New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-M-10(7)C
Corporation Tax
December 10, 2010

Summary of Budget Bill Corporation Tax Changes Enacted in 2010

This memorandum contains summaries of the corporation tax legislative changes that are part of the fiscal 2010-2011 New York State budget bills (Chapters 57 and 59 of the Laws of 2010). The memorandum covers corporation tax changes under Articles 9 (corporation tax), 9-A (franchise tax on business corporations), 13 (tax on unrelated business income), 32 (franchise tax on banking corporations), and 33 (franchise tax on insurance corporations) of the Tax Law.

This memorandum summarizes legislative changes in the following areas:

- Biofuel production credit
- Captive real estate investment trusts and captive regulated investment companies
- Electronic filing and electronic payments
- Empire State film production credit and new Empire State film post-production credit
- Empire Zones Program amendments
- Excelsior Jobs Program Act
- Federal conformity for bad debt deductions for banks
- Information reporting required for credit and debit card payments
- Low-income housing credit
- Qualified emerging technology companies (QETC) facilities, operations, and training credit
- Tax enforcement technical corrections
- Temporary deferral of certain tax credits

Biofuel production credit

The Tax Law relating to the biofuel production credit has been amended. The amendment provides that in the case of a partnership or New York S corporation, the cap of $2.5 million per taxpayer per tax year for up to no more than four consecutive tax years per biofuel plant will be imposed at the entity level. Therefore, the aggregate credit allowed to the partners in a partnership or shareholders in a New York S corporation that qualify to claim the biofuel production credit cannot exceed $2.5 million in a tax year.

This amendment applies to tax years beginning on or after January 1, 2010.

(Tax Law section 28(a))

Captive real estate investment trusts and captive regulated investment companies

Chapter 57 of the Laws of 2010 made permanent the provisions requiring certain captive real estate investment trusts (REITs) and certain regulated investment companies (RICs) to file a combined report. The definition of a captive real estate investment trust (REIT) in section 2 of the Tax Law was also amended.

Captive REIT and RIC sunset removed. The provisions of the Tax Law that require certain captive real estate investment trusts (REITs) and captive regulated investment companies (RICs) to file a combined report with their parent corporation or closest controlling corporate shareholder were made permanent. These provisions were set to expire for taxable years beginning on or after January 1, 2011.

Amended definition of a captive real estate investment trust. Under the amendment, a captive REIT is a REIT that is not regularly traded on an established securities market, more than 50% of the voting stock is owned or controlled, directly or indirectly, by a single entity treated as an association taxable as a corporation under the Internal Revenue Code, and that single entity is not exempt from federal income tax and is not a REIT.

The following entities are not considered an association taxable as a corporation for purposes of this definition:

- any listed Australian property trust (meaning an Australian unit trust registered as a managed investment scheme under the Australian Corporations Act in which the principal class of units is listed on a recognized stock exchange in Australia and is regularly traded on an established securities market), or an entity organized as a trust, provided that a listed Australian property trust owns or controls, directly or indirectly, 75% or more of the voting power or value of the beneficial interests or shares of such trust; or

- any qualified foreign entity, meaning a corporation, trust, association, or partnership organized outside the laws of the United States and which satisfies the following criteria:

    - at least 75% of the entity's total asset value at the close of the taxable year is represented by real estate assets (as defined under section 856(c)(5)(B) of the IRC, which includes shares or certificates of beneficial interest in any REIT), cash and cash equivalents, and United States Government securities;
    - the entity is not subject to tax on amounts distributed to its beneficial owners, or is exempt from entity-level taxation;
    - the entity distributes at least 85% of its taxable income (as computed in the jurisdiction in which it is organized) to the holders of its shares or certificates of beneficial interest on an annual basis;
    - not more than 10% of the voting power or value in such entity is held directly or indirectly, or constructively, by a single entity or individual, or the shares or beneficial interests of such entity are regularly traded on an established securities market; and
    - the entity is organized in a country that has a tax treaty with the United States.

