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24 Section 1-1.1 General. (Tax Law, section 208(9))

25 (a) Any term used in this Subchapter shall, unless a different meaning is clearly  
26 required, presumably have the same meaning as when used in a comparable context in:

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

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

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

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

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

40 Section 1-1.2 Commissioner of Taxation and Finance. (Tax Law section 2(1))

41 The term “commissioner” means the Commissioner of Taxation and Finance or the  
42 commissioner’s delegate unless the text clearly requires a different meaning.

43 Section 1-1.3 Corporation. (Tax Law, sections 208(1) and 209(2-a))

44 (a) The term “corporation” means an entity created as such under the laws of the  
45 United States, any state, territory or possession thereof, the District of Columbia, or any  
46 foreign country, or any political subdivision of any of the foregoing, which provides a medium

47 for the conducting of business and the sharing of its gains. An entity conducted as a  
48 corporation is deemed to be a corporation. The term “corporation” includes:

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

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

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

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

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

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

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

74 (2) The term “foreign corporation” means a corporation that is not a domestic  
75 corporation.

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

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

82 Section 1-1.4 Department of Taxation and Finance. (Tax Law section 2(1))

83 The terms “department”, “Tax Department”, and “Department of Taxation and Finance”  
84 mean the New York State Department of Taxation and Finance unless the text clearly requires  
85 a different meaning.

86 Section 1-1.5. Effectively connected income.

87 The term “effectively connected income” means income, gain, or loss that is effectively  
88 connected with the conduct of a trade or business within the United States as determined under  
89 IRC section 882 in the case of an alien corporation that under any provision of the IRC is not  
90 treated as a domestic corporation as defined in IRC section 7701. It includes income, gain, or  
91 loss that is described in section 208(9)(b) and excluded from Federal taxable income under any  
92 provision of Federal law, including under a United States treaty obligation, that would be treated,

93 in the absence of such exclusion, as effectively connected with the conduct of a trade or business  
94 within the United States. Income, gain, or loss excluded from Federal taxable income under a  
95 United States treaty obligation will be deemed to be treated as effectively connected with the  
96 conduct of a trade or business within the United States unless such treaty prohibits state taxation  
97 of such income, gain, or loss.

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

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

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

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

109 Section 1-1.7 Real property.

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

113 Section 1-1.8. Regularly traded.

114 The term “regularly traded,” for purposes of determining whether a REIT is a captive  
115 REIT, or whether a RIC is a captive RIC, a REIT or RIC will be deemed to be regularly traded

116 on an established securities market, means that

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

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

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

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

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

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

139 Section 1-1.9 REIT, captive REIT, and non-captive REIT (Tax Law, sections 2(7) and  
140 2(9))

141 (a) The term “REIT” means a corporation, trust or association that is a real estate  
142 investment trust as defined in IRC section 856(a) and that meets the requirements of IRC section  
143 856(c), as modified, where applicable, by IRC section 965(m)(1)(A).

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

150 (c) The term “non-captive REIT” means a REIT that is not a captive REIT.

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

153 Section 1-1.11 RIC, captive RIC, and non-captive RIC. (Tax Law, sections 2(8) and  
154 2(10))

155 (a) The term “RIC” means a corporation that is a regulated investment company as  
156 defined in IRC section 851 that is subject to Federal income tax under IRC section 852.

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

162 determining whether a RIC is a captive RIC.

163 (c) The term “non-captive RIC” means a RIC that is not a captive RIC.

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

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

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

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

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

175 Section 1-1.13. Stock. (Tax Law, section 208(4))

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

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



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

187 Section 1-1.14 Tangible personal property (Tax Law section 208(11))

188 The term “tangible personal property” means corporeal personal property such as  
189 machinery, tools, implements, goods, wares and merchandise. It includes audio works,  
190 audiovisual works, literary works, visual works, graphic works or games, delivered via a  
191 physical medium that are not subject to the rules for digital products under section 210-A(4). It  
192 does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an  
193 interest in property and evidences of debt.

194 Section 1-1.15 Taxable year.

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

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

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

207 (b) The term “taxpayer” also includes a receiver, referee, trustee, assignee or other

208 fiduciary, or any officer or agent appointed by state or federal court, who conducts the business  
209 of a corporation. For example, a trustee who, under the authority of a federal court, conducts the  
210 business of a corporation in bankruptcy is a taxpayer subject to tax. If the activities of the trustee  
211 are limited to the liquidation of the business and the disposition of the assets of the corporation,  
212 neither the trustee nor the corporation is subject to the franchise tax.

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

219

220

## SUBPART 1-2

221

## CORPORATIONS SUBJECT TO TAX

222 Sec.

223 1-2.1 Domestic corporations subject to tax

224 1-2.2 Foreign corporations subject to tax – general

225 1-2.3 Foreign corporations – partnership interests

226 1-2.4 Foreign corporations – doing business

227 1-2-5 Foreign corporations – employing capital

228 1-2.6 Foreign corporations – owning or leasing property

229 1-2.7 Foreign corporations – maintaining an office

230 1-2.8 Foreign corporations – deriving receipts

231 1-2.9 Activities deemed insufficient to subject foreign corporations to tax

232 1-2.10 Foreign corporations - Public Law 86-272

233 1-2.11 Corporations not subject to tax

234 1-2.12 Change of classification

235 1-2.13 Examples

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

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

245 Example: A corporation is incorporated under the laws of New York  
246 State on July 1, 2015. It begins to do business on February  
247 1, 2016, setting up its books on the basis of a calendar year.  
248 The corporation is subject to tax from July 1, 2015 to  
249 December 31, 2015, since it had the privilege of exercising  
250 its corporate franchise for that period. It is also subject to  
251 tax for the period beginning January 1, 2016.

252 (b)(1) A domestic corporation that is no longer doing business, employing capital,  
253 owning or leasing property in a corporate or organized capacity, or deriving receipts from

254 activity in this state is exempt from the fixed dollar minimum tax for tax years following its final  
255 tax year, provided that the corporation:

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

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

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

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

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

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

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

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

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

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

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

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

276 (ii) may be issued assessments, including penalties and interest for failure to file an

277 article 9-A franchise tax return or to pay the article 9-A franchise tax, or for failure to do both.

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

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

283 (ii) continue to pay all applicable tax; and

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

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

286 (3)

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

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

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

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

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

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

298 (b) Except as specified in section 1-2.10 of this Part, a foreign corporation engaged in  
299 New York State in any one or more of the activities described in subdivision (a) of this section

300 is subject to tax even though its activities are wholly or partly in interstate or foreign  
301 commerce.

302 (c) A foreign corporation that is not subject to tax or that is exempt from tax, other than a  
303 corporation that cannot be included in a combined report under section 210-C(2)(c) and the  
304 applicable regulations, is required to be included in a combined report with a taxpayer if the  
305 combined reporting requirements are met.

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

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

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

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

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

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

321 (a) If a partnership is doing business, employing capital, owning or leasing property,  
322 maintaining an office, or deriving receipts from activity in New York State, as determined

323 pursuant to the rules under article 9-A, then all of its corporate general partners (other than  
324 corporate partners that are or would be subject to franchise tax under article 9 or 33) are subject  
325 to the tax imposed by article 9-A.

326 (b) A foreign corporation is doing business, employing capital, owning or leasing  
327 property, maintaining an office, or deriving receipts from activity in New York State if:

328 (1) it is a limited partner of a partnership, other than a portfolio investment partnership,  
329 that is doing business, employing capital, owning or leasing property, maintaining an office,  
330 or deriving receipts from activity in New York State and

331 (2) it is engaged, directly or indirectly, in the participation in or the domination or control  
332 of all or any portion of the business activities or affairs of the partnership. Such foreign  
333 corporations that are limited partners of such partnerships (other than corporate partners that are  
334 or would be subject to franchise tax under article 9 or 33) are subject to the tax imposed by  
335 article 9-A. A foreign corporation is engaged, directly or indirectly, in the participation in or the  
336 domination or control of all or any portion of the business activities or affairs of the partnership  
337 if one or more of certain factual situations, including but not limited to the following, exist  
338 during the taxable year or, except for subparagraph (i) of this subdivision, any previous  
339 taxable year:

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

346 the foreign corporation or of officers or directors of members of the foreign corporation's  
347 affiliated group are added to the foreign corporation's interest in the partnership or the basis of  
348 its interest in the partnership, respectively.

349 (ii) An officer, employee, or director of the foreign corporation or an officer, employee,  
350 or director of a member of an affiliated group that includes such foreign corporation or a  
351 member of such an affiliated group, is a general partner of the partnership.

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

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

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

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

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



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

372 (ix) The foreign corporation is a limited partner that for purposes of IRC section 469 is  
373 materially participating in the partnership as defined in 26 CFR 1.469-5T(e)(2). For purposes  
374 of this subparagraph, references to taxpayer in such section 469 is deemed to mean any  
375 person, as defined in IRC section 7701(a)(1).

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

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

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

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

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

389 (4) 50% or more of the foreign corporation's assets or those of a member of an  
390 affiliated group that includes such foreign corporation are a limited partnership interest in the  
391 partnership.

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

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

397 (7) The foreign corporation, or a member of an affiliated group that includes such  
398 foreign corporation, is interrelated with the partnership through one or more of the following  
399 factors:

400 (i) common management;

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

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

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

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

410 (vi) common or inter-entity personnel recruitment;

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

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

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

415 (x) common or inter-entity transfer or pooling of technical information;  
416 (xi) common or inter-entity pension plans and/or insurance plans; or  
417 (xii) common or inter-entity credit analysis and coordination of credit extension.

418 (d) If a limited liability company that is treated as a partnership for tax purposes, other  
419 than a limited liability company that is treated as a portfolio investment partnership, is doing  
420 business, employing capital, owning or leasing property, maintaining an office or deriving  
421 receipts from activity in New York State, then all of its members that are foreign corporations  
422 (other than foreign corporations that are or would be subject to tax under article 9 or 33) are  
423 subject to the tax imposed by article 9-A; provided, however, that if the operating agreement of  
424 such limited liability company imposes limitations on the foreign corporate member's  
425 participation in the management of the limited liability company either equivalent to or more  
426 stringent than the limitations on the participation in the control of the business of a limited  
427 partnership imposed on limited partners under article 8-A of the New York Partnership Law, the  
428 foreign corporate member will be subject to the rules applicable to foreign corporate limited  
429 partners set out in this section.

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

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

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

437 (3) The term "affiliated group" has the same meaning as such term is defined in IRC

438 section 1504, except that the term “common parent corporation” is deemed to mean any  
439 person, as defined in IRC section 7701(a)(1), and except that references to at least 80% in  
440 such section 1504 are read as more than 50%. IRC section 1504 is read without regard to the  
441 exclusions provided for in section 1504(b).

442 (4) The term “portfolio investment partnership” means a limited partnership that meets  
443 the gross income requirement of IRC section 851(b)(2). For purposes of the preceding  
444 sentence, income and gains from commodities (not described in IRC section 1221) or from  
445 futures, forwards, and options with respect to such commodities are included in income that  
446 qualifies to meet such gross income requirement. Such commodities must be of a kind  
447 customarily dealt in on an organized commodity exchange and the transaction must be of a  
448 kind customarily consummated at such place, as required by IRC section 864(b)(2)(B)(iii). To  
449 the extent that such a partnership has income and gains from commodities (not described in IRC  
450 section 1221) or from futures, forwards, and options with respect to such commodities, such  
451 income and gains must be derived by a partnership that is not a dealer in commodities and is  
452 trading for its own account as described in IRC section 864(b)(2)(B)(ii). The term portfolio  
453 investment partnership does not include a dealer (within the meaning of IRC section 1236) in  
454 stocks or securities.

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

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

460 corporation is doing business, it is immaterial whether its activities actually result in a profit or  
461 a loss.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

489 (d) (1) A foreign corporation doing business in New York State because it issues credit  
490 cards is deemed to be doing business for all of its taxable year or part of its taxable year from the  
491 date in such taxable year on which it issues its first credit card in New York State.

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

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

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

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

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

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

503 (a) The term employing capital is used in a comprehensive sense. Any of a large  
504 variety of uses, which may overlap other activities, may give rise to taxable status. In general,  
505 the use of assets in maintaining or aiding the corporate enterprise or activity in New York

506 State will make the corporation subject to tax. Employing capital includes such activities as:

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

508 (2) owning materials and equipment assembled for construction.

509 Section 1-2.6 Foreign corporation – owning or leasing property. (Tax Law, section  
510 209(1)).

511 (a) The owning or leasing of real or personal property within New York State  
512 constitutes an activity that subjects a foreign corporation to tax. Property owned by or held for  
513 the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to  
514 make the corporation subject to tax. Property held, stored or warehoused in New York State  
515 creates taxable status. Property held as a nominee for the benefit of others creates taxable  
516 status. Also, consigning property to New York State may create taxable status if the consignor  
517 retains title to the consigned property.

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

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

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

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

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

529 computed in Part 4 of this Subchapter.

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

532 (c) A corporation derives receipts from activity in New York State if:

533 (1) the corporation is part of a unitary group that meets the ownership test under section  
534 210-C,

535 (2) it has New York receipts of at least \$10,000, and

536 (3) the total New York receipts of all the members of the unitary group that each have at  
537 least \$10,000 of New York receipts is at least \$1 million of such receipts.

538 (d) A corporation derives receipts from activity in New York State if:

539 (1) the corporation is a general partner of a partnership and its New York receipts, if any,  
540 when combined with the New York receipts of the partnership total at least \$1 million; or

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

546 (3) the corporation is a member of a limited liability company that is treated as a  
547 partnership for tax purposes, other than a limited liability company that is treated as a portfolio  
548 investment partnership, the operating agreement of which does not impose limitations on the  
549 corporate member's participation in the management of the limited liability company either  
550 equivalent to or more stringent than the limitations on the participation in the control of the  
551 business of a limited partnership imposed on limited partners under article 8-A of the New York



552 Partnership Law, and its New York receipts, if any, when combined with the New York receipts  
553 of the limited liability company total at least \$1 million; or

554 (4) the corporation is a member of a limited liability company that is treated as a  
555 partnership for tax purposes, other than a limited liability company that is treated as a portfolio  
556 investment partnership, the operating agreement of which imposes limitations on the corporate  
557 member's participation in the management of the limited liability company either equivalent to  
558 or more stringent than the limitations on the participation in the control of the business of a  
559 limited partnership imposed on limited partners under article 8-A of the New York Partnership  
560 Law, and its New York receipts, if any, when combined with the New York receipts of the  
561 limited liability company total at least \$1 million, provided that the member is engaged, directly  
562 or indirectly, in the participation in or the domination or control of all or any portion of the  
563 business activities or affairs of the limited liability company.

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

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

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

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

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

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

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

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

598 the adjustment. When the commissioner has adjusted the receipts thresholds as provided for in  
599 this subdivision, any reference to \$1 million or \$10,000 in this Part is deemed to be a reference to  
600 the receipts thresholds as adjusted.

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

603 (k) For purposes of this section, the term “unitary group that meets the ownership test  
604 under section 210-C” means a group of corporations where:

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

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

609 (1)(1) A foreign corporation deriving receipts from activity in New York State is deemed  
610 to be deriving receipts for all of its taxable year or part of its taxable year from the date in such  
611 taxable year of its first receipt derived from activity in New York State.

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

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

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

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

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

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

627 (4) the maintenance of an office in this State by one or more officers or directors of the  
628 corporation who are not employees of the corporation if the corporation is not otherwise doing  
629 business or employing capital in New York State and does not own or lease property in New  
630 York State;

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

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

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

643 (8) the acquisition of title to property located in New York State through the foreclosure

644 of a security interest;

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

649 (10) any combination of the foregoing activities.

