property;

(7) retirement of the property before expiration of its useful life;

(8) condemnation of the property;

(9) loss of the property due to fire, theft, storm or other casualty; and

(10) transfer of the property to a corporation not taxable under article 9-A.

(d) Property that ceases to be in qualified use includes:

(1) property that initially qualified, but no longer meets the requirements of section 5-1.2 (a) of this Subpart, such as property that no longer has situs in New York State or property that no longer is used in the production of goods; and

(2) property on which a credit was allowed that was subsequently leased to others.

(e) For purposes of this section, a disposition does not occur where property is transferred from a corporation as part of a transaction to which IRC section 381(a) applies: e.g., a complete liquidation of a subsidiary under IRC section 332, or a reorganization under IRC section 361 and IRC section 368 (a)(1)(A) (statutory merger or consolidation), IRC section 368 (a)(1)(C) (certain acquisitions of property from one corporation by another), IRC section 368 (a)(1)(D) (certain transfers of assets), IRC section 368 (a)(1)(F) (mere change in identity, form or place of organization, however effected) or IRC section 368 (a)(1)(G) (bankruptcy reorganizations). As there is no disposition in these cases, an add back is not required provided that the property continues in qualified use and is acquired by a corporation subject to tax under article 9-A. Generally, in these cases, the acquiring or surviving corporation cannot claim an investment tax credit because it takes over such property at the adjusted basis of the transferor and the transfer therefore does not qualify as a purchase pursuant to IRC section 179(d)(2). If the property in the hands of the acquiring corporation is not in qualified use for its entire life or for more than 12 consecutive years, a recovery from the acquiring corporation is required. In measuring the period of qualified use, the period during which the property was held by the transferor corporation and the acquiring corporation are to be taken into account.

(f) There is no add-back of the investment tax credit if the property is disposed of or ceases to be in qualified use after it has been in qualified use for more than 12 consecutive years or after the end of its useful life.

(g) As used in this section, the useful life of property shall be the same number of years as the corporation uses for Federal depreciation purposes.

(h) If property that qualifies for the investment tax credit is disposed of or ceases to be in qualified use prior to the end of the taxable year in which the credit is to be taken, an investment tax credit is allowed for the period the property was in qualified use. The credit that will be allowed is that part of the credit that would have been allowed for the entire taxable year multiplied by a fraction, the numerator of which is the total number of months in qualified use of the property and the denominator of which is the total number of months of the property's useful life.

SUBPART 5-2

EMPLOYMENT INCENTIVE TAX CREDIT

Section 5-2.1. Employment incentive tax credit. (Tax Law, section 210-B(2))

(a) Where a corporation is allowed an investment tax credit under section 210-B(1), the corporation may be allowed an employment incentive tax credit for each of the two years next succeeding the taxable year for which the investment tax credit is allowed. The amount of the employment incentive credit is a percentage of the investment credit base that varies depending on the percentage increase in employment. The employment incentive credit will be allowed for any taxable year only if:

(1) the average number of employees during such taxable year is at least 101% of the average number of employees during the taxable year immediately preceding the taxable year for which the investment tax credit is allowed; or

(2) in case of a corporation that was not subject to the tax imposed by article 9-A and did not have a taxable year immediately preceding the taxable year for which the investment tax credit is allowed, the average number of employees in the taxable year for which the credit under this Subpart is allowable is at least 101% of the average number of employees during the taxable year in which the investment tax credit is allowed.

(b) The employment incentive tax credit shall not reduce the tax to less than the fixed dollar minimum tax. If the corporation has excess employment incentive tax credit after reducing the tax due to the fixed dollar minimum tax or the corporation otherwise pays tax on the fixed dollar minimum, the excess credit may be carried over to the fifteen taxable years immediately following such taxable year and may be deducted from the corporation's tax for such year or years.

(c) A corporation entitled to claim the employment incentive tax credit must submit a Claim for Investment Tax Credit that includes the employment incentive tax credit on Form CT-46 when claiming the credit.

SUBPART 5-3

SECURITY TRAINING TAX CREDIT

Section 5-3.1. General. (Tax Law, sections 26, 210-B(21))

(a) A corporation that is a qualified building owner, as defined under section 26(b)(1), and that has been issued a certificate of tax credit by the New York State Office of Homeland Security, is allowed to claim a credit against the tax imposed by article 9-A. The amount of the credit allowed is $3,000 for each qualified security officer, as defined under section 26(b)(4), who is directly or indirectly employed to provide protection to the corporation's building or buildings for a full year. However, the amount of the credit may be reduced due to the limitation placed on the total amount of all tax credits issued by the New York State Office of Homeland Security in any calendar year. In the case of a qualified security officer who is employed for less than a full year, the amount of the credit is prorated to reflect the length of such employment as provided in this section.

(b) The security training tax credit shall not reduce the tax to less than the fixed dollar minimum tax. If the corporation has excess security tax training credit after reducing the tax to the fixed dollar minimum tax or the corporation otherwise pays the tax on the fixed dollar minimum, the security training tax credit shall be treated as an overpayment of tax to be credited or refunded.

(c) A corporation must submit a Claim for Security Officer Training Credit on Form CT-631 when claiming the credit.

Section 5-3.2. Definitions for purposes of the security training tax credit. (Tax Law, sections 26, 210-B(21))

(a) The term “full year” means 1,750 qualified hours worked during the calendar year.

(b) The term “qualified hours” means hours worked, directly or indirectly, as a qualified security officer for the qualified building owner.

Section 5-3.3. Prorating the security training tax credit for security officers employed for less than a full year. (Tax Law, sections 26, 210-B(21))

(a) In the case of a qualified security officer who is employed for less than a full year, the amount of the security training tax credit is prorated.

(b) The prorated amount of the credit for a qualified security officer employed for less than a full year is computed as follows:

(1) ascertain the number of qualified hours worked by the qualified security officer during the calendar year (limited to 1,750 hours);

(2) divide the number of hours by 1,750; and

(3) multiply the result by $3,000.

(c) This method of proration applies for purposes of the security training tax credit against the tax imposed by article 9-A, as well as the taxes imposed by articles 9, 22, and 33.

PART 6

REPORTS

SUBPART 6-1

GENERAL REQUIREMENTS

Section 6-1.1. Corporations required to file reports. (Tax Law, section 211(1))

Reports are required to be filed annually by:

(a) every corporation subject to tax, regardless of the amount of its business income, capital or receipts;

(b) every receiver, referee, trustee, assignee or other fiduciary, or other officer or agent appointed by any court that conducts the business of any corporation subject to tax under article 9-A;

(c) every corporation that continues in business after it is dissolved; and

(d) every taxable domestic international sales corporation (DISC).

Section 6-1.2. Short period reports. (Tax Law, section 211(1))

(a) Except as provided in subdivision (c), a short period report is required in the case of:

(1) a newly organized taxpayer whose first accounting period is less than 12 months;

(2) a foreign corporation that becomes subject to tax in New York State subsequent to the commencement of its Federal accounting period;

(3) a taxpayer that dissolves, merges, consolidates or ceases to be subject to tax in New York State prior to the close of its accounting period for Federal income tax purposes;

(4) a taxpayer that changes its accounting period for Federal income tax purposes;

(5) a taxpayer that becomes part of or ceases to be part of a Federal consolidated group during the year; or

(6) a taxpayer that changes from one Federal consolidated group to another Federal consolidated group during the year.

(b) (1) When any corporation meets the requirements to be included in a combined report, it must be included in the combined group starting with the date it meets the requirements to be included in that combined report.

(2) A corporation that is subject to article 9-A and is a separate filer under article 9-A prior to being included in a new combined group is required to file a short period report that ends on the day prior to the day it meets the requirements to be included in that combined group.

(3) A corporation that continues to be subject to tax as a separate filer after it leaves its existing combined group is required to file a short period report for the period starting on the day it no longer meets the combined reporting requirement with the existing combined group and ending on the last day of the corporation's taxable year.

(4) When a corporation leaves one combined group ("combined group A") because it no longer meets the requirements to be included in that combined group, and then joins a new combined group ("combined group B"), its activities, income, loss, assets and receipts are included in the calculation of tax on the combined report of combined group A from the first day of its taxable year until the day immediately preceding the day it no longer met the requirements to be included in combined group A. Its activities, income, loss, assets and receipts are included in the calculation of tax on the combined report of combined group B from the day it met the requirements to be included in combined group B until the last day of the taxable year of combined group B.

(c) A short period report is not required when one of the situations listed in paragraphs (4) through (6) of subdivision (a) of this section occurs, but the corporation remains in the same New York State combined report before and after those changes.

Section 6-1.3. Reports where Federal income is changed. (Tax Law, section 211(3))

(a) General. If the amount of the taxable income of any corporation or of any shareholder of any corporation that has elected to be taxed under Subchapter S of chapter one of the IRC, as reported for Federal income tax purposes, is changed or corrected by a final determination of the Commissioner of Internal Revenue or other officer of the United States or other competent authority, or if a renegotiation of a contract or subcontract with the United States results in a change in taxable income, the corporation is required to report the changed or corrected taxable income or the results of the renegotiation within 90 days, or 120 days in the case of a corporation making a combined report for the taxable year affected, after the final determination. The corporation must concede the accuracy of the determination or explain how it is erroneous.

(b) Final determination. Any deficiency notice issued (including a notice issued pursuant to a waiver filed by a corporation) pursuant to the provisions of the IRC is a final determination unless a timely petition to redetermine the deficiency is filed in the Tax Court of the United States. If a petition is filed, the judgment of the court of last resort is the final determination. The allowance by the Commissioner of Internal Revenue of a refund of any part of the tax shown on the taxpayer's Federal return or of any deficiency thereafter assessed, whether the refund is made on the commissioner’s own motion or pursuant to the judgment of a court, is also a final determination. The allowance of a tentative carry-back adjustment in accordance with IRC section 6411 based on a net operating loss carry-back or a net capital loss carry-back must be treated as a final determination. Any settlement or closing agreement entered into between the taxpayer and the IRS or any consent to IRS audit findings signed by the taxpayer also is a final determination.

Section 6-1.4. Amended Federal return. (Tax Law, section 211(3))

Any corporation that files an amended return with the Internal Revenue Service must, within 90 days (or 120 days in the case of a corporation included in a combined report) thereafter, file an amended report with the Commissioner.

SUBPART 6-2

COMBINED REPORTS

Section 6-2.1. General. (Tax Law, section 210-C)

(a) A combined report covering any taxpayer and another corporation or corporations is required where:

(1) the capital stock requirement is met; and

(2) the unitary business requirement is met.

(b) A group of commonly owned or controlled corporations may elect to file a combined report when the capital stock requirement is met. This election is referred to as the commonly owned group election.

(c)(1) Each combined group must have a designated agent to act for the combined group. Only the designated agent may act on behalf of all the members of the combined group in all matters relating to the combined group. The actions taken by the designated agent are binding on all members of the combined group.

(2) The designated agent must be a taxpayer under article 9-A and must be identified annually on an original, timely filed combined report or on a timely extension of time to file a report if an extension is requested. Once identified on an application for an extension of time to file a report, if utilized, the designated agent cannot be changed on the original report filed for that period unless at the time the original report is filed the designated agent has been sold, dissolved, merged or consolidated into another corporation or otherwise ceases to meet the requirements to be included in the combined report. If the designated agent is first identified on an original report, the designated agent cannot be changed on an amended report for the taxable year unless at the time an amended report is filed the designated agent has been sold, dissolved, merged or consolidated into another corporation, or otherwise ceases to meet the requirements to be included in a combined report.

(3) The designated agent may be changed in a subsequent year on either an original, timely filed combined report or on a timely extension to file a report if an extension is requested.

(d) Each member of the combined group that is a taxpayer under article 9-A shall be jointly and severally liable for the tax due on the combined report for the combined group. The tax due on the combined report shall be the sum of:

(1) the highest of:

(i) the tax measured by the combined business income base tax;

(ii) the tax measured by the combined capital base; or

(iii) the fixed dollar minimum tax attributable to the designated agent of the combined group; and

(2) the fixed dollar minimum tax attributable to each member of the combined group (other than the designated agent) that is a taxpayer under article 9-A. However, tax credits cannot be used to reduce the fixed dollar minimum tax of any member of the combined group that is a taxpayer other than the designated agent.

(e) For a combined group to be eligible for the preferential tax treatment available to qualified emerging technology companies, every member of the combined group must be a qualified emerging technology company.

Section 6-2.2. Capital stock requirement. (Tax Law, section 210-C)

(a) A taxpayer and another corporation meet the capital stock requirement if:

(1) the taxpayer owns or controls, either directly or indirectly, more than 50% of the voting power of the capital stock of another corporation; or

(2) more than 50% of the voting power of the capital stock of the taxpayer is owned or controlled, either directly or indirectly, by another corporation; or

(3) more than 50% of the voting power of the capital stock of the taxpayer and more than 50% of the voting power of the capital stock of one or more other corporations are owned or controlled, either directly or indirectly, by the same interests. Whether or not the same interests test is met will be determined based on the facts and circumstances of each case. The same interests include, but are not limited to, one or more alien, foreign or domestic corporations, partnerships, trusts or individuals.

(b) The term "capital stock of a corporation" means the issued and outstanding stock of the corporation.

(c) The term "ownership" means actual or beneficial ownership, rather than mere record title as shown by the stock books of the corporation. To be considered the owner, the stockholder must have the right to vote and the right to receive any dividends declared.

(d) The term "control" means all cases where one corporation directly or indirectly possesses the power to dictate or influence the management and policies of another corporation through the direct or indirect ownership of more than 50% of the voting power of the capital stock of that corporation. In addition, a corporation controls the voting power of capital stock if it has been given the right to vote that stock by proxy or otherwise. The determination as to whether or not a corporation is controlled by or controls another corporation or is controlled by the same interests will be determined by the facts in each case.

(e) The term "voting power of capital stock of a corporation" means the shares of stock, under the applicable law, corporate charter, articles of incorporation, or shareholder agreements, that have the power to elect the board of directors of the corporation. In determining whether the stock owned by a person or entity possesses a certain percentage of the total combined voting power of all classes of stock of a corporation entitled to vote, consideration will be given to all the facts and circumstances of each case. A share of stock generally will be considered as possessing the voting power accorded to that share by the corporate charter, by-laws, or share certificate. If there is any agreement, whether express or implied, that a stockholder will not exercise its right to vote, the formal voting rights possessed by that stock may be disregarded in determining the percentage of the total combined voting power possessed by that stockholder in the corporation. Moreover, if a stockholder agrees to vote its stock in a corporation in the manner specified by another stockholder in the corporation, the voting rights possessed by the stock owned by the first stockholder may be considered to be possessed by the stock owned by the other stockholder. For contingent voting rights, the stock is deemed to possess voting power only when the contingency occurs, and the rights become exercisable.

(f) (1) The ownership test is applied before the control test. Direct ownership is examined before indirect ownership, and direct control is examined before indirect control. However, the capital stock requirement may be satisfied through direct or indirect ownership, direct or indirect control or through a combination of direct or indirect ownership or control.

(2) Examples.

The following examples are intended to illustrate the indicia of ownership and control set forth above. Generally, the examples are meant to illustrate either ownership or control since both do not need to be met concurrently in order for the capital stock requirement to be met.

Example 1: The taxpayer, X Corporation, owns 40% of the capital stock with voting rights of Y Corporation. The remaining capital stock of Y Corporation with voting rights is owned by three employees of X Corporation. These employees have agreed in writing to sell their stock to X Corporation when they leave the corporation. As part of the agreement, the employees have given X Corporation their voting proxy. Thus, X Corporation controls more than 50% of the voting power of the capital stock of Y Corporation. X and Y Corporations satisfy the capital stock requirement to be included in a combined report.

Example 2: The taxpayer, R Corporation, has issued 900 shares of common stock with voting rights equal to one vote per share. These shares are owned by P Corporation. R Corporation has also issued 1,000 shares of preferred stock. These shares possess voting rights equal to one-tenth of one vote (.10) per share of preferred stock. Those shares are owned by Q Corporation. Even though P Corporation owns less than 50% of the number of voting shares (900 shares out of a total of 1,900 shares), it owns more than 50% of the voting power of the capital stock of R Corporation (900 votes out of a total of 1,000 votes). Thus, P Corporation and R Corporation satisfy the capital stock requirement to be included in a combined report. While Q Corporation owns more than 50% of the number of shares of R Corporation (1,000 shares out of a total of 1900 shares), it only owns one-tenth of the voting power of the capital stock of R Corporation (100 votes of a total of 1,000 votes). Q Corporation does not satisfy the capital stock requirement to be included in a combined report with P Corporation and R Corporation.

Example 3: The taxpayer, Corporation A, owns 51% of the capital stock of Corporation B. Corporation B in turn owns 51% of the capital stock of Corporation C. The capital stock in both corporations has voting rights. By owning 51% of the capital stock with voting rights of Corporation B, Corporation A controls more than 50% of the voting power of the capital stock of Corporation B. Because Corporation A controls more than 50% of the voting power of the capital stock of Corporation B, it also controls indirectly more than 50% of the voting power of the capital stock of Corporation C. Corporations A, B and C satisfy the capital stock requirement to be included in a combined report.

Example 4: The taxpayer, Corporation A, is a 60% partner of Partnership Y, and is the general partner of Partnership Y. Partnership Y owns 40% of the capital stock with voting rights of Corporation B. Thus, Corporation A indirectly owns only 24% of the voting power of the capital stock of Corporation B (60% multiplied by 40%). However, because Corporation A holds more than a 50% interest in Partnership Y and has the power to manage the affairs of the partnership under the operating agreement, it can control how Partnership Y votes its stock in Corporation B. Thus, Corporation A controls indirectly the voting power of the capital stock owned by Partnership Y. In this case, because Partnership Y owns only 40% of the voting power of the capital stock of Corporation B, Corporation A controls indirectly only 40% of the voting power of the capital stock of Corporation B. Because Corporation A does not own or control, directly or indirectly, more than 50% of voting power of the capital stock of Corporation B, Corporation A and Corporation B do not satisfy the capital stock requirement to be included in a combined report.

Example 5: The taxpayer, Corporation A, has a 60% membership interest in Limited Liability Company Y, which is treated as a partnership for tax purposes. Limited Liability Company Y owns 80% of the capital stock with voting rights of Corporation B. Corporation A is considered a managing member of Limited Liability Company Y, since the terms of the operating agreement do not impose limitations on the corporate member's participation in the management either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law. Since Corporation A is a managing member of Limited Liability Company Y, which in turn has greater than 50% voting power of the capital stock of B, Corporation A has the authority to direct how Limited Liability Company Y uses its voting power in Corporation B. Thus, Corporation A controls indirectly more than 50% of the voting power of the capital stock of Corporation B, and Corporations A and B satisfy the capital stock requirement to be included in the combined report.

