

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in section 25, subdivision First of section 171, subsection (a) of section 697, and subsection (a) of section 1096 of the Tax Law, the First Deputy Commissioner of Taxation and Finance, being duly authorized to act in the absence of the Commissioner of Taxation and Finance, hereby proposes to make and adopt the following amendments to the Procedural Regulations, as published in Chapter IX of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, such amendments to read as follows:

Section 1. A new Part 2500 is added to such regulations to read as follows:

PART 2500

New York Reportable Transactions

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(Statutory Authority: Tax Law, sections 25, 171, 697, 1096)

2500.1 Disclosure of New York Reportable Transactions and Related Information

Section 2500.1 Disclosure of New York Reportable Transactions and Related Information.

(a) Authorization. Section 25(a)(3) of the Tax Law authorizes the commissioner to promulgate regulations with regard to New York reportable transactions.

(b) Brief description of 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.

(c) Purpose. Taxpayers who participate in New York reportable transactions are required to disclose their participation to the department.

Section 2500.2 Disclosure of participation in a New York reportable transaction. Every taxpayer that has participated in a New York reportable transaction during its taxable year is required to disclose its participation with its tax return for that taxable year in the manner and form prescribed by the commissioner. The fact that a transaction is 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 New York reportable transactions. (a) General. 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. The term "transaction" includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan. There are three categories of New York reportable transactions: New York listed transactions, New York confidential transactions, and New York transactions with contractual protection.

(b) New York listed transactions. A "New York listed transaction" is a transaction that is the same as or substantially similar to one of the types of transactions that the commissioner has determined to be a tax avoidance transaction and identified by notice or other form of published guidance as a New York listed transaction. For purposes of identifying a "New York listed transaction", the determination that a type of transaction is a tax avoidance transaction shall be based upon a finding by the commissioner that (1) the transaction is not done for a valid business purpose, that is, one or more business purposes, other than obtaining tax benefits, that alone or in combination constitute the primary motivation for the transaction; (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.

(c) New York confidential transactions. (1) General. 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 a fee. For purposes of this subdivision (c), related persons who bear a relationship to each other as described in section 267(b) or section 707(b) of the Internal Revenue Code will be treated as the same person.

(2) Conditions of confidentiality. A transaction is considered to be offered to a taxpayer under conditions of confidentiality if the advisor who is paid the fee places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that advisor's tax strategies. A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure if the advisor confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

(3) Determination of advisor fee. For purposes of this subdivision (c), a fee 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. For purposes of this subdivision (c), 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. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property.

(d) New York transactions with contractual protection. (1) General. A “New York transaction with contractual protection” is a transaction for which the taxpayer or a related party (as described in section 267(b)

or section 707(b) of the Internal Revenue Code) has the right to a full or partial refund of fees (as described in paragraph (2) of this subdivision) if all or part of the intended tax consequences from the transaction are not sustained. A transaction with contractual protection also is a transaction for which fees (as described in paragraph (2) of this subdivision) are contingent on the taxpayer's realization of tax benefits 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.

(2) Fees. Paragraph (1) of this subdivision only applies with respect to fees paid by or on behalf of the taxpayer or a related party to any person who makes or provides a statement, oral or written, to the taxpayer or related party (or for whose benefit a statement is made or provided to the taxpayer or related party) as to the potential tax consequences that may result from the transaction.

(3) Exceptions. (i) Termination of transaction. 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.

(ii) Previously reported transaction. If a person makes or provides a statement to a taxpayer as to the potential tax consequences that may result from a transaction only after the taxpayer has 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 the taxpayer relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection.

(e) Exceptions. (1) General. A transaction will not be considered a New York reportable transaction, or will be excluded from any individual category of New York reportable transaction under subdivisions (c) and (d) of this section, if the commissioner makes a determination by published guidance that the transaction is not

subject to the reporting requirements of this Part. The commissioner may also, upon request, make a determination under section 2500.6 of this Part that a specific transaction or type of transaction is not subject to the reporting requirements of this Part.

(2) Special rule for Regulated Investment Companies. For purposes of this Part, a corporation which is a regulated investment company as defined in section 851 of the Internal Revenue Code and subject to Federal income tax under section 852 of the Internal Revenue Code or an investment vehicle that is owned 95 percent or more by one or more regulated investment companies at all times during the course of the transaction is not required to disclose a transaction that is described in subdivisions (c) and (d) of this section unless the transaction is also a New York listed transaction.