650 (b)(1) An alien corporation will not be deemed to be doing business, employing capital,  
651 owning or leasing property in a corporate or organized capacity, maintaining an office or  
652 deriving receipts from activity in New York State if its activities in New York State are limited  
653 solely to investing or trading for its own account in:

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

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

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

657 (2) An alien corporation engaged in any one or more of the activities described in section  
658 1-2.2(a) of this Subpart, that under any provision of the IRC is not treated as a domestic  
659 corporation as defined in IRC section 7701 and does not have effectively connected income for  
660 the taxable year will not be subject to tax under article 9-A.

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

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

666 (1) the solicitation of orders by employees or representatives in New York State for

667 sales of tangible personal property and the orders are sent outside New York State for approval  
668 or rejection; and if approved, are filled by shipment or delivery from a point outside New York  
669 State;

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

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

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

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

690 contractor.

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

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

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

703 (3) using autos furnished by the corporation;

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

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

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

708 (7) intervention in credit disputes;

709 (8) use of space at the salesperson's home solely for the salesperson's convenience.

710 (However, see subdivision (g) of this section as to loss of immunity for maintaining an office.);

711 (9) participating in a trade show or shows, provided that participation is for not more  
712 than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal

713 income tax purposes. (However, see subdivision (g) of this section as to loss of immunity for  
714 maintaining an office.)

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

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

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

730 (2) making credit investigations;

731 (3) collecting delinquent accounts;

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

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

735 (6) giving technical advice on the use of the corporation's products after the products



736 have been delivered to the customer.

737 (g) Maintaining an office, shop, warehouse or stock of goods in New York State will  
738 make a corporation taxable. However, a corporation will not be made taxable solely by  
739 maintaining a supply of goods in New York State if such goods are used only as free samples  
740 in connection with the solicitation of orders. A corporation will be considered to be  
741 maintaining an office in New York State if the space is held out to the public as an office or  
742 place of business of the taxpayer. For example, a salesperson uses his or her house for  
743 business. A telephone, listed in the corporation's name, is maintained at the salesperson's  
744 house. The salesperson makes telephone contacts from the house or receives calls and orders at  
745 the house. The residence will be treated as an office of the corporation, and the corporation  
746 will be taxable.

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

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

758 Example 1: A foreign manufacturing corporation has its factory

759 outside New York State. Its only activity in New York  
760 State is the solicitation of orders for its products through a  
761 sales office located in New York State. The orders are  
762 forwarded to its home office outside the State for  
763 acceptance and the merchandise is shipped by common  
764 carrier from the factory direct to the purchasers. The  
765 corporation is subject to tax because it maintains an office  
766 in New York State and therefore its activities are not  
767 limited to those described in this section.

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

777 Example 3: A foreign corporation sends salespeople into New York  
778 State to solicit orders. The orders must be accepted at the  
779 home office of the corporation located in another state.  
780 The corporation displays goods in New York City at a  
781 space leased occasionally and for short terms. The

782 corporation is subject to tax because it is employing capital  
783 in New York State and therefore its activities are not  
784 limited to those described in this section.

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

798 Example 5: Seven foreign corporations each have \$200,000 of receipts  
799 from activity in New York State and are part of the same  
800 unitary group that meets the ownership test under section  
801 210-C. Therefore, the seven corporations together exceed  
802 the \$1 million receipts threshold. Three members of the  
803 group have activities in New York State that consist solely  
804 of the solicitation of orders by employees in New York

805 State for sales of tangible personal property, which orders  
806 are sent outside New York State for approval or rejection  
807 and, if approved, are filled by shipment from a point  
808 outside New York State. These three corporations are not  
809 subject to tax in New York State because their activities are  
810 limited to those described in this section; the other four  
811 corporations are subject to tax because they are deriving  
812 receipts from activity in New York State and their activities  
813 are not limited to those described in this section. The seven  
814 corporations are required to file in a combined report,  
815 which will include the receipts, net income, net gains, net  
816 losses, and net deductions of all the corporations, together  
817 with their proportionate share of the unitary group's assets  
818 and liabilities.

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

825 Example 7: A foreign corporation regularly provides assistance to its  
826 customers after its products have been delivered, either by  
827 email or electronic "chat" that customers initiate by

828 clicking on an icon on the corporation's website. For  
829 example, the corporation regularly advises customers on  
830 how to use products after the products have been delivered.  
831 Since this activity does not constitute, and is not entirely  
832 ancillary to, the solicitation of orders for sales of tangible  
833 personal property, the corporation is not exempt from tax  
834 under this section.

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

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

851           Example 10: A foreign corporation places Internet “cookies” onto the  
852                           computers or other electronic devices of its customers.  
853                           These cookies gather customer search information that will  
854                           be used to adjust production schedules and inventory  
855                           amounts, develop new products, or identify new items to  
856                           offer for sale. Since this activity does not constitute, and is  
857                           not entirely ancillary to, the solicitation of orders for sales  
858                           of tangible personal property, the corporation is not exempt  
859                           from tax under article 9-A under this section.

860           Example 11: The same facts as example 10 except that the cookies  
861                           gather customer information that is used only for purposes  
862                           entirely ancillary to the solicitation of orders for tangible  
863                           personal property, such as: to remember items that  
864                           customers have placed in their shopping cart during a  
865                           current web session, to store personal information  
866                           customers have provided to avoid the need for the  
867                           customers to re-input the information when they return to  
868                           the corporation’s website, and to remind customers what  
869                           products they have considered during previous sessions.  
870                           The cookies perform no other function, and these are the  
871                           only types of cookies delivered by the corporation to the  
872                           computers or other devices of its customers. Since this  
873                           activity is entirely ancillary to the solicitation of orders for

874 sales of tangible personal property, the corporation, under  
875 the facts of this example, is exempt from tax under article  
876 9-A under this section.

877 Example 12: A foreign corporation remotely fixes or upgrades products  
878 previously purchased by its customers by transmitting code  
879 or other electronic instructions to those products via the  
880 Internet. Since this does not constitute, and is not entirely  
881 ancillary to, the solicitation of orders for sales of tangible  
882 personal property, the corporation is not exempt from tax  
883 under article 9-A under this section.

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

891 Example 14: A foreign corporation contracts with a marketplace  
892 provider that facilitates the sale of the corporation's  
893 products on the provider's online marketplace. The  
894 marketplace provider maintains inventory, including some  
895 of the corporation's products, at fulfillment centers in New  
896 York State. Since this activity involves the maintenance of

897 the corporation's products in New York State, the  
898 corporation is not exempt from tax under article 9-A under  
899 this section.

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

907 Example 16: A foreign corporation offers for sale only items of tangible  
908 personal property on its website. The website enables  
909 customers to search for items, read product descriptions,  
910 select items for purchase, choose among delivery options,  
911 and pay for the items. The corporation does not engage in  
912 any activities in New York State that are not described in  
913 this example. Since the corporation engages exclusively in  
914 activities in New York State that either constitute  
915 solicitation of orders for sales of tangible personal property  
916 or are entirely ancillary to solicitation, the corporation is  
917 exempt from tax under article 9-A under this section.

918 Section 1-2.11 Corporations not subject to tax. (Tax Law, sections 3, 8, 13, 208(9)(i) and  
919 209(4), (9), (10), (12))



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

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

924 (2) farmers, fruit growers and other like agricultural corporations organized and  
925 operated on a cooperative basis subject to tax under section 185 for tax years prior to January 1,  
926 2018;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

956 (ii) A domestic corporation exclusively engaged in the operation of vessels in foreign  
957 commerce remains exempt where (a) it has investments in other domestic corporations  
958 exclusively engaged in the operation of vessels in foreign commerce or (b) average  
959 investments (other than investments in a domestic corporation qualifying for this exemption)  
960 are minimal in comparison to overall activities. Generally, where other investments are 10%  
961 or less of average total assets, these investments will be considered minimal.

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

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

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

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

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

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

981 (ii) received more than 5% of its gross rentals from the rental of property that it  
982 purchased or rented from its stockholders; or

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

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

989 stock drops below a certain level will not make the trust taxable;

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

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

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

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

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

999 (14) a qualified subchapter S subsidiary (QSSS) corporation, as defined in section  
1000 208(1-B), provided it meets the requirements for exemption pursuant to section 208(9)(k) of  
1001 such article;

1002 (15) a qualified settlement fund under IRC section 468B or an entity that is treated as  
1003 such for Federal purposes or a grantor trust, either of which is used for Nazi reparations;

1004 (16) farmers, fruit growers and other like agricultural corporations organized and  
1005 operated on a cooperative basis for the purposes expressed in and as provided under the  
1006 Cooperative Corporations Law, whether or not such corporations have capital stock.

1007 Section 1-2.12 Change of classification. (Tax Law, section 209(1)).

1008 (a) A corporation subject to tax under article 9-A may, by reason of a change in the  
1009 nature of its activities or a change in the ownership or control of the voting powers of its  
1010 capital stock, cease to be subject to such tax and become taxable under some other article.

1011 Conversely, a corporation subject to tax under some other article may, for the same reasons,

1012 cease to be taxable thereunder and become subject to tax under article 9-A. The date on which  
1013 any such change of classification becomes effective will be determined by the facts of each  
1014 case.

1015 (b) A corporation that becomes subject to tax under article 9-A during one of its fiscal  
1016 or calendar years by reason of a change in classification is treated in the same manner as a  
1017 corporation that became subject to tax during such year.

1018 (c) A corporation that ceases to be subject to the franchise tax imposed by article 9-A  
1019 during one of its fiscal or calendar years by reason of a change of classification is treated,  
1020 insofar as article 9-A is concerned, in the same manner as a corporation that is dissolved or  
1021 ceases to be taxable in New York State during such year.

1022 Section 1-2.13 Examples. The following are examples of foreign corporations that  
1023 either are subject to tax under article 9-A because they are doing business, or employing  
1024 capital, or owning or leasing property in a corporate or organized capacity, or maintaining an  
1025 office or deriving receipts from activity in New York State, or are not subject to tax. Each of  
1026 these examples is intended for illustration purposes only and to be applicable only to the specific  
1027 activity as identified in each example.

1028 Example 1: A foreign corporation in another state operates or is  
1029 organized for the purposes of buying and selling  
1030 securities. It does not maintain a physical office  
1031 anywhere, other than a statutory office in the state of its  
1032 incorporation. Regular and continuous purchases of  
1033 securities are directed by its officers or agents located in  
1034 New York State. The corporation is subject to tax because

- 1035 it is doing business in New York State.
- 1036 Example 2: A foreign corporation participates in a joint venture that  
1037 carries on business in this State, but the foreign  
1038 corporation is not otherwise engaged in any activities in  
1039 New York State. The corporation is subject to tax because  
1040 it is doing business in New York State.
- 1041 Example 3: A foreign holding corporation coordinates and supervises  
1042 in New York State activities of a subsidiary that is taxable  
1043 in New York State. It also makes loans to its subsidiary  
1044 and guarantees loans obtained by the subsidiary from  
1045 sources other than the parent. The corporation is subject to  
1046 tax because it is doing business in New York State.
- 1047 Example 4: A foreign manufacturing corporation has its factories and  
1048 offices located outside New York State. Its sole activity in  
1049 New York State consists of holding or storing goods in a  
1050 warehouse owned by an unrelated party. The corporation is  
1051 subject to tax because it is employing capital in New York  
1052 State.
- 1053 Example 5: A foreign corporation that has no office or other place of  
1054 business in New York State leases automobiles to  
1055 customers in New York State, with receipts from this  
1056 activity equaling less than \$1 million. The corporation is  
1057 subject to tax because it owns property in New York State.

1058           Example 6:   A foreign corporation formerly engaged in manufacturing  
1059                           in another state discontinues such business and transfers  
1060                           its office to New York State, where its activities consist  
1061                           solely of the acquisition of bonds and the receipt of  
1062                           interest on such bonds and the holding of directors'  
1063                           meetings. The corporation is subject to tax because it  
1064                           maintains an office in New York State.

1065           Example 7:   A foreign corporation issues credit cards to 500 customers  
1066                           with a mailing address in New York State as of the last day  
1067                           of its taxable year and has contracts with merchants  
1068                           covering 500 locations in New York State to which it  
1069                           remits payments during the taxable year. Since the  
1070                           corporation issues credit cards to customers with a mailing  
1071                           address in the state and has merchant customer contracts  
1072                           that cover locations in the state to which it remits payments  
1073                           for credit card transactions, and the sum of the number of  
1074                           customers and the number of locations is 1,000, the  
1075                           corporation is subject to tax because it is doing business in  
1076                           New York State.

1077           Example 8:   Three foreign corporations are part of the same unitary  
1078                           group that meets the ownership test under section 210-C.  
1079                           All of the members of which each have at least \$10,000 of  
1080                           receipts from activity in New York State. They are a bank,

1081 a broker-dealer, and an insurance company subject to tax  
1082 under article 33. The bank and the broker-dealer together  
1083 have \$900,000 of receipts from activity in New York State.  
1084 The insurance company has \$300,000 of receipts from  
1085 activity in New York State. Since the insurance company is  
1086 a corporation that cannot be included in a combined report  
1087 under section 210-C(2)(c) and the applicable regulations,  
1088 its New York receipts will not be included for purposes of  
1089 determining whether the unitary group is deriving receipts  
1090 from activity in New York State. Therefore, the bank and  
1091 the broker-dealer are not subject to tax in New York State  
1092 because they are not deriving receipts from activity in New  
1093 York State.

1094 Example 9: A foreign corporation organized as a bank in another state  
1095 has interest income from Federal funds but no other New  
1096 York receipts. Since the corporation's only New York  
1097 receipts are from interest income from Federal funds, the  
1098 corporation is not subject to tax in New York State, because  
1099 it is not deemed to be deriving receipts from activity in New  
1100 York State.

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1103

## PART 2

## ACCOUNTING PERIODS AND METHODS



1104 Subpart 2-1 Accounting Periods

1105 Subpart 2-2 Accounting Methods

1106 Subpart 2-3 Cessation Periods

1107 SUBPART 2-1

1108 ACCOUNTING PERIODS

1109 Sec.

1110 2-1.1 General

1111 2-1.2 Calendar-year taxpayers

1112 2-1.3 Fiscal-year taxpayers

1113 2-1.4 Taxpayers using a 52-53 week year

1114 2-1.5 Change of accounting period

1115 Section 2-1.1 General. (Tax Law, sections 208(10), 209(1))

1116 (a) Generally, for Federal income tax purposes, a taxpayer's taxable year is the same as  
1117 its accounting period. In most cases, the taxable year for which the franchise tax imposed by  
1118 article 9-A is to be computed and for which a franchise tax report is to be filed shall be the  
1119 same as the taxpayer's taxable year for Federal income tax purposes, or that portion of the  
1120 Federal taxable year for which the taxpayer is subject to the tax imposed by article 9-A. The  
1121 taxable year under article 9-A generally will be the accounting period covered by the  
1122 taxpayer's Federal income tax return whether such period be a calendar year, a properly  
1123 established fiscal year (which includes an accounting period consisting of 52 - 53 weeks) or an  
1124 accounting period of less than 12 months as permitted or required under the IRC. If a taxpayer  
1125 does not have a taxable year for Federal income tax purposes, the tax must be computed and a  
1126 report must be filed for a calendar year, unless the commissioner authorizes the use of some

1127 different accounting period.

