These proposed revisions to Part 4 replace the previously posted draft dated August 31, 2017. In addition, revisions to the discretionary adjustment rules are now included in this draft and replace the version dated March 4, 2016. While the Department welcomes comments on all of the proposed changes, the Department specifically requests comments on the definition of “business receipts” and the elimination of the apportionment rule regarding unusual events.

The rules for sourcing receipts from digital products and other business receipts are currently posted separately and will be incorporated into this draft at a later date. Apportionment rules for corporate partners will be released at a later date in a separate Subpart dedicated to corporate partner issues.
Section 1. Part 4 of Subchapter A of title 20 NYCRR is repealed and a new Part 4, Apportionment, is added to read as follows.

Part 4

Apportionment

Subpart 4-1 General
Subpart 4-2 Specific Apportionment Rules
Subpart 4-3 New York S Corporations
Subpart 4-4 Other Rules

Subpart 4-1

GENERAL

Section 4-1.1 General rules for apportionment. (Tax Law, Section 210-A)

(a) All taxpayers apportion within and without New York State their total business income and business capital by a business apportionment factor. The factor is a fraction, the numerator of which is the sum of all business receipts required to be included in the numerator pursuant to Tax Law section 210-A and this Part, hereinafter referred to as New York receipts, and the denominator of which is the sum of all business receipts required to be included in the denominator pursuant to Tax Law section 210-A and the applicable regulations, hereinafter
referred to as everywhere receipts.

(b) Unless otherwise provided, the term business receipts means items included in the computation of the taxpayer's gross income as defined in IRC section 61 and entire net income for the taxable year. Business receipts do not include (i) receipts, net income (not less than zero) or net gains (not less than zero) from investment capital as defined in Tax Law section 208(5) and section 3-4.1 of this Subchapter, even if such receipts, net income (not less than zero), or net gains (not less than zero) are included in business income pursuant to the gross investment income limitation described in section 3-4.6 of this Subchapter, (ii) other exempt income as defined in Tax Law section 208(6-a) and section 3-4.7 of this Subchapter generated by stock that is not marked to market, (iii) 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 provided for in section 4-2.5 of this Part, (iv) amounts specified in Tax Law section 208(9)(a)(3) through (18), and (v) amounts specified in Tax Law section 208(9)(b)(3) through (21).

(c) Business receipts do not include certain reimbursements of expenses (i) paid for by the taxpayer on behalf of a customer that are received from the customer in advance or received from the customer and placed by the taxpayer into a separate account, provided the reimbursement does not exceed the amount of expenses and (ii) reimbursements received by the taxpayer under a cost-sharing arrangement the taxpayer 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 taxpayer has with another company that includes a mark-up of expenses, only the amount of the mark-up shall be included in business receipts.

(d) In the case of the sale of multiple assets in one transaction, the proceeds from the sale
of the assets shall be reasonably divided among the types of assets sold by the taxpayer and the
receipts or net gains from each type of asset must be apportioned using the applicable rule in Tax
Law section 210-A and this Part for each type of asset sold. Full details regarding the sale and
the division of the proceeds and gain must be submitted with the taxpayer’s report.

(e) 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 net gains
attributable to New York must be determined in the year of the sale by applying the
apportionment rules in Tax Law section 210-A and this Part. 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.

(f) 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
entire net income, must be taken into account.

(g) New York and everywhere receipts shall be computed using the rules in Tax Law
section 210-A. For certain types of receipts, the provisions of this Part provide further guidance.
Such rules shall be applied to each receipt, item of income, gain, or other item described in Tax
Law section 210-A except as otherwise provided.

(h) Examples.

Example 1: 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 customer’s 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.  Example 2: 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 Tax Law section 210-A(2)(a), the portion attributable to the sale of real 
property shall be apportioned to New York State using the rules for Tax Law section 210-A(2)(d), 
and the portion attributable to the sale of goodwill shall be apportioned to New York State using 
the rules for Tax Law section 210-A(10).

