

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(8)C
Corporation Tax
July 12, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C080222A

The Department of Taxation & Finance received a petition from Alvarez & Marsal requesting guidance with respect to the characterization and sourcing of business receipts of its client under Article 9-A of the Tax Law. The client is a group of affiliated entities as described below.

Facts

Parent Corporation (“Parent”) is a Delaware corporation with headquarters located outside of New York State. Parent owns, directly or indirectly, 100% of the following affiliates: Affiliate A, a Delaware corporation; Affiliate B, a New York corporation; Affiliate C, a Delaware corporation; Affiliate D, a Delaware corporation; Affiliate X, a Delaware limited partnership with headquarters outside of New York that has elected to be treated as a corporation for both federal income tax and New York State purposes; Affiliate Y, a single-member limited liability company disregarded for federal income tax purposes; and Affiliate Z, a Delaware corporation with headquarters in New York State.

Parent

Parent owns and operates an internet-based exchange platform which serves as a marketplace for the global futures and over-the-counter (“OTC”) markets (the “Exchange”). Via the Exchange, Parent serves as an OTC market operator. Parent also operates the Exchange on behalf of affiliates who operate regulated futures exchanges.

The Exchange provides a marketplace for buyers and sellers of certain commodities contracts, financial contracts, and other derivative contracts in the futures and OTC markets to meet and execute transactions on a real-time basis. Parent is not a registered securities or commodities broker or dealer. All property and equipment associated with the Exchange is located outside of New York State.

Members (i.e., customers) may access the Exchange via the internet through Parent’s website, through a dedicated line between the customer’s server and Parent’s server, or by co-location of a customer’s server at Parent’s server location. Dedicated lines are provided by independent software vendors (“ISV’s”) at Parent’s data hub locations. Parent currently has no hub locations within New York State. Members are responsible for any and all costs associated with accessing the Exchange, which may include a charge by Parent for use of a dedicated line,

or co-location of customer's server at Parent's server location. These dedicated line and server charges are not part of Petitioner's opinion request.

Parent generates revenue from a variety of sources with respect to the OTC markets that it operates. Each member is charged a minimum fee for access to the information and data available on the Exchange. Additionally, whenever a trade is executed on the Exchange, the trading member is obligated to pay Parent a commission for successful execution of the trade. Parent also charges a fee for providing electronic trade confirmation.

The minimum fee gives a member the right to access and view the information available on the Exchange. The minimum fee is only charged to those members who do not incur trading commissions in excess of the minimum amount. Because the minimum fees are generated only in those situations where trading commissions are below an agreed threshold, the minimum fees predominantly represent fees paid for view-only access to the Exchange. Affiliate X is the owner of the data generated by the Exchange pursuant to the terms of an intercompany arrangement between Parent and Affiliate X. Therefore, Parent pays 70% of the total minimum fee revenue to Affiliate X.

Parent maintains a staff of more than 150 full-time personnel who write and test program code, manage all hardware and software, compile and analyze data, perform capacity planning, and provide customer service support related to the Exchange. Customer support includes account set-up and maintenance; user training to ensure that clients are able to effectively use the Exchange; and day-to-day operational support for business-related customer inquiries.

All trading on the Exchange is done anonymously. Parent operates OTC markets for both bilateral and cleared trades. Bilateral trades are settled between counterparties (i.e., buyer and seller). Cleared trades are processed by an affiliated clearinghouse where they are marked-to-market and margined daily before final settlement. As a result of this process, the central clearinghouse becomes the central counterparty ("CCP") in each trade (i.e., the buyer to the clearing member firm at which the seller carries its account and the seller to the clearing member firm at which the buyer carries its account). With respect to cleared OTC trades, the clearing administration function is performed outside of New York State.

If both counterparties to a bilateral trade choose to have their trade confirmed electronically, Parent charges both counterparties a flat fee for the confirmation. The electronic confirmation can be through a manual entry using a web form, a file upload, or a direct automated interface. Both parties may also choose a traditional paper confirmation for no additional cost. Fees charged for electronic confirmation services are invoiced separately from the trading commissions.

