

## SUBSTANCE OF THE PROPOSED RULE

### DEPARTMENT OF TAXATION AND FINANCE

The proposal creates Part 2500 “New York Reportable Transactions” in the Procedural Regulations as published in Chapter IX of Title 20 NYCRR. The rule provides a definition of a New York reportable transaction and the disclosure requirements for participation in a New York reportable transaction. A New York reportable transaction is a transaction that has the potential to be a tax avoidance transaction under articles 9, 9-A, 22, 32, or 33 of the Tax Law.

A summary of the sections of Part 2500 as contained in the proposal follows:

Section 2500.1 provides the statutory authority for the amendments, a brief description of a New York reportable transaction and the purpose of the Part.

Section 2500.2 requires a taxpayer to disclose its participation in a New York reportable transaction with its tax return for the taxable year it has participated in such New York reportable transaction. The section also conveys that a transaction’s designation as a New York reportable transaction shall not affect the legal determination of whether the taxpayer’s treatment of the transaction is proper.

Section 2500.3 defines a New York reportable transaction and includes a description of the three categories of New York reportable transactions: New York listed transactions, New York confidential transactions, and New York transactions with contractual protection. A brief description of each category follows.

A New York listed transaction is a transaction that is the same or substantially similar to a transaction that the commissioner has determined to be a tax avoidance transaction and identified by notice or form of published guidance as a New York listed transaction. When determining whether a transaction is a tax avoidance transaction, the commissioner is required to find that one of the following conditions exists:

- (1) The transaction is not done for a valid business purpose;

- (2) The transaction does not have economic substance apart from its tax benefits; or
- (3) The tax treatment of the transaction is based upon an elevation of form over substance.

A New York confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor fee.

A New York transaction with contractual protection is a transaction where the taxpayer or related party has a right to a full or partial refund of fees if the tax treatment is not sustained or where the fee is contingent on the taxpayer's realization of tax benefits from the transaction.

Section 2500.4 provides the definitions for Part 2500. The definition of "taxpayer" describes persons who may be subject to the reporting requirement if they participate in New York reportable transactions, and is structured to include persons required to file a return or report or are subject to tax under the specific articles of the Tax Law: 9, 9-A, 22, 32, and 33.

The definition of "participation" describes when a taxpayer has participated in New York reportable transactions and therefore, is subject to the disclosure requirements. Generally, a taxpayer is considered to have participated in a transaction if its return reflects a tax benefit from the transaction. Thus, for instance, a member of a combined group that is subject to New York tax has participated in a transaction where the combined report reflects a tax benefit from a transaction engaged in by another member of the group, even if the other member is not subject to New York tax. Other terms defined are: substantially similar, tax, tax benefit, tax return, tax treatment, and tax structure.

Section 2500.5 provides taxpayer is required to report such disclosure on the forms and in the manner prescribed by the commissioner. Guidance of the specific filing and disclosure requirements will be provided in applicable forms, instructions, and other appropriate publications.

The section provides the requirement for a timely disclosure of participation in a New York listed transaction where the designation of the transaction as a listed transaction occurs after a taxpayer has filed the

tax return that encompasses the date the New York listed transaction occurred. The taxpayer must disclose its participation with the next tax return filed after the date the transaction is listed.

The section also provides that these disclosure requirements are intended to supplement any existing provisions of the Tax Law.

Section 2500.6 allows a taxpayer to request a review of a transaction to determine whether or not a transaction is subject to the New York reportable transaction disclosure requirements prior to the date that disclosure would normally be required. A protective disclosure procedure is also provided for a transaction where a taxpayer is uncertain whether a transaction is subject to the disclosure requirements.

Section 2500.7 provides the document retention requirements based upon Tax Law sections 25(d) and (e). The section also provides that these retention requirements are intended to supplement any existing provisions of the Tax Law.

The rule is effective upon publication of the Notice of Adoption in the State Register and shall apply to taxable years beginning on or after January 1, 2006.