Example 6: The taxpayer, Corporation A, is an 80% limited partner of Partnership Y. Partnership Y owns 40% of the capital stock with voting rights of Corporation B. Corporation A also directly owns 22% of the capital stock with voting rights of Corporation B. Even though Corporation A has an 80% interest in Partnership Y, Corporation A is a limited partner and cannot control how Partnership Y votes its stock in Corporation B. Thus, Corporation A does not control indirectly 40% of the voting power of the capital stock of Corporation B, and so that 40% is not combined with the 22% of the voting power of the capital stock of Corporation B that Corporation A controls directly through its ownership of Corporation B stock to determine if Corporation A controls more than 50% of the voting power of the capital stock of Corporation B. As a result, Corporations A and B do not meet the capital stock requirement and therefore cannot be included in a combined report.

Example 7: The taxpayer, Corporation A, is a 60% general partner of Partnership Y. Partnership Y owns 40% of the capital stock with voting rights of

Corporation B. Corporation A also directly owns 30% of the capital stock with voting rights of Corporation B. By combining its direct and indirect ownership of the stock of Corporation B, Corporation A owns, directly and indirectly, 54% of the voting power of the capital stock of Corporation B (30% plus 60% multiplied by 40%). Because Corporation A directly or indirectly owns more than 50% of the voting power of the capital stock of Corporation B, Corporations A and B satisfy the capital stock requirement to be included in a combined report.

Example 8: The taxpayer, Corporation A, owns 100% of the voting power of the capital stock of Corporation B. Corporation B owns 51% of the voting power of the capital stock of Corporation C. Corporation C owns 40% of the voting power of the capital stock of Corporation D. Individual X owns 100% of the voting power of the capital stock of Corporation A and also owns 20% of the voting power of the capital stock of Corporation D. Corporations A, B, C and D satisfy the capital stock requirement to be included in a combined report because they are all directly or indirectly controlled by the same interests (Individual X).

Example 9: The taxpayer, Corporation A, owns 60% of the capital stock with voting rights of Corporation C and 60% of the capital stock with voting rights of Corporation D. Corporation B, also a taxpayer, owns 40% of the capital stock with voting rights of Corporation C and 40% of the capital stock with voting rights of Corporation D. Corporations C and D each own 30% of the capital stock with voting rights of Corporation E. Corporation B directly owns the remaining 40% of the capital stock with voting rights of Corporation E. Corporation A directly owns more than 50% of the voting power of Corporations C and D. Corporation A, acting indirectly through its control of Corporations C and D, controls Corporation E. Corporation B directly and indirectly owns 64% of the voting power of the capital stock of Corporation E (B's 40% ownership of C multiplied by C's 30% ownership of E plus B's 40% ownership of D multiplied by D's 30% ownership of E plus B's direct ownership of 40% of E). Corporations A, B, C, D and E satisfy the capital stock requirement to be included in a combined report.

Example 10: Individuals A, B, C and D each own 25% of the voting stock of Corporations S and T. Because more than 50% of the ownership of the voting stock of both corporations is owned by the same interests, Corporations S and T satisfy the capital stock requirement to be included in a combined report.

Section 6-2.3. Unitary business requirement. (Tax Law, section 210-C)

(a) General. For purposes of this Subchapter, the term "unitary business" shall be construed to the broadest extent permitted under the U.S. Constitution as interpreted by the U.S. Supreme Court, the courts of this state and the New York State Tax Appeals Tribunal.

(b) Attributes of a unitary business.

(1) A unitary business is characterized by a flow of value as evidenced by functional integration, centralized management and economies of scale.

(i) Functional integration is characterized by transfers between, or pooling among, business activities that significantly affect the operation of the business activities. Functional integration includes, but is not limited to, transfers or pooling with respect to the business's products or services, technical information, marketing information, distribution systems, purchasing and intangibles. The use of market-based or arm's length pricing for such transactions does not negate the presence of functional integration.

(ii) Centralized management exists when directors, officers, and/or other management employees jointly participate in the management decisions that affect the respective business activities and that may also operate to the benefit of the entire economic enterprise. Centralized management may exist even when day-to-day management responsibility and accountability have been decentralized, so long as the management has an operational role with respect to the business activities, such as participation in overall operational strategy for the business.

(iii) Economies of scale refers to a relationship among and between business activities resulting in a significant decrease in the average per unit cost of operational or administrative functions due to the increase in operational size. Economies of scale may exist from the inherent cost savings that arise from the presence of functional integration or centralized management.

(2) Functional integration, centralized management and economies of scale should be analyzed in conjunction with one another for their cumulative effect. The determination of a unitary business depends on all of the facts and circumstances of each case.

(c) Presumptions. Without limiting the scope of a unitary business, a unitary business will be presumed in the following factual scenarios. The corporation or the commissioner may overcome the presumption that the corporations in question are engaged in a unitary business by the presentation of clear and convincing evidence. If the activities of the corporations do not give rise to one of the presumptions set forth below, the presence of a unitary business will be determined based on all of the facts and circumstances of the case without the application of a presumption in favor of or against a finding of a unitary business.

(1) Horizontal integration. Corporations that satisfy the capital stock requirement are presumed to be engaged in a unitary business when their primary activities are in the same general line of business.

(2) Vertical integration. Corporations that satisfy the capital stock requirement are presumed to be engaged in a unitary business when the corporations are engaged in different steps in a vertically structured enterprise.

(3) Strong centralized management. Corporations that satisfy the capital stock requirement, and that might otherwise be considered as engaged in more than one unitary business, are presumed to be engaged in one unitary business where there is strong central management coupled with the existence of centralized departments or affiliates for such functions as financing, advertising, research and development, or purchasing.

(4) Newly-formed corporations. A newly-formed corporation is presumed to be engaged in a unitary business with its forming corporation or corporations in the taxable year of the newly-formed corporation that includes the date the corporations satisfy the capital stock requirement and starting from that date.

(5) Newly-acquired corporations. A newly-acquired corporation is presumed to be engaged in a unitary business with its acquiring corporation in the first taxable year that the corporations satisfy the capital stock requirement and starting in that year, if the corporations are engaged in a relationship described in paragraph 1, 2 or 3 of this subdivision.

(6) Holding companies. If a holding company, including a passive holding company, financial holding company, or a bank holding company, and one or more operating companies together satisfy the capital stock requirement, the holding company is presumed to be engaged in a unitary business with the operating company or companies.

(d) Examples.

The following examples are intended to illustrate the presumptions set forth above. For purposes of the illustrations, the corporations referred to in the examples satisfy the capital stock requirement.

Example 1: Corporations A and B sell natural and organic foods at their retail stores located throughout the United States. Corporation C sells the same types of foods at its retail stores located in Canada. Corporations A, B and C are presumed to be engaged in a unitary business.

Example 2: Corporation A is engaged in the exploration of oil. Corporation B extracts the oil found by Corporation A. Corporation C processes the oil extracted by Corporation B. Corporation D sells the oil processed by Corporation C. Corporations A, B, C and D are presumed to be engaged in a unitary business.

Example 3: Corporations A, B and C manufacture and sell children's apparel to customers located throughout the United States. Corporations D and E operate a chain of restaurants located in New York and Florida. Corporation F provides centralized purchasing, advertising and finance services to Corporations A, B, C, D and E. The executive officers of Corporation F are also actively engaged in the operations of Corporations A, B,C, D and E. Corporations A, B, C, D, E and F are presumed to be engaged in one unitary business.

Example 4: Corporation A contributes all of its intellectual property to Corporation B for 100% of Corporation B's capital stock. Corporations A and B are presumed to be engaged in a unitary business in the first taxable year in which they satisfy the capital stock requirement.

Example 5: Corporation A acquires 51% of the capital stock of Corporation B. Corporation B distributes the products manufactured by Corporation A such that Corporations A and B are part of a vertically structured business apart from satisfying the capital stock requirement. Corporations A and B are presumed to be engaged in a unitary business in the first taxable year that includes the acquisition.

Section 6-2.4. Combined group composition.

(a) If the commonly owned group election is not in effect, the following steps must be taken annually to determine if a combined report is required and, if so, which corporations to include in the combined group:

(1) A taxpayer must first identify all of the corporations with which it is engaged in a unitary business. This includes domestic, foreign and alien corporations.

(2) Of the group of corporations determined in paragraph (1) of this subdivision, a taxpayer must exclude any corporation that does not meet the capital stock requirement.

(3) Of the corporations remaining after paragraph (2) of this subdivision, any corporation prohibited from being included in a combined report must be excluded. The corporations remaining constitute the combined group for the taxable year.

(b) If the commonly owned group election is in effect, the following steps must be taken annually to determine which corporations to include in the combined group:

(1) A taxpayer must first identify all of the corporations that meet the capital stock requirement. This includes domestic, foreign and alien corporations.

(2) Of the corporations determined in paragraph (1) of this subdivision, any corporation prohibited from being included in a combined report must be excluded. The remaining corporations constitute the combined group for the taxable year.

(3) The commonly owned group has no relationship to the taxpayer's Federal consolidated group and may, in fact, include corporations that are not, or cannot be, included in a Federal consolidated group with the taxpayer or corporations that are included in different Federal consolidated groups.

Section 6-2.5. Filing combined reports. (Tax Law, section 210-C)

(a)(1) As provided in this Subpart, a group of corporations may be required or, in the case of the commonly owned group election, permitted to file on a combined basis. To file on a combined basis, the designated agent of the group must file a completed combined report. The first year the designated agent of the group files on a combined basis, and each year thereafter in which the composition of the group changes, the designated agent of the group must include the following information with the report:

(i) the exact name, address, employer identification number and state of incorporation, or, in the case of an alien corporation, country of incorporation, of each corporation included in the combined report, including the designated agent; and

(ii) information showing that each of the corporations meets the capital stock requirement for the taxable year.

(2) In addition, the following information may be required to be submitted for the taxable year at another time, such as in conjunction with an audit:

(i) a statement providing details as to why a filed combined report includes only the corporations listed in subparagraph (1)(i) of this subdivision that meet the capital stock requirement and the details as to why the corporations listed pursuant to subparagraph (1)(ii) of this subdivision are excluded from that combined report;

(ii) except in the case of a combined report filed using the commonly owned group election, information establishing that each of the corporations included in the report meets the unitary business requirement with respect to the other corporations in the group; and

(iii) the exact name, address, employer identification number and state of incorporation or, in the case of an alien corporation, country of incorporation, of all corporations that meet the capital stock requirement for the taxable year, but are not included in the combined report.

(b) Generally, the filing of a combined report or the inclusion of a corporation in or the exclusion of a corporation from a combined report is subject to revision or disallowance on audit.

Section 6-2.6. Corporations prohibited from filing a combined report. (Tax Law, section 210-C)

(a) The following corporations are prohibited from being included in a combined report under article 9-A, including a combined report under the commonly owned group election:

(1) a corporation that is taxable under a franchise tax imposed by article 9 or article 33;

(2) a corporation that would be taxable under a franchise tax imposed by article 9 or article 33 if subject to tax;

(3) a real estate investment trust (REIT) that is not a captive REIT, provided the REIT must be included in a combined report with its qualified REIT subsidiary;

(4) a regulated investment company (RIC) that is not a captive RIC, provided the RIC must be included in a combined report with its subsidiary;

(5) a New York S corporation; or

(6) an alien corporation that under any provision of the IRC is not treated as a "domestic corporation" as defined in IRC section 7701 and has no effectively connected income for the taxable year.

(b) If a corporation is subject to tax under article 9-A solely as a result of its ownership of a limited partner interest in a limited partnership, as described in section 1-2.3(b) of this Subchapter or its membership interest in a limited liability company that is equated to the interest of a limited partner, as described in section 1-2.3(d) of this Subchapter, and none of the corporation's related corporations are subject to tax under article 9-A, the corporation shall not be required or permitted to file a combined report with such related corporations.

For purposes of this Subpart, the term "related corporations" means corporations that meet the capital stock requirement and the unitary business requirement.

Section 6-2.7. Commonly owned group election. (Tax Law, section 210-C)

(a) (1) Subject to the restrictions in section 6-2.6 of this Subpart, a taxpayer may elect to treat as its combined group all corporations that meet the capital stock requirement (such corporations are collectively referred to as the "commonly owned group"). If the election is made, all of the corporations that are members of the commonly owned group are bound by the election and will be treated as the members of a single combined group for combined reporting purposes, regardless of whether:

(i) these corporations are included in more than one Federal consolidated return filed by more than one Federal consolidated group, or

(ii) these corporations in fact are engaged in one or more unitary businesses.

(2) Upon making the election, the commonly owned group must calculate the combined group's combined business income, and combined capital of all members of the commonly owned group, and the fixed dollar minimum base tax of all taxpayers in the commonly owned group.

(3) Upon making the election, the commonly owned group is deemed to be engaged in a single unitary business for all purposes, including for purposes of calculating business and investment capital, business and investment income and the apportionment factor.

(4) Example.

> Corporation A is in the business of producing paper, packaging and office supplies. It has three wholly owned subsidiaries. Corporation B is in the business of producing school supplies. Corporation C is in the business of selling the paper, packaging, office and school supplies produced by Corporations A and B. Corporation D is in the business of operating an

electronic legal research service that it sells to law firms. In 2015 and 2016, Corporations A, B and C properly file a combined report as a unitary business and Corporation D properly files a separate report. The dividends Corporation A receives from Corporation D are properly treated as investment income on the combined report as income received from stock in a non-unitary corporation that qualifies as investment capital. In 2017, Corporation A makes the commonly owned group election and Corporations A, B, C and D file a combined report. As Corporation D is included in the combined report, its stock cannot be investment capital. On that report, the dividends Corporation A receives from Corporation D are properly eliminated in computing combined business income. In 2018, Corporation A sells all of its stock in Corporation D to a third-party, realizing a capital gain on the sale. Corporation A's capital gain on the sale of its stock in Corporation D is treated as a capital gain from the sale of a unitary member of the combined group and is properly reported as business income on the combined report of the commonly owned group.

(b) Mechanics of making the election. A commonly owned group election must be made by the designated agent of the combined group, acting on behalf of all the corporations in the commonly owned group. The election must be made on an original, timely filed report, determined with regard to extensions of time for filing. Any commonly owned group election made on a report that is filed late will be invalid and ineffective.

(c) Effect of election in subsequent tax years. A commonly owned group election is binding for and applicable to the taxable year for which it is made and for the next six taxable years (if the first year is not a short taxable year) or the next seven taxable years (if the first year is a short taxable year). The election is binding on all corporations that meet the capital stock requirement and continues in place regardless of whether any Federal consolidated group to which members of the combined group belong discontinues the filing of a Federal consolidated return or the designated agent of the group changes. Any corporation that enters a commonly owned group by acquisition or creation during the time that the commonly owned group election is in effect must be included in the combined group beginning with the taxable year during which the corporation enters the group, and the corporation entering the group shall be considered to have consented to the application of the election and to have waived any objection to its inclusion in the combined group. The disposition of or the failure to meet the capital stock requirement of one or more members of a combined group will not sever an election for the remaining members of the group and the leaving member or members are not bound by the election. However, reverse acquisition rules based on the Federal rules set forth in 26 CFR 1.1502-75(d)(3) will be applied in determining whether a corporation is bound by a commonly owned group election. The entrance or departure of a corporation from the commonly owned group does not change the effective periods as defined in subdivision (d) of this section.

(d) Revocation, renewal of election. A commonly owned group election, once made, cannot be revoked until after it has been effective for seven taxable years (if the election is not made on a short period return) or eight taxable years (if the election is made on a short period return), such periods hereinafter referred to as the "effective period". When an election is made, it will continue to be automatically renewed after the effective period for another effective period indefinitely, unless the designated agent of the commonly owned group, acting on behalf of all the corporations included in the commonly owned group, affirmatively revokes the election at the end of the effective period. In the case of a revocation, a new election will not be permitted in any of the three taxable years immediately following the revocation. A revocation will be effective for the first taxable year (whether or not that taxable year is a short taxable year) after the completion of the effective period for which the prior election was in place and must be made by the designated agent on an original, timely filed report, determined with regard to extensions of time for filing, for that first subsequent taxable year. Every corporation that is a member of the commonly owned group is bound by such revocation. If a commonly owned group election is affirmatively revoked after the effective period, the election will terminate for the subsequent taxable year, and no commonly owned group election by any member of that commonly owned group will apply for that year and the subsequent two taxable years (if revoked on a report that is not a short period report) or the subsequent three taxable years (if revoked on a report that is a short period report). In such cases, the designated agent of that commonly owned group may make a new election beginning in the third or fourth taxable year after the revocation.

(e) In determining the effective periods described in this section, short taxable years will not be considered or counted. However, the election or revocation may be made on a report for a short taxable year.

(1) Example.

> Corporation A is a calendar year taxpayer for Federal income tax purposes. On April 1, 2015, Corporation A, which has 25 wholly owned subsidiaries, purchases an office building in New York State. Prior to April 1, 2015, neither Corporation A nor any of its subsidiaries had nexus with New York. Thus, Corporation A's first taxable year in New York is a short taxable year (4/1/15-12/31/15). Corporation A, as the designated agent, makes the commonly owned group election on its first report and includes all of its 25 wholly owned subsidiaries in a combined report. Although the commonly owned group election can be made on the short period 2015 report, such period does not count in determining the seven-year period for which the election is in effect. As such, the commonly owned group election will apply from April 1, 2015, until the tax year

ending on December 31, 2022, assuming there are no other short taxable years during this time period.

Section 6-2.8. Other rules. (Tax Law, section 210-C)

(a) For rules regarding when REITS or RICS should be included in a combined report, see Subpart 9-4 of this Subchapter.

(b) A combinable captive insurance company, as defined in section 2(11), is required to be included in a combined report if more than 50% of the voting power of its capital stock is owned or controlled directly or indirectly by a corporation subject to tax under article 9-A or a corporation required to be included in a combined report under article 9-A.

SUBPART 6-3

FORM OF REPORTS

Section 6-3.1. Form of reports. (Tax Law, sections 211(1), (2), (2-a) and (3), 1085(n))

(a) Reports are required to be filed on the forms and in the manner prescribed by the commissioner. The forms and instructions are available from the department and may be downloaded from the department's website.

(b) A change in Federal taxable income must be reported on an amended New York State report and must be accompanied by a copy of the Federal amended return or the Federal revenue agent's report, and copies of all other related information.

(c) Every taxpayer must submit such other reports and other information that the commissioner may require in the administration of article 9-A.

(d) Every report must include a certification that the statements in the report are true. The certification must be made by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer of the taxpayer authorized to act in that capacity. The fact that an individual's name is signed on the certification of the report is prima facie evidence that the individual is authorized to sign and to certify the report on behalf of the corporation.