Affiliate A

Affiliate A operates a global futures exchange for trading futures contracts and options on futures contracts related to certain commodities, financial contracts and other derivative contracts. Depending on the type of contract being traded, members may execute trades

electronically via Parent's Exchange. In addition, members may execute transactions using Affiliate A's physical trading floor, engaging in transactions by "open outcry". Members, or their authorized employees, who have been granted the requisite floor trading privileges ("Member Brokers") may execute transactions for their own account or for the accounts of others. All property and equipment associated with the execution of any transactions on the Exchange are located outside of New York State. The physical trading floor is located in New York. Affiliate A is not a registered securities or commodities broker or dealer .

Affiliate A's members execute electronic futures trades using Parent's Exchange. Affiliate A's employees are responsible for certain administrative functions relating to the Exchange, such as legal and information technology services, as well as maintaining the open outcry trading floor. In addition, Affiliate A has employees who travel to customer locations both within and without New York State. In accordance with their agreement with Affiliate A, each trading member is obligated to pay Affiliate A a trading commission for the successful execution of a trade on the Exchange.

Affiliate A Trading Commissions

Affiliate A receives trading commission revenue only in those instances where trades are successfully executed. Affiliate A charges a commission fee to both counterparties based on the contract (i.e., position) being traded.

The electronic futures trading activity involved in Affiliate A's business occurs on the Exchange and is similar to the electronic trading activity involved in Parent's business, with the principal differences relating to the type of contracts being traded or the markets in which they are traded (i.e., only futures contracts and options on futures contracts are traded in the futures exchange operated by Affiliate A).

Affiliate A Open Outcry Trading Commissions

For the open outcry trading, Member Brokers are physically positioned on Affiliate A's trading floor. There they communicate offers to buy and sell to the other assembled Member Brokers. In addition, approximately 25 employees of Affiliate A work on the trading floor. These employees observe trade transactions between Member Brokers and enter all trade information into a price reporting system via a wireless hand-held device that distributes the information over the ticker to the public. Following execution, the members pay the settlement amounts charged by Affiliate B, as described below. As with electronic trades executed using the Exchange, Affiliate A charges a trading commission fee to both counterparties based on the contract (i.e., position) being traded.

Affiliate B

Affiliate B is the designated clearinghouse for Affiliate A, and therefore acts as the central counterparty for all trades executed on the futures and options markets operated by Affiliate A. As such, Affiliate B provides clearing and settlement services for Affiliate A's

futures contracts and options on futures contracts, regardless of whether the trading occurs electronically on the Exchange or on the open outcry trading floor. As the central counterparty, Affiliate B calculates and collects initial margin, calculates daily mark-to-market amounts and pays and/or collects all variation margin and payments in final settlement of contracts. Affiliate B charges and collects all Affiliate A and Affiliate B fees (i.e., trading commissions and fees for clearing and settlement services), and remits the Affiliate A fees to Affiliate A. Affiliate B establishes and monitors financial requirements for clearing members and sets minimum margin requirements for products traded on the Exchange and on the open outcry trading floor. The clearing process is automated wherever possible, but may include manual activities. The manual activity takes place in New York, and includes data entry, technical support and customer support. Affiliate B charges both counterparties a fee for each trade cleared. Affiliate B is not a registered securities or commodities broker or dealer.

Affiliate B has offices within and without New York State. Affiliate B has its own employees who are paid by Affiliate A. Affiliate B's employees are located both within and without New York State. Affiliate B's customers are located both within and without New York State.

Affiliate C

Affiliate C offers trade execution and processing for over-the-counter ("OTC") financial markets. Affiliate C owns and operates an exchange platform which serves as a marketplace for the global OTC financial markets (the "Platform"). Via the Platform, Affiliate C serves as an OTC market operator. The Platform provides a marketplace for buyers and sellers of certain financial contracts in the OTC markets to meet and execute transactions on a real-time basis. Affiliate C is not a registered securities or commodities broker or dealer; however, in certain aspects of Affiliate C's OTC market operations, Affiliate C acts as an interdealer broker. In addition, Affiliate C operates a highly automated trade confirmation and data delivery system.