Example 3: Corporation C sells its New York real estate in the 2016 tax year and has a 
$5,000,000 net gain. 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 2016, Corporation C also 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 net 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 net gain from the real estate
installment sale and $25,000,000 of rental income from real property located within and without
the state). Its business apportionment factor for the 2016 tax year is 0.807692.

In tax year 2017, 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 net gain from New York real property) and $3,000,000 of everywhere receipts
($1,000,000 of its second installment of net gains from the sale of real property plus $2,000,000
of rental income from real property located outside the state). Its business apportionment factor
for the 2017 tax year is 0.333333.

Section 4-1.2 Apportionment on combined reports. (Tax Law, Section 210-C(5))

(a) For purposes of this Part, in the case of a combined report, the term taxpayer means all
corporations included in the combined report, regardless of whether such individual members of
the combined group are themselves subject to tax, except as otherwise provided.

(b) 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.

(1) 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.

(2) 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:
(i) 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 customer sourcing rule in Tax Law section 210-A and the applicable regulations in this Part, provided that the result cannot be less than zero.

(ii) 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.

(3) If an apportionment rule contained in Tax Law section 210-A and this Part 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 paragraph (1) of this subdivision.

Section 4-1.3 Definitions. (Tax Law, Sections 208(1) and 210-A)

For purposes of this Part, the following definitions apply:

(a) (1) Commercial domicile is determined by the use of the following hierarchy for business entities, based on the information known to the taxpayer or information that would have been known upon reasonable inquiry, such as publicly or readily available information: (i) the seat of management and control of the business entity within the United States; and (ii) the billing address of the business entity in the taxpayer’s records. Taxpayers must exercise due diligence before abandoning the first method in this hierarchy and proceeding to the second level.

(2) 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.

(b) (1) Marked to market means that a financial instrument is, under IRC section 475 or 1256, treated by the taxpayer as sold for its fair market value on the last business day of the taxpayer’s taxable year.

(2) In the case of a taxpayer 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 taxpayer identifies the security under IRC section 475(b)(2).

(c) Marked to market gain or loss means the gain or loss recognized by the taxpayer under IRC section 475 or 1256 because the financial instrument is treated as sold for its fair market value on the last business day of the taxpayer’s taxable year.

(d) 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.

(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, 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. Provided,
business receipts from such registered broker or dealer that are described in Tax Law section 210-
A(5)(b) and are passed through to the corporation are apportioned using the rules in such section
210-A(5)(b).

(f) 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, which
are not subject to section 4-2.3 of this Part. 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.

Subpart 4-2

SPECIFIC APPORTIONMENT RULES

Section

4-2.1 Receipts from the sale of tangible personal property
4-2.2 Receipts from rents and royalties
4-2.3 Receipts from the sales of, license to use, and granting of remote
access to digital products
4-2.4 Net income from qualified financial instruments for corporations
other than non-captive REITs and non-captive RICs
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**Section 4-2.1 Receipts from the sale of tangible personal property. (Tax Law, Section 210-A(2)(a))**

(a) Receipts 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 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 taxpayer or the purchaser, or via the taxpayer'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 (b) 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 (b) 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 (b) of this section regarding evidence of destination.

(b) 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.

(c) For rules relating to receipts from sales of tangible personal property traded as
commodities, see section 4-2.10 of this Subpart.
Section 4-2.2 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. One hundred percent 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 taxpayer for the use of or occupation of tangible personal property or real property, whether or not such property is owned by the taxpayer.

(3) Gross receipts from real and tangible personal property that is subleased from the taxpayer must be included in the apportionment factor.

(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 the state compared to the total of such locations, or any other method that fairly apports such receipts to New York State. One hundred percent 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.

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. Twenty-five percent of the miles traveled by the
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% * $20,000). Twenty thousand dollars 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 the 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 the 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. One hundred percent 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 taxpayer 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 taxpayer and whether or not paid 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 such as a license is used in New York State to the extent that the activities thereunder are carried on in New York State.

