

REGULATORY IMPACT STATEMENT SUMMARY
DEPARTMENT OF TAXATION AND FINANCE

1. STATUTORY AUTHORITY:

Tax Law section 171, subdivision First, authorizes the commissioner to make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of the commissioner's powers and the performance of the commissioner's duties under the Tax Law; section 1096(a) of Tax Law article 27 authorizes the commissioner to make such rules and regulations as are necessary to enforce the New York State Franchise Tax on Business Corporations imposed by Tax Law article 9-A; section 1519 of Tax Law article 33 cites the provisions of Tax Law article 27 as being applicable to and having the same force and effect on the Franchise Taxes on Insurance Corporations; Tax Law section 697(a) provides the authority for the commissioner to make such rules and regulations as are necessary to enforce the personal income tax.

2. LEGISLATIVE OBJECTIVES:

The rule is being proposed pursuant to such authority, and in accordance with the legislative objective that the commissioner administer the provisions of the Tax Law, to provide guidance with respect to legislative changes that sought to simplify, clarify, and modernize the corporation franchise tax. The proposed rule implements the sweeping reform of New York State's corporate tax framework effected by Part A of Chapter 59 of the Laws of 2014, together with related, primarily technical and conforming amendments enacted by Part T of Chapter 59 of the Laws of 2015 and Part P of Chapter 60 of the Laws of 2016 (hereinafter referred to collectively as "Tax Reform").

The proposed rule is necessary to implement and administer the Tax Law, as amended by the Tax Reform statutes. The objective of the rule is to interpret the Tax Reform statutes and provide guidance to enhance voluntary compliance, consistent with the overarching goals of Tax Reform. The proposed rule also would interpret and integrate other related provisions of the Tax Law regarding business models that have developed since these regulations were last comprehensively updated, such as the emergence of limited liability companies. The resulting rule provides regulated parties with detailed direction regarding the computation of tax under Tax Law article 9-A, as revised by Tax Reform.

The 2014 Tax Reform legislation represents the most extensive restructuring of New York State's corporate tax framework since the 1940s. In particular, the new Tax Law article 9-A structure modernized and simplified the tax law, enhanced certainty and clarity, and addressed the most common areas of dispute between taxpayers and the department. The amendments to Tax Law article 9-A established an economic nexus standard (deriving receipts from activity in this state), changed the apportionment scheme from one based generally on the location where services were performed to a market-based approach, changed the rules for mandatory and permissive combined reporting, eliminated the separate taxation of subsidiary capital, established new definitions of investment capital and income, and changed how investment capital and income are taxed.

Tax Reform also merged the bank tax imposed under Tax Law article 32 into the corporate franchise tax imposed under Tax Law article 9-A. This repeal of the bank tax crucially eliminated the differing schemes of taxation of taxpayers involved in essentially the same activities, thereby removing the opportunity to exploit differences in the rules of the two articles of the Tax Law.

The rule repeals 20 NYCRR Chapter I, Subchapter A, the Business Corporation Franchise Tax, Parts 1 through 9, and adds new Parts 1 through 9 to replace the previous regulations. It also repeals 20 NYCRR Chapter I, Subchapter B, the Franchise Tax on Banking Corporations, Parts 16 through 23, to reflect the repeal of Tax Law article 32 and merger of the taxation of banks into Tax Law article 9-A. Additionally, the rule repeals 20 NYCRR Chapter I, Subchapter C, Franchise Taxes on Insurance Corporations, Parts 32 and 33 to repeal obsolete provisions and adds a new Part 32 to incorporate pre-reform Tax Law article 9-A combination rules, which previously had been incorporated into the Franchise Taxes on Insurance Corporations only by reference to the Tax Law article 9-A regulations.

3. NEEDS AND BENEFITS:

As noted by the memorandum in support of Part A of Chapter 59 of the Laws of 2014, “[t]he State's current franchise tax structure, which dates back to the 1940's, is outdated, unduly complex and vulnerable to aggressive tax avoidance techniques.” These complexities caused disruptions and uncertainty for businesses, while increasing administration costs for New York State, and resulted in extremely volatile tax collections that were difficult to forecast and could have dramatic effects on the State’s financial plans. Tax Reform addressed these deficiencies by modernizing the tax code to better reflect the current New York State business environment and creating certainty regarding the most commonly disputed issues.