Section 2500.4 Definitions. (Tax Law, section 25(a)(2)) For purposes of this Part, the following terms are defined as follows:

(a) "Taxpayer". (1) The term "taxpayer" means any person who is required to file a return or report under articles 9, 9-A, 22, 32, or 33 of the Tax Law.

(2) As used in this Part the term "taxpayer" includes:

(i) corporations subject to tax under sections 183, 184, 185, or 186 of article 9 of the Tax Law and persons subject to tax under sections 186-a or 186-e of article 9 of the Tax Law;

(ii) general business corporations subject to tax under article 9-A of the Tax Law;

(iii) individuals (including sole proprietors), 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 article 22 of the Tax Law;

(iv) banking corporations subject to tax under article 32 of the Tax Law; and

(v) insurance corporations and captive insurance companies subject to tax under article 33 of the Tax Law.

(3) The term “taxpayer” also includes each member of a combined group filing under articles 9-A, 32, or 33 of the Tax Law. Each member must disclose its participation in a New York reportable transaction on a separate basis in the manner and form prescribed by the commissioner.

(b) “Participation”. (1) New York listed transactions. A taxpayer has participated in a New York listed transaction if the taxpayer's tax return reflects tax consequences or a tax strategy described by notice or other form of published guidance that lists the transaction under section 2500.3(b) of this Part. A taxpayer also has participated in a New York listed transaction if the taxpayer knows or has reason to know that the taxpayer's tax benefits are derived directly or indirectly from tax consequences or a tax strategy described by notice or other form of published guidance that lists a transaction under section 2500.3(b) of this Part. A published notice or other form of guidance may identify other types or classes of persons that will be treated as participants in a New York listed transaction.

(2) New York confidential transactions. A taxpayer has participated in a New York confidential transaction if the taxpayer's tax return reflects a tax benefit from the transaction and the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in section 2500.3(c) of this Part. If a partnership's, S corporation's or trust's disclosure is limited, and the partner's, shareholder's, or beneficiary's disclosure is not limited, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the New York confidential transaction.

(3) New York transactions with contractual protection. A taxpayer has participated in a New York transaction with contractual protection if the taxpayer's tax return reflects a tax benefit from the transaction and, as described in section 2500.3 (d) of this Part, the taxpayer has the right to the full or partial refund of fees or the fees are contingent. If a partnership, S corporation, or trust has the right to a full or partial refund of fees or has a contingent fee arrangement, and the partner, shareholder, or beneficiary does not individually have the

right to the refund of fees or a contingent fee arrangement, then the partnership, S corporation, or trust, and not the partner, shareholder, or beneficiary, has participated in the New York transaction with contractual protection.

(4) Shareholder of foreign corporation. A taxpayer who owns or controls, either directly or indirectly, more than 50% of the voting stock of a corporation not subject to New York State tax is deemed to participate in a transaction described in subdivisions (b), (c) and (d) of section 2500.3 of this Part if such corporation would be considered to participate in the transaction under the rules of section 2500.4(b) of this Part if it were a taxpayer filing a tax return that reflects the items from the transaction.

(5) Examples. The following examples illustrate the provisions of this subdivision:

(i) Example of participation in a New York confidential transaction. XYZ is a limited liability company treated as a partnership for New York State tax purposes and is required to file a tax return under article 22 of the Tax Law. X, Y, and Z are members of XYZ and are taxpayers for New York State purposes. X is an individual, Y is an S corporation, and Z is a partnership. XYZ enters into a New York confidential transaction under section 2500.3(c) of this Part. X is bound by the confidentiality agreement, but Y and Z are not bound by the agreement. As a result of the transaction, XYZ, X, Y, and Z all reflect a tax benefit on their tax returns. Both XYZ's and X's disclosure of the tax treatment and tax structure are limited in the manner described in section 2500.3(c) of this Part and their tax returns reflect a tax benefit from the transaction. Therefore, XYZ and X have participated in the New York confidential transaction. Neither Y nor Z has participated in the New York confidential transaction because they are not subject to the confidentiality agreement.