Affiliate C owns substantially all intangible property used in its operations, including the technology related to the Platform as well as the technology related to the auction businesses and the trade confirmation and data delivery business described below. All property and equipment associated with the provision of the Platform to its customers is located within New York State, excluding the Platform's disaster recovery equipment which is located outside New York State.

Affiliate C's employees who are responsible for the daily operation and maintenance of the Platform are located within New York State. These employees perform functions for the Platform similar to the functions performed by Parent's employees in support of Parent's Exchange (e.g., Development & Testing, Operations Support, and Helpdesk Support). Affiliate C has an office located within New York State with more than 30 employees who work as brokers in the interdealer broker business. The brokers may occasionally travel outside New York for visits with customers as well as to attend certain client functions.

As an interdealer broker, Affiliate C facilitates voice, electronic, and hybrid (i.e., a combination of voice and electronic) execution methods for trading in OTC financial contracts

on the Platform. Facilitation of a trade involves actions by the broker that help bring about a trade, and include the receipt of a bid or ask price; solicitation of counter prices from other traders; and providing general price history and market information. After downloading Platform software onto their desktop, Affiliate C's customers may access the Platform directly via the internet or dedicated private lines provided by ISVs. Affiliate C's three primary revenue streams are auction fees, trading commissions and trade confirmation fees.

Affiliate C Auction Fees

Receipts from Affiliate C auction fees are generated through a highly automated, digital auction business. Auction participants independently log onto the Platform and enter relevant data, and final settlements are analyzed, displayed and executed via the Platform using complex algorithms. Customer support is offered by client service managers located within and without New York State. The auction customers are also located both within and without New York State.

Affiliate C Trading Commissions

Affiliate C does not charge a minimum fee for access to the Platform. Affiliate C receives commission revenue, but only in those instances where trades are successfully executed. Affiliate C charges trading commissions to both counterparties based on the contract (i.e., position) being traded. Trading commission customers are located both within and without New York State.

The following example illustrates the process involved in a transaction giving rise to Affiliate C Trading Commissions:

Example:

Buyer and Seller are both members of the Platform. Buyer and Seller may choose to execute a trade via either a voice, electronic, or hybrid method. In an electronic trade, much like a trade executed on Parent's Exchange, both Buyer and Seller independently access and log onto the Platform, where Buyer can view Seller's quote price on a position. Buyer enters a bid on the position and if Seller agrees to Buyer's bid price, Buyer and Seller electronically execute the trade which is recorded and processed via the Platform. Affiliate C does not act as a principal to the transaction in any way.

In a voice trade, Buyer and/or Seller contact Affiliate C's Broker via phone regarding a position. Broker provides customer support to Buyer and/or Seller to facilitate the trade, but does not advise Buyer or Seller on which trades to execute nor act as a principal to the transaction in any capacity. Once the trade has been agreed to by Buyer and Seller, the Broker verbally executes the trade on the Buyer and/or Seller's behalf and it is recorded and processed via the Platform.

A hybrid trade may vary in its combination of the electronic and voice trade execution methods, but the result is the same. Revenue is not earned until the trade is executed. Regardless of the method by which the trade is executed, Affiliate C receives its trading commission from each counterparty once the trade has been successfully executed and processed.

Affiliate C Trade Confirmation Fees

Affiliate C's trade confirmation business is similar to Parent's electronic confirmation business, except that Parent and Affiliate C provide such services with respect to contracts traded on the Exchange and Platform, respectively. The business is supported by employees located both within and without New York. Support functions include day-to-day support for business-related customer inquiries; account set up; and user training. This includes answering phones to assist members with connectivity issues and trade resolution problems. Support functions also include technical support, which focuses on ensuring that customers encounter no technical problems in accessing the Platform. Revenue is generated based on the total number of trades processed with a fee per process event. Customers are located both within and without New York State.

Affiliate D

Affiliate D is a registered securities or commodities broker/dealer. Affiliate D receives two primary types of revenue, trading/brokerage commissions and auction fees.

