REGULATORY IMPACT STATEMENT

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:

Background

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 discussion below outlines the more significant changes the department made in response to comments and provides an explanation of the more significant alternatives considered, but ultimately rejected.

A. Imposition of Tax

1. Tax Reform included a new nexus standard based on a minimum amount of receipts derived from activity in New York, determined using the market-based sourcing rules contained in Tax Law section 210-A. Due to the complexities of sourcing certain income streams, the statute provides that, in limited instances, 8% of total receipts from these select financial assets are considered New York receipts. Reviewers argued that these mandatory 8% sourcing rules should be completely excluded when determining whether, for nexus purposes, a corporation is deriving receipts from activity in New York and the Metropolitan Commuter Transportation District (MCTD). The department considered but rejected the total exclusion of those receipts subject to an 8% rule because it is appropriate to consider some categories of receipts in determining whether a corporation is subject to tax because those receipts are sufficiently connected to the corporation's activity. In compromise, section 1-2.8(i) was drafted to provide that a corporation is not considered to be deriving receipts from New York if its only New York receipts are from the following income categories: interest income and net gains from government agency issued securities, interest income from Federal funds, and interest paid directly by the Federal reserve bank on reserves maintained at the Federal reserve.

2. As the prevalence of limited liability companies has grown, the department determined that the nexus provisions of the rule needed to clarify when members of a limited liability company (LLC) would be subject to tax in New York. The initial draft imposed nexus on all members of a LLC.

Commentors argued that this position was more stringent than the treatment for corporate partners and that the two standards should be similar. After reviewing the comments made, the department determined that the rule should be modified to treat corporate members of LLCs that are treated as partnerships for tax purposes in a comparable manner to limited partners of partnerships for purposes of determining whether the corporate members are subject to tax.

3. The existing regulations address the department's historical interpretation of Public Law 86-272, which generally exempts out-of-state sellers of tangible personal property from tax if their business activities in the state are limited to solicitation of orders. Because Tax Reform included a new nexus standard based solely on deriving receipts in New York, this proposed rule provides additional guidance for corporations conducting business via the internet and seeking an exemption from tax under Public Law 86-272. The proposed rule is based upon model regulations adopted by the Multistate Tax Commission and guidance issued by other states. While some commenters advocated for the elimination of the additional rules for internet-based activities, arguing that rules of statutory construction do not support the Department's interpretation of Public Law 86-272, other commenters concluded that the Department has the authority to promulgate regulations that narrowly interpret the Public Law 86-272 protections, and should leave it to the courts to decide whether the Department's interpretation is correct. Accordingly, the Rule includes guidance regarding the application of Public Law 86-272 to corporations conducting business via the internet.

B. Income and Capital

Because the reformed Tax Law article 9-A exempts investment capital and income from tax, the definition of investment capital is significantly narrowed post-reform. The new statutory definition of investment capital is limited to non-unitary stocks that meet certain criteria and assets New York cannot

tax under the US constitution (constitutionally protected investment capital). There is a corresponding subtraction for income from investment capital, subject to statutory limits. The department considered, but rejected, three notable alternatives related to this income and capital, discussed below.

1. In order for non-unitary stock to qualify as investment capital, there are five criteria that must be met. In 2015, the department issued detailed guidance to assist taxpayers in determining whether an asset could be investment capital. The guidance specified that corporate partners using the aggregate method to compute tax may claim that the proportional part of stock owned by partnerships is investment capital only if all the criteria for investment capital are met at the partnership level. Commenters argued that it is not always possible for corporate partners to direct partnerships to make the required investment capital identification and, therefore, the department should allow the investment capital identification to be done at the corporate partner level. The department rejected this alternative because it was inconsistent with the aggregate theory of partnership taxation employed in New York that generally treats the corporate partner as doing what the partnership is doing. In addition, identifying investment capital at the partnership level ensures that all amounts that flow from partnerships are treated consistently between partners.

2. Generally, income from investment capital (investment income) is exempt from tax as it is subtracted from entire net income (ENI) in determining business income. However, the statute provides that the subtraction for investment income cannot exceed 8% of ENI. Any investment income in excess of 8% of ENI would be included in business income. Because the statute does not differentiate between stocks that meet the five criteria to be investment capital and stocks that are constitutionally protected investment capital, some commenters questioned whether income from constitutionally protected investment capital potentially could be taxed under a plain reading of the 8% rule in the statute. The department recognizes that it cannot tax more than is constitutionally permissible, and the proposed rule

would clarify this limit in section 3-4.5(c) by stating that income from investment capital is limited to the greater of income from constitutionally protected investment capital or 8% of ENI. Commenters have advocated that the limit instead should be the sum of income from constitutionally protected investment capital and 8% of ENI. The department rejected this alternative because it would expand the exemption for investment income beyond what is contemplated in the statute.