These amendments are effective as of August 11, 2010.

For a detailed description of the Tax Law provisions that apply to captive REITs and captive RICs, see TSB-M-09(1)C, *Tax Treatment of Real Estate Investment Trusts (REITs) and Regulated Investment Companies (RICs)*.

(Chapter 57 of the Laws of 2008, Part FF-1, section 18 and Tax Law section 2.9)

Electronic filing and electronic payments

The Tax Law and the Administrative Code of the City of New York were amended in relation to penalties imposed upon tax return preparers who fail to electronically file (e-file), to authorize reasonable correction periods for electronic tax filings and payments, and to prohibit tax return preparers and software companies from charging separately for electronic filing of New York tax documents. These amendments are as follows:

- The amendments changed what will be considered reasonable cause for the failure to e-file penalty. Under existing law, a tax return preparer who is required by the e-file mandate to file returns electronically is subject to a $50 penalty for each failure to e-file a return unless reasonable cause for the failure is shown. Under the amendments, a client who elects to not e-file his or her return is no longer an example of reasonable cause. Therefore the client opt-out procedure using Form TR-800, *Taxpayer Opt-Out and Reasonable Cause Record for Tax Return Preparers*, has been eliminated. This amendment applies to tax returns and other tax documents required to be filed electronically on or after December 31, 2010.

  If a tax return preparer has reasonable cause not to e-file, he or she must maintain adequate documentation for each instance.

- The amendments authorize the Commissioner to establish reasonable correction periods and resubmission procedures for electronic tax filing and payments that were initially rejected after they were timely filed. This applies to electronic returns and payments made for tax years beginning on or after December 31, 2010.

- The amendments also prohibit tax return preparers and software companies from charging separate fees for the electronic filing of New York tax documents. In addition, software companies are prohibited from offering a version of tax software that charges a separate fee for the electronic filing of authorized tax documents and another version of the same software that does not.

  Any tax return preparer or software company that violates these provisions will be liable for a penalty of $500 for the first violation and a penalty of $1,000 for each subsequent violation. These amendments became effective as of August 11, 2010.

For the most up-to-date information on the e-file requirements, visit the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law sections 29(e)(1), 33, 34, and 685(u)(5))

Empire State film production credit and new Empire State film post-production credit

Chapter 57 of the Laws of 2010 made a number of amendments to the film production credit eligibility rules and also added a new post-production credit.

Amendments to the film production credit. The following amendments have been made to the film production credit:

- The statewide aggregate dollar amount of Empire State film production credits allowed has been increased by an additional $420 million in each year from 2010 to 2014. The Governor's Office for Motion Picture and Television Development is required to list the allocation year assigned to a taxpayer on the *Certificate of Tax Credit* provided to the taxpayer if the credit is from this additional amount (referred to as additional pool 2). Taxpayers eligible to claim a credit are required to report the assigned allocation year on their Empire State film production credit tax form and include a copy of the certificate with their tax return.

- Where a qualified film has been allocated funds from the additional pool 2, the credit may not be claimed before the later of:

  - the taxable year the production of the qualified film is complete, or
  - the taxable year immediately following the allocation year assigned to the taxpayer on the *Certificate of Tax Credit*.

- The amendments now allow the film production credit to be claimed by a taxpayer that is a qualified independent film production company or is the sole proprietor of, or a member of a partnership which is, a qualified independent film production company. (Tax Law section 24(a)(1))

  A qualified independent film production company is defined as a corporation, partnership, limited partnership, or other entity or individual that:

  - is principally engaged in the production of a qualified film with a maximum budget of $15 million;
  - controls the film during production; and
  - is not a publicly-traded entity or is not beneficially owned, directly or indirectly, by a publicly-traded entity. (Tax Law section 24(b)(7))