Section 4-2.3 Receipts from the sales of, license to use, and granting of remote access to digital products. (Tax Law, Section 210-A(4)) – Draft regulation posted separately

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 taxpayers that are not subject to section 3-11.4 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 Tax Law 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) - physical commodities; and (ii) the instrument has been marked to market in the taxable year.

(2) (i) If a taxpayer has marked to market any instrument described in clause (A), (B), (C), (D), or (I) of Tax Law section 210-A(5)(a)(2), then any other financial instrument described in the same clause that has not been marked to market is also 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 Tax Law 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 taxpayer has marked to market a stock, then any other stock that has not been marked to market is also a qualified financial instrument in the taxable year. If a taxpayer has marked to market a partnership interest, then any other partnership interest that has not been marked to market is also a qualified financial instrument in the taxable year.

(iii) If a taxpayer has marked to market a specific financial instrument described in Tax Law section 210-A(5)(a)(2)(H), then only a financial instrument of the same type is also a qualified financial instrument in the taxable year. Therefore, some types of financial instruments described in Tax Law 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 shall always be nonqualified financial instruments:

(i) loans secured by real property;

(ii) loans not secured by real property, if the only loans the taxpayer has marked to market are loans secured by real property;

(iii) stock that is investment capital as defined in Tax Law section 208(5) and section 3-4.1 of this Subchapter;

(iv) stock that generates other exempt income, as defined in Tax Law section 208(6-a) and section 3-4.7 of this Subchapter, that is not marked to market, 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 Tax Law section 210-A(5)(b).

(4) If a corporation is included in a combined report, the determination of whether a financial instrument is a qualified financial instrument is determined 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 3-13.3 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 customer sourcing method contained in Tax Law 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 eight percent of net income from qualified financial instruments in New York receipts and one hundred percent 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 Tax Law 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations 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 for 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.

(ii) In the case of a combined report, the fixed percentage method election shall 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.

(4) If the fixed percentage election has been made, other exempt income, as defined in Tax Law section 208(6-a) and section 3-4.7 of this Subchapter, generated by a stock that is marked to market shall 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations 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.
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 has not been marked to market, as that term is defined in section 4-1.3(b) of this Part, 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 has not 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 customer sourcing rule in Tax Law 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 customer sourcing method in Tax Law section 210-A(5)(a)(2) and the applicable regulations.

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) included in the combined group’s New York receipts or everywhere receipts is determined using the customer sourcing method outlined
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 the 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 percent 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 business apportionment factor of
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.

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 gain from the sale of State D 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 $3,700 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);
- $500 of gains from sales of other state bonds (100 percent of the net gain is included when the fixed percentage election is made, as opposed to 50 percent of the net gain under the customer sourcing method);
- $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 $296 ($3,700 multiplied by 8 percent) of net income from qualified financial instruments in the combined group’s New York receipts.

In addition, corporation R owns loan I secured by real property and Corporation S owns loan J secured by real property 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 publicly traded or widely held partnerships, the interest in partnership K is a nonqualified financial instrument. The amount of income, gains, and losses from nonqualified financial instruments for Corporations R and S is broken down as follows:

- $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);
• $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);

• $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);

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 and $200 is included in the combined group’s everywhere receipts. The amount included in the combined group’s New York receipts is 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]).

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 $637 of New York receipts ($296 from qualified financial instruments and $341 from nonqualified financial instruments) and $4,450 of everywhere receipts ($3,700 from qualified financial instruments and $750 from nonqualified financial instruments). The result is the combined group’s business apportionment factor is 0.143146.

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 fifty percent 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 the 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 the 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 taxpayer 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 taxpayer 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 the 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 fifty percent 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 the 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 taxpayer 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 taxpayer 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 only at the time the loan is originated, and will be redetermined only if the loan is refinanced.

(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 the 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, Corporation X must determine the fair market value (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 * $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 the 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, 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.