The Business Corporate Franchise Tax regulations, like the statutory corporate franchise tax scheme prior to Tax Reform, have remained largely unchanged for decades. The repeal of Parts 1 through 9, 16 through 23 and 32 through 33 and addition of new Parts 1 through 9 and 32 of the regulations governing Franchise and Certain Business Taxes are necessary to modernize

the regulations and implement and provide guidance relating to the sweeping changes effected by Tax Reform.

In drafting the proposed rule, the department routinely engaged stakeholders in the rule development process. Soon after the enactment of Tax Reform, the department provided interested parties with the opportunity to submit questions on the new law via the department's website. To the extent that an answer was applicable to a larger body of taxpayers, it was then posted to the frequently asked questions (FAQ) portion of the department's dedicated corporate tax reform webpage. The insight gained from these FAQs, as well as from outreach events and internal discussions, greatly informed the development of this rule. The department also posted drafts of the proposed regulations to its website as they were developed, notified interested parties, and solicited comments as each new draft was posted. Since 2015, more than 40 drafts of various portions of the proposed rule have been posted for external review and comment.

Commentors have applauded the transparent, cooperative development of the regulations for the guidance and settled expectations they will confer. The added certainty and predictability that the proposed regulations will provide to regulated parties also will enhance voluntary compliance and diminish the potential for future litigation.

The department received comments from industry representatives, including such organizations as the Tax Section of the New York State Bar Association (NYSBA); the New York Bankers Association (NYBA), the Securities Industry and Financial Markets Association (SIFMA); the Business Council of New York State; State Taxes After Reform and Recession Partnership (STARR); the Council on State Taxation (COST); the Life Insurance Council of New York (LICONY); the Broadband Tax Institute; American Investment Council; Managed Funds Association; the Institute of International Bankers; and the Motion Picture Association of

America (MPAA). Individual industry practitioners, participants and firms also submitted comments. The department reviewed and analyzed all the comments received and made changes to the draft regulations where appropriate; substantive changes made in response to such comments, as well as the department's reasons for rejecting certain suggested alternatives, are discussed in paragraph 8 herein.

4. COSTS:

a. Costs to State government: The amendments do not impose any costs on State government beyond those imposed by statute.

b. Costs to local government: The amendments do not impose any costs on local government beyond those imposed by statute.

c. Costs to private regulated parties: The amendments do not impose any costs on private regulated parties beyond those imposed by statute.

d. Costs to regulating agency for implementation and continued administration: The amendments do not impose any costs on the regulating agency for implementation and continued administration beyond those imposed by statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendments do not impose any additional program, service, duty, or responsibility upon any local government beyond those imposed by statute.

6. PAPERWORK:

The proposed amendments do not impose any additional paperwork requirements beyond those imposed by statute.

7. DUPLICATION:

The proposed amendments do not duplicate existing State or Federal requirements beyond those imposed by statute.

8. ALTERNATIVES:

Industry representatives and individuals submitted over 80 highly detailed and carefully considered comments and suggestions. Those commenting expressed appreciation for the department's transparency in sharing the draft regulations and willingness to engage stakeholders in their development at the outset. While the department implemented many comments and suggestions, it resolved some of the issues raised in a different manner than suggested. The department also rejected some suggestions as inconsistent with the Tax Law, established Tax Department policy, related Federal provisions or the legislative objectives of Tax Reform, as lacking statutory authority or as administratively impracticable.

The most significant and prevalent issues raised in the comments centered on the imposition of tax under the new nexus standard instituted by tax reform; the implications of the post-reform changes in the definition of investment capital and income and treatment of subsidiary capital; the treatment of the various types of losses post-reform; apportionment in the context of Tax Reform's adoption of additional sourcing rules addressing significantly more categories of receipts, as well as a general market-based approach to determining New York receipts; the post-reform mandatory and elective combined reporting rules; and the rules relating to special treatment of special entities.

Paragraph 8 of the unabridged Regulatory Impact Statement published on the website of the Department of Taxation and Finance contains a detailed discussion of the department's response to the positions advocated by those commenting, together with its reasons for

incorporating certain suggestions in the final proposed rule, rejecting others, and resolving certain issues in a manner different from that advocated in the comments.

9. FEDERAL STANDARDS:

There are no applicable Federal standards unless explicitly so stated in the rule.

10. COMPLIANCE SCHEDULE:

These amendments will take effect when the Notice of Adoption is published in the State Register. No additional time is needed in order for regulated parties to comply with this rule.