3. In addition to changing the definition of investment capital and income, Tax Reform also eliminated the concept of subsidiary capital and the preferential treatment given to income generated by subsidiaries. Under prior law, a corporation was considered a subsidiary if more than 50% of its stock was owned by the taxpayer. Income from subsidiary capital was excluded when calculating ENI, and subsidiary capital was excluded from the capital base tax and instead was subject to a special preferential tax. Tax Reform eliminated this subsidiary capital taxation scheme, primarily because most stocks owned by corporations that were not part of the corporation's unitary business would qualify as investment capital. Those assets that do not qualify as investment capital constitute business capital. In particular, section 3-5.1(a)(2)(i)(c) of the proposed rule provides that stock of corporations subject to the franchise taxes imposed by Tax Law article 9 or Tax Law article 33 (cross-article corporation stock) that are owned by the taxpayer and are part of the taxpayer's unitary business are considered business capital. Commenters have advocated for these assets to be excluded from the definition of business capital and, therefore, not subject to the capital base tax. The department rejected this alternative because it concluded that there is no legal basis to exempt these assets from tax and a legislative change would be required to exclude them.

C. Losses

Due to fundamental changes to the statutory rules pertaining to net operating losses (NOLs), pre-reform NOLs could not simply be carried into post-reform years. Instead, under Tax Reform, the losses

sustained pre-reform were converted into a prior net operating loss conversion (PNOLC) subtraction pool that could be utilized in post-reform years. The PNOLC subtraction pool is computed using the following values from 2014 (the last pre-reform) tax year: the unabsorbed net operating loss (UNOL), the tax rate, and the business allocation percentage (BAP). This new subtraction was intended to create a fixed value of pre-reform NOLs and allow for that value to be easily subtracted in the computation of the reformed business income base. The amount of the subtraction is limited in a given year and taxpayers cannot claim the subtraction for more than 20 years. Section 3-8.12 of the proposed rule generally provides that changes to the UNOL can be made within the statute of limitations period for the return on which the PNOLC subtraction is first claimed and changes to the tax rate and BAP must be made within the statute of limitations for amending the taxpayer's 2014 return. Any Federal changes finalized after the respective statutes of limitations have expired will not be considered in the computation of the PNOLC pool. The department considered, but rejected, changing this rule to allow all Federal changes to be included in the PNOLC computation. Given that Federal changes can occur many years after the close of a tax period and, therefore, many years into the period for claiming the PNOLC subtraction (if not already exhausted), a Federal change potentially would impact all years the subtraction was used, including those for which the statute of limitations has already expired. The department did not make this suggested change because it would create cascading impacts and undo the certainty intended by the PNOLC subtraction.

D. Apportionment

Tax Reform created additional sourcing rules to address significantly more categories of receipts and also adopted a market-based approach to determine New York receipts. The proposed rule contains very detailed guidance on the application of these rules for the business apportionment factor (BAF) and commenters provided significant feedback on these provisions during the development of the rule.

1. Prior to Tax Reform, receipts not earned in the regular course of business and receipts from the sale of capital assets generally were excluded from the receipts factor. This policy was the subject of frequent disputes between taxpayers and the department. The initial draft of the proposed rule continued the pre-reform policy by excluding receipts from sales of real, personal and intangible property that arise from “unusual events” from the BAF. Additionally, the initial draft rule sought to address previously gray areas by including examples of when receipts would and would not be subject to the sourcing rules contained in Tax Law section 210-A and Part 4, including this unusual events rule. While commenters generally were appreciative of the examples, they sought additional clarification. After further considering the issue, the department determined that the unusual events rule was no longer appropriate because Tax Reform provided significantly more detailed sourcing rules, including guidelines for those transactions that might have been excluded under pre-reform policy. The proposed rule reflects this determination to eliminate the unusual events rule. The department rejected the argument that the pre-reform unusual events policy should continue. In the event that the inclusion of certain receipts distorts the BAF or is not appropriate, either the department or the taxpayer could pursue a discretionary adjustment to the BAF.