As the property used to secure Loan O is located within and without New York, Corporation Y first determines that the fair market value (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 percent ($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 within the state of $380,000 is the sum of $300,000 from loan N and $80,000 from Loan O ($200,000 gross proceeds * 40%). The total gross proceeds of loans secured by real property located within and without the state is $500,000. Corporation Y’s gross proceeds fraction of $380,000/$500,000 (or 76%) 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% * $500). Five hundred dollars 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) Eight percent 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. One hundred percent of all such interest income is included in everywhere receipts.

(b)(1) Eight percent of net gains (not less than zero) from sales of (i) asset backed securities or other securities issued by government agencies or (ii) asset backed securities that are sold through a registered securities broker or dealer or through a licensed exchange is included in New York receipts. One hundred percent of all such net gains (not less than zero) is included in
(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 the 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 such of such asset backed securities is included in everywhere receipts.

(c) (1) For each sale of an asset backed security, the taxpayer shall compute a gain or loss from the sale by subtracting the basis in such security from the sale price of such security. If the sale price exceeds the basis, the result is a gain. If the sale price is less than the basis, the result is a loss.

(2) To determine the amount of net gains from sales of the asset backed securities referenced in subdivision (b) of this section, the taxpayer 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 taxpayer 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 if the
taxpayer’s records indicate his or her billing address in the records of the taxpayer is in the state.

If the purchaser is a business entity, the business entity is located in New York if its commercial domicile is in the 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 taxpayer’s 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) Eight percent 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. One hundred percent of all such net gains (not less than zero) computed in paragraph (3) of this subdivision 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 the 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 computed in paragraph (3) shall be included in everywhere receipts.
(c) (1) For each sale of a bond, the taxpayer shall compute a gain or loss from the sale by subtracting the basis in such bond from the sale price of such bond. If the sale price exceeds the basis, the result is a gain. If the sale price is less than the 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 taxpayer 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 taxpayer shall subtract the sum of all losses computed in paragraph (2) of this subdivision from the sum of all gains computed in paragraph (2) of this subdivision. 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 if its billing address in the records of the taxpayer is in the state. If the purchaser is a business entity, the business entity is located in New York if its commercial domicile is in the 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 taxpayer’s basis.

Section 4-2.8 Net interest income from reverse repurchase agreements and securities borrowing agreements (Tax Law, Sec. 210-A(5)(a)(2)(E))
(a) Eight percent 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 subdivision 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 taxpayer's repurchase agreements where it is the seller/borrower plus the value of the taxpayer's securities lending agreements where it is the securities lender, provided such sum is limited to the sum of the value of the taxpayer's reverse repurchase agreements where it is the purchaser/lender plus the value of the taxpayer's securities lending agreements where it is the securities borrower.

(c) Example: Taxpayer A has $4,000 of interest income from reverse repurchase agreements and $5,000 of interest expense from repurchase agreements for the tax year ended December 31, 2016. Taxpayer 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, Taxpayer 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. Taxpayer 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, Sec. 210-A(5)(a)(2)(F))

(a) Eight percent 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 includes interest income paid directly by the federal reserve on funds deposited at a federal reserve bank and interest income paid by another institution on the taxpayer’s funds deposited at a federal reserve bank that are borrowed by another institution in the federal reserve system. Interest expense from federal funds includes the interest paid by the taxpayer to another institution in the federal reserve system for the use of the other institution’s funds deposited at a federal reserve bank.