(ii) Example of participation in a New York transaction with contractual protection. Corporation A is required to file a return under article 9-A of the Tax Law. Corporation A enters into a New York transaction with contractual protection under section 2500.3(d) of this Part. Corporation A is bound by the terms of the agreement which outlines potential tax consequences that may result from participation in the transaction, and

includes a contingent fee arrangement based on Corporation A's realization of tax benefits. Corporation A has participated in the New York transaction with contractual protection because its tax return reflects a tax benefit from the transaction and the fee was contingent upon the tax benefit realized from the transaction. Therefore, Corporation A has participated in a New York transaction with contractual protection.

(c) "Substantially similar". The term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax consequences and that 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.

(d) "Tax". The term "tax" means franchise and excise taxes and the tax on furnishing of utility services under 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.

(e) "Tax benefit". A "tax benefit" includes deductions, exclusions, and modifications included in gross receipts, gross earnings, income (including entire net income, gross income, New York source income, New York adjusted gross 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 a taxpayer's New York State's tax liability by affecting the amount, timing, character, or source of any such item, amount or activity.

(f) "Tax return". For purposes of this Part, the term "tax return" includes original returns or reports, amended returns or reports and applications for credit or refund of tax.

(g) "Tax treatment". The "tax treatment" of a transaction is the purported or claimed New York State tax treatment of the transaction.

(h) “Tax structure”. The “tax structure” of a transaction is any fact that may be relevant to understanding the purported or claimed New York State tax treatment of the transaction.

Section 2500.5 Form, timing, and content of disclosure of New York reportable transactions. (Tax Law, section 25(a)(2) and (e))

(a) A taxpayer subject to disclosure as required by Tax Law section 25(a)(2) is required to report such disclosure on the forms and in the manner prescribed by the commissioner.

(b) If a transaction becomes a New York listed transaction after the filing of a taxpayer's 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 a taxpayer must disclose the New York listed transaction on the forms and in the manner prescribed by commissioner with the tax return next filed after the date the transaction is listed regardless of whether the taxpayer participated in the transaction in that tax year.

(c) The disclosure and filing requirements of this Part are in addition to any other disclosure or filing requirements, general or specific, provided by law.

Section 2500.6 Determinations and protective disclosures for New York reportable transactions. (a) A taxpayer may, on or before the date that disclosure would otherwise be required under this Part, submit a request to the Department of Taxation and Finance for a determination as to whether a transaction is subject to the disclosure requirements of this Part. The request for a determination shall be submitted to the address designated by the department for such purpose. If the request fully discloses all relevant facts relating to the transaction, the potential obligation of that taxpayer to disclose the transaction will be suspended during the period that the determination request is pending and, if the department subsequently concludes that the

transaction is a New York reportable transaction subject to disclosure under this Part, until the 60th day after the issuance of the determination (or, if the request is withdrawn, 60 days after the date that the request is withdrawn). Furthermore, in the determination, the commissioner may determine that the submission satisfies the disclosure rules under this Part for that particular transaction or type of transaction.

(b) Protective disclosures. If a taxpayer is uncertain whether a transaction must be disclosed under this Part, the taxpayer may disclose the transaction in accordance with the requirements of this Part, and indicate on the appropriate forms that the taxpayer is uncertain whether the transaction is required to be disclosed under this Part and that the disclosure is being filed on a protective basis.

(c) Determination on the merits of a transaction. If a taxpayer requests a determination on the merits of a specific New York reportable transaction on or before the date that disclosure would otherwise be required under this Part, and receives a favorable determination as to the transaction, the disclosure rules under this Part will be deemed to have been satisfied by that taxpayer with regard to that transaction, so long as the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this Part.

Section 2500.7 (Tax Law section 25(d) and (e)) Retention of documents for New York reportable transactions. (a) Every taxpayer required to disclose a New York reportable transaction as required under section 2500.2 must retain a copy of all relevant documents related to such transaction in accordance with section 25(d) of the Tax Law.

(b) A taxpayer must retain all documents 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; and must make such information available for inspection by the commissioner in connection with any examination.

(c) The retention requirements of this Part are in addition to any other retention requirements, general or specific, provided by law.

Section 2. This regulation is effective upon publication of the notice of adoption in the “State Register” and shall be applicable to taxable years beginning on or after January 1, 2006.

Dated: Albany, New York
October 10, 2006

Barbara G. Billet
Executive Deputy Commissioner of Taxation
and Finance