- The criteria for a taxpayer to qualify for a film tax credit have changed under the amendments. The taxpayer must now spend at least 10% of the total principal photography shooting days in the production of the qualified film at a qualified film production facility. This provision does not apply to a qualified independent film production company or a pilot. (Tax Law section 24(a)(2))

- A qualified film production company or qualified independent film production company that receives the credit must now:

- include in each qualified film distributed by DVD, or other media for the secondary market:
  - a New York promotional video approved by the Governor's Office of Motion Picture and Television Development, or
  - include in the end credits of each qualified film "*Filmed with the Support of the New York Governor's office of Motion Picture and Television Development*" and an accompanying logo; and
- certify that it will purchase taxable tangible property and services, defined as qualified production costs under section 24(b)(1), only from a registered New York State sales tax vendor. (Tax Law section 24(a)(4))

- The definition of qualified production costs under section 24(b)(1) has been amended. Under the new definition, post-production costs will qualify for the credit only if 75% or more of the total post-production costs are attributable to property or services in New York State. (Tax Law section 24(b)(1))

- The definition of a qualified film production facility has been amended to add minimum square footage, heating and cooling, soundproofing, electrical service, and space requirements for facilities located in New York City. In addition, armories owned by the state or by New York City that are located in New York City and do not meet the minimum requirements above will not be considered qualified facilities unless the Governor's Office of Motion Picture and Television Development determines that no qualified facility was available at the time of shooting. However, it will be considered a qualified facility if the facility or armory is being used by a qualified independent film production company. (Tax Law sections 24(b)(4) and 24(b)(5))

- The amendments allow a waiver of taxpayer confidentiality rules to allow the Governor's Office of Motion Picture and Television Development and the Tax Department to exchange information regarding the film credit. The information that may be exchanged includes information contained in or derived from credit claim forms submitted to the Tax Department and applications for credit submitted to the Governor's Office of Motion Picture and Television Development. (Tax Law section 24(d))

Post-production tax credit. A new post-production tax credit has been added to section 31 of the Tax Law. The credit is available to a qualified film company that is ineligible for the film credit and that is:

- a corporation subject to tax under Article 9-A,
- a sole proprietorship taxable under Article 22, or
- a partnership or New York S corporation whose partners or shareholders are taxable under Article 22 of the Tax Law.

The amount of the credit is equal to 10% of the qualified post-production costs paid in the production of a qualified film at a qualified post-production facility. To be eligible for the credit, the qualified post-production costs incurred at a qualified post-production facility must equal or exceed 75% of the total post-production costs at any post-production facility. The credit is allowed for the taxable year in which the production of the qualified film is completed.

For purposes of the film post-production credit, the following definitions apply:

> *Post-production costs* means costs associated with production of original content for a qualified film employing traditional, emerging and new workflow techniques used in post-production for picture, sound and music editing, rerecording and mixing, visual effects, graphic design, original scoring, animation, and musical composition. Post-production costs do not include the editing of previously produced content for a qualified film. (Tax Law section 31(b)(2))
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> *Post-production facility* means a building and/or complex of buildings and their improvements where films are intended to be post-produced. (Tax Law section 31(b)(3))
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> *Qualified post-production facility* means a post-production facility located in New York State, engaged in finishing a qualified film. (Tax Law section 31(b)(4))

The annual allocation of the Empire State film post-production credit is up to $7 million. However, the Governor's Office of Motion Picture and Television Development was granted authority by Chapter 312 of the Laws of 2010 to redirect post-production credit funds to the film credit if there are insufficient claims for the post-production credit and applications for the film production credit exceed the allotted total.