1128           (b) The tax imposed by article 9-A is imposed for each fiscal or calendar year of the  
1129 taxpayer, or any part thereof, during which the taxpayer has a corporate franchise granted by  
1130 New York State or does business, employs capital, owns or leases property in a corporate or  
1131 organized capacity, maintains an office, or derives receipts from activity in New York State.  
1132 Therefore, for purposes of article 9-A, the taxpayer's first taxable year begins in the case of a  
1133 domestic corporation on the date of its incorporation or, if elected, on such other date for the  
1134 beginning of its corporate existence as set forth in the certificate of incorporation, not to  
1135 exceed 90 days after the filing of such certificate, and ends on the last day of such fiscal or  
1136 calendar year or on the last day it is subject to the tax imposed by article 9-A, whichever  
1137 comes first. In the case of a foreign corporation, the taxpayer's first taxable year begins on the  
1138 date it begins to do business, employ capital, own or lease property, maintain an office, or  
1139 derive receipts from activity in New York State and ends on the last day of such fiscal or  
1140 calendar year or on the last day it is subject to the tax imposed by article 9-A, whichever comes  
1141 first.

1142           Section 2-1.2 Calendar-year taxpayers. (Tax Law, section 208(10))

1143           (a) A taxpayer that reports on the basis of a calendar year for Federal income tax  
1144 purposes must report on the same basis for purposes of article 9-A. A calendar year is a period  
1145 of 12 calendar months ending on December 31st, or a period of less than 12 calendar months  
1146 beginning on the date a taxpayer becomes subject to tax and ending on December 31st. A  
1147 calendar year also includes, in the case of a taxpayer that changes the period on the basis of  
1148 which it keeps its books from a fiscal year to a calendar year, the period from the close of its  
1149 last fiscal year to and including the following December 31st.

1150 (b) A taxpayer shall use a calendar year as its accounting period and report on a  
1151 calendar-year basis in the following situations:

1152 (1) the taxpayer keeps its books on the basis of a calendar year;

1153 (2) the taxpayer keeps its books on the basis of any period ending on any day other  
1154 than the last day of a calendar month, except in the case of a taxpayer that keeps its books on  
1155 the basis of a 52-53 week accounting period;

1156 (3) the taxpayer does not keep books;

1157 (4) the taxpayer is not required to file a Federal income tax return, unless the use of  
1158 a fiscal year or 52-53 week period basis of reporting has been authorized by the commissioner;  
1159 or

1160 (5) the taxpayer has made no election as to the use of either a fiscal- or calendar-  
1161 year basis of reporting.

1162 (c) Examples. The calendar-year taxpayer's first accounting period and its first taxable  
1163 year ends on December 31, 2017 in each of the following examples. The taxpayer's first report  
1164 must be filed on or before April 15, 2018.

1165 Example 1: The corporation is organized in New York State on  
1166 October 23, 2017, and its certificate of incorporation is  
1167 filed in the Office of the Secretary of State on the same  
1168 date. The corporation becomes subject to tax on October  
1169 23, 2017 and its first accounting period and taxable year  
1170 begins on that date irrespective of when the corporation  
1171 starts to transact business.

1172           Example 2:   The corporation is organized in New York State on  
1173   December 31, 2017  
1174                   and its certificate of incorporation is filed in the Office of  
1175                   the Secretary of State on the same day. The corporation's  
1176                   first accounting period and taxable year is one day,  
1177                   December 31, 2017, and the corporation must file a report  
1178                   based on such period.

1179           Example 3:   The foreign corporation, which reports for Federal income  
1180                   tax purposes on a calendar-year basis, leases space for an  
1181                   office in New York City on February 6, 2017. Prior to  
1182                   February 6, 2017, the corporation did not do business,  
1183                   employ capital, own or lease property, maintain an office,  
1184                   or derive receipts from activity in New York State. The  
1185                   corporation hires personnel and opens its office in New  
1186                   York City on March 1, 2017. The corporation becomes  
1187                   subject to tax on February 6, 2017. Since the taxpayer  
1188                   reports for Federal income tax purposes on a calendar-year  
1189                   basis, its first taxable year for purposes of article 9-A  
1190                   begins February 6, 2017, and its tax is computed on the  
1191                   basis of an accounting period which begins January 1,  
1192                   2017 and ends December 31, 2017.

1193           Section 2-1.3 Fiscal-year taxpayers. (Tax Law, section 208(10))

1194           (a) A taxpayer that reports on the basis of a fiscal year for Federal income tax purposes

1195 must report on the same basis for purposes of article 9-A. A fiscal year is a period not longer  
1196 than 12 calendar months, or any shorter period beginning on the date the taxpayer becomes  
1197 subject to tax and ending on the last day of any month other than December. A fiscal year also  
1198 includes, in the case of a taxpayer that changes the period on the basis of which it keeps its  
1199 books from a calendar year to a fiscal year, or from one fiscal year to another fiscal year, the  
1200 period from the close of its last calendar or fiscal year up to the date designated as the close of  
1201 its new fiscal year. A fiscal year also includes a 52-53 week accounting period if the taxpayer  
1202 has elected for Federal income tax purposes such period.

1203 (b) A taxpayer reporting on a fiscal-year basis must keep its books on such basis.

1204 (c) Examples.

1205 Example 1: A domestic corporation is incorporated in New York State  
1206 on November 19, 2017. The corporation selects the fiscal-  
1207 year basis of reporting and uses the date November 30th as  
1208 the last day of its fiscal year. The corporation is subject to  
1209 tax for the period November 19, 2017 to November 30,  
1210 2017, and must file a report for that period. The report must  
1211 be filed on or before March 15, 2018.

1212 Example 2: A foreign corporation, which reports for Federal income  
1213 tax purposes on a fiscal-year basis, uses September 30th as  
1214 the last day of its fiscal year. The corporation leases a store  
1215 in New York City on March 1, 2017. The corporation  
1216 continues to do business throughout the year 2017. Since  
1217 the taxpayer reports for Federal income tax purposes on a

1218 fiscal-year basis, its first taxable year for purposes of article  
1219 9-A begins March 1, 2017, and its tax is computed on the  
1220 basis of an accounting period which begins October 1, 2016  
1221 and ends September 30, 2017. The report must be filed on  
1222 or before January 15, 2018.

1223 Section 2-1.4 Taxpayers using a 52-53 week year.

1224 (a) A taxpayer that reports on the basis of a 52-53 week accounting period for Federal  
1225 income tax purposes may report on the same basis for purposes of article 9-A. A 52-53 week  
1226 period must end on the same day of the week each year, and end always on whatever date that  
1227 day of the week last occurs in a calendar month, or on whatever date that day of the week falls  
1228 that is nearest the last day of a calendar month.

1229 (b) If a 52-53 week accounting period is used and the period starts within seven days  
1230 from the first day of any calendar month, the taxable year will be deemed to have begun on the  
1231 first day of that calendar month. If a 52-53 week accounting period ends within seven days  
1232 from the last day of any calendar month, the taxable year will be deemed to have ended on the  
1233 last day of that month.

1234 (c) If a taxpayer uses a 52-53 week accounting period for purposes of reporting its  
1235 Federal income taxes and becomes subject to tax under article 9-A, the taxpayer may be  
1236 required to file reports for two taxable years during an accounting period for which one  
1237 Federal return is required. For example, a domestic corporation is incorporated on Friday,  
1238 October 30, 2016, or a foreign corporation engages in activities in New York State which  
1239 make it subject to tax on October 30, 2016. Both corporations use a 52-53 week accounting  
1240 period ending on the Saturday nearest the last day of October for purposes of reporting Federal

1241 income taxes. The 52-53 week accounting period upon which the corporation computes its tax  
1242 for Federal income tax purposes begins October 29, 2016 and ends Saturday, November 3,  
1243 2017. For purposes of article 9-A, the period from October 30, 2016 to October 31, 2016,  
1244 inclusive, is deemed to be the first period for which a report is due and a tax payable. The next  
1245 taxable period is deemed to be from November 1, 2016 to October 31, 2017, and is based on  
1246 the accounting period ending November 3, 2017.

1247 Section 2-1.5 Change of accounting period.

1248 (a) If a taxpayer's accounting period for Federal income tax purposes is changed, the  
1249 taxable year and accounting period for which the taxpayer's report is filed under article 9-A  
1250 must be changed at the same time to coincide with the new Federal income tax accounting  
1251 period and taxable year.

1252 (b) Where a taxable year or accounting period of less than 12 months results from a  
1253 change of accounting period, the taxpayer must file a report and pay the tax due for the period  
1254 beginning from the close of the last taxable year or accounting period for which a report was  
1255 required to be filed to the date designated as the close of its new accounting period or taxable  
1256 year. Where a change in taxable year from or to a 52-53 week accounting period, or from one  
1257 52-53 week period to a different 52-53 week period, results in a period of either 359 days or  
1258 more or 6 days or less, the tax for the 359-day-or-more period must be computed as if it were a  
1259 full taxable year, and the period of six days or less must be added to and deemed part of the  
1260 following taxable year. In the case of a period consisting of more than 6 days and less than 359  
1261 days, a report must be filed for such period.

1262 (c) A taxpayer whose accounting period is changed for Federal income tax purposes is  
1263 not required to apply for or obtain permission to make a similar change with respect to reports

1264 required under article 9-A. In such a case, however, the taxpayer must submit, with the first  
1265 report filed for the new accounting period under article 9-A, a copy of the consent of the  
1266 Commissioner of Internal Revenue to the change for Federal income tax purposes. A taxpayer  
1267 that changes its accounting period for Federal income tax purposes without the prior approval  
1268 of the Commissioner of Internal Revenue must submit, with the first report filed for the new  
1269 accounting period under article 9-A, a statement indicating the authority for the Federal  
1270 change.

1271 (d) In the case of a taxpayer that has an established accounting period for Federal  
1272 income tax purposes, no change of accounting period for purposes of article 9-A (other than  
1273 one required by reason of change of the Federal accounting period as set forth in subdivision  
1274 (a) of this section) will be permitted.

## 1275 SUBPART 2-2

### 1276 ACCOUNTING METHODS

1277 Sec.

1278 2-2.1 General

1279 2-2.2 Change of Accounting Method

1280 Section 2-2.1 General. (Tax Law, section 208(9))

1281 (a) The accounting method or basis on which business income is to be computed must  
1282 be the same as the taxpayer's method of accounting for Federal income tax purposes. However,  
1283 when the commissioner deems it necessary in order to properly reflect the business income of  
1284 the taxpayer, the commissioner may determine the taxable year or period in which any item of  
1285 income or deduction must be included, without regard to the method of accounting used by the  
1286 taxpayer.



1287 (b) In the absence of an accounting method for Federal income tax purposes, business  
1288 income must be computed in accordance with the method regularly employed in keeping the  
1289 books of the taxpayer, provided such method properly reflects business income. If the books of  
1290 a taxpayer do not properly reflect business income, or if no books are kept, the computation of  
1291 business income must be made in such manner as the commissioner deems necessary to  
1292 properly reflect business income.

1293 Section 2-2.2 Change of accounting method.

1294 (a) If a taxpayer's method of accounting for Federal income tax purposes is changed,  
1295 the accounting method employed in determining business income for purposes of article 9-A  
1296 must be changed at the same time to the method approved for Federal income tax purposes.  
1297 When a change of accounting method occurs, any adjustments that are determined to be  
1298 necessary solely by reason of the change in order to prevent amounts from being duplicated or  
1299 omitted must be taken into account to the extent they are required to be taken into account in  
1300 determining the taxpayer's Federal taxable income.

1301 (b) A taxpayer whose method of accounting is changed must submit, with its first report  
1302 in which the new accounting method is used, a copy of the consent of the Commissioner of  
1303 Internal Revenue, together with complete details of any adjustments with respect to items of  
1304 income or deduction.

1305 SUBPART 2-3

1306 CESSATION PERIODS

1307 Section 2-3.1 Cessation period. (Tax Law, section 209(1))

1308 (a) The franchise tax is imposed for all or any part of each taxable year during which a  
1309 taxpayer exercises its corporate franchise, does business, employs capital, owns or leases

1310 property in a corporate or organized capacity, maintains an office, or derives receipts from  
1311 activity in New York State. Accordingly, every taxpayer is required to pay a tax measured by  
1312 business income (or other applicable basis) up to the date on which it ceases to possess a  
1313 franchise if a domestic corporation, or ceases to do business, employ capital, own or lease  
1314 property in a corporate or organized capacity, maintain an office, or derive receipts from  
1315 activity in New York State if a foreign corporation, regardless of whether or not such  
1316 corporation has been granted written authority by the New York State Department of State to do  
1317 business in the state.

1318 (b) A domestic corporation may cease to possess a franchise as a result of its  
1319 dissolution, merger or consolidation into another corporation, or the revocation or annulment  
1320 of its charter.

1321 (c) A taxpayer may cease to be subject to tax under article 9-A because of a change in  
1322 the nature of its activities or a change in classification. In such event, the taxpayer must pay a  
1323 tax measured by business income (or other applicable basis) up to the date of the change. In  
1324 some cases, a corporation may then become subject to tax under some other article of the Tax  
1325 Law.

1326 (d) A corporation that is a member of a group taxed on the basis of a combined report,  
1327 and that ceases to be subject to tax under article 9-A, may, in the discretion of the  
1328 commissioner, be permitted to be included in the next combined report of the group.  
1329 Application for permission to report in such manner must be mailed to the commissioner. The  
1330 corporation that ceases to be subject to tax under article 9-A must, at the time of such  
1331 application, pay a tax of no less than the fixed dollar minimum described in section 210(1)(d).

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PART 3  
COMPUTATION OF TAX  
SUBPART 3-1  
TAX BASES  
Sec.  
3-1.1 Computation of tax  
3-1.2 Business income base tax  
3-1.3 Capital base tax  
3-1.4 Fixed dollar minimum tax  
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.

1356 Section 3-1.2 Business income base tax. (Tax Law, sections 210(1)(a) and 209(6))

1357 (a) (1) Generally, the business income base is the measure of the tax if such calculation  
1358 results in an amount of tax greater than the capital base tax and greater than the fixed dollar  
1359 minimum tax.

1360 (2) The business income base is the corporation's total business income apportioned  
1361 within the State minus the prior net operating loss conversion subtraction and the net operating  
1362 loss deduction.

1363 (3) To compute the tax measured by the business income base, the corporation must  
1364 multiply its business income base by the tax rate specified in section 210(1)(a).

1365 (b) (1) Where a group of corporations file a combined report, the combined business  
1366 income base generally is the measure of the tax if such calculation results in an amount of tax  
1367 greater than the combined capital base tax and greater than the fixed dollar minimum tax that is  
1368 attributable to the designated agent of the combined group.

1369 (2) The combined business income base is the total business income of the combined  
1370 group apportioned within the State minus the prior net operating loss conversion subtraction of  
1371 the combined group and the net operating loss deduction of the combined group.

1372 (3) To compute the tax measured by the combined business income base, the combined  
1373 business income base is multiplied by the tax rate specified in section 210 (1)(a).

1374 (c) The business income base tax is not applicable to New York S corporations and  
1375 DISCs.

1376 Section 3-1.3 Capital base tax. (Tax Law, sections 209(5) and (7), 210(1) and (1-c))

1377 (a)(1) Generally, the capital base is the measure of the tax if such calculation results in  
1378 an amount of tax that is greater than or equal to that computed on the business income base

1379 tax and greater than the fixed dollar minimum tax.

1380 (2) The capital base is the portion of the corporation's total business capital apportioned  
1381 within the State.

1382 (3) To compute the tax measured by the capital base, the corporation must multiply its  
1383 capital base by the tax rate specified in section 210(1)(b).

1384 (b) (1) Where a group of corporations file a combined report, the combined capital base  
1385 is the measure of the tax if such calculation results in an amount of tax greater than or equal to  
1386 the combined business income base tax and greater than the fixed dollar minimum tax that is  
1387 attributable to the designated agent of the combined group.

