

REGULATORY IMPACT STATEMENT

DEPARTMENT OF TAXATION AND FINANCE

1. Statutory authority: Tax Law, sections 171, subdivision First; 697(a); and 605(b)(1). Section 171, Subdivision First authorizes the Commissioner to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and performance of the Commissioner's duties. Section 697(a) authorizes the Commissioner to adopt regulations relating specifically to the personal income tax. Section 605(b)(1) provides that an individual who is not domiciled in New York is considered a resident if the individual maintains a permanent place of abode in the State and spends more than 183 days of the taxable year in the State.

2. Legislative objectives: This rule is being proposed pursuant to this authority to exclude dwelling places maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode under 20 NYCRR 105.20(e)(1).

3. Needs and benefits: The purpose of these amendments is to exclude places of abode maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education from the definition of permanent place of abode for purposes of determining residency status for personal income tax purposes. A dwelling, such as a traditional dormitory room that does not contain basic facilities, such as those for cooking or bathing, is currently not deemed a permanent place of abode for residency purposes under 20 NYCRR 105.20(e)(1).

In 2008, the regulations were amended to eliminate the "temporary stay" concept from the definition of "permanent place of abode". Prior to the 2008 amendment, a place of abode was not considered permanent under section 105.20(e)(1) if it was maintained only during a temporary stay for the accomplishment of a

particular purpose. Both a “particular purpose” and “fixed and limited period” test had to be satisfied in order for a stay to be considered temporary. Removing the temporary stay concept from the regulations rendered many college students previously not taxed as residents subject to personal income tax as statutory residents. Students living in traditional dormitories have not been taxed as statutory residents because dormitories lack the facilities to be deemed permanent places of abode under the regulations. This creates artificial distinctions among students who may or may not have the option of choosing between living in a dormitory and living elsewhere.

The Department conducts regular taxpayer outreach programs to assist taxpayers in complying with the Tax Law, and works with New York State colleges and universities to present programs directed toward their students. In the course of these outreach efforts, it became apparent that students were being required to determine their residency status for personal income tax based on subtle distinctions among housing situations.

Undergraduate student housing has evolved so that fine distinctions would have to be made between traditional dormitory housing and other styles of student residence to determine residency for personal income tax purposes. Moreover, students do not always have the option of choosing to live in a dormitory, depending upon the housing situation at a particular institution. These amendments would resolve these issues.

4. Costs:

(a) Costs to regulated parties: The rule does not impose any new compliance costs on the regulated parties, who will continue to be required to file a New York State income tax return as either residents or nonresidents, or be relieved of the obligation to file altogether. The rule may have an impact on the personal income tax liability and reporting responsibilities of particular taxpayers. The impact will depend on the particular circumstances of the taxpayer. Some undergraduate students currently taxed as residents as a result of the 2008 amendments will now be considered nonresidents. Treatment as a nonresident could result in a reduction of tax liability, because unearned income would generally not be considered New York source

income. On the other hand, some who are currently eligible to claim the New York State college tuition credit as residents will not be able to do so because the credit is not available to nonresidents. Additionally, some students currently required to file a New York State income tax return will no longer need to do so.

(b) Costs to the agency and to the State and local governments: It is estimated that the implementation and continued administration of this rule will not impose any compliance costs upon this agency, New York State or its local governments. It is estimated that the implementation and continued administration of the proposed rule will result in a revenue gain to the State of \$375,000 in State fiscal year (SFY) 2009-10 and \$1.5 million annually in subsequent fiscal years and a \$500,000 revenue loss to New York City in SFY 2009-10 and \$2 million annually in subsequent fiscal years. In context, last year's amendments were estimated to result in an annual gain to New York City of \$30 million.

Data for 2006 obtained from the New York State Department of Education's (NYSED) Office of Higher Education were used to estimate the number of foreign and out-of-state students required to file New York State resident income tax returns under current law. This number was adjusted to reflect the fact that students in their freshman and senior years are unlikely to be considered statutory residents under 20 NYCRR 105.20(a)(2), because they likely will not maintain a permanent place of abode for substantially all of the taxable year, generally interpreted by the Department to be eleven months. After further adjusting to account for those students living in college provided housing in traditional dormitories, based on the percentage of students living in such dormitories at the State University of New York at Buffalo, it was estimated that the total number of foreign and out-of-state undergraduates potentially considered statutory residents under current regulations is approximately 47,250.