Section 6-3.2. Form of reports on combined basis. (Tax Law, section 211(1))

(a) In all cases where a combined report is required or permitted, a combined franchise tax report must be submitted by the designated agent responsible for paying the combined tax. In addition, each member of the combined group must submit such other reports and other information that the commissioner may require.

(b) It is not necessary that all corporations in the combined group have the same accounting period. (See Subpart 2-1 of this Subchapter for information relating to accounting periods.) Where a corporation's taxable year is different from that of the designated agent, the applicable taxable year of such corporation to be included in the combined group is the taxable year that ends within the taxable year of the designated agent. Only amounts from the months included in the combined report are used in the computation of tax for the period. The commissioner may permit or require a corporation to use a different accounting period where appropriate.

(c) Each member of a combined group, including non-taxpayer members, annually must file an information return with the department. This required form includes a detailed schedule of information needed to compute the combined group's tax and the fixed dollar minimum base of each taxpayer member, including but not limited to the member's business and investment capital and business apportionment items. This required form also must include the employer identification number (EIN) of the designated agent.

SUBPART 6-4

TIME AND PLACE FOR FILING REPORTS

Section 6-4.1. Time for filing reports. (Tax Law, section 211(1))

(a) Reports must be filed at the times set forth in this section.

(1) Every calendar-year taxpayer, except a taxable DISC and a New York S corporation, must file its annual report on or before the 15^{th} day of April following the close of its calendar year.

(2) Every fiscal-year taxpayer, except a taxable DISC, must file its annual report on or before the 15th day of the fourth month following the close of its fiscal year.

(3) Every taxpayer, except a taxable DISC, using a 52-53 week accounting period must file its report on or before the 15th day of the fourth month following the date on which its fiscal year is deemed to have ended. A 52-53 week accounting period that ends within seven days from the last day of any calendar month will be deemed to have ended on the last day of that month.

(4)(i) Where a corporation that is not part of a Federal consolidated group becomes part of such a group on a day other than the first day of its Federal taxable year (determined without reference to its membership in the group), such taxpayer is required to file a Federal short period return for the period from the first day of its taxable year through the end of the day on which it becomes such a member. (26 CFR 1.1502-76(b) Section 6-1.2 (b)(1) of this Part requires, in such an instance, that the taxpayer file a short period report for purposes of article 9-A covering the period covered by the Federal short period return (to the extent that it is subject to article 9-A during that period). Where the due date for the Federal short period return is established pursuant to 26 CFR 1.1502-76(c)(1), or where the Federal short period return is required pursuant to 26 CFR 1.1502-76(c)(2) to be filed on or before the 15th day of the fourth month following the close of what would have been the taxpayer's Federal taxable year, determined without regard to such membership, then the due date for the article 9-A short period report shall be the due date for the Federal short period return. This provision does not apply in the case of Federal amended short period returns described in 26 CFR 1.1502-76(c)(2). The due date for the article 9-A amended report, for the same short period covered by such Federal amended return (to the extent that it is subject to article 9-A during such period), is prescribed by section 6-1.4 of this Part.

(ii) Where a taxpayer ceases to be part of a Federal consolidated group, including the case where it leaves one Federal consolidated group to join another, an article 9-A short period report is required to be filed, covering the period from the beginning of its taxable year for article 9-A purposes up to the date it leaves the group. Such report shall be filed on or before the 15th day of the fourth month following the close of its taxable year under article 9-A determined without regard to its cessation of membership in such Federal consolidated group.

(iii) Notwithstanding the provisions in subparagraphs (i) and (ii) of this paragraph, no short period report is required to be filed if the corporation remains in the same New York State combined group before and after the changes mentioned in such subparagraphs.

(5) In the case of an election made pursuant to IRC section 338, the old target (within the meaning of 26 CFR 1.338-10) may be required to file a final report that is a short period report. In such event, the corporation, if a taxpayer, must file a short period report for purposes of article 9-A covering the same period as the Federal short period return (to the extent that it is subject to article 9-A during such period). Such report shall be filed by the due date for the Federal short period return as prescribed by 26 CFR 1.338-10, except that this provision shall not apply to an amended return described in 26 CFR 1.338-10 as a deemed sale return. The due date for the article 9-A amended report, for the same short period covered by such Federal amended return (to the extent that it is subject to article 9-A during such period), is prescribed by section 6-1.4 of this Part.

(6) In the case of an S corporation termination year, the S short year and the C short year are treated as short taxable years but the due date of the report for the S short year is the same as the due date of the report for the C short year.

Section 6-4.2. Time for filing reports of corporations ceasing to exercise franchise or be subject to tax. (Tax Law, section 211(1))

(a) A domestic corporation that ceases to exercise its franchise is required to file a report on the date of cessation or at such other times as the commissioner may require covering each year or period for which no report was filed. The report is required in any such case whether the corporation continues in existence and remains subject to article 9-A or is dissolved and ceases to be subject to tax.

(b) A foreign corporation that ceases to do business in New York State or to employ capital, or to own or lease property in this State in a corporate or organized capacity, or to maintain an office in this State, or to derive receipts from activity in this State and, thus, ceases to be subject to tax under article 9-A, or any corporation that ceases to be subject to tax under article 9-A because of a change of classification, is required to file a report on the date of cessation, or date of change of classification, or at such other time as the commissioner may require, covering each year or period for which no report was filed.

(c) If a corporation that is taxed on the basis of a combined report ceases to be subject to tax under article 9-A but continues to be included in the next combined report, it need not file a separate report at the time of cessation.

Section 6-4.3. Extension of time for filing reports. (Tax Law, section 211(1))

(a) An automatic six-month extension of time for filing an annual report will be granted if an application for automatic extension is filed and a properly estimated tax is paid on or before the due date of the report for the taxable period for which the extension is requested. Failure to meet any of the requirements in this section makes the application invalid and any report filed after the due date will be treated as a late filed report.

(b) An automatic six-month extension of time for filing a combined report will be granted to a group of corporations filing a combined report provided an application for automatic extension is filed and properly estimated tax is paid on or before the due date of the report for the taxable period for which the extension is requested. Failure to meet any of the requirements in this section makes the application invalid and any report filed after the due date will be treated as a late filed report. To obtain an automatic extension, an application must be filed by the designated agent for the combined group. However, each taxpayer member corporation of a new combined group also must file a separate application to extend the time to file for the first period for which the new combined group actually files a combined report. In addition, each taxpayer member corporation being newly added to an existing combined group must also file a separate application to extend the time to file the report for the first period for which they are actually included in the combined group's report. Corporations included in the combined report that are not subject to tax are not required to file a separate application to extend the time to file. Each applicant must submit the following information:

(1) The name of each corporation included in the combined group.

(2) The employer identification number of each corporation in the combined group.

(3) For any appropriate corporation, the beginning and ending dates of any taxable year of less than 12 months.

(4) The estimated fixed dollar minimum tax for each member of the combined group that is taxable in New York State.

(5) From the report filed for the taxable year immediately preceding the taxable year for which the extension is being requested, the sum of any overpayment requested to be credited to the next period, plus any tax credits to be applied to the next period.

(6) If a corporation made any separate estimated tax installment payments for the taxable year for which the extension is being requested, the total amount for that corporation.

(7) If a payment was made on an extension filed for the taxable year for which the extension is being requested, the corporation that filed the form and the amount of payments it made, if any.

(8) Any prepayments made by the designated agent, as applicable. The designated agent for the combined group must pay with its application the properly estimated combined tax, including the tax measured by the fixed dollar minimum for each of the other taxpayers included in the combined group.

(c) On or before the expiration of the automatic six-month extension of time for filing a report, the commissioner may grant additional three-month extensions of time for filing reports when good cause exists. No more than two additional three-month extensions of time for filing a report for any taxable year may be granted. An application for each additional three-month extension must be made in writing before the expiration of the previous extension. Additional extensions of time for filing a New York S Corporation franchise tax return will not be granted. Additional extensions of time for filing by a combined group must be requested in one application by the designated agent for the combined group. The applicant must submit the following information:

(1) its complete corporate name;

(2) its employer identification number;

(3) the reason for requesting the additional extension; and

(4) in the case of an application by a combined group, a list showing the corporate name, employer identification number, and taxable period of each of the other corporations properly included as part of the combined group.

(d) Any extension of time for filing a report granted under this Subpart will not extend the time for the payment of any tax due.

Section 6-4.4. Place for filing reports.

Reports must be filed electronically or mailed to the address provided in the most recent report instructions or on the New York State Department of Taxation and Finance website. Every corporation must file electronically if it:

(1) prepares tax documents without the assistance of a tax professional;

(2) uses approved e-file tax software or a computer to prepare, document, or calculate its report, extension, mandatory first installment or estimated tax payment; and

(3) has broadband internet access.

PART 7

PAYMENT OF TAX, DECLARATION AND PAYMENT OF

ESTIMATED TAX, AND COLLECTION

SUBPART 7-1

PAYMENT OF TAX

Section 7-1.1. Time for payment of tax. (Tax Law, sections 213(1) and (3), 1091)

(a) The tax imposed by article 9-A is payable to the department in full at the time the report is required to be filed. The time when the payment is required to be made is determined without regard to any extension of time for filing such report.

(b) The Commissioner may grant a reasonable extension of time for payment of the tax upon receipt of a written request from the taxpayer giving complete information as to the reasons for its inability to make payment of the tax on or before the prescribed due date. Interest must be paid on any balance due from the original due date of the report, without regard to any extension, to the date of payment.

Section 7-1.2. Properly estimated tax. (Tax Law, section 213(2))

(a) A taxpayer applying for an automatic six-month extension for filing its tax report must pay, on or before the date that its report is required to be filed, without regard to any extension of time, its properly estimated tax. The estimated tax paid, or balance thereof, will be deemed properly estimated if the tax paid is either:

(1) not less than 90% of the tax as finally determined; or

(2) not less than the tax shown on the taxpayer's report for the immediately preceding taxable year, if such preceding year was a taxable year of 12 months.

(b) For purposes of paragraph (2) of subdivision (a) of this section, the amount of the tax shown on the taxpayer's report for the immediately preceding taxable year will be utilized, irrespective of the amount of the tax, if any, shown on the taxpayer’s report for the second preceding taxable year.

Section 7-1.3. Cessation tax. (Tax Law, section 213(1))

Any taxpayer that ceases to exercise its franchise or to be subject to the tax imposed by article 9-A must pay the tax, or balance thereof, at the time the report is required to be filed; see section 6-4.2 of this Subchapter.

SUBPART 7-2

DECLARATION OF ESTIMATED TAX

Section 7-2.1. Requirement of declaration. (Tax Law, section 213-a(a))

(a) Every taxpayer subject to the tax imposed by article 9-A must make a declaration of its estimated tax for the current taxable year if such estimated tax can reasonably be expected to exceed $1,000 for the taxable year.

(b) The declaration required by this section must cover a calendar-year accounting period if the taxpayer files its report on the basis of a calendar year, or a full fiscal year if the taxpayer files its report on the basis of a fiscal year, unless a declaration for a short period is required. No declaration may be made for a period of more than 12 months.

Section 7-2.2. Amendments of declaration. (Tax Law, section 213-a(d))

In making a declaration of estimated tax, the taxpayer is required to take into account the facts and circumstances existing at the time, as well as those reasonably to be anticipated, that relate to the prospective article 9-A tax. Amended or revised declarations may be made if the taxpayer finds that its estimated tax differs from the estimated tax reflected in its most recent declarations of estimated tax. However, an amended declaration may only be made on an installment date (see section 7-3.4 of this Part—Other installments of estimated tax) and no further amendment may be made until a succeeding installment date. The amended declaration must be made on form CT-400 and marked "AMENDED". No refund will be issued as a result of the filing of an amended declaration. Consideration will be given to a refund only in connection with a completed report filed by a taxpayer for the taxable year covered by its declaration (and amended declaration).

Section 7-2.3. Report as declaration or amendment. (Tax Law, section 213-a(e) and (f))

(a) If the taxpayer files its report for the calendar year on or before February 15th of the succeeding calendar year (or if the taxpayer files on a fiscal-year basis, on or before the 15th day of the second month succeeding the taxable year) and pays together with such report the balance, if any, of the full amount of the tax shown to be due on the report:

(1) Such report will be considered to be its declaration if no declaration was required to be filed on or before the 15th day of the ninth month of the calendar year or fiscal year for which the tax was imposed, but a declaration was required to be filed on or before the 15th day of the twelfth month of the calendar year or fiscal year.

(2) Such report will be considered as the amendment permitted by section 7-2.2 of this Subpart to be filed on or before the 15th day of the twelfth month of the calendar year or fiscal year if the tax shown on the report is greater than the estimate shown on the declaration previously made.

(3) Examples.

Example 1: A taxpayer that reports on the basis of a calendar year first meets the requirement for making a declaration of estimated tax on September 7, 2021. The taxpayer may satisfy the requirements for making a declaration of estimated tax by making and filing its report for the 2021 taxable year on or before February 15, 2022, and paying, at the time of filing, the balance, if any, of the full amount of tax shown to be payable. The report will be treated as the declaration required to be filed on or before December 15, 2021.

Example 2: The taxpayer makes and files, on or before September 15, 2021, a timely declaration of estimated tax for such year, and, on or before February 15, 2022, files its 2021 tax report and pays the balance, if any, of the full amount of tax shown to be payable. If the taxpayer's report shows the tax to be greater than the estimated tax shown on the declaration, the report will be treated as the amended declaration permitted to be filed on or before December 15, 2021.

(b) The filing of a declaration or amended declaration or the payment of the last installment of estimated tax on December 15th, or the filing of a report by February 15th of the succeeding calendar year (or if on a fiscal-year basis, on the 15th day of the twelfth month of the current fiscal year and the 15th day of the second month of the succeeding fiscal year), will not relieve the taxpayer of the additional charge for underpayment of installments, under section 1085(c), if it failed to pay the estimated tax that was due earlier in its taxable year.

Section 7-2.4. Short periods. (Tax Law, section 213-a(g))

If a taxpayer is required to make a declaration of estimated tax pursuant to section 7-2.1 of this Subpart and a short taxable year is involved, a declaration for the fractional part of the year is required. No declaration is required if the short taxable year is a period of five months or less.

Section 7-2.5. Time for filing declaration of estimated tax for short taxable year. (Tax Law, section 213-a(g))

In the case of a short taxable year of more than five months, the declaration of estimated tax must be filed in accordance with the following schedule:

(a) If at any time before the first day of the sixth month of the current taxable year the taxpayer’s estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the sixth month of the current taxable year.

(b) If no declaration is required to be filed pursuant to subdivision (a) of this section, and at any time after the last day of the fifth month of the current taxable year, but before the first day of the ninth month of the current taxable year, the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the ninth month or the 15th day of the last month of the current taxable year, whichever comes first.

(c) If no declaration is required to be filed pursuant to subdivision (a) or (b) of this section, and at any time after the last day of the eighth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, the declaration must be filed on or before the 15th day of the last month of the current taxable year.

Section 7-2.6. Extension of time for filing declaration of estimated tax. (Tax Law, section 213-a(h))

The Commissioner may grant a reasonable extension of time, not to exceed three months, for the filing of any declaration of estimated tax upon receipt of a written request from the taxpayer giving complete information as to the reasons for its inability to file the declaration on or before the prescribed due date.

SUBPART 7-3

PAYMENTS OF ESTIMATED TAX

Section 7-3.1. General.

The amount of estimated tax due as shown on a declaration of estimated tax may be paid in installments or, at the election of the taxpayer, may be paid in full at the time of filing the declaration. If the estimated tax is paid in installments, one installment, following any mandatory first installment paid must accompany the declaration.

Section 7-3.2. Definitions. (Tax Law, section 213-b(f))

(a) The term "preceding year's tax" as used in this Subpart means the tax imposed by article 9-A for the immediately preceding calendar or fiscal year. It also means, for purposes of computing the first installment of estimated tax when an application has been filed for extension of the time for filing the report required to be filed for the immediately preceding calendar or fiscal year, the amount properly estimated as the tax imposed upon the taxpayer for such preceding calendar or fiscal year.

(b) The term “second preceding year’s tax” as used in this Subpart means the tax imposed by article 9-A for the calendar or fiscal year preceding the calendar or fiscal year described in the first sentence of subdivision (a) of this section.

(c) For purposes of determining the calendar or fiscal year used pursuant to subdivisions (a) and (b) of this section, short taxable years will be considered.

Section 7-3.3. First installment of estimated tax for certain taxpayers. (Tax Law, section 213-b(a))

(a) New York S Corporations. Every New York S corporation subject to the tax imposed by article 9-A must pay with its report required for the immediately preceding taxable year, or with an application for extension of the time for filing such report, a mandatory first installment of estimated tax equal to:

(1) 25% of such preceding year's tax, if such tax exceeded $1,000 but was equal to or less than $100,000; or

(2) 40% of such preceding year’s tax, if such tax exceeded $100,000.

(b) New York C corporations. Every New York C corporation subject to the tax imposed by article 9-A must file form CT-300 on or before the fifteenth day of the third month following the close of its taxable year and pay with such form a mandatory first installment of estimated tax equal to:

(1) 25% of the second preceding year's tax, if such tax exceeded $1,000 but was equal to or less than $100,000; or

(2) 40% of the second preceding year’s tax, if such tax exceeded $100,000.

(c) The mandatory first installment required to be paid pursuant to this section must be paid for a taxable year of any length, including short taxable years.

(d) Examples.

Example 1: Corporation A, a New York C corporation, is a calendar-year filer. Its tax for the 2020 taxable year is $200,000 and its tax for the 2021 taxable year is $50,000. Since the mandatory first installment of estimated tax for C corporations is based on the second preceding year's tax, Corporation A must pay a mandatory first installment of estimated tax for the 2022 taxable year equal to $80,000 (40% of $200,000). The installment must be made on form CT-300, on or before March 15, 2022.

Example 2: Corporation B, a New York S corporation, is a calendar-year filer. Its tax for the 2021 taxable year is $3,000. Since the mandatory first installment for S corporations is based on the preceding year's tax, Corporation B must pay a mandatory first installment of estimated tax for the 2022 taxable year equal to $750 (25% of $3,000). The installment must be made with its report required for the 2021 taxable year (or with its application for extension) due on or before March 15, 2022.

Example 3: Corporation C, a New York C corporation, has two short periods for the 2021 taxable year. Its tax for the first 2021 short period, January 1, 2021, through August 31, 2021, is $710,000 and its tax for the second 2021 short period, September 1, 2021, through December 31, 2021, is $340,000. Corporation C must pay a mandatory first installment of estimated tax for the 2022 taxable year equal to $284,000 (40% of $710,000) on form CT-300, on or before March 15, 2022.

