This draft contains updates to Parts 1 through 3 of the Article 9-A regulations (*previously posted April 2021*). While there are minor editorial and consistency edits made to these rules, the more notable changes are outlined below by topic.

Nexus

- As the corporate partner draft regulation proposes a modified separate accounting election, this draft reverts to the existing nexus standards for certain limited partners.
- New provisions, largely modeled after the MTC model statute, are added to address PL 86-272 and activities conducted via the internet.
- Nexus provisions are re-organized into additional sections.

Losses

- UNOL example #5 has been updated.
- A new NOL example #9 has been added.
- Given the size of the loss examples, the SAPA rules require that the examples are no longer embedded in the draft regulation but instead are separate appendix documents.

As the Department would like to begin the formal regulation adoption process this year, we strongly encourage feedback on necessary changes being submitted in the near future so the Department has time to consider changes before regulations are proposed.

Parts 1 through 3 of title 20 NYCRR are repealed and new Parts 1 through 3 are added as follows:

PART 1

IMPOSITION OF TAX

SUBPART 1-1

DEFINITIONS

Sec.

1-1.15 Taxable year

1-1.16 Taxpayer

Section 1-1.1 General. (Tax Law, section 208(9)). Any term used in this Subchapter shall, unless a different meaning is clearly required, presumably have the same meaning as when used in a comparable context in:

(a) the laws of the United States relating to Federal income taxes and the Federal tax regulations promulgated thereunder;

(b) Tax Law article 1 and the regulations promulgated thereunder;

(c) Tax Law article 9-A and the regulations promulgated thereunder; or

(d) Tax Law article 27 and the regulations promulgated thereunder.

Any reference in this Subchapter to the laws of the United States shall mean the provisions of the Internal Revenue Code (IRC) and other provisions of the laws of the United States relating to Federal income taxes, as the same are effective for the taxable year. Any reference to Federal regulations shall mean the provisions of Title 26 of the Code of Federal Regulations (CFR), relating to Federal income taxes, as the same are effective for the taxable year. Any reference to article 1, article 9, article 9-A, article 22, article 27 or article 33 is a reference to those articles of the Tax Law. Any reference to a section of law that is not described as a section of a specific law is a reference to a section of the Tax Law.

Section 1-1.2 Commissioner of Taxation and Finance. (Tax Law section 2(1)). The term "commissioner" means the Commissioner of Taxation and Finance or the commissioner's delegate unless the text clearly requires a different meaning.

Section 1-1.3 Corporation. (Tax Law, sections 208(1) and 209(2-a)). (a) The term "corporation" means an entity created as such under the laws of the United States, any state,

territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, which provides a medium for the conducting of business and the sharing of its gains. An entity conducted as a corporation is deemed to be a corporation. The term "corporation" includes:

(1) a domestic international sales corporation (DISC), as defined in IRC section 992(a);

(2) a limited liability company or other business entity classified as a corporation for Federal income tax purposes, except where otherwise provided; and

(3) (i) an association, within the meaning of IRC section 7701(a)(3), a joint stock company or association, a publicly traded partnership treated as a corporation pursuant to IRC section 7704 and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument.

(ii) The terms" joint stock company" and "association" include every unincorporated joint stock association, joint stock company or enterprise having written articles of association and capital stock divided into shares. The term "association" includes a joint stock association.

(iii) A business conducted by a trustee or trustees in which interest or ownership is evidenced by certificate or other written instrument includes, but is not limited to, an association commonly referred to as a business trust or Massachusetts trust. In determining whether a trustee or trustees are conducting a business, the form of the agreement is of significance but is not controlling. The actual activities of the trustee or trustees, not their purposes and powers, will be regarded as decisive factors in determining whether a trust is subject to tax under article 9-A. The mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds, does not

constitute the conduct of a business in the case of a business conducted by a trustee or trustees.

(b) There are generally three types of corporations - domestic corporations, foreign corporations, and alien corporations.

(1) The term "domestic corporation" means a corporation incorporated by or under the laws of the state of New York.

(2) The term "foreign corporation" means a corporation that is not a domestic corporation.

(3) The term "alien corporation" means a corporation organized under the laws of a country, or any political subdivision thereof, other than the United States, or organized under the laws of a possession, territory, or commonwealth of the United States. An alien corporation is also considered a foreign corporation.

(c) Unless otherwise specified, whenever the term "corporation" is used in this Subchapter, it references a taxpayer and a non-taxpayer.

Section 1-1.4 Department of Taxation and Finance. (Tax Law section 2(1)). The terms "department", "Tax Department", and "Department of Taxation and Finance" mean the New York State Department of Taxation and Finance unless the text clearly requires a different meaning.

Section 1-1.5. Effectively connected income. The term" effectively connected income" means income, gain, or loss that is effectively connected with the conduct of a trade or business within the United States as determined under IRC section 882 in the case of an alien corporation that under any provision of the IRC is not treated as a domestic corporation as defined in IRC section 7701. It includes income, gain, or loss that is described in section 208(9)(b) and excluded

from Federal taxable income under any provision of Federal law, including under a United States treaty obligation, that would be treated, in the absence of such exclusion, as effectively connected with the conduct of a trade or business within the United States. Income, gain, or loss excluded from Federal taxable income under a United States treaty obligation will be deemed to be treated as effectively connected with the conduct of a trade or business within the United States unless such treaty prohibits state taxation of such income, gain, or loss.

Section 1-1.6 Partnership and partner. (Tax Law section 2(6)).

(a) The term “partnership” shall have the same meaning as set forth in IRC section 761(a) and 26 CFR section 1.761-1(a) whether or not the election provided for therein has been made. Also, the term "partnership" does not include a corporation within the meaning of section 1-1.5 of this Subpart.

(b) The term “partnership”, unless the context requires otherwise, includes a limited liability company or other business entity classified as a partnership for Federal income tax purposes.

(c) The term “partner” shall have the same meaning as set forth in IRC section 761(b) and shall include a member of a limited liability company classified as a partnership for Federal income tax purposes.

Section 1-1.7 Real property. The term “real property” means land, buildings, structures, and improvements thereon. In addition, it includes shares in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold.

Section 1-1.8. Regularly traded. The term “regularly traded,” for purposes of determining whether a REIT is a captive REIT, or whether a RIC is a captive RIC, a REIT or RIC will be deemed to be regularly traded on an established securities market, means that (a):

(1) more than 50% of the REIT's or RIC's voting stock is listed during the taxable year on one or more established securities markets;

(2) trades are made on shares of the REIT's or RIC's voting stock on such market or markets, other than trades made in de minimis quantities, on at least 60 days during the taxable year (or one-sixth of the number of days in a short taxable year); and

(3) the number of shares of the REIT's or RIC's voting stock that are traded on such market or markets during the taxable year comprise at least 10% of the average number of such shares that are outstanding during such taxable year (or, in the case of a short taxable year, a percentage that equals at least 10% of the average number of shares outstanding during the taxable year multiplied by the number of days in the short taxable year, divided by 365).

(b) For purposes of subdivision (a) of this section, the shares of the REIT's or RIC's voting stock that are traded on an established securities market located in the United States will be deemed to meet the requirements of paragraphs (2) and (3) of subdivision (a) of this section, if such shares are regularly quoted by dealers making a market in such stock. A dealer "makes a market" in stock only if the dealer in the ordinary course of a trade or business regularly and actively offers to purchase and sell such stock, and in fact does purchase such stock from, and sell such stock to, customers that are not related corporations as defined in section 6-2.6 of this Subchapter, with respect to the dealer.

(c) The term "regularly traded" does not include trades made between or among related corporations, as defined in section 6-2.6 of this Subchapter.

(d) For purposes of this section, the term "established securities market" means a securities market that meets the requirements of 26 CFR 1.883-2(b).

Section 1-1.9 REIT, captive REIT, and non-captive REIT (Tax Law, sections 2(7) and

2(9)). (a) The term "REIT" means a corporation, trust or association that is a real estate investment trust as defined in IRC section 856(a) and that meets the requirements of IRC section 856(c), as modified, where applicable, by IRC section 965(m)(1)(A).

(b) The term "captive REIT" means a REIT that is not regularly traded on an established securities market and more than 50% of the voting stock of which is owned or controlled, directly or indirectly, by a single entity treated as an association taxable as a corporation under the IRC that is not exempt from Federal income tax and is not a REIT. However, for purposes of this definition, the entities described in paragraphs (a) and (b) of section 2 (9) are not considered to be an association taxable as a corporation.

(c) The term "non-captive REIT" means a REIT that is not a captive REIT.

Section 1-1.10 Report (Tax Law, section 211(1)). Report. The term "report" means a report or return of tax but does not include an estimated tax filing.

Section 1-1.11 RIC, captive RIC, and non-captive RIC. (Tax Law, sections 2(8) and 2(10)). (a) The term "RIC" means a corporation that is a regulated investment company as defined in IRC section 851 that is subject to Federal income tax under IRC section 852.

(b) The term "captive RIC" means a RIC that is not regularly traded on an established securities market and more than 50% of the voting stock of which is owned or controlled directly or indirectly by a single corporation that is not exempt from Federal income tax and is not a RIC. Any voting stock in a RIC that is held in a segregated asset account of a life insurance corporation (as described in IRC section 817) shall not be taken into account for purposed of determining whether a RIC is a captive RIC.

(c) The term "non-captive RIC" means a RIC that is not a captive RIC.

Section 1-1.12 S corporation and QSSS. (Tax Law, sections 208(1-A) and 208(1-B)).

(a) The term “S corporation” means a corporation for which the Federal S election under IRC section 1362 is in effect for the tax year. An S corporation includes a limited liability company that is classified as an S corporation for Federal income tax purposes.

(b) The term “New York S corporation” means an S corporation subject to tax under article 9-A that has made the election under section 660(a), or that has been mandated a New York S corporation under section 660(i).

(c) The term “QSSS” means a corporation that is a qualified subchapter S subsidiary as defined in IRC section 1361(b)(3)(B).

(d) The term “exempt QSSS” means a corporation that is a qualified subchapter S subsidiary exempt from tax under article 9-A.

Section 1-1.13. Stock. (Tax Law, section 208(4))**.** (a) The term “stock” means an interest in a corporation that is treated as equity for Federal income tax purposes. The definition includes corporate equity instruments similar to stocks, such as the following: business trust certificates; units in publicly traded partnerships included in the definition of “corporation” in section 208(1); shares of a RIC; and shares in a REIT.

(b) An interest in a corporation will be deemed to be treated as equity for Federal income tax purposes under this section if such interest would be treated as equity, rather than debt, based upon relevant Federal guidance and court decisions, and upon all surrounding facts and circumstances.

(c) Generally, the determination of the Internal Revenue Service as to whether an instrument is equity will be followed, but such determination is not binding on the commissioner.

Section 1-1.14 Tangible personal property (Tax Law section 208(11)). The term “tangible personal property” means corporeal personal property such as machinery, tools, implements,

goods, wares and merchandise. It includes audio works, audiovisual works, literary works, visual works, graphic works or games, delivered via a physical medium that are not subject to the rules for digital products under section 210-A(4). It does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt.

Section 1-1.15 Taxable year. The term "taxable year" means, in most cases, the taxpayer's taxable year for Federal income tax purposes, or the part thereof during which the taxpayer is subject to the tax imposed by article 9-A. In the case of a report made for a fractional part of the year, taxable year means the period for which the report is made. A taxable year must be a calendar year or a fiscal year ending during a calendar year. A taxable year shall not include more than 12 calendar months except in the case of a 52-53 week period. If a taxpayer does not have a taxable year for Federal income tax purposes, the taxable year must be a calendar year, unless the commissioner authorizes the use of a fiscal year. Any reference in article 9-A or 27 or this Subchapter to the term tax year or taxable period is a reference to taxable year as defined by this section.

Section 1-1.16 Taxpayer. (Tax Law, sections 208(2) and 209(3)).

(a) The term "taxpayer" means any corporation that is subject to the tax imposed by article 9-A.

(b) The term "taxpayer" also includes a receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by state or federal court, who conducts the business of a corporation. For example, a trustee who, under the authority of a federal court, conducts the business of a corporation in bankruptcy is a taxpayer subject to tax. If the activities of the trustee are limited to the liquidation of the business and the disposition of the assets of the corporation, neither the trustee nor the corporation is subject to the franchise tax.

(c) The term "taxpayer" also includes a corporation that continues to do business after it has been dissolved or surrenders its authority to do business in New York, by proclamation or otherwise. A dissolved corporation or a corporation that surrendered its authority to do business in New York is not taxable under article 9-A if its activities are limited to the liquidation of its business and affairs, the disposition of its assets (other than in the regular course of business), and the distribution of the proceeds.

SUBPART 1-2

CORPORATIONS SUBJECT TO TAX

Sec.

Section 1-2.1 Domestic corporations subject to tax. (Tax Law, section 209(1), (8)).

(a) The tax is imposed on every domestic corporation, not specifically exempt as provided in section 1-2.11 of this Subpart, for the privilege of exercising its corporate franchise, that is to say, for the mere possession of the privilege. Accordingly, a domestic corporation is subject to tax for each fiscal or calendar year, or part thereof, during which it is in existence, regardless of whether it does any business, employs any capital, owns or leases any property, maintains any office, derives any receipts from any activity in this state or engages in any activity, within or without New York State. A domestic corporation is subject to tax even though it carries on its business or derives its receipts entirely outside New York State.

Example: A corporation is incorporated under the laws of New York State on July 1, 2015. It begins to do business on February 1, 2016, setting up its books on the basis of a calendar year. The corporation is subject to tax from July 1, 2015 to December 31, 2015, since it had the privilege of exercising its corporate franchise for that period. It is also subject to tax for the period beginning January 1, 2016.

(b)(1) A domestic corporation that is no longer doing business, employing capital, owning or leasing property in a corporate or organized capacity, or deriving receipts from activity in this state is exempt from the fixed dollar minimum tax for tax years following its final tax year, provided that the corporation:

(i) is not doing business in New York State;

(ii) is not employing capital in New York State;

(iii) does not own or lease property in New York State in a corporate or organized capacity;

(iv) does not derive receipts from activity in New York State;

(v) does not have any outstanding article 9-A franchise taxes for its final tax year or any prior tax year; and

(vi) has filed its final article 9-A franchise tax return.

(2) A domestic corporation that meets the requirements of paragraph (1) of this subdivision:

(i) will no longer need to file any additional article 9-A franchise tax returns for taxable years or periods occurring after the period covered by its final article 9-A tax return; and

(ii) after filing its final article 9-A tax return, may seek consent to be dissolved.

(3) A domestic corporation that meets the requirements of paragraph (1) of this subdivision but does not seek consent to be dissolved under subparagraph (ii) of paragraph (2) of this subdivision will be subject to dissolution by proclamation after it has not filed article 9-A franchise tax returns for at least two years.

(4) A domestic corporation that does not meet the requirements of paragraph (1) of this subdivision and that ceases to file article 9-A franchise tax returns:

(i) will not qualify for the exemption from the fixed dollar minimum tax; and

(ii) may be issued assessments, including penalties and interest for failure to file an article 9-A franchise tax return or to pay the article 9-A franchise tax, or for failure to do both.

(5) A domestic corporation that is no longer doing business, employing capital, owning or leasing property in a corporate or organized capacity, or deriving receipts from activity in this state, as described in paragraph (1) of this subdivision, but that wishes to retain its certificate of

incorporation must:

(i) continue to file article 9-A franchise tax returns;

(ii) continue to pay all applicable tax; and

(iii) not file a final return, that is, not file a return marked final.

Section 1-2.2 Foreign corporations subject to tax - general. (Tax Law, section 209(1), (3)).

(a) The tax is imposed on every foreign corporation, not specifically exempt as provided in section 1-2.11 of this Subpart, whose activities include one or more of the following:

(i) doing business in New York State in a corporate or organized capacity or in a corporate form; or

(ii) employing capital in New York State in a corporate or organized capacity or in a corporate form; or

(iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form; or

(iv) maintaining an office in New York State; or

(v) deriving receipts from activity in New York State.

(b) Except as specified in section 1-2.10 of this Part, a foreign corporation engaged in New York State in any one or more of the activities described in subdivision (a) of this section is subject to tax even though its activities are wholly or partly in interstate or foreign commerce.

(c) A foreign corporation that is not subject to tax or that is exempt from tax, other than a corporation that cannot be included in a combined report under section 210-C(2)(c) and the

applicable regulations, is required to be included in a combined report with a taxpayer if the combined reporting requirements are met.

(d) A foreign corporation engaged in New York State in any one or more of the activities described in subdivision (a) of this section is subject to tax regardless of whether it is authorized to do business in New York State, including after it surrenders its authority to do business.

(e)(i) A foreign corporation engaged in New York State in any of the activities described in subdivision (a) of this section is subject to tax:

(a) for any taxable year or part of a taxable year during which it engages in any of the activities described in subdivision (a) of this section; and

(b) for any subsequent taxable year during which it engages in any of the activities described in subdivision (a) of this section.

(e) An alien corporation that under any provision of the IRC is treated as a domestic corporation as defined in IRC section 7701 or that has effectively connected income for the taxable year is subject to tax if such alien corporation is engaged in New York State in any one or more of the activities described in subdivision (a) of this section.

Section 1-2.3 Foreign corporations - partnership interests. (Tax Law, section 209(1)).

(a) If a partnership is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York State, as determined pursuant to the rules under article 9-A, then all of its corporate general partners (other than corporate partners that are or would be subject to franchise tax under article 9 or 33) are subject to the tax imposed by article 9-A.

(b) A foreign corporation is doing business, employing capital, owning or leasing

property, maintaining an office, or deriving receipts from activity in New York State if (i) it is a limited partner of a partnership, other than a portfolio investment partnership, that is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York State and (ii) it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership. Such foreign corporations that are limited partners of such partnerships (other than corporate partners that are or would be subject to franchise tax under article 9 or 33) are subject to the tax imposed by article 9-A. A foreign corporation is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership if one or more of certain factual situations, including but not limited to the following, exist during the taxable year or, except for paragraph (1) of this subdivision, any previous taxable year:

(1) The foreign corporation has a 1% or more interest as a limited partner in a partnership and/or the basis of the foreign corporation's interest in the limited partnership, determined pursuant to IRC section 705, is more than $1 million. For purposes of determining whether the level of interest in the partnership or level of basis of the interest in the partnership is met, the percentage of interest in the partnership and basis of interest in the partnership of members of the foreign corporation's affiliated group, of officers or directors of the foreign corporation or of officers or directors of members of the foreign corporation's affiliated group are added to the foreign corporation's interest in the partnership or the basis of its interest in the partnership, respectively.

(2) An officer, employee, or director of the foreign corporation or an officer, employee, or director of a member of an affiliated group that includes such foreign corporation or a

member of such an affiliated group, is a general partner of the partnership.

(3) The foreign corporation or a member of an affiliated group that includes the foreign corporation is a 5% or more stockholder in a general partner of the partnership.

(4) One or more officers, employees, directors or agents of the foreign corporation, or of a member of an affiliated group that includes such foreign corporation, perform acts usually performed by a general partner.

(5) The foreign corporation becomes a limited partner after one or more officers, employees, directors or agents of such corporation, or of a member of an affiliated group that includes such foreign corporation, negotiates the terms of the partnership agreement instead of merely accepting an existing agreement.

(6) There is substantial communication between one or more officers, employees, directors or agents of the foreign corporation, or of a member of an affiliated group that includes such foreign corporation, and the general partner regarding the business activities or affairs of the partnership.

(7) The foreign corporation, a member of an affiliated group that includes such foreign corporation, or an officer, employee, or director of the foreign corporation or of a member of such an affiliated group, guarantees payment of one or more loans to the partnership.

(8) The foreign corporation, a member of an affiliated group that includes such foreign corporation, or an officer, employee, or director of the foreign corporation or of a member of such an affiliated group, makes loans to the partnership.

(9) The foreign corporation is a limited partner that for purposes of IRC section 469 is materially participating in the partnership as defined in 26 CFR 1.469-5T(e)(2). For purposes of this clause, references to *taxpayer* in such section 469 is deemed to mean any person, as

defined in IRC section 7701(a)(1).

(10) The foreign corporation entered into the limited partnership arrangement not for a valid business or economic purpose, but for the principal purpose of avoiding or evading the payment of tax.

(c) Other factual situations, during the taxable year or any previous taxable year, to be considered as indications that a foreign corporation is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership, include the following:

(1) The foreign corporation, or a member of an affiliated group that includes such foreign corporation, sells its products and/or services to the partnership.

(2) The foreign corporation, or a member of an affiliated group that includes such foreign corporation, purchases the partnership's products and/or services.

(3) The foreign corporation, or a member of an affiliated group that includes such foreign corporation, is engaged in a similar or identical business to that of the partnership.

(4) 50% or more of the foreign corporation's assets or those of a member of an affiliated group that includes such foreign corporation are a limited partnership interest in the partnership.

(5) The business carried on by the partnership is integrally related to the business of the foreign corporation or a member of an affiliated group that includes such foreign corporation.

(6) The foreign corporation exercises its voting rights as a limited partner to remove a general partner, to approve the sale of the partnership assets, to amend the partnership agreement or to dissolve the partnership.

(7) The foreign corporation, or a member of an affiliated group that includes such

foreign corporation, is interrelated with the partnership through one or more of the following factors:

(i) common management;

(ii) common policy and directives including policy and directives relating to legal services, assignment or transfer of executive personnel, determination and enforcement of procedures to ensure compliance with the law, salary guidelines or uniform pay scale and/or labor relations activities;

(iii) common or inter-entity use of intelligent assets, such as patents, trademarks or copyrights;

(iv) common or inter-entity use of product distribution systems and/or warehousing functions;

(v) common or inter-entity use of facilities, equipment, or employees;

(vi) common or inter-entity personnel recruitment;

(vii) common or inter-entity research and development activities;

(viii) common or inter-entity marketing and/or advertising;

(ix) common or inter-entity information processing and computer support, printing, telecommunications, and/or other support services;

(x) common or inter-entity transfer or pooling of technical information;

(xi) common or inter-entity pension plans and/or insurance plans; or

(xii) common or inter-entity credit analysis and coordination of credit extension.

(d) If a limited liability company that is treated as a partnership for tax purposes, other than a limited liability company that is treated as a portfolio investment partnership, is doing business, employing capital, owning or leasing property, maintaining an office or deriving

receipts from activity in New York State, then all of its members that are foreign corporations (other than foreign corporations that are or would be subject to tax under article 9 or 33) are subject to the tax imposed by article 9-A; provided, however, that if the operating agreement of such limited liability company imposes limitations on the foreign corporate member's participation in the management of the limited liability company either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law, the foreign corporate member will be subject to the rules applicable to foreign corporate limited partners set out in this section.

(e) As used in this paragraph, the following terms have these meanings:

(1) The term "1% or more interest" means a distributive share of 1% or more of a limited partnership's income, gain, loss, deduction, or credit determined pursuant to IRC section 704.

(2) The term "inter-entity" means business activities or affairs carried on between a foreign corporation that is a limited partner of a partnership, or a member of an affiliated group that includes such foreign corporation, and such partnership.

(3) The term "affiliated group" has the same meaning as such term is defined in IRC section 1504, except that the term "common parent corporation" is deemed to mean any person, as defined in IRC section 7701(a)(1), and except that references to at least 80% in such section 1504 are read as more than 50%. IRC section 1504 is read without regard to the exclusions provided for in section 1504(b).

(4) The term "portfolio investment partnership" means a limited partnership that meets the gross income requirement of IRC section 851(b)(2). For purposes of the preceding

sentence, income and gains from commodities (not described in IRC section 1221) or from futures, forwards, and options with respect to such commodities are included in income that qualifies to meet such gross income requirement. Such commodities must be of a kind customarily dealt in on an organized commodity exchange and the transaction must be of a kind customarily consummated at such place, as required by IRC section 864(b)(2)(B)(iii). To the extent that such a partnership has income and gains from commodities (not described in IRC section 1221) or from futures, forwards, and options with respect to such commodities, such income and gains must be derived by a partnership that is not a dealer in commodities and is trading for its own account as described in IRC section 864(b)(2)(B)(ii). The term portfolio investment partnership does not include a dealer (within the meaning of IRC section 1236) in stocks or securities.