Section 4-2.10 Net income from commodities (Tax Law, Sec. 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 commodities actually delivered and sales of commodities where delivery does not actually occur. The amount of net income (not less than zero) included in New York receipts from sales of commodities actually delivered occurs 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 the state and the denominator of which is the amount of all gross receipts from sales of commodities actually delivered. 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 to all purchasers. One hundred percent of net
income (not less than zero) from sales of commodities actually delivered is included in
everywhere receipts. One hundred percent 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 purpose 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 customer sourcing rule contained in Tax Law 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 percent ($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 of commodities that are not actually delivered. Corporation A multiplies its $500 of net income by 10 percent ($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. 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 the 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. 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 from sales of commodities to purchasers located in the state, where delivery does not actually occur, for all members of the combined group and the denominator of which is the amount of gains from all sales of commodities to all purchasers, where delivery does not actually occur, for all members of the combined group. One hundred percent of net income (not less than zero) from sales of commodities for all members of the combined group 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 commodities, see section 4-2.1 of this Subpart.

Section 4-2.11 Marked to market net gains (Tax Law, Sections 210-A(5)(a)(1) and 210-A(5)(a)(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 eight percent of marked to market net gains (not less than zero) from each type of qualified financial instrument is included in New York receipts and one hundred percent 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 or 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 that net gains from sales of stocks be included in the apportionment factor pursuant to Tax Law section 210-A(5)(a)(2)(G). 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 net gains from the sale of partnership interests be included in the apportionment factor pursuant to Tax Law section 210-A(5)(a)(2)(G).

(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 Tax Law section 210-A(5)(a)(2) 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 Tax Law section 210-A(5)(a)(2). Marked to market net gains (not less than zero) from financial instruments for which the amount included in New York receipts is determined under the immediately preceding sentence are included in everywhere receipts.

(3) If there are no actual sales of that type of financial instrument that is marked to market or if the taxpayer 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) - loans, (B) - federal, state, and municipal debt, (C) - asset backed securities and other agency debt, (D) - corporate bonds, (E) - reverse repurchase agreements and securities borrowing agreements, (F) - federal funds, (G) - stock or partnership interests, (H) - other financial instruments and (I) - physical commodities of Tax Law section 210-A(5)(a)(2) and subclause (ii) of Tax Law section 210-A(5)(a)(2)(J), and the denominator of which is the sum of the amount of receipts included in everywhere receipts under clauses (A), (B), (C), (D), (E), (F), (G), (H) and (I) of Tax Law section 210-A(5)(a)(2) and subclause (ii) of Tax Law section 210-A(5)(a)(2)(J). One hundred percent of marked to market net gains (not less than zero) for which the amount to be included in New York receipts determined under the immediately preceding sentence 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 Tax Law section 210-A(5)(a)(2)(A)-(G), (I), and (J) and the applicable regulations.

(b) Interest income from other financial instruments includes, but is not limited to, interest income on (i) deposit accounts, (ii) money market mutual funds, and (iii) debt issued by a country, or political subdivision thereof, other than the United States. Such interest income is included in New York receipts if the payor is located in New York State. One hundred percent
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.

(d) (1) For each sale of a financial instrument apportioned under this section, the taxpayer shall compute a gain or loss from the sale by subtracting the basis in such financial instrument from the sale price of such financial instrument. If the sale price exceeds the basis, the result is a gain. If the sale price is less than the 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. 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.

(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: 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 4: 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 5: 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. When determining the amount of New York receipts or everywhere receipts, 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))

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 the state if the taxpayer’s records indicate the mailing address of the customer who is responsible for paying such commissions is in the state.

Example: Broker X earns $10,000 in brokerage commission income from investment advisor Y to execute trades for investment partnership 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 partnership 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) For purposes of this section, credit card and issuer bank shall have the same meaning
as section 4-2.15(a)(1) of this Subpart.

   (d) Receipts from merchant discounts are included in New York receipts if the merchant
is located within the state. One hundred percent 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 taxpayer.

Section 4-2.15 Receipts received by credit card processors. (Tax Law, Section 210-
A(5)(c)(4))

   (a) For purposes of this section, the following definitions shall apply:

   (1) Credit card includes credit, bank, 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.

   (2) Credit card processor means an entity, whether it is a corporation or an
unincorporated entity, that derives 50 percent 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
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in this subdivision and Tax Law 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.

3. 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.

4. 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.