Example 4: Corporation D, a New York C corporation, is a calendar-year filer. Its tax for the 2020 taxable year is $10,000,000 and its tax for the 2021 taxable year is $16,000,000. Corporation D knows that a short period report will be required pursuant to section 6-1.2 of this Subchapter for the period January 1, 2022, through March 31, 2022. It must still pay a mandatory first installment of estimated tax for the 2022 taxable year equal to $4,000,000 (40% of $10,000,000) on form CT-300, on or before March 15, 2022.

Example 5: Corporation E, a New York C corporation, first becomes subject to tax under article 9-A on June 1, 2021. Its first New York taxable year runs June 1, 2021, through December 31, 2021. Corporation E is not required to pay a mandatory first installment of estimated tax for the 2022 taxable year because it was not required to file a report for the second preceding taxable year of 2020.

Section 7-3.4. Other installments of estimated tax. (Tax Law, section 213-b(b) and (h))

(a) In the case of a declaration of estimated tax for a 12-month taxable year, the other dates for filing the declaration and for installment payments are:

Dates for filing the declaration	Dates for installment payments
(1) On or before the 15th day of the sixth month:	The estimated tax must be paid in three equal installments (after deducting the amount of mandatory first installment paid, if any). One payment must be made at the time of filing the declaration, one on or before the 15th day of the

	ninth month and one on or before the 15th day of the twelfth month of the current taxable year.
(2) On or before the 15th day of the ninth month:	The estimated tax must be paid in two equal installments (after deducting the amount of mandatory first installment paid, if any). One payment must be made at the time of filing the declaration and one on or before the 15th day of the twelfth month of the current taxable year.
(3) On or before the 15th day of the twelfth month of the current taxable year:	The estimated tax must be paid in full at the time of filing the declaration (after deducting the amount of mandatory first installment paid, if any).

(b) If a declaration is filed after the time prescribed in section 213-a , or after the expiration of any extension of time, then the provisions of paragraphs (1)-(3) of subdivision (a) of this section do not apply, and the taxpayer must pay at the time of filing the declaration all installments of estimated tax that would have been payable at or before such time if the declaration had been filed at the time prescribed in section 213-a. The remaining installments must be paid at the time and in the amounts that they would have been payable if the declaration had been filed at the time prescribed in section 213-a

(c) Example.

Corporation X, a New York C corporation, was required to file a declaration of estimated tax on or before June 15, 2022, but filed its declaration for calendar year 2022 on November 18, 2022. At the time of filing its declaration, Corporation X had failed to pay two installments of its estimated tax for the 2022 taxable year (i.e., the installments due on June 15, 2022, and September 15, 2022). Upon filing the declaration on

November 18, 2022, it must pay the two installments of estimated tax that it previously failed to pay.

Section 7-3.5. Impact of amendments of declaration on estimated payments. (Tax Law, section 213-b(c) and (h))

If any amendment of a declaration is filed, the remaining installments, if any, must be ratably increased or decreased (as the case may be) to reflect any increase or decrease in the estimated tax by reason of such amendment. If an amendment is made after the 15th day of the ninth month of the current taxable year, any increase in the estimated tax must be paid at the time of making such amendment.

(a) Example.

On June 15, 2022, Corporation Y files a declaration of estimated tax of $14,000 for the 2022 taxable year. Corporation Y has already paid a mandatory first installment of $2,000 on March 15, 2022, and divides the $12,000 of remaining estimated tax by three to compute the $4,000 installment amount to be paid on June 15, on September 15, and on December 15. Corporation Y paid the required $4,000 installment on June 15, 2022. On September 15, 2022, it files an amended declaration showing an estimated tax of $20,000 for the 2022 taxable year. The balance of $14,000 ($20,000 minus $2,000 mandatory first installment and $4,000 June estimated payment) must be paid in two remaining installments: $7,000 on September 15, 2022, and $7,000 on December 15, 2022.

Section 7-3.6. Application of installments based on preceding and second preceding year's tax. (Tax Law, section 213-b(a) and (d))

Any amount of mandatory first installment paid must first be applied as payment of the first installment against the estimated tax for the current taxable year shown on the declaration required to be filed, and any amount remaining must be considered as a payment on account of the tax shown on the report required to be filed by the taxpayer for the current taxable year. If no declaration of estimated tax is required to be filed by the taxpayer, any amount of mandatory first installment paid will be considered as a payment on account of the tax shown on the report required to be filed by the taxpayer for the current taxable year.

Section 7-3.7. Short taxable years. (Tax Law, section 213-b(g))

In the case of a short taxable year of a taxpayer for which a declaration of estimated tax is required to be made and filed, the estimated tax, after deducting the amount, if any, paid as a mandatory first installment for such period, must be paid in equal installments. One such installment must be paid at the time of filing the declaration, one on the 15th day of the ninth month of the current taxable year (unless the short taxable year closed prior to such ninth month, in which case the installment will be eliminated), and one on the 15th day of the last month of the current taxable year.

(a) Example.

> Corporation A has a short taxable year of 10 months, from January 1, 2021, to October 31, 2021. If there is a reasonable expectation before June 1, 2021, that Corporation A's estimated tax will exceed $1,000 for such short taxable year, the declaration is required to be made and filed on or before June 15, 2021. The estimated tax (after deducting the amount of mandatory first installment paid, if any) is payable in three equal installments: one on the date of filing the declaration and one each on September 15, 2021, and October 15, 2021.

If, instead, there is a reasonable expectation on or after June 1, 2021, but before September 1, 2021, that Corporation A's estimated tax will exceed $1,000, the declaration is required to be made and filed on or before September 15, 2021. The estimated tax (after deducting the amount of mandatory first installment paid, if any) is payable in two equal installments: one on the date of filing the declaration and one on October 15, 2021.

If there is a reasonable expectation on or after September 1, 2021, but not before such date, that Corporation A's estimated tax will exceed $1,000, the declaration is required to be made and filed on or before October 15, 2021. The estimated tax (after deducting the amount of mandatory first installment paid, if any) is payable in full on the date of filing the declaration.

Section 7-3.8. Extension of time. (Tax Law, section 213-b(i))

The commissioner may grant a reasonable extension of time, not to exceed six months, for payment of any installment of estimated tax upon receipt of a written request from the taxpayer giving complete information as to the reasons for its inability to pay the installment on or before the prescribed due date. As a condition for granting an extension of time, the commissioner may require the taxpayer to furnish a bond or other security in an amount not to exceed twice the amount of the installment. Interest must be paid from the original due date of the installment, without regard to any extension, to the date of payment.

Section 7-3.9. Payments of installments in advance. (Tax Law, section 213-b(j))

At the election of the taxpayer, any installment of the estimated tax may be paid prior to the date prescribed for its payment. No interest will be allowed or paid on such prepayment.

PART 8

METROPOLITAN TRANSPORTATION

BUSINESS TAX SURCHARGE

SUBPART 8-1

GENERAL

Section 8-1.1. Definitions. (Tax Law, section 209-B)

(a) (1) The term “surcharge taxpayer” means every corporation other than a New York S corporation that is exercising its corporate franchise or doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in the Metropolitan Commuter Transportation District (MCTD).

(2) In the case of a combined group that has at least one corporation included in the combined report that is itself exercising its corporate franchise or doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in the MCTD, the term “surcharge taxpayer” means every such corporation.

(i) Where the surcharge taxpayer is either permitted or required by a provision of this Part to take some action, such action shall be taken by the combined group’s designated agent.

(ii) For purposes of determining the MCTD apportionment percentage, the term “surcharge taxpayer” shall include each corporation properly includable in the combined report.

(b) The term “surcharge base” means the tax imposed on the surcharge taxpayer due on such taxpayer’s corporate franchise tax report, before the deduction of any credits allowed. In the case of a combined report, the term “surcharge base” means the tax due on the combined report, before the deduction of any credits allowed, and also includes the amount of fixed dollar minimum tax for each member of the combined group that is itself exercising its corporate franchise or doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in the MCTD.

(c) The terms “doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in the MCTD” have the same meaning as in Subpart 1-2 of this Chapter, except that the definitions of such terms shall be adapted to this Part. For example: “tax surcharge” shall be substituted for “tax”; “surcharge taxpayer” shall be substituted for “taxpayer”; “the MCTD” shall be substituted for “New York State” and “the state”; and “any corporation” shall be substituted for “foreign corporation”.

(d) The term “deriving receipts from activity” has the same meaning as in section 1-2.8 of this Subchapter, except that the definition of such term shall be adapted to this Part. For example: “tax surcharge” shall be substituted for “tax”; “the MCTD” shall be substituted for “New York State” and “the state”; “and “any corporation” shall be substituted for “foreign corporation”. “MCTD receipts” shall be substituted for “New York receipts” and determined under Subpart 8-4 of this Part.

Section 8-1.2. Imposition of the tax surcharge. (Tax Law, section 209-B)

(a) In addition to the tax imposed by section 209, a tax surcharge is imposed on every surcharge taxpayer for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the Metropolitan Commuter Transportation District (MCTD).

(b) The tax surcharge is imposed on the surcharge base that is apportioned to the MCTD based on the surcharge taxpayer’s business activity carried on within the MCTD.

(c)(1) To compute the tax surcharge, the surcharge base is multiplied by the MCTD apportionment percentage and the surcharge tax rate.

(2) The surcharge tax rate is:

(i) 25.6% for taxable years beginning on or after January 1, 2015, and before January 1, 2016;

(ii) 28% for taxable years beginning on or after January 1, 2016, and before January 1, 2017;

(iii) 28.3% for taxable years beginning on or after January 1, 2017, and before January 1, 2018;

(iv) 28.6% for taxable years beginning on or after January 1, 2018, and before January 1, 2019;

(v) 28.9% for taxable years beginning on or after January 1, 2019, and before January 1, 2020;

(vi) 29.4% for taxable years beginning on or after January 1, 2020, and before January 1, 2021;

(vii) 30% for taxable years beginning on or after January 1, 2021, and before January 1, 2024;

(viii) The tax rate specified in section 209-B(1)(a) for taxable years beginning on or after January 1, 2024.

(d) The tax surcharge will not be allowed as a deduction in the computation of any tax imposed under the Tax Law; and the credits otherwise allowable under article 9-A will not be allowed against the tax surcharge.

Section 8-1.3. Applicability of rules on administration of tax. (Tax Law, section 209-B)

All of the procedural provisions concerning the administration of the tax imposed by section 209, in law and in regulation, including the provisions of article 27 and the regulations promulgated thereunder, shall apply to the tax surcharge.

SUBPART 8-2

METROPOLITAN COMMUTER TRANSPORTATION DISTRICT (MCTD) APPORTIONMENT PERCENTAGE

Section 8-2.1. Apportionment of surcharge base to the MCTD. (Tax Law, section 209-B)

(a) A surcharge taxpayer must apportion its surcharge base by multiplying such surcharge base by its MCTD apportionment percentage. The surcharge taxpayer's MCTD apportionment percentage is computed using a formula consisting of three factors, expressed as percentages. The three factors are:

(1) real and tangible personal property that is located within the MCTD and all such property that is located in New York State, including real and tangible personal property that is rented to the surcharge taxpayer;

(2) business receipts from within the MCTD and all business receipts from New York State; and

(3) payroll within the MCTD and all payroll from New York State.

(b) The MCTD apportionment percentage is computed by adding together the surcharge taxpayer's real and tangible personal property factor, business receipts factor and payroll factor, and dividing by three. If a factor is missing, the other two factors will be added together and the total divided by two. If two factors are missing, the remaining factor is the MCTD apportionment percentage. A factor is missing only if both the numerator and the denominator are zero.

Section 8-2.2. Discretionary adjustment to the MCTD apportionment percentage.

(a) In certain circumstances, use of the rules and methods described in this Part to determine the MCTD apportionment percentage may not properly reflect the surcharge taxpayer's business income or business capital in the MCTD. Under such circumstances, where it appears that the MCTD apportionment percentage does not properly reflect the surcharge taxpayer's business income or business capital within the MCTD, the commissioner, in an exercise of discretion, or at the request of the surcharge taxpayer, and pursuant to the rules and standards set forth in section 4-1.6 of this Subchapter, may adjust the MCTD apportionment percentage or require that the surcharge taxpayer use a different apportionment formula or a different apportionment method to more accurately reflect the surcharge taxpayer's business activity carried on within the MCTD.

SUBPART 8-3

PROPERTY FACTOR OF MCTD

APPORTIONMENT PERCENTAGE

Section 8-3.1. Computation of the property factor.

(a) The percentage of the surcharge taxpayer's real property and tangible personal property, whether owned by or rented to the surcharge taxpayer, that is within the MCTD is determined by dividing the average value of such property within the MCTD (without deduction of any encumbrances) by the average value of all such property within New York State (without deduction of any encumbrances). For purposes of this section, the value of real property owned by the surcharge taxpayer and the value of tangible personal property owned by the surcharge taxpayer means the adjusted basis of such properties for Federal income tax purposes.

(b) The term “real property” includes land, buildings, structures, and improvements thereon. In addition, it includes shares in a cooperative housing corporation, as defined in IRC section 216(b), in connection with the grant or transfer of a proprietary leasehold. Such shares in a cooperative housing corporation will be deemed to be owned within New York State if the property owned or leased by such corporation, as described in IRC section 216(b)(1)(B), is located in New York State, and such shares will be deemed to be owned within the MCTD if such property is located within the MCTD.

(c) The term “tangible personal property” means corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise. It does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of any interest in property and evidences of debt.

(d)(1) The average value of real property owned by the surcharge taxpayer and tangible personal property owned by the surcharge taxpayer is determined in accordance with the provisions of section 3-2.4 of this Subchapter applicable to the valuation of assets included in business capital. The same method of valuation must be used consistently with respect to property located within the MCTD and all property located in New York State.

(2) For purposes of paragraphs (3) and (4) of subdivision (e) of this section, the average value of tangible personal property owned by the surcharge taxpayer that is in transit and is considered to be within the MCTD will be determined based on the value of such property during the time that it is in transit.

(e) For purposes of computation of the property factor, tangible personal property owned by the surcharge taxpayer:

(1) is considered to be within the MCTD for as long as it remains physically situated or located within the MCTD, even though it may be stored in a bonded warehouse;

(2) is considered to be situated or located within the MCTD if held within the MCTD by an agent or other such person or entity acting on behalf of the surcharge taxpayer, or by a consignee;

(3) that is in transit between locations of the surcharge taxpayer, is considered to be within the MCTD if its final destination is within the MCTD;

(4) that is in transit between a buyer and a seller, is considered to be within the MCTD if its final destination is within the MCTD and the property is included by the surcharge taxpayer in the denominator of its property factor in accordance with its regular accounting practices.

(f) For purposes of computation of the property factor, omnibuses and other rolling equipment, such as construction equipment or trucks, located within the MCTD and all such rolling equipment located in New York State must be apportioned to the MCTD by a fraction. Such fraction may be based on any of the following measures: miles operated within the MCTD compared to total miles operated in New York State; time operated within the MCTD compared to total time operated in New York State; the number of pickup and delivery locations within the MCTD compared to the total of such locations in New York State; or any other measure that fairly apportions such operations to the MCTD. Operations within the MCTD are included in the numerator of the fraction, and 100% of operations in New York State are included in the denominator. Omnibus operations while engaged in school bus operations must be disregarded in determining the fraction.

(g) For purposes of the property factor, the underlying asset of a capital lease between the surcharge taxpayer and another party (the lessor) is considered owned by the surcharge taxpayer.

Section 8-3.2. Election for fair market value.

(a) On or before the due date for filing its original report (determined with regard to extensions of time for filing) for its first taxable year beginning on or after January 1, 2015, the surcharge taxpayer may make a one-time revocable election to use fair market value (FMV), as defined in section 3-2.3 of this Subchapter, as the value of all its real property and tangible personal property owned. Such election must be made on the surcharge taxpayer's original report for its first taxable year beginning on or after January 1, 2015, and shall not be made on an amended report.

(b) The election under this section:

(1) will not apply to any taxable year with respect to a combined report unless the combined group's designated agent makes, or has made, a valid election pursuant to subdivision (a) of this paragraph and applies such election to all corporations properly included in the combined report;

(2) will continue to be in effect until revoked by the surcharge taxpayer or the combined group's designated agent, if applicable, on a report for a subsequent taxable year, and will be deemed to have been revoked starting with such subsequent taxable year.

(c) In no event shall the election under this section or the revocation of the election be for a part of a taxable year.

Section 8-3.3. Real and tangible personal property rented to the surcharge taxpayer.

(a)(1) Real and tangible personal property rented to the surcharge taxpayer must be included for purposes of computation of the property factor.

(2) The value of real and tangible personal property that is rented to the surcharge taxpayer is determined by multiplying the gross rents payable during the period covered by the report by eight.

(b) The term "gross rents" as used in this section means the actual sum of money or other consideration payable, directly or indirectly, either by the surcharge taxpayer or for its benefit for the use or possession of the property and includes:

(1) Any amount payable for the use or possession of real and tangible personal property, or any part of such property, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

(i) Example.

> A surcharge taxpayer, pursuant to the terms of a lease, pays the lessor $1,000 per month and at the end of the year pays the lessor 1% of its gross sales. Its gross sales were $400,000, resulting in a gross rent of $16,000.

(2) Any amount payable as additional rent or payable in lieu of rent, such as interest, taxes, insurance, repairs or any other amount made payable by the terms of a lease or other arrangement.

(i) Example.

> A surcharge taxpayer, pursuant to the terms of a lease, pays its lessor $24,000 a year. It also pays real estate taxes of $4,000 and interest on a mortgage in the amount of $2,000 pursuant to the lease. The taxpayer's gross rent is $30,000.

(3) The proportionate part of the cost of any improvement to real and tangible personal property made by or on behalf of the surcharge taxpayer that reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is based on the unexpired term of the lease commencing with the date the improvement is completed (or the life of the improvement if its life expectancy is less than the unexpired term of the lease). However, where a building is erected on land leased by or on behalf of the surcharge taxpayer, the value of the land is determined by multiplying the gross rent by eight, and the value of the building is determined in the same manner as if owned by the surcharge taxpayer. The proportionate part of the cost of an improvement (other than a building on leased land) is generally equal to the amount of amortization allowed in computing entire net income, regardless of whether the lease contains an option for renewal.

(i) Examples.

Example 1: A surcharge taxpayer enters into a 21-year lease of certain premises at a rental of $20,000 a year. After the expiration of one year, it installs a new store front at a cost of $10,000 that reverts to the owner upon the expiration of the lease. Its gross rent for the first year is $20,000. However, for subsequent years its gross rent is $20,500 ($20,000 annual rent plus 1/20th of $10,000, the cost of the improvement apportioned on the basis of the unexpired term of the lease).

Example 2: A surcharge taxpayer leases a parcel of vacant land for 40 years at an annual rental of $5,000 and erects a building on the land that costs $600,000. The value of the land is determined by multiplying the annual rent of $5,000 by eight. The value of the building is determined as if owned by the surcharge taxpayer.