Section 1-2.4. Foreign corporation – doing business. (Tax Law, section 209(1)).

(a) The term doing business is used in a comprehensive sense and includes all activities that occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

(b) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(1) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(2) the purposes for which the corporation was organized;

(3) the location of its offices and other places of business;

(4) the employment in New York State of agents, officers and employees; and

(5) the location of the actual seat of management or control of the corporation.

(c) A corporation is doing business in New York State if:

(1) it issues credit cards to at least 1000 customers with a mailing address in the state as of the last day of its taxable year;

(2) it has merchant customer contracts that cover at least 1000 locations in the state to which it remits payments for credit card transactions during its taxable year;

(3) the sum of the number of customers and the number of locations in paragraphs (1) and (2) totals at least 1000; or

(4) the corporation itself does not meet the thresholds in paragraphs (1), (2) or (3) of this subdivision but is part of a unitary group that meets the ownership test under section 210-C, and:

(i) it issues credit cards to at least 10 customers with a mailing address in the state as of the last day of its taxable year; or

(ii) it has merchant customer contracts that cover at least 10 locations in the state to which it remits payments for credit card transactions during its taxable year; or

(iii) the sum of the number of customers and the number of locations in subparagraph (i) and (ii) totals at least 10, and

(iv) the members of the unitary group that meet the requirements of either (i), (ii) or (iii) of this paragraph together meet the requirements of paragraph (1), (2) or (3) of this subdivision, other than any member that is a corporation that cannot be included in a combined report under section 210-C(2)(c) and the applicable regulations.

(d) (1) A foreign corporation doing business in New York State because it issues credit

cards is deemed to be doing business for all of its taxable year or part of its taxable year from the date in such taxable year on which it issues its first credit card in New York State.

(2) A foreign corporation doing business in New York State because it issues credit cards in its first taxable year, if also doing business in the subsequent taxable year, is deemed to be doing business from the beginning of the subsequent taxable year.

(e) The term "credit cards" has the same meaning as in section 4-2.15 of this Subchapter.

(f) For purposes of this section, the term "unitary group that meets the ownership test under section 210-C*"* means a group of corporations where:

(1) the corporations meet the capital stock requirement as defined in section 6-2.2 of this Subchapter; and

(2) the corporations are engaged in a unitary business as defined in section 6-2.3 of this Subchapter.

Section 1-2.5 Foreign corporation – employing capital. (Tax Law, section 209(1)).

(a) The term employing capital is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as:

(1) maintaining stockpiles of raw materials or inventories; or

(2) owning materials and equipment assembled for construction.

Section 1-2.6 Foreign corporation – owning or leasing property. (Tax Law, section 209(1)).

(a) The owning or leasing of real or personal property within New York State constitutes an activity that subjects a foreign corporation to tax. Property owned by or held for

the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax. Property held, stored or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

(b) Shares in a cooperative housing corporation will be deemed to be real property owned within New York State if the real property owned or leased by such corporation, as described in IRC section 216(b)(1)(B), is located in New York State.

Section 1-2.7 Foreign corporation – maintaining an office. (Tax Law, section 209(1)).

A foreign corporation that maintains an office in New York State is engaged in an activity that makes it subject to tax. An office is any area, enclosure or facility that is used in the regular course of the corporate business. A salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Section 1-2.8 Foreign corporation – deriving receipts. (Tax Law, section 209(1)).

(a) A foreign corporation that derives receipts from any activity in New York State is subject to tax. For purposes of this section, “New York receipts” means New York receipts as computed in Part 4 of this Subchapter.

(b) A corporation derives receipts from activity in New York State if its New York receipts equal or exceed $1 million.

(c) A corporation derives receipts from activity in New York State if (i) the corporation is part of a unitary group that meets the ownership test under section 210-C, (ii) it has New York receipts of at least $10,000, and (iii) the total New York receipts of all the members of the unitary group that each have at least $10,000 of New York receipts is at least $1 million of such

receipts.

(d) A corporation derives receipts from activity in New York State if (i) the corporation is a general partner of a partnership and its New York receipts, if any, when combined with the New York receipts of the partnership total at least $1 million; or

(ii) the corporation is a limited partner of a partnership, other than a portfolio investment partnership, and its New York receipts, if any, when combined with the New York receipts of the partnership total at least $1 million, provided that the limited partner is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership; or

(iii) the corporation is a member of a limited liability company that is treated as a partnership for tax purposes, other than a limited liability company that is treated as a portfolio investment partnership, the operating agreement of which does not impose limitations on the corporate member’s participation in the management of the limited liability company either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law, and its New York receipts, if any, when combined with the New York receipts of the limited liability company total at least $1 million; or

(iv) the corporation is a member of a limited liability company that is treated as a partnership for tax purposes, other than a limited liability company that is treated as a portfolio investment partnership, the operating agreement of which imposes limitations on the corporate member’s participation in the management of the limited liability company either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership

Law, and its New York receipts, if any, when combined with the New York receipts of the limited liability company total at least $1 million, provided that the member is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the limited liability company.

(e) For purposes of determining whether a corporation is deriving receipts from activity in New York State, a corporation's New York receipts will include such receipts from activities described in Public Law 86-272, and further described in section 1-2.10 of this Subpart.

(f) A corporation that is part of a unitary group will not be considered when determining if the standards specified in this paragraph are met if it cannot be included in a combined report under section 210-C(2)(c) and the applicable regulations.

(g) For purposes of subdivision (d) of this section, for a corporation that is a partner in one or more partnerships, and for a corporation that is a member of one or more limited liability companies treated as a partnership for tax purposes, the corporation's New York receipts include its distributive share of any New York receipts of each such partnership or limited liability company.

(h) In determining the amount of a corporation's New York receipts, merchant discount fees received by a corporation for processing credit card transactions are included in its New York receipts.

(i) A corporation will not be deemed to be deriving receipts from activity in the state if the only New York receipts are (i) interest income and net gains received by a corporation from securities issued by government agencies, including but not limited to securities issued by the government national mortgage association, the Federal national mortgage association, the Federal home loan mortgage corporation, and the small business administration or (ii) interest

income from Federal funds.

(j) (1) The receipts thresholds of this subdivision are subject to adjustment by the commissioner based on an annual year-end review of the Consumer Price Index by the Department, as follows:

(2) In December of each year, the commissioner will calculate the average Consumer Price index for the preceding twelve months and will use that average to determine the cumulative percentage change in the Consumer Price Index.

(3) In the first instance, if the Consumer Price Index has changed by 10% or more from the Consumer Price Index available on January 1, 2015, then the receipts thresholds will be adjusted by the same percentage as the change in the Consumer Price Index and rounded to the nearest $1,000 level. Thereafter, if the Consumer Price Index has changed by 10% or more from the Consumer Price Index ascertained at the time of and used by the commissioner for the purpose of making the previous adjustment in the receipts thresholds, then the commissioner will adjust the receipts thresholds as provided in clause (c) of this subparagraph. Any adjustments will apply to taxable years beginning on or after January 1 next succeeding the announcement of the adjustment. When the commissioner has adjusted the receipts thresholds as provided for in this subdivision, any reference to $1 million or $10,000 in this Part is deemed to be a reference to the receipts thresholds as adjusted.

(4) For purposes of this subdivision, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers, or the CPI-U.

(j) For purposes of this section, the term "unitary group that meets the ownership test under section 210-C*"* means a group of corporations where:

(1) the corporations meet the capital stock requirement as defined in section 6-2.2 of this

Subchapter; and

(2) the corporations are engaged in a unitary business as defined in section 6-2.3 of this Subchapter.

(k)(1) A foreign corporation deriving receipts from activity in New York State is deemed to be deriving receipts for all of its taxable year or part of its taxable year from the date in such taxable year of its first receipt derived from activity in New York State.

(2) A foreign corporation deriving receipts from activity in New York State, if also deriving receipts in the subsequent taxable year, is deemed to be deriving receipts from the beginning of the subsequent taxable year.

Section 1-2.9 Activities deemed insufficient to subject foreign corporations to tax. (Tax Law, section 209(2), (2-a)).

(a) A foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in New York State because of:

(1) the maintenance of cash balances with banks or trust companies in New York State;

(2) the ownership of shares of stock or securities kept in New York State in a safe deposit box, safe, vault or other receptacle rented for this purpose, or if pledged as collateral security, or if deposited in safekeeping or custody accounts with one or more banks or trust companies, or brokers who are members of a recognized security exchange;

(3) the taking of any action by any such bank or trust company or broker that is incidental to the rendering of safekeeping or custodian service to such corporation;

(4) the maintenance of an office in this State by one or more officers or directors of the corporation who are not employees of the corporation if the corporation is not otherwise doing

business or employing capital in New York State and does not own or lease property in New York State;

(5) the keeping of books or records of a corporation in New York State, if such books or records are not kept by employees of such corporation and such corporation does not otherwise do business, employ capital, own or lease property, or maintain an office in New York State;

(6) the participation in a trade show or shows, regardless of whether the corporation has employees or other staff present at such trade shows, provided the corporation's activity at the trade show is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside New York State for acceptance or rejection and are filled from outside the state, and provided that such participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes;

(7) the acquisition of one or more security interests in real or tangible personal property located in New York State;

(8) the acquisition of title to property located in New York State through the foreclosure of a security interest;

(9) the holding of meetings of the board of directors in New York State, where such directors are not employees of the corporation and if the corporation is not otherwise doing business or employing capital in New York State and does not own or lease property in New York State; or

(10) any combination of the foregoing activities.

(b)(1) An alien corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or

deriving receipts from activity in New York State if its activities in New York State are limited solely to investing or trading for its own account in:

(i) stocks and securities within the meaning of IRC section 864(b)(2)(A)(ii); or

(ii) commodities within the meaning of IRC section 864(b)(2)(B)(ii); or

(iii) any combination of stocks, securities and commodities described in (i) and (ii).

(2) An alien corporation engaged in any one or more of the activities described in section 1-2.2(a) of this Subpart, that under any provision of the IRC is not treated as a domestic corporation as defined in IRC section 7701 and does not have effectively connected income for the taxable year will not be subject to tax under article 9-A.

Section 1-2.10 Foreign corporations – Public Law 86-272.

(a) Pursuant to Public Law 86-272 (15 U.S.C.A. sections 381-384), a foreign corporation is exempt from the tax imposed by article 9-A if its activities are limited to those described in that law. Thus, to be exempt under Public Law 86-272, the activities of the corporation in New York State must be limited to one or more of the following:

(1) the solicitation of orders by employees or representatives in New York State for sales of tangible personal property and the orders are sent outside New York State for approval or rejection; and if approved, are filled by shipment or delivery from a point outside New York State;

(2) the solicitation of orders for sales of tangible personal property by employees or representatives in New York State in the name of or for the benefit of a prospective customer of such corporation if the customer's orders to the corporation are sent outside the State for approval or rejection; and, if approved, are filled by shipment or delivery from a point outside New York State; and

(3) the solicitation of orders via the Internet in New York State for sales of tangible personal property and the orders are sent outside New York State for approval or rejection; and if approved, are filled by shipment or delivery from a point outside New York State.

(b) For purposes of this exemption, a corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of sales in New York State or the solicitation of orders for sales in New York State, of tangible personal property on behalf of the corporation by one or more independent contractors. A corporation will not be considered to have engaged in taxable activities in New York State by reason of maintaining an office in New York State by one or more independent contractors whose activities on behalf of the corporation in New York State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(c) The term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or in soliciting orders for the sale of tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities. The term "representative" does not include an independent contractor.

(d) In order to be exempt by virtue of Public Law 86-272, the activities in New York State of employees or representatives, or activities engaged in via the Internet, must be limited to the solicitation of orders for the sale of tangible personal property. The solicitation of orders includes offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property and those ancillary activities, other than maintaining an office, that serve no independent business function apart from their connection to the solicitation of orders. Examples of activities performed by such employees or representatives in New York

State, or that are engaged in via the Internet, that are entirely ancillary to the solicitation of orders include:

(1) the use of free samples and other promotional materials in connection with the solicitation of orders;

(2) passing product inquiries and complaints to the corporation's home office;

(3) using autos furnished by the corporation;

(4) advising customers on the display of the corporation's products and furnishing and setting up display racks;

(5) recruitment, training and evaluation of sales representatives;

(6) use of hotels and homes for sales-related meetings;

(7) intervention in credit disputes;

(8) use of space at the salesperson's home solely for the salesperson's convenience. (However, see subdivision (g) of this section as to loss of immunity for maintaining an office.);

(9) participating in a trade show or shows, provided that participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes. (However, see subdivision (g) of this section as to loss of immunity for maintaining an office.)

(e) The exemption under the provisions of Public Law 86-272 is limited to the solicitation of orders for the sale of tangible personal property and does not include the solicitation of orders for the sale of services or intangible property.

(f) Activities in New York State beyond the solicitation of orders will subject a corporation to tax in New York State unless such activities are de minimis. Activities will not

be considered de minimis if such activities establish a nontrivial additional connection with New York State. Solicitation activities do not include those activities that the corporation would have reason to engage in apart from the solicitation of orders but chooses to allocate to its New York State sales force, or to engage in via the Internet, including interacting with customers or potential customers through the corporation's website or computer application. However, a corporation will not be made taxable solely by presenting static text or images on its website. In determining whether a corporation's activities exceed the solicitation of orders, all of the corporation's activities in New York State will be considered. Examples of activities that go beyond the solicitation of orders include:

(1) making repairs to or installing the corporation's products;

(2) making credit investigations;

(3) collecting delinquent accounts;

(4) taking inventory of the corporation's products for customers or prospective customers;

(5) replacing the corporation's stale or damaged products;

(6) giving technical advice on the use of the corporation's products after the products have been delivered to the customer.

(g) Maintaining an office, shop, warehouse or stock of goods in New York State will make a corporation taxable. However, a corporation will not be made taxable solely by maintaining a supply of goods in New York State if such goods are used only as free samples in connection with the solicitation of orders. A corporation will be considered to be maintaining an office in New York State if the space is held out to the public as an office or place of business of the taxpayer. For example, a salesperson uses his or her house for

business. A telephone, listed in the corporation's name, is maintained at the salesperson's house. The salesperson makes telephone contacts from the house or receives calls and orders at the house. The residence will be treated as an office of the corporation, and the corporation will be taxable.

(h) A corporation (other than a corporation that cannot be included in a combined report under section 210-C(2)(c) and the applicable regulations) may be included in a combined report required under section 210-C, even if it is exempt from taxation under article 9-A pursuant to the provisions of Public Law 86-272, as described in this section. In addition, the receipts of such a corporation will be included in determining whether a unitary group is deriving receipts from activity in this state. However, if all the members of such a unitary group are exempt from taxation under article 9-A pursuant to the provisions of Public Law 86-272, as described in this section, then the unitary group would not be required to file a combined report.

(i) Examples. The following are examples of foreign corporations that either are exempt or not exempt from tax under this section. Each of these examples is intended for illustration purposes only and to be applicable only to the specific activity, as identified in each example.

Example 1: A foreign manufacturing corporation has its factory outside New York State. Its only activity in New York State is the solicitation of orders for its products through a sales office located in New York State. The orders are forwarded to its home office outside the State for acceptance and the merchandise is shipped by common carrier from the factory direct to the purchasers. The corporation is subject to tax because it maintains an office in New York State and therefore its activities are not limited to those described in this section.

Example 2: A foreign corporation that operates several retail stores outside New York State leases an office in New York City for the convenience of its buyers when they come to New York State. Salespeople call at the office to solicit orders. The merchandise is shipped by the sellers directly to the offices of the corporation outside New York State. The corporation is subject to tax because it maintains an office in New York State, and therefore its activities are not limited to those described in this section.

Example 3: A foreign corporation sends salespeople into New York State to solicit orders. The orders must be accepted at the home office of the corporation located in another state. The corporation displays goods in New York City at a space leased occasionally and for short terms. The corporation is subject to tax because it is employing capital in New York State and therefore its activities are not limited to those described in this section.

Example 4: A foreign corporation has $950,000 of receipts from activities in New York State that consist solely of the solicitation of orders by employees in New York State for sale of tangible personal property; all the orders are sent outside New York State for approval or rejection and, if approved, are filled by shipment from a point outside New York State. The corporation also has $100,000 of New York receipts from the sale of services. The corporation is subject to tax because it is deriving receipts from activity in New York State. The corporation may not disclaim tax liability in New York State this section, since its activities in New York State are not limited to those described in this section.

Example 5: Seven foreign corporations each have $200,000 of receipts from activity in New York State and are part of the same unitary group that meets the ownership test under section 210-C. Therefore, the seven corporations together exceed the $1 million receipts threshold. Three members of the group have activities in New York State that consist solely of the solicitation of orders by employees in New York State for sales of tangible personal property, which orders are sent outside New York State for approval or rejection and, if approved, are filled by shipment from a point outside New York State. These three corporations are not subject to tax in New York State because their activities are limited to those described in this section; the other four corporations are subject to tax because they are deriving receipts from activity in New York State and their activities are not limited to those described in this section. The seven corporations are required to file in a combined report, which will include the receipts, net income, net gains, net losses, and net deductions of all the corporations, together with their proportionate share of the unitary group's assets and liabilities.

Example 6: A foreign corporation solicits sales of tangible personal property on its website and provides assistance to customers by posting a list of static frequently asked questions ("FAQs") and answers on the corporation's website. Since this activity is de minimis under this section, the corporation is exempt from tax under article 9-A.

Example 7: A foreign corporation regularly provides assistance to its customers after

its products have been delivered, either by email or electronic "chat" that customers initiate by clicking on an icon on the corporation's website. For example, the corporation regularly advises customers on how to use products after the products have been delivered. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 8: A foreign corporation solicits and receives online applications for its branded credit card via the corporation's website. The issued cards will generate interest income and fees for the corporation. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under this section.

Example 9: A foreign corporation's website invites viewers in New York State to apply for non-sales positions with the corporation. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and résumé. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under article 9-A under this section.

Example 10: A foreign corporation places Internet "cookies" onto the computers or other electronic devices of is customers. These cookies gather customer search information that will be used to adjust production schedules and

inventory amounts, develop new products, or identify new items to offer for sale. Since this activity does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax under article 9-A under this section.

Example 11: The same facts as example 10 except that the cookies gather customer information that is used only for purposes entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the corporation's website, and to remind customers what products they have considered during previous sessions. The cookies perform no other function, and these are the only types of cookies delivered by the corporation to the computers or other devices of its customers. Since this activity is entirely ancillary to the solicitation of orders for sales of tangible personal property, the corporation, under the facts of this example, is exempt from tax under article 9-A under this section.

Example 12: A foreign corporation remotely fixes or upgrades products previously purchased by its customers by transmitting code or other electronic instructions to those products via the Internet. Since this does not constitute, and is not entirely ancillary to, the solicitation of orders for sales of tangible personal property, the corporation is not exempt from tax

under article 9-A under this section.

Example 13: A foreign corporation offers and sells extended warranty plans through its website to New York State customers who purchase the corporation's products. Since this activity involves selling, or offering to sell, a service that is not entirely ancillary to the solicitation of orders for sales of tangible personal property the corporation is not exempt from tax under article 9-A under this section.

Example 14: A foreign corporation contracts with a marketplace provider that facilitates the sale of the corporation's products on the provider's online marketplace. The marketplace provider maintains inventory, including some of the corporation's products, at fulfillment centers in New York State. Since this activity involves the maintenance of the corporation's products in New York State, the corporation is not exempt from tax under article 9-A under this section.

Example 15: A foreign corporation that sells tangible personal property via the Internet also contracts with New York State customers to stream videos and music to electronic devices for a fee. Since this activity involves streaming, which does not constitute the sale of tangible personal property the corporation is not exempt from tax under article 9-A under this section.

Example 16: A foreign corporation offers for sale only items of tangible personal property on its website. The website enables customers to search for items, read product descriptions, select items for purchase, choose among delivery options, and pay for the items. The corporation does not engage

in any activities in New York State that are not described in this example. Since the corporation engages exclusively in activities in New York State that either constitute solicitation of orders for sales of tangible personal property or are entirely ancillary to solicitation, the corporation is exempt from tax under article 9-A under this section.

Section 1-2.11 Corporations not subject to tax. (Tax Law, sections 3, 8, 13, 208(9)(i) and 209(4), (9), (10), (12))

(a) A corporation that is subject to any of the following taxes is not subject to tax under article 9-A:

(1) transportation and transmission corporations and associations subject to tax under sections 183 and 184;

(2) farmers, fruit growers and other like agricultural corporations organized and operated on a cooperative basis subject to tax under section 185 for tax years prior to January 1, 2018;

(3) continuing section 186 taxpayers subject to tax under former section 186 as it was in effect on December 31, 1999;

(4) insurance corporations subject to the franchise taxes on insurance corporations imposed by article 33, including health maintenance organizations required to obtain a certificate of authority under article 44 of the Public Health Law;

(5) cooperative corporations subject to the annual fee imposed by section 77 of the Cooperative Corporations Law;

(6) captive REITs included in a combined report under article 33; and

(7) captive RICs included in a combined report under article 33.

(b) The following corporations are exempt from taxation under article 9-A:

(1) limited-profit housing companies organized pursuant to article 2 of the Private Housing Finance Law;

(2) limited-dividend housing companies organized pursuant to article 4 of the Private Housing Finance Law;

(3) any trust company organized under a law of New York State, all of the stock of which is owned by not less than 20 savings banks organized under a law of New York State;

(4) the Urban Development Corporation and subsidiary corporations of the Urban Development Corporation. A corporation is deemed a subsidiary of the Urban Development Corporation whenever and so long as:

(i) more than one half of any voting shares of the subsidiary are owned or held by the Urban Development Corporation; or

(ii) a majority of the subsidiary's directors, trustees or members are designees of the Urban Development Corporation;

(5) domestic corporations exclusively engaged in the operation of one or more vessels in foreign commerce.

(i) The domestic corporation must operate the vessels regardless of whether it owns them or has leased them from another person or corporation. "Operation of the vessels" means the direction and supervision of the crew and of the actual movements or routes of the vessels. The commissioner generally deems the furnishing of the crew as the operation of the vessel.

(ii) A domestic corporation exclusively engaged in the operation of vessels in foreign commerce remains exempt where *(a)* it has investments in other domestic corporations exclusively engaged in the operation of vessels in foreign commerce or *(b)* average

investments (other than investments in a domestic corporation qualifying for this exemption) are minimal in comparison to overall activities. Generally, where other investments are 10% or less of average total assets, these investments will be considered minimal.

(iii) A domestic corporation engaged in other activities (except as described in subparagraph (ii) of this paragraph) is not exempt. A domestic corporation is not exempt if it acts as an agent for others by selling tickets, purchasing supplies and services, providing services for others, or operating any other business (e.g., a restaurant).

(6) corporations organized other than for profit that do not have stock or shares or certificates for stock or for shares and that are operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director, or member, including not-for-profit corporations and religious corporations.

(i) A corporation organized other than for profit, as described in this paragraph, that is exempt from Federal income taxation pursuant to IRC section 501(a), will be presumed to be exempt from tax under article 9-A. If a corporation organized other than for profit is denied exemption from taxation under the IRC, such corporation will be presumed to be subject to tax under article 9-A.