5. Settlement processing means the service of delivering instructions for the actual
movement of funds between issuing banks and acquirer banks that reflects the amounts
determined to be due to or from each entity during clearing processing.

6. 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.

7. Volume-based activities means services that are charged to customers measured on
the dollar volume or number of credit card transactions.

8. Access point means a physical location at which a credit card processor’s customers
access or may access the credit card processor’s network.

9. 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.

10. Acquirer bank means a financial institution that contracts with merchants to accept
payments by credit card.

(11) 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 one through nine of Tax Law 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) eight percent 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 one through nine of Tax Law 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) eight percent and (ii) the percent of the credit card processor’s New York State access points.
York receipts by multiplying the total amount of such other receipts by the average percentage of
(i) eight percent and (ii) the percent of its customers with billing addresses in the state.

(d) Notwithstanding section 4-4.1 of this Part, 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 taxpayer bears the burden of proof to demonstrate that
applying the apportionment rules contained in subdivisions (b) and (c) of this section does 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))

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. Revenue miles operated while an omnibus is engaged in school
bus operations must be disregarded in computing the fraction. 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.
One hundred percent 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. One hundred percent 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.

Example 1: Billboard Company owns 5 roadside billboards 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*$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
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$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. Buses containing ads for Company B travel 14,000 miles in New York State out of a total of 70,000 miles. Buses containing ads for Company C travel 40,000 miles, exclusively in New York State. Bus Company must include $18,300 in New York receipts, which is the sum of 50 percent of the receipt from Company A, 20 percent of the receipt from Company B, and 100 percent of the receipt 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. One hundred percent 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. One hundred percent of such receipts are included in everywhere receipts.

(ii) If, after exercising due diligence, a taxpayer 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 taxpayer 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 taxpayer 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 taxpayer is not reasonable, the Commissioner may substitute a method that the Commissioner determines is appropriate. In this instance, the taxpayer 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 taxpayer’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 taxpayer apply its method in a consistent manner.

(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”). One hundred percent 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 taxpayer must primarily rely on statistics and information that are compiled or utilized as part of the market research and advertising strategy developed by the taxpayer for its customer. If no such statistics or information are available, a taxpayer may then use other sources of information that attempt to determine the location of the intended targets.

(i) In any case in which a taxpayer uses a method to determine the location of the intended targets and the Commissioner determines that the method employed by the taxpayer is not reasonable, the Commissioner may substitute a method that the Commissioner determines is appropriate. In this instance, the taxpayer 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 taxpayer’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 taxpayer apply its method in a consistent manner.

Example 3: 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.
Example 4: 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 Americans to determine the amount of the receipt to include in New York receipts. One hundred percent of such receipts are included in everywhere receipts.

Example 5: 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. AdCo must include 75 percent of the receipts earned from Landscaper Co for designing and securing the ad on the placemats in its New York receipts. One hundred percent of such receipts are included in everywhere receipts.

(3) Where a lump sum is received by the taxpayer 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 taxpayer 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 taxpayer’s report.

Example 6: 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 cost included in New York receipts, the
amount of each allocated cost is then multiplied by its own intended target fraction as described
in paragraph one of this subdivision. Thus, for newspaper ad buys, the allocated cost 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 cost 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 cost 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. One hundred percent of such receipts are included in everywhere receipts.
Section 4-2.18 Receipts from other services and other business receipts (Tax Law, Section 210-A(10)) – Draft regulations posted separately

Subpart 4-3 New York S corporations

Section 4-3.1 Definition of business receipts for New York S corporations. (Tax Law, Section 210-A)

A New York S corporation as defined in Tax Law section 208(1-A) determines the amount of business receipts included in New York receipts or everywhere receipts using the rules in Tax Law section 210-A and Subparts 4-1 and 4-2 of this Part, 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 Tax Law section 210-A and the applicable regulations that are included in the New York S corporation’s nonseparately 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.
For purposes of applying the rules in section 4-2.4 of this Part, 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).