(c) The term “gross rents” does not include:

(1) intercorporate rents if both the lessor and the lessee are properly included in a combined report under article 9-A;

(2) amounts payable as separate charges for water and electric service furnished by the lessor;

(3) amounts payable for storage, unless the storage space is designated for the surcharge taxpayer or under its control;

(4) amounts payable pursuant to a capital lease;

(5) any portion of a rental payment payable for space subleased from the surcharge taxpayer and not used by it.

(i) Example.

A surcharge taxpayer leases a building located in the MCTD, to be used in manufacturing. The rent is $20,000 a year. The taxpayer subleases 40% of the building to one or more subtenants. Since 40% of the rent paid by the taxpayer is applicable to the portion of the building subleased, 40% of the rent, or $8,000, is excluded in computing the taxpayer's gross rent for the building, for purposes of determining the building's average value, regardless of the actual amount of rent received by the taxpayer from the sublease.

(d) For purposes of this section, the term "capital lease" means any lease that meets at least one of the following:

(1) The present value of the minimum lease payments is 90% of the fair value of the property to the lessor.

(2) The lease term is 75% or more of the leased property's estimated economic life.

(3) The lease contains a bargain (less than fair value) purchase option.

(4) Ownership is transferred to the lessee by the end of the lease term.

(e) In exceptional cases, use of the general method described in this section may result in inaccurate valuations of rented real or tangible personal property. In such cases, any other method that properly reflects the value may be adopted either on the commissioner's own motion or at the request of the surcharge taxpayer. Another method of valuation may not be used unless approved by the commissioner. A request for a different method of valuation must be made in accordance with the procedures for a discretionary adjustment described in section 4-1.6 of this Subchapter and provide full information with respect to the property, including the basis for the valuation proposed by the surcharge taxpayer.

SUBPART 8-4

RECEIPTS FACTOR OF MCTD

APPORTIONMENT PERCENTAGE

Section 8-4.1. Computation of the receipts factor.

The percentage of a surcharge taxpayer's receipts within the MCTD is determined pursuant to the apportionment rules described in section 210-A and this Subchapter, with the following exceptions:

(a) The numerator of the apportionment fraction under section 210-A is the denominator for purposes of the MCTD receipts factor.

(b) The numerator of the MCTD receipts factor is determined by applying the rules of section 210-A as if those rules made reference to the MCTD rather than to New York State.

(c) In the case of a combined report, the combined group's receipts factor of the MCTD apportionment percentage will be determined after the elimination of intercorporate and inter-entity receipts.

(d) Adjustment must be made for qualified financial instruments (QFIs), as defined in section 210-A and this Subchapter, and other statutorily imposed apportionment percentages for purposes of the MCTD receipts factor, as follows:

(1) If a surcharge taxpayer elects to use the fixed percentage method to apportion receipts from QFIs to the State pursuant to section 210-A(5)(a)(1) and section 4-2.4(c) or section 9-4.3 of this Subchapter, the fixed percentage method applies in computing the receipts factor under this Subpart.

(2) If 8% of the receipts specified in a provision of section 210-A(5) are required by such provision and this Subchapter to be included in the numerator of the apportionment fraction under section 210-A(5), then 90% of the 8% will be considered to be within the MCTD, and 100% of the 8% will be considered to be within New York State. This rule also is applicable in determining the amount of any other receipts received by a credit card processor that are deemed to have been generated within the MCTD.

(e) If the receipts specified in a provision of section 210-A are not includable in the numerator of the apportionment fraction, then such receipts will not be included in determining the MCTD apportionment percentage.

SUBPART 8-5

PAYROLL FACTOR OF MCTD

APPORTIONMENT PERCENTAGE

Section 8-5.1. Computation of the payroll factor.

(a) The percentage of the surcharge taxpayer's payroll apportioned to the MCTD is determined by dividing the wages, salaries and other personal service compensation of the surcharge taxpayer's employees within the MCTD, except general executive officers, during the period covered by the report by the total amount of such compensation of all of the surcharge taxpayer’s employees within New York State, except general executive officers, during the period covered by the report.

(b) Wages, salaries and other compensation include all amounts paid for services rendered to the surcharge taxpayer by its employees, after intercorporate eliminations of such amounts paid by members of a combined group, and do not include amounts paid by the surcharge taxpayer that do not have the element of compensation for personal services already rendered or to be rendered.

(c) Wages, salaries and other compensation are computed either on the cash or the accrual basis, in accordance with the method of accounting used in computing the entire net income (ENI) of the surcharge taxpayer.

(d)(1) Employees within the MCTD include all employees regularly connected with or working out of an office or place of business of the surcharge taxpayer within the MCTD, irrespective of where the services of such employees were performed. However, the commissioner may permit or require the surcharge taxpayer to instead compute the payroll factor on the basis of the amount of compensation paid for services performed within the MCTD if both of the following are established:

(i) that a substantial part of the surcharge taxpayer's payroll was paid to employees either attached to an office in the MCTD, but who performed a substantial part of their services outside the MCTD, or attached to an office outside the MCTD, but who performed a substantial part of their services within the MCTD; and

(ii) that the computation of the payroll factor according to the general rule stated above would not properly reflect the amount of the surcharge taxpayer's business done within the MCTD by its employees.

(2) Services performed within the MCTD will be deemed to be:

(i) in the case of an employee whose compensation depends directly on the volume of business secured by such employee, for example, a salesperson on a commission basis, the amount received by such employee for such business attributable to the employee's efforts within the MCTD;

(ii) in the case of an employee whose compensation depends on achieving results other than as described in subparagraph (i) of this paragraph, the proportion of the total compensation that the value of such employee's services within the MCTD bears to the value of all of the employee's services within New York State;

(iii) in the case of an employee compensated on a time basis, the proportion of the total amount received by such employee that such employee's working time within the MCTD bears to the employee's total working time within New York State; and

(iv) in the case of an employee compensated by a combination of the bases of subparagraphs (i) through (iii) of this paragraph, the aggregate of the amounts arrived at pursuant to (i) through (iii).

Section 8-5.2. Definition of employee.

(a) For purposes of computing the payroll factor, the term "employee" means any individual whose relationship with the surcharge taxpayer is that of employer and employee, as described in subdivision (b) of this section. The wages, salaries and other personal service compensation of every such individual, except general executive officers, will be included in the computation of the payroll factor of the MCTD apportionment percentage.

(b) Generally, the relationship of employer and employee exists when the surcharge taxpayer has the right to control and direct the individual not only as to the result to be accomplished by such employee, but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship, as well as the measure, method and designation of the employee's compensation, are immaterial.

(c) A director of a corporation is not an employee. Therefore, compensation paid to directors for acting in their capacity as directors should not be included in computing the payroll factor. In addition, a partner in a partnership cannot be an employee of that partnership.

(d)(1) For purposes of this section, a general executive officer is an appointed or elected officer of the corporation who either has company-wide authority with respect to the officer's assigned functions or duties or is responsible for an entire division of the company. Specifically, a general executive officer:

(i) will have been elected by the shareholders of the corporation;

(ii) will have been elected or appointed by the board of directors of the corporation; or

(iii) if initially appointed by another officer, will have had such appointment ratified by the board of directors of the corporation.

(2) If the jurisdiction of incorporation is other than New York State, the officer of the corporation must be elected or appointed in accordance with the laws of the state or country of incorporation.

(3) General executive officers include the chairperson, president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, comptroller, and any other officer charged with and performing general executive duties of the corporation.

(4) Any person who has merely been designated as an officer but who is not an appointed or elected officer, as described in paragraph (1) of this subdivision, is not a general executive officer.

(5) Personal service compensation paid to general executive officers of the taxpayer for acting in the role

of a general executive officer should not be included in the computation of the payroll factor.

PART 9

SPECIAL ENTITIES

SUBPART 9-1

QUALIFIED NEW YORK MANUFACTURERS

Section 9-1.1. General definitions. (Tax Law, section 210(1)(a)(vi) and 210(1)(b)(2))

For purposes of this Subpart, the following terms have the following meaning.

(a) “New York state adjusted basis” means the adjusted basis of such property for Federal income tax purposes at the close of the taxable year plus the accumulated amount of the Federal depreciation deductions disallowed under section 208(9)(b)(17) for such property (including the depreciation deductions for the current taxable year) minus the accumulated amount of the subtractions from Federal taxable income allowed under section 208(9)(a)(17) for such property (including the subtractions for the current taxable year).

(b) “ Qualified manufacturing property” means tangible personal property and other tangible property, including buildings and structural components of buildings, owned by the corporation and principally used by the corporation or, in the case of a combined report, principally used by the corporation or another member of the combined group, in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, that (i) are depreciable pursuant to IRC section 167, (ii) have a useful life of four years or more, (iii) are acquired by purchase as defined in IRC section 179(d), and (iv) have a situs in New York State. It does not include tangible personal property and other tangible property qualifying under clauses (B) through (G) of section 210-B(1)(b)(i).

(c) “Goods” mean tangible movable personal property having intrinsic value.

(d) “Qualified manufacturing employees” means employees of the corporation or a member of a combined group who are engaged in manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing in New York.

Section 9-1.2. Definition of qualified New York manufacturer. (Tax Law, section 210(1)(a)(vi) and 210(1)(b)(2))

(a) A corporation or, in the case of a combined report, a combined group, engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing during the taxable year will be a qualified New York manufacturer if the criteria in paragraph (1) or (2) of this subdivision are met.

(1) (i) The corporation or combined group derives more than 50% of its gross receipts during the taxable year from its sale of goods produced by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing (hereinafter referred to as the "principally engaged test") and has qualified manufacturing property that has a New York adjusted basis of at least one million dollars at the end of the taxable year or has all its real and personal property in New York State for the entire taxable year.

(ii) The corporation's sale of goods requires that title be transferred from the taxpayer to another party, except in instances of contracts covering more than one taxable year for the ultimate sale of goods. Any receipts earned pursuant to such contracts in each taxable year shall be deemed a sale of goods even though transfer of title has not yet occurred. The sale of a good shall not include:

(a) the licensing of goods;

(b) the sale of a warranty;

(c) the sale of an insurance contract; or

(d) the sale of advertising related to the good.

(iii) To determine whether the corporation or the combined group has satisfied the principally engaged test, the total everywhere receipts as determined under this Subchapter of the corporation or, in the case of a combined report, the combined group, shall be multiplied by a fraction. The denominator of the fraction used to compute the principally engaged test is the corporation's or combined group's everywhere receipts, except that any global intangible low-taxed income as defined in IRC section 951A must be excluded. The numerator of the fraction is the portion of such everywhere receipts derived from the sale, by the taxpayer or combined group, of goods produced by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing. Receipts from the foregoing activities are combined when determining the numerator of the fraction for the principally engaged test.

(iv) In the case of a combined report, intercorporate receipts are eliminated in the computation of the principally engaged test.

(2) A corporation or a combined group, in the case of a combined report, that does not satisfy the principally engaged test will be a qualified New York manufacturer if the corporation or combined group employs at least 2,500 qualified manufacturing employees on the last day of the taxable year and has qualified manufacturing property that has an adjusted basis of at least 100 million dollars at the close of the taxable year.

(b) In determining whether goods are produced by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing (hereinafter referred to as manufacturing activities), the following will not be considered manufacturing activities:

(1) A process that makes a good more attractive for sale without substantially altering the good.

(2) A process that does not effect a material change in the good.

(3) Market research, research and development, and design and creation of a prototype.

(4) The manipulation of information.

(5) The transmission of information.

(6) The performance of a service.

(7) Cooking, baking and other preparation of food for on-site consumption.

(8) The generation and distribution of electricity, the distribution of natural gas, and the production of steam, ice, or any other good associated with the generation of electricity.

(9) The creation of a digital product.

(10) Heating, cooling, regulating, cleaning, purifying, blending, and distributing activities.

(c) The determination of whether a corporation or a combined group is a qualified New York manufacturer is done on an annual basis.

(d) For purposes of computing the capital base tax, a qualified New York manufacturer includes a corporation that is defined as a qualified emerging technology company under Public Authorities Law section 3102-e(1)(c) regardless of the $10 million limitations expressed in subparagraph (1) of that paragraph (c). In the case of a combined report, all members of the combined group must be qualified emerging technology companies for the combined group to be considered a qualified New York manufacturer under this subdivision.

Section 9-1.3. Contract manufacturing.

(a) For purposes of this section, a corporation that contracts out its production activities is referred to as “the contracting company”. The entity to whom the production activities are contracted is referred to as “the production company”.

(b) (1) In determining if the contracting company is a qualified New York manufacturer, it may include the assets and employees used in the production activities in that determination only if the contracting company owns the assets being used by the production company in the production activities and only its employees operate or use those assets.

(2) Receipts earned by the contracting company from the sale of goods produced by the production company on behalf of the contracting company are not receipts from the sale of goods produced by manufacturing activities and, thus, would not be included in the numerator of the fraction used in the

computation of the principally engaged test.

(c) (1) In determining if a production company is a qualified New York manufacturer, it may include the assets and employees used in the production activities in that determination only if the production company owns the assets being used and only its employees operate or use those assets.

(2) Receipts paid by the contracting company to the production company for the manufacture of the goods produced by the production company on behalf of the contracting company are not receipts from the sale of goods produced by manufacturing activities unless the production company in fact is selling those goods (that is transferring title to those goods) to the contracting company. The receipts received by the production company from the contracting company would be included in the numerator of the fraction used in the computation of the principally engaged test only if the receipts are from the sale of goods as described in the previous sentence.

Section 9-1.4. Corporate Partners.

(a) A corporation that is a partner in a partnership filing under the aggregate method must combine its distributive share of receipts from the partnership with its own receipts in the computation of the principally engaged test.

(b) A corporation that is a partner in a partnership filing under the aggregate method must combine its proportionate part of the partnership's qualified manufacturing property and qualified manufacturing employees with its own qualified manufacturing property and qualified manufacturing employees to determine if it is a qualified New York manufacturer.

(c) Under the aggregate method, the property, receipts, and employees of the partnership are deemed to be that of the corporate partner. As such, the rules of contract manufacturing do not apply to any partnership/corporate partner agreement regarding manufacturing.

(d) In determining whether a corporation that is a partner in a partnership filing under the entity method is a qualified New York manufacturer, the corporation does not consider any of the partnership's property or employees in that determination. In addition, it would not include any of the partnership's receipts in the numerator of the fraction used in the computation of the principally engaged test.

SUBPART 9-2

CORPORATE PARTNERS

Section 9-2.1. General. (Tax Law, section 210(3))

(a) A corporation that is a partner in a partnership must compute its tax with respect to its interest in such partnership under the aggregate method or entity method, whichever applies.

(b) Under the aggregate method, a corporate partner is viewed as having an undivided interest in the partnership's assets, liabilities and items of receipts, income, gain, loss, and deduction. Under the aggregate method, the partner is treated as participating in the partnership's transactions and activities.

(c) Under the entity method, a partnership is treated as a separate entity and a corporate partner is treated as owning an interest in the partnership entity. The partner's interest in the partnership is an intangible asset.

Section 9-2.2. Determination of applicable methodology.

(a) A corporation must use the aggregate method in determining its tax with respect to its interest in a partnership if the corporation has access to the information necessary to compute its tax using such method. A corporation is presumed to have access to the information if any one of the following is met:

(1) it is conducting a unitary business with the partnership;

(2) it is a general partner of the partnership or is a managing member of a limited liability company that is treated as a partnership for Federal income tax purposes;

(3) it has a 5% or more interest in the partnership determined in the manner provided in section 1-2.3(e)(1) of this Subchapter;

(4) it has reported information from the partnership in a prior taxable year using the aggregate

method;

(5) its partnership interest constitutes more than 50% of its total assets;

(6) its basis in its interest in the partnership pursuant to IRC section 705 and 26 CFR 1.705-1 on the last day of the partnership year that ends within or with the corporation's taxable year is more than $5,000,000;

(7) any member of its affiliated group or New York combined group has the information necessary to perform such computation; or

(8) it is claiming a tax credit based upon the activities of the partnership or claiming a tax credit computed at the partnership level that flows through from the partnership to the corporation.

(b) (1) If a corporation does not meet any of the presumptions set forth in subdivision (a) of this section and does not and will not have access to the information necessary to compute its tax using the aggregate method within the time period allowed for filing a report, determined with regard to all available extensions of time to file, and certifies these facts to the Commissioner, the corporation must use the entity method.

(2) If a corporation meets one or more of the presumptions set forth in subdivision (a) of this section, but the corporation establishes to the satisfaction of the Commissioner that it, any member of its affiliated group, or any member of its New York combined group does not and will not have access to the information necessary to compute the corporation's tax using the aggregate method within the time period allowed for filing a report, determined with regard to all available extensions of time to file, and certifies these facts to the Commissioner, then the corporation must use the entity method.

(c) If a corporation is a partner in a partnership ("upper tier partnership") and such partnership is a partner in another partnership ("lower tier partnership") and the corporation has the necessary information to use the aggregate method with respect to the items of receipts, income, gain, loss, deduction, assets and liabilities, and activities of the upper tier partnership that are not attributable to the lower tier partnership, but does not have the necessary information to use the aggregate method with respect to such items that are attributable to the lower tier partnership, then such corporation must use the aggregate method with respect to the items of receipts, income, gain, loss, deduction, assets and liabilities, and activities of the upper tier partnership that are not attributable to the lower tier partnership and must use the entity method with respect to such items that are attributable to the lower tier partnership. If there are additional tiers of partnerships, this methodology must be employed at each tier. The corporation will be presumed to have access to the necessary information with respect to a lower tier partnership and will be subject to the provisions of paragraph (2) of subdivision (b) of this section with respect to a lower tier partnership if one or more of the presumptions set forth in subdivision (a) of this section are met at each tier. If the corporation does not meet any of the presumptions set forth in subdivision (a) of this section and does not have access to the necessary information with respect to a lower tier partnership the provisions of paragraph (1) of subdivision (b) of this section will apply.

(d)(1) For purposes of this section, the term "affiliated group" will have the same meaning as such term has in IRC section 1504, except that the term "common parent corporation" will be deemed to mean any person as defined in IRC section 7701(a)(1). Such section 1504 must be read without regard to the exclusions provided for in section 1504(b).

(2) For purposes of this section, a partnership interest constitutes more than 50% of a corporation's total assets if its interest in the partnership is more than 50% of the corporation's total assets. In determining its interest in the partnership and its total assets, the corporation may elect to use ending amounts, the average of the beginning and ending amounts as reported on the corporation's balance sheet included in its Federal income tax return, or average amounts determined on a more frequent basis as determined in a manner consistent with the corporation's balance sheet included in its Federal income tax return. Whichever method a

corporation elects to use, it must use that method for all of its assets. If the corporation is not required to include a balance sheet in its Federal income tax return, it must use a method that it would have used if it had been required to include a balance sheet in its Federal income tax return. An alien corporation must use only amounts that are effectively connected with its United States trade or business.