Affiliate D Trading/Brokerage Commissions

Affiliate D brings together two counterparties to facilitate a trade. Affiliate D earns a commission from each counterparty upon the successful execution of a trade based on the contract traded.

Affiliate D Auction Fees

Settlement auctions operated by Affiliate D, while auctioning a different product than Affiliate C, would generally operate much in the same manner as the Affiliate C auction fees described above. The auction customers are located both within and without New York State.

Affiliate X

Parent owns 100 percent of Affiliate X. Affiliate X is headquartered outside of New York, and has no property or payroll within New York State. Affiliate X's primary type of revenue is from data fees.

Affiliate X Data Fees

Parent has granted to Affiliate X the exclusive right to access trading data on the Exchange related to the OTC markets that it operates, and to repackage it for sale to third-parties. Affiliate X assimilates this information into various products that are sold to third parties. Products offered by Affiliate X include but are not limited to:

- Historical and real-time reports, including various market indices;
- Daily reports showing high, low, total volume, and volume weighted average prices generated by the market over the past 24 hours; and
- Miscellaneous reports customized to meet a customer's specific needs.

Affiliate X also receives 70 percent of the minimum fee charged by Parent to members of the Exchange. In addition, Affiliate X charges Exchange members a flat monthly subscription fee based on the number of users and member status for the right to view data derived from the Exchange. The subscription fee varies depending on which Affiliate X products the member chooses to view. In some cases Affiliate X contracts with vendors to provide customers with access to the Exchange data. In other cases, Affiliate X provides Exchange data directly to customers without the use of a vendor.

Affiliate Y

Parent owns 100 percent of Affiliate Y, which is headquartered in New York, and has both property and payroll within the State. This affiliate acts as an interdealer broker, providing voice-brokerage services in certain OTC commodities markets. Affiliate Y brings two parties together to facilitate a trade, and receives a trading commission for this service based on a fixed rate, which varies by customer, the contract traded and whether the contract is settled bilaterally or cleared. Affiliate Y is not a registered securities or commodities broker or dealer.

Affiliate Y's clients are located both within and without New York State. Periodically, employees of Affiliate Y will visit client sites which may be located both within and without New York State. The following example illustrates the process involved in a voice-brokerage transaction facilitated by Affiliate Y:

Example

Buyer and Seller are both looking to execute a trade. Independently, Buyer and Seller contact Affiliate Y by phone with details of the desired trade. Acting as an interdealer broker, Affiliate Y assists with the structuring of the trade and verbally discusses the details of the trade with each counterparty. The counterparties then choose to either complete the trade bilaterally, or as a cleared trade.

Affiliate Z

Parent owns 100 percent of Affiliate Z, which is headquartered in New York, and has both property and employees within the state. Affiliate Z provides certain services for Parent

and Affiliate X. As such, Affiliate Z earns its revenue entirely through intercompany contracts with Parent and Affiliate X. Affiliate Z performs all of its services in New York State. Affiliate Z is not a registered securities or commodities broker or dealer.

Analysis

For taxable years beginning on or after January 1, 2007, the receipts factor alone is used to determine a taxpayer's business allocation percentage. Tax Law § 210.3(a)(10)(A)(ii). Section 210.3(a)(2) of the Tax Law provides that the receipts factor is determined by ascertaining the ratio of the taxpayer's New York receipts during the taxable year, which are receipts arising from various enumerated activities or transactions that are sourced to New York, to the total amount of the taxpayer's receipts for the period. Sourcing rules are provided for sales of tangible personal property and services, rentals of property, royalties from the use of patents and copyrights, and other specifically described activities. Receipts that do not fall within any of the specific categories are treated as "other business receipts" and are sourced to where they are earned. Tax Law § 210.3(a)(2)(D).