(ii) The determination of the Internal Revenue Service, denying or revoking exemption from Federal taxation under the IRC, will ordinarily be followed;

(7) certain DISCs. A DISC will be exempt from taxation under article 9-A for any taxable year in which it:

(i) received more than 5% of its gross receipts from the sale of inventory or other property that it purchased from its stockholders; or

(ii) received more than 5% of its gross rentals from the rental of property that it

purchased or rented from its stockholders; or

(iii) received more than 5% of its total receipts other than from sales and rentals from its stockholders;

(8) trusts that are not conducting a business (passive trusts). Where the functions of a trustee are only to hold property and to collect and distribute income, the trust is not subject to tax under article 9-A. The power to sell, invest and reinvest must be clearly and expressly limited. For example, a power to sell stock and reinvest the proceeds if the bid price of the stock drops below a certain level will not make the trust taxable;

(9) an industrial development agency created pursuant to article 18-A of the General Municipal Law;

(10) housing development fund companies organized pursuant to the provisions of article 11 of the Private Housing Finance Law;

(11) an entity that is treated for Federal income tax purposes as a real estate mortgage investment conduit (REMIC);

(12) an organization described in paragraph (2) or (25) of IRC section 501(c);

(13) redevelopment companies organized pursuant to article 5 of the Private Housing Finance Law;

(14) a qualified subchapter S subsidiary (QSSS) corporation, as defined in section 208(1-B), provided it meets the requirements for exemption pursuant to section 208(9)(k) of such article;

(15) a qualified settlement fund under IRC section 468B or an entity that is treated as such for Federal purposes or a grantor trust, either of which is used for Nazi reparations;

(16) farmers, fruit growers and other like agricultural corporations organized and

operated on a cooperative basis for the purposes expressed in and as provided under the Cooperative Corporations Law, whether or not such corporations have capital stock.

Section 1-2.12 Change of classification. (Tax Law, section 209(1)).

(a) A corporation subject to tax under article 9-A may, by reason of a change in the nature of its activities or a change in the ownership or control of the voting powers of its capital stock, cease to be subject to such tax and become taxable under some other article. Conversely, a corporation subject to tax under some other article may, for the same reasons, cease to be taxable thereunder and become subject to tax under article 9-A. The date on which any such change of classification becomes effective will be determined by the facts of each case.

(b) A corporation that becomes subject to tax under article 9-A during one of its fiscal or calendar years by reason of a change in classification is treated in the same manner as a corporation that became subject to tax during such year.

(c) A corporation that ceases to be subject to the franchise tax imposed by article 9-A during one of its fiscal or calendar years by reason of a change of classification is treated, insofar as article 9-A is concerned, in the same manner as a corporation that is dissolved or ceases to be taxable in New York State during such year.

Section 1-2.13 Examples. The following are examples of foreign corporations that either are subject to tax under article 9-A because they are doing business, or employing capital, or owning or leasing property in a corporate or organized capacity, or maintaining an office or deriving receipts from activity in New York State, or are not subject to tax. Each of these examples is intended for illustration purposes only and to be applicable only to the specific

activity as identified in each example.

Example 1: A foreign corporation incorporated in another state operates or is organized for the purposes of buying and selling securities. It does not maintain a physical office anywhere, other than a statutory office in the state of its incorporation. Regular and continuous purchases of securities are directed by its officers or agents located in New York State. The corporation is subject to tax because it is doing business in New York State.

Example 2: A foreign corporation participates in a joint venture that carries on business in this State, but the foreign corporation is not otherwise engaged in any activities in New York State. The corporation is subject to tax because it is doing business in New York State.

Example 3: A foreign holding corporation coordinates and supervises in New York State activities of a subsidiary that is taxable in New York State. It also makes loans to its subsidiary and guarantees loans obtained by the subsidiary from sources other than the parent. The corporation is subject to tax because it is doing business in New York State.

Example 4: A foreign manufacturing corporation has its factories and offices located outside New York State. Its sole activity in New York State consists of holding or storing goods in a warehouse owned by an unrelated party. The corporation is subject to tax because it is employing capital in New York State.

Example 5: A foreign corporation that has no office or other place of business in

New York State leases automobiles to customers in New York State, with receipts from this activity equaling less than $1 million. The corporation is subject to tax because it owns property in New York State.

Example 6: A foreign corporation formerly engaged in manufacturing in another state discontinues such business and transfers its office to New York State, where its activities consist solely of the acquisition of bonds and the receipt of interest on such bonds and the holding of directors' meetings. The corporation is subject to tax because it maintains an office in New York State.

Example 7: A foreign corporation issues credit cards to 500 customers with a mailing address in New York State as of the last day of its taxable year and has contracts with merchants covering 500 locations in New York State to which it remits payments during the taxable year. Since the corporation issues credit cards to customers with a mailing address in the state and has merchant customer contracts that cover locations in the state to which it remits payments for credit card transactions, and the sum of the number of customers and the number of locations is 1,000, the corporation is subject to tax because it is doing business in New York State.

Example 8: Three foreign corporations are part of the same unitary group that meets the ownership test under section 210-C. All of the members of which each have at least $10,000 of receipts from activity in New York State. They are a bank, a broker-dealer, and an insurance company subject to tax under article 33. The bank and the broker-dealer together have $900,000 of

receipts from activity in New York State. The insurance company has $300,000 of receipts from activity in New York State. Since the insurance company is a corporation that cannot be included in a combined report under section 210-C(2)(c) and the applicable regulations, its New York receipts will not be included for purposes of determining whether the unitary group is deriving receipts from activity in New York State. Therefore, the bank and the broker-dealer are not subject to tax in New York State because they are not deriving receipts from activity in New York State.

Example 9: A foreign corporation organized as a bank in another state has interest income from Federal funds but no other New York receipts. Since the corporation's only New York receipts are from interest income from Federal funds, the corporation is not subject to tax in New York State, because it is not deemed to be deriving receipts from activity in New York State.

PART 2

ACCOUNTING PERIODS AND METHODS

SUBPART 2-1 ACCOUNTING PERIODS

Sec.

2-1.5 Change of accounting period

Section 2-1.1 General. (Tax Law, sections 208(10), 209(1))

(a) Generally, for Federal income tax purposes, a taxpayer's taxable year is the same as its accounting period. In most cases, the taxable year for which the franchise tax imposed by article 9-A is to be computed and for which a franchise tax report is to be filed shall be the same as the taxpayer's taxable year for Federal income tax purposes, or that portion of the Federal taxable year for which the taxpayer is subject to the tax imposed by article 9-A. The taxable year under article 9-A generally will be the accounting period covered by the taxpayer's Federal income tax return whether such period be a calendar year, a properly established fiscal year (which includes an accounting period consisting of 52 - 53 weeks) or an accounting period of less than 12 months as permitted or required under the IRC. If a taxpayer does not have a taxable year for Federal income tax purposes, the tax must be computed and a report must be filed for a calendar year, unless the commissioner authorizes the use of some different accounting period.

(b) The tax imposed by article 9-A is imposed for each fiscal or calendar year of the taxpayer, or any part thereof, during which the taxpayer has a corporate franchise granted by New York State or does business, employs capital, owns or leases property in a corporate or organized capacity, maintains an office, or derives receipts from activity in New York State. Therefore, for purposes of article 9-A, the taxpayer's first taxable year begins in the case of a domestic corporation on the date of its incorporation or, if elected, on such other date for the beginning of its corporate existence as set forth in the certificate of incorporation, not to exceed 90 days after the filing of such certificate, and ends on the last day of such fiscal or calendar year or on the last day it is subject to the tax imposed by article 9-A, whichever

comes first. In the case of a foreign corporation, the taxpayer's first taxable year begins on the date it begins to do business, employ capital, own or lease property, maintain an office, or derive receipts from activity in New York State and ends on the last day of such fiscal or calendar year or on the last day it is subject to the tax imposed by article 9-A, whichever comes first.

Section 2-1.2 Calendar-year taxpayers. (Tax Law, section 208(10))

(a) A taxpayer that reports on the basis of a calendar year for Federal income tax purposes must report on the same basis for purposes of article 9-A. A calendar year is a period of 12 calendar months ending on December 31st, or a period of less than 12 calendar months beginning on the date a taxpayer becomes subject to tax and ending on December 31st. A calendar year also includes, in the case of a taxpayer that changes the period on the basis of which it keeps its books from a fiscal year to a calendar year, the period from the close of its last fiscal year to and including the following December 31st.

(b) A taxpayer shall use a calendar year as its accounting period and report on a calendar-year basis in the following situations:

(1) the taxpayer keeps its books on the basis of a calendar year;

(2) the taxpayer keeps its books on the basis of any period ending on any day other than the last day of a calendar month, except in the case of a taxpayer that keeps its books on the basis of a 52-53 week accounting period;

(3) the taxpayer does not keep books;

(4) the taxpayer is not required to file a Federal income tax return, unless the use of a fiscal year or 52-53 week period basis of reporting has been authorized by the commissioner;

or

(5) the taxpayer has made no election as to the use of either a fiscal- or calendar-year basis of reporting.

(c) Examples. The calendar-year taxpayer's first accounting period and its first taxable year ends on December 31, 2017 in each of the following examples. The taxpayer's first report must be filed on or before April 15, 2018.

Example 1: The corporation is organized in New York State on October 23, 2017 and its certificate of incorporation is filed in the Office of the Secretary of State on the same date. The corporation becomes subject to tax on October 23, 2017 and its first accounting period and taxable year begins on that date irrespective of when the corporation starts to transact business.

Example 2: The corporation is organized in New York State on December 31, 2017 and its certificate of incorporation is filed in the Office of the Secretary of State on the same day. The corporation's first accounting period and taxable year is one day, December 31, 2017, and the corporation must file a report based on such period.

Example 3: The foreign corporation, which reports for Federal income tax purposes on a calendar-year basis, leases space for an office in New York City on February 6, 2017. Prior to February 6, 2017, the corporation did not do business, employ capital, own or lease property, maintain an office, or derive receipts from activity in New York State. The corporation hires personnel and opens its office in New York City on March 1, 2017. The

corporation becomes subject to tax on February 6, 2017. Since the taxpayer reports for Federal income tax purposes on a calendar-year basis, its first taxable year for purposes of article 9-A begins February 6, 2017, and its tax is computed on the basis of an accounting period which begins January 1, 2017 and ends December 31, 2017.

Section 2-1.3 Fiscal-year taxpayers. (Tax Law, section 208(10))

(a) A taxpayer that reports on the basis of a fiscal year for Federal income tax purposes must report on the same basis for purposes of article 9-A. A fiscal year is a period not longer than 12 calendar months, or any shorter period beginning on the date the taxpayer becomes subject to tax and ending on the last day of any month other than December. A fiscal year also includes, in the case of a taxpayer that changes the period on the basis of which it keeps its books from a calendar year to a fiscal year, or from one fiscal year to another fiscal year, the period from the close of its last calendar or fiscal year up to the date designated as the close of its new fiscal year. A fiscal year also includes a 52-53 week accounting period if the taxpayer has elected for Federal income tax purposes such period.

(b) A taxpayer reporting on a fiscal-year basis must keep its books on such basis.

(c) Examples.

Example 1: A domestic corporation is incorporated in New York State on November 19, 2017. The corporation selects the fiscal-year basis of reporting and uses the date November 30th as the last day of its fiscal year. The corporation is subject to tax for the period November 19, 2017 to November 30, 2017, and must file a report for that period. The report must be filed on or before March 15, 2018.

Example 2: A foreign corporation, which reports for Federal income tax purposes on a fiscal-year basis, uses September 30th as the last day of its fiscal year. The corporation leases a store in New York City on March 1, 2017. The corporation continues to do business throughout the year 2017. Since the taxpayer reports for Federal income tax purposes on a fiscal-year basis, its first taxable year for purposes of article 9-A begins March 1, 2017, and its tax is computed on the basis of an accounting period which begins October 1, 2016 and ends September 30, 2017. The report must be filed on or before January 15, 2018.

Section 2-1.4 Taxpayers using a 52-53 week year.

(a) A taxpayer that reports on the basis of a 52-53 week accounting period for Federal income tax purposes may report on the same basis for purposes of article 9-A. A 52-53 week period must end on the same day of the week each year, and end always on whatever date that day of the week last occurs in a calendar month, or on whatever date that day of the week falls that is nearest the last day of a calendar month.

(b) If a 52-53 week accounting period is used and the period starts within seven days from the first day of any calendar month, the taxable year will be deemed to have begun on the first day of that calendar month. If a 52-53 week accounting period ends within seven days from the last day of any calendar month, the taxable year will be deemed to have ended on the last day of that month.

(c) If a taxpayer uses a 52-53 week accounting period for purposes of reporting its Federal income taxes and becomes subject to tax under article 9-A, the taxpayer may be required to file reports for two taxable years during an accounting period for which one

Federal return is required. For example, a domestic corporation is incorporated on Friday, October 30, 2016, or a foreign corporation engages in activities in New York State which make it subject to tax on October 30, 2016. Both corporations use a 52-53 week accounting period ending on the Saturday nearest the last day of October for purposes of reporting Federal income taxes. The 52-53 week accounting period upon which the corporation computes its tax for Federal income tax purposes begins October 29, 2016 and ends Saturday, November 3, 2017. For purposes of article 9-A, the period from October 30, 2016 to October 31, 2016, inclusive, is deemed to be the first period for which a report is due and a tax payable. The next taxable period is deemed to be from November 1, 2016 to October 31, 2017, and is based on the accounting period ending November 3, 2017.

Section 2-1.5 Change of accounting period.

(a) If a taxpayer's accounting period for Federal income tax purposes is changed, the taxable year and accounting period for which the taxpayer's report is filed under article 9-A must be changed at the same time to coincide with the new Federal income tax accounting period and taxable year.

(b) Where a taxable year or accounting period of less than 12 months results from a change of accounting period, the taxpayer must file a report and pay the tax due for the period beginning from the close of the last taxable year or accounting period for which a report was required to be filed to the date designated as the close of its new accounting period or taxable year. Where a change in taxable year from or to a 52-53 week accounting period, or from one 52-53 week period to a different 52-53 week period, results in a period of either 359 days or more or 6 days or less, the tax for the 359-day-or-more period must be computed as if it were a full taxable year, and the period of six days or less must be added to and deemed part of the

following taxable year. In the case of a period consisting of more than 6 days and less than 359 days, a report must be filed for such period.

(c) A taxpayer whose accounting period is changed for Federal income tax purposes is not required to apply for or obtain permission to make a similar change with respect to reports required under article 9-A. In such a case, however, the taxpayer must submit, with the first report filed for the new accounting period under article 9-A, a copy of the consent of the Commissioner of Internal Revenue to the change for Federal income tax purposes. A taxpayer that changes its accounting period for Federal income tax purposes without the prior approval of the Commissioner of Internal Revenue must submit, with the first report filed for the new accounting period under article 9-A, a statement indicating the authority for the Federal change.

(d) In the case of a taxpayer that has an established accounting period for Federal income tax purposes, no change of accounting period for purposes of article 9-A (other than one required by reason of change of the Federal accounting period as set forth in subdivision (a) of this section) will be permitted.

Subpart 2-2 Accounting Methods

Section 2-2.1 General. (Tax Law, section 208(9))

(a) The accounting method or basis on which business income is to be computed must be the same as the taxpayer's method of accounting for Federal income tax purposes. However, when the commissioner deems it necessary in order to properly reflect the business income of the taxpayer, the commissioner may determine the taxable year or period in which any item of income or deduction must be included, without regard to the method of accounting used by the taxpayer.

(b) In the absence of an accounting method for Federal income tax purposes, business income must be computed in accordance with the method regularly employed in keeping the books of the taxpayer, provided such method properly reflects business income. If the books of a taxpayer do not properly reflect business income, or if no books are kept, the computation of business income must be made in such manner as the commissioner deems necessary to properly reflect business income.

Section 2-2.2 Change of accounting method.

(a) If a taxpayer's method of accounting for Federal income tax purposes is changed, the accounting method employed in determining business income for purposes of article 9-A must be changed at the same time to the method approved for Federal income tax purposes. When a change of accounting method occurs, any adjustments that are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted must be taken into account to the extent they are required to be taken into account in determining the taxpayer's Federal taxable income.

(b) A taxpayer whose method of accounting is changed must submit, with its first report in which the new accounting method is used, a copy of the consent of the Commissioner of Internal Revenue, together with complete details of any adjustments with respect to items of income or deduction.

Subpart 2-3 Cessation Periods

Section 2-3.1 Cessation period. (Tax Law, section 209(1))

(a) The franchise tax is imposed for all or any part of each taxable year during which a taxpayer exercises its corporate franchise, does business, employs capital, owns or leases property in a corporate or organized capacity, maintains an office, or derives receipts from activity

in New York State. Accordingly, every taxpayer is required to pay a tax measured by business income (or other applicable basis) up to the date on which it ceases to possess a franchise if a domestic corporation, or ceases to do business, employ capital, own or lease property in a corporate or organized capacity, maintain an office, or derive receipts from activity in New York State if a foreign corporation, regardless of whether or not such corporation has been granted written authority by the New York State Department of State to do business in the state.

(b) A domestic corporation may cease to possess a franchise as a result of its dissolution, merger or consolidation into another corporation, or the revocation or annulment of its charter.

(c) A taxpayer may cease to be subject to tax under article 9-A because of a change in the nature of its activities or a change in classification. In such event, the taxpayer must pay a tax measured by business income (or other applicable basis) up to the date of the change. In some cases, a corporation may then become subject to tax under some other article of the Tax Law.

(d) A corporation that is a member of a group taxed on the basis of a combined report, and that ceases to be subject to tax under article 9-A, may, in the discretion of the commissioner, be permitted to be included in the next combined report of the group. Application for permission to report in such manner must be mailed to the commissioner. The corporation that ceases to be subject to tax under article 9-A must, at the time of such application, pay a tax of no less than the fixed dollar minimum described in section 210(1)(d).

PART 3 COMPUTATION OF TAX

SUBPART 3-1 TAX BASES

Sec.

Section 3-1.1. Computation of tax. (Tax Law, sections 210(1) and 210(1-c)).

(a) Generally, a corporation subject to the tax imposed by article 9-A is required to pay a tax computed by one of the three bases set forth in this subdivision and must pay whichever results in the highest tax:

(1) the business income base tax;

(2) the capital base tax; and

(3) the fixed dollar minimum tax.

(b) A qualified homeowners association, as defined in section 210(1), is required only to pay the greater of the business income base tax or the capital base tax.

(c) For special rules concerning domestic internal sales corporations (DISCs), REITs, RICs, New York S corporations, corporate partners, and REMICS, see Part 10 of this Subchapter.

(d) For the computation of tax on a combined report, see Subpart 6-2 of this Chapter – Combined reports.

Section 3-1.2 Business income base tax. (Tax Law, sections 210(1)(a) and 209(6)).

(a) (1) Generally, the business income base is the measure of the tax if such calculation results in an amount of tax greater than the capital base tax and greater than the fixed dollar minimum tax.

(2) The business income base is the corporation’s total business income apportioned within the State minus the prior net operating loss conversion subtraction and the net operating loss deduction.

(3) To compute the tax measured by the business income base, the corporation must multiply its business income base by the tax rate specified in section 210(1)(a).

(b) (1) Where a group of corporations file a combined report, the combined business income base generally is the measure of the tax if such calculation results in an amount of tax greater than the combined capital base tax and greater than the fixed dollar minimum tax that is attributable to the designated agent of the combined group.

(2) The combined business income base is the total business income of the combined group apportioned within the State minus the prior net operating loss conversion subtraction of the combined group and the net operating loss deduction of the combined group.

(3) To compute the tax measured by the combined business income base, the combined business income base is multiplied by the tax rate specified in section 210 (1)(a).

(c) The business income base tax is not applicable to New York S corporations and DISCs.

Section 3-1.3 Capital base tax. (Tax Law, sections 209(5) and (7), 210(1) and (1-c)).

(a)(1) Generally, the capital base is the measure of the tax if such calculation results in an amount of tax that is greater than or equal to that computed on the business income base tax and greater than the fixed dollar minimum tax.

(2) The capital base is the portion of the corporation's total business capital apportioned within the State.

(3) To compute the tax measured by the capital base, the corporation must multiply its capital base by the tax rate specified in section 210(1)(b).

(b) (1) Where a group of corporations file a combined report, the combined capital base is the measure of the tax if such calculation results in an amount of tax greater than or equal to the combined business income base tax and greater than the fixed dollar minimum tax that is

attributable to the designated agent of the combined group.

(2) The combined capital base is the combined total business capital apportioned within the State.

(3) To compute the tax measured by the combined capital base, the combined capital base is multiplied by the tax rate specified in section 210(1)(b).

(c) The capital base tax does not apply to:

(1) a non-captive RIC;

(2) a non-captive REIT;

(3) the first two taxable years of a taxpayer that, for one or both such years, is a small business taxpayer;

(4) a New York S corporation.

(d) For purposes of subdivision (c) of this section, a small business taxpayer, as defined in section 210(1)(f), is required only to pay the higher of the business income base tax or the fixed dollar minimum tax in its first two taxable years. A combined group may qualify as a small business taxpayer if the combined group satisfies the requirements to be a small business taxpayer specified in section 210(1)(f)(i), (ii) and (iv) and each member of the combined group satisfies the requirement in section 210(1)(f)(iii).

Section 3-1.4. Fixed dollar minimum tax. (Tax Law, section 210(1)(d)).

(a) Generally, the fixed dollar minimum is the measure of the tax if such calculation results in an amount of tax that is greater than or equal to the business income base tax and greater than or equal to the capital base tax. The amount of the fixed dollar minimum tax determined in section 210(1)(d) varies by the amount of New York receipts and the type of taxpayer.

(b) (1) Where a group of corporations files a combined report, the fixed dollar minimum tax attributable to the designated agent generally is the measure of the tax for the combined group if such calculation results in an amount greater than or equal to the combined business income base tax and greater than or equal to the combined capital base tax. In addition, the tax on a combined report must include the fixed dollar minimum tax for each member of the combined group that is a taxpayer, other than the designated agent. Any corporation included in the combined report that is not a taxpayer is not required to pay a fixed dollar minimum tax.

(2) Each taxpayer member of the combined group, including the designated agent, must compute its own fixed dollar minimum tax based on its own New York receipts. Such receipts must be computed on a separate company basis and determined without the consideration of intercorporate eliminations or deferrals.

(c) For purposes of calculating the fixed dollar minimum tax, New York receipts are the receipts included in the numerator of the apportionment factor for the taxable year.

SUBPART 3-2

GENERAL RULES

Sec.

Section 3-2.1. Correcting distortions of income or capital. (Tax Law, section 211(5)).

(a) In case it shall appear to the commissioner that any agreement, understanding or arrangement exists between the corporation and any other corporation or any person or firm, whereby the activity, business, income or capital of the corporation within New York State is improperly or inaccurately reflected, the commissioner is authorized in the commissioner's discretion to adjust items of income (including gains and losses), deductions, and capital. In addition, the commissioner is authorized in the commissioner's discretion to eliminate assets and the receipts derived therefrom in computing the business apportionment fraction or the MCTD apportionment percentage, provided that any income directly traceable thereto is also excluded from entire net income so as to equitably determine the tax.

(b) The commissioner may include in the entire net income of any taxpayer the fair profits which, but for an agreement, arrangement or understanding as described in subdivision (a) of this section, the taxpayer might have derived from any transaction:

(1) where the taxpayer conducts its activity or business under any agreement, arrangement, or understanding in such manner as either directly or indirectly to benefit its members or stockholders, or any of them, or any person or persons directly or indirectly interested in such activity or business, by entering into any transaction at more or less than a fair price which, but for such agreement, arrangement or understanding, might have been paid or received thereof; or

(2) where the taxpayer, a substantial portion of the voting power of whose capital stock is owned or controlled either directly or indirectly by another corporation, enters into any transaction with such other corporation on such terms as to create an improper loss or net income.

(c) Where any taxpayer owns or controls, directly or indirectly, more than 50% of the voting power of the capital stock of another corporation subject to tax under section 1502-A and 50% or less of whose gross receipts for the taxable year consist of premiums, the commissioner

may include in the entire net income of the taxpayer, as a deemed distribution, the amount of the net income of the other corporation that is in excess of its net premium income.

Section 3-2.2 Adjusting tax bases to period covered by report. (Tax Law, sections 208(9)(h) and 210(2)).