Section 9-2.3. Computation of tax under the aggregate method.

(a)(1) Under the aggregate method, the corporation's distributive share (see IRC section 704) of each partnership item of receipts, income, gain, loss, and deduction and the corporation's proportionate part of each partnership asset and liability and each partnership activity are included in the computation of the corporation's business income base, capital base, and the fixed dollar minimum tax and will have the same source and character in the hands of the corporate partner for article 9-A purposes as such item has in the hands of the partnership for Federal income tax purposes. Where an item, amount or activity of the partnership is not characterized for Federal income tax purposes or is not required to be taken into account for Federal income tax purposes, the source and character of each item, amount or activity of the partnership will be determined as if such item, amount or activity realized, incurred or experienced by the partnership were realized, incurred or experienced directly by the corporate partner.

(2) A corporation's proportionate part of the partnership's assets and liabilities and activities is determined in accordance with the corporation's capital interest in the partnership. If using a corporation's capital interest in a partnership to determine the corporation's share of partnership items constituting business capital and investment capital does not properly reflect the corporation's share of partnership items constituting business income, investment income, and other exempt income, then the corporation's proportionate part of the partnership's assets and liabilities and activities is determined using the percentage resulting from the manner in which the partners divide the partnership's profits in a profit year and losses in a loss year.

(i) Example.

Corporations A and B are partners in Partnership P. A will perform services for a 40% interest in the profits and losses of Partnership P and B will contribute $1,000 for a 60% interest in the profits and losses of Partnership P. B's capital interest is 100% and A's capital interest is zero. Partnership P's only asset is $500 of stock, which pays dividends of $30 during the taxable year.

Based on capital interests, A's proportionate part of P's stock is zero ($500 x 0%) and B's proportionate part of P's stock is $500 ($500 x 100%). In this case, using capital interests does not properly reflect A's share of P's stock. This is because A receives 40% of P's dividends and using capital interests attributes none of P's stock to A. Likewise, B receives 60% of P's dividends and using capital interests attributes all of P's stock to B.

In this case, both A and B must determine their proportionate part of P's assets and liabilities in accordance with their profits and loss interest (40% and 60%, respectively) in P. As a result, A's distributive share of the dividends is $12 ($30 multiplied by 40%) and B's distributive share is $18 ($30 multiplied by 60%).

(3)(i) An allocation of an item, amount or activity, even if recognized for Federal income tax purposes, will not be recognized where it has as a principal purpose the avoidance or evasion of any tax imposed on the corporation, or the combined group of which the corporation is a member, by New York State or any of its political subdivisions. Where an allocation is not recognized, the corporation's distributive share will be determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances).

(ii) The determination of whether a principal purpose of an allocation of an item, amount or activity is the avoidance or evasion of any tax imposed on the corporation, or the combined group of which the corporation is a member, by New York State or any of its political subdivisions depends on all the surrounding facts and circumstances. Among the relevant circumstances to be considered are the following:

(a) whether the allocation has substantial economic effect;

(b) whether the related items of partnership income, gain, loss, and deduction from the same source are subject to the same allocation;

(c) whether the allocation was made without recognition of normal business factors and only after the amount of the allocated item could reasonably be estimated;

(d) the duration of the allocation; and

(e) the overall tax consequences of the allocation.

(iii) A special allocation to a corporate partner of a New York tax credit that is computed at the partnership level may be allowed only if the following conditions are satisfied:

(a) the sole component in the calculation of the tax credit is a partnership expenditure;

(b) the tax credit is allocated in the same way as that expenditure is allocated among the partners;

(c) the allocation of the tax credit does not have as a principal purpose the avoidance or evasion of any tax imposed on the corporation, or the combined group of which the corporation is a member; and

(d) the allocation of the expenditure has substantial economic effect.

(4) Where a corporation is a partner in an upper tier partnership that is a partner in a lower tier partnership, the source and character of such corporation's distributive share or proportionate part, as the case may be, of each partnership item of receipts, income, gain, loss, deduction, asset, liability, and activity of the upper tier partnership that is attributable to the lower tier partnership retains the source and character determined at the level of the lower tier partnership. Such source and character are not changed by reason of the fact that such item flows through the upper tier partnership to such partner.

(b) Business income base. The corporation's distributive share of each partnership item of income, gain, loss, and deduction must be taken into account in the computation of entire net income and the business income base. These amounts must be taken into account in determining the corporation's business income, investment income, and other exempt income.

(c) Capital base. The corporation's proportionate part of each asset and liability of the partnership must be taken into account in the computation of the capital base. These amounts must be taken into account when determining business capital and investment capital. The capital base does not include any amount with respect to the corporation's interest in the partnership itself.

(d) Fixed dollar minimum. In determining the tax measured by the fixed dollar minimum, the corporation must use its New York receipts determined in subdivision (f) of this section.

(e) Small business taxpayer. For purposes of the reduced rate of tax provided in section 210(1)(a) or the exemption from the tax measured by the capital base provided in section 210(1-c) for a small business taxpayer, a corporation must meet the definition of a small business taxpayer in section 210(1)(f). In determining whether the corporation qualifies, it must take into account its distributive share or proportionate part, as the case may be, of partnership amounts of items described in section 210(1)(f).

(f) Business Apportionment Factor (BAF).

(1) A corporation must include its distributive share of the partnership's business receipts when computing its BAF. Its distributive share of the partnership's business receipts during the applicable partnership year should be combined with the corporation's own receipts for the taxable year. The corporation must apportion such combined amounts using the rules specified in section 210-A and of this Subchapter. To the extent an apportionment rule uses a fraction to determine the amount of New York receipts, a corporation must include the distributive share or proportionate parts of any partnership amounts with the corporation's own amounts in such fraction. In addition, netting of gains and losses must be computed on the combined corporation and partnership amounts.

(2) Where a corporation has receipts from sales to a partnership in which it is a partner, the corporation must reduce its receipts from its sales to the partnership by its distributive share of such purchases by the partnership. Where a partnership has receipts from sales to a corporation that is a partner in the partnership, the corporation does not include its distributive share of the partnership receipts from sales to the corporation in its BAF.

(3) Examples.

In the following examples, Partnership P has two partners, Corporation A and Corporation B. Corporation A has a 20% interest in the partnership and Corporation B has an 80% interest. There are no allocations of an item, amount or activity.

Example 1: Corporation A's sales are $20,000,000 for the year, $5,000,000 of which are made to Partnership P. Partnership P makes sales of $10,000,000 during the same year, none of which are to A or other partners.

Corporation A determines its everywhere receipts of $21,000,000 as follows:

Sales by Corporation A to other entities		$15,000,000

Sales by Corporation A to Partnership P	$5,000,000	
Less its distributive share of Partnership P's purchases from Corporation A (20% x $5,000,000)	($1,000,000)	
Corporation A's total sales to Partnership P ($5,000,000 - $1,000,000)		$4,000,000
Corporation A's distributive share of Partnership P's total sales (20% x $10,000,000)		$2,000,000
Corporation A's everywhere receipts		$21,000,000

Example 2: The sales made by Corporation A, Corporation B, and Partnership P are as follows:

Corporation A		$20,000,000
Corporation B		$80,000,000
Partnership P sales to Corporation A	$3,000,000	
Partnership P sales to Corporation B	$6,000,000	
Partnership P sales to unrelated Corporation X	$1,000,000	
Partnership P's total sales		$10,000,000

Corporation A determines its everywhere receipts of $21,400,000 as follows:

Sales by Corporation A		$20,000,000
Corporation A's distributive share of Partnership P's total sales (20% x $10,000,000)	$2,000,000	
Less Corporation A's distributive share of Partnership P's sales to Corporation A (20% x $3,000,000)	$600,000	
Corporation A's distributive share of Partnership P's sales		$1,400,000
Corporation A's everywhere receipts		$21,400,000

Corporation B determines its everywhere receipts of $83,200,000 as follows:

Sales by Corporation B		$80,000,000
Corporation B's distributive share of Partnership P's total sales	$8,000,000	

(80% x $10,000,000)		
Less Corporation B's distributive share of Partnership P's sales to Corporation B (80% x $6,000,000)	$4,800,000	
Corporation B's distributive share of Partnership P's sales		$3,200,000
Corporation B's everywhere receipts		$83,200,000

(4) In instances where an apportionment rule requires the use of a fraction to compute New York receipts, the corporation must use the sum of its own amounts for the taxable year and its distributive share or proportionate part, as the case may be, of partnership amounts during the applicable partnership year when computing such fractions.

(g) Metropolitan Transportation Business Tax Surcharge.

(1) The corporation takes into account its distributive share of the partnership's receipts and payroll within the Metropolitan Commuter Transportation District (MCTD) and New York State and its distributive share or proportionate part, as the case may be, of the partnership's property within the MCTD and New York State in computing its MCTD apportionment percentage as required by section 209-B(2). For purposes of section 209-B(2), a corporation that is a partner in a partnership computes its MCTD apportionment percentage by computing the property, receipts and payroll factors as follows:

(i) The average value of the corporation's real and tangible personal property, owned or rented, within the MCTD plus the average value of the corporation's distributive share or proportionate part, as the case may be, of the partnership's real and tangible personal property, owned or rented, within the MCTD during the applicable partnership year is divided by the average value of the corporation's real and tangible personal property, owned or rented, within New York State plus the average value of its distributive share or proportionate part, as the case may be, of the partnership's real and tangible personal property, owned or rented, within New York State during the applicable partnership year. Where a corporation has leased or rented real or tangible personal property to a partnership in which it is a partner, the corporation includes only the average value of such property in its property factor. The corporation does not include eight times its distributive share of the partnership's rental expense because the average value of the property is included by the corporate partner as the owner of the property. Where a corporation has leased or rented real or tangible personal property from a partnership in which it is a partner, the corporation includes both its proportionate part of the average value of such property and eight times the amount of rental expense that is deemed to have been paid to the other partners with respect to such property. The amount of rental expense deemed paid to other partners is the corporation's total rental expense paid to the partnership less the corporation's distributive share of the partnership's rental income from such property.

(ii) The corporation's business receipts within the MCTD plus the taxpayer's distributive share of the partnership's business receipts within the MCTD during the applicable partnership year (MCTD receipts) is divided by the corporation's New York receipts determined in subdivision (f) of this section. The MCTD receipts are determined using the rules in subdivision (f) of this section, but substituting MCTD for New York State.

(iii) The wages, salaries and other personal service compensation of the corporation's employees, except general executive officers, within the MCTD plus the corporation's distributive share of the wages, salaries and other personal service compensation paid by the partnership to its employees, except employees of the partnership having partnership-wide authority or having responsibility for an entire division of the partnership, within the MCTD during the applicable partnership year is divided by the wages, salaries and other personal service compensation of the corporation's employees, except general executive officers, within New York State plus the corporation's distributive share of the wages, salaries and other personal service compensation paid by the partnership to its employees, except employees of the partnership having partnership-wide authority or having responsibility for an entire division of the partnership, within New York State during the applicable partnership year.

(2) Examples.

In the following examples regarding the computation of the property factor of the MCTD apportionment percentage, Partnership P has two partners, Corporation A and Corporation B. Corporation A has a 20% interest in the partnership and Corporation B has an 80% interest. There are no allocations of an item, amount or activity.

Example 1: Partnership P rents a building in the MCTD owned by corporate partner A (average value of $100,000) for $12,000 per year. Corporation A must include the average value of $100,000 for the building in both the numerator and denominator of its property factor. No portion of the property's rental value is included in Corporation A's property factor.

Corporation B must include $76,800 in the numerator and denominator of its property factor, which is its distributive share of the average value of the property rented in the MCTD by Partnership P (80% x $12,000 x 8).

Example 2: Partnership P owns a building in the MCTD and rents it to Corporation A for $12,000 per year. Corporation A must include its proportionate part of the average value of the building, $20,000 (20% X $100,000), in the numerator and denominator of its property factor. In addition, Corporation A must include eight times the amount of rental expense that is deemed to have been paid to Corporation B with respect to such property in the numerator and denominator of its property factor. Such expense of $9,600 is computed by reducing Corporation A's rental expense of $12,000 paid to Partnership P by its distributive share of the partnership's rental income of $2,400 (20% x $12,000). Thus, the value of the building to be used in the numerator and denominator of Corporation A's property factor is $96,800 ($20,000 + [8 X $9,600]). Corporation B must include its proportionate part of the average value of the building, $80,000 (80% X $100,000) in the numerator and denominator of Corporation B's property factor.

(h) In the case of a corporation included in a combined report that is filing under the aggregate method with respect to a partnership interest and such partnership engages in transactions with another member of the partner's combined group, the distributive share and proportionate amounts from such partnership are subject to the same intercorporate eliminations as if such transactions occurred directly between the partner and the member of the partner's combined group.

(i) The term "applicable partnership year" means any taxable year of the partnership ending within or with the taxable year of the partner.

Section 9-2.4. Computation of tax under the entity method.

(a) Under the entity method, for purposes of determining the taxes measured by the business income base, capital base, and the fixed dollar minimum, a corporate partner is treated as owning an interest in the partnership entity. The partner's interest in the partnership is an intangible asset that is business capital.

(b) Business income base.

(1) To the extent a corporation's entire net income (ENI) includes its distributive share of partnership items of income, gain, loss and deduction, such items will be treated as business income. The corporation's distributive share of such partnership items must be apportioned as provided in subdivision (e) of this section and included in the corporation's apportioned business income.

(2) While a corporation may have the information concerning one or more of the modifications set

forth in section 208(9), such as state bond interest, a corporation using the entity method does not have all the information necessary to properly compute its article 9-A tax using the aggregate method. Therefore, no modifications should be made with respect to any partnership items.

(c) Capital base. The corporation's interest in a partnership is business capital and is apportioned as provided in subdivision (e) of this section. The corporation's interest in the partnership is the value shown on its books and records kept in accordance with generally accepted accounting principles. If the interest is a marketable security, it is valued at fair market value (FMV). The capital base does not include any other amounts that the corporation may have included on its balance sheet with respect to its interest in the partnership.

(d) Fixed dollar minimum. The corporation does not take into account any partnership items in determining its fixed dollar minimum tax.

(e) A corporation must apportion its distributive share of partnership items of income, gain, loss and deduction included in its business income and its interest in the partnership included in its business capital by its BAF determined under Part 4 of this Subchapter, computed without regard to its distributive share of any partnership items of income, gain, loss or deduction. In addition, the MCTD apportionment percentage determined under Part 8 of this Subchapter must be computed without regard to its distributive share or proportionate part, as the case may be, of any partnership items.

(f) Because the corporation is treated as owning an intangible asset, it is not entitled to claim any portion of any tax credit that would be computed at the partnership level.

(g) Example.

> Corporation X is a partner in Partnership P. For state tax purposes, the only information Corporate Partner X receives from Partnership P is a statement that lists its proportionate share of New York State income

(loss), as well as state source income for other states in which Partnership P operates. The statement does not specify how the state source amounts were computed, nor does it confirm that the New York article 9-A rules were used to compute the New York amount. Therefore, Corporate Partner X does not have the necessary information to properly compute its article 9-A tax using the aggregate method, and it must compute its tax using the entity method. As such, the specific information provided by Partnership P about New York State income (loss) must be disregarded. To compute its tax under article 9-A, Corporate Partner X must include its total distributive share of income, gain, loss and deduction from Partnership P as business income. The amount of such amounts from Partnership P are then multiplied by a BAF computed without regard to the amounts from Partnership P.

Section 9-2.5. Treatment of gain or loss from the sale of a partnership interest.

Where a corporation is a partner in a partnership, any gain or loss that is recognized from the sale of the corporation's interest in such partnership and included in entire net income is business income or loss.

Section 9-2.6. Election by certain foreign limited partners. (Tax Law, section 209(1)(f))

(a) (1) A foreign corporation that is a limited partner in one or more limited partnerships, that is subject to tax under article 9-A solely as a result of the application of section 1-2.3(b) of this Subchapter and that does not file on a combined basis for article 9-A purposes, may elect to compute its tax bases by taking into account only its distributive share of each partnership item of receipts, income, gain, loss and deduction (including any modifications relating thereto) and its proportionate part of each partnership asset and liability, and each partnership activity, of all such limited partnerships that are doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts in New York State, whether or not such share is actually distributed. However, such election may not be made with respect to a partnership if the limited partnership and corporate group are engaged in a unitary business wherever conducted. The election shall be applicable to all of those limited partnership interests that are not engaged in a unitary business with the corporate group ("election partnerships"). The term corporate group means the corporate limited partner itself or, if it is a member of an affiliated group, the corporate limited partner and all other members of such affiliated group. The term affiliated group shall have the same meaning as provided in section 9-2.2(d)(1) of this Subpart.

(2) If the foreign corporation makes the election allowed under this section, the foreign corporation's distributive share of such partnership's items of income, gain, loss and deduction shall be presumed to be business income and its proportionate part of such partnership's assets and liabilities shall be deemed to be business capital and be apportioned entirely to New York, unless the foreign corporation proves otherwise.

(3) If the separate accounting election has been made and the foreign corporation has an interest in more than one election partnership, a separate business income base, capital base, and New York receipts amount (used for purposes of computing the tax measured by the fixed dollar minimum) must be computed for each limited partnership interest. Each amount is then aggregated, with negative amounts limited to zero, to determine the foreign corporation's business income base tax, capital base tax, and fixed dollar minimum tax. Where such negative amounts are limited to zero in determining the business income base tax of the foreign corporation, the corporation may generate an NOL for the taxable year equal to the negative business income base computed for such partnership interest. Such NOL may only be applied against the apportioned business income of the partnership generating such loss in accordance with Subpart 3-9.

(b) The election is made at the time of filing the original, timely filed return, determined with regard to valid extensions. Once an election is made, it may not be revoked by filing an amended report and is binding with respect to all election partnerships for all future taxable years as long as the criteria in subdivision (a)(1) still applies.

(c) Where a corporation makes such an election, but is not allowed to make such an election with respect to one or more other such partnerships as those partnerships and the corporate group are engaged in a unitary business wherever conducted ("nonelection partnerships"), then, subdivision (a) of this section to the contrary notwithstanding, the taxpayer shall compute its tax bases with respect to nonelection partnerships by reducing its receipts, income, gain, loss and deductions by the amounts that are directly and indirectly attributable to such election partnerships.

SUBPART 9-3

NEW YORK S CORPORATIONS

Section 9-3.1. Apportionment rules for New York S corporations. (Tax Law, section 210-A)

A New York S corporation determines the amount of business receipts included in New York receipts or everywhere receipts using the rules in section 210-A and Part 4 of this Subchapter, except as provided in this Subpart.