1388 (2) The combined capital base is the combined total business capital apportioned within  
1389 the State.

1390 (3) To compute the tax measured by the combined capital base, the combined capital base  
1391 is multiplied by the tax rate specified in section 210(1)(b).

1392 (c) The capital base tax does not apply to:

1393 (1) a non-captive RIC;

1394 (2) a non-captive REIT;

1395 (3) the first two taxable years of a taxpayer that, for one or both such years, is a small  
1396 business taxpayer;

1397 (4) a New York S corporation.

1398 (d) For purposes of subdivision (c) of this section, a small business taxpayer, as defined  
1399 in section 210(1)(f), is required only to pay the higher of the business income base tax or the  
1400 fixed dollar minimum tax in its first two taxable years. A combined group may qualify as a small  
1401 business taxpayer if the combined group satisfies the requirements to be a small business

1402 taxpayer specified in section 210(1)(f)(i), (ii) and (iv) and each member of the combined group  
1403 satisfies the requirement in section 210(1)(f)(iii).

1404 Section 3-1.4. Fixed dollar minimum tax. (Tax Law, section 210(1)(d))

1405 (a) Generally, the fixed dollar minimum is the measure of the tax if such calculation results  
1406 in an amount of tax that is greater than or equal to the business income base tax and greater than or  
1407 equal to the capital base tax. The amount of the fixed dollar minimum tax determined in section  
1408 210(1)(d) varies by the amount of New York receipts and the type of taxpayer.

1409 (b) (1) Where a group of corporations files a combined report, the fixed dollar minimum,  
1410 the fixed dollar minimum tax attributable to the designated agent generally is the measure of the  
1411 tax for the combined group is such calculation results in an amount greater than or equal to the  
1412 combined business income base tax and greater than or equal to the combined capital base tax.  
1413 In addition, the tax on a combined report must include the fixed dollar minimum tax for each  
1414 member of the combined group that is a taxpayer, other than the designated agent. Any corporation  
1415 included in the combined report that is not a taxpayer is not required to pay a fixed dollar  
1416 minimum tax.

1417 (2) Each taxpayer member of the combined group, including the designated agent, must  
1418 compute its own fixed dollar minimum tax based on its own New York receipts. Such receipts  
1419 must be computed on a separate company basis and determined without the consideration of  
1420 intercorporate eliminations or deferrals.

1421 (c) For purposes of calculating the fixed dollar minimum tax, New York receipts are the  
1422 receipts included in the numerator of the apportionment factor for the taxable year.

1423 SUBPART 3-2

1424 GENERAL RULES

1425 Sec.

1426 3-2.1 Correcting distortions of income or capital

1427 3-2.2 Adjusting tax bases to period covered by report

1428 3-2.3 Fair market value

1429 3-2.4 Average value

1430 3-2.5 Use of dollar amounts in computing tax

1431 Section 3-2.1. Correcting distortions of income or capital. (Tax Law, section 211(5))

1432 (a) In case it shall appear to the commissioner that any agreement, understanding or  
1433 arrangement exists between the corporation and any other corporation or any person or firm,  
1434 whereby the activity, business, income or capital of the corporation within New York State is  
1435 improperly or inaccurately reflected, the commissioner is authorized in the commissioner's  
1436 discretion to adjust items of income (including gains and losses), deductions, and capital. In  
1437 addition, the commissioner is authorized in the commissioner's discretion to eliminate assets and  
1438 the receipts derived therefrom in computing the business apportionment fraction or the MCTD  
1439 apportionment percentage, provided that any income directly traceable thereto is also excluded  
1440 from entire net income so as to equitably determine the tax.

1441 (b) The commissioner may include in the entire net income of any taxpayer the fair  
1442 profits which, but for an agreement, arrangement or understanding as described in subdivision  
1443 (a) of this section, the taxpayer might have derived from any transaction:

1444 (1) where the taxpayer conducts its activity or business under any agreement,  
1445 arrangement, or understanding in such manner as either directly or indirectly to benefit its  
1446 members or stockholders, or any of them, or any person or persons directly or indirectly  
1447 interested in such activity or business, by entering into any transaction at more or less than a fair

1448 price which, but for such agreement, arrangement or understanding, might have been paid or  
1449 received thereof; or

1450 (2) where the taxpayer, a substantial portion of the voting power of whose capital stock is  
1451 owned or controlled either directly or indirectly by another corporation, enters into any  
1452 transaction with such other corporation on such terms as to create an improper loss or net  
1453 income.

1454 (c) Where any taxpayer owns or controls, directly or indirectly, more than 50% of the  
1455 voting power of the capital stock of another corporation subject to tax under section 1502-A and  
1456 50% or less of whose gross receipts for the taxable year consist of premiums, the commissioner  
1457 may include in the entire net income of the taxpayer, as a deemed distribution, the amount of the  
1458 net income of the other corporation that is in excess of its net premium income.

1459 Section 3-2.2 Adjusting tax bases to period covered by report. (Tax Law, sections  
1460 208(9)(h) and 210(2))

1461 (a) Entire net income. (1) Except in the case of a New York S termination year, if the  
1462 entire net income required to be reported under article 9-A is for a period different from the  
1463 period covered by the taxpayer's Federal income tax return, the taxpayer's entire net income  
1464 must be prorated to correspond with the period covered by the report under article 9-A. The  
1465 prorated entire net income is computed as follows: (i) adjust Federal taxable income to arrive at  
1466 entire net income in the manner set forth in section 3-3.1 of this Part to arrive at entire net  
1467 income; (ii) multiply entire net income by the number of calendar months, or major parts  
1468 thereof, covered by the report under article 9-A; and (iii) divide the result by the number of  
1469 calendar months, or major parts thereof, covered by the return for Federal income tax purposes.  
1470 Other exempt income and investment income must be similarly prorated.



1471           Example 1:    A calendar year taxpayer was organized in 2013 under the  
1472                            laws of another state where it carried on its business. It  
1473                            began doing business in New York State on March 14,  
1474                            2015. It files its return for Federal income tax purposes for  
1475                            the calendar year 2015 and its Federal taxable income was  
1476                            \$70,000. In computing its entire net income for the period  
1477                            March 14, 2015 to December 31, 2015, its Federal taxable  
1478                            income of \$70,000 for the calendar year 2015 is first  
1479                            adjusted as required by section 3-3.1 of this Part. The  
1480                            taxpayer's entire net income after those adjustments was  
1481                            \$78,000. That entire net income must be multiplied by 10  
1482                            (the number of months from March to December) and the  
1483                            product divided by 12, resulting in a prorated entire net  
1484                            income of \$65,000.

1485           Example 2:    Same facts as in Example 1, except that the taxpayer began  
1486                            doing business in New York State in March 20, 2015. The  
1487                            entire net income of \$78,000 must be multiplied by 9 and  
1488                            the product divided by 12, resulting in a prorated entire net  
1489                            income of \$58,500.

1490                   (2) The method of computing entire net income set forth in paragraph (1) of this  
1491                   subdivision applies to taxpayers reporting on either a calendar year or a fiscal year basis for  
1492                   Federal income tax purposes.

1493                   (3) If, in the opinion of the commissioner, the method described in this subdivision does

1494 not properly reflect the taxpayer's entire net income for purposes of article 9-A during the period  
1495 covered by its report, the commissioner may determine entire net income solely on the basis of  
1496 the taxpayer's income during such period.

1497 (b) Business and investment capital. If a period covered by a report under article 9-A  
1498 is other than 12 calendar months, the amount of business capital and the amount of investment  
1499 capital are each determined by multiplying its average value, by the number of calendar  
1500 months or major parts thereof included in that period, and dividing the product by 12.

1501 Example 1: A foreign corporation began to do business in New York  
1502 State on June 10, 2015, and reports on a calendar year  
1503 basis. The average value of its total investment capital for  
1504 that year was \$60,000, and the average value of its total  
1505 business capital was \$240,000. The amount of each class  
1506 of capital, for purposes of computing the tax for taxable  
1507 year 2015, is determined by multiplying each of the above  
1508 amounts by seven (the number of months from June to  
1509 December) and dividing the product by 12, resulting in  
1510 investment capital of \$35,000 and business capital of  
1511 \$140,000.

1512 (c) Fixed dollar minimum tax. If the taxable period covered by a report under article 9-A is  
1513 less than 12 months, the amount of New York receipts used to determine the amount of the fixed  
1514 dollar minimum tax is determined by dividing the amount of the receipts for the period covered by  
1515 the report by the number of months (or major parts thereof) in that period and multiplying the  
1516 result by 12. In addition, the amount of fixed dollar minimum tax determined under section

1517 210(1)(d)(1) shall be reduced by:

1518 (1) 25% if the period for which the taxpayer is subject to tax is more than six months but  
1519 not more than nine months, or

1520 (2) 50% if the period for which the taxpayer is subject to tax is not more than six months.

1521 Example 2: A foreign corporation began to business in New York State  
1522 on May 10, 2015 and reports on a calendar year basis.

1523 During the period from May 10, 2015 through December  
1524 31, 2015, its New York receipts is \$2,500,000. The amount  
1525 of the receipts used to determine its fixed dollar minimum  
1526 is \$3,750,000, which is determined by dividing 2,500,000  
1527 by 8 and multiplying the result by 12. The fixed dollar  
1528 minimum tax when New York receipts are \$3,750,000 is  
1529 \$1,500. Because the period covered by the report is more  
1530 than 6 months but less than 9 months, the amount of the  
1531 fixed dollar minimum tax is reduced by 25% to 1,125.

1532 (d) Whenever the tax base is prorated for a tax period of less than 12 months, the business  
1533 apportionment fraction must also be adjusted in the same manner for the period pursuant to the  
1534 method described in section 4-4.2 of this Part.

1535 Section 3-2.3. Fair market value.

1536 (a) The fair market value of any asset owned by the taxpayer is the price at which a  
1537 willing seller, not compelled to sell, will sell and a willing purchaser, not compelled to buy,  
1538 will buy.

1539 (b) The fair market value, on any date, of stocks, bonds and other securities regularly  
1540 traded on an exchange, or in an over-the-counter market, is the mean between the highest and  
1541 lowest selling prices on that date. If there were no sales on the valuation date, such value is the  
1542 mean between the highest and the lowest selling prices on the nearest date, within a reasonable  
1543 time, on which there were sales. If actual sales within a reasonable time are not available, the  
1544 fair market value is the mean between the bona fide bid and asked prices on the valuation date  
1545 or the nearest date within a reasonable time.

1546 (c) If the actual sales prices or bona fide bid and asked prices within a reasonable time  
1547 are not available, or if, by reason of the character or extent of the taxpayer's investments or for  
1548 any other reason, such prices are not truly indicative of value, the fair market value is  
1549 ascertained as follows:

1550 (1) in the case of shares of stock, on the basis of the issuing corporation's net worth,  
1551 earning power, book value, dividends paid, and all other relevant factors;

1552 (2) in the case of bonds and other securities, by giving consideration to various factors,  
1553 including the soundness of the security, the interest yield, and the date of maturity.

1554 (d) If a taxpayer consistently computes the fair market value of its stocks, bonds and  
1555 other securities on some other basis, such as the last selling price on the valuation date, such  
1556 method of valuation may be accepted by the commissioner. In all such cases, a complete  
1557 explanation of the method of valuation must be included with the report.

1558 Section 3-2.4. Average value. (Tax Law, section 210(2))

1559 (a) In determining average value, the taxpayer must use fair market value for real  
1560 property and marketable securities and must use the value shown on the balance sheet included  
1561 with its federal tax return for personal property other than marketable securities. If the taxpayer

1562 is not required to include a balance sheet in their Federal income tax return, it must use the value  
1563 for personal property other than marketable securities that it would have used if it had been  
1564 required to include a balance sheet with its Federal income tax return. However, corporations  
1565 more than 50% directly or indirectly owned or controlled by the taxpayer (or combined group)  
1566 must be valued using the equity method of accounting in accordance with generally accepted  
1567 accounting principles (GAAP), provided the value cannot be less than zero. The equity method  
1568 of accounting calls for each such corporation to be valued based on the average value of their  
1569 owner's equity account per their balance sheet. Allowance must be made for variations in the  
1570 amount of assets held by the taxpayer during the period covered by the report, as well as for  
1571 variations in market prices. Average value generally is computed on a quarterly basis where  
1572 the taxpayer's usual accounting practice permits such computation. However, at the option of  
1573 the taxpayer, a more frequent basis (such as a monthly, weekly or daily average) may be used.  
1574 Where the taxpayer's usual accounting practice does not permit a quarterly or more frequent  
1575 computation of average value, a semiannual or annual computation may be used where no  
1576 distortion of average value will result. If, because of variations in the amount or value of any  
1577 class of assets, it appears to the commissioner that averaging on an annual, semiannual or  
1578 quarterly basis does not properly reflect average value, the commissioner may require  
1579 averaging on a more frequent basis. Any method of determining average value that is adopted  
1580 by the taxpayer on any report and accepted by the commissioner may not be changed on any  
1581 subsequent report without the prior consent of such commissioner.

1582 (b) Generally, the value of assets must be determined without reduction for liabilities.  
1583 However, if a taxpayer's assets include reverse repurchase agreements and/or security borrowing  
1584 agreements, then the sum of the FMV of these assets must be reduced, but not below zero, by the

1585 sum of the FMV of all repurchase agreements and/or security lending agreements included in the  
 1586 taxpayer's liabilities.

1587 Example 1: A taxpayer owns shares of common stock of X  
 1588 Corporation. The fair market values, during the period  
 1589 covered by its report, on a quarterly basis, were as  
 1590 follows:  
 1591 (1) at the end of first quarter, it owned no shares;  
 1592 (2) at the end of second quarter, it owned no shares;  
 1593 (3) at the end of third quarter, it owned no shares; and  
 1594 (4) at the end of fourth quarter, it owned 100 shares with a  
 1595 value of \$100 a share.

1596 The average value during the period covered by the report,  
 1597 on a quarterly basis, of the taxpayer's holdings of X  
 1598 Corporation's common stock would be \$2,500, computed  
 1599 as follows:

1600	Fair market values of stock	
1601	End of 1st quarter	0
1602	End of 2nd quarter	0
1603	End of 3rd quarter	0
1604	End of 4th quarter	<u>\$10,000</u>
1605	Total	\$10,000

1606  
 1607 Average Value:  $10,000 \div 4 = \$2,500$



1631 during the period covered by its report, computed on the  
 1632 basis of the average values at the beginning end and end of  
 1633 such period, would be  
 1634 \$790,000, computed as follows:

1635	Beginning of year	\$800,000
1636	End of year	<u>\$780,000</u>
1637	Total	\$1,580,000
1638	Average Value: = 1,580,000 ÷ 2 = \$790,000	

1639 Section 3-2.5. Use of dollar amounts in computing tax. (Tax Law, section 171(19))

1640 (a) Any amount required to be included in a report may be entered at the nearest whole  
 1641 dollar amount. This does not apply to the items that must be taken into account in making the  
 1642 computations necessary to determine such amount. For example, each sale must be taken into  
 1643 account at its exact amount, including cents, in computing the amount to be included in the  
 1644 franchise tax report. However, the total amount to be included in the franchise tax report may  
 1645 be entered at the nearest whole dollar amount. A taxpayer may elect not to use whole dollar  
 1646 amounts by reporting all amounts in full, including cents. Such election must be made on an  
 1647 original timely filed return (determined with regard to extensions). A new election may be made  
 1648 on any report for any subsequent taxable year.

