New York State Department of Taxation and Finance

Instructions for Form DTF-686-ATT

DTF-686-ATT-I

New York Reportable Transaction Disclosure Statement and Request for a Determination

General information

A taxpayer must file a separate Form DTF-686-ATT, *New York Reportable Transaction Disclosure Statement and Request for a Determination*, for each New York reportable transaction in which they participated.

The fact that a transaction must be reported on this form does not mean the tax benefits from the transaction will be disallowed.

See *Participation in a New York reportable transaction* on page 2 to determine if you participated in a New York reportable transaction. For more information on the disclosure rules, see New York Codes, Rules, and Regulations (NYCRR), Title 20, Part 2500.

To request a determination from the Tax Department that a specific transaction, or type of transaction, is, or is not, subject to the reporting requirement, use Form DTF-686-ATT (see *Request for determination*, below).

Who must file

For tax years beginning on or after January 1, 2006, any taxpayer (as defined below) that participates in a New York reportable transaction (as defined below) must file Form DTF-686-ATT. However, a regulated investment company (RIC) (as defined in Internal Revenue Code (IRC) section 851) that is subject to federal income tax under IRC section 852, or an investment vehicle that is at least 95% owned by one or more RICs at all times during the course of a transaction is not required to file Form DTF-686-ATT for any transaction other than a listed transaction (as defined below).

When and how to file

For tax years beginning on or after January 1, 2006, you must complete and attach Form DTF-686-ATT to your Form DTF-686 if you participated in a New York reportable transaction during that tax year. Attach both forms to your tax return for that tax year when you file.

If a New York reportable transaction that you participated in for a tax year beginning on or after January 1, 2006, results in a loss or credit carried back to a prior tax year, attach Form DTF-686-ATT to Form DTF-686 and attach both forms to your amended returns or applications for credit or refund of tax for the carryback years.

If you filed a return or amended return that reflects the tax consequences or tax strategy of a transaction that later becomes a listed transaction, attach Forms DTF-686 and DTF-686-ATT to the first tax return you file after the date the transaction becomes a listed transaction.

If you are reporting this transaction to the IRS on your federal Form 8886 and it is also a New York listed transaction, then you must complete New York Form DTF-686-ATT. If you are reporting this transaction to the IRS on federal Form 8886 as a confidential transaction or a transaction with contractual protection and the transaction is not a New York listed transaction, then you only need to complete Form DTF-686 and attach your federal Form(s) 8886.

Request for determination

The Tax Department may determine, upon request, that a specific transaction, or type of transaction, is not subject to the reporting requirement. To make such a request you must mark an ***X*** in the item B box and complete Form DTF-686-ATT as if disclosing the transaction for which you are requesting the determination. You must mail Form DTF-686-ATT on or before the date that disclosure would otherwise be required to the following address:

NYS DEPARTMENT OF TAXATION AND FINANCE
TAX SHELTER DISCLOSURE
PO BOX 22104
ALBANY NY 12201

Note: Do not mail a request for determination with Form DTF-686 or with your return.

If the request fully discloses all relevant facts relating to the transaction, the potential obligation to disclose the transaction will be suspended during the period that the determination is pending and, if the Tax Department subsequently concludes that the transaction is a New York reportable transaction subject to disclosure, will be further suspended until the sixtieth day after the determination is issued (or, if the request is withdrawn, 60 days after the date that the request is withdrawn). In the determination, the Tax Department may determine that the submission satisfies the disclosure rules for that particular transaction or type of transaction.

Definitions

A *New York reportable transaction* is a transaction that has the potential to be a tax avoidance transaction under Tax Law Article 9, 9-A, 22, 32, or 33.

A *taxpayer* is any person who is required to file a return or report under Tax Law Article 9, 9-A, 22, 32, or 33. This includes:

- corporations subject to tax under Tax Law, Article 9, sections 183, 184, 185, or 186, and persons subject to tax under Tax Law, Article 9, sections 186-a or 186-e;
- general business corporations subject to tax under Tax Law Article 9-A;
- individuals (including sole proprietorships), partnerships (including a limited liability company (LLC) that is treated as a partnership for federal income tax purposes), estates and trusts, partners in a partnership (including members of a LLC that is treated as a partnership for federal income tax purposes), shareholders of an S corporation, and beneficiaries of an estate or trust subject to tax or required to file a tax return under Tax Law Article 22;
- banking corporations subject to tax under Tax Law Article 32;
- insurance corporations and captive insurance companies subject to tax under Tax Law Article 33;
- each member of a combined group filing under Tax Law Article 9-A, 32, and 33. Each member must disclose its participation in a New York reportable transaction on a separate basis.