(a) The term" business receipts for a New York S corporation" means all receipts, net income (not less than zero), net gains (not less than zero), and other items described in section 210-A and this Subchapter that are included in the New York S corporation's non-separately computed income and loss or in the New York S corporation's separately stated items of income and loss, determined pursuant to subdivision (a) of IRC section 1366. Business receipts for New York S corporations include amounts that otherwise would have been characterized as investment income from investment capital or other exempt income for New York C corporations.

(b) Because a New York S corporation does not have any investment capital or other exempt income, stock that otherwise would have been investment capital or could generate other exempt income for a New York C corporation as defined in section 208(1-A) may be a qualified financial instrument for a New York S corporation. For purposes of applying the rules in section 4-2.4 of this Subchapter, the term qualified financial instrument shall have the same meaning as in section 4-2.4, except that the instruments excluded from qualified financial instruments in the case of New York S corporations shall be limited to the following:

(1) loans secured by real property;

(2) loans not secured by real property, if the only loans the taxpayer has marked to market are loans secured by real property; and

(3) partnership interests that do not meet the definition of security in IRC section 475(c).

(c) Global intangible low-taxed income (GILTI) is included in everywhere receipts only in instances where the GILTI inclusion amount is computed at the entity level under IRC section 951A. GILTI is not included in New York receipts.

Section 9-3.2. Nonresident and part-year resident shareholders of New York S corporations. (Tax Law, sections 631, 632)

(a) To determine the amounts derived from New York sources for purposes of article 22, a nonresident shareholder of a New York S corporation multiplies its pro-rata share of the New York S corporation's items of income, gain, loss, and deduction (and any related section 612 modifications) that are included in the nonresident shareholder's New York adjusted gross income by a fraction, the numerator of which is the New York S corporation's New York receipts and the denominator of which is the New York S corporation's everywhere receipts. Such fraction is hereinafter referred to as the apportionment factor.

(b) For part-year resident shareholders, the rule in subdivision (a) applies only to the New York S corporation's items received during the nonresident period of the taxable year (and any related section 612 modifications) that are included in the part-year resident's New York adjusted gross income.

Section 9-3.3. Examples.

Example 1: Corporation A is a New York S corporation that has the following types of receipts:

- dividends from stock of unitary corporations (that would have been characterized as other exempt income for a New York C corporation);
- dividends from stock of non-unitary corporations (that would have been characterized as investment income for a New York C corporation);
- net gains from sales of stock of non-unitary corporations (that would have been characterized as investment income for a New York C corporation);
- interest from loans secured by real property;
- interest from corporate bonds; and
- net gains from sales of corporate bonds.

Corporation A marks to market stock of non-unitary corporations only. No other assets are marked to market.

All of these receipts are considered business receipts for Corporation A. The amount of such receipts included in Corporation A's New York receipts or everywhere receipts is determined in accordance with section 9-3.1 of this Subchapter.

Corporation A did not make the fixed percentage election. Therefore, dividends and net gains from stock are not included in its New York receipts or everywhere receipts pursuant to section 210-A.5(a)(2)(G) and the amount of interest from loans secured by real property, interest from corporate bonds, and net gains from the sale of corporate bonds included in New York receipts or everywhere receipts is determined in accordance with section 210-A.5(a)(2) and this Subchapter.

To determine the amounts derived from New York sources for purposes of article 22, nonresident shareholder X of Corporation A must multiply its pro-rata share of Corporation A's items of income, gain, loss, and deduction that are included in shareholder X's New York adjusted gross income, including all income, gain, and loss from Corporation A's stocks, loans, and corporate bonds by Corporation A's apportionment factor.

Example 2: Same facts as Example 1 except that Corporation A makes the fixed percentage election. Since one stock has been marked to market, all stock are qualified financial instruments. The result is that 8% of the dividends and net gains (not less than zero) from stocks are included in Corporation A's New York receipts and 100% of dividends and net gains (not less than zero) from stock are included in everywhere receipts. The loans and corporate bonds are not qualified financial instruments as none of these assets have been marked to market. The amount of interest from the loans secured by real property, interest from corporate bonds, and net gains from the sales of corporate bonds included in New York receipts or everywhere receipts is determined in accordance with section 210-A and this

Subchapter

To determine the amounts derived from New York sources for purposes of article 22, nonresident shareholder X of Corporation A must multiply its pro-rata share of Corporation A's items of income, gain, loss, and deduction that are included in shareholder X's New York adjusted gross income, including all income, gain, and loss from Corporation A's stock, loans, and corporate bonds by Corporation A's apportionment factor.

SUBPART 9-4

REAL ESTATE INVESTMENT TRUSTS (REITS) AND REGULATED INVESTMENT COMPANIES (RICS)

Section 9-4.1. General treatment of REITs and RICs. (Tax Law, sections 209(4), (5) and (7), 210, 210-C, 1515(f)(4))

(a)(1) For any taxable year in which a REIT is subject to tax for Federal income tax purposes under IRC section 857, the REIT will be subject to tax under article 9-A unless it is a captive REIT required to be included in a combined report under article 33.

(2) For any taxable year in which a RIC is subject to tax for Federal income tax purposes under IRC section 852, the RIC will be subject to tax under article 9-A, unless it is a captive RIC required to be included in a combined report under article 33.

(b) For purposes of article 9-A, REITs and RICs, other than captive REITs and RICs required to be included in a combined report, are subject to tax computed on either the business income base or the fixed dollar minimum tax, whichever is greater.

(c) In the event that a REIT pays dividends after the close of a taxable year, pursuant to IRC section 858, and such dividends were declared before the date its Federal report for such year must be filed (including extensions), such REIT may treat the dividends as having been paid during the taxable year.

(d) For any taxable year during which a REIT does not qualify for taxation under IRC section 857, or a RIC does not qualify for taxation under IRC section 852, such REIT or such RIC will be treated in the same manner as any other taxpayer subject to tax under article 9-A.

Section 9-4.2. Computation of income. (Tax Law, section 209(5) and (7))

(a)(1) In the case of a REIT, "Federal taxable income" means real estate investment trust taxable income as defined in IRC section 857(b)(2), as modified by IRC section 858 and, where applicable, by IRC section 965(m)(1)(B).

(2) If a REIT is subject to IRC section 965(m) and makes the election provided for by IRC section 965(m)(1)(B), the amount of any deduction allowed pursuant to IRC section 965(c) will be determined with reference to IRC section 965(m)(2)(B)(i), for purposes of the adjustments required by sections 208(9)(b)(23) and 1503(b)(2)(W).

(b)(1) In the case of a RIC, "taxable income" means investment company taxable income as defined in IRC section 852(b)(2), as modified by IRC section 855, plus any amount taxable under IRC section 852(b)(3).

(2)(i) A RIC that has received or accrued interest from, state, municipal or other obligations must add back the amount of such interest in computing its entire net income (ENI), to the extent such interest is exempt from income tax and is not included in taxable income. The amount to be added back may be reduced by any expenses attributable to such interest that are denied deductibility under IRC section 265, as well as any related amortizable bond premium that is denied deductibility under IRC section 171(a)(2).

(ii) Any amount added back pursuant to this paragraph must not be subtracted in computing ENI.

Section 9-4.3. Qualified financial instrument apportionment rules for non-captive REITs and non-captive RICs. (Tax Law, section 210-A)

When computing the business apportionment factor, non-captive REITs and non-captive RICs must use the following rules regarding qualified financial instruments in lieu of the rules specified in section 4-2.4 of this Subchapter.

(a) For purposes of this section, a “qualified financial instrument” means a financial instrument, other than a financial instrument listed in subdivision (b) of this section, that is of a type described in one of the following clauses of section 210-A(5)(a)(2): clause (A)—loans; clause (B)— state, and municipal debt; clause (C)—asset backed securities and other government agency debt; clause (D)—corporate bonds; clause (G)—dividends and net gains from sales of stock or partnership interests; clause (H)—other financial instruments; clause (I)— commodities.

(b) The following financial instruments are not qualified financial instruments, even if they are of a type described in subdivision (a) of this section:

(1) a loan secured by real property;

(2) a financial instrument that is investment capital; and

(3) stock that generates other exempt income.

(c) Except as provided in subdivision (d) of this section, the amount of receipts, net income (not less than zero) and net gains (not less than zero) from qualified financial instruments included in New York receipts or everywhere receipts is determined using the customer sourcing method contained in section 210-A(5)(a)(2), and further described in this section.

(d)(1) Non-captive REITs and non-captive RICs may elect the fixed percentage method to include 8% of net income (not less than zero) from qualified financial instruments in New York receipts and 100% of net income (not less than zero) from qualified financial instruments in everywhere receipts. The election may be made whether or not such net income would otherwise be included in New York receipts or everywhere receipts pursuant to the provisions of section 210-A(5)(a)(2).

(2) Net income from qualified financial instruments is the sum of:

(i) net gains (not less than zero) from each type of qualified financial instrument that would be subject to the same customer sourcing method in section 210-A(5)(a)(2) and Part 4 of this Subchapter if not for the fixed percentage method;

(ii) net income (not less than zero) from each type of qualified financial instrument that would be subject to the same customer sourcing method in section 210-A(5)(a)(2) and Part 4 of this Subchapter, if not for the fixed percentage method; and

(iii) receipts from each type of qualified financial instrument.

(3) The fixed percentage method election must be made annually and must be made on an original, timely filed report, determined with regard to extensions for time for filing. Any fixed percentage method election made on a report that is filed late will be invalid and ineffective.

(4) Once the fixed percentage method election has been made in the manner required in paragraph (3) of this subdivision for a taxable year, it is binding on the taxpayer and the department for such taxable year and cannot be revoked or overridden.

(e) Example.

> Corporation X is a non-captive RIC. It elects to use the fixed percentage method in the manner required by paragraph (3) of subdivision (d) of this section to determine the amount of its net income (not less than zero) from qualified financial instruments to include in New York receipts and everywhere receipts. Its income does not qualify as other exempt income or income from investment capital.
>
> Corporation X has $1,000 in dividends from Stock A; ($200) loss from the

sale of Stock B; $750 gain from the sale of corporate bond C, which was sold through a licensed exchange; $25,000 gain from the sale of corporate bond D, which was not sold through a registered securities broker or dealer or through a licensed exchange; $5,000 gain from the sale of debt obligation E, which was issued by Country Y; ($2,000) loss from the sale of debt obligation F, which was issued by Country Z; and $2,000 of interest from deposit accounts.

Corporation X has $31,750 of net income (not less than zero) from qualified financial instruments included in everywhere receipts broken down as follows:

- $1,000 of dividends from stock;
- $0 of gains from sales of stock (as the loss is limited to zero);
- $750 of gains from sales of bonds sold through a licensed exchange or registered securities broker or dealer;
- $25,000 of gains from sales of bonds not sold through a licensed exchange or registered securities broker or dealer;
- $3,000 of gains from one type of other financial instrument (debt obligations issued by a country, or political subdivision thereof, other than the United States); and
- $2,000 of interest from one type of other financial instrument (deposit accounts).

Corporation X includes $2,540 (8% multiplied by $31,750) from qualified financial instruments in its New York receipts and $31,750 in its everywhere receipts.

Section 9-4.4. Combination rules for REITs and RICs.

(a) Captive REITs and captive RICs will always be included in a combined report under article 9-A, unless they are required to be included in a combined report under article 33.

(1)(i) For purposes of determining under which article of the Tax Law a captive REIT or a captive RIC is to be combined, the rules in section 1515 will be applied first. If such captive REIT or such captive RIC is not required to be included in a combined report under article 33, then it will be included in a combined report pursuant to the rules included in section 210-C and further described in Subpart 6-2 of this Subchapter.

(ii) A captive REIT or captive RIC is required to be included in a combined return under article 33 in either of these circumstances:

(a) When the corporation that directly owns or controls more than 50% of the voting power of the capital stock of the captive REIT or captive RIC is a life insurance corporation subject to tax or required to be included in a combined return under article 33; or, if this condition in this clause is not satisfied, then

(b) When the closest controlling stockholder of the captive REIT or captive RIC is a life insurance corporation subject to tax or required to be included in a combined return under article 33.

(c) The term “closest controlling stockholder” means the corporation that indirectly owns or controls over 50% of the voting power of the capital stock of a captive REIT or captive RIC, is subject to tax under section 1501 or article 9-A or is required to be included in a combined return under article 33 or a combined report under article 9-A, and is the fewest tiers of corporations away in the ownership structure from the captive REIT or captive RIC.

(d) Examples.

Example 1: Insurance Company X, which is licensed as a life insurance company in New York State and subject to tax under section 1501, owns 100% of the voting power of the capital stock of Corporation Y, a general business corporation subject to tax under article 9-A. Corporation Y owns 75% of the voting stock of a captive REIT. Because over 50% of the voting power of the capital stock of the captive REIT is not directly owned or controlled by a life insurance corporation subject to tax or required to be included in a combined return under article 33 and the closest controlling stockholder of the captive REIT is a life insurance company, the captive REIT must be included in a combined return with Insurance Company X.

Example 2: Insurance Company X, which is licensed as a life insurance company in New York and subject to tax under section 1501, owns 100% of the voting power of the capital stock of Corporation Y, a general business corporation subject to tax under article 9-A. Corporation Y owns 100% of the voting power of the capital stock of Corporation Z, also a general business corporation subject to tax under article 9-A. Corporations Y and Z are engaged in a unitary business. Corporation Z owns 100% of the voting power of the capital stock in a captive RIC. Corporation Y is the closest controlling stockholder in the captive RIC. Because over 50% of the voting power of the capital stock of the captive RIC is not directly owned or controlled by Insurance Company X, and the closest controlling stockholder in the captive RIC is not a life insurance corporation subject to tax under article 33, the captive RIC is required to be included in a combined report under article 9-A with Corporations Y and Z.

Example 3: Same facts as in Example 2 except that Corporations Y and Z are not engaged in a unitary business. In this case, the captive RIC is required to be included in a combined report with Corporation Z.

(2) If a captive REIT owns the stock of a qualified REIT subsidiary (QRS), as defined in IRC section 856(i)(2), then the QRS must be included in any combined report required to be made by such REIT.

(b) A non-captive REIT must be included in a combined report under article 9-A with its qualified REIT subsidiary. All other non-captive REITs are prohibited from being included in a combined report under article 9-A.

(c) In the case of a combined report including a captive REIT, or a captive RIC:

(1) such captive REIT or such captive RIC must be included in the computation of the combined capital base;

(2) intercompany dividends paid by such captive REIT to another member of the combined group are not eliminated in the computation of combined taxable income if the combined group is utilizing the subtraction for small thrifts and qualified community banks that maintain a captive REIT under section 208(9)(t);

(3) the adjustments required by section 1503 will not include the deduction for dividends paid by such captive RIC to any member of the affiliated group that includes the corporation that directly or indirectly owns over 50% of such RIC's voting stock; and

(4) taxable income shall be computed without regard to the deduction for dividends paid by such captive REIT or such captive RIC to any member of the affiliated group that includes the corporation that directly or indirectly owns over 50% of such captive REIT's or such captive RIC's voting stock. For purposes of this subdivision, "affiliated group" has the same meaning as in IRC section 1504, but without regard to the exceptions provided for in IRC section 1504(b).

SUBPART 9-5

DOMESTIC INTERNATIONAL

SALES CORPORATIONS (DISCs)

Section 9-5.1. General. (Tax Law, sections 208(1) and (9)(i), 209(6))

(a) For purposes of article 9-A, a DISC is either a “tax exempt DISC” or a “taxable DISC”. For any taxable year during which a corporation does not meet the requirements for treatment as a DISC, it will be treated in the same manner as any other taxpayer subject to tax under article 9-A.

(b) The term “former DISC” refers, with respect to any taxable year, to a corporation that is not a DISC during such year, but was (or was treated as) a DISC for a prior taxable year. However, a corporation will not be considered a former DISC for a taxable year unless such corporation has, at the beginning of such taxable year, undistributed previously taxed income or accumulated DISC income.

(c) To determine if a taxpayer that is a stockholder of a taxable DISC may be included in a combined report with the taxable DISC, see Subpart 6-2 of this Subchapter. Provided, in the case of a combined report, intercorporate dividends from a taxable DISC or a taxable former DISC are treated as business income and shall not be eliminated.

Section 9-5.2. Corporate stockholders of tax exempt DISC. (Tax Law, section 208(9)(i))

(a) A taxpayer that is subject to tax under article 9-A and is a stockholder of a tax exempt DISC must do the following on its report required to be filed under article 9-A:

(1) adjust its receipts, expenses, assets and liabilities to include its attributable share of the DISC's receipts, expenses, assets and liabilities;

(2) eliminate any deemed or actual distributions received from the DISC to the extent already included in entire net income; and

(5) eliminate intercorporate transactions between the stockholder and the tax exempt

DISC.

(b) A taxpayer required to file a report pursuant to this section also must file the affiliated entity information schedule.

Section 9-5.3. Corporate stockholders' treatment of distribution and capital of a DISC. (Tax Law, section 208(8-A))

(a) Since a DISC is not subject to tax on its earnings and profits, no deduction is allowed for the dividends distributed to a corporation owning stock of a DISC.

(b) Deemed distributions from a DISC or a former DISC that are taxable as dividends pursuant to IRC section 995(b) must be treated as business income.

(c) Actual distributions from a DISC or a former DISC must be treated as business income, unless such distributions meet the requirements of subdivision (d) of this section.

(d) Actual distributions from a DISC or a former DISC will be treated as investment income if:

(1) such distributions are treated as being made out of "other earnings and profits" for Federal income tax purposes under IRC section 996; and

(2) the stock of the DISC meets the definition of investment capital.

(e) Any gain or loss recognized for Federal income tax purposes on the disposition of stock in a DISC or a former DISC must be treated as business income, whether or not the stock of the DISC meets the definition of investment capital.

(f) The corporate stockholder's distributive share of the DISC's investments in the stocks, bonds or other securities or indebtedness from a DISC must be treated as business capital.

Section 9-5.4. Rules for treatment of earnings and profits.

(a) The earnings and profits of a DISC or of a former DISC are deemed to be divided into the following three categories:

(1) accumulated DISC income, which includes the earnings and profits of the corporation that have been deferred from taxation, as defined in 26 CFR 1.996-3(b);

(2) previously taxed income, which includes the earnings and profits of the DISC that have been previously taxed by reason of having been deemed distributed, as defined in 26 CFR 1.996-3(c); and

(3) other earnings and profits, which includes the earnings and profits of the DISC that were derived by the corporation in taxable years when it was not qualified as a DISC, as defined in 26 CFR 1.996-3(d).