(a) Entire net income. (1) Except in the case of a New York S termination year, if the entire net income required to be reported under article 9-A is for a period different from the period covered by the taxpayer's Federal income tax return, the taxpayer's entire net income must be prorated to correspond with the period covered by the report under article 9-A. The prorated entire net income is computed as follows: (i) adjust Federal taxable income to arrive at entire net income in the manner set forth in section 3-3.1 of this Part to arrive at entire net income; (ii) multiply entire net income by the number of calendar months, or major parts thereof, covered by the report under article 9-A; and (iii) divide the result by the number of calendar months, or major parts thereof, covered by the return for Federal income tax purposes. Other exempt income and investment income must be similarly prorated.

Example 1: A calendar year taxpayer was organized in 2013 under the laws of another state where it carried on its business. It began doing business in New York State on March 14, 2015. It files its return for Federal income tax purposes for the calendar year 2015 and its Federal taxable income was $70,000. In computing its entire net income for the period March 14, 2015 to December 31, 2015, its Federal taxable income of $70,000 for the calendar year 2015 is first adjusted as required by section 3-3.1 of this Part. The taxpayer’s entire net income after those adjustments was $78,000. That entire net income must be multiplied by 10 (the number of months from March to

December) and the product divided by 12, resulting in a prorated entire net income of $65,000.

Example 2: Same facts as in Example 1, except that the taxpayer began doing business in New York State in March 20, 2015. The entire net income of $78,000 must be multiplied by 9 and the product divided by 12, resulting in a prorated entire net income of $58,500.

(2) The method of computing entire net income set forth in paragraph (1) of this subdivision applies to taxpayers reporting on either a calendar year or a fiscal year basis for Federal income tax purposes.

(3) If, in the opinion of the commissioner, the method described in this subdivision does not properly reflect the taxpayer's entire net income for purposes of article 9-A during the period covered by its report, the commissioner may determine entire net income solely on the basis of the taxpayer's income during such period.

(b) Business and investment capital. If a period covered by a report under article 9-A is other than 12 calendar months, the amount of business capital and the amount of investment capital are each determined by multiplying its average value, by the number of calendar months or major parts thereof included in that period, and dividing the product by 12.

Example 1: A foreign corporation began to do business in New York State on June 10, 2015, and reports on a calendar year basis. The average value of its total investment capital for that year was $60,000, and the average value of its total business capital was $240,000. The amount of each class of capital, for purposes of computing the tax for taxable year 2015, is determined by multiplying each of the above amounts by seven (the

number of months from June to December) and dividing the product by 12, resulting in investment capital of $35,000 and business capital of $140,000.

(c) Fixed dollar minimum tax. If the taxable period covered by a report under article 9-A is less than 12 months, the amount of New York receipts used to determine the amount of the fixed dollar minimum tax is determined by dividing the amount of the receipts for the period covered by the report by the number of months (or major parts thereof) in that period and multiplying the result by 12. In addition, the amount of fixed dollar minimum tax determined under section 210(1)(d)(1) shall be reduced by:

(1) 25% if the period for which the taxpayer is subject to tax is more than six months but not more than nine months, or

(2) 50% if the period for which the taxpayer is subject to tax is not more than six months.

Example 2: A foreign corporation began to business in New York State on May 10, 2015 and reports on a calendar year basis. During the period from May 10, 2015 through December 31, 2015, its New York receipts is $2,500,000. The amount of the receipts used to determine its fixed dollar minimum is $3,750,000, which is determined by dividing 2,500,000 by 8 and multiplying the result by 12. The fixed dollar minimum tax when New York receipts are $3,750,000 is $1,500. Because the period covered by the report is more than 6 months but less than 9 months, the amount of the fixed dollar minimum tax is reduced by 25% to 1,125.

(d) Whenever the tax base is prorated for a tax period of less than 12 months, the business apportionment fraction must also be adjusted in the same manner for the period pursuant to the

method described in section 4-4.2 of this Part.

Section 3-2.3. Fair market value.

(a) The fair market value of any asset owned by the taxpayer is the price at which a willing seller, not compelled to sell, will sell and a willing purchaser, not compelled to buy, will buy.

(b) The fair market value, on any date, of stocks, bonds and other securities regularly traded on an exchange, or in an over-the-counter market, is the mean between the highest and lowest selling prices on that date. If there were no sales on the valuation date, such value is the mean between the highest and the lowest selling prices on the nearest date, within a reasonable time, on which there were sales. If actual sales within a reasonable time are not available, the fair market value is the mean between the bona fide bid and asked prices on the valuation date or the nearest date within a reasonable time.

(c) If the actual sales prices or bona fide bid and asked prices within a reasonable time are not available, or if, by reason of the character or extent of the taxpayer's investments or for any other reason, such prices are not truly indicative of value, the fair market value is ascertained as follows:

(1) in the case of shares of stock, on the basis of the issuing corporation's net worth, earning power, book value, dividends paid, and all other relevant factors;

(2) in the case of bonds and other securities, by giving consideration to various factors, including the soundness of the security, the interest yield, and the date of maturity.

(d) If a taxpayer consistently computes the fair market value of its stocks, bonds and other securities on some other basis, such as the last selling price on the valuation date, such

method of valuation may be accepted by the commissioner. In all such cases, a complete explanation of the method of valuation must be included with the report.

Section 3-2.4. Average value. (Tax Law, section 210(2))

(a) In determining average value, the taxpayer must use fair market value for real property and marketable securities and must use the value shown on the balance sheet included with its federal tax return for personal property other than marketable securities. If the taxpayer is not required to include a balance sheet in their Federal income tax return, it must use the value for personal property other than marketable securities that it would have used if it had been required to include a balance sheet with its Federal income tax return. However, corporations more than 50% directly or indirectly owned or controlled by the taxpayer (or combined group) must be valued using the equity method of accounting in accordance with generally accepted accounting principles (GAAP), provided the value cannot be less than zero. The equity method of accounting calls for each such corporation to be valued based on the average value of their owner's equity account per their balance sheet. Allowance must be made for variations in the amount of assets held by the taxpayer during the period covered by the report, as well as for variations in market prices. Average value generally is computed on a quarterly basis where the taxpayer's usual accounting practice permits such computation. However, at the option of the taxpayer, a more frequent basis (such as a monthly, weekly or daily average) may be used. Where the taxpayer's usual accounting practice does not permit a quarterly or more frequent computation of average value, a semiannual or annual computation may be used where no distortion of average value will result. If, because of variations in the amount or value of any class of assets, it appears to the commissioner that averaging on an annual, semiannual or quarterly basis does not properly reflect average value, the commissioner may require

averaging on a more frequent basis. Any method of determining average value that is adopted by the taxpayer on any report and accepted by the commissioner may not be changed on any subsequent report without the prior consent of such commissioner.

(b) Generally, the value of assets must be determined without reduction for liabilities. However, if a taxpayer's assets include reverse repurchase agreements and/or security borrowing agreements, then the sum of the FMV of these assets must be reduced, but not below zero, by the sum of the FMV of all repurchase agreements and/or security lending agreements included in the taxpayer's liabilities.

Example 1: A taxpayer owns shares of common stock of X Corporation. The fair market values, during the period covered by its report, on a quarterly basis, were as follows:

(1) at the end of first quarter, it owned no shares;

(2) at the end of second quarter, it owned no shares;

(3) at the end of third quarter, it owned no shares; and

(4) at the end of fourth quarter, it owned 100 shares with a value of $100 a share.

The average value during the period covered by the report, on a quarterly basis, of the taxpayer's holdings of X Corporation's common stock would be $2,500, computed as follows:

Fair market values of stock	
End of 1st quarter	0
End of 2nd quarter	0
End of 3rd quarter	0

End of 4th quarter	$10,000
Total	$10,000

Average Value: 10,000 ÷ 4 = $2,500

Example 2: The taxpayer's inventories and their values during the period covered by its report, on a quarterly basis, were as follows:

(1) at the end of first quarter, 1,000 tons with a value of $2 a ton;

(2) at the end of second quarter, 2,000 tons with a value of $2 a ton;

(3) at the end of third quarter, 2,000 tons with a value of $3 a ton; and

(4) at the end of fourth quarter, 1,000 tons with a value of $2 a ton.

The average value of the taxpayer's inventories during the period covered by the report, computed on a quarterly basis, would be $3,500, computed as follows:

Value of inventories

End of 1st quarter	$2,000
End of 2nd quarter	$4,000
End of 3rd quarter	$6,000
End of 4th quarter	$2,000
Total	$14,000

Average Value: 14,000 ÷ 4 = $3,500

Example 3: The taxpayer did not dispose of or acquire any part of its plant or equipment

during the period covered by its report. The values of its plant and equipment were as follows:

(1) at the beginning of the year, the value was $800,000; and

(2) at the end of the year, the value was $780,000.

The average value of the taxpayer's plant and equipment during the period covered by its report, computed on the basis of the average values at the beginning end and end of such period, would be $790,000, computed as follows:

Beginning of year	$800,000
End of year	$780,000
Total	$1,580,000

Average Value: = 1,580,000 ÷ 2 = $790,000

Section 3-2.5. Use of dollar amounts in computing tax. (Tax Law, section 171(19)).

(a) Any amount required to be included in a report may be entered at the nearest whole dollar amount. This does not apply to the items that must be taken into account in making the computations necessary to determine such amount. For example, each sale must be taken into account at its exact amount, including cents, in computing the amount to be included in the franchise tax report. However, the total amount to be included in the franchise tax report may be entered at the nearest whole dollar amount. A taxpayer may elect not to use whole dollar amounts by reporting all amounts in full, including cents. Such election must be made on an original timely filed return (determined with regard to extensions). A new election may be made on any report for any subsequent taxable year.

(b) For the purpose of the computation to the nearest dollar, a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case the amount (determined without regard to the fractional part of a dollar) shall be increased by one dollar.

Example:

Exact amount	To be reported as
$500,000.49	$500,000.00
$500,000.50	$500,001.00
$500,000.51	$500,001.00

SUBPART 3-3

ENTIRE NET INCOME

Sec.

Section 3-3.1. Definition of entire net income. (Tax Law, section 208(9)).

(a) (1) Entire net income means total net income from all sources. The starting point for the computation of entire net income is Federal taxable income, which generally means taxable income as defined in IRC section 63 ("taxable income"). After determining the amount of Federal taxable income, it must be adjusted by the addition and subtraction modifications as required by the provisions of section 208(9), and, to the extent necessary, further described in this Subpart.

(2) "Federal taxable income" is presumed to be the same as (i) the taxable income the taxpayer is required to report to the United States Treasury Department, or (ii) the taxable

income that the taxpayer would have been required to report to the United States Treasury Department, if it had not made an election under Subchapter S of Chapter one of the IRC; or (iii) the taxable income that the taxpayer, in the case of a corporation that is exempt from Federal income tax (other than the tax on unrelated business taxable income imposed under IRC section 511) but is subject to tax under article 9-A, would have been required to report to the United States Treasury Department but for such exemption; or (iv) the income, gain, or loss that is effectively connected with the conduct of a trade or business within the United States as determined under IRC section 882 in the case of an alien corporation that under any provision of the IRC is not treated as a domestic corporation as defined in IRC section 7701.

(3) The amount of any specific exemption or credit allowed in any law of the United States imposing any tax on or measured by the income of corporations is not allowed in computing entire net income. The income actually reported or the income actually determined for Federal income tax purposes is not necessarily the same as the taxable income that was required to be reported for Federal income tax purposes under the provisions of the IRC. Generally, the determination of the Internal Revenue Service as to Federal taxable income is followed, but it is not binding on the commissioner or the taxpayer.

(b) Each corporation included in a Federal consolidated group must compute its Federal taxable income for purposes of article 9-A as if such corporation had computed its Federal taxable income on a separate basis for Federal income tax purposes. Provided, however, in the case of a member of a selling consolidated group, as defined in IRC section 338(h)(10), with respect to which an election under such section 338(h)(10) has been made, Federal taxable income shall not include any gain or loss on the sale or exchange of stock of a target corporation which is not recognized by virtue of such election, but only if such member files on a combined

report with such target corporation for the period including the acquisition date, as such term is defined in IRC section 338(h)(2).

(c) Combined reports. In computing combined entire net income, the combined group will generally be treated as a single corporation. All intercorporate dividends must be eliminated (except dividends from a DISC or a former DISC not exempt from tax under article 9-A or dividends from a captive REIT included in the combined report if the group is utilizing the subtraction modification in section 208(9)(t)). In addition, all other intercorporate transactions must be deferred in a manner similar to the United States treasury regulations relating to intercompany transactions under IRC section 1502. In computing combined entire net income, contributions should be deducted and intercorporate profits should be treated in a manner similar to US treasury regulations for consolidation purposes.

(d) Entire net income may be affected by a net capital loss carried from another taxable year for Federal income tax purposes pursuant to IRC section 1212. (For the rules for calculating a capital loss and a capital loss carry back and carry forward for New York purposes, see Subpart 3-7 of this Part).

Section 3-3.2. Taxable year in which income or deduction is included in entire net income. (Tax Law, section 208(9)(d))

(a) In general, the method of accounting used in computing taxable income for Federal income tax purposes is used in computing entire net income. However, whenever the commissioner deems it necessary in order to properly reflect the entire net income of the taxpayer, the commissioner may determine the taxable year or period in which any item of income or deduction shall be included, without regard to the method of accounting used by the taxpayer for Federal income tax purposes.

(b) Examples.

Example 1: A taxpayer has a contract for the construction of a building and the subsequent installation of equipment in that building. The contract covers a period in excess of one taxable year. The taxpayer keeps its books so as to reflect the total income derived from the contract in the taxable year in which the contract is finally completed, and reports its Federal taxable income accordingly. The commissioner may require the taxpayer to report the income from the contract on the basis of the percentage of completion in each taxable year, or some other appropriate basis.

Example 2: A foreign corporation sells its New York State real estate on an installment basis, and terminates its taxable status in New York State in the year of the sale. The full profit on the sale must be included in entire net income in the year of the sale.

Example 3: A foreign corporation sells its New York State real estate on an installment basis and terminates its taxable status in New York State in a subsequent taxable year prior to the receipt of all of its installment payments. The profit included in the remaining installment payments for the sale must be included in entire net income in the year it terminates its taxable status in New York State.

Section 3-3.3. Subtraction modifications for community banks and thrifts. (Tax Law sections 208(9)(r), (s), (t)).

(a) Captive REIT modification. (1) A corporation that is a small thrift institution or qualified community bank, both as defined in section 208(9)(s), that maintained a captive REIT on April 1, 2014 must utilize the REIT subtraction provided for in this subdivision in any taxable year it maintained such captive REIT on the last day of the tax year. Such corporation maintained a captive REIT if it owned, directly or indirectly, more than 50% of the voting stock of such captive REIT on the required date. The REIT subtraction is equal to 160% of the dividends paid deductions allowed to that captive REIT for the taxable year for Federal income tax purposes.

(2) When computing the combined business income base, there is no elimination of intercompany dividends received from the combined captive REIT by any member of the combined group in any taxable year in which the subtraction modification described in this subdivision is utilized.

(3) A combined group that includes a small thrift institution or qualified community bank is not allowed to utilize the subtraction modification for qualified residential loan portfolios described in subdivision (b) of this section or the subtraction modification for qualified community banks and small thrifts described in subdivision (c) of this section in any taxable year in which such thrift institution or community bank owns the captive REIT referred to in paragraph (1) on the last day of the taxable year.

(b) Subtraction modification for qualified residential loan portfolios. (1) A corporation that is a thrift institution, as defined in section 208(9)(r)(3), or a qualified community bank, as defined in section 208(9)(s)(2), that maintains a qualified residential loan portfolio as defined in paragraph (2) of this subdivision is allowed as a deduction in computing entire net income the amount, if any, by which (i) 32% of its entire net income determined without regard to this subtraction

modification exceeds (ii) the amounts deducted by the taxpayer pursuant to IRC sections 166 and 585 less any amounts included in Federal taxable income because of a recovery of a loan.

(2) Qualified residential loan portfolio. A corporation maintains a qualified residential loan portfolio if at least 60% of the amount of the total assets at the close of the taxable year of the thrift institution or qualified community bank consists of the assets described in clauses (A) through (L) of subparagraph (i) of this paragraph, with the application of the rule in clause (M) of subparagraph (i) of this paragraph. At the election of the corporation, such percentage shall be applied based on the average assets outstanding during the taxable year, in lieu of the close of the taxable year. The corporation can elect to compute an average using the assets measured on the first day of the taxable year and on the last day of each subsequent quarter, or month or day during the taxable year. This election may be made annually.

(i) Assets:

(A) cash, which includes cash and cash equivalents including cash items in the process of collection, deposit with other financial institutions, including corporate credit unions, balances with Federal reserve banks and Federal home loan banks, Federal funds sold, and cash and cash equivalents on hand. Cash shall not include any balances serving as collateral for securities lending transactions;

(B) obligations of the United States or of a state or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality or a government sponsored enterprise of the United States or of a state or political subdivision thereof;

(C) loans secured by a deposit or share of a member;

(D) loans secured by an interest in real property which is (or from the proceeds of the loan, will become) residential real property or real property used primarily for church

purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, or loans secured by stock in a cooperative housing cooperation that entitles the stockholders to occupy for dwelling purposes a specified unit in the building owned by the cooperative housing corporation pursuant to a proprietary lease of that unit. For purposes of this clause, residential real property includes single or multi-family dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis;

(E) property acquired through the liquidation of defaulted loans described in clause (D) of this subparagraph;

(F) any regular or residual interest in a REMIC, as defined in IRC section 860D, but only in the proportion which the assets of such REMIC consist of property described in clauses (A) through (E) of this paragraph, except that if 95% or more of the assets of such REMIC are assets described in clauses (A) through (E) of this subparagraph, the entire interest in the REMIC will qualify;

(G) any mortgage-backed security that represents ownership of a fractional undivided interest in a trust, the assets of which consist primarily of mortgage loans, if the real property that serves as security for the loans is (or from the proceeds of the loan, will become) the type of property described in clause (D) of this subparagraph and any collateralized mortgage obligation, the security for which consists primarily of mortgage loans that maintain as security the type of property described in clause (D) of this subparagraph;

(H) certificates of deposit in, or obligations of, a corporation organized under a state law that specifically authorizes such corporation to insure the deposits or share accounts of member associations;

(I) loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities;

(J) loans made for the payment of expenses of college or university education or vocational training;

(K) property used by the taxpayer in support of business which consists principally of acquiring the savings of the public and investing in loans; and

(L) loans for which the taxpayer is the creditor and which are wholly secured by loans described in clause (D) of this subparagraph.

(M) The value of accrued interest receivable and any loss-sharing commitment or another loan guaranty by a governmental agency will be considered part of the basis in the loans to which the accrued interest or loss protection applies.

(ii) For purposes of clause (D) of subparagraph (i) of this paragraph, (A) if a multifamily structure securing a loan is used in part for nonresidential use purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80% of the property's planned use (measured, at the taxpayer’s election, by using square footage or gross rental revenue, and determined as of the time the loan is made), and (B) loans made to finance the acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if there is a reasonable assurance that the property will become residential real property within a

period of three years from the date of acquisition of such land; but this clause shall not apply for any taxable year unless, within such three-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (F) of subparagraph (i) of this paragraph, any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding item under principles like the principle of such clause (F), except that if such REMICs are part of a tiered structure, they shall be treated as one REMIC for purposes of such clause (F).

(3) Combined groups. (i) In the case of a combined report, the deduction provided for in this subdivision will be computed on a combined basis. For purposes of calculating this subtraction, the entire net income of the combined reporting group shall be multiplied by a fraction, the numerator of which is the average total assets of all the thrift institutions and qualified community banks included in the combined report and the denominator of which is the average total assets of all the corporations included in the combined report.

(ii) The determination of whether the combined group maintains a qualified residential loan portfolio will be made by aggregating the assets of the thrift institutions and qualified community banks that are members of the combined group.

(4) A taxpayer, or in the case of a combined group, a combined group claiming the subtraction modification described in this subdivision is not allowed to utilize the captive REIT subtraction modification described in subdivision (a) of this section or the subtraction modification for community banks and small thrifts described in subdivision (c) of this section.

(c) Subtraction modification for community banks and small thrifts. (1) A corporation that is a qualified community bank or a small thrift institution, both as defined in section 208(9)(s), is allowed a deduction in computing entire net income equal to the amount computed as follows:

(i) Multiply the corporations's net interest income from loans during the taxable year by a fraction, the numerator of which is the gross interest income during the taxable year from qualifying loans and the denominator of which is the gross interest income during the taxable year from all loans.

(ii) Multiply the amount determined in subparagraph (i) of this paragraph by 50%. This product is the amount of the deduction allowed under this paragraph.

(2) Net interest income from loans means gross interest income from loans less gross interest expense from loans, provided the result cannot be less than zero. Gross interest expense from loans is determined by multiplying gross interest expense by a fraction, the numerator of which is the average total value of loans owned by the thrift institution or community bank during the taxable year and the denominator of which is the average total assets of the thrift institution or community bank during the taxable year.

(3) A qualifying loan is a loan that meets the conditions specified in subparagraphs (i) and (ii) of this paragraph. A loan that meets the definition of a qualifying loan in a prior taxable year (including years prior to 2015) remains a qualifying loan in taxable years during and after which such loan is acquired by another member of the same combined group.

(i) The loan is originated by the qualified community bank or small thrift institution or is purchased by the qualified community bank or small thrift institution immediately after its origination in connection with a commitment to purchase made by the bank or thrift institution prior to the loan's origination.

(ii) The loan is a small business loan or a residential mortgage loan, the principal amount of which loan is $5 million or less, and either the borrower is located in this state and the loan is not secured by real property, or the loan is secured by real property located in New York. A loan

is secured by real property located in New York if, at the time the real property loan is originated, more than 50% of the fair market value of property used to secure the loan is located in New York.

(A) For purposes of this paragraph, a small business loan means a loan made to an active business that, in its immediately preceding taxable year, had an average number, determined on a quarterly basis, of full-time employees of 100 or fewer, not including general executive officers, and total gross receipts of not greater than $10 million. A business qualifies as an active business if the average value, determined on a quarterly basis, of its loans, Federal, state and municipal debt, asset backed securities and other government agency debt, corporate bonds, reverse repurchase agreements and securities borrowing agreements, Federal funds, stocks and partnership interests, physical commodities and other financial instruments that it owns does not exceed 50% of the average value of its total assets. In the event that the active business applies for the loan in its first year of operations, satisfaction of the requirements in the preceding two sentences is determined by the employees, receipts and assets of the business on the date of the loan application. In addition, the business may not be part of an affiliated group, as defined in IRC section 1504, unless the group itself would have met, as a group, the active business, employee and the gross-receipts requirements. A loan made to an entity that meets these requirements to be a small business at the time of the filing of the loan application is deemed to be a small business loan throughout the term of such loan.

(B) For purposes of this paragraph, a residential mortgage loan is a loan described in clause (D) of subparagraph (i) of paragraph (2) of subdivision (b) of this section.

(4) Examples.

Example 1*:* A retail clothing business located in New York submits an application for a loan from a qualified community bank on February 1, 2016. The bank determines that, during the 2015 tax year, the business had an average number of 30 employees, and that for the same tax year the business's gross receipts were $3 million and its assets consisted entirely of inventory (valued at $75,000) and bank deposits (valued at $25,000). The bank further determines that the business is not part of an affiliated group. The loan is a qualifying loan for purposes of this subtraction modification.

Example 2: The business in example 1 submits an application for a second loan from the same community bank on February 1, 2017. The bank determines that, during the 2016 tax year, the business had an average number of 40 employees, and that for the same tax year the business's gross receipts were $4 million. The bank further determines that for the 2016 tax year the business was part of an affiliated group; and that during that tax year the members of the affiliated group together had an average number of 90 employees, and total gross receipts were $9 million. The loan is a qualifying small business loan for purposes of this subtraction modification.