2. Given the high volume of transactions that financial service companies engage in, Tax Reform created a statutory safe harbor for sourcing certain financial receipts. In lieu of directly sourcing each receipt under the specific rules in Tax Law section 210-A(5), taxpayers can make an election that allows for 8% of income from certain types of financial instruments (termed qualified financial instruments, or QFIs) to be included in New York receipts. This election simplifies sourcing and provides certainty for both taxpayers and the department. Two areas of significant feedback centered on the determination of QFI type and the netting of income from QFIs.

a. The statute generally defines QFI as an asset that is marked to market by the taxpayer under section 475 or 1256 of the internal revenue code (IRC) or an asset of the same type as an asset that has been marked to market by the taxpayer. This proposed rule, consistent with the post-reform corporate tax forms, provides that the taxpayer must first determine each type of QFI and then determine the amount of net receipt or gain (not less than 0) for each type subject to the same customer sourcing rule. Interested parties have argued that one aggregate net value should be determined encompassing all types of QFIs when the election is made. The practical implication of this would be that gains from one type of QFI, such as corporate bonds, could be offset by losses from a totally different type of QFI, such as commodities. The department rejected this alternative because the netting of receipts is required to be performed within each receipt sourcing category before the QFI election is applied to determine the amount to include in New York and everywhere receipts. The proposed rule is consistent with the determination of QFI by type and reflects the clear intent of the statute to consider each receipts category separately.

b. The statute provides a catch-all category of “other financial instruments” that applies to financial instruments that are not otherwise explicitly addressed. A variety of assets may fall into this “other” category, such as foreign currency swaps, interest on bank accounts, and debt issued by foreign countries. In addition, some of these assets cannot be marked to market under the IRC sections referenced in the QFI definition. The proposed rule, consistent with post-reform corporate tax form instructions, provides guidance on how to determine whether assets that fall into this “other financial instruments” category are QFIs. In particular, it clarifies that there may be multiple types of assets included in “other financial instruments.” Certain other financial instruments may be considered QFIs if marked to market under the specified IRC sections, but marking to market one type of “other financial instrument” under the specified sections of the IRC does not make all “other financial instruments”

QFIs. Commenters have argued that the department should consider all assets in this category as one type for receipt netting purposes. The department has rejected this alternative as inconsistent with the requirement to determine QFIs by type. Similarly, commenters advocated that stocks and partnership interests should be considered the same type of QFI because they are addressed by the same clause of the statute. The department likewise rejected this alternative as inconsistent with the requirement to determine QFIs by type.

3. The statute requires that taxpayers use a hierarchy to source receipts from digital products/services and other business receipts and services. Taxpayers have argued that it is extremely time consuming and costly for them to comply with the hierarchy rules. As such, commenters advocated for a safe harbor utilized by other states with similar customer sourcing rules that would allow taxpayers to source receipts to their customer's billing address, in lieu of using the rules of the hierarchy, if the taxpayer generally had more than 250 customers. Initially, the department did not propose the suggested safe harbor because, for business customers, the billing address in many instances does not reflect the primary rule of the respective hierarchies: location where a digital product/service is primarily used or where the benefit of an other business activity or service is received. In response to feedback, the department revised the initial draft rule to provide some administrative relief to taxpayers by exempting taxpayers with a large number of customers from the requirement to inquire with those customers about the location information needed to source the receipts ("inquiries safe harbor"). The Department further considered the issue and included in its last pre-proposal draft a safe harbor more closely aligned with commenters' alternative that generally allows taxpayers with more than 10,000 business customers to source receipts to such customers' billing address rather than performing the steps required by the hierarchy. In response to additional comments on this issue, the proposed rule adopts

the 250 customers billing address safe harbor as advocated by the commenters and eliminates as unnecessary the inquiries safe harbor.

4. While the statute explicitly provides for the sourcing of certain fees for services provided to regulated investment companies (RICs) to the location of RIC shareholders, it is silent as to the sourcing of similar receipts for services provided to non-regulated investment funds ("passive investment customers"). The department sought to clarify how these receipts would be sourced to ensure that the result reflected the location where the customer received the benefit of the service, rather than a location with no real economic value that could be manipulated. Over the course of the regulation drafting process, the department advanced several methods for sourcing receipts from passive investment customers. Alternatives included treating these non-regulated funds as investment companies subject to the RIC sourcing rules, sourcing to the location where the passive investment customer (or the party that is granted authority to make executive decisions on behalf of the passive investment customer) makes the decision to utilize the investment or management advice, and sourcing to the location where the service contract is managed by the passive investment customer. The commentary received on the last pre-proposal draft overwhelmingly urged the department to source these types of receipts to the investors in the passive investment customer. The department was receptive to this feedback: the proposed rule primarily sources to the location of the investors, while including a secondary rule for use when that location cannot be determined.

5. In some instances, the statutory rules for computing the BAF may not result in a proper reflection of the taxpayer's business income or capital in the state. As such, either the taxpayer may request or the commissioner may exercise discretion to adjust the fraction. While the ability to adjust the sourcing methodology existed both pre-reform and post-reform, the Tax Reform statute explicitly provides that the party seeking the adjustment bears the burden of proof to show it is necessary.