In *New York Mercantile Exchange*, Adv Opn Comm T&F, April 7, 1999, TSB-A-99(16)C (herein "NYMEX"), the petitioner entered into license agreements with direct and indirect vendors for worldwide distribution of its market data. The vendors generally did not use the market data other than to provide it to subscribers via electronic transmission. The subscribers were only permitted to use the market data internally. The petitioner placed its own modems and other transmission equipment at a direct vendor's place of business for the vendor's telecommunications link with the taxpayer's network. The equipment remained the property of the petitioner at all times. Indirect vendors also obtained access to the market data through a direct vendor. A vendor paid the petitioner a monthly subscription fee based on the number of terminals at subscriber locations that provided access to the taxpayer's market data. The advisory opinion held that the monthly subscription fees received by the petitioner from the vendors constituted "other business receipts" for purposes of the receipts factor, and were earned at the location where the petitioner delivered the market data to the vendors. That is, they were earned at the location of the modems and other transmission equipment that the vendor used to draw upon the market data. When the location of the modems and other transmission equipment was in New York State, the subscription fees were earned in New York.

In *Insurance Services Offices, Inc.*, Adv Opn Comm T & F, April 18, 2002, TSB-A-00(15)C (herein "Insurance Services"), the petitioner's customers subscribed to its Internet service to access petitioner's databases. In doing so, the customers were paying the petitioner for the intangible right to access and obtain copyrighted data, and customers that subscribed to the databases signed a license agreement to that effect. Similar to *NYMEX, supra*, it was held that the revenues for access to the petitioner's copyrighted material constituted "other business receipts" for purposes of the receipts factor. Those fees were also properly sourced within and without New York on the basis of the location of modems and other transmission equipment that the customer used to obtain the copyrighted material. In instances where information was not available to determine the location of the modems and other transmission equipment, the location was presumed to be at the customer's mailing address as indicated in the records of the petitioner.

In *Deloitte & Touche, LLP*, Adv Opn Comm T & F, April 18, 2002, TSB-A-02(3)C, the taxpayer was an online marketer and transaction processor of gift certificates, gift cards and other related products. The taxpayer's product line included physical certificates and cards issued by 3rd party merchants, as well as digital (e-mailable) gift certificates that were redeemable at a merchant's website or store. The taxpayer also offered its own physical and digital gift certificates. The opinion stated that the underlying value of the gift certificates was the right to redeem them for property or services at some future time. Since the receipts from their sale did not fall into any other enumerated category, the receipts from the certificates and cards were characterized as "other business receipts" under Tax Law §210.3(a)(2). The opinion also concluded that the taxpayer's business activities in offering its products through the Internet were substantially similar to the activities described in *NYMEX* and *Insurance Services, supra*, in that the taxpayer's receipts were derived from the activity of the customer that accessed the Internet to purchase products from the taxpayer's website. Accordingly, for purposes of the receipts factor, the taxpayer's sales of gift certificates and cards would be sourced to New York State when the location where the customer accessed the taxpayer's website was located in New York State.

Parent

Parent receives a minimum fee from each member of the Exchange that allows the member to access the information and data available on the Exchange. Parent also receives a transaction fee (which Parent describes as a commission) for each successful execution of a trade by a member through the Exchange. The minimum fee is charged to a member only if the trade execution fees of the member do not exceed the minimum fee.

Parent's minimum fee and the transaction fees it receives upon a customer's successful execution of a trade on the Exchange are both similar to the fees received by petitioners in *NYMEX*, *Insurance Services*, and *Deloitte & Touche*. In all cases, the fees are derived from the activity of the customer that accesses the Internet to obtain information from Parent or complete a transaction. As such, these fees constitute "other business receipts." For purposes of determining the receipts factor, the fees are sourced and allocated to the location of the customer who accesses Parent's Exchange, or who conducts a trade through the Exchange. In those cases where the location of the customer cannot be determined, Parent may use the address of the customer in its records.

The fees charged by Parent for electronic confirmation of transactions are also similar to the fees involved in *NYMEX*, *Insurance Services* and *Deloitte & Touch*. In these instances, the members of Parent's Exchange request confirmation of the transactions they have engaged in, and Parent electronically provides the verification. As with the other fees, the electronic confirmation fees are considered "other business receipts" and are sourced to the location of the customer who receives the confirmation.

