

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

Pursuant to the authority contained in subdivisions First, Fifteenth, and Eighteenth-a of section 171 and subsection (a) of section 1096 of the Tax Law and Chapter 469 of the Laws of 2011, the Commissioner of Taxation and Finance hereby proposes to make and adopt the following amendments to the Business Corporation Franchise Tax Regulations, as published in Subchapter A of Chapter I of Title 20 and the Compromises Regulations, as published in Chapter XIII of Title 20, of the Official Compilation of Codes, Rules and Regulations of the State of New York:

Section 1. Section 7-4.5 is REPEALED.

Section 2. Subdivision (a) of section 5000.1 is amended to read as follows:

(a) The Commissioner of Taxation and Finance, or such person as may be designated by the commissioner, may compromise any civil liability arising [under the Tax Law, a law enacted pursuant to the authority of the Tax Law] from a tax or other imposition which is administered by the [Department of Taxation and Finance, or a law enacted pursuant to the authority of article 2-E of the General City Law,] commissioner prior to the time the tax, other imposition or administrative action becomes finally and irrevocably fixed and is no longer subject to administrative review. The Attorney General may compromise any such liability after reference of a case to the Department of Law for prosecution or defense, but prior to the time the tax, other imposition or the administrative action taken by the [Department of Taxation and Finance] commissioner is no longer subject to judicial review. Any such liability may be compromised only upon one or both of the

following two grounds:

(1) doubt as to liability; or

(2) doubt as to collectibility or where collection in full would cause an individual taxpayer undue economic hardship (see paragraph (b)(3) of section 5005.1 of this Chapter for information on undue economic hardship).

Section 3. A new subdivision (c) of section 5000.1 is added to read as follows:

(c) An offer in compromise will not be accepted for any reason where acceptance of such an offer would undermine voluntary compliance with taxes or other impositions administered by the commissioner or would not be in the best interests of the State. Factors indicating that an offer would undermine voluntary compliance or would not be in the best interests of the State may include a taxpayer's overall history of noncompliance, a taxpayer's deliberate actions to evade payment, and a taxpayer's encouragement of others to refuse to comply with the tax laws.

Section 4. Subdivisions (a), (d) and (f) of section 5000.3 are amended to read as follows:

(a) "Form of offers." An offer in compromise shall be filed on the forms prescribed by the Commissioner of Taxation and Finance. The forms are available from the [Commissioner of Taxation and Finance, or from such person as may be designated by the commissioner, upon request. An offer in compromise should generally be accompanied by a remittance representing the amount of the compromise offer or a deposit if the offer provides for future installment payments] department or on the department's Web site. The compromise offer must be in addition to the total amounts previously paid, or collected, against the [tax] liability being compromised, if any. If the final payment on an accepted offer is contingent upon the immediate or simultaneous release of a tax lien in whole or in part, such payment must be [in cash, or] remitted by means, acceptable to the Department of Taxation and Finance, that assures unconditional and final payment, such as

certified check, bank check or postal money order.

(d) "Withdrawal or rejection." An offer in compromise may be withdrawn by the taxpayer making the offer at any time prior to its acceptance. In the event an offer is rejected, the taxpayer making the offer shall be promptly notified in writing. Frivolous offers or offers filed for the purpose of delaying the collection of [tax] liabilities shall be immediately rejected. [If an offer in compromise is withdrawn or rejected, the amount tendered with the offer, including all installments paid, shall be refunded without interest, unless the taxpayer has stated or agreed that the amount tendered may be applied to the liability with respect to which the offer was filed.]

(f) "Limitation on number of offers." [A] Generally, a taxpayer may only make one offer in compromise regarding a particular [tax] liability for a particular taxable period under subdivision eighteenth-a. [whether or not such offer is accepted or rejected.]

Section 5. Section 5000.4 is amended to read as follows:

Section 5000.4 Record.