Example 3: A partnership submits an application for a loan from a qualified community bank on February 1, 2017. The bank determines that,

during the 2016 tax year, the partnership had no employees and its gross receipts were $2 million for the year. The bank also determines that its assets consist of corporate stock that has an average value equal to $40 million and land that has an average value equal to $10 million. The partnership holds the corporate stock for investment. The partnership is not an active business because more than 50% of its assets are financial investments. Therefore, the loan is not a qualifying loan for purposes of this subtraction modification because it is not a small business loan.

Example 4: Jane Smith, a resident of New York, submits an application to a small thrift for a residential mortgage loan of $1 million to purchase a second home in Massachusetts. Ms. Smith will use both the Massachusetts property and her primary residence in New York to secure the mortgage loan. At the time the loan is originated, the fair market value of the New York property is $700,000 and the fair market value of the Massachusetts property is $300,000. Since more than 50% of the loan is secured by real property in New York, the entire loan is considered secured by real property in New York. As such, the loan is a qualifying loan for purposes of this subtraction modification.

(5) In the case of a combined report, the subtraction modification described in this subdivision must be computed separately for each qualified community bank or a small thrift

institution included in the combined report. The sum of such amounts is the amount of the deduction allowed under this paragraph.

(6) A taxpayer, or in the case of a combined group, a combined group, claiming the subtraction modification provided for in this subdivision is not allowed to utilize the captive REIT subtraction modification described in subdivision (a) of this section or the subtraction modification for qualified residential loan portfolios described in subdivision (b) of this section.

(d) For purposes of determining if a corporation is a qualified community bank or small thrift institution, the average value determined under section 3-2.4 of the taxpayer's assets, or if the taxpayer is included in a combined report, the combined group's assets determined under section 210-C, must not exceed $8 billion. Such assets will be included only if the income, loss or expense of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of entire net income for the taxable year

(e) For purposes of all other assets used in this section, the following rules shall apply.

(1) Total assets are those assets that are properly reflected on a balance sheet, computed in the same manner as is required by the banking regulator of the taxpayers included in the combined return. Total assets include leased real property that is not properly reflected on a balance sheet.

(2) Assets will only be included if the income or expenses of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of the combined group's entire net income for the taxable year. Assets will not include deferred tax assets and intangible assets identified as goodwill.

(4) Tangible real and personal property, such as buildings, land, machinery, and equipment

shall be valued at cost. Leased real property that is not properly reflected on a balance sheet will be valued at the annual lease payment multiplied by eight. Intangible property, such as loans and investments, shall be valued at book value exclusive of reserves.

(5) Intercorporate stockholdings and bills, notes and accounts receivable and payable, and other intercorporate indebtedness between the corporations included in the combined report shall be eliminated.

(6) Average assets are computed using the assets measured on the first day of the taxable year, and on the last day of each subsequent quarter of the taxable year or month or day during the taxable year.

Section 3-3.4 Royalty modification. (Tax Law, section 208(9)(o)).

In computing entire net income, section 208(9)(o) provides that a corporation that is not included in a combined report with a related member (as that term is defined in subparagraph (1) of that paragraph) must add back royalty payments directly or indirectly paid, accrued or incurred in connection with one or more direct or indirect transactions with one or more related members during the taxable year to the extent deductible in calculating Federal taxable income. The addback will not apply if the corporation establishes by clear and convincing evidence of the form and type specified by the commissioner that one of three exceptions specified in section 208(9)(o)(2)(B)(i)-(iii) apply. For purposes of verifying that the corporation meets an exception to the addback, the corporation is required to retain and produce upon request an unredacted copy of the tax return filed with the applicable taxing authority of the related member for each transaction in question. The corporation is also required to supply an English translation of each non-English tax return required to be produced, including a translation of foreign currency to

U.S. dollars. In addition, the addback will not apply if the corporation and the commissioner agree in writing to the application or use of alternative adjustments or computations.

SUBPART 3-4

INVESTMENT CAPITAL, INVESTMENT INCOME AND OTHER EXEMPT INCOME

Sec.

Section 3-4.1. Definition of investment capital. (Tax Law, sections 208(4) and (5))

(a) The term "investment capital*"* means investments described in paragraphs (1), (2) or (3) of this subdivision, as further described in this Subpart.

(1) Stocks that satisfy the criteria in subparagraphs (i) through (v) of this paragraph shall be referred to as "actual investment capital."

(i) The stocks satisfy the definition of a capital asset under IRC section 1221 at all times during the taxable year in which the taxpayer owned the stock.

(ii) The stocks are held for investment by the corporation for more than one year. For purposes of determining the length of the holding period, the principles of IRC section 1223 shall be followed under the circumstances described in that section.

(iii) The dispositions of the stocks are, or would be, treated by the corporation as generating long-term capital gains or losses under the IRC.

(iv) If the stocks are acquired on or after January 1, 2015, the stocks have never been held for sale to customers in the regular course of business at any time after the close of the day on which they were acquired.

(v) The stocks are clearly identified in the corporation's records as held for investment in the manner described in section 3-4.3 of this Subpart.

(2) Stocks acquired during the taxable year that meet the criteria in subparagraphs (i), (iii), (iv), and (v) of paragraph (1) of this subdivision that have been held as investment by the corporation for one year or less at the time the corporation files its original report for the taxable year and are still held at such time shall be referred to as “presumed investment capital”.

(3) In the case of a corporation incorporated and commercially domiciled outside of New York State, stocks not described in paragraph (1) or (2) of this subdivision, debt obligations, and other securities shall be referred to as “constitutionally protected investment capital” if the income or gain from such stocks, debt obligations, and other securities cannot be apportioned to New York State as the result of United States constitutional principles. In the case of a combined report, commercial domicile shall be determined on an entity by entity basis.

(b) Stock in a corporation that is conducting a unitary business with the taxpayer, stock in a corporation included in a combined report with the taxpayer pursuant to the commonly owned group election, and stock issued by the taxpayer will not constitute investment capital. For purposes of this section, if the taxpayer owns or controls, directly or indirectly, less than 20% of the voting power of the stock of a corporation, that corporation will be presumed to not be conducting a unitary business with the taxpayer.

(c) If a corporation is a partner in a partnership and the corporation is using the aggregate method to compute its tax, the corporation's proportional part of the stock owned by the partnership may qualify as investment capital if requirements for investment capital specified in subdivision (a) of this section are satisfied at the partnership level and the partnership and corporate partner are not unitary with the corporation that issued the stock.

(d) The amount of investment capital is determined as follows:

(1) ascertain the average value of each item of investment capital;

(2) ascertain the net value of each such item by subtracting from the average value of each such item the average liabilities that are directly or indirectly attributable to that item; and

(3) add the net values so arrived at.

Provided, if the sum determined in paragraph (3) is less than zero, then the amount of investment capital is deemed to be zero.

(e) Investment capital does not include any investments in stock the income from which is excluded from entire net income pursuant to the provisions of section 208(9)(c-1). Investment capital will be computed without regard to liabilities directly or indirectly attributable to such investments, but only if air carriers organized in the United States and operating in the foreign country or countries in which the taxpayer has its major base of operations and in which it is organized, resident or headquartered (if not in the same country as its major base of operations) are not subject to any tax based on or measured by capital imposed by such foreign country or countries or any political subdivision thereof, or if taxed, are provided an exemption, equivalent to that provided for herein, from any tax based on or measured by capital imposed by such foreign country or countries and from any such tax imposed by any political subdivision thereof.

Section 3-4.2. Constitutionally protected investment capital. (Tax Law, section 208(5)(e)).

In the case of a corporation incorporated and commercially domiciled outside New York State, the United States Constitution prohibits the state from apportioning income or gain from intangible assets when such income or gain lacks a sufficient connection to a unitary business being carried on in the state by the corporation. The income or gain from an intangible asset (i.e., a debt obligation or other security) is apportionable (1) where the underlying activities of the recipient of the intangible income and the source of the income constitute a unitary business; or (2) where the intangible asset or the income from the intangible asset serves an operational function in the taxpayer's business. Whether an intangible asset serves an operational function depends on the nature of the asset's use and its relation to the corporation and the corporation's activities in the state. For example, an intangible asset would serve an operational function if the asset is held to meet currently identified needs of the business, including, but not limited to, the use of the asset's income stream to pay the business's operating expenses or finance the business's functions.

Section 3-4.3. Investment capital identification procedures. (Tax Law, section 208(5)(a)(v)).

(a) Identification requirement. To qualify as investment capital, an investment in stock must be clearly identified in the corporation's records as stock held for investment in the same manner as required under IRC section 1236(a)(1) for the stock of a dealer in securities (whether or not the corporation is a dealer in securities). The identification requirements described in this section do not apply to constitutionally protected investment capital.

(b) Dealers in Securities. In the case of a corporation that is a dealer in securities subject to IRC section 1236, the identification requirement in subparagraph (v) of paragraph (1) of subdivision (a) of section 3-4.1 of this Subpart will be satisfied only if the stocks are clearly identified in the corporation's records as stock held for investment under IRC section 1236(a)(1).

However, any stock purchased by a corporation that is a dealer in securities pursuant to an option will meet the identification requirement only if the option also is clearly identified in the corporation's records as held for investment under IRC section 1236(a)(1). Identification under any other IRC section, including IRC section 475, or under any section of New York law or regulation, will not satisfy the identification requirement.

(c) All corporations other than dealers in securities. In the case of corporations that are not dealers in securities subject to IRC section 1236, the identification requirement in subparagraph (v) of paragraph (1) of subdivision (a) of section 3-4.1 of this Subpart will be satisfied only if the stocks are recorded in an account that:

(1) is maintained specifically for purposes of identifying such stocks as held for investment for investment capital purposes;

(2) is separate from any account maintained for stock held for sale to customers; and

(3) is maintained in a separate account in the corporation's books of account for recordkeeping purposes; or in a separate depository account maintained by a clearing company as nominee for the corporation; and

(4) discloses (A) the name of the stock; (B) the identifying number of the stock according to either the Committee on Uniform Securities Identification Procedures (CUSIP) or the CUSIP International Numbering System (CINS), as appropriate; and, (C) if the stock is sold, the date of the sale, the number of shares sold in the sale, and the price at which the stock or the option, respectively, is sold; and

(5) is established in such a manner as to readily identify the length of time that the stock is owned.

(d)(1) Except as otherwise provided in this subdivision, for corporations other than dealers in securities, the stocks must be identified in the manner described in subdivision (c) of this section before:

(i) October 1, 2015 for stocks acquired prior to October 1, 2015; or

(ii) the close of the day on which the stock was acquired for stock acquired on or after October 1, 2015.

(2) Under the circumstances described in subparagraphs (i) and (ii) of this paragraph that occur on or after October 1, 2015, the corporation must identify such stocks by the additional identification period end date, which is the 90th day after the later of the measurement date specified in such subparagraphs or January 7, 2016. Only stocks owned by the corporation on the additional identification period end date will be eligible for identification under this clause.

(i) In the case of a corporation that first becomes subject to tax under article 9-A on or after October 1, 2015, the measurement date is the date that the corporation begins doing business, employing capital, owning or leasing property or maintaining an office in New York State. However, in the case of a corporation that becomes subject to tax solely because it is deriving receipts from activity in the state, the measurement date is the date on which the corporation first has receipts within the state of $1 million or more. In the case of a unitary group that becomes subject to tax solely because it is deriving receipts from activity in the state, the measurement date for every corporation included in the unitary group as of the additional identification period end date is the date on which the unitary group in the aggregate first has receipts within the state of $1 million or more.

(ii) In the case of a corporation that is not a taxpayer in the state, has not been included in a combined report previously, and that first meets the capital stock requirement to be

included in a combined report with a taxpayer under section 210-C(2)(a) on or after October 1, 2015, the measurement date for that corporation is the day that corporation first meets the capital stock requirement to be included in a combined report.

(e) For stocks purchased pursuant to an option, the identification requirements and procedures specified in this section should be read as if the requirements and procedures referenced the option in addition to the stock.

(f) In the case of a combined report, each member of the combined group must follow the identification requirements and procedures specified in this section for investments in stock owned by that corporation.

(g) If a corporation is a partner in a partnership and the corporation is using the aggregate method to compute its tax, the partnership must follow the identification requirements and procedures specified in this section for investments in stock owned by the partnership to qualify as investment capital of the corporate partner. If, on or after October 1, 2015, a corporation becomes a partner in a partnership that is not a dealer for purposes of IRC section 1236, and the partnership, prior to the date the corporation becomes a partner, had not identified any stock as investment capital using the requirements and procedures specified in this section, only stock acquired by the partnership on or after the date the corporation becomes a partner may potentially qualify as investment capital.

Section 3-4.4. Presumed investment capital that fails the holding period requirement. (Tax Law, section 208(5)(d)).

(a) If a corporation has presumed investment capital and disposes of any such stock after the filing of the original report for that tax year and before the filing of the report for the next succeeding taxable year, the corporation must determine how long such stock had been held for

investment as of the date it files its original report for the next succeeding taxable year. If any such stock in fact had been held as investment for one year or less (as counted across tax years), the corporation must either:

(1) file an amended report for the taxable year in which such stock was presumed investment capital to properly classify the capital and income as business capital and income, respectively; or

(2) (i) increase its business capital in the immediately succeeding taxable year by the amount previously included in investment capital for that stock, net of any liabilities attributable to that stock (but not less than zero); and (ii) increase its business income in the immediately succeeding taxable year by the amount of income and net gains (but not less than zero) from that stock previously included in gross investment income after the limitation in section 3-4.5(c) of this Subpart less either (A) the safe harbor reduction amount determined in section 3-4.8 of this Subpart on the return on which this presumed investment capital was identified or (B) the amount of interest deductions directly or indirectly attributable to the items of investment capital that failed the presumption determined pursuant to the method in section 3-4.7 of this Subpart on the return on which this presumed investment capital was identified. No adjustment will be allowed in the immediately succeeding taxable year for excess interest deductions directly or indirectly attributable to the items of investment capital that failed the presumption that were added back to entire net income in the year the presumed investment capital was included in investment capital.

(b) For purposes of paragraph (2) of subdivision (a) of this section, to determine if stocks that are presumed investment capital generated income that was claimed as investment income in the preceding tax year, the corporation shall use the ordering rules contained in section 3-4.5(b) of this Subpart. Provided that, for purposes of paragraph (3) of such subdivision, stocks that had been

held as investment for more than one year, as counted across tax years, shall be considered before stocks that had been held as investment for one year or less. For stocks held for one year or less, stocks with the largest interest deductions computed pursuant to section 3-4.7 of this Subpart shall be considered first.

Section 3-4.5. Definition of investment income. (Tax Law, section 208(6).)

(a)(1) Gross investment income is income from investment capital, to the extent included in entire net income. It includes dividends from investment capital, interest from investment capital, capital gains in excess of capital losses from the sale or exchange of investment capital and other income from investment capital.

(2) Investment income is gross investment income less either (i) interest deductions directly or indirectly attributable to investment capital or gross investment income determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(3) Investment income cannot exceed entire net income minus other exempt income.

(b) The following ordering rules shall apply when determining the make-up of investment income in a given taxable year when the investment income is subject to the gross investment income limitation as described in subdivision (c) of this section:

(1) income from constitutionally protected investment capital;

(2) income from actual investment capital; and

(3) income from presumed investment capital.

(c) Gross investment income limitation. Gross investment income is limited to the greater of (1) income from constitutionally protected investment capital or (2) 8% of the taxpayer's entire

net income, or in the case of a combined group, 8% of the combined group's entire net income. This limitation on investment income does not impact the value of investment capital.

Section 3-4.6. Definition of other exempt income[1].(Tax Law, section 208(6-a))

(a) CFC stock and related income. (1) CFC stock means investments in stock of a corporation that generates, or could generate, exempt CFC income.

(2) Gross exempt CFC income is (i) except to the extent described in subparagraph (ii), income required to be included in the taxpayer's Federal gross income pursuant to IRC section 951(a) received from a corporation that is conducting a unitary business with the taxpayer but that is not included in a combined report with the taxpayer, (ii) the income required to be included in the taxpayer's Federal gross income pursuant to IRC section 951(a) by reason of IRC section 965(a), as adjusted by IRC section 965(b), and without regard to IRC section 965(c), received from a corporation that is not included in a combined report with the taxpayer, and (iii) 95% of the income required to be included in the taxpayer's Federal gross income pursuant to subsection (a) of IRC section 951A, without regard to the deduction under IRC section 250, received from a corporation that is not included in a combined report with the taxpayer. The income described in this subdivision shall not constitute investment income or exempt unitary corporation dividends.

(3) Exempt CFC income is gross exempt CFC income less either (i) interest deductions directly or indirectly attributable to gross exempt CFC income as determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(4) Total gross income from CFC stock is the sum of net capital gains in excess of capital losses from the sale of CFC stock plus gross exempt CFC income.

[1] This section reflects the current definition of other exempt income, which incorporates the changes for repatriation and GILTI that were enacted in Part KK of Chapter 59 of the Laws of 2018 and Part I of Chapter 39 of the Laws of 2019. For tax years before the enactment of such provisions, the statutory definition applicable at the time should be relied on, rather than these regulations.

(b) Cross-article corporation stock and related income. (1) Cross-article corporation stock means investments in stock of a corporation that is taxable under article 9 or 33, or would be taxable under article 9 or 33 if subject to tax, and is conducting a unitary business with the taxpayer, but is not included in a combined report with the taxpayer.

(2) Gross exempt cross-article dividends mean dividend income received from cross-article stock, before the reduction for interest deductions directly or indirectly attributable to gross exempt cross-article dividends as determined in section 3-4.7 of this Subpart.

(3) Exempt cross-article dividends mean gross exempt cross-article dividends, less the interest deductions directly or indirectly attributable to gross exempt cross-article dividends as determined in section 3-4.7 of this Subpart.

(4) Total gross income from cross-article corporation stock is the sum of net capital gains in excess of capital losses from the sale of cross-article stock plus gross exempt cross-article dividends.

(c) Other unitary corporation stock and related income. (1) Other unitary corporation stock means investments in stock in a corporation that is conducting a unitary business with the taxpayer, but is not included in a combined report with the taxpayer. Other unitary corporation stock does not include cross-article stock.

(2) Gross exempt other unitary corporation dividends mean dividend income received from other unitary corporation stock, before the reduction for either (i) interest deductions directly or indirectly attributable to gross exempt other unitary corporation dividends as determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(3) Exempt other unitary corporation dividends means dividends from other unitary corporation stock less either (i) the interest deductions directly or indirectly attributable to gross exempt other unitary corporation dividends as determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

(4) Total gross income from other unitary corporation stock is the sum of sum of net capital gains in excess of capital losses from the sale of other unitary corporation stock plus gross exempt other unitary corporation dividends.

(d) General. (1) Gross other exempt income is the sum of gross exempt CFC income, gross exempt cross-article dividends, and gross exempt other unitary corporation dividends.

(2) Other exempt income is the sum of exempt CFC income, exempt cross-article dividends, and exempt other unitary corporation dividends. Other exempt income cannot exceed entire net income.

(3) Gross other exempt income and other exempt income do not include any amounts treated as dividends pursuant to IRC section seventy-eight.

Section 3-4.7. Attribution of interest deductions. (Tax Law. sections 208(6) and (6-a)).

(a) Unless the safe harbor reduction election has been made as required by section 3-4.8, gross investment income and gross other exempt income must be reduced by any interest deductions allowed in computing ENI that are directly or indirectly attributable to investment capital, gross investment income, or gross other exempt income as follows:

(1) Determine the total amount of interest deductions subject to direct and indirect attribution. The total amount of interest deductions subject to direct and indirect attribution is:

(i) the amount of interest deductions included in Federal taxable income after the IRC section 163(j) limitation; less

(ii) those Federal interest deductions required to be added back to Federal taxable income in computing ENI; plus

(iii) interest deductions attributable to interest income not includable in Federal taxable income but required to be included in ENI, to the extent such expenses are not deducted for Federal tax purposes; plus

(iv) in the case of a corporation organized outside the United States that is not treated as a domestic corporation for Federal purposes, interest deductions attributable to treaty income not included in Federal taxable income that would be treated as effectively connected if not for the treaty, if taxation by states was not prevented, to the extent such expenses are not deducted for federal tax purposes; plus

(v) in the case of a corporation organized outside the United States that is not treated as a domestic corporation for Federal purposes, interest deductions attributable to income from any state or local bond that would be treated as effectively connected income if it was not excluded from gross income by IRC section 103(a), to the extent such expenses are not deducted for Federal tax purposes.

(2) Determine the total amount of interest deductions subject to direct and indirect attribution before the IRC section 163(j) limitation. If the corporation does not have interest deductions limited by IRC section 163(j) in the current year, this paragraph does not apply and it should proceed to paragraph (3) of this subdivision. Otherwise, the corporation must determine the total amount of interest deductions subject to direct and indirect attribution before the IRC section 163(j) limitation by performing the same computation as required by paragraph (1) of this subdivision, except that in subparagraph (i) of paragraph (1) of this subdivision it should instead

use the amount of interest deductions included in Federal taxable income prior to the IRC section 163(j) limitation.

(3) Determine the amount of interest deductions that can be directly traced. (i) The corporation, must determine the portion of total interest deductions subject to direct and indirect attribution that are directly traceable, whether in whole or in part, to gross investment income or investment capital, gross exempt CFC income, gross exempt cross-article dividends, gross exempt other unitary corporation dividends, and business capital or business income.

(ii) If the corporation determines that a particular interest deduction is directly attributable to more than one type of income or capital, the corporation may apportion that interest expense between or among the types of capital and income, using any method that reasonably determines the appropriate amount.

(iii) Examples of interest deductions that are traceable in whole or in part to gross exempt other unitary corporation dividends, gross exempt CFC income, gross exempt cross-article dividends, gross investment income or investment capital, or business income or business capital include:

(a) interest incurred to purchase or carry stock of corporations that generates such income or capital;

(b) interest incurred to purchase or carry investment capital (investment capital);

(c) interest incurred to purchase or build a manufacturing plant (business capital);

(d) interest incurred to purchase or carry the stock of a combined affiliate (business capital);

(e) interest incurred by a partnership to purchase or carry investment capital that is included

in a corporate partner's distributive share of income or loss from that partnership (investment capital);

(f) an interest deduction the reimbursement of which, received in the form of a management fee paid by an entity not included in the combined group of the taxpayer, is included in ENI (business capital), or

(g) interest incurred to purchase or carry reverse repurchase agreements and security borrowing agreements (business capital). The amount of such interest deductions that is subject to direct tracing is the interest expense associated with the sum of the average fair market value (FMV) of a corporation's repurchase agreements plus the average FMV of the corporation's securities lending agreements. However, this sum is limited to the sum of the average FMV of the corporation's reverse repurchase agreements plus the average FMV of the corporation's securities borrowing agreements. Note: If the sum of the average FMV of reverse repurchase agreements and security borrowing agreements exceed the sum of the average FMV of repurchase agreements and security lending agreements, then all such interest deductions are directly traceable to business capital. Otherwise, use the methodology below to compute the amount of such interest deductions directly traceable to business capital.

Average FMV of repurchase agreements and security lending agreements	$105
Average FMV of reverse repurchase agreements and security borrowing agreements	$100
Interest deductions for repurchase agreements and security lending agreements for the year	$2

Average cost of funds ($2/$105)	1.904%
Amount of $2 interest deduction directly traceable to reverse repurchase agreements and security borrowing agreements (business capital) ($100 x 1.904%)	$1.90

(iv) Special rules for corporations utilizing a carryforward of interest deductions previously limited by IRC section 163(j). For all tax years in which a carryforward of interest deductions limited by IRC section 163(j) is subsequently deductible for Federal tax purposes, the carryforward amount deducted in subsequent taxable years cannot be included in directly traced amounts. Instead, these amounts must be indirectly traced as required in paragraph (4) of this section.