An estimate of \$750 in unearned income was approximated using 2006 personal income tax data for those claiming college tuition credit. This value was multiplied by the 47,250 undergraduates to arrive at an estimate of approximately \$35.4 million in unearned income attributable to this student population. This total

unearned income amount was then multiplied by an effective tax rate of 5.1 percent to arrive at a potential revenue gain of \$2 million.

Since these students are considered statutory residents for taxation purposes, they may be eligible to claim the New York State college tuition credit allowed for undergraduate college tuition expenses paid by New York residents on behalf of themselves, their spouses, or dependents. The credit equals 4 percent of expenses, up to a maximum of \$10,000 of expenses per student. Taking into consideration the large percentage of foreign students whose tuition and expenses are paid by their home country, the average credit received was assumed to be \$300.

An adjustment was made to reduce the number of students claiming the credit by 50 percent, to take into account a number of factors, including the incidence of high income nonresident taxpayers taking the college tuition itemized deduction; that some students whose nonresident parents work in New York and claim the student as a dependent are not eligible to claim the credit; the effect of treaty agreements with the United States; and the fact that many students may not be aware of the credit. Multiplying the average credit amount of \$300 times the number of foreign and out-of-state students claiming the credit results in an estimated revenue loss of approximately \$3.5 million.

Combining the estimated revenue gain from tax related to unearned income of these students with the estimated revenue loss from these same students claiming the college tuition credit yields a revenue loss to the State of approximately \$1.5 million annually under the existing regulation. Therefore, instituting this proposed rule would save New York State approximately \$1.5 million per year. Assuming these amendments apply to tax years ending on or after December 31, 2009, and that 25 percent of the fiscal impact is realized in the first year, the proposed rule would increase revenues by \$375,000 in SFY 2009-10 and \$1.5 million annually in subsequent fiscal years.

A similar procedure was followed in estimating potential revenue gain or loss to New York City from these amendments. New York City does not tax nonresidents' income (earned or unearned) and has no City college tuition credit. As a result, the rule would lose revenue at the city level while raising revenue at the State level. There is no specific data concerning the number of foreign and out-of-state full-time undergraduate students attending a college or university in New York City. However, data from NYSED provides a detailed distribution of each category of students (full-time, part-time, graduate, 4-year university, 2-year college, etc.) of all colleges and universities in New York State by county. Dissecting the data by county shows that in 2008 approximately 40 percent of all full-time undergraduate students attending four year colleges or universities did so in New York City.

Applying the same assumption as on the State level, of the students being nonresidents for their first and last years, and increasing the 30 percent living in dorms to 50 percent (to take into account the housing policies of certain universities within the City) results in an estimated 13,500 foreign or out-of-state undergraduates in New York City now considered statutory residents. The average taxable income of these students is assumed to be \$10,000 per year. This figure is backed up by the fact that Census data show that 15 percent of full-time students work full-time; consequently, most college students do not work or work part-time, and distributional analysis of those who claim the college tuition credit shows that the majority have New York adjusted gross income below \$30,000. An effective New York City tax rate of 1.6 percent was applied to the estimated taxable income of foreign and out-of-state students going to school in New York City. The result is a potential revenue gain of over \$2 million annually under the existing regulation. Thus, the proposed rule would result in approximately a \$2 million annual revenue loss to New York City. Assuming these amendments apply to tax years ending on or after December 31, 2009, and that 25 percent of the fiscal impact is realized in the first year, the proposed rule would decrease revenues to New York City by \$500,000 in SFY 2009-10 and \$2 million annually in subsequent fiscal years.

(c) Information and methodology: The methodology employed to estimate the impact of the proposed rule is set forth in detail in the discussion of costs in section four herein. This analysis is based on a review of the rule, on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis, and Office of Budget and Management Analysis, and on data obtained from the Department's records, NYSED, the State University of New York at Buffalo, and the United States Census.