Unless the unpaid amount of tax or other imposition which was the subject of the administrative action, including any interest, additions to the tax or penalty, is less than [\$25,000] \$50,000, if an offer in compromise is accepted, there shall be placed on file in the office of the [Commissioner of Taxation and Finance] commissioner the opinion of the counsel for the Department of Taxation and Finance with respect to such compromise, with the reasons [therefore] therefor. The opinion shall include a statement of:

(a) the amount of tax or other imposition and any other issues which may be subject of such compromise;

(b) the amount of interest, additions to the tax, or penalties imposed on the taxpayer or other person against whom the administrative action was taken by the Department of Taxation and Finance; and

(c) the amount actually paid or required to be paid in accordance with the terms of the compromise.

Section 6. Paragraph (2) of subdivision (b) of section 5000.5 is amended to read as follows:

(2) An offer in compromise based on doubt as to collectibility requires a showing that the taxpayer has been discharged in bankruptcy, [or] is insolvent, or that collection in full would cause an individual taxpayer undue economic hardship. A statement of financial condition and other information (Form DTF-5) is required in all offer-in-compromise cases based on the taxpayer's inability to pay the total amount due or that full payment will cause undue economic hardship, regardless of the type of tax or amount of liability involved. [An acceptable offer must reflect all that can be collected from a taxpayer's income, present or prospective,] The amount acceptable in compromise must reasonably reflect collection potential (reasonable collection potential) or otherwise be justified by proof offered by the taxpayer. Reasonable collection potential is based on the total realizable value of the taxpayer's assets and the amount that could reasonably be expected to be collected from the taxpayer's anticipated future income, after giving effect to all priorities granted to New York State and applicable statutes of limitations on collections. [In any case involving a large liability and a nominal offer, additional consideration is required for the acceptance of offers based in whole or in part on inability to pay. The additional consideration required is dependent upon the facts in the particular case, but generally is provided for by the submission of collateral] (i) The realizable value of the taxpayer's assets is the amount that could reasonably be expected from the sale of the assets within 90 days or less (quick sale value) minus any amount owed to a secured creditor with priority over the department's interest. Assets such as real property, personal and business assets, and vehicles will generally be valued at 80% of fair market value to determine the quick sale value.

(ii) Generally, anticipated future income is calculated over the remainder of the collection period, but no less than a period of 5 years and no more than a period of ten years, unless there are circumstances indicating

that a significant recovery can reasonably be expected if a longer period is used. Other circumstances, including the age of taxpayer, the age of the liability, and the best interests of the State are also considered. Collateral agreements, such as agreements pertaining to payments from future income may also be required based on the facts in a particular case.

Section 7. Subdivision (a) of section 5005.1 is amended to read as follows:

(a) "General." Section 171, subdivision fifteenth of the Tax Law allows for offers in compromise for any taxes or other impositions or any warrant or judgment of taxes or other impositions administered by the Commissioner of Taxation and Finance. The provisions of section 171, subdivision fifteenth and this Part apply to any tax or other imposition administered by the commissioner. Under section 171 subdivision fifteenth, an offer in compromise may only be made where the [tax] liability has been finally fixed and where the taxpayer has exhausted the taxpayer's protest rights.

Section 8. Paragraph (1) of subdivision (b) of section 5005.1 is amended to read as follows:

(1) A compromise under this section may [only] be made where the taxpayer has been discharged in bankruptcy or is shown[,] by proof[,] to be insolvent, or where an individual taxpayer shows by proof that collection in full would cause the taxpayer undue economic hardship. The amount acceptable in compromise [cannot be less than the amount the Department of Taxation and Finance could collect through legal proceedings. An offer cannot be accepted because of hardship or any other issue which does not have a direct bearing on the department's legal ability to collect from the taxpayer] must reasonably reflect collection potential or be otherwise justified by proof offered by the taxpayer. In the case of trust tax liabilities ("e.g.", withholding or sales, but not use, taxes), an amount less than the tax, exclusive of penalties and interest, would not normally be acceptable. If, however, upon consideration of all factors, it is apparent that accepting an offer would be in the best interests of all parties, an offer may be accepted for an amount less than the tax as long as

the amount offered reasonably reflects collection potential. In addition, with respect to trust tax liabilities, a responsible person of the taxpayer may make an offer to compromise such person's liability. A separate appraisal will be made of the ability of such responsible person to pay in determining if an individual offer should be accepted. Acceptance of an offer from one responsible person with respect to trust tax liabilities will not relieve any remaining responsible persons - nor the entity itself - from any outstanding balance due on the total liability.