(v) Special rules for corporations impacted by the IRC section 163(j) limitation in the current year. Corporations limited by IRC section 163(j) in the current year must directly trace the total amount of interest deductions subject to direct and indirect attribution prior to the IRC section 163(j) limitation. If such amount is greater than its total amount of interest deductions subject to direct and indirect attribution after the IRC section 163(j) limitation as determined in paragraph (1) of subdivision (a) of this section, then the amount of interest deductions directly traced to a specific category of income or capital is computed by multiplying the total interest deductions subject to direct and indirect attribution after the IRC section 163(j) limitation as determined in paragraph (1) of subdivision (a) of this section by a fraction, the numerator of which is the portion of interest deductions subject to direct and indirect attribution prior to the IRC section 163(j) limitation that can be directly traced to a specific category of income or capital and the denominator of which is the interest deductions subject to direct and indirect

attribution prior to the IRC section 163(j) that can be directly traced to all categories of income and capital.

If the amount of interest deductions prior to the IRC section 163(j) limitation that can be directly traced is less than or equal to the total amount of interest deductions subject to direct and indirect attribution after such limitation, such directly traced amounts prior to the IRC section 163(j) limitation shall be the amount of interest deductions directly traced for purposes of this paragraph.

(4) Determine the amount of interest deductions to be indirectly traced. The amount of interest deductions subject to indirect attribution is the total amount of interest deductions subject to direct and indirect attribution after the IRC section 163(j) limitation minus the total amount of interest deductions directly traced pursuant to paragraph three of this subdivision.

(5) Perform indirect tracing. (i) To determine the amount of interest deductions indirectly attributable to gross exempt cross-article dividends, the corporation, must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the taxpayer's cross-article stock and the denominator of which is the total average value of all taxpayer's assets.

If, during the taxable year, the corporation's investment in cross-article stock generates both taxable net capital gains (capital gains in excess of capital losses) and gross exempt cross-article dividends, the numerator of the fraction above must be multiplied by a fraction, the numerator of which is gross exempt cross-article dividends and the denominator of which is total gross income total gross income from cross-article stock.

(ii) To determine the amount of interest deductions indirectly attributable to gross exempt

other unitary corporation dividends, the taxpayer, or combined group, must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the corporation's other unitary corporation stock and the denominator of which is the total average value of all of the corporation's assets. If, during the taxable year, the corporation's investment in other unitary corporation stock generates both taxable income from business capital (e.g. net capital gains from business capital or 5% of global intangible low-taxed income) and gross exempt other unitary corporation dividends, the numerator of the fraction above must be multiplied by a fraction, the numerator of which is gross exempt other unitary corporation dividends and the denominator of which is total gross income from other unitary corporation stock.

(iii) To determine the amount of interest deductions indirectly attributable to gross exempt CFC income, the corporation, must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the corporation's CFC stock and the denominator of which is the total average value of all taxpayer's assets. If, during the taxable year, the corporation's investment in CFC stock generates both taxable income from business capital (e.g. net capital gains from business capital or 5% of global intangible low-taxed income) and gross exempt CFC income, the numerator of the fraction above must be multiplied by a fraction, the numerator of which is gross exempt CFC income and the denominator of which is total gross income from CFC stock.

(iv) To determine the amount of interest deductions indirectly attributable to investment capital or gross investment income, the corporation must multiply the total amount of interest deductions subject to indirect attribution by a fraction, the numerator of which is the average value of the taxpayer's investment capital and the denominator of which is the total average value of all corporation's assets.

(v) The amount of interest deductions directly or indirectly attributable to gross investment income and investment capital, gross exempt CFC income, gross exempt cross-article dividends, and gross exempt other unitary corporation dividends is the sum of the amounts computed in subparagraphs (i) through (iv) of this paragraph.

(vi) For purposes of indirect attribution, it is possible that an asset may generate more than one type of income that requires the use of the indirect attribution formulas in this section. In the event that investment capital assets generate other exempt income, such assets are included only in the indirect attribution formula for investment capital or gross investment income. If an asset generates both exempt CFC income and exempt cross-article dividends, such asset shall be included in one indirect attribution formula. The determination of which attribution formula is determined based on the majority of the income that such asset generates.

(b) In the case of a combined report, all computations must be done as if the combined group were a single corporation, after the elimination of all intercompany transactions and activity.

(c) A corporate partner using the aggregate method to determine its tax with respect to its interest in a partnership must include its distributive share of each partnership item of receipts, income, gain, loss and deduction and the corporation's proportionate part of each asset and liability from that partnership, after the elimination of all inter-entity transactions and activity, when computing income amounts and the attribution of interest deductions.

(d)) For purposes of this subdivision, only those assets and liabilities required to be included in the valuation of business and investment capital for purposes of computing the capital base tax are included, as determined in section 3-2.4 of this Part.

(e) If the numerator of a fraction measured by income is zero and the denominator of a fraction measured by income is an amount greater than zero, the respective income fraction is zero.

(d) Examples. For purposes of these examples, assume the corporation does not have to make any adjustments to its Federal interest deductions as provided for in paragraph (1) of subdivision (a) of this section. As a result, the total amount of interest deductions subject to direct and indirect attribution is the amount of interest deductions included in Federal taxable income.

Example 1: Corporation A has $120,000 in interest expense for 2018 prior to applying the IRC section 163(j) limitation, of which $100,000 is directly traced as follows:

$ 20,000 directly attributable to gross exempt unitary corporation dividends

$ 30,000 directly attributable to gross exempt CFC income

$ 10,000 directly attributable to gross investment income or investment capital

$ 40,000 directly attributable to business income or business capital

Due to the IRC section 163(j) limitation, $50,000 of interest expense is deducted at the Federal level and is therefore the total amount of interest deductions subject to direct and indirect attribution. The remaining $70,000 of interest expense is carried forward to subsequent years.

Since the $100,000 of total interest deductions prior to the IRC section 163(j) limitation that is directly traceable is greater than the $50,000 of total interest deductions subject to direct and indirect attribution, the

amount of interest deductions directly attributed to each specific category of income or capital is determined as follows:

$50,000 x $20,000/$100,000 = $10,000 directly attributable to gross exempt unitary corporation dividends

$50,000 x $30,000/$100,000 = $15,000 directly attributable to gross exempt CFC income

$50,000 x $10,000/$100,000 = $ 5,000 directly attributable to gross investment income or investment capital

$50,000 x $40,000/$100,000 = $20,000 directly attributable to business income or business capital

There are no interest deductions subject to indirect attribution for 2018.

The $70,000 of interest expense that is limited by IRC section 163(j) in 2018 and carried forward to subsequent years is subject to indirect attribution in the subsequent tax year(s) in which the interest expense becomes deductible for Federal tax purposes.

Example 2: Corporation B has $120,000 in interest expense for 2018 prior to applying the IRC section 163(j) limitation, of which $40,000 is directly traced as follows:

$ 8,000 directly attributable to gross exempt unitary corporation dividends

$ 17,000 directly attributable to gross exempt CFC income

$ 5,000 directly attributable to gross investment income or investment capital

$ 10,000 directly attributable to business income or business capital

Due to the IRC section 163(j) limitation, $50,000 of interest expense is deducted at the Federal level and is therefore the total amount of interest deductions subject to direct and indirect attribution. The remaining $70,000 of interest expense is carried forward to subsequent years.

Since the $40,000 of total interest deductions prior to the IRC section 163(j) limitation that are directly traceable are less than the $50,000 of total interest deductions subject to direct and indirect attribution, the amount of interest deductions directly attributed to each specific category of income or capital is as determined as follows:

$ 8,000 directly attributable to gross exempt unitary corporation dividends

$ 17,000 directly attributable to gross exempt CFC income

$ 5,000 directly attributable to gross investment income or investment capital

$ 10,000 directly attributable to business income or business capital

To determine the amount of interest deductions subject to indirect attribution, Corporation B must reduce the $50,000 of total interest deductions subject to direct and indirect attribution by the $40,000 of interest deductions directly traced above. The resulting $10,000 of interest

deductions must be indirectly attributed. The $70,000 of interest expense that is limited by IRC section 163(j) in 2018 and carried forward to subsequent years must be indirectly attributed in the subsequent tax year(s) in which the interest expense becomes deductible for Federal tax purposes unless the 40% safe harbor election is made and the taxpayer does not own exempt cross-article stock.

Section 3-4.8. Safe harbor reduction election. (Tax Law, sections 208(6) and (6-a)).

(a) In lieu of performing the attribution of interest deductions in section 3-4.7 of this Subpart, a corporation may elect to reduce the amount of gross investment income, gross exempt CFC income, and gross exempt other unitary corporation dividends by the safe harbor reduction amount, which is 40% of the respective gross income amount. If the corporation has gross exempt cross-article dividends, it must attribute interest deductions to such income using the methodology described in section 3-4.7 only as it relates to such exempt cross-article stock. In addition, the amounts of interest deductions directly attributable to gross investment income or investment capital, gross exempt CFC income, and gross exempt unitary corporation dividends are not subtracted from gross investment income, gross exempt CFC income, and gross exempt unitary corporation dividends, respectively.

(b) This election applies to gross investment income, gross exempt CFC income, and gross exempt other unitary corporation dividends. The absence of gross investment income, gross exempt CFC income, or gross exempt other unitary corporation dividends does not preclude the election being made.

(c) (1) The election may be made or revoked by the taxpayer or in the case of a combined group, the designated agent, filing of a tax return within the statute of limitations for each applicable tax year. Such election is binding on both the taxpayer and the Department.

SUBPART 3-5

BUSINESS CAPITAL AND BUSINESS INCOME

Sec.

Section 3-5.1. Definition of business capital and capital base. (Tax Law, sections 208(5) and (7)).

(a) (1) Business capital is all assets, other than investment capital and stocks issued by the taxpayer, less liabilities not deducted from investment capital. Business capital includes only those assets the income, loss, or expense of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed or depreciated or expensed to a nominal amount) in the computation of entire net income for the taxable year.

(2) (i) Business capital includes, but is not limited to:

(A) cash;

(B) stock in a controlled foreign corporation, except to the extent such stock qualifies as investment capital under Subpart 3-4 of this Part;

(C) cross-article corporation stock;

(D) other unitary corporation stock;

(E) reverse repurchase agreements and securities borrowing agreements, as well as the securities underlying those agreements and repurchase agreements and securities lending agreements;

(F) real property;

(G) tangible personal property; and

(H) investments in a Federal reserve bank or a Federal home loan bank.

(b) Total business capital is the sum of business capital and any presumed investment capital from the immediately preceding tax year required to be added back pursuant to section 3-4.4(a)(2) of this Part. The total business capital of the taxpayer is determined by computing the total of the average value, during the period covered by the report, of all the assets of the taxpayer, other than investment capital and stock issued by the taxpayer, less the average value of liabilities not deducted in computing investment capital.

(c) (1) The capital base is the product of total business capital and the business apportionment fraction determined in Part 4 of this Subchapter.

(2) In the case of a combined report, the combined capital base is the product of the combined total business capital and the business apportionment fraction determined in Part 4.

In computing combined business capital, all intercorporate stockholdings, intercorporate bills, intercorporate notes receivable and payable, intercorporate accounts receivable and payable and other intercorporate indebtedness between corporations included in the combined report must be eliminated. For when a combined report is required or permitted, see Subpart 6-2 of this Subchapter – Combined reports.

Section 3-5.2. Definition of business income and the business income base. (Tax Law, sections 208(8), 210(1)(a)).

(a) Business income is entire net income minus other exempt income and investment income. It also includes (1) interest deductions directly or indirectly attributable to gross investment income or investment capital that exceed the amount of gross investment income and (2) interest deductions directly or indirectly attributable to gross other exempt income that exceed the amount of gross other exempt income.

(b) Total business income is the sum of business income and income from presumed investment capital from the immediately preceding tax year required to be added back pursuant to section 3-4.4(a)(2) of this Part.

(c) (1) The business income base is equal to (i) the product of total business income and the business apportionment fraction minus (ii) the prior net operating loss conversion subtraction and the net operating loss deduction.

(2) In computing total business income of the combined group, all intercorporate dividends between corporations included in the combined report must be eliminated and all other intercorporate transactions between corporations included in the combined report must be deferred in a manner similar to the United States treasury regulations relating to intercompany transactions under IRC section 1502.

SUBPART 3-6

EXAMPLES OF INCOME AND CAPITAL

Example 1: Fossil Fuel Corporation ("Fossil") is a vertically integrated oil business. Fossil recently sold off 60% of its 100% ownership interest in Northwest Exploration, Inc. ("NWE"), a subsidiary engaged in oil exploration in far northern latitudes. While Fossil no longer owns a majority of NWE's stock, it remains the largest

shareholder. In addition, NWE continues to operate as part of Fossil's vertically integrated oil business, benefiting from functional integration, centralized management and economies of scale.

NWE and Fossil are engaged in a unitary business but cannot be included in a combined report because they do not meet the capital stock requirement. Because Fossil and NWE are unitary, Fossil's NWE stock is other unitary corporation stock. Fossil's NWE stock is business capital because other unitary corporation stock is always business capital. In addition, the dividend income Fossil receives from NWE would constitute other unitary corporation dividends and, as such, other exempt income. Any gain on the sale of additional NWE stock by Fossil would be business income.

Example 2: NewsCo is a newspaper publisher incorporated in Delaware and commercially domiciled in Illinois that publishes local newspapers in New York and 10 other states. In 2015, anticipating a serious shortage of newspaper print, NewsCo acquires 30% of the stock of PaperCo, a paper mill company with facilities in North Carolina, Georgia and Oregon. This action is taken in an attempt to mitigate the risk of a shortage of newsprint. Based on its significant ownership share, NewsCo is given two seats on PaperCo's 15-member board of directors. No changes are made in PaperCo's senior management, and the relationship of the two businesses

largely remains that of purchaser and supplier. In 2017, when it appears the newsprint shortage is over, NewsCo sells its stock in PaperCo for a gain of $80 million.

NewsCo and PaperCo are not engaged in a unitary business. They are in related but distinct lines of business, and while NewsCo owns 30% of PaperCo's stock and has two seats on the board of directors, no steps were taken toward functional integration or centralized management. However, while the two corporations are not engaged in a unitary business, NewsCo's investment in PaperCo, Inc. serves an operational function for NewsCo – that is, to facilitate NewsCo's access to newsprint during the shortage. Consequently, the PaperCo stock owned by NewsCo is not constitutionally protected investment capital.

If the stock meets all of the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stock would be considered either actual or presumed investment capital, respectively. Dividend income received from PaperCo and the $80 million gain from the sale of PaperCo's stock would be income from investment capital.

If the stock did not meet the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, then the stock would be business capital. As a result, any dividend income received from PaperCo would be business

income and the $80 million gain from the sale of PaperCo's stock would be business income.

Example 3: Ore Corporation, a mining company incorporated and commercially domiciled in Utah, routinely invests its cash on hand in short-term debt instruments that yield interest income. These investments serve an operational function in Ore Corporation's business and therefore are not constitutionally protected investment capital. Consequently, these debt instruments are business capital, and the income they generate is business income.

Example 4: EquipmentCo, a manufacturer of farm equipment incorporated in Delaware and commercially domiciled in Iowa, operates sales and distribution facilities in New York State. EquipmentCo maintains a portfolio of stocks and bonds in the telecommunications sector managed to generate long-term gains. As such, its investments in telecommunications stocks and bonds are not part of EquipmentCo's unitary farm equipment business in the State and do not serve an operational function in EquipmentCo's business. The dividend and interest income generated by the telecommunication stocks and bonds do not have the constitutionally required connection to the EquipmentCo's business in the State. The stocks and bonds qualify as constitutionally protected investment capital

and the income from the stocks and bonds is income from investment capital.

Example 5: MMW, Inc. is engaged in a multistate manufacturing and wholesaling business incorporated and commercially domiciled in New Jersey. In connection with that business, it maintains a special reserve fund available for use in the case of a natural disaster or other extraordinary event. The securities in the reserve fund include both "blue chip" stocks and AAA bonds. The fund serves an operational function for MMW, Inc. – ensuring the unitary business can remain operational in the event of a natural disaster or other extraordinary event. Since the securities in the fund serve an operational function, the securities are not constitutionally protected investment capital. Because actual and presumed investment capital is limited by law to stocks, the bonds are prohibited from being investment capital and any interest income or net gains generated by those bonds is business income. In order for the stocks in the special reserve fund to be considered investment capital, the stocks must satisfy the criteria in section 3-4.1(a)(1) or (a)(2) of this Part. If the stocks are investment capital, the dividends from the stock and the net gains from the sale of the stock would be income from investment capital. If the stocks do not satisfy these criteria, the stocks would be business capital and the dividends and net gains from those stocks would be business income.

Example 6: MNO is incorporated and commercially domiciled in California. It develops software. In 2016, MNO issued a stock offering, netting $300 million. The explicitly stated purpose of the offering was to provide additional capital for the acquisition of companies and products in the same line of business as, or complementary to, MNO's line of business. Consistent with that purpose, MNO kept the funds acquired in segregated accounts. Within those accounts, MNO invested in a broad array of securities, including both stocks and bonds.

Because the explicit stated purpose of the funds and assets in the segregated accounts is clearly tied to the unitary software development business of MNO, the funds and securities serve an operational function for all years the funds and securities are at MNO's disposal. As such, the securities are not constitutionally protected investment capital. Because actual and presumed investment capital is limited by law to stocks, the bonds are prohibited from being investment capital and any income earned from those bonds is business income. If the stocks in the segregated accounts meet all the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stocks would be considered actual or presumed investment capital, respectively, and the dividends and net gains from the stocks would be income from investment capital. If the stocks do not satisfy all of those criteria, the stocks would be business capital and the

dividends and net gains from those stocks would be business income.

Example 7: Retail Corp, incorporated and commercially domiciled in North Carolina, earns substantial revenue from its retail operations located solely within New York. It invests a large portion of the revenue in fixed income securities that are divided into three categories: (a) short-term securities held pending use of the funds in the taxpayer's retail business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market; and (c) long-term securities held as an investment. The income generated by both types of short-term securities serves an operational function for Retail Corp. As a result, the securities are not constitutionally protected investment capital. If the securities in category (a) or (b) include stocks and the stocks meet all the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stocks would be considered actual or presumed investment capital, respectively, and the dividends and net gains from the stocks would be income from investment capital. The stocks in categories (a) and (b) above that do not meet all the criteria to be considered actual or presumed investment capital and any other securities in categories (a) and (b) above are business capital and any interest income, dividends or net gains from those securities are business income. The interest income, dividends or net gains from the long-term securities in

category (c) held as an investment do not have the constitutionally required connection to the retail operations in the State. These long-term securities qualify as constitutionally protected investment capital and any interest income, dividends or net gains from the securities are income from investment capital.

Example 8: Manu Corp. is a manufacturer incorporated and commercially domiciled in California with facilities in New York and other states. In 2015, Manu Corp. purchases, at a deep discount, corporate bonds issued by Grocery, Inc., a large supermarket chain in default on its interest payments and on the verge of bankruptcy. Manu Corp. believes that Grocery, Inc. will be able to emerge from its difficulties as a viable business and that the Grocery, Inc. bonds it holds will sell at a considerably higher price at some future date. Manu Corp. sells the bonds in 2019 for a significant gain. Even though Manu Corp's investment is in corporate bonds, the nature of the investment is more akin to an investment in stock held for long-term appreciation. Manu Corp. will not be receiving interest income from the bonds or using the bonds as collateral. The bonds, therefore, are not serving an operational function. The investment in the bonds is an investment separate and apart from the unitary business of Manu Corp. The net gain on the sale of the bonds does not have the constitutionally required connection to Manu Corp's operations in

New York. The bonds are constitutionally protected investment capital and the net gain is income from investment capital.

Example 9: Same facts as example 9, except that the purchaser of the Grocery, Inc. corporate bonds is FISCO, which is incorporated and commercially domiciled in Connecticut and operates a diversified financial services business. In addition to being a dealer in securities, it buys and sells securities for its own account. The purchase of the Grocery, Inc. bonds is within the scope of FISCO's unitary financial services business of buying and selling securities. Therefore, the bonds are not constitutionally protected investment capital. In the hands of FISCO, the Grocery Inc. corporate bonds are business capital and the net gain on the sale of the bonds is business income.

Example 10: VinylCo is incorporated and commercially domiciled in Delaware and is a manufacturer of rubber and vinyl products. In 2015, it purchased a 15% interest in SupplierCo, which supplies VinylCo with synthetic rubber, to obtain status as a preferred customer. In all other respects, VinylCo and SupplierCo operate independently. VinylCo and SupplierCo are not engaged in a unitary business. However, VinylCo's investment in SupplierCo serves an operational function for VinylCo by helping VinylCo to maintain an ongoing supply of synthetic rubber. As such, the stock VinylCo

owns in SupplierCo is not constitutionally protected investment capital. If the stock meets all the criteria in section 3-4.1(a)(1) or (a)(2) of this Part, the stock would be considered actual or presumed investment capital, respectively, and the dividends and net gains from the stock would be income from investment capital. If the stock does not satisfy all of these criteria, the stock would be business capital and the dividends and net gains from the stock would be business income.

Example 11: RDS is incorporated and commercially domiciled in Connecticut, and is principally engaged in the operation of a chain of retail department stores within and without New York. RDS also holds stock in several corporations, including QRS Inc., which designs, develops and markets "off-the-shelf" computer programs. In 2016, RDS sells its stock in QRS Inc. which it purchased in 2009, at a $100 million net gain. Because RDS's investment in the stock of QRS Inc. was not part of RDS's unitary retail business and did not serve an operational function, the stock is constitutionally protected investment capital and the net gain is income from investment capital.

Example 12: Corporation A has entire net income of $15,000. Included in that amount is $0 of gross other exempt income and $2,000 of gross

investment income before the gross investment income limitation provided for in section 3-4.5(c) of this Part, broken down as follows:

- $1,700 from constitutionally protected investment capital; and
- $300 from actual investment capital.

The gross investment income limitation in section 3-4.5(c) of this Part provides that gross investment income is limited to greater of the income from constitutionally protected investment capital of $1,700 or 8% of entire net income of $15,000, or $1,200. As a result, Corporation A has $1,700 of gross investment income in the tax year.

Corporation A elects to use the safe harbor reduction method of this Part when computing investment income and therefore reduces the $1,700 of gross investment income by 40%. The result is $1,020 of investment income claimed in the tax year.

Example 13: Same facts as example 12, except that Corporation A did not elect to use the safe harbor method election and determines it has $400 of interest deductions directly or indirectly attributable to gross investment income and investment capital

Corporation A must reduce its gross investment income of $1,700 by $400, the total interest deductions directly or indirectly

attributable to gross investment income and investment capital. The result is $1,300 of investment income claimed in the tax year.

Example 14: Corporation A has entire net income of $100,000 in the 2015 tax year. Included in that amount is $0 of gross other exempt income and $20,000 of gross investment income before the gross investment income limitation in section 3-4.5(c) of this Part, broken down as follows:

- $2,000 from constitutionally protected investment capital;
- $7,000 from actual investment capital; and
- $11,000 from presumed investment capital.

The gross investment income limitation in section 3-4.5(c) of this Part provides that gross investment income is limited to the greater of the $2,000 of the income from constitutionally protected investment capital or 8% of entire net income, which is $8,000. As a result, Corporation A has gross investment income of $8,000 in the 2015 tax year.

Corporation A does not elect to use the safe harbor reduction method and determines it has $1,750 of interest deductions directly or indirectly attributable to gross investment income and investment capital.

Corporation A must reduce the $8,000 of gross investment income by $1,750, the total amount of interest deductions directly or indirectly attributable to gross investment income and investment capital. The result is $6,250 of investment income claimed in the 2015 tax year.

After filing the report for the 2015 tax year, Corporation A disposes of its 2015 presumed investment capital before it is held for more than one year. Based on the ordering rules in section 3-4.5(b) of this Part, the $8,000 of gross investment income claimed in the 2015 tax year was comprised of $2,000 from constitutionally protected investment capital and $6,000 from actual investment capital. Corporation A is not subject to the requirements in section 3-4.4 of this Part because the amount of investment income claimed in the 2015 tax year, after applying the gross investment income limitation in section 3-4.5(c) of this Part, did not include income from presumed investment capital that failed to meet the holding period requirement.