A taxpayer claiming the post-production credit under Article 9-A may not reduce the tax due below the fixed dollar minimum tax. If the amount of the credit reduces the tax to the fixed dollar minimum tax, 50% of the excess will be treated as a refund or an overpayment of tax to be credited to next year's tax. The balance not refunded or credited will be carried over to the next succeeding tax year. Any amount of the credit carried over in the succeeding tax year that exceeds the taxpayer's tax for that year will be treated as a refund or an overpayment of tax to be credited to next year's tax. Interest will not be paid on the refund or overpayment. (Tax Law section 210.41)

A taxpayer claiming the post-production credit under Article 22 may reduce the tax to zero. If the amount of the credit exceeds the taxpayer's tax for the year, 50% of the excess will be treated as a refund or an overpayment of tax to be credited to next year's tax. The balance not refunded or credited will be carried over to the next succeeding tax year. Any amount of the credit carried over in the succeeding tax year that exceeds the taxpayer's tax for that year will be treated as a refund or an overpayment of tax to be credited to next year's tax. Interest will not be paid on the refund or overpayment. (Tax Law sections 606(i)(1)(B) and 606(qq))

Empire Zones (EZ) Program amendments

Chapter 57 of the Laws of 2010 made several amendments to the Empire Zones Program. These amendments clarify the effective date of a revoked certification, amend the definition of taxes for purposes of the Qualified Empire Zone Enterprise (QEZE) credit for real property taxes, and provide transitional rules due to the expiration of the Empire Zones Program on June 30, 2010. For a description of the amendments, see TSB-M-10(6)C, (12)I, (19)S, *Legislative Changes to the Empire Zones Program.*

(Tax Law sections 14(h), 15(e), 17(a), 210.12-B(g), 210.12-B(h), 210.12-C(d), 210.12-C(e), 210.20(f), 606(j)(7), 606(j-1)(4), 606(l)(5), 1119(d)(6), 1456(d)(5), 1511(h)(5))

Excelsior Jobs Program Act

Chapter 59 of the Laws of 2010 creates the Excelsior Jobs Program (EJP) Act. The new program is administered by Empire State Development (ESD). The credit is available to eligible taxpayers subject to tax under Articles 9-A (franchise tax on business corporations), 22 (personal income tax), 32 (franchise tax on banking corporations), and 33 (franchise tax on insurance corporations) of the Tax Law for tax years beginning in 2011.

To be eligible for the excelsior jobs program credit, the taxpayer must be issued a certificate of tax credit by ESD. The amount of the credit is the sum of the following four credit components:

- the excelsior jobs tax credit,
- the excelsior investment tax credit,
- the excelsior research and development tax credit, and
- the excelsior real property tax credit.

The credit may be claimed beginning in the first taxable year that the taxpayer receives a certificate of tax credit or the first taxable year listed on its preliminary schedule of benefits, whichever is later. A taxpayer may claim the benefits for the next four consecutive taxable years, provided the taxpayer meets and maintains established job and investment thresholds. A taxpayer who is eligible to claim the excelsior investment tax credit component may not claim the investment tax credit or the brownfield tangible property credit component for the same property.

For additional information on the excelsior jobs program credit, see the Empire State Development Web site at *www.empire.state.ny.us.*

(Tax Law sections 31, 210.41, 606(qq), 606(i)(1)(B), 1456(u), 1511(y))

Federal conformity for bad debt deductions for banks

Chapter 57 of the Laws of 2010 amended Article 32 of the Tax Law relating to the franchise tax on banking corporations. The amendment conforms the bad debt deduction allowed under Article 32 to that allowed for federal income tax purposes. As a result, the bad debt

modifications previously required by the Business Tax Reform and Rate Reduction Act of 1987 (see TSB-M-87(17)C), and as amended by Chapter 411 of the Laws of 1996 (see TSB-M-96(1)C), have been eliminated. These changes are effective for taxable years beginning on or after January 1, 2010.

For additional information on these amendments, see TSB-M-10(4)C, *Article 32 – Franchise Tax on Banking Corporations*.