Section 9. Paragraph (3) of subdivision (b) of section 5005.1 is renumbered to be paragraph 4 and a new paragraph 3 is added to read as follows:

(3) Undue economic hardship.

(i) Undue economic hardship occurs when a taxpayer is unable to pay reasonable basic living expenses.

The determination of a reasonable amount for basic living expenses will be made by the department and will vary according to the unique circumstances of the individual taxpayer. The inability to maintain an affluent or luxurious lifestyle does not constitute undue economic hardship. Because economic hardship is the inability to meet reasonable basic living expenses, it applies only to individuals, including sole proprietorship entities. Undue economic hardship does not apply to corporations or other non-individual entities. The taxpayer's financial information and special circumstances will be examined.

(ii) Financial information. The taxpayer's income and basic living expenses must be considered to determine if the taxpayer qualifies for an offer in compromise due to undue economic hardship.

("a") Basic living expenses are those expenses that provide for the health, welfare, production of income of the taxpayer and the taxpayer's family. The department will look to national and local standard expense amounts used by the Internal Revenue Service as a guideline to provide accuracy and consistency in determining a taxpayer's basic living expenses.

(“b”) Expenses that are not generally allowed as necessary living expenses unless the taxpayer can show that the expenses are necessary for the health and welfare of the taxpayer or the taxpayer’s family or for the production of income include but are not limited to:

- (“1”) tuition for private schools;
- (“2”) public or private college expenses;
- (“3”) charitable contributions;
- (“4”) voluntary retirement contributions;
- (“5”) payments on unsecured debt, such as credit cards; or
- (“6”) other similar expenses.

(iii) Other factors. In addition to the basic living expenses, other factors are considered that can impact a taxpayer’s financial condition, including:

- (“a”) taxpayer’s age and employment status and history, and the taxpayer’s ability to earn;
- (“b”) number, age and health of dependents;
- (“c”) cost of living where the taxpayer resides;
- (“d”) extraordinary circumstances such as special educational expenses, a medical catastrophe or a natural disaster;
- (“e”) any other fact that the taxpayer claims bears on economic hardship.

(iv) Factors that support an undue economic hardship determination may include:

- (“a”) The taxpayer is incapable of earning a living because of a long term illness, medical condition or disability, and it is reasonably foreseeable that the taxpayer’s financial resources will be exhausted providing for care and support during the course of the condition.

(“b”) The taxpayer has a set monthly income and no other means of support and the income is exhausted providing for the care of dependents.

(“c”) The taxpayer has assets, but is unable to borrow against equity in assets, and liquidation to pay the outstanding liability would render the taxpayer unable to meet basic living expenses.

Section 10. Newly renumbered paragraph (4) of subdivision (b) of section 5005.1 is amended to read as follows:

(4) [As provided in paragraph (1) of this subdivision, the amount to be offered in compromise must equal or exceed the amount the department would be able to collect, over a period of time, through legal proceedings. Therefore, when] (i) Reasonable collection potential is based on the total realizable value of the taxpayer’s assets and the amount that could reasonably be expected to be collected from the taxpayer’s anticipated future income, after giving effect to all priorities granted to New York State and applicable statutes of limitations on collections.

(“a”) The realizable value of the taxpayer’s assets is the amount that could reasonably be expected from the sale of the assets within 90 days or less (quick sale value) minus any amount owed to a secured creditor with priority over the department’s interest. Assets such as real property, personal and business assets, and vehicles will generally be valued at 80% of fair market value to determine the quick sale value.

(“b”) Generally, anticipated future income is calculated over the remainder of the collection period, but no less than a period of 5 years and no more than a period of ten years, unless there are circumstances indicating that a significant recovery can reasonably be expected if a longer period is used. Other circumstances, including the age of taxpayer, the age of the liability, and the best interests of the State are also considered. In addition, collateral agreements, such as agreements pertaining to payments from future income, may also be required based on the facts in a particular case.