Example 15: Corporation D has $50,000 in entire net income in the 2015 tax year. Included in that amount is $0 of gross other exempt income and $20,000 of gross investment income before the gross investment income limitation in section 3-4.5(c) of this Part, broken down as follows:

- $3,000 from stock A that is actual investment capital;

- $2,000 from stock B that is presumed investment capital; and
- $15,000 from stock C that is presumed investment capital.

The gross investment limitation in section 3-4.5(c) of this Part provides that gross investment income is limited to the greater of income from constitutionally protected investment capital, which is $0, or 8% of entire net income, which is $4,000. As a result, Corporation D has gross investment income of $4,000 in the 2015 tax year.

Corporation D does not elect to use the safe harbor reduction method and determines it has $1,170 of interest deductions directly or indirectly attributable to gross investment income and investment capital.

Corporation D must reduce its gross investment income of $4,000 by $1,170, the total amount of interest deductions directly or indirectly attributable to gross investment income and investment capital. The result is $2,830 in investment income claimed in the 2015 tax year.

After filing the report for the 2015 tax year, Corporation D disposes of Stock B after it is held for more than one year and Stock C before it is held for more than one year. Based on the ordering rules in section 3-4.5(b) of this Part, the $4,000 of gross investment income claimed in the 2015 tax year was comprised of $3,000 from Stock A (the actual investment capital) and

$1,000 from Stock B (the presumed investment capital held for more than one year). Corporation D is not subject to the requirements in section 3-4.4 of this Part because the amount of investment income claimed in the 2015 tax year, after applying the gross investment income limitation in section 3-4.6(c) of this Part, did not include income from presumed investment capital that failed to meet the holding period requirement.

SUBPART 3-7

CAPITAL LOSSES

Sec.

Section 3-7.1 New York investment capital gains or losses in taxable years beginning on or after January 1, 2015.

(a) Definitions.

(1) "New York investment capital gains or losses" mean the amount of Federal capital gains generated or losses sustained in taxable years beginning on or after January 1, 2015 that are attributable to investment capital.

(2) "New York net investment capital gain" means the amount of New York investment capital gains in excess of New York investment capital losses for the taxable year.

(3) "New York net investment capital loss" means the amount of New York investment capital losses in excess of New York investment capital gains for the taxable year.

(b) New York investment capital gains generated or losses sustained do not include any amount of Federal capital gains generated or losses sustained in a year in which a corporation is:

(1) not a taxpayer or a member of a New York combined group under article 9-A (an article 9-A New York non-filing year);

(2) a New York S corporation (a New York S year);

(3) a non-captive real estate investment trust REIT (a non-captive REIT filing year);

(4) a non-captive regulated investment company RIC (a non-captive RIC filing year); or

(5) a captive insurance company that is not a combinable captive insurance company (a non-combinable captive insurance company filing year).

Section 3-7.2 New York business capital gains or losses in taxable years beginning on or after January 1, 2015.

(a) Definitions.

(1) "New York business capital gains or losses" mean the amount of Federal capital gains generated or losses sustained in taxable years beginning on or after January 1, 2015 that are attributable to business capital.

(2) "New York net business capital gain" means the amount of New York business capital gains in excess of New York business capital losses for the taxable year.

(3) "New York net business capital loss" means the amount of New York business capital losses in excess of New York business capital gains for the taxable year.

(b) New York business capital gains generated or losses sustained do not include any amount of Federal capital gains generated or losses sustained in:

(1) an article 9-A non-filing year;

(2) a New York S year;

(3) a non-captive REIT filing year;

(4) a non-captive RIC filing year; or

(5) a non-combinable captive insurance company filing year.

Section 3-7.3 Capital losses sustained in taxable years beginning before January 1, 2015.

(a) Except as provided in subdivisions (b) and (c) of this section, a corporation subject to tax under article 9-A or article 32, or a member of a combined group subject to tax under Article 9-A or article 32, that sustained a Federal net capital loss under IRC section 1212 in a taxable year beginning before January 1, 2015 shall carry back and forward such Federal net capital loss as required by Subpart 3-7 of this Part and section 18-2.5(b) of Subchapter B of this Chapter, as such provisions existed on December 31, 2014.

(b) The carryover of any amount of a Federal net capital loss that was sustained in a taxable year beginning before January 1, 2015 to a taxable year beginning after December 31, 2014 shall be governed by these Subpart 3-7 provisions as subsequently enacted.

(c) Any Federal net capital loss available for carryforward as of the end of the last taxable year beginning before January 1, 2015 shall be deemed to be a New York net business capital

loss (regardless of whether such capital loss was from business capital, investment capital, or subsidiary capital as such terms were previously defined in article 9-A regulations or, to the extent relevant, Article 32 regulations as such regulations existed on December 31, 2014). Such New York net business capital loss shall be carried forward to the next succeeding taxable year beginning on or after January 1, 2015, and must be applied only against New York business capital gains. Such New York net business capital loss may only be carried forward to the 5 taxable years immediately succeeding the loss year and nothing in this Subpart extends this capital loss carryforward period.

Section 3-7.4 Capital losses sustained in taxable years beginning on or after January 1, 2015.

(a) In computing the business income base, taxpayers generally start with Federal taxable income that includes capital gains in excess of capital losses without differentiation between New York investment capital gains and losses and New York business capital gains and losses. For New York State purposes, taxpayers must ensure that investment capital losses do not offset business capital gains and that business capital losses do not offset investment capital gains when calculating the business income base.

(b) A corporation or combined group, in the case of a combined report, subject to tax under article 9-A must properly classify and separate any amount of Federal capital losses and Federal capital gains, as such terms are defined in IRC section 1222, into New York business capital gains or losses and New York investment capital gains or losses. To calculate the business income base, Federal taxable income must be increased by the amount of New York net investment capital loss that offsets New York net business capital gains. Similarly, to calculate the business income base, Federal taxable income must be increased by the amount of New York

net business capital loss that offsets New York net investment capital gains.

(c) For any amount of Federal capital loss sustained in an article 9-A New York non-filing year that is used on a Federal return in an article 9-A New York filing year, Federal taxable income in that New York filing year must be increased by the amount of Federal capital loss that was used from that Article 9-A New York non-filing year.

(d) For any amount of Federal capital loss sustained in a New York S year that is used on a Federal return in a New York C year, Federal taxable income in that New York C year must be increased by the amount of the Federal capital loss that was used from the New York S year.

(e) For any amount of Federal capital loss sustained in a non-captive REIT filing year that is used on a Federal return in a captive REIT filing year, Federal taxable income in that captive REIT filing year must be increased by the amount of the Federal capital loss that was used from the non-captive REIT filing year.

(f) For any amount of Federal capital loss sustained in a non-captive RIC filing year that is used on a Federal return in a captive RIC filing year, Federal taxable income in that captive RIC filing year must be increased by the amount of the Federal capital loss that was used from the non-captive RIC filing year.

(g) For any amount of Federal capital loss sustained in a non-captive REIT filing year that is used on a Federal return in a year that the corporation, trust, or association fails to meet the definition and requirements of a REIT under section 10-4.1(b) of this Subchapter, Federal taxable income of that filing year must be increased by the amount of the Federal capital loss that was used from the non-captive REIT filing year.

(h) For any amount of Federal capital loss sustained in a non-combinable captive insurance company filing year that is used on a Federal return in a combinable captive insurance

company filing year, Federal taxable income in that non-combinable captive insurance company filing year must be increased by the amount of the Federal capital loss that was used from the combinable captive filing year.

Section 3-7.5 Application of New York net capital losses.

(a) Except as otherwise provided in this Subpart, the amount of New York net business capital loss and the amount of New York net investment capital loss must be carried back to each of the 3 taxable years immediately preceding the taxable year of each such loss and, to the extent that any capital loss remains, must be carried forward to the 5 taxable years immediately succeeding the taxable year of each such loss, but only to the extent that the amount of New York net business capital loss or New York net investment capital loss does not increase or produce a net operating loss for New York State purposes. New York net business capital loss must be carried back or forward in accordance with this Subpart to offset only New York business capital gains in other taxable years, for New York State purposes. New York net investment capital loss must be carried back and forward in accordance with this Subpart to offset only New York investment capital gains in other taxable years, for New York State purposes.

(b) A New York net business capital loss or New York net investment capital loss cannot be carried back to a taxable year beginning before January 1, 2015.

(c) Except as provided in subdivision (b) of this section, a New York net business capital loss or New York net investment capital loss is carried first to the earliest of the 3 taxable years immediately preceding the tax year in which the loss was sustained. If such net capital loss is not entirely used in that tax year, the remaining amount is then carried to the second taxable year preceding the loss year, and any amount thereafter remaining is carried to the first taxable year

immediately preceding the tax year in which the net capital loss was sustained. Any unused amount after the application of the carryback rules is then carried forward to the first 5 taxable years immediately succeeding the loss year. Such net capital loss is carried forward first to the taxable year immediately following the loss year and then to the next immediately succeeding taxable year or years until the loss is used up or the fifth taxable year following the loss year, whichever comes first. Any unused capital loss carryforward is forfeited after the fifth taxable year following the loss year.

(d) For purposes of determining the number of tax years to which a capital loss may be carried back or forward, the following years are counted:

(1) a New York filing year;

(2) a New York non-filing year;

(3) a New York S filing year;

(4) a non-captive REIT filing year;

(5) a non-captive RIC filing year; and

(6) a non-combinable captive insurance filing year.

(e) A corporation that reports as part of a consolidated group for Federal income tax purposes but on a separate basis for purposes of article 9-A must compute its New York net business capital loss and New York net investment capital loss as if it is filing separately for Federal income tax purposes. This requires such corporation, when computing its Federal taxable income as if it had filed its Federal tax return on a separate basis, to also compute its Federal net capital gain or loss as if it had filed separately for Federal income tax purposes. The corporation then computes its New York net investment capital gain or loss and New York net business capital gain or loss in accordance with this Subpart.

(f) In computing its tax bases, a New York State combined group is generally treated as a single corporation subject to the same Federal income tax limitations that would apply if such corporation had filed for such taxable year on a consolidated Federal income tax return with the members of the combined group. When applying this rule to the computation of combined business income, Federal taxable income must be computed as if all the corporations in the combined group had filed a Federal consolidated return including such group members. When the New York State combined group is comprised of corporations different than those that filed on the same Federal consolidated return, a re-computation of Federal taxable income is required and, as a result, a re-computation of Federal net capital gain or loss is required as if the Federal net capital gain or loss was computed by a Federal consolidated group comprised of the same members as the New York State combined group. A New York State combined group must then, for the purpose of computing its New York combined business income, compute its New York net business capital loss and New York net investment capital loss, pursuant to this Subpart, as if all the corporations included in the combined group are a single corporation.

Section 3-7.6 Rules for combined reports

(a) In computing the New York net capital loss of corporations included in a combined report pursuant to section 210-C, the New York net capital loss of the combined group is computed in accordance with this Subpart, substituting “combined group” for “corporation”.

(b) A member leaving a combined group must compute its own share of New York net business capital loss carryover and New York net investment capital loss carryover. New York net capital loss carryover is net capital loss that may be carried back or forward as the case may be.

(1) To compute the leaving member’s share of the New York net business capital loss

carryover, multiply the combined group's New York net business capital loss carryover for the taxable year by a fraction, the numerator of which is the total New York business capital losses for that taxable year of the departing member and the denominator of which is the total New York business capital losses for that taxable year of all members of the combined group having such New York business capital losses to the extent such capital losses are included in the capital loss carryover amount of the combined group in accordance with this section.

(2) To compute the departing member's share of New York net investment capital loss carryover, multiply the combined group's New York net investment capital loss carryover for the taxable year by a fraction, the numerator of which is the total New York investment capital losses for that taxable year of the departing member and the denominator of which is the total New York investment capital losses for that taxable year of all members of the combined group having such New York investment capital losses to the extent such capital losses are included in the capital loss carryover amount of the combined group in accordance with this section.

(c) If a corporation is a member of a combined group for any taxable year beginning on or after January 1, 2015 and leaves that group in a later taxable year, the departing member takes its share of the combined group's New York net business capital loss carryover and New York net investment capital loss carryover. If the departing corporation joins another combined group, its New York net business capital loss carryover is added to, or becomes, the new combined group's New York net business capital loss carryover and its New York net investment capital loss carryover is added to, or becomes, the new combined group's New York net investment capital loss carryover, subject to the rules in this Subpart. If the departing corporation files a separate New York return, it is allowed to use its New York net business capital loss carryover or New York net investment capital loss carryover on a separate basis, subject to the rules in this

Subpart.

(d) If a corporation that was subject to tax under article 9-A and was not a member of a combined group in any taxable year beginning on or after January 1, 2015 subsequently joins a combined group, that incoming member's New York net business capital loss carryover is added to, or becomes, the combined group's New York net business capital loss carryover and its New York net investment capital loss carryover is added to, or becomes, the combined group's New York net investment capital loss carryover, subject to the rules in this Subpart.

Section 3-7.7 Record keeping.

A taxpayer or a combined group that claims a New York net capital loss carryback or carryforward, either business or investment, must submit a copy of its Federal schedule of capital gains and losses used and a schedule of New York capital gains and losses used for the loss year and for any year(s) to which the losses are to be carried. A claim for refund based on a New York capital loss carryback or carryforward must be filed on the forms and in the manner prescribed by the commissioner.

Section 3-7.8. Appendix – Subpart 3-7 capital loss examples.

SUBPART 3-8

COMPUTATION OF THE PRIOR NET OPERATING LOSS CONVERSION (PNOLC) SUBTRACTION

Sec.

Section 3-8.1 Definitions.

For purposes of this Subpart, the following terms shall have the following meaning.

(a) The term “base year” means a corporation’s last taxable year beginning on or after January 1, 2014 and before January 1, 2015.

(b) The term “base year BAP” means either of the following, whichever is applicable: (1) the taxpayer's or combined group’s, in the case of a combined report in the base year (“base year combined group”), business allocation percentage for purposes of calculating entire net income (ENI) for the base year (whether or not liability was in fact based on ENI), as calculated under section 210(3)(a) as such section was in effect on December 31, 2014; or (2) the taxpayer’s or base year combined group’s allocation percentage for purposes of calculating ENI for the base year (whether or not liability was in fact based on ENI), as calculated under section 1454 as such section was in effect on December 31, 2014.

(c) The term “base year tax rate” means the taxpayer's or base year combined group’s tax rate for purposes of computing the tax on ENI for the base year (whether or not liability was in fact based on ENI), as calculated under either section 210(1)(a) or section 1455(a), whichever is applicable, as such sections were in effect on December 31, 2014.

(d) The term “first 2015 taxable year” means a corporation’s first taxable year that begins on or after January 1, 2015 and before January 1, 2016.

(e)(1) The term “small business taxpayer” means a corporation that, in the first 2015 taxable year, satisfied all of the criteria specified in subparagraphs (i), (ii), and (iii) of paragraph (2) of this subdivision as of the last day of the base year; and, in the case of a combined report, means a combined group that in the first 2015 taxable year would have satisfied the criteria specified in subparagraphs (i) and (ii) of paragraph (2) of this subdivision on the last day of the base year if the group had filed a combined report in such base year, provided that each member of the combined group would have satisfied the criteria specified in subparagraph (iii) of paragraph (2) of this subdivision on the last day of the base year.

(2) The criteria that must be satisfied to qualify as a small business taxpayer are:

(i) the ENI of the corporation or the combined group for the base year before allocation was not more than $390,000 (such amount will be annualized for a base year that constitutes a short taxable year);

(ii) the total amount of money and other property that the corporation or combined group received for stock, as a contribution to capital and as paid-in surplus, was not more than $1 million as of the last day of the base year; and

(iii) the corporation was not part of an affiliated group, as defined in IRC section 1504, unless the group itself would have satisfied the requirements in subparagraphs (i) and (ii) of this paragraph if it had filed a combined report.

Section 3-8.2 Computation of the unabsorbed net operating loss (UNOL)

(a) The "unabsorbed net operating loss" (hereinafter referred to in this Subpart as the UNOL) means the unabsorbed portion of net operating loss (NOL) as calculated under section 208(9)(f) or section 1453(k-1) as such sections were in effect on December 31, 2014, that was not deductible in previous taxable years (including the base year) and was eligible for carryover on the last day of the base year, including any NOL sustained by the taxpayer during the base year. The computation of such UNOL is subject to the rules in subdivisions (b) through (e) of this section.

(b) To compute the UNOL, the rules in paragraphs (1) and (2) of this subdivision must be followed.

(1) Federal and New York State NOLs available for carryover. A corporation must first compute its Federal and New York State NOLs available for carryover, from taxable years beginning before January 1, 2015, as of the last day of such corporation's base year (Federal and New York State NOLs available for carryover), by applying the following rules:

(i) NOLs are carried back and carried forward to taxable years beginning before January 1, 2015, and included in the determination of deductible NOLs, as well as remaining NOLs available for carryover, subject to NOL deduction limitations, as set forth in either section 208(9)(f) and Subpart 3-8 of this Part or section 1453(k-1), whichever is applicable as such provisions were in effect and applicable on December 31, 2014. NOLs available for carryover do not include any NOLs that were deductible in a taxable year beginning prior to January 1, 2015, regardless of whether or not the corporation actually deducted the NOL. However, if the amount of NOL

actually deducted in any taxable year is greater than the amount deductible, the NOL available for carryover is reduced by the excess amount deducted. When computing the amount of NOLs available for carryover, New York State NOLs must be applied against ENI to reduce ENI to zero or the greatest extent possible, regardless of the tax base on which the franchise tax was actually paid.

(ii) If the carryforward period for an NOL, as determined in subparagraph (i) of this paragraph, ends prior to, or on, the last day of the corporation's base year, no portion of such NOL is included in the NOLs available for carryover.

(2) Eligible NOL carryover amounts. After computing its Federal and New York State NOLs available for carryover, the corporation must then compute its Federal and New York State carryover amounts as of the last day of the corporation's base year (its eligible NOL carryover amounts), to be used in the computation of the UNOL, by applying the following rules and limitations in subparagraphs (i) through (v) of this paragraph.:

(i) A corporation's Federal and New York State NOLs available for carryover are included in the eligible Federal and New York State NOL carryover amount, respectively, only when there is both a Federal and New York State NOL sustained in the same taxable year and available for carryover as of the last day of the corporation's base year.

(ii) A corporation's Federal NOL sustained in a separate return limitation year (SRLY) beginning before January 1, 2015, and any corresponding New York State NOL, that was not deductible in taxable years beginning before January 1, 2015, and that was available for carryover as of the last day of the corporation's base year, is included in its entirety in the eligible Federal and New York State NOL carryover amount, respectively, subject to the rules in this section.

(iii) If, under IRC section 381, a corporation, in a taxable year beginning prior to January 1, 2015, succeeded to the tax attributes, including Federal NOL carryovers, of another corporation, and the acquiring or successor corporation also succeeded to the New York State NOL carryovers of the acquired or predecessor corporation, then any such Federal and New York State NOLs that were not deductible by the acquiring or successor corporation in taxable years beginning before January 1, 2015, and that were available for carryover as of the last day of the corporation's base year, are included in their entirety in the eligible Federal and New York State NOL carryover amounts, respectively, subject to the rules in this section.

(iv) A corporation's Federal NOLs subject to the limitations imposed by IRC section 382 as a result of an ownership change (pre-change losses) that were not deductible in taxable years beginning before January 1, 2015, and that were available for carryover as of the last day of the corporation's base year, are included in the eligible Federal NOL carryover amount, subject to the rules in this section, but only to the extent that such pre-change losses, in the aggregate, that relate to such ownership change, do not exceed the amount computed as follows: (A) the applicable annual IRC section 382 limitation for a post-change year for such ownership change, multiplied by 20; less (B) any such pre-change losses that were deductible in taxable years beginning before January 1, 2015. Such amount shall be computed separately for each ownership change.

(v) In the case of a corporation operating on a cooperative basis under IRC section 1381 that is taxable under article 9-A or article 32 for its base year, the corporation's Federal patronage and non-patronage source NOLs, and the corporation's New York State patronage and non-patronage source NOLs, respectively, that were not deductible in taxable years beginning before January 1, 2015, and that were available for carryover as of the last day of the corporation's base

year, are combined and included in the eligible Federal and New York State NOL carryover amount, respectively, subject to the rules in this section.

(c) (1) After applying all other rules and limitations in this section to compute the eligible Federal and New York State NOL carryover amount, respectively, whichever of the two eligible NOL carryover amounts (Federal or New York State) is the lesser amount is the corporation's UNOL.

(2) When subparagraph (v) of paragraph (2) of subdivision (b) of this section applies, for purposes of applying the limitation under paragraph (1) of this subdivision to eligible Federal and New York State NOL carryover amounts to compute a corporation's UNOL, a corporation's eligible Federal NOL carryover amount arising from Federal NOLs subject to IRC section 382 limitations is used to apply such limitation to any corresponding eligible New York State NOL carryover amount, and a corporation's eligible Federal NOL carryover amount arising from Federal NOLs not subject to IRC section 382 limitations is used to apply such limitation to any corresponding eligible New York State NOL carryover amount. The corporation's UNOL is then the sum of the following amounts: (i) the lesser of the eligible Federal or New York State NOL carryover amounts arising from Federal NOLs subject to IRC section 382 limitations; and (ii) the lesser of the eligible Federal or New York State NOL carryover amounts arising from Federal NOLs not subject to IRC section 382 limitations.

(d) In computing the UNOL of a corporation that was included in a combined report for the base year, the UNOL of the base year combined group first is computed in accordance with subdivisions (a) through (c) of this section, substituting combined group for corporation. Each corporation included in the base year combined group then must compute its own UNOL for its base year, by multiplying the base year combined group's UNOL by a percentage that represents

that base year combined group member's contribution of losses to the base year combined group's UNOL. Such percentage is calculated by: (1) dividing the total New York State NOLs of the corporation by the total New York State NOLs of all members of the combined group having such New York State NOLs (to the extent such New York State NOLs are included in the eligible New York State NOL carryover amount of the base year combined group in accordance with this section); and (2) multiplying the result by one hundred.

Section 3-8.3 – Appendix – Subpart 3-8 UNOL Examples.

Section 3-8.4 PNOLC subtraction overview.

A corporation that has a UNOL must convert the UNOL to a PNOLC subtraction pool using the rules in section 3-8.6 of this Subpart. A taxpayer or combined group, in the case of a combined report, is then allowed a PNOLC subtraction as computed in sections 3-8.7 and 3-8.8 of this Subpart, applied before the NOL deduction, in the computation of its business income base for tax years beginning on or after January 1, 2015. A taxpayer or combined group, in the case of a combined group, that is allowed a PNOLC subtraction in a taxable year, must claim that subtraction in that taxable year.

Section 3-8.5 Corporations that are not allowed a PNOLC subtraction.

The following corporations are not allowed a PNOLC subtraction:

(a) A corporation that does not have a UNOL, including a corporation that was a RIC in its base year;

(b) A corporation that has or is a member of a combined group that has a base year BAP of zero percent, whether or not such corporation has a UNOL;

(c) A corporation that has or is a member of a base year combined group that has a base year tax rate of zero percent, including a corporation that in its base year was a New York S

Corporation, as defined in section 208(1-A), whether or not such corporation has a UNOL;

(d) A corporation that in its base year was not a member of a combined group subject to tax under article 9-A or article 32 and that was not subject to tax itself under article 9-A or article 32, whether or not such corporation has a UNOL;

Section 3-8.6 Computation of PNOLC subtraction pool.

(a) The PNOLC subtraction pool for a taxpayer that was not a member of a combined group in its base year is computed as follows:

(1) Determine the tax value of the taxpayer’s UNOL. The tax value of the UNOL is the product of (i) the amount of the taxpayer's UNOL; (ii) the taxpayer's base year BAP; and (iii) the taxpayer's base year tax rate.