(Tax Law sections 1453(b)(11), 1453(b)(12), 1453(e)(13), 1453(e)(14), 1453(e)(15), 1453(h)(2), 1453(h)(3), 1453(i)(1), 1453(i)(2))

Information reporting required for credit and debit card payments

The Tax Law was amended to require the filing of annual reports with the Tax Department relating to credit and debit card payments to payees with New York State addresses or who are New York State taxpayers (referred to collectively for purposes of this memorandum as *New York State payees*). These amendments follow the provisions of section 6050W of the Internal Revenue Code (IRC) to require that annual reports be filed by payment settlement entities, third-party settlement organizations, electronic payment facilitators, or other third parties acting on behalf of payment settlement entities, also as defined by section 6050W of the IRC. For purposes of this memorandum these entities will be referred to collectively as *reporting entity*.

New filing requirements related to filing that will be required under Section 6050W of the Internal Revenue Code. Section 6050W of the IRC requires a reporting entity to file annual information returns with the Internal Revenue Service (IRS) reflecting the transactions of its payees. Under the federal law, the first information returns must be filed with the IRS by January 31, 2012, covering payment information for calendar year 2011. Under the new Tax Law provisions, a reporting entity that is required to file the information returns under section 6050W of the IRC is also required to file either a duplicate information return with the Tax Department or to file a duplicate of any information returns related to New York State payees. The duplicate information return required under this new law must be filed within 30 days of the filing of the information returns required to be filed with the IRS under section 6050W of the IRC.

Under the new law, the Tax Department is required to maintain and make available to a reporting entity a list or database of New York State taxpayers and persons registered for sales tax purposes no later than 45 days prior to the deadline for filing the duplicate information returns. A reporting entity is prohibited from using this list or database for any purpose other than to enable it to comply with the filing requirements of this new law.

In addition, the Tax Department is prohibited from using for any purpose information received from payment settlement entities concerning non-New York State payees.

Penalties for failure to file the duplicate information returns under the new law. The new law provides that a $50 penalty will be imposed for each failure to file the duplicate information return with the Tax Department, with an annual maximum penalty of $250,000. The

Tax Department may waive all or any portion of the penalty if the failure to file is shown to be due to reasonable cause and not due to willful neglect, or if it is determined that rescinding the penalty would promote compliance with the requirements of the Tax Law, or if it is in the interest of effective tax administration by the Tax Department.

Effective date. While this new law was enacted on August 11, 2010, as indicated above, the duplicate information returns required to be filed with the Tax Department are not due until 30 days after information returns are filed with the IRS under section 6050W of the IRC. Therefore, since the first information returns to be filed with the IRS will be due on January 31, 2012, the first duplicate information returns required to be filed with the Tax Department will be due on March 1, 2012. The Tax Department will be issuing additional guidance in the future regarding this requirement to file the duplicate information returns.

(Tax Law section 1703)

Low-income housing credit

The New York State low-income housing tax credit program was established in 2000 to promote the construction and rehabilitation of low-income housing in New York State. The credit is similar to the federal low-income housing credit and is administered by the New York State Division of Housing and Community Renewal.

The Public Housing Law has been amended to increase the statewide aggregate dollar amount of low-income housing tax credits that may be used for qualifying low-income housing projects from $24 million to $28 million.

This provision took effect August 11, 2010.

(Public Housing Law section 22(4) and Tax Law section 18)

Qualified emerging technology companies (QETC) facilities, operations, and training credit

The Tax Law relating to the QETC facilities, operations, and training credit has been amended. The amendment provides that in the case of a partnership or New York S corporation, the credit cap of $250,000 per taxpayer per year shall be imposed at the entity level. Therefore, the aggregate credit allowed to the partners in a partnership or shareholders in a New York S corporation that qualify to claim this credit cannot exceed $250,000 per year.

This amendment applies to tax years beginning on or after January 1, 2010.