(ii) When evaluating an offer in compromise, the department will consider the legal collection proceedings available to it. Under the Tax Law, where a taxpayer has failed to pay the taxpayer's outstanding [tax] liabilities, the department may file a tax warrant against the taxpayer with the Department of State and in the appropriate County Clerk's Office. A filed tax warrant is entered in the judgment docket and secures the State of New York as a lienholder of the taxpayer's personal and real property, and empowers the department to use the collection procedures set forth in article 52 of the Civil Practice Law and Rules relating to enforcement of money judgments. These collection procedures may result in, for example, the seizure and sale of the taxpayer's real and personal property, including but not limited to, seizure of money from the taxpayer's bank accounts and seizure of any motor vehicles which the taxpayer may own, or a levy against money that a third party owes the taxpayer, such as a loan or rent owed to the taxpayer. In addition, the department may issue an income execution against the wages of the taxpayer. Under an income execution, the department generally may take up to 10 percent of the taxpayer's gross wages to satisfy the [tax] liability.

Section 11. A new paragraph (5) of subdivision (b) of section 5005.1 is added to read as follows:

(5) An offer in compromise will not be accepted for any reason where acceptance of such an offer would undermine voluntary compliance with the taxes or other impositions administered by the commissioner or would not be in the best interests of the State. Factors indicating that an offer would undermine voluntary compliance or would not be in the best interests of the State may include a taxpayer's overall history of noncompliance, a taxpayer's deliberate actions to evade payment, and a taxpayer's encouragement of others to refuse to comply with the tax laws.

Section 12. Paragraphs (1) and (4) of subdivision (c) of section 5005.1 are amended to read as follows:

(1) An offer in compromise must be filed on forms prescribed by the Commissioner of Taxation and Finance for such purpose at the address prescribed in the forms. The forms are available from the

[Commissioner of Taxation and Finance, or from such person as may be designated by the commissioner, upon request. An offer in compromise should generally be accompanied by a remittance representing the amount of the compromise offer or a deposit if the offer provides for future installments (see paragraph (d)(2) of this section)] department or on the department's Web site. The compromise offer must be in addition to the total amounts previously paid, or collected, against the [tax] liability being compromised, if any. If the final payment on an accepted offer is contingent upon the immediate or simultaneous release of a tax lien in whole or in part, such payment must be [in cash, or] remitted by means, acceptable to the Department of Taxation and Finance, that assures unconditional and final payment, such as certified check, bank check or postal money order. [(See paragraph (e) (3) of this section for refund of remittance where an offer in compromise is not accepted.)]

(4) The taxpayer must make a good faith offer. Generally, taking into account the reason for denial, once an offer has been denied, another offer may be reconsidered only upon a showing of a material change in circumstances or if there is a meaningful increase in the offer. Additionally, the department may reconsider an offer that was previously denied due to a misinterpretation or a misunderstanding on the part of the department of the information contained in such offer. The [Tax Compliance Division] department will work, to the extent possible, with the taxpayer to try to effectuate a compromise likely to be accepted by the commissioner.

Section 13. Clauses (a) and (e) of subparagraph (i) of paragraph (2) of subdivision (e) of section 5005.1 are amended to read as follows:

("a") failure to meet the statutory requirements (e.g., the taxpayer has not been discharged in bankruptcy, [or] is not insolvent, or does not show by proof that collection in full would cause the individual taxpayer undue economic hardship and/or the [department can collect more through legal proceedings than the amount being offered in compromise] amount acceptable in compromise does not reasonably reflect collection potential or is not otherwise justified by proof offered by the taxpayer);

(“e”) where there is evidence of conveyance of assets for less than fair market value after the taxpayer has knowledge of the liability;

Section 14. Paragraph (3) of subdivision (e) of section 5005.1 is amended to read as follows:

(3) Receiving acceptance of an offer in compromise is a privilege, not a right, available to financially distressed taxpayers in order to put overwhelming [tax] liabilities behind them. In the event an offer is rejected, the taxpayer making the offer shall be promptly notified in writing. [If an offer in compromise is withdrawn or rejected, the amount tendered with the offer shall be refunded without interest, unless the taxpayer has stated or agreed that the amount tendered may be applied to the liability with respect to which the offer was filed.]

Dated: Albany, New York
September 9, 2013

Thomas H. Mattox
Commissioner of Taxation and Finance