1649 (b) For the purpose of the computation to the nearest dollar, a fractional part of a dollar  
 1650 shall be disregarded unless it amounts to one-half dollar or more, in which case the amount  
 1651 (determined without regard to the fractional part of a dollar) shall be increased by one dollar.

1652	Example:	Exact amount	To be reported as
1653		\$500,000.49	\$500,000.00



1654 \$500,000.50 \$500,001.00

1655 \$500,000.51 \$500,001.00

1656

1657 SUBPART 3-3

1658 ENTIRE NET INCOME

1659 Sec.

1660 3-3.1 Definition of entire net income

1661 3-3.2 Taxable year in which income or deduction is included in entire net income

1662 3-3.3 Subtraction modifications for community banks and thrifts

1663 3-3.4 Royalty modification

1664 Section 3-3.1. Definition of entire net income. (Tax Law, section 208(9))

1665 (a) (1) Entire net income means total net income from all sources. The starting point for  
1666 the computation of entire net income is Federal taxable income, which generally means taxable  
1667 income as defined in IRC section 63 (“taxable income”). After determining the amount of  
1668 Federal taxable income, it must be adjusted by the addition and subtraction modifications as  
1669 required by the provisions of section 208(9), and, to the extent necessary, further described in  
1670 this Subpart.

1671 (2) “Federal taxable income” is presumed to be the same as

1672 (i) the taxable income the taxpayer is required to report to the United States Treasury  
1673 Department, or

1674 (ii) the taxable income that the taxpayer would have been required to report to the  
1675 United States Treasury Department, if it had not made an election under Subchapter S of  
1676 Chapter One of the IRC; or

1677 (iii) the taxable income that the taxpayer, in the case of a corporation that is exempt

1678 from Federal income tax (other than the tax on unrelated business taxable income imposed  
1679 under IRC section 511) but is subject to tax under article 9-A, would have been required to  
1680 report to the United States Treasury Department but for such exemption; or

1681 (iv) the income, gain, or loss that is effectively connected with the conduct of a trade or  
1682 business within the United States as determined under IRC section 882 in the case of an alien  
1683 corporation that under any provision of the IRC is not treated as a domestic corporation as  
1684 defined in IRC section 7701.

1685 (3) The amount of any specific exemption or credit allowed in any law of the United  
1686 States imposing any tax on or measured by the income of corporations is not allowed in  
1687 computing entire net income. The income actually reported or the income actually determined  
1688 for Federal income tax purposes is not necessarily the same as the taxable income that was  
1689 required to be reported for Federal income tax purposes under the provisions of the IRC.  
1690 Generally, the determination of the Internal Revenue Service as to Federal taxable income is  
1691 followed, but it is not binding on the commissioner or the taxpayer.

1692 (b) Each corporation included in a Federal consolidated group must compute its  
1693 Federal taxable income for purposes of article 9-A as if such corporation had computed its  
1694 Federal taxable income on a separate basis for Federal income tax purposes. Provided,  
1695 however, in the case of a member of a selling consolidated group, as defined in IRC section  
1696 338(h)(10), with respect to which an election under such section 338(h)(10) has been made,  
1697 Federal taxable income shall not include any gain or loss on the sale or exchange of stock of a  
1698 target corporation which is not recognized by virtue of such election, but only if such member  
1699 files on a combined report with such target corporation for the period including the acquisition  
1700 date, as such term is defined in IRC section 338(h)(2).

1701 (c) Combined reports. In computing combined entire net income, the combined group  
1702 will generally be treated as a single corporation. All intercorporate dividends must be eliminated  
1703 (except dividends from a DISC or a former DISC not exempt from tax under article 9-A or  
1704 dividends from a captive REIT included in the combined report if the group is utilizing the  
1705 subtraction modification in section 208(9)(t)). In addition, all other intercorporate transactions  
1706 must be deferred in a manner similar to the United States treasury regulations relating to  
1707 intercompany transactions under IRC section 1502. In computing combined entire net income,  
1708 contributions should be deducted and intercorporate profits should be treated in a manner similar  
1709 to US treasury regulations for consolidation purposes.

1710 (d) Entire net income may be affected by a net capital loss carried from another taxable  
1711 year for Federal income tax purposes pursuant to IRC section 1212. (For the rules for  
1712 calculating a capital loss and a capital loss carry back and carry forward for New York purposes,  
1713 see Subpart 3-7 of this Part).

1714 Section 3-3.2. Taxable year in which income or deduction is included in entire net  
1715 income. (Tax Law, section 208(9)(d))

1716 (a) In general, the method of accounting used in computing taxable income for  
1717 Federal income tax purposes is used in computing entire net income. However, whenever the  
1718 commissioner deems it necessary in order to properly reflect the entire net income of the  
1719 taxpayer, the commissioner may determine the taxable year or period in which any item of  
1720 income or deduction shall be included, without regard to the method of accounting used by the  
1721 taxpayer for Federal income tax purposes.

1722 (b) Examples.

1723 Example 1: A taxpayer has a contract for the construction of a

1724 building and the subsequent installation of  
1725 equipment in that building. The contract covers a  
1726 period in excess of one taxable year. The taxpayer  
1727 keeps its books so as to reflect the total income  
1728 derived from the contract in the taxable year in  
1729 which the contract is finally completed, and  
1730 reports its Federal taxable income accordingly.  
1731 The commissioner may require the taxpayer to  
1732 report the income from the contract on the basis of  
1733 the percentage of completion in each taxable year,  
1734 or some other appropriate basis.

1735 Example 2: A foreign corporation sells its New York State real  
1736 estate on an installment basis, and terminates its  
1737 taxable status in New York State in the year of the  
1738 sale. The full profit on the sale must be included in  
1739 entire net income in the year of the sale.

1740 Example 3: A foreign corporation sells its New York State real  
1741 estate on an installment basis and terminates its  
1742 taxable status in New York State in a subsequent  
1743 taxable year prior to the receipt of all of its  
1744 installment payments. The profit included in the  
1745 remaining installment payments for the sale must be  
1746 included in entire net income in the year it

1747 terminates its taxable status in New York State.

1748 Section 3-3.3. Subtraction modifications for community banks and thrifts. (Tax Law

1749 sections 208(9)(r), (s), (t))

1750 (a) Captive REIT modification.

1751 (1) A corporation that is a small thrift institution or qualified community bank, both as

1752 defined in section 208(9)(s), that maintained a captive REIT on April 1, 2014 must utilize the

1753 REIT subtraction provided for in this subdivision in any taxable year it maintained such captive

1754 REIT on the last day of the tax year. Such corporation maintained a captive REIT if it owned,

1755 directly or indirectly, more than 50% of the voting stock of such captive REIT on the required

1756 date. The REIT subtraction is equal to 160% of the dividends paid deductions allowed to that

1757 captive REIT for the taxable year for Federal income tax purposes.

1758 (2) When computing the combined business income base, there is no elimination of

1759 intercompany dividends received from the combined captive REIT by any member of the

1760 combined group in any taxable year in which the subtraction modification described in this

1761 subdivision is utilized.

1762 (3) A combined group that includes a small thrift institution or qualified community bank

1763 is not allowed to utilize the subtraction modification for qualified residential loan portfolios

1764 described in subdivision (b) of this section or the subtraction modification for qualified

1765 community banks and small thrifts described in subdivision (c) of this section in any taxable year

1766 in which such thrift institution or community bank owns the captive REIT referred to in

1767 paragraph (1) on the last day of the taxable year.

1768 (b) Subtraction modification for qualified residential loan portfolios.

1769 (1) A corporation that is a thrift institution, as defined in section 208(9)(r)(3), or a  
1770 qualified community bank, as defined in section 208(9)(s)(2), that maintains a qualified  
1771 residential loan portfolio as defined in paragraph (2) of this subdivision is allowed as a deduction  
1772 in computing entire net income the amount, if any, by which (i) 32% of its entire net income  
1773 determined without regard to this subtraction modification exceeds (ii) the amounts deducted by  
1774 the taxpayer pursuant to IRC sections 166 and 585 less any amounts included in Federal taxable  
1775 income because of a recovery of a loan.

1776 (2) Qualified residential loan portfolio. A corporation maintains a qualified residential  
1777 loan portfolio if at least 60% of the amount of the total assets at the close of the taxable year of  
1778 the thrift institution or qualified community bank consists of the assets described in clauses (a)  
1779 through (l) of subparagraph (i) of this paragraph, with the application of the rule in clause (m) of  
1780 subparagraph (i) of this paragraph. At the election of the corporation, such percentage shall be  
1781 applied based on the average assets outstanding during the taxable year, in lieu of the close of the  
1782 taxable year. The corporation can elect to compute an average using the assets measured on the  
1783 first day of the taxable year and on the last day of each subsequent quarter, or month or day  
1784 during the taxable year. This election may be made annually.

1785 (i) Assets:

1786 (a) cash, which includes cash and cash equivalents including cash items in the process  
1787 of collection, deposit with other financial institutions, including corporate credit unions,  
1788 balances with Federal reserve banks and Federal home loan banks, Federal funds sold,  
1789 and cash and cash equivalents on hand. Cash shall not include any balances serving as  
1790 collateral for securities lending transactions;

1791 (b) obligations of the United States or of a state or political subdivision thereof, and  
1792 stock or obligations of a corporation which is an instrumentality or a government  
1793 sponsored enterprise of the United States or of a state or political subdivision thereof;  
1794 (c) loans secured by a deposit or share of a member;  
1795 (d) loans secured by an interest in real property which is (or from the proceeds of the  
1796 loan, will become) residential real property or real property used primarily for church  
1797 purposes, loans made for the improvement of residential real property or real property  
1798 used primarily for church purposes, or loans secured by stock in a cooperative housing  
1799 cooperation that entitles the stockholders to occupy for dwelling purposes a specified  
1800 unit in the building owned by the cooperative housing corporation pursuant to a  
1801 proprietary lease of that unit. For purposes of this clause, residential real property  
1802 includes single or multi-family dwellings, facilities in residential developments  
1803 dedicated to public use or property used on a nonprofit basis for residents, and mobile  
1804 homes not used on a transient basis;  
1805 (e) property acquired through the liquidation of defaulted loans described in clause (d)  
1806 of this subparagraph;  
1807 (f) any regular or residual interest in a REMIC, as defined in IRC section 860D, but  
1808 only in the proportion which the assets of such REMIC consist of property described in  
1809 clauses (a) through (e) of this paragraph, except that if 95% or more of the assets of  
1810 such REMIC are assets described in clauses (a) through (e) of this subparagraph, the  
1811 entire interest in the REMIC will qualify;  
1812 (g) any mortgage-backed security that represents ownership of a fractional undivided  
1813 interest in a trust, the assets of which consist primarily of mortgage loans, if the real

1814 property that serves as security for the loans is (or from the proceeds of the loan, will  
1815 become) the type of property described in clause (D) of this subparagraph and any  
1816 collateralized mortgage obligation, the security for which consists primarily of  
1817 mortgage loans that maintain as security the type of property described in clause (D) of  
1818 this subparagraph;

1819 *(h)* certificates of deposit in, or obligations of, a corporation organized under a state law  
1820 that specifically authorizes such corporation to insure the deposits or share accounts of  
1821 member associations;

1822 *(i)* loans secured by an interest in educational, health, or welfare institutions or  
1823 facilities, including structures designed or used primarily for residential purposes for  
1824 students, residents, and persons under care, employees, or members of the staff of such  
1825 institutions or facilities;

1826 *(j)* loans made for the payment of expenses of college or university education or  
1827 vocational training;

1828 *(k)* property used by the taxpayer in support of business which consists principally of  
1829 acquiring the savings of the public and investing in loans; and

1830 *(l)* loans for which the taxpayer is the creditor and which are wholly secured by loans  
1831 described in clause (D) of this subparagraph.

1832 *(m)* The value of accrued interest receivable and any loss-sharing commitment or  
1833 another loan guaranty by a governmental agency will be considered part of the basis in  
1834 the loans to which the accrued interest or loss protection applies.

1835 *(ii)* For purposes of clause *(d)* of subparagraph *(i)* of this paragraph:



1836           (a) if a multifamily structure securing a loan is used in part for nonresidential use  
1837 purposes, the entire loan is deemed a residential real property loan if the planned residential use  
1838 exceeds 80% of the property's planned use (measured, at the taxpayer's election, by using square  
1839 footage or gross rental revenue, and determined as of the time the loan is made), and

1840           (b) loans made to finance the acquisition or development of land shall be deemed to be  
1841 loans secured by an interest in residential real property if there is a reasonable assurance that the  
1842 property will become residential real property within a period of three years from the date of  
1843 acquisition of such land; but this clause shall not apply for any taxable year unless, within such  
1844 three-year period, such land becomes residential real property. For purposes of determining  
1845 whether any interest in a REMIC qualifies under clause (f) of subparagraph (i) of this paragraph,  
1846 any regular interest in another REMIC held by such REMIC shall be treated as a loan described  
1847 in a preceding item under principles like the principle of such clause (f), except that if such  
1848 REMICs are part of a tiered structure, they shall be treated as one REMIC for purposes of such  
1849 clause (f).

1850           (3) Combined groups.

1851           (i) In the case of a combined report, the deduction provided for in this subdivision will  
1852 be computed on a combined basis. For purposes of calculating this subtraction, the entire net  
1853 income of the combined reporting group shall be multiplied by a fraction, the numerator of  
1854 which is the average total assets of all the thrift institutions and qualified community banks  
1855 included in the combined report and the denominator of which is the average total assets of all  
1856 the corporations included in the combined report.

1857 (ii) The determination of whether the combined group maintains a qualified residential  
1858 loan portfolio will be made by aggregating the assets of the thrift institutions and qualified  
1859 community banks that are members of the combined group.

1860 (4) A taxpayer, or in the case of a combined group, a combined group claiming the  
1861 subtraction modification described in this subdivision is not allowed to utilize the captive REIT  
1862 subtraction modification described in subdivision (a) of this section or the subtraction  
1863 modification for community banks and small thrifts described in subdivision (c) of this section.

1864 (c) Subtraction modification for community banks and small thrifts.

1865 (1) A corporation that is a qualified community bank or a small thrift institution, both  
1866 as defined in section 208(9)(s), is allowed a deduction in computing entire net income equal to  
1867 the amount computed as follows:

1868 (i) Multiply the corporations's net interest income from loans during the taxable year by  
1869 a fraction, the numerator of which is the gross interest income during the taxable year from  
1870 qualifying loans and the denominator of which is the gross interest income during the taxable  
1871 year from all loans.

1872 (ii) Multiply the amount determined in subparagraph (i) of this paragraph by 50%. This  
1873 product is the amount of the deduction allowed under this paragraph.

1874 (2) Net interest income from loans means gross interest income from loans less gross  
1875 interest expense from loans, provided the result cannot be less than zero. Gross interest expense  
1876 from loans is determined by multiplying gross interest expense by a fraction, the numerator of  
1877 which is the average total value of loans owned by the thrift institution or community bank  
1878 during the taxable year and the denominator of which is the average total assets of the thrift  
1879 institution or community bank during the taxable year.

1880           (3) A qualifying loan is a loan that meets the conditions specified in subparagraphs (i)  
1881 and (ii) of this paragraph. A loan that meets the definition of a qualifying loan in a prior taxable  
1882 year (including years prior to 2015) remains a qualifying loan in taxable years during and after  
1883 which such loan is acquired by another member of the same combined group.

1884           (i) The loan is originated by the qualified community bank or small thrift institution or  
1885 is purchased by the qualified community bank or small thrift institution immediately after its  
1886 origination in connection with a commitment to purchase made by the bank or thrift institution  
1887 prior to the loan's origination.