The initial proposed revisions to the discretionary adjustment rules generally only updated the existing regulations for the Tax Reform changes. Early comments advocated for additional clarifications, such as the standard used for the burden of proof, examples of when the department would exercise its discretion, guidance on the process for adjustments, and the overall framework for when a discretionary adjustment would be utilized. The department carefully considered these comments and provided additional guidance in subsequent drafts of these provisions.

This rule continues the previous regulatory requirement that, unless the taxpayer receives permission to adjust the BAF prior to the deadline for filing its original return, it must file in accordance with the statutory requirements without any adjustment. While some commenters have argued this "pre-filing" requirement is contrary to the statute, the Department disagrees as the statute clearly provides that a taxpayer must affirmatively request an adjustment. However, the department recognized that it is necessary to ensure that taxpayers always have a pathway to seek an adjustment and be able to timely file their returns. Therefore, this rule more clearly specifies that the taxpayer may file an amended return with its proposed discretionary adjustment if the department had not responded to its request before the original return was filed. In addition, a taxpayer may request reconsideration of a denial of a proposed discretionary adjustment on audit.

E. Combined Reporting

1. While the concept of a unitary business was part of the analysis prior to Tax Reform to determine whether a combined report was required, the revised mandatory combined reporting rules now are based solely on the unitary business and capital stock requirements. Determining whether a business is unitary is very fact intensive and based on case law. As the statute does not define a unitary business, commenters questioned how the analysis would be done in specific fact patterns. The department agreed that it would be advantageous for both taxpayers and the department to have more

guidance on this analytical process. As a result, this rule sets forth the general attributes of a unitary business, as well as presumptions that, when met, will be indicative of a unitary business.

2. In addition to mandatory combined reporting, Tax Reform provides for an election that allows corporations that meet the capital stock requirement to be included in a combined report, regardless of whether these entities are conducting a unitary business. As a trade-off for certainty regarding the combined group composition, the election is binding for seven years and applies to all corporations that meet the ownership test during that time period. Since the election was modeled after elections offered by other states, the department reviewed the rules in those other states to determine the type of guidance needed. The department's initial draft rule included a provision that would have allowed the department to essentially undo the election if it was made for tax avoidance reasons. Commentors argued that such a provision would be contrary to the goal of providing certainty for both taxpayers and the department and would raise more questions about the circumstances in which the department would exercise such authority. After further considering the issue, the department removed that provision from the proposed rule.

F. Special Entities

Even before the enactment of Tax Reform, New York has provided preferential tax benefits to corporations that are qualified emerging technology companies (QETCs) and qualified New York manufacturers. The benefits for qualified New York manufacturers were further enhanced in 2014 by providing these entities with a zero percent income base tax rate and a real property tax credit. This rule provides additional guidance pertaining to these special entities.

1. In the case of a combined report, the proposed rule requires that all members of a combined group satisfy the requirements for QETCs in order for the combined group to be eligible for the preferential QETC tax computations. Commenters have objected to this position. However, the

department rejected alternatives proposed by commenters because the proposed rule is a rational interpretation of the statute, is consistent with long-standing department policy, and is designed to prevent inappropriate tax avoidance.

2. Under Tax Reform, qualified New York manufacturers receive the benefit of a zero percent tax rate on the business income base. The proposed rule contains specific criteria for determining which party to a contract where one company performs certain manufacturing tasks for the other is, in fact, the manufacturer for tax purposes, in order to prevent both parties to the contract from claiming to qualify for the zero percent rate. The proposed rule specifies the tasks the company must perform to be a qualified New York manufacturer. The department considered, but rejected, alternatives that would have made it easier for a company to claim to be a manufacturer in contract manufacturing situations when, in fact, it was not doing the actual work. The proposed rule is a reasonable interpretation of the statute and limits the potential for abuse of this tax benefit.

3. Pre-proposal drafts included provisions relevant to residual holders in real estate mortgage investment conduits (REMICs). The department has consistently taken the position that residual interest holders whose federal taxable income is measured by the excess inclusion amount, as required by IRC section 860E, would use excess inclusion as the starting point for calculating ENI, but without any New York addition or subtraction modifications. However, pre-proposal drafts took varying positions on whether or not an NOL can be generated and, if so, how much. The department reconsidered its previous policy, and the proposed rule eliminates the tie to IRC section 860E as the starting point for calculating ENI. Under this policy, taxpayers sustaining a loss would calculate an NOL under existing law.

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 the regulated parties to comply with this rule.