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 Tax Law section 208(1-A) may be a qualified financial instrument for a New York S corporation.

Section 4-3.2 Nonresident and part-year resident shareholders of New York S Corporations. (Tax Law, Sections 631 and 632)

(a) To determine the amounts derived from New York sources for purposes of Article 22 of the Tax Law, 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 Tax Law 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 tax year (and any related Tax Law section 612 modifications) that are included in the part-year resident’s New York adjusted gross income.

Section 4-3.3 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 4-3.1 of this Subpart.

Corporation A did not make the fixed percentage election pursuant to section 4-2.4(c) of this Part. Therefore, dividends and net gains from stock are not included in its New York receipts or everywhere receipts pursuant to Tax Law 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 Tax Law section 210-A.5(a)(2) and Subparts 4-1 and 4-2 of this Part.

To determine the amounts derived from New York sources for purposes of Article 22 of
the Tax Law, 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 pursuant to section 4-2.4(c) of this Part. Since one stock has been marked to
market, all stock are qualified financial instruments. The result is that eight percent of the
dividends and net gains (not less than zero) from stocks are included in Corporation A’s New
York receipts and one hundred percent 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 Tax Law section 210-A and the applicable regulations.

To determine the amounts derived from New York sources for purposes of Tax Law,
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 4-4

OTHER RULES

Section

4-4.1  Power of the Commissioner of Taxation and Finance to adjust the business apportionment factor

4-4.2  Short period business apportionment factor

Section 4-4.1. Power of the Commissioner of Taxation and Finance to adjust the business apportionment factor. (Tax Law, Section 210-A(11))

(a) Generally, the business apportionment factor results in a fair apportionment of the taxpayer's business capital and business income to New York State. However, in certain instances, the business apportionment factor may not result in a proper reflection of the taxpayer’s activities, business income or business capital in the State. Tax Law section 210-A(11) authorizes the commissioner, in his or her discretion or at the request of the taxpayer, to adjust the business apportionment factor in order to properly and fairly reflect the taxpayer’s activities within New York. In the case of a combined report, the term “taxpayer” in this Subpart means the combined group and the request to adjust the business apportionment factor on the combined report must be made by the designated agent. If the business apportionment factor is adjusted, it must be calculated to effect 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 the State.
(b) When it appears that the business apportionment factor does not fairly and properly reflect the activities, business income or business capital of the taxpayer in New York State, the commissioner, in his or her discretion or at the request of the taxpayer, may adjust the business apportionment factor by:

(1) excluding one or more items of receipts, net income, net gain or other items included in the determination of the business apportionment factor;

(2) including one or more other items in the determination of the business apportionment factor; 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 the State.

(c)(1) A taxpayer may not vary the statutory business apportionment factor on an original report for a taxable year without the consent of the commissioner. A taxpayer making a request for an adjustment of its business apportionment factor that does not have such consent prior to the time it files its report must file its report and compute its tax using the business apportionment factor determined pursuant to Tax Law section 210-A and the applicable regulations in this Part. If a taxpayer receives consent after filing its report, the taxpayer may then amend the report and use the approved method to compute its tax due. If a taxpayer’s request is denied before it files its original report, it must file its report and compute its tax using the business apportionment factor determined pursuant to Tax Section 210-A and the applicable regulations in this Part. The taxpayer then may request reconsideration of its request during the course of an audit of the report. Alternatively, if the taxpayer’s request is denied and an audit has not been commenced, the taxpayer may file an amended report using its proposed adjusted
business apportionment factor, provided that the amended report is accompanied by a full explanation and justification for the adjustments made to the business apportionment factor.

(2) Except as otherwise provided in paragraph one of this subdivision, a request to vary the business apportionment factor must be submitted in writing and must be submitted separately from the report to which it relates and must set forth full information on which the request is based. If the taxpayer has not requested that the commissioner adjust the business apportionment factor before the date on the first written piece of correspondence received by the taxpayer from the Audit Division about the commencement of an audit of the report, the determination of whether or not the business apportionment factor results in a fair and proper reflection of the business income and business capital of the taxpayer will be made during the course of that audit.