1888           (ii) The loan is a small business loan or a residential mortgage loan, the principal  
1889 amount of which loan is \$5 million or less, and either the borrower is located in this state and the  
1890 loan is not secured by real property, or the loan is secured by real property located in New York.  
1891 A loan is secured by real property located in New York if, at the time the real property loan is  
1892 originated, more than 50% of the fair market value of property used to secure the loan is located  
1893 in New York.

1894           (a) For purposes of this paragraph, a small business loan means a loan made to an active  
1895 business that, in its immediately preceding taxable year, had an average number, determined on a  
1896 quarterly basis, of full-time employees of 100 or fewer, not including general executive officers,  
1897 and total gross receipts of not greater than \$10 million. A business qualifies as an active business  
1898 if the average value, determined on a quarterly basis, of its loans, Federal, state and municipal  
1899 debt, asset backed securities and other government agency debt, corporate bonds, reverse  
1900 repurchase agreements and securities borrowing agreements, Federal funds, stocks and  
1901 partnership interests, physical commodities and other financial instruments that it owns does not  
1902 exceed 50% of the average value of its total assets. In the event that the active business applies

1903 for the loan in its first year of operations, satisfaction of the requirements in the preceding two  
1904 sentences is determined by the employees, receipts and assets of the business on the date of the  
1905 loan application. In addition, the business may not be part of an affiliated group, as defined in  
1906 IRC section 1504, unless the group itself would have met, as a group, the active business,  
1907 employee and the gross-receipts requirements. A loan made to an entity that meets these  
1908 requirements to be a small business at the time of the filing of the loan application is deemed to  
1909 be a small business loan throughout the term of such loan.

1910 (b) For purposes of this paragraph, a residential mortgage loan is a loan described in  
1911 clause (d) of subparagraph (i) of paragraph (2) of subdivision (b) of this section.

1912 (4) Examples.

1913 Example 1: A retail clothing business located in New York  
1914 submits an application for a loan from a qualified  
1915 community bank on February 1, 2016. The bank  
1916 determines that, during the 2015 tax year, the  
1917 business had an average number of 30 employees,  
1918 and that for the same tax year the business's gross  
1919 receipts were \$3 million and its assets consisted  
1920 entirely of inventory (valued at \$75,000) and bank  
1921 deposits (valued at \$25,000). The bank further  
1922 determines that the business is not part of an  
1923 affiliated group. The loan is a qualifying loan for  
1924 purposes of this subtraction modification.

1925                    Example 2:    The business in example 1 submits an application  
1926    for a second loan from the same community bank  
1927    on February 1, 2017. The bank determines that,  
1928    during the 2016 tax year, the business had an  
1929    average number of 40 employees, and that for the  
1930    same tax year the business's gross receipts were \$4  
1931    million. The bank further determines that for the  
1932    2016 tax year the business was part of an affiliated  
1933    group; and that during that tax year the members of  
1934    the affiliated group together had an average number  
1935    of 90 employees, and total gross receipts were \$9  
1936    million. The loan is a qualifying small business loan  
1937    for purposes of this subtraction modification.

1938  
1939                    Example 3:    A partnership submits an application for a loan from  
1940    a qualified community bank on February 1,  
1941    2017. The bank determines that, during the 2016 tax  
1942    year, the partnership had no employees and its gross  
1943    receipts were \$2 million for the year. The bank also  
1944    determines that its assets consist of corporate stock  
1945    that has an average value equal to \$40 million and  
1946    land that has an average value equal to \$10 million.  
1947    The partnership holds the corporate stock for

1948 investment. The partnership is not an active  
1949 business because more than 50% of its assets are  
1950 financial investments. Therefore, the loan is not a  
1951 qualifying loan for purposes of this subtraction  
1952 modification because it is not a small business loan.

1953 Example 4: Jane Smith, a resident of New York, submits an  
1954 application to a small thrift for a residential  
1955 mortgage loan of \$1 million to purchase a second  
1956 home in Massachusetts. Ms. Smith will use both the  
1957 Massachusetts property and her primary residence  
1958 in New York to secure the mortgage loan. At the  
1959 time the loan is originated, the fair market value of  
1960 the New York property is \$700,000 and the fair  
1961 market value of the Massachusetts property is  
1962 \$300,000. Since more than 50% of the loan is  
1963 secured by real property in New York, the entire  
1964 loan is considered secured by real property in New  
1965 York. As such, the loan is a qualifying loan for  
1966 purposes of this subtraction modification.

1967 (5) In the case of a combined report, the subtraction modification described in this  
1968 subdivision must be computed separately for each qualified community bank or a small thrift  
1969 institution included in the combined report. The sum of such amounts is the amount of the  
1970 deduction allowed under this paragraph.

1971 (6) A taxpayer, or in the case of a combined group, a combined group, claiming the  
1972 subtraction modification provided for in this subdivision is not allowed to utilize the captive  
1973 REIT subtraction modification described in subdivision (a) of this section or the subtraction  
1974 modification for qualified residential loan portfolios described in subdivision (b) of this section.

1975 (d) For purposes of determining if a corporation is a qualified community bank or small  
1976 thrift institution, the average value determined under section 3-2.4 of the taxpayer's assets, or if  
1977 the taxpayer is included in a combined report, the combined group's assets determined under  
1978 section 210-C, must not exceed \$8 billion. Such assets will be included only if the income, loss  
1979 or expense of which are properly reflected (or would have been properly reflected if not fully  
1980 depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of  
1981 entire net income for the taxable year

1982 (e) For purposes of all other assets used in this section, the following rules shall apply.

1983 (1) Total assets are those assets that are properly reflected on a balance sheet, computed  
1984 in the same manner as is required by the banking regulator of the taxpayers included in the  
1985 combined return. Total assets include leased real property that is not properly reflected on a  
1986 balance sheet.

1987 (2) Assets will only be included if the income or expenses of which are properly  
1988 reflected (or would have been properly reflected if not fully depreciated or expensed, or  
1989 depreciated or expensed to a nominal amount) in the computation of the combined group's entire  
1990 net income for the taxable year. Assets will not include deferred tax assets and intangible assets  
1991 identified as goodwill.

1992 (3) Tangible real and personal property, such as buildings, land, machinery, and

1993 equipment shall be valued at cost. Leased real property that is not properly reflected on a balance  
1994 sheet will be valued at the annual lease payment multiplied by eight. Intangible property, such as  
1995 loans and investments, shall be valued at book value exclusive of reserves.

1996 (4) Intercorporate stockholdings and bills, notes and accounts receivable and payable,  
1997 and other intercorporate indebtedness between the corporations included in the combined report  
1998 shall be eliminated.

1999 (5) Average assets are computed using the assets measured on the first day of the  
2000 taxable year, and on the last day of each subsequent quarter of the taxable year or month or day  
2001 during the taxable year.

2002 Section 3-3.4 Royalty modification. (Tax Law, section 208(9)(o))

2003 In computing entire net income, section 208(9)(o) provides that a corporation that is not  
2004 included in a combined report with a related member (as that term is defined in subparagraph (1)  
2005 of that paragraph) must add back royalty payments directly or indirectly paid, accrued or  
2006 incurred in connection with one or more direct or indirect transactions with one or more related  
2007 members during the taxable year to the extent deductible in calculating Federal taxable income.  
2008 The addback will not apply if the corporation establishes by clear and convincing evidence of the  
2009 form and type specified by the commissioner that one of three exceptions specified in section  
2010 208(9)(o)(2)(B)(i)-(iii) apply. For purposes of verifying that the corporation meets an exception  
2011 to the addback, the corporation is required to retain and produce upon request an unredacted  
2012 copy of the tax return filed with the applicable taxing authority of the related member for each  
2013 transaction in question. The corporation is also required to supply an English translation of each  
2014 non-English tax return required to be produced, including a translation of foreign currency to



2015 U.S. dollars. In addition, the addback will not apply if the corporation and the commissioner  
 2016 agree in writing to the application or use of alternative adjustments or computations.

2017 SUBPART 3-4

2018 INVESTMENT CAPITAL, INVESTMENT INCOME

2019 AND OTHER EXEMPT INCOME

2020 Sec.

2021 3-4.1 Definition of investment capital

2022 3-4.2 Constitutionally protected investment capital

2023 3-4.3 Investment capital identification procedures

2024 3-4.4 Presumed investment capital that fails the holding period requirement

2025 3-4.5 Definition of investment income

2026 3-4.6 Definition of other exempt income

2027 3-4.7 Attribution of interest deductions

2028 3-4.8 Safe harbor reduction election

2029 Section 3-4.1. Definition of investment capital. (Tax Law, sections 208(4) and (5))

2030 (a) The term “investment capital” means investments described in paragraphs (1), (2) or  
 2031 (3) of this subdivision, as further described in this Subpart.

2032 (1) Stocks that satisfy the criteria in subparagraphs (i) through (v) of this paragraph shall  
 2033 be referred to as “actual investment capital.”

2034 (i) The stocks satisfy the definition of a capital asset under IRC section 1221 at all times  
 2035 during the taxable year in which the taxpayer owned the stock.

2036 (ii) The stocks are held for investment by the corporation for more than one year. For  
2037 purposes of determining the length of the holding period, the principles of IRC section 1223 shall  
2038 be followed under the circumstances described in that section.

2039 (iii) The dispositions of the stocks are, or would be, treated by the corporation as  
2040 generating long-term capital gains or losses under the IRC.

2041 (iv) If the stocks are acquired on or after January 1, 2015, the stocks have never been held  
2042 for sale to customers in the regular course of business at any time after the close of the day on  
2043 which they were acquired.

2044 (v) The stocks are clearly identified in the corporation's records as held for investment in  
2045 the manner described in section 3-4.3 of this Subpart.

2046 (2) Stocks acquired during the taxable year that meet the criteria in subparagraphs (i),  
2047 (iii), (iv), and (v) of paragraph (1) of this subdivision that have been held as investment by the  
2048 corporation for one year or less at the time the corporation files its original report for the taxable  
2049 year and are still held at such time shall be referred to as “presumed investment capital”.

2050 (3) In the case of a corporation incorporated and commercially domiciled outside of New  
2051 York State, stocks not described in paragraph (1) or (2) of this subdivision, debt obligations, and  
2052 other securities shall be referred to as “constitutionally protected investment capital” if the  
2053 income or gain from such stocks, debt obligations, and other securities cannot be apportioned to  
2054 New York State as the result of United States constitutional principles. In the case of a combined  
2055 report, commercial domicile shall be determined on an entity by entity basis.

2056 (b) Stock in a corporation that is conducting a unitary business with the taxpayer, stock in a  
2057 corporation included in a combined report with the taxpayer pursuant to the commonly owned  
2058 group election, and stock issued by the taxpayer will not constitute investment capital. For

2059 purposes of this section, if the taxpayer owns or controls, directly or indirectly, less than 20% of  
2060 the voting power of the stock of a corporation, that corporation will be presumed to not be  
2061 conducting a unitary business with the taxpayer.

2062 (c) If a corporation is a partner in a partnership and the corporation is using the aggregate  
2063 method to compute its tax, the corporation's proportional part of the stock owned by the  
2064 partnership may qualify as investment capital if requirements for investment capital specified in  
2065 subdivision (a) of this section are satisfied at the partnership level and the partnership and  
2066 corporate partner are not unitary with the corporation that issued the stock.

2067 (d) The amount of investment capital is determined as follows:

2068 (1) ascertain the average value of each item of investment capital;

2069 (2) ascertain the net value of each such item by subtracting from the average value of each  
2070 such item the average liabilities that are directly or indirectly attributable to that item; and

2071 (3) add the net values so arrived at.

2072 Provided, if the sum determined in paragraph (3) is less than zero, then the amount of  
2073 investment capital is deemed to be zero.

2074 (e) Investment capital does not include any investments in stock the income from which  
2075 is excluded from entire net income pursuant to the provisions of section 208(9)(c-1). Investment  
2076 capital will be computed without regard to liabilities directly or indirectly attributable to such  
2077 investments, but only if air carriers organized in the United States and operating in the foreign  
2078 country or countries in which the taxpayer has its major base of operations and in which it is  
2079 organized, resident or headquartered (if not in the same country as its major base of operations)  
2080 are not subject to any tax based on or measured by capital imposed by such foreign country or  
2081 countries or any political subdivision thereof, or if taxed, are provided an exemption, equivalent

2082 to that provided for herein, from any tax based on or measured by capital imposed by such  
2083 foreign country or countries and from any such tax imposed by any political subdivision thereof.

2084 Section 3-4.2. Constitutionally protected investment capital. (Tax Law, section  
2085 208(5)(e))

2086 In the case of a corporation incorporated and commercially domiciled outside New York  
2087 State, the United States Constitution prohibits the state from apportioning income or gain from  
2088 intangible assets when such income or gain lacks a sufficient connection to activities or presence  
2089 in the state by the corporation. For example, the income or gain from an intangible asset (i.e., a  
2090 debt obligation or other security) is apportionable where the underlying activities of the recipient  
2091 of the intangible income and the source of the income constitute a unitary business; or where the  
2092 intangible asset or the income from the intangible asset serves an  
2093 operational function in the taxpayer's business. Whether an intangible asset serves an operational  
2094 function depends on the nature of the asset's use and its relation to the corporation and the  
2095 corporation's activities in the state. For example, an intangible asset would serve an operational  
2096 function if the asset is held to meet currently identified needs of the business, including, but not  
2097 limited to, the use of the asset's income stream to pay the business's operating expenses or  
2098 finance the business's functions.

2099 Section 3-4.3. Investment capital identification procedures. (Tax Law, section  
2100 208(5)(a)(v))

2101 (a) Identification requirement. To qualify as investment capital, an investment in stock  
2102 must be clearly identified in the corporation's records as stock held for investment in the same  
2103 manner as required under IRC section 1236(a)(1) for the stock of a dealer in securities (whether

2104 or not the corporation is a dealer in securities). The identification requirements described in this  
2105 section do not apply to constitutionally protected investment capital.

2106 (b) Dealers in Securities. In the case of a corporation that is a dealer in securities subject  
2107 to IRC section 1236, the identification requirement in subparagraph (v) of paragraph (1) of  
2108 subdivision (a) of section 3-4.1 of this Subpart will be satisfied only if the stocks are clearly  
2109 identified in the corporation's records as stock held for investment under IRC section 1236(a)(1).  
2110 However, any stock purchased by a corporation that is a dealer in securities pursuant to an option  
2111 will meet the identification requirement only if the option also is clearly identified in the  
2112 corporation's records as held for investment under IRC section 1236(a)(1). Identification under  
2113 any other IRC section, including IRC section 475, or under any section of New York law or  
2114 regulation, will not satisfy the identification requirement.

2115 (c) All corporations other than dealers in securities. In the case of corporations that are  
2116 not dealers in securities subject to IRC section 1236, the identification requirement in  
2117 subparagraph (v) of paragraph (1) of subdivision (a) of section 3-4.1 of this Subpart will be  
2118 satisfied only if the stocks are recorded in an account that:

2119 (1) is maintained specifically for purposes of identifying such stocks as held for  
2120 investment for investment capital purposes;

2121 (2) is separate from any account maintained for stock held for sale to customers; and

2122 (3) is maintained in a separate account in the corporation's books of account for  
2123 recordkeeping purposes; or in a separate depository account maintained by a clearing company  
2124 as nominee for the corporation; and

2125 (4) discloses (i) the name of the stock; (ii) the identifying number of the stock according

2126 to either the Committee on Uniform Securities Identification Procedures (CUSIP) or the CUSIP  
2127 International Numbering System (CINS), as appropriate; and (iii) if the stock is sold, the date of  
2128 the sale, the number of shares sold in the sale, and the price at which the stock or the option,  
2129 respectively, is sold; and

2130 (5) is established in such a manner as to readily identify the length of time that the stock  
2131 is owned.

