Subpart 3-11 and Subpart 3-12 of Part 3 of Subchapter A of Title 20 of the Codes, Rules and Regulations of the State of New York are repealed and a new Subpart 3-11, Real Estate Investment Trusts (REITs) and Regulated Investment Companies (RICs), is added to read as follows:

SUBPART 3-11

REAL ESTATE INVESTMENT TRUSTS (REITs) AND REGULATED INVESTMENT COMPANIES (RICs)

Sec.



Section 3-11.1. Definitions. [Tax Law, section 2]

For purposes of article 9-A and article 33 of the Tax Law, the following terms have the following meanings.

(a) “REIT” means a corporation, trust or association that is a real estate investment trust as defined in IRC section 856(a) and that meets the requirements of IRC section 856(c), as modified, where applicable, by IRC section 965(m)(1)(A).

(b) “Non-captive REIT” means a REIT that is not a captive REIT as defined in Tax Law section 2(9).

(c) “RIC” means a corporation that is a regulated investment company as defined in IRC section 851 that is subject to Federal income tax under IRC section 852.

(d) "Non-captive RIC" means a RIC that is not a captive RIC as defined in Tax Law section 2(10).

Section 3-11.2. 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 of the Tax Law, unless it is a captive REIT required to be included in a combined report under article 33 of the Tax Law.

(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 of the Tax Law, unless it is a captive RIC required to be included in a combined report under article 33 of the Tax Law.

(b) For purposes of article 9-A of the Tax Law, REITs and RICs are subject to tax computed on either the business income base in Tax Law section 210(1)(a) or the fixed dollar minimum tax in Tax Law section 210(1)(d), 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 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 of the Tax Law.

(e) For rules relating to corporate partners, see Subpart 3-13 of this Part—Corporate Partners.

Section 3-11.3 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 federal 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 Tax Law sections 208(9)(b)(23) and 1503(b)(2)(W).

(b)(1) In the case of a RIC, federal 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 federal, state, municipal or other obligations must add back the amount of such interest to its entire net income, since such interest is exempt from federal income tax and is not included in federal taxable income, as defined in section 3-3.1 of this Part. 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 from entire net income under Tax Law section 208(9).

Section 3-11.4. Apportionment rules for non-captive REITs and non-captive RICs. [Tax Law section 210-A]

The following rules apply only to non-captive REITs and non-captive RICs. Captive REITs and captive RICs included in a combined report under article 9-A of the Tax Law must use the apportionment rules provided for in Part 4 of this Title.

(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 Tax Law section 210-A(5)(a)(2): clause (A)—loans; clause (B)—federal, 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)—physical 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) stock that is investment capital as defined in Tax Law section 208(5), and further described in section 3-4.1 of this Part; and

(3) stock that generates other exempt income, as defined in Tax Law section 208(6-a), and further described in section 3-4.7 of this Part, with respect to that 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 Tax Law 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 eight percent of net income (not less than zero) from qualified financial instruments in New York receipts and one hundred percent 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 Tax Law 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 Tax Law section 210-A(5)(a)(2), and the applicable regulations, 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 Tax Law section 210-A(5)(a)(2), and the applicable regulations, 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 percent multiplied by $31,750) from qualified financial instruments in its New York receipts. Since Corporation X only has receipts and net gains (not less than zero) from qualified financial instruments, the result is a business apportionment factor of eight percent.

Section 3-11.5. Combination rules for REITs and RICs.

(a) Captive REITs and captive RICs will always be included in a combined report under article 9-A of the Tax Law, unless they are required to be included in a combined report under article 33 of the Tax Law.

(1) For purposes of determining under which article of the Tax Law a captive REIT or a captive RIC is to be combined, the rules for Tax Law 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 Tax Law section 210-C, and further described in Subpart 6-2 of this Title.

(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 REIT that is not a captive REIT must be included in a combined report under article 9-A of the Tax Law with its qualified REIT subsidiary, as defined in IRC section 856(i)(2). All other REITs that are not 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 federal taxable income if the

combined group is utilizing the subtraction for small thrifts and qualified community banks that maintain a captive REIT under Tax Law section 208(9)(t);

(3) the adjustments required by Tax Law 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 percent of such RIC's voting stock; and

(4) federal 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 percent 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).