A *transaction* includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement and it includes any series of steps carried out as part of a plan.

A transaction is *substantially similar* to another transaction if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy. Receipt of any written advice regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as, or substantially similar to, another transaction. Further, the term *substantially similar* must be broadly construed in favor of disclosure.

A *tax benefit* is any deduction, exclusion, and modification included in gross receipts, gross earnings, income (including entire net income (ENI), gross income, New York adjusted gross income, and New York source income), gain, loss, assets, liabilities, total capital, capital stock, tax credits, nonrecognition of gain, status as an entity exempt from New York State taxation, and any other tax consequences that may reduce the New York State tax liability of a taxpayer by affecting the amount, timing, character, or source of any such item, amount, or activity.

For purposes of this form*, tax* refers to franchise and excise taxes and the tax on furnishing of utility services under Tax Law Article 9; business corporation franchise tax under Article 9-A; personal income tax under Article 22; franchise tax on banking corporations under Article 32; and franchise taxes on insurance corporations under Article 33.

The term *tax return* refers to the original returns or reports, amended returns or reports, and applications for credit or refund of tax.

Tax treatment is the purported or claimed New York State tax treatment of the transaction.

Tax structure is any fact that may be relevant to understanding the purported or claimed New York State tax treatment of the transaction.

Participation in a New York reportable transaction

A New York reportable transaction is a transaction described in one or more of the following three categories: New York listed transactions; New York confidential transactions; and New York transactions with contractual protection.

New York listed transactions — This category includes transactions that are the same as or substantially similar to one of the types of transactions that the Tax Department has determined to be a tax avoidance transaction. These transactions must be identified by notice or other form of published guidance as a New York listed transaction.

You have participated in a New York listed transaction if any of the following applies:

- your tax return reflects tax consequences or a tax strategy described by notice or other form of published guidance that lists the transaction;
- you know or have reason to know that tax benefits reflected on your tax return are derived directly or indirectly from such tax consequences or tax strategy; or
- you are in a class or type of persons that published notice or guidance treats as participants in a New York listed transaction

If a transaction becomes a New York listed transaction after the filing of your tax return reflecting either tax consequences or a tax strategy described in the notice or other form of published guidance listing the transaction (or a tax benefit derived from tax consequences or a tax strategy described in the notice or other form of published guidance listing the transaction) and before the end of the period of the statute of limitations for the tax return (whether or not already filed) reflecting the tax consequences, tax strategy, or tax benefit, then you must disclose the New York listed transaction with the tax return next filed after the date the transaction is listed regardless of whether you participated in the transaction in that tax year.

New York confidential transactions — This category includes transactions that are offered to you under conditions of confidentiality and for which you paid an advisor a fee (as defined below). Related persons who bear a relationship to each other as described in IRC sections 267(b) or 707(b) will be treated as the same person.

A transaction is considered to be offered under conditions of confidentiality if the advisor who is paid the fee places a limitation on your disclosure of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of the advisor's tax strategies. The transaction is treated as confidential even if the conditions of confidentiality are not legally binding on you.

A *fee* paid to an advisor includes all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction. These fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent that the fees exceed the fees customary for return preparation. A taxpayer also is treated as paying fees to an advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction.

You have participated in a New York confidential transaction if your tax return reflects a tax benefit from the transaction and the disclosure of the tax treatment or tax structure is limited as described above. If disclosure by a pass-through entity (partnership, S corporation, or trust) is limited, but disclosure by the partner, shareholder, or beneficiary is not limited, then the pass-through entity (but not the partner, shareholder, or beneficiary) has participated in the New York confidential transaction.