Affiliate A

Affiliate A operates a global futures exchange. Depending on the contract traded, Affiliate A's customers may either access Parent's Exchange to conduct the trade, or, if the member has been granted floor trading privileges, use Affiliate A's trading floor to conduct "open outcry" trading.¹ Affiliate A is not a registered securities or commodities broker-dealer, and so the allocation provisions relating to those entities in Tax Law § 210.3(a)(9) are not controlling.

The electronic trading activity involved in Affiliate A's business occurs on the Exchange and is similar to the electronic trading activity involved in Parent's business, with the principal differences relating to the type of contracts being traded or the markets in which they are traded. In view of this similarity, the receipts of Affiliate A from these electronic trading transactions would be treated the same as for Parent. That is, they would be considered "other business receipts" that are sourced to the location of the customer involved in the transaction.

The open outcry trading provided by Affiliate A lets approved members enter onto Affiliate A's trading floor where the members can actively engage in quoting offers to sell and buy to the other assembled members. Employees of Affiliate A enter the details of completed sales into the Exchange price reporting system by way of wireless hand-held devices. Commissions are paid by each of the Member Brokers involved in these transactions.

Open outcry trading involves Affiliate A providing its members with physical access to its trading floor and facilitating trades through employees of Affiliate A who monitor offers and acceptances of the members, and record consummated transactions through hand held devices. In this situation, Affiliate A is providing a service to the members. Accordingly, the commission receipts from these transactions will be sourced to where the service is performed. In this case the services are performed at the location of Affiliate A's trading floor.

Affiliate B

Affiliate B acts as the designated clearinghouse for Affiliate A's futures contracts and options on futures contracts that are electronically traded on the Exchange or on the open outcry trading floor. The clearinghouse acts as a central counterparty for each executed trade, and each party to a cleared transaction is charged a fee by Affiliate B. Affiliate B is not a registered securities or commodities broker-dealer, and so the allocation provisions relating to those entities in Tax Law § 210.3(a)(9) are not controlling.

As with the trading fees received by Parent and Affiliate A, the fees charged by Affiliate B for clearing trades are similar to the fees involved in *NYMEX*, *Insurance Services* and *Deloitte & Touch*. These fees are derived from activities of the customers that access the Exchange and

¹ In *DeMartino v. Comm'r* (862 F.2d 400 [2d Cir 1988]), the Court described this type of trading as it occurred on the New York Commodities Exchange. "Trading of commodity futures contracts takes place in so-called trading pits or trading rings on the floor of the NYCE. The trades must take place by 'open outcry,' which involves vocal expressions and ritualized hand signals indicating the position, quantity, and price at which the floor broker or trader is willing to trade; this practice was vividly described in Frank Norris's *The Pit*, a 1903 novel about Chicago's grain market." *Id* at 402.

are considered “other business receipts.” As such, they are properly allocated to the location of the customers involved in the transaction.

Affiliate C

Affiliate C operates the Platform, an exchange which serves as a marketplace for the global OTC financial markets. Utilizing the Platform, Affiliate C operates a highly automated digital auction business that allows participants to enter relevant data and execute successful bids. Unlike Parent, Affiliate C does not charge a minimum fee for access to the Platform, but Affiliate C does charge a commission to each of the counterparties involved in a successfully executed trading transaction. Affiliate C also acts as an interdealer broker in certain aspects of its OTC market operations, but is not a registered securities or commodities broker or dealer. In addition, Affiliate C operates a highly automated trade confirmation system.

Affiliate C’s digital auction fees and commission fees from electronic trades are similar to the fees involved in *NYMEX*, *Insurance Services* and *Deloitte & Touch*. These fees are derived from the activity of the customer that accesses the Internet to participate in the auction or conduct trading. Therefore, the receipts from these activities are considered “other business receipts” and are also properly sourced to the location of the customers involved in the transactions.

Affiliate C’s trade confirmation business is similar to Parent’s electronic confirmation business, except that Affiliate C provides confirmations with respect to contracts traded on the Platform. The receipts from this line of business should be sourced the same as Parent’s confirmation fees, that is as “other business receipts” allocated to the location of customers involved in the transaction.