5. Local government mandates: This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties. Certain students may have to file Form IT-203, New York State Nonresident and Part Year Resident income tax return, rather than Form IT-201, Resident Income Tax return. Others will no longer need to file a New York State income tax return.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: The Department considered various alternatives, including inaction, but determined that dwelling places maintained and occupied by full-time undergraduate students pursuing a baccalaureate degree while enrolled at an institution of higher education should be excluded from the definition of permanent place of abode.

The Department considered extending the exclusion to graduate students as well, but considered the fact that graduate students tend to be older, more independent, and more significantly employed than undergraduate students. This is supported by the US Census Bureau's Current Population Survey, which indicates that 64 percent of graduate students are 25 years old or older, while 18 percent are 35 years old or older. The National Center for Education Statistics' 2008 Survey of Graduate Students indicates that graduate students earn an

average of approximately \$33,500. The study also shows that 50 percent of graduate students are married, have dependents, or both. Further, approximately 50 percent of graduate students own a home or pay a mortgage on a home. Statistics maintained by the New York State Department of Education demonstrate that the graduate student population is also much smaller than the undergraduate population, which is approximately 70 percent larger than the graduate student population. In short, the purpose of avoiding the confusion inherent in making fine distinctions among substantially similar on-campus housing and off-campus housing is not served by extending the exclusion to graduate students. In the Department's view, limiting the exclusion to undergraduate students provides a logical, easily understood and administered point at which to delimit the exclusion.

The Department considered excluding only those places of abode provided by the institution to such students, but concluded that that approach would not resolve the problem of making fine distinctions among students, given the evolution of institution-provided student housing and the fact that some students do not have the option of living in institution-provided housing.

The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. The Department also notified the New York City Department of Finance.

The New York State Bar Association Tax Section submitted comments. The Bar Association reiterated the position expressed in its comments on the 2008 amendments, to the effect that the temporary stay rule should not have been eliminated. (For the reasons articulated in the Department's Assessment of Public

Comment at the time, the 2008 amendments were adopted over this objection.) The Bar Association also noted that this rule seems to be a return to the temporary stay concept for certain taxpayers. Notwithstanding these concerns, the Bar Association stated that the exclusion from the definition of permanent place of abode should be available to all full-time students, including graduate students. A certified public accountant also made a similar comment. The State University of New York at Buffalo also expressed concern regarding the limitation of the exclusion to undergraduate students. As discussed above, the Department did not extend the exclusion to graduate students. In a similar vein, the Bar Association recommended that the definition of full-time students contained in the amendments be changed to reduce the number of semesters a student must be enrolled at an institution of higher education during the taxable year from two semesters to one. The Department considered this alternative and concluded that the exclusion should be limited.

The Bar Association also voiced concern that the amendments change the basic terminology of section 105.20(e)(1) by focusing on the nature of the place of abode in determining permanency. The Department found this argument unpersuasive, inasmuch as the regulations clearly refer to the nature of a dwelling in defining permanent place of abode. Section 105.20(e)(1) states that “a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.” The language of the current regulation clearly links permanency to the nature of the abode, rather than the period over which it is maintained. Section 105.20(a)(2) defines a resident individual as one who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year and spends in the aggregate more than 183 days of the taxable year in New York State. The temporal requirements for residency are separate from the requirement that an individual must maintain a permanent place of abode in New York State to be considered a resident. Whether a dwelling is permanent or not hinges on its suitability for habitation on a permanent basis.

The Bar Association also suggested that the Department make clear that the amendments do not require that the student's dwelling be provided by the institution of higher education to be considered non-permanent, and that a student domiciled in New York State would continue to be considered a resident whether or not enrolled at an institution of higher education in the State. We do not believe these changes are necessary.

In addition, the Department solicited comment from the following educational institutions: University of Rochester; Rensselaer Polytechnic Institute; Syracuse University; State University of New York at Albany; State University of New York at Buffalo; New York University; State University of New York at Stonybrook; and Columbia College. Two of the institutions that responded with comments both supported the rule, expressing the view that it would make a positive change. The views of the remaining institution submitting comments are discussed above.

9. Federal standards: This rule does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: These amendments will take effect when the Notice of Adoption is published in the State Register, and apply to taxable years ending on or after December 31, 2009.