(b) Any actual distribution to a stockholder that is made out of the earnings and profits of a DISC or a former DISC shall be treated as made in the following order:

(1) first, out of previously taxed income, as described in paragraph (2) of subdivision (a) of this section;

(2) second, out of accumulated DISC income, as described in paragraph (1) of subdivision (a) of this section; and

(3) third, out of other earnings and profits, as described in paragraph (3) of subdivision (a) of this section.

(c) If for any taxable year a DISC, or a former DISC, incurs a deficit in earnings and profits, such deficit shall be charged in the following order:

(1) first, to other earnings and profits, as described in paragraph (3) of subdivision (a) of this section;

(2) second, to accumulated DISC income, as described in paragraph (1) of subdivision (a) of this section; and

(3) third, to previously taxed income, as described in paragraph (2) of subdivision (a) of this section.

Section 2. Parts 16 through 23 of Subchapter B of Chapter I of Title 20 of the Rules and Regulations of the State of New York are repealed.

Section 3. Parts 32 and 33 of Subchapter C of Chapter 1 of Title 20 of the Rules and Regulations of the State of New York are repealed and a new Part 32 is added to read as follows:

PART 32

COMBINED RETURNS

Section 32.1. General. (Tax Law, section 1515(f))

(a) Every corporation is a separate taxable entity and shall file its own return. However, certain taxpayers subject to tax under article 33 are required to file on a combined basis with related corporations where:

(1) the capital stock requirement is met; and

(2) there are substantial intercorporate transactions among the related corporations.

(b) Where the capital stock requirement is met and substantial intercorporate transactions are absent, a combined return covering corporations may be permitted or required if the commissioner deems such a return necessary because of inter-company transactions or some agreement, understanding, arrangement, or transaction referred to in section 1515(g), in order to properly reflect the tax liability under article 33.

Section 32.2. Capital stock requirement.

To determine if the capital stock requirement is met, the rules in section 6-2.2 of this Title shall be used, except that any reference to “fifty percent” shall be substituted by “eighty percent”. Corporations that meet the capital stock requirement are “related corporations” for purposes of this Part.

Section 32.3. Substantial intercorporate transactions generally.

(a) In determining whether substantial intercorporate transactions among the related corporations exist, the facts and circumstances of all activities and transactions will be considered regardless of the transfer price for such intercorporate transactions. It is not necessary that there be substantial intercorporate transactions between any one corporation and every other related corporation. However, it is necessary that there be substantial intercorporate transactions between the taxpayer and a related corporation or collectively a group of such related corporations.

(b) (1) In determining whether there are substantial intercorporate transactions, the commissioner will consider and evaluate all activities and transaction of a taxpayer and its related corporations, including but not limited to:

(i) manufacturing, acquiring goods or property, or performing services for related corporations;

(ii) selling goods acquired from related corporations;

(iii) financing sales of related corporations;

(iv) performing related customer services using common facilities and employees for related corporations;

(v) selling policies or contracts of insurance for related corporations;

(vi) reinsuring risks for related corporations;

(vii) collecting premiums or other consideration for any policy or contract of insurance for related corporations;

(viii) incurring expenses that benefit, directly or indirectly, one or more related corporations; and

(ix) transferring assets, including assets such as accounts receivable, patents, or trademarks from one or more related corporations.

(2) For purposes of determining whether substantial intercorporate transactions exist, dividends are not considered in the measure of intercorporate receipts, total receipts, intercorporate expenditures, or total expenditures described in section 32.4 of this Part. Interest paid and received on loans between corporations is considered in determining if there are substantial intercorporate transactions, including interest on loans that

constitute subsidiary capital pursuant to section 1500(h). Taxes paid or reimbursed will not be considered in determining if there are substantial intercorporate transactions. Similar transactions must be treated in a consistent manner from taxable year to taxable year. Service functions will not be considered when they are incidental to the business of the corporation providing such service and expenditures for service functions are not considered expenditures benefiting a related corporation or a group of related corporations described in paragraph (3) of subdivision (a) of section 32.4 of this Part. Service functions include, but are not limited to, accounting, legal, payroll processing, and personnel services. Where a corporation makes expenditures that benefit a related corporation or a group of related corporations and allocates these costs to the related corporation or a group of related corporations, the intercorporate cost allocations are not considered receipts or expenditures described in subdivision (a) of section 32.4 of this Part; the expenditures benefiting the related corporation or group of related corporations are included in such expenditures described in paragraph (3) of subdivision (a) of section 32.4 of this Part.

(c) In determining whether the substantial intercorporate transaction requirement has been met, the Department will consider the materiality of the transactions and whether the transactions have economic substance, including the extent to which the motivation of the taxpayer in undertaking the transactions was to affect membership of the combined group.

Section 32.4. Substantial intercorporate transactions receipts and expenditures tests.

(a) Subject to subdivision (b) of this section, the substantial intercorporate transactions requirement based on a corporation's receipts or expenditures is met where:

(1) during the taxable years, 50 percent or more of a corporation's receipts includable in the computation of entire net income (excluding nonrecurring receipts) are from a related corporation or a group of related corporations;

(2) during the taxable year, 50 percent or more of a corporation's expenditures includable in the

computation of entire net income (ENI), including expenditures for inventory, but excluding nonrecurring expenditures, are to a related corporation or a group of related corporations; or

(3) during the taxable year:

(i) 50 percent or more of a corporation's expenditures includable in the computation of ENI (excluding nonrecurring expenditures) directly or indirectly benefit a related corporation or a group of related corporations; or

(ii) a corporation's expenditures includable in the computation of ENI (excluding nonrecurring expenditures) directly or indirectly benefitting a related corporation or a group of related corporations are equal to 50 percent or more of the sum of such expenditures and the expenditures (excluding nonrecurring expenditures) of the beneficiary corporation or corporations.

(b) If, in a particular taxable year, a corporation's intercorporate receipts or expenditures described in paragraph (1), (2) or (3) of subdivision (a) of this section, are between 45 percent and 55 percent of the total of the corporation's receipts or expenditures, as the case may be, then the test will be satisfied only if the corporation's receipts or expenditures, as the case may be, from one or more related corporations during the taxable year and the prior two taxable years in aggregate equals or exceeds 50 percent of its total receipts or expenditures, as the case may be, during the taxable year and the prior two taxable years in aggregate. If the corporation or one or more of the related corporations involved in the intercorporate transactions did not exist for all of the two prior taxable years, then the 50 percent measure for each corporation will be computed using the number of months that it existed.

Section 32.5. Substantial intercorporate transactions based on asset transfers.

The substantial intercorporate transactions requirement based on a corporation's asset transfers is met where a corporation transfers assets (including through incorporation) to a related corporation and 20 percent or more of the transferee's gross income, including any dividends received, in the taxable year of the transfer, or in taxable years subsequent to the year the asset or assets were transferred, is derived directly from the transferred assets. This applies to assets transferred on or after January 1, 2007. For purposes of this test, the following apply:

(a) Generally, only assets to the extent that they are transferred in exchange for stock or paid in capital are considered “qualifying assets." Transfers of assets other than in exchange for stock or paid in capital, including transfers of assets through a nonmonetary property dividend, are not considered unless the principal purpose of the transfer is the avoidance or evasion of the franchise tax imposed on the taxpayer or the combined group by New York State.

(b) Transfers of cash to a related corporation in exchange for stock or paid in capital are not considered.

(c) For purposes of determining whether the substantial intercorporate transactions requirement based on a corporation’s asset transfers is met, the term gross income means life insurance gross income or gross income as defined by section 803 or 832 of the Internal Revenue Code, whichever is applicable.

(d) Gross income is derived directly from an asset if the asset or the use of the asset by the transferee produces gross income. Gross income from transferred assets that generate income only when used in combination with other assets is not gross income derived directly from the assets. The gain from a sale of any transferred asset is considered gross income derived directly from the asset. Assets that may directly produce gross income include, but are not limited to, real property, accounts receivable, and intangibles such as patents, copyrights, trademarks, and partnership interests.

(e) Gross income from the sale of items produced from transferred production equipment would not, by itself, be considered gross income derived directly from the transferred assets. However, gross income from the sale of items produced from the transferred assets constituting substantially all of the productions process, including associated intangibles, such as might occur in the transfer of an operating division, would constitute gross income derived directly from the transferred assets.

(f) Gross income received by the transferee as a result of the reinvestment of income attributable to the transferred asset is not gross income derived directly from the transferred asset.

(g) The test must be applied for each year of an asset's normal depreciation recovery period under sections 167 or 168(c) of the Internal Revenue Code or amortization period under section 197(a) of the Internal Revenue Code. In the case of an asset that is not required to be depreciated or amortized for Federal income tax purposes, such as accounts receivable, the test must be applied for each year the asset is reflected on the books and records of the transferee under generally accepted accounting principles.

(h) If the asset transferred is an interest in another entity including a partnership, an entity treated as a partnership or a disregarded entity, the income distributed or deemed distributed to the transferee by such entity is gross income derived directly from the transferred asset.

(i) Where more than one asset is transferred, the gross income from all qualifying assets is used in determining whether the test is met.

(j) The determination of whether a transaction or series of transactions constitutes an asset transfer is based on the facts and circumstances of the transaction. The form of a transaction will not be respected if the transaction lacks economic substance or if the taxpayer intended a series of actions to be part of a single integrated transaction, or where it had as a principal purpose the avoidance or evasion of the franchise tax imposed on the taxpayer, or the combined group, by New York State.

(k) The following example illustrates when gross income is or is not derived directly from a transferred asset: Rental income derived from a transferred asset is considered gross income derived directly from a transferred asset. However, if the rental income is deposited in a bank account, interest earned on the bank account is not gross income derived directly from the asset.

Section 32.6. Combined group composition.

The following steps should be used to determine whether a combined return is required and, if so, which corporations are included in that combined return:

(a) Step 1. Every taxpayer must identify all of the corporations to which it is related, regardless of the franchise tax imposed by the Tax Law the corporation is subject to (or would be taxable under if subject to tax). Where one or more of the related corporations are taxpayers, identify all of the corporations related to these taxpayers. Do this until all related corporations have been identified. If a taxpayer has no related corporations, it must file on a separate basis. This constitutes the step 1 group of related corporations.

(b) Step 2. Identify all of the related corporations that have substantial intercorporate transactions with a taxpayer identified in step 1. These related corporations and the taxpayer with which they have substantial intercorporate transactions constitute the step 2 tentative combined group.

(c) Step 3. Add to the step 2 tentative combined group every related corporation that has substantial intercorporate transactions with any corporation identified in step 2. This constitutes the step 3 tentative combined group.

(d) Step 4. Add to the step 3 tentative combined group every related corporation that has substantial intercorporate transactions with any corporation identified in step 3. Repeat this process until it adds no more corporations to the group. This constitutes the step 4 tentative combined group.

(e) Step 5. Identify each related corporation not in the step 4 tentative combined group that has substantial intercorporate transactions with another related corporation not in the step 4 tentative combined group. Compare all such groups and combine into one group those with common members (unattached related group). There may be more than one unattached related group.

(f) Step 6. If there are substantial intercorporate transactions between any one corporation in an unattached related group and the step 4 tentative combined group, then all corporations in that unattached related group are included in the combined group. Do this for each unattached related group. As unattached related groups are included in the combined group, do this analysis between the expanded group and each unattached related group. The resulting group is the step 6 tentative combined group.

(g) Step 7. If there are substantial intercorporate transactions between any one corporation in the step 6 tentative combined group and an unattached related group, then all corporations in the unattached related group are included in the combined group. Do this for each unattached related group. As unattached related groups are included in the combined group, do this analysis between the expanded group and each unattached related group. The resulting group is the step 7 tentative combined group.

(h) Step 8. Add to the step 7 tentative combined group each related corporation that has substantial intercorporate transactions with the step 7 tentative combined group.

(i) Step 9. Repeat the process set forth in steps 4, 6, 7, and 8 until no more corporations can be added to the tentative combined group.

(j) Step 10. Eliminate from the tentative combined group those corporations that are formed under the laws of another country (alien corporations), that are taxable under another franchise tax imposed by the Tax Law (or would be taxable under another franchise tax if subject to tax), or that are subject to the tax imposed by section 1502-a or section 1502-b. Also eliminate any captive REIT or captive RIC as defined in subdivisions 9 and 10 of section 2, respectively, that is required to be included in a combined return under section 210-C. If two or more corporations are eliminated, it is possible that they will constitute a combined group if they have substantial intercorporate transactions.

Section 32.7 Filing Combined Returns.

(a)(1) As provided in this Part, a group of related corporations may be required or permitted to file on a combined basis. To file on a combined basis the group must file a completed combined return. The first year the group files on a combined basis, and each year thereafter in which the composition of the group changes, the group must include the following information, with the return:

(i) the exact name, address, employer identification number and the state of incorporation of each corporation included in the combined return;

(ii) information showing that each of the corporations meets the capital stock requirement for the taxable year; and

(iii) the exact name, address, employer identification number and the state of incorporation of all corporations (except alien corporations) that meet the capital stock requirement for the taxable year, but are not included in the combined return.

(2) In addition, the following information may be required to be submitted for the taxable year at another time, such as in conjunction with an audit:

(i) a statement providing details as to why a combined return that includes only the corporations listed in subparagraph (1)(i) of this subdivision that meet the capital stock requirement and the details as to why the corporations listed pursuant to subparagraph (1)(iii) of this subdivision are excluded; and

(ii) information establishing that each corporation included in the return meets the substantial intercorporate transactions test.

(b) The filing of a combined return, or the inclusion of a corporation in or the exclusion of a corporation from a combined return, is subject to revision or disallowance on audit.

(c) If a corporation properly reports on a combined basis, the corporation must continue to file its returns on a combined basis until the facts relevant to section 32.1 of this Part materially change.

Section 32.8. Corporations not required or permitted to file a combined return.

The following corporations may not be included in a combined return:

(a) A corporation that is taxable under another franchise tax imposed by the Tax Law (or would be taxable under another franchise tax if subject to tax).

(b) insurance corporations subject to the tax imposed by section 1502-a.

(c) captive insurance corporations subject to the tax imposed by section 1502-b.

Section 32.9. Examples.

Unless otherwise provided, assume the following facts for all examples: Corporation A owns all of the stock of corporations B, C, D, E, F, G, H, I, L, M, N, O, P, Q, and R. All of the corporations are calendar year taxpayers for Federal income tax purposes. Corporation I is taxable under article 9-A. Corporations B and C are taxable under sections 1501 and 1502 of article 33. All remaining corporations would be subject to tax under sections 1501 and 1502 of article 33 if they had nexus with New York. None of the corporations are taxable under section 1502-a. Only Corporation D is a corporation organized under the laws of a country other than the United States. To the extent that the conclusion of the example is filing on a separate basis, it is assumed that the Commissioner did not find that a combined report would be required to properly reflect tax liability as a result of inter-company transactions or some agreement, understanding or arrangement or transaction.

Example 1: 90 percent of B's receipts are from D. Therefore, there are substantial intercorporate transactions between B and D. B and D are a tentative combined group and must file a combined return.

Example 2: B's receipts are: 22 percent from A, 20 percent from C, 30 percent from D, 10 percent from E and the rest are from unrelated entities. 40 percent of C's expenses are to B. No other substantial intercorporate transactions occur between the corporations. Since there is no tentative combined group among the related corporations, corporations B and C file on a separate basis.

Example 3: 90 percent of B's receipts are from D and 100 percent of

D's receipts are from E. D is an alien corporation. There are substantial intercorporate transactions between B and D, and D and E. B, D and E must file a combined return.

Example 4: A is the only taxpayer and 50 percent of A's receipts are from B, with another 4 percent from E. 30 percent of E's expenditures are to A and 20 percent to D. C has no transactions with anyone in the group. 50 percent of D's receipts are from A. 50 percent of F's receipts are from A. 100 percent of H's receipts are from F. 100 percent of R's receipts are from H. 20 percent of B's receipts are from L, 20 percent from M, and 20 percent from N. 100 percent of L's receipts are from M. 100 percent of M's receipts are from N. 40 percent of O's receipts are from R and 30 percent are from D. 60 percent of P's receipts are from O. 80 percent of L's expenditures are to Q. All of these corporations are in the step 1 group of related corporations because they meet the stock ownership test. The step 2 tentative combined group consists of A, B, D, and F. As a result of step 3, H is added to the tentative combined group. As a result of step 4, R is added to the tentative combined group. As described in step 5, L, M, N and Q is an unattached related group and O and P is an unattached related group. Corporations O and P are added to the tentative group pursuant to step 6 because 70 percent of O's receipts are from R and D. The step 6 tentative combined group is A, B, D, F, H, R, O and P. The corporations in the unattached unrelated group of L, M, N and Q are all added to the tentative combined group pursuant to step 7 because B has substantial intercorporate transactions with the unattached related group of L, M, N and Q. The step 7 tentative combined group is A, B, D, F, H, R, O, P, L, M, N and Q. Pursuant to step 8, E is added to the step 7 tentative combined group because 30 percent of its expenditures are from A and 20 percent are from D. The step 9 tentative combined group is the same as the step 8 tentative combined group. Since no corporations will be excluded from the step 9 tentative combined group pursuant to step 10, the group of corporations that must file a combined return are A, B, D, F, H, R, O, P, L, M, N, Q and E.

Example 5: A's only activity is to receive dividends from its wholly owned subsidiaries. B sells stocks, C sells municipal bonds and D sells corporate bonds. B, C and D each have their own employees. However, the employees of one corporation are authorized to and do sell extensively the securities sold by the other corporations. 80 percent of the receipts of B, 70 percent of the receipts of C and 60 percent of the receipts of D are generated by sales made by the common pool of employees of B, C, and D. All three corporations carry on their activities at or using common facilities. Because there are substantial intercorporate transactions using common facilities and employees among B, C and D, they are a combined group and must file a combined return. A is not included in the combined group because it has no substantial intercorporate transactions with a related corporation.

Example 6: 90 percent of B's receipts are from I and 100 percent of I's receipts are from E. C has no transactions with anyone in the group. I is taxable under article 9-A. There are substantial intercorporate transactions between B and I, and I and E. B, I and E are a tentative combined group. However, since I is taxable under another franchise tax imposed by the Tax Law, it cannot be included in a combined return. Therefore, B and E must file a combined return. C files on a separate basis.

Example 7: A, B, C, D, and E are parties to an intercompany reinsurance pooling agreement. In accordance with the terms and conditions of this agreement, the member companies cede 100% of their direct and assumed business to Company A, the lead company pool participant. In turn, each pool participant assumes their percentage share of the pooled business ceded from Company A. The capital stock requirement is met but substantial intercorporate transactions are absent. However, the Commissioner deems a combined report including A. B, C, D and E is necessary to properly reflect tax liability because of inter-company agreements between the corporations.

Dated: Albany, New York
December 11, 2023

/s/ Amanda Hiller
Amanda Hiller
Acting Commissioner of Taxation and Finance