(2) Compute the PNOLC subtraction pool. Divide the tax value of the UNOL, as determined pursuant to paragraph (1) of this subdivision, by 6.5% (the conversion percentage). The result is the taxpayer's PNOLC subtraction pool.

(b) The PNOLC subtraction pool for a corporation that was a member of a combined group in its base year, whether or not the corporation was a taxpayer in its base year, is computed as follows:

(1) Determine the tax value of the corporation’s UNOL. The tax value of the corporation’s UNOL is the product of (i) the amount of the corporation’s UNOL; (ii) the combined group's base year BAP; and (iii) the combined group's base year tax rate.

(2) Compute the PNOLC subtraction pool. Divide the tax value of the corporation’s UNOL, as determined pursuant to paragraph (1) of this subdivision, by 6.5% (the conversion percentage). The result is the corporation’s PNOLC subtraction pool.

Section 3-8.7 Computation of the PNOLC subtraction. (a) PNOLC subtraction available for use.

(1) In the case of a taxpayer that is not a member of a combined group, its PNOLC subtraction available for use in its first 2015 taxable year is equal to its tax period PNOLC subtraction allotment (as described in subdivision (b) of this section) for such taxable year. The amount of PNOLC subtraction available for use in any taxable year following the taxpayer's first 2015 taxable year is equal to its tax period PNOLC subtraction allotment for the taxable year plus any unused PNOLC subtraction carryforward.

(2) In the case of a combined group, the PNOLC subtraction available for use in its first 2015 taxable year is the sum of the tax period PNOLC subtraction allotments for such taxable year of all members of the combined group. The amount of PNOLC subtraction available for use by a combined group in any taxable year following its first 2015 taxable year is the sum of the tax period PNOLC subtraction allotments for each such taxable year of all members of the combined group plus the sum of any unused PNOLC subtraction carryforwards of all members of the combined group.

(b) Tax period PNOLC subtraction allotment.

(1) A corporation's tax period PNOLC subtraction allotment is the percentage of its PNOLC subtraction pool that may be claimed in a taxable year as provided in paragraph (2). If a corporation cannot utilize the entire tax period PNOLC subtraction allotment in a taxable year, the unused portion for that taxable year is considered an unused PNOLC subtraction carryforward.

(2) Tax period PNOLC subtraction allotment methods.

(i) One hundred percent allotment method for small business taxpayers. A small business

taxpayer's tax period PNOLC subtraction allotment for its first 2015 taxable year is equal to 100% of its PNOLC subtraction pool. A small business taxpayer has no tax period PNOLC subtraction allotment after the first 2015 taxable year but any unused portion of its 2015 PNOLC subtraction allotment is considered an unused PNOLC subtraction carryforward, eligible to be utilized without any allotment limitations.

(ii) Ten percent allotment method. For any corporation that is not a small business taxpayer or electing the 50% method in subparagraph (iii), the tax period PNOLC subtraction allotment is equal to 10% of its PNOLC subtraction pool in each of its first 10taxable years after the base year. There is no tax period PNOLC subtraction allotment after the tenth taxable year. Unused portions of each allotment are considered PNOLC subtraction carryforwards. Taxpayers with unused PNOLC subtraction carryforwards are eligible to use them in future periods without regard to the 10% allotment limitation.

(iii) Fifty percent allotment method. (A) In the case of a corporation electing the 50% allotment method, the tax period PNOLC subtraction allotment in each of the corporation's first two taxable years after its base year is equal to 50% of its PNOLC subtraction pool. There is no tax period PNOLC subtraction allotment after the second taxable year. Unused portions of the subtraction allotments are considered unused PNOLC subtraction carryforwards. This method may be used only for taxable years beginning before January 1, 2017. However, PNOLC subtraction carryforwards cannot be used to exceed 50% of the PNOLC subtraction pool in any tax period beginning prior to January 1, 2017.

(B) For the 50% allotment method to be valid and effective, a taxpayer, or designated agent in the case of a combined report, must make the election to use the 50% allotment method on an original, timely filed return for the first 2015 taxable year, determined with regard to

extensions of time for filing. Such election is binding on the taxpayer or, in the case of a combined group, all members of the combined group, whether or not that corporation remains in that combined group in subsequent taxable years. However, the election may be revoked by a taxpayer or, in the case of a combined group, the designated agent of a combined group by timely filing an amended return for each year the taxpayer or combined group used the 50% allotment method. If the election is revoked, the revocation shall apply to the taxpayer or, in the case of a combined report, all members of the combined group at the time the election is revoked.

(3) Combined groups. In the case of a combined group, each member of the group:

(i) shall compute its own tax period PNOLC subtraction allotment using the allotment method determined by its designated agent in the group's first 2015 taxable year if it was included in the combined report in the group's first 2015 taxable year; or

(ii) compute its own tax period PNOLC subtraction allotment determined by the method used in the member's first 2015 taxable year if the member was not included in a combined report in that year. The combined group's tax period PNOLC subtraction allotment in a taxable year is the sum of the tax period PNOLC subtraction allotments for all members of the combined group for the taxable year.

(c) PNOLC subtraction. (1) 100% allotment method for small business taxpayers and 10% allotment method.

(i) For all corporations not electing the 50% allotment method, the amount of PNOLC subtraction in a given taxable year is the lesser of:

(A) the applicable PNOLC subtraction allotment plus available PNOLC subtraction carryforwards (the PNOLC subtraction available for use); or

(B) The amount required to reduce the tax on total business income prior to the deduction of a PNOLC subtraction and net operating losses to the higher of the tax on the capital base or the fixed dollar minimum tax (the maximum amount of PNOLC subtraction to be deducted).

(ii) For corporations not electing the 50% allotment method, a PNOLC subtraction may be claimed for no longer than 20 taxable years or the taxable year beginning on or after January 1, 2035 but before January 1, 2036, whichever comes first.

(2) Fifty percent allotment method. (i) In the case of a corporation electing the 50% allotment method, the amount of PNOLC subtraction in a taxable year (regardless of the number of taxable years the taxpayer has during the period beginning on and after January 1, 2015 and before January 1, 2017) is the lesser of:

(A) the applicable PNOLC subtraction allotment plus available PNOLC subtraction carryforwards (the PNOLC subtraction available for use); or

(B) The amount required to reduce the tax on total business income prior to the deduction of a PNOLC subtraction and net operating losses to the higher of the tax on the capital base or the fixed dollar minimum tax (the maximum amount of PNOLC subtraction to be deducted).

(ii) The amount computed in subparagraph (i) is further limited in each taxable year to 50% of the corporation’s PNOLC subtraction pool.

(iii) In the case of a corporation utilizing the 50% allotment method, a PNOLC subtraction is allowed only in taxable years beginning before January 1, 2017. Any amount of a corporation’s unused PNOLC subtraction carryforward is forfeited and cannot be carried forward and subtracted in any tax year beginning on or after January 1, 2017.

(d) Maximum amount of the PNOLC subtraction to be deducted. (1) In the case of a taxpayer that is not a member of a combined group, the maximum amount of the PNOLC

subtraction to be deducted in a taxable year is computed as follows:

(i) multiply the business income tax rate for the taxable year by the apportioned business income before the PNOLC subtraction and the net operating loss deduction for the taxable year;

(ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater of the capital base tax or the fixed dollar minimum tax for the taxable year; and

(iii) divide the result in subparagraph (ii) of this paragraph by the taxpayer's business income tax rate for the taxable year.

(2) In the case of a combined report, the maximum amount of PNOLC subtraction to be deducted in a taxable year is computed as follows:

(i) multiply the business income tax rate for the taxable year by the combined apportioned business income before the PNOLC subtraction and the net operating loss deduction for the taxable year;

(ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater of the combined capital base tax or the fixed dollar minimum tax attributable to the designated agent for the taxable year; and

(iii) divide the result in subparagraph (ii) of this paragraph by the combined group's business income tax rate for the taxable year.

Section 3-8.8 Impact of combined group changes on the PNOLC subtraction.

(a) If a taxpayer that was not a member of a combined group in any taxable year beginning on or after January 1, 2015 subsequently joins a combined group in a later taxable year, the taxpayer's PNOLC subtraction allotment and unused PNOLC subtraction carryforward are added to the combined group's PNOLC subtraction allotment and unused PNOLC subtraction carryforward respectively, subject to the rules in section 210(1)(a)(viii)(B) and this

Subpart.

(b) If a corporation is a member of a combined group for any taxable year beginning on or after January 1, 2015 and subsequently leaves that group in a later taxable year, the outgoing member of the combined group takes its own PNOLC subtraction allotment with it to use in future taxable years. In addition, such member also takes its own share of the combined group's combined unused PNOLC subtraction carryforward, which shall be based upon its share of the combined group's PNOLC subtraction available for use in the last year it was included in the combined group. If the departing corporation joins another combined group, its PNOLC subtraction allotment and unused PNOLC subtraction carryforward are added to the combined group's PNOLC subtraction allotment and unused PNOLC subtraction carryforward, respectively, subject to the rules in section 210(1)(a)(viii)(B) and this Subpart. If such corporation does not join another combined group, it is allowed its PNOLC subtraction allotment and unused PNOLC subtraction carryforward on a separate basis, subject to the rules in section 210(1)(a)(viii)(B) and this Subpart.

Section 3-8.9 – Appendix – Subpart 3-8 PNOLC Examples.

Section 3-8.10 Impact of certain corporate acquisitions on the PNOLC subtraction.

In a transaction to which IRC section 381(a) applies, the acquiring corporation shall succeed to the balance of the PNOLC subtraction allotments and unused PNOLC subtraction carryforward of the distributor or transferor corporation, subject to the same restrictions and limitations on the use of that PNOLC subtraction allotments and unused PNOLC subtraction carryforward to which the distributor or transferor corporation was subject.

Section 3-8.11 Record-keeping.

A taxpayer or combined group with a PNOLC subtraction pool must attach to its report,

Form CT-3.3 and a detailed schedule showing the computation of the UNOL, amount of unused PNOLC subtraction allotment carryforward and, in the case of a combined group, each member's UNOL and amount of unused PNOLC subtraction allotment carryforward, together with all material and pertinent facts related to the taxpayer's or combined group's, if applicable, claim. Such records shall be retained during the period in which the statute of limitations for a change to the PNOLC subtraction may be made by the taxpayer or the department.

Section 3-8.12 Subsequent changes.

(a) Any change in the amount of a corporation's UNOL must be made by the taxpayer or the Department within the statute of limitations referenced in section 1083(a), determined with regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of such time period allowed by section 1083(c)(12), for the report on which a PNOLC subtraction as computed in section 3-8.7 of this Subpart is first claimed by the taxpayer. Any Federal changes that are finalized after the statute of limitations described in the preceding sentence has expired will not be considered in the computation of the UNOL.

(b) Any change in the base year tax rate or base year BAP must be made within the statute of limitations referenced in section 1083(a) for the base year, determined with regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of such time period allowed by section 1083(c)(12). Any Federal changes that are finalized after the statute of limitations described in the preceding sentence has expired will not be considered in the computation of the base year tax rate or base year BAP.

(c) Except as otherwise provided in this section, if it is determined by either the department or the taxpayer that an error was made in the calculation or application of the UNOL or the PNOLC subtraction in a tax year or tax years for which the statute of limitations

referenced in section 1083(a), as determined with regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of such time allowed by section 1083(c)(12), has expired, the taxpayer and the department shall be bound by the position taken by the taxpayer on the report or reports for such year or years as they pertain to the calculation of the UNOL and the PNOLC subtraction, and the PNOLC subtraction and the unused PNOLC subtraction carryforward shall be corrected for the taxable years for which the statute of limitations is still open and for future taxable years. In the first year in which such correction may be made, the amount of recomputed PNOLC subtraction pool shall be reduced by the amount of PNOLC subtraction that was used erroneously in the tax year or tax years for which the statute of limitations has expired. A new PNOLC subtraction allotment must be computed for the remaining years of the corporation's allotment method using the re-computed PNOLC subtraction pool, and any unused PNOLC subtraction carryforward from the tax year or tax years for which the statute of limitations has expired is disallowed.

(d) Examples.

Example 1: Taxpayer A files its 2014 report using a BAP of 15%. However, on its 2015 report, it computes its PNOLC subtraction using a base year BAP of 100%. Taxpayer A had a UNOL of $1,500,000 and a base year tax rate of 7.1%. It computed a PNOLC subtraction pool of $1,638, 461 and used the 10% allotment method in the determination of its PNOLC subtraction.

In 2015, Taxpayer A had a PNOLC subtraction of $100,000 and claimed a PNOLC subtraction carryforward of $63,846 (10% allotment of $163,846 - $100,000).

The department does not audit Taxpayer A's 2014 and 2015 reports and does not discover the discrepancy in the 2014 reported BAP and the base year BAP used in the PNOLC subtraction pool computation until it audits Taxpayer A's 2016 report in 2019, after the statute of limitations for the 2014 and 2015 tax years has expired. Taxpayer A is bound by the BAP it used on its 2014 report when computing the PNOLC subtraction pool. Thus, as part of the audit of the 2016 report, the department properly recomputes Taxpayer A's PNOLC subtraction pool using the 15% BAP Taxpayer claimed on its 2014 report. Accordingly, Taxpayer A's PNOLC subtraction pool should have been $245,769 ($1,500,000 x .15 x .071/.065). The re-computed PNOLC subtraction pool is reduced by the $100,000 used in 2015 to determine the remaining PNOLC subtraction pool of $145,769. Since Taxpayer A used the 10% allotment method and there are 9 remaining years of allotments to determine, the remaining PNOLC subtraction pool is divided by 9. The PNOLC subtraction allotment for 2016 and the next 8 tax years is $16,197. The PNOLC subtraction carryforward of $63,846 reported on its 2015 return is disallowed. As a result, Taxpayer A has a PNOLC subtraction available for use of $16,197 in the 2016 taxable year.

Example 2: On its 2014 report, Taxpayer B claims to be a qualified manufacturer and used a zero percent tax rate for its entire net income base. However, on its 2015 report, it computed a PNOLC subtraction using a base year tax rate

of 7.1% and the 10% allotment method. The department does not audit Taxpayer B's 2014 and 2015 reports and does not discover the discrepancy in the 2014 reported tax rate and the base year tax rate used in the PNOLC subtraction pool computation until it audits Taxpayer B's 2016 report in 2019, after the statute of limitations for the 2014 and 2015 tax years has expired. Taxpayer B is bound by the tax rate it used on its 2014 report and, as part of the 2016 audit, the department properly re-computes a PNOLC subtraction pool of $0 and denies the PNOLC subtraction in 2016. Taxpayer B is not entitled to use any PNOLC subtraction in future years.

Example 3: Same facts as Example 2, except that Taxpayer B is a small business taxpayer as defined in section 3-8.1(e)(1) of this Subpart and Taxpayer B used 100% of its PNOLC subtraction pool on its 2015 report. Because the statute of limitations for the 2015 tax year has expired, the department is bound by the taxpayer's actions in 2015 and cannot recoup the PNOLC subtraction the taxpayer used in 2015.

SUBPART 3-9

NET OPERATING LOSS AND NET OPERATING LOSS DEDUCTIONS FOR TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2015

Sec.

Section 3-9.1 Definitions. (Tax Law, sections 210(1)(a)(ix) and 210-C(4)(d))

(a)(1) "Net operating loss" (NOL) means the amount of a total business income in a particular taxable year multiplied by the business apportionment factor for that taxable year, when such total business income is less than zero. The amount of NOL cannot include any New York investment capital losses, as defined in section 3-7.1 of this Part.

(2) In the case of a combined report, the NOL is the combined business loss incurred in a particular taxable year multiplied by the combined business apportionment factor for that taxable year. The amount of combined business loss cannot include any New York investment capital losses.

(3) In the case of an alien corporation, the NOL is calculated using effectively connected

income as a starting point for the business income base.

(b) A "separate return year" means a taxable year of a corporation for which it files a separate return or for which it filed as a member of a different combined group.

Section 3-9.2 Net operating loss deduction. (Tax Law, sections 210 and 210-C)

(a) (1) A corporation that reports as part of a consolidated group for Federal income tax purposes but on a separate basis for purposes of article 9-A computes its NOL and its net operating loss deduction (NOLD) as if it were filing on a separate basis for Federal income tax purposes.

(2) If the combined group is different than the consolidated group for Federal income tax purposes, then the combined group computes its NOL and NOLD as if it were filing a consolidated return for Federal income tax purposes with the combined group members.

(b) The NOLD for taxable years beginning on or after January 1, 2015 is not limited to the Federal NOLD amount. However, such deduction is determined using the same limitations that would apply for Federal income tax purposes under the IRC and the related regulations regarding the NOLs of the acquired or merged loss companies.

(c) The NOLD that is required to be utilized in a taxable year is the amount that reduces the tax on apportioned total business income after the prior net operating loss conversion (PNOLC) subtraction and prior to the NOLD to the higher of the tax on the capital base or the fixed dollar minimum tax. In the case of a combined report, the NOLD that is required to be utilized in a taxable year is the amount that reduces the tax on apportioned total combined business income after the PNOLC subtraction and prior to the NOLD to the higher of the tax on the combined capital base or the fixed dollar minimum tax of the designated agent.

(d) (1) A corporation is allowed an NOLD in computing its business income base or, in

the case of a combined report, in computing the combined group's business income base.

(2) The NOLD is the amount of NOL from one or more taxable years that is carried forward or carried back to a particular taxable year, subject to the limitations in this Subpart. In the case of a combined report, the NOLD is the aggregate amount of the combined group members' NOL from one or more taxable years that is carried forward or carried back to a particular taxable year, subject to the limitations in this Subpart.

(3) When both a PNOLC subtraction and an NOLD are being claimed for a particular taxable year, the PNOLC subtraction must be applied against the business income base before the NOLD.

(e) A corporation will not be allowed an NOLD for any NOL sustained in any of the taxable years listed in paragraph (1), (2) or (3) of this subdivision:

(1) a New York S year. The New York S year must, however, be treated as a taxable year for purposes of determining the number of taxable years to which an NOL may be carried forward or back.

(2) any taxable year beginning prior to January 1, 2015; or

(3) any taxable year in which the corporation was not subject to tax under Article 9-A or not a member of a combined group subject to tax under article 9-A.

Section 3-9.3 Application of NOLs. (Tax Law, sections 210(1) and 210-C)

(a) Except as otherwise provided in this Subpart, an NOL must be carried back three years preceding the taxable year of the loss (the "loss year"). However, no NOL can be carried back to a taxable year beginning before January 1, 2015. The NOL is first carried to the earliest of the three taxable years preceding the loss year. If the NOL is not entirely used to offset income in that year, the remainder is carried to the second taxable year preceding the loss year,

and any remaining amount is carried to the taxable year immediately preceding the loss year. Any unused amount of NOL then remaining may be carried forward for as many as twenty taxable years following the loss year. NOLs carried forward are carried first to the taxable year immediately following the loss year and then to the next immediately succeeding taxable year or years until the NOL is used up or to the twentieth taxable year following the loss year, whichever comes first.

(b) When there are two or more NOLs, or portions thereof, to be carried back or carried forward and deducted in one particular taxable year, the earliest NOL incurred must be applied first.

(c) An NOL from a separate return year of a corporation that is filing as a new member of a combined group may not be carried back to offset income of that combined group in a taxable year in which the corporation was not a member of the combined group.

(d) In the case of a combined report, the portion of the combined NOL attributable to any member of the group that files a separate report, or to a member of a different group that files a combined report for a preceding or succeeding taxable year will be an amount bearing the same relation to the combined loss as the NOL of such corporation bears to the total NOLs of all members of the group having such losses, to the extent that such losses are taken into account in computing the combined NOL. The NOL attributable to a member filing a separate report, or as a member of a different group filing a combined return, is to be calculated by applying the business apportionment factor of the combined group to that member's proportional share of the group's business loss. A corporation's share of the combined group's NOL may be carried back to a separate return year of such corporation to offset only that corporation's business income in such year. A NOL of a combined group may not be carried back to offset the income of a

corporation that was not a member of the combined group when the loss was incurred.

(e) A corporation may elect to waive the entire carry back period with respect to an NOL by making an election on the corporation's original, timely filed report (determined with regard to extensions) for the taxable year of the NOL for which the election is to be in effect. Once such an election is made for a taxable year, it shall be irrevocable for that taxable year. In the case of a combined report, the election is made by the designated agent and applies to all members of the combined group. Therefore, a member of a combined group that has elected to waive the entire carry back period may not carry back its share of the combined group's NOL to a separate return year. A separate election must be made for each loss year. Failure to affirmatively waive the entire carryback period in the manner prescribed by the commissioner means that such NOL must be carried back.

(f) If a corporation calculates a higher tax liability for a taxable year under the capital base tax or the fixed dollar minimum tax than under the business income base, it does not need to utilize an NOLD. However, the year will be treated as a taxable year for purposes of determining the number of taxable years to which an NOL may be carried forward or back.

Section 3-9.4 Overpayments and underpayments resulting from NOL carrybacks.

(a) A corporation claiming a credit or refund of franchise tax paid under article 9-A for a taxable year to which an NOL is carried back as a deduction must file an amended return for that taxable year within the statute of limitations on credit or refund pursuant to section 1087.

(b) For those instances in which an NOL is carried back and the amount of NOL is subsequently changed:

(1) The Department may assess additional tax at any time that a deficiency for the taxable year of the loss can be assessed in accordance with section 1083(c)(4). This applies whether or

not the NOL was affected by a change in business income or change to the business apportionment factor or both.

(2) The Department may refund an overpayment at any time that a refund for the taxable year of the loss can be claimed in accordance with section 1087. This applies whether or not the NOL was affected by a change in business income or change to the business apportionment factor or both.

(3) The Department will apply the rules in paragraphs (1) and (2) above to all years affected by the revised NOL amount.

Section 3-9.5 Income from discharge of indebtedness.

In a year in which the corporation has income from the discharge of indebtedness that was excluded from Federal taxable income, the corporation must reduce any New York NOLs in the same manner as provided under IRC section 108(b) and related regulations, provided reductions to federal tax attributes that are not applicable to New York State are excluded. The amount by which the New York NOLs must be reduced is computed by multiplying the New York business apportionment factor for the year of discharge by the amount of federal NOL that is required to be reduced.

Section 3-9.6 Carryforwards in certain corporate reorganizations and acquisitions.

(a) For purposes of this section, a “separate return limitation year” (SRLY) means any separate return year of a corporation. The carryforward of any NOL incurred by a corporation for any taxable year beginning on or after January 1, 2015 is limited after a reorganization or merger by the same principles for the limitation of the carryforward of an NOL for Federal tax purposes as required under the provisions of IRC sections 381 through 384 and related regulations and any other section of the IRC or related regulations. NOLs arising in taxable years

beginning on or after January 1, 2015 and carried forward to a combined report from a SRLY may be used to reduce the combined group's apportioned business income only to the extent of the apportioned business income of the combined group attributable to the acquired loss corporation that carried forward the loss from the SRLY (SRLY limitation).

(b) NOL carryforward that is subject to limitation under IRC section 382 and related provisions. If the corporation's federal NOL carryforward is limited in a particular year under IRC section 382, the amount of NOL carryforward allowed for New York State purposes is similarly limited. The IRC section 382 limitation adjusted for New York is the product of the annual IRC section 382 limitation and the BAF for the current tax year. In addition, if the NOLD of the combined group is less than such annual limitation in a given tax year, the annual IRC section 382 limitation adjusted for New York in the next taxable year shall be increased by such excess.

(c) The amount of NOL available for deduction from an acquired corporation will be limited to the lesser of:

(1) the IRC section 382 limitation adjusted for New York State purposes; or

(2) the SRLY limitation.

(d) In the event the NOLs described in subdivision (a) or (b) of this section are from the same loss year as losses of the acquiring corporation, the amount of SRLY limited carryforward under subdivision (a) or the IRC section 382 limited carryforward under subdivision (b) shall be applied before applying any other NOL against the remaining business income of the combined group.

Section 3-9.7 – Appendix – Subpart 3-9 NOL Examples.