(d) The party seeking to vary the business apportionment factor bears the burden of proof to demonstrate by clear and convincing evidence that the business apportionment factor determined pursuant to Tax Law section 210-A and the applicable regulations in this Part does not result in a proper reflection of the taxpayer’s business income or business capital within the State and that the proposed adjustment is appropriate. The party seeking to vary the business apportionment factor must demonstrate that application of the statutory formula attributes income or capital to the State out of all proportion to the business transacted by the taxpayer in the State.

(e) See Tax Law section 211(5) concerning other powers of the Commissioner to adjust business income and business capital of a taxpayer.

(f) Examples.
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. Ninety-five percent of its income consists of dividends and net gains from its stock holdings. The remaining five percent of its income consists of the fees it receives for the administrative and investment advisory services. Under Tax Law section 210-A(5)(a)(2)(G), dividends and net gains from stock are not included in the numerator or denominator of the business apportionment fraction unless the Commissioner determines pursuant to Tax Law section 210-A(11) and this section that inclusion of such dividends and net gains is necessary to properly reflect the taxpayer’s business income or capital of the taxpayer. In this instance, under the statutory formula, the receipts generating ninety-five percent of the taxpayer’s income would not have any representation in the business apportionment fraction. 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 business apportionment fraction. The dividends from the stock of corporations domiciled in New York would be included in the numerator of the business apportionment fraction. The net gains would be included in the numerator of the business apportionment fraction to the extent that the purchasers are located in New York. The total amount of dividends and net gains would be included in the denominator of the business apportionment fraction.

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. Under Tax Law section 210-A(5)(b) and section 4-2.13 of this Part, these commissions are included in the numerator of the business apportionment fraction if the taxpayer’s records indicate the mailing address of the
customer who is responsible for paying such commissions is in the state. However, in State X, these commissions are included in the numerator of the business apportionment fraction 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 the exclude such receipts from the numerator of the business apportionment fraction. 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 business apportionment fraction does not fairly and properly reflect Corporation’s activities and business income in New York.

Section 4-4.2 Short period business apportionment factor. (Tax Law, Section 210-A(11))

(a) A taxpayer that is subject to tax for a period less than its taxable period for Federal income tax purposes computes its business apportionment factor only for the period it is subject to tax in New York State.

(b) The business income and business capital for the short period are apportioned by an apportionment factor determined pursuant to Tax Law section 210-A and the applicable regulations in this Part, using only those receipts, net income, net gain and other items for the period for which it is subject to the tax in New York State.

(c) The short period business apportionment factor 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 taxpayer is subject to tax in New York State. Prorated business income and
prorated business capital are computed as follows:

(1) divide business income or business capital before apportionment by the number of
months covered by the taxpayer's Federal return; and

(2) multiply the figure determined in paragraph (1) of this subdivision by the number of
months for which the taxpayer is subject to tax in New York State.

Example 1: A corporation incorporated in the State of Delaware in 2010 became subject to
tax in New York State on July 2, 2016. The taxpayer reports on a fiscal year ending November
30th. The short period business apportionment factor, computed as described in subdivision (b)
of this section, is 20 percent. It had business income of $24,000 for the 12-month period covered
by the Federal return. The taxpayer's apportioned business income is $2,000, computed as
follows:

$24,000 divided by 12 (months) = $2,000
$2,000 x 5 (months) = $10,000
$10,000 x 20% = $2,000

(d) A taxpayer must submit complete details with its report showing how it computed its
business apportionment factor 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, either on his or her own volition or at the
request of the taxpayer, the prorated business income or prorated business capital for the period
for which the taxpayer is subject to tax in New York State does not properly reflect the business
income and business capital for such period, the Commissioner may determine business income
and business capital solely on the basis of the taxpayer's business income and business capital
during such period.