(Tax Law sections 210.12-G(f) and 606(nn)(6))

Tax enforcement technical corrections

The Tax Law was amended to make technical corrections to the tax enforcement provisions of last year's budget legislation (Chapter 57 of the Laws of 2009), which included revisions to the criminal penalties under Article 37 of the Tax Law and established the right to an

expedited hearing in certain circumstances. In addition to some minor technical corrections made to the aggregation provisions of section 1807 of the Tax Law and the effective date provisions of Subpart I of Chapter 57 of the Laws of 2009, the amendments include the following technical corrections.

Repeated failure to file personal income and earnings tax returns and corporate returns or reports. The new law restores the criminal penalties for repeated failure to file personal income and earnings tax returns and corporate tax returns or reports. The restored provisions are identical to the provisions of sections 1802 and 1803 of the Tax Law as they existed prior to April 7, 2009 and the enactment of Chapter 57 of the Laws of 2009.

Under the restored provisions, the failure to file a return for three consecutive years in which there is a tax liability, with the intent to evade tax under Article 22 of the Tax Law, or any related income or earnings tax statute, is a class E felony.

Also, the failure to file a corporate tax return or report for three consecutive years in which there is a tax liability, with the intent to evade tax under Articles 9 (except section 180 or 181 of the Tax Law), 9-A, 13, 32, 33, or 33-A of the Tax Law, is again, a class E felony.

An acceptable defense against prosecution for each of the above described class E felonies would be a showing that the defendant had no unpaid tax liability for any of the three consecutive taxable years.

Expedited hearings. Chapter 57 of the Laws of 2009 included provisions to allow for expedited hearings before the Bureau of Conciliation and Mediation Services and Division of Tax Appeals in cases where a person receives a written notice that advises the person of:

- the proposed cancellation, revocation, or suspension of a license, permit, registration, or other credential issued under the authority of the Tax Law;

- the denial of an application for a license, permit, registration, or other credential issued under the authority of the Tax Law, except for an application to renew a sales tax *Certificate of Authority*;

- the imposition of a fraud penalty

Those provisions required that in situations where an expedited hearing was available, the conciliation conference must be requested within 30 days of the receipt of the notice that was to be the subject of the hearing. Chapter 57 of the Laws of 2009 also inadvertently repealed language in the Tax Law which specified the process by which a party can discontinue a conciliation conference.

The new legislation provides that the 30-day period for requesting an expedited hearing begins on **the date of mailing of the notice** that is to be the subject of the hearing. Under the prior law, the 30-day period for requesting an expedited hearing began on the date the notice was received. In addition, the new law clarifies that the expedited hearing provisions do not apply to a denial of an application for, or a cancellation, revocation or suspension of a certificate of

registration as a retail dealer of cigarettes or tobacco products, which are covered by section 480-a(4)(c) of the Tax Law.

(Tax Law sections 170(3-a)(b), 170(3-a)(h), 1807, 1808, 1809, 2008(2)(a) and (b) and section 34 of subpart I of Chapter 57 of the Laws of 2009)

Temporary deferral of certain tax credits

New sections 33 and 34 have been added to the Tax Law. These sections establish the temporary deferral of certain tax credits. In addition, new sections were added under Article 9 (Corporation Tax), 9-A (Business Corporations), 22 (Personal Income Tax), 32 (Franchise Tax on Banking Corporations), and 33 (Insurance Franchise Tax) relating to the application of deferred tax credit amounts.

Effective for tax years beginning on or after January 1, 2010, and before January 1, 2013, certain tax credits will be subject to a temporary deferral in any tax year that the total amount of those credits, that would otherwise be used to reduce the taxpayer's tax liability or be refunded or credited as an overpayment to estimated tax, is in excess of $2 million.

Taxpayers will be allowed to claim the deferred credit amounts starting with tax years beginning on or after January 1, 2013. No interest will be paid on the deferred credit amounts.

For more information, see TSB-M-10(5)C,(11)I, *Temporary Deferral of Certain Tax Credits*.

(Tax Law sections 33, 34, 187-o, 187-p, 210.41, 210.42, 606(qq), 606(rr), 1456(v), 1456(w), 1511(y), 1511(z))

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