Affiliate C’s interdealer brokers facilitate trades between customers.² The receipts generated by trades executed with the assistance of the interdealer brokers differ from the receipts generated through fully electronic trading. In the case of the interdealer brokers, the customers are seeking the expertise of these Affiliate C employees in determining whether to engage in financial transactions, and the brokers provide useful information to their customers. Under such circumstances, it is concluded that the fees from interdealer broker-assisted trades are receipts from services for allocation purposes. As such, the receipts are sourced to where the services are performed. Therefore, Affiliate C should source these fees to the location of the interdealer broker involved in the transaction.

Affiliate D

² The Securities Industry and Financial Markets Association (SIFMA), focusing on the fixed income markets, has described these brokers’ role as follows. “The [interdealer broker] community distributes information and facilitates transactions in the secondary, or wholesale, financial debt markets between dealers and dealer banks around the world. *See*, www.sifma.net/assets/files/InterdealerBrokers_0320.pdf They “provide buyers and sellers with the critical market information they need to trade.” *Id.* These market participants “enhance price discovery;” provide “anonymity and confidentiality” through their position in the middle of trades; facilitate information flow; facilitate enhanced liquidity (via their broad range of contacts); improve market efficiency (via their rapid access to liquidity); and lower costs (by making available a market value for illiquid securities and lowering search costs for broker-dealers). *Id.*

Affiliate D is a registered securities or commodities broker-dealer and receives two types of revenue. The first is trading commission receipts. Affiliate D brings two counterparties together to complete a trade and earns a commission from each. Pursuant to Tax Law § 210.3(a)(9)(A)(i), brokerage commissions of a registered securities or commodities broker or dealer are considered receipts from services performed at the mailing address of the customer who is responsible for paying the commission. Accordingly, these receipts should be sourced to the location of the counterparty that pays the trading commission.

Affiliate D's second type of receipt is from its digital auction business. The customers participating in this auction pay fees to Affiliate D for the execution of purchase and sale orders. Therefore, these auction fees are considered brokerage commissions and should also be allocated pursuant to Tax Law § 210.3(a)(9)(A)(i) to the mailing address of the customer who is responsible for paying the commission.

Affiliate X

Affiliate X is a limited partnership treated as a corporation for New York State and Federal income tax purposes. It charges its customers, who are members of the Exchange, a flat monthly subscription fee that is based on the number of users, member status and the type of product provided to the customer. Affiliate X also receives 70% of the minimum fees paid to Parent since the minimum fees predominantly represent view-only access by members to the Exchange data that is owned by Affiliate X.

Both *NYMEX* and *Insurance Services, supra*, are instructive in determining the allocation of Affiliate X's receipts. In those opinions the subscription fees for access to electronic databases, whether for a set periodic amount or variable, were held to be "other business receipts" that would be allocated to where they were earned pursuant to Tax Law § 210.3(a)(2)(D). Those fees were earned at the location of the customer accessing the databases. The data access fees received by Affiliate X, including the minimum fee payments, are similar to the receipts in *NYMEX* and *Insurance Services* and are also considered "other business receipts." Accordingly, these receipts should be sourced to the location of the members who are provided access to Affiliate X's information and data.

Affiliate Y

Affiliate Y is an interdealer broker, but is not a registered securities or commodities broker/dealer. This affiliate derives one source of receipts – fees for voice brokerage. Affiliate Y assists customers in structuring and completing a trade in certain OTC commodities markets.

As with the interdealer brokerage commissions earned by Affiliate C, the brokerage fees paid to Affiliate Y are considered receipts from services and are allocated to the place the services are performed. In this case the brokerage fees should be sourced to the location of Affiliate Y's interdealer broker involved in the transaction. Since Affiliate Y is a single member limited liability company wholly owned by Parent and treated as a disregarded entity, its receipts are included in Parent's receipts for allocation purposes.

Affiliate Z

Affiliate Z is not a registered securities or commodities broker or dealer. According to the Petition, it provides certain services to Parent and other affiliates. All the services are performed in New York State. Accordingly, all the receipts of Affiliate Z would be sourced to New York for allocation purposes pursuant to Tax Law § 210.3(a)(2)(B).

DATED: July 12, 2011

/S/

DEBORAH LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.