2132 (d)(1) Except as otherwise provided in this subdivision, for corporations other than  
2133 dealers in securities, the stocks must be identified in the manner described in subdivision (c) of  
2134 this section before:

2135 (i) October 1, 2015 for stocks acquired prior to October 1, 2015; or

2136 (ii) the close of the day on which the stock was acquired for stock acquired on or after  
2137 October 1, 2015.

2138 (2) Under the circumstances described in subparagraphs (i) and (ii) of this paragraph that  
2139 occur on or after October 1, 2015, the corporation must identify such stocks by the additional  
2140 identification period end date, which is the 90<sup>th</sup> day after the later of the measurement date  
2141 specified in such subparagraphs or January 7, 2016. Only stocks owned by the corporation on  
2142 the additional identification period end date will be eligible for identification under this clause.

2143 (i) In the case of a corporation that first becomes subject to tax under article 9-A on or  
2144 after October 1, 2015, the measurement date is the date that the corporation begins doing  
2145 business, employing capital, owning or leasing property or maintaining an office in New York  
2146 State. However, in the case of a corporation that becomes subject to tax solely because it is  
2147 deriving receipts from activity in the state, the measurement date is the date on which the  
2148 corporation first has receipts within the state of \$1 million or more. In the case of a unitary group

2149 that becomes subject to tax solely because it is deriving receipts from activity in the state, the  
2150 measurement date for every corporation included in the unitary group as of the additional  
2151 identification period end date is the date on which the unitary group in the aggregate first has  
2152 receipts within the state of \$1 million or more.

2153 (ii) In the case of a corporation that is not a taxpayer in the state, has not been included in  
2154 a combined report previously, and that first meets the capital stock requirement to be included in  
2155 a combined report with a taxpayer under section 210-C(2)(a) on or after October 1, 2015, the  
2156 measurement date for that corporation is the day that corporation first meets the capital stock  
2157 requirement to be included in a combined report.

2158 (e) For stocks purchased pursuant to an option, the identification requirements and  
2159 procedures specified in this section should be read as if the requirements and procedures  
2160 referenced the option in addition to the stock.

2161 (f) In the case of a combined report, each member of the combined group must follow the  
2162 identification requirements and procedures specified in this section for investments in stock  
2163 owned by that corporation.

2164 (g) If a corporation is a partner in a partnership and the corporation is using the aggregate  
2165 method to compute its tax, the partnership must follow the identification requirements and  
2166 procedures specified in this section for investments in stock owned by the partnership to qualify  
2167 as investment capital of the corporate partner. If, on or after October 1, 2015, a corporation  
2168 becomes a partner in a partnership that is not a dealer for purposes of IRC section 1236, and the  
2169 partnership, prior to the date the corporation becomes a partner, had not identified any stock as  
2170 investment capital using the requirements and procedures specified in this section, only stock

2171 acquired by the partnership on or after the date the corporation becomes a partner may  
2172 potentially qualify as investment capital.

2173 Section 3-4.4. Presumed investment capital that fails the holding period requirement.  
2174 (Tax Law, section 208(5)(d))

2175 (a) If a corporation has presumed investment capital and disposes of any such stock after  
2176 the filing of the original report for that tax year and before the filing of the report for the next  
2177 succeeding taxable year, the corporation must determine how long such stock had been held for  
2178 investment as of the date it files its original report for the next succeeding taxable year. If any  
2179 such stock in fact had been held as investment for one year or less (as counted across tax years),  
2180 the corporation must either:

2181 (1) file an amended report for the taxable year in which such stock was presumed  
2182 investment capital to properly classify the capital and income as business capital and income,  
2183 respectively; or

2184 (2) (i) increase its business capital in the immediately succeeding taxable year by the  
2185 amount previously included in investment capital for that stock, net of any liabilities attributable  
2186 to that stock (but not less than zero); and

2187 (ii) increase its business income in the immediately succeeding taxable year by the  
2188 amount of income and net gains (but not less than zero) from that stock previously included in  
2189 gross investment income after the limitation in section 3-4.5(c) of this Subpart less either  
2190 (a) the safe harbor reduction amount determined in section 3-4.8 of this Subpart on the return on  
2191 which this presumed investment capital was identified or (b) the amount of interest deductions  
2192 directly or indirectly attributable to the items of investment capital that failed the presumption  
2193 determined pursuant to the method in section 3-4.7 of this Subpart on the return on which this



2194 presumed investment capital was identified. No adjustment will be allowed in the immediately  
2195 succeeding taxable year for excess interest deductions directly or indirectly attributable to the  
2196 items of investment capital that failed the presumption that were added back to entire net income  
2197 in the year the presumed investment capital was included in investment capital.

2198 (b) For purposes of paragraph (2) of subdivision (a) of this section, to determine if stocks  
2199 that are presumed investment capital generated income that was claimed as investment income in  
2200 the preceding tax year, the corporation shall use the ordering rules contained in section 3-4.5(b)  
2201 of this Subpart. Provided that, for purposes of paragraph (3) of such subdivision, stocks that had  
2202 been held as investment for more than one year, as counted across tax years, shall be considered  
2203 before stocks that had been held as investment for one year or less. For stocks held for one year  
2204 or less, stocks with the largest interest deductions computed pursuant to section 3-4.7 of this  
2205 Subpart shall be considered first.

2206 Section 3-4.5. Definition of investment income. (Tax Law, section 208(6))

2207 (a)(1) Gross investment income is income from investment capital, to the extent included  
2208 in entire net income. It includes dividends from investment capital, interest from investment  
2209 capital, capital gains in excess of capital losses from the sale or exchange of investment capital  
2210 and other income from investment capital.

2211 (2) Investment income is gross investment income less either (i) interest deductions  
2212 directly or indirectly attributable to investment capital or gross investment income determined in  
2213 section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8  
2214 of this Subpart.

2215 (3) Investment income cannot exceed entire net income minus other exempt income.

2216 (b) The following ordering rules shall apply when determining the make-up of investment  
2217 income in a given taxable year when the investment income is subject to the gross investment  
2218 income limitation as described in subdivision (c) of this section:

2219 (1) income from constitutionally protected investment capital;

2220 (2) income from actual investment capital; and

2221 (3) income from presumed investment capital.

2222 (c) Gross investment income limitation. Gross investment income is limited to the greater  
2223 of (1) income from constitutionally protected investment capital or (2) 8% of the taxpayer's  
2224 entire net income, or in the case of a combined group, 8% of the combined group's entire net  
2225 income. This limitation on investment income does not impact the value of investment capital.

2226 Section 3-4.6. Definition of other exempt income<sup>1</sup>.( Tax Law, section 208(6-a))

2227 (a) CFC stock and related income.

2228 (1) CFC stock means investments in stock of a corporation that generates, or could  
2229 generate, exempt CFC income.

2230 (2) Gross exempt CFC income is (i) except to the extent described in subparagraph (ii),  
2231 income required to be included in the taxpayer's Federal gross income pursuant to IRC section  
2232 951(a) received from a corporation that is conducting a unitary business with the taxpayer but  
2233 that is not included in a combined report with the taxpayer, (ii) the income required to be  
2234 included in the taxpayer's Federal gross income pursuant to IRC section 951(a) by reason of IRC  
2235 section 965(a), as adjusted by IRC section 965(b), and without regard to IRC section 965(c),  
2236 received from a corporation that is not included in a combined report with the taxpayer, and (iii)

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<sup>1</sup> 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.

2237 95% of the income required to be included in the taxpayer's Federal gross income pursuant to  
2238 subsection (a) of IRC section 951A, without regard to the deduction under IRC section 250,  
2239 received from a corporation that is not included in a combined report with the taxpayer. The  
2240 income described in this subdivision shall not constitute investment income or exempt unitary  
2241 corporation dividends.

2242 (3) Exempt CFC income is gross exempt CFC income less either (i) interest deductions  
2243 directly or indirectly attributable to gross exempt CFC income as determined in section 3-4.7 of  
2244 this Subpart or (ii) the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

2245 (4) Total gross income from CFC stock is the sum of net capital gains in excess of capital  
2246 losses from the sale of CFC stock plus gross exempt CFC income.

2247 (b) Cross-article corporation stock and related income.

2248 (1) Cross-article corporation stock means investments in stock of a corporation that is  
2249 taxable under article 9 or 33, or would be taxable under article 9 or 33 if subject to tax, and is  
2250 conducting a unitary business with the taxpayer, but is not included in a combined report with  
2251 the taxpayer.

2252 (2) Gross exempt cross-article dividends mean dividend income received from cross-  
2253 article stock, before the reduction for interest deductions directly or indirectly attributable to  
2254 gross exempt cross-article dividends as determined in section 3-4.7 of this Subpart.

2255 (3) Exempt cross-article dividends mean gross exempt cross-article dividends, less the  
2256 interest deductions directly or indirectly attributable to gross exempt cross-article dividends as  
2257 determined in section 3-4.7 of this Subpart.

2258 (4) Total gross income from cross-article corporation stock is the sum of net capital gains  
2259 in excess of capital losses from the sale of cross-article stock plus gross exempt cross-article  
2260 dividends.

2261 (c) Other unitary corporation stock and related income.

2262 (1) Other unitary corporation stock means investments in stock in a corporation that is  
2263 conducting a unitary business with the taxpayer, but is not included in a combined report with  
2264 the taxpayer. Other unitary corporation stock does not include cross-article stock.

2265 (2) Gross exempt other unitary corporation dividends mean dividend income received  
2266 from other unitary corporation stock, before the reduction for either (i) interest deductions  
2267 directly or indirectly attributable to gross exempt other unitary corporation dividends as  
2268 determined in section 3-4.7 of this Subpart or (ii) the safe harbor reduction amount determined in  
2269 section 3-4.8 of this Subpart.

2270 (3) Exempt other unitary corporation dividends means dividends from other unitary  
2271 corporation stock less either (i) the interest deductions directly or indirectly attributable to gross  
2272 exempt other unitary corporation dividends as determined in section 3-4.7 of this Subpart or (ii)  
2273 the safe harbor reduction amount determined in section 3-4.8 of this Subpart.

2274 (4) Total gross income from other unitary corporation stock is the sum of sum of net  
2275 capital gains in excess of capital losses from the sale of other unitary corporation stock plus gross  
2276 exempt other unitary corporation dividends.

2277 (d) General.

2278 (1) Gross other exempt income is the sum of gross exempt CFC income, gross exempt  
2279 cross-article dividends, and gross exempt other unitary corporation dividends.

2280 (2) Other exempt income is the sum of exempt CFC income, exempt cross-article  
2281 dividends, and exempt other unitary corporation dividends. Other exempt income cannot exceed  
2282 entire net income.

2283 (3) Gross other exempt income and other exempt income do not include any amounts  
2284 treated as dividends pursuant to IRC section seventy-eight.

2285 Section 3-4.7. Attribution of interest deductions. (Tax Law. sections 208(6) and (6-a))

2286 (a) Unless the safe harbor reduction election has been made as required by section 3-4.8,  
2287 gross investment income and gross other exempt income must be reduced by any interest  
2288 deductions allowed in computing ENI that are directly or indirectly attributable to investment  
2289 capital, gross investment income, or gross other exempt income as follows:

2290 (1) Determine the total amount of interest deductions subject to direct and indirect  
2291 attribution. The total amount of interest deductions subject to direct and indirect attribution is:

2292 (i) the amount of interest deductions included in Federal taxable income after the IRC  
2293 section 163(j) limitation; less

2294 (ii) those Federal interest deductions required to be added back to Federal taxable income  
2295 in computing ENI; plus

2296 (iii) interest deductions attributable to interest income not includable in Federal taxable  
2297 income but required to be included in ENI, to the extent such expenses are not deducted for  
2298 Federal tax purposes; plus

2299 (iv) in the case of a corporation organized outside the United States that is not treated as a  
2300 domestic corporation for Federal purposes, interest deductions attributable to treaty income not  
2301 included in Federal taxable income that would be treated as effectively connected if not for the

2302 treaty, if taxation by states was not prevented, to the extent such expenses are not deducted for  
2303 federal tax purposes; plus

2304 (v) in the case of a corporation organized outside the United States that is not treated as a  
2305 domestic corporation for Federal purposes, interest deductions attributable to income from any  
2306 state or local bond that would be treated as effectively connected income if it was not excluded  
2307 from gross income by IRC section 103(a), to the extent such expenses are not deducted for  
2308 Federal tax purposes.

2309 (2) Determine the total amount of interest deductions subject to direct and indirect  
2310 attribution before the IRC section 163(j) limitation. If the corporation does not have interest  
2311 deductions limited by IRC section 163(j) in the current year, this paragraph does not apply and it  
2312 should proceed to paragraph (3) of this subdivision. Otherwise, the corporation must determine  
2313 the total amount of interest deductions subject to direct and indirect attribution before the IRC  
2314 section 163(j) limitation by performing the same computation as required by paragraph (1) of  
2315 this subdivision, except that in subparagraph (i) of paragraph (1) of this subdivision it should  
2316 instead use the amount of interest deductions included in Federal taxable income prior to the IRC  
2317 section 163(j) limitation.

2318 (3) Determine the amount of interest deductions that can be directly traced.

2319 (i) The corporation, must determine the portion of total interest deductions subject to  
2320 direct and indirect attribution that are directly traceable, whether in whole or in part, to gross  
2321 investment income or investment capital, gross exempt CFC income, gross exempt cross-article  
2322 dividends, gross exempt other unitary corporation dividends, and business capital or business  
2323 income.

2324 (ii) If the corporation determines that a particular interest deduction is directly  
2325 attributable to more than one type of income or capital, the corporation may apportion that  
2326 interest expense between or among the types of capital and income, using any method that  
2327 reasonably determines the appropriate amount.

2328 (iii) Examples of interest deductions that are traceable in whole or in part to gross exempt  
2329 other unitary corporation dividends, gross exempt CFC income, gross exempt cross-article  
2330 dividends, gross investment income or investment capital, or business income or business capital  
2331 include:

2332 (a) interest incurred to purchase or carry stock of corporations that generates such income  
2333 or capital;

2334 (b) interest incurred to purchase or carry investment capital (investment capital);

2335 (c) interest incurred to purchase or build a manufacturing plant (business capital);

2336 (d) interest incurred to purchase or carry the stock of a combined affiliate (business  
2337 capital);

2338 (e) interest incurred by a partnership to purchase or carry investment capital that is  
2339 included

2340 in a corporate partner's distributive share of income or loss from that partnership (investment  
2341 capital);

2342 (f) an interest deduction the reimbursement of which, received in the form of a  
2343 management

2344 fee paid by an entity not included in the combined group of the taxpayer, is included in ENI  
2345 (business capital), or

2346 (g) interest incurred to purchase or carry reverse repurchase agreements and security

2347 borrowing agreements (business capital). The amount of such interest deductions that is subject  
 2348 to direct tracing is the interest expense associated with the sum of the average fair market value  
 2349 (FMV) of a corporation's repurchase agreements plus the average FMV of the corporation's  
 2350 securities lending agreements. However, this sum is limited to the sum of the average FMV of  
 2351 the corporation's reverse repurchase agreements plus the average FMV of the corporation's  
 2352 securities borrowing agreements. Note: If the sum of the average FMV of reverse repurchase  
 2353 agreements and security borrowing agreements exceed the sum of the average FMV of  
 2354 repurchase agreements and security lending agreements, then all such interest deductions are  
 2355 directly traceable to business capital. Otherwise, use the methodology below to compute the  
 2356 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) ( $\$100 \times 1.904\%$ )	\$1.90

2357 (iv) Special rules for corporations utilizing a carryforward of interest deductions  
 2358 previously limited by IRC section 163(j). For all tax years in which a carryforward of interest  
 2359 deductions limited by IRC section 163(j) is subsequently deductible for Federal tax purposes, the



2360 carryforward amount deducted in subsequent taxable years cannot be included in directly traced  
2361 amounts. Instead, these amounts must be indirectly traced as required in paragraph (4) of this  
2362 section.