New York transactions with contractual protection — This category includes transactions for which you have, or a related party (as described in IRC section 267(b) or 707(b)) has, the right to a full refund or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained. It also includes a transaction for which fees are contingent on your realization of tax benefits from the transaction.

The foregoing only applies with respect to fees paid by or on behalf of you, or a related party, to any person who makes or provides a statement, oral or written, to you or the related party (or for whose benefit a statement is made or provided to you or the related party) as to the potential tax consequences that may result from the transaction. All the facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation. If a person makes or provides a statement to you as to the potential tax consequences that may result from a transaction only after you have entered into the transaction and reported the consequences of the transaction on a filed tax return, and the person has not previously received fees from you relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection.

A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

You have participated in a New York transaction with contractual protection if your tax return reflects a tax benefit from the transaction, and you have the right to the full or partial refund of fees or the fees are contingent as described above. If a

pass-through entity (partnership, S corporation, or trust) has the right to a full or partial refund of fees or has a contingent fee arrangement, but the partner, shareholder, or beneficiary individually does not, then the pass-through entity (but not the partner, shareholder, or beneficiary) has participated in the New York transaction with contractual protection.

Shareholder of foreign corporation — If you own or control, either directly or indirectly, more than 50% of the voting stock of a corporation not subject to New York State tax, you are deemed to participate in a New York reportable transaction if such corporation would be considered to participate in a New York reportable transaction as described above, if it were a taxpayer filing a tax return that reflects the items from the transaction, and your return reflects a tax benefit from the transaction.

Protective disclosure

If you are uncertain whether a transaction must be disclosed, you may disclose the transaction following the instructions in this form and indicate by marking an ***X*** in the item A box on Form DTF-686-ATT that the disclosure is being filed on a protective basis.

Exception

Published guidance — A transaction is not considered a New York reportable transaction, or will be excluded from categorization as a New York confidential transaction or a New York transaction with contractual protection, if the Tax Department makes a determination in published guidance that it is not subject to the reporting requirements.

Recordkeeping

You must keep a copy of all documents and other records related to a New York reportable transaction in accordance with Tax Law section 25(d). Such documents must be retained for six years from the due date of the return for which disclosure of a New York reportable transaction is required, or the date of filing, if later.

Penalties

There is a monetary penalty under Tax Law sections 685(x) and 1085(p) for the failure to include on any return or statement any information required to be disclosed under Tax Law section 25 with respect to a New York reportable transaction. The penalty for failure to include information with respect to a New York reportable transaction, other than a New York listed transaction, is $10,000 in the case of a taxpayer subject to Tax Law Article 22 and $20,000 in any other case. The penalty for failure to include information with respect to a New York listed transaction is $25,000 in the case of a taxpayer subject to Tax Law Article 22 and $50,000 in any other case. This penalty is in addition to any other penalty that may be imposed.

If you have a New York reportable transaction understatement, an accuracy-related penalty may be imposed under Tax Law sections 685(p-1) and 1085(k-1). See these Tax Law sections for more information.

A penalty is assessed for each failure by any person required to file a Form DTF-686-ATT, if the person (a) fails to file the form by the due date, including extensions, or (b) files a form that fails to include all the information required (or includes incorrect information). The Form DTF-686-ATT must be completed in its entirety with all required attachments to be considered complete. Do not enter *Information provided upon request* or *Details available upon request* or any similar statement in the space provided. Inclusion of any such statements subjects you to the penalties previously discussed.

Extended statutes of limitations

If you are required to disclose a New York listed transaction and fail to do so within the time and manner prescribed under Tax Law section 25 and the related regulations, then under Tax Law sections 1083(c)(ii) and 683(c) the period of limitations to assess any tax with respect to the New York listed transaction will be extended beyond the normal assessment period until one year after the earlier of either:

- the date you disclose the transaction by filing Form DTF-686-ATT; or
- the date that a material advisor provides the information required under IRC section 6112 in response to a request by the Tax Department under Tax Law section 25(c).

Tax may be assessed at any time within six years after the return was filed if a deficiency is attributable to an abusive tax avoidance transaction. An *abusive tax avoidance* transaction means a plan or arrangement devised for the principal purpose of avoiding tax. Abusive tax avoidance transactions include, but are not limited to, New York listed transactions.