2363 (v) Special rules for corporations impacted by the IRC section 163(j) limitation in the  
2364 current year. Corporations limited by IRC section 163(j) in the current year must directly trace  
2365 the total amount of interest deductions subject to direct and indirect attribution prior to the IRC  
2366 section 163(j) limitation. If such amount is greater than its total amount of interest deductions  
2367 subject to direct and indirect attribution after the IRC section 163(j) limitation as determined in  
2368 paragraph (1) of subdivision (a) of this section, then the amount of interest deductions directly  
2369 traced to a specific category of income or capital is computed by multiplying the total interest  
2370 deductions subject to direct and indirect attribution after the IRC section 163(j) limitation as  
2371 determined in paragraph (1) of subdivision (a) of this section by a fraction, the numerator of  
2372 which is the portion of interest deductions subject to direct and indirect attribution prior to the  
2373 IRC section 163(j) limitation that can be directly traced to a specific category of income or  
2374 capital and the denominator of which is the interest deductions subject to direct and indirect  
2375 attribution prior to the IRC section 163(j) that can be directly traced to all categories of income  
2376 and capital.

2377 If the amount of interest deductions prior to the IRC section 163(j) limitation that can be  
2378 directly traced is less than or equal to the total amount of interest deductions subject to direct and  
2379 indirect attribution after such limitation, such directly traced amounts prior to the IRC section  
2380 163(j) limitation shall be the amount of interest deductions directly traced for purposes of this  
2381 paragraph.

2382 (4) Determine the amount of interest deductions to be indirectly traced. The amount of  
2383 interest deductions subject to indirect attribution is the total amount of interest deductions subject  
2384 to direct and indirect attribution after the IRC section 163(j) limitation minus the total amount of  
2385 interest deductions directly traced pursuant to paragraph three of this subdivision.

2386 (5) Perform indirect tracing.

2387 (i) To determine the amount of interest deductions indirectly attributable to gross exempt  
2388 cross-article dividends, the corporation, must multiply the total amount of interest deductions  
2389 subject to indirect attribution by a fraction, the numerator of which is the average value of the  
2390 taxpayer's cross-article stock and the denominator of which is the total average value of all  
2391 taxpayer's assets.

2392 If, during the taxable year, the corporation's investment in cross-article stock generates  
2393 both taxable net capital gains (capital gains in excess of capital losses) and gross exempt cross-  
2394 article dividends, the numerator of the fraction above must be multiplied by a fraction, the  
2395 numerator of which is gross exempt cross-article dividends and the denominator of which is total  
2396 gross income total gross income from cross-article stock.

2397 (ii) To determine the amount of interest deductions indirectly attributable to gross exempt  
2398 other unitary corporation dividends, the taxpayer, or combined group, must multiply the total  
2399 amount of interest deductions subject to indirect attribution by a fraction, the numerator of which  
2400 is the average value of the corporation's other unitary corporation stock and the denominator of  
2401 which is the total average value of all of the corporation's assets. If, during the taxable year, the  
2402 corporation's investment in other unitary corporation stock generates both taxable income from  
2403 business capital (e.g. net capital gains from business capital or 5% of global intangible low-taxed  
2404 income) and gross exempt other unitary corporation dividends, the numerator of the fraction

2405 above must be multiplied by a fraction, the numerator of which is gross exempt other unitary  
2406 corporation dividends and the denominator of which is total gross income from other unitary  
2407 corporation stock.

2408 (iii) To determine the amount of interest deductions indirectly attributable to gross  
2409 exempt  
2410 CFC income, the corporation, must multiply the total amount of interest deductions subject to  
2411 indirect attribution by a fraction, the numerator of which is the average value of the corporation's  
2412 CFC stock and the denominator of which is the total average value of all taxpayer's assets. If,  
2413 during the taxable year, the corporation's investment in CFC stock generates both taxable  
2414 income from business capital (e.g. net capital gains from business capital or 5% of global  
2415 intangible low-taxed income) and gross exempt CFC income, the numerator of the fraction above  
2416 must be multiplied by a fraction, the numerator of which is gross exempt CFC income and the  
2417 denominator of which is total gross income from CFC stock.

2418 (iv) To determine the amount of interest deductions indirectly attributable to investment  
2419 capital or gross investment income, the corporation must multiply the total amount of interest  
2420 deductions subject to indirect attribution by a fraction, the numerator of which is the average  
2421 value of the taxpayer's investment capital and the denominator of which is the total average  
2422 value of all corporation's assets.

2423 (v) The amount of interest deductions directly or indirectly attributable to gross  
2424 investment income and investment capital, gross exempt CFC income, gross exempt cross-article  
2425 dividends, and gross exempt other unitary corporation dividends is the sum of the amounts  
2426 computed in subparagraphs (i) through (iv) of this paragraph.

2427 (vi) For purposes of indirect attribution, it is possible that an asset may generate more  
2428 than one type of income that requires the use of the indirect attribution formulas in this section.  
2429 In the event that investment capital assets generate other exempt income, such assets are  
2430 included only in the indirect attribution formula for investment capital or gross investment  
2431 income. If an asset generates both exempt CFC income and exempt cross-article dividends, such  
2432 asset shall be included in one indirect attribution formula. The determination of which  
2433 attribution formula is determined based on the majority of the income that such asset generates.

2434 (b) In the case of a combined report, all computations must be done as if the combined  
2435 group were a single corporation, after the elimination of all intercompany transactions and  
2436 activity.

2437 (c) A corporate partner using the aggregate method to determine its tax with respect to its  
2438 interest in a partnership must include its distributive share of each partnership item of receipts,  
2439 income, gain, loss and deduction and the corporation's proportionate part of each asset and  
2440 liability from that partnership, after the elimination of all inter-entity transactions and activity,  
2441 when computing income amounts and the attribution of interest deductions.

2442 (d) For purposes of this subdivision, only those assets and liabilities required to be  
2443 included in the valuation of business and investment capital for purposes of computing the  
2444 capital base tax are included, as determined in section 3-2.4 of this Part.

2445 (e) If the numerator of a fraction measured by income is zero and the denominator of a  
2446 fraction measured by income is an amount greater than zero, the respective income fraction is  
2447 zero.

2448 (f) Examples. For purposes of these examples, assume the corporation does not have to  
2449 make any adjustments to its Federal interest deductions as provided for in paragraph (1) of

2450 subdivision (a) of this section. As a result, the total amount of interest deductions subject to  
2451 direct and indirect attribution is the amount of interest deductions included in Federal taxable  
2452 income.

2453           Example 1: Corporation A has \$120,000 in interest expense for 2018  
2454                           prior to applying the IRC section 163(j) limitation, of  
2455                           which \$100,000 is directly traced as follows:  
2456                           \$ 20,000 directly attributable to gross exempt unitary corporation  
2457                           dividends  
2458                           \$ 30,000 directly attributable to gross exempt CFC income  
2459                           \$ 10,000 directly attributable to gross investment income or investment  
2460                           capital  
2461                           \$ 40,000 directly attributable to business income or business capital

2462  
2463                           Due to the IRC section 163(j) limitation, \$50,000 of  
2464                           interest expense is deducted at the Federal level and is  
2465                           therefore the total amount of interest deductions subject to  
2466                           direct and indirect attribution. The remaining \$70,000 of  
2467                           interest expense is carried forward to  
2468                           subsequent years.

2469                           Since the \$100,000 of total interest deductions prior to the  
2470                           IRC section 163(j) limitation that is directly traceable is  
2471                           greater than the \$50,000 of total interest deductions subject  
2472                           to direct and indirect attribution, the amount of interest  
2473

2474 deductions directly attributed to each specific category of  
2475 income or capital is determined as follows:  
2476  $\$50,000 \times \$20,000/\$100,000 = \$10,000$  directly attributable to gross  
2477 exempt unitary corporation dividends  
2478  $\$50,000 \times \$30,000/\$100,000 = \$15,000$  directly attributable  
2479 to gross exempt CFC income  
2480  $\$50,000 \times \$10,000/\$100,000 = \$ 5,000$  directly attributable  
2481 to gross investment income or investment capital  
2482  $\$50,000 \times \$40,000/\$100,000 = \$20,000$  directly attributable  
2483 to business income or business capital

2484

2485 There are no interest deductions subject to indirect  
2486 attribution for 2018.

2487

2488 The \$70,000 of interest expense that is limited by IRC  
2489 section 163(j) in 2018 and carried forward to subsequent  
2490 years is subject to indirect attribution in the subsequent tax  
2491 year(s) in which the interest expense becomes deductible  
2492 for Federal tax purposes.

2493

2494 Example 2: Corporation B has \$120,000 in interest expense for 2018  
2495 prior to applying the IRC section 163(j) limitation, of which  
2496 \$40,000 is directly traced as follows:

2497                   \$ 8,000 directly attributable to gross exempt unitary  
2498                   corporation dividends

2499                   \$ 17,000 directly attributable to gross exempt CFC income

2500                   \$ 5,000 directly attributable to gross investment income or  
2501                   investment capital

2502                   \$ 10,000 directly attributable to business income or business  
2503                   capital

2504

2505                   Due to the IRC section 163(j) limitation, \$50,000 of  
2506                   interest expense is deducted at the Federal level and is  
2507                   therefore the total amount of interest deductions subject to  
2508                   direct and indirect attribution. The remaining \$70,000 of  
2509                   interest expense is carried forward to subsequent years.

2510                   Since the \$40,000 of total interest deductions prior to the  
2511                   IRC section 163(j) limitation that are directly traceable are  
2512                   less than the \$50,000 of total interest deductions subject to  
2513                   direct and indirect attribution, the amount of interest  
2514                   deductions directly attributed to each specific category of  
2515                   income or capital is as determined as follows:

2516                   \$ 8,000 directly attributable to gross exempt unitary  
2517                   corporation dividends

2518                   \$ 17,000 directly attributable to gross exempt CFC income

2519 \$ 5,000 directly attributable to gross investment income or  
2520 investment capital

2521 \$ 10,000 directly attributable to business income or  
2522 business capital

2523

2524 To determine the amount of interest deductions subject to  
2525 indirect attribution, Corporation B must reduce the \$50,000  
2526 of total interest deductions subject to direct and indirect  
2527 attribution by the \$40,000 of interest deductions directly  
2528 traced above. The resulting \$10,000 of interest deductions  
2529 must be indirectly attributed. The \$70,000 of interest  
2530 expense that is limited by IRC section 163(j) in 2018 and  
2531 carried forward to subsequent years must be indirectly  
2532 attributed in the subsequent tax year(s) in which the interest  
2533 expense becomes deductible for Federal tax purposes  
2534 unless the 40% safe harbor election is made and the  
2535 taxpayer does not own exempt cross-article stock.

2536 Section 3-4.8. Safe harbor reduction election. (Tax Law, sections 208(6) and (6-a))

2537 (a) In lieu of performing the attribution of interest deductions in section 3-4.7 of this

2538 Subpart, a corporation may elect to reduce the amount of gross investment income, gross exempt  
2539 CFC income, and gross exempt other unitary corporation dividends by the safe harbor reduction  
2540 amount, which is 40% of the respective gross income amount. If the corporation has gross  
2541 exempt cross-article dividends, it must attribute interest deductions to such income using the



2542 methodology described in section 3-4.7 only as it relates to such exempt cross-article stock. In  
2543 addition, the amounts of interest deductions directly attributable to gross investment income or  
2544 investment capital, gross exempt CFC income, and gross exempt unitary corporation dividends  
2545 are not subtracted from gross investment income, gross exempt CFC income, and gross exempt  
2546 unitary corporation dividends, respectively.

2547 (b) This election applies to gross investment income, gross exempt CFC income, and  
2548 gross exempt other unitary corporation dividends. The absence of gross investment income,  
2549 gross exempt CFC income, or gross exempt other unitary corporation dividends does not  
2550 preclude the election being made.

2551 (c) (1) The election may be made or revoked by the taxpayer or in the case of a combined  
2552 group, the designated agent, filing of a tax return within the statute of limitations for each  
2553 applicable tax year. Such election is binding on both the taxpayer and the Department.

2554

#### 2555 SUBPART 3-5

#### 2556 BUSINESS CAPITAL AND BUSINESS INCOME

2557 Sec.

2558 3-5.1 Definition of business capital and capital base

2559 3-5.2 Definition of business income and business income base

2560 Section 3-5.1. Definition of business capital and capital base. (Tax Law, sections 208(5) and (7)).

2561 (a) (1) Business capital is all assets, other than investment capital and stocks issued by the  
2562 taxpayer, less liabilities not deducted from investment capital. Business capital includes only  
2563 those assets the income, loss, or expense of which are properly reflected (or would have been

2564 properly reflected if not fully depreciated or expensed or depreciated or expensed to a nominal  
2565 amount) in the computation of entire net income for the taxable year.

2566 (2) (i) Business capital includes, but is not limited to:

2567 (a) cash;

2568 (b) stock in a controlled foreign corporation, except to the extent such stock

2569 qualifies as investment capital under Subpart 3-4 of this Part;

2570 (c) cross-article corporation stock;

2571 (d) other unitary corporation stock;

2572 (e) reverse repurchase agreements and securities borrowing agreements, as well as the

2573 securities underlying those agreements and repurchase agreements and securities lending

2574 agreements;

2575 (f) real property;

2576 (g) tangible personal property; and

2577 (h) investments in a Federal reserve bank or a Federal home loan bank.

2578 (b) Total business capital is the sum of business capital and any presumed investment  
2579 capital from the immediately preceding tax year required to be added back pursuant to section 3-  
2580 4.4(a)(2) of this Part. The total business capital of the taxpayer is determined by computing the  
2581 total of the average value, during the period covered by the report, of all the assets of the  
2582 taxpayer, other than investment capital and stock issued by the taxpayer, less the average value  
2583 of liabilities not deducted in computing investment capital.

2584 (c) (1) The capital base is the product of total business capital and the business

2585 apportionment fraction determined in Part 4 of this Subchapter.

2586 (2) In the case of a combined report, the combined capital base is the product of the  
2587 combined total business capital and the business apportionment fraction determined in Part 4.  
2588 In computing combined business capital, all intercorporate stockholdings, intercorporate bills,  
2589 intercorporate notes receivable and payable, intercorporate accounts receivable and payable and  
2590 other intercorporate indebtedness between corporations included in the combined report must be  
2591 eliminated. For when a combined report is required or permitted, see Subpart 6-2 of this  
2592 Subchapter – Combined reports.

2593 Section 3-5.2. Definition of business income and the business income base. (Tax Law,  
2594 sections 208(8), 210(1)(a))

2595 (a) Business income is entire net income minus other exempt income and investment  
2596 income. It also includes:

2597 (1) interest deductions directly or indirectly attributable to gross investment income or  
2598 investment capital that exceed the amount of gross investment income and

2599 (2) interest deductions directly or indirectly attributable to gross other exempt income  
2600 that exceed the amount of gross other exempt income.

2601 (b) Total business income is the sum of business income and income from presumed  
2602 investment capital from the immediately preceding tax year required to be added back pursuant  
2603 to section 3-4