Specific instructions

How to complete Form DTF-686-ATT

You must complete all required entries on Form DTF-686-ATT and attach any required attachments when you file. Do not simply write *See attached.* Returns that are missing required pages or that have pages with missing entries are considered incomplete and cannot be processed, and may subject taxpayers to penalty and interest.

If the information required exceeds the space provided, complete as much information as possible in the available space and attach additional sheets containing the remaining information. The additional sheets must be in the same order as the lines to which they correspond and must include your name and identifying number at the top of each sheet and the line number that corresponds to the information being reported.

Note: Do **not** report more than one transaction on this form.

Item A — Indicate that you are filing on a protective basis by marking an ***X*** in this box.

Item B — Indicate that you are filing a request for a determination by marking an ***X*** in this box.

Line 1a — Enter the name, if any, by which the transaction is known. If no name exists, provide a short identifying description of this transaction that distinguishes it from other New York reportable transactions in which you have participated (or may participate in the future).

Line 1b — Enter the first year that you participated in this transaction.

Note: This may not be the same as the year for which you are disclosing a New York reportable transaction.

Line 2 — Mark an ***X*** in the box for all categories that apply to the transaction being reported. The three New York reportable transaction categories are described under *Participation in a New York reportable transaction* on page 2.

If the transaction is a New York listed transaction, mark an ***X*** in the *New York listed transaction* box in addition to any other box that may apply.

Line 3 — Provide a brief identifying description of the New York listed transaction and identify the notice or other form of published guidance.

Line 4 — If you participated in the transaction through another entity, such as a partnership, an S corporation, or a foreign corporation, complete line 4, boxes a through d. If you are reporting more than one entity, separate the information for each entity by commas in each space provided. For line 4c, enter the form number of the New York State tax or information return filed by the entity (for example, Form IT-204). If the entity did not file a New York State tax return, enter ***None***. Enter the taxpayer identification number of the entity, if any (include the hyphen).

Line 6 — Include the facts that may be relevant to understanding the claimed or expected New York income or franchise tax treatment of the transaction.

Line 6a — Tax benefits include deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as a tax-exempt organization, or any other tax consequences that may reduce your tax liability by affecting the amount, timing, character, or source of any item of income, gain, loss, expense, or credit.

Line 6b

1. If you marked an ***X*** in line 2, box B, explain how your disclosure of information concerning the transaction was limited (for example, by contract or verbal agreement) and the nature and extent of the disclosure limitations.
2. If you marked an ***X*** in line 2, box C, describe the terms of the contractual protection.

If you need more space, follow the instructions under *How to complete Form DTF-686-ATT* on page 3.

Line 7 — Provide the complete name(s), address(es), and all identifying number(s) of all parties to the transaction (including, but not limited to, participants in the transaction), and describe their involvement in the transaction. For example, such parties may include:

- other investors in the transaction,
- tax-exempt entities that received fees, contributions, income, or gains in connection with the transaction,
- foreign individuals or entities not subject to New York State income or franchise tax that received fees, income, or gains in connection with the transaction, or
- financial institutions that loaned money used in the transaction.

Need help?

Internet access: *www.nystax.gov* (for information, forms, and publications)

Fax-on-demand forms: Forms are available 24 hours a day, 7 days a week. 1 800 748-3676

Telephone assistance is available from 8:00 A.M. to 5:00 P.M. (eastern time), Monday through Friday.

To order forms and publications: 1 800 462-8100

Corporation Tax Information Center: 1 888 698-2908

Personal Income Tax Information Center: 1 800 225-5829

From areas outside the U.S. and outside Canada: (518) 485-6800

Hotline for the hearing and speech impaired: If you have access to a telecommunications device for the deaf (TDD), contact us at 1 800 634-2110. If you do not own a TDD, check with independent living centers or community action programs to find out where machines are available for public use.

Persons with disabilities: In compliance with the Americans with Disabilities Act, we will ensure that our lobbies, offices, meeting rooms, and other facilities are accessible to persons with disabilities. If you have questions about special accommodations for persons with disabilities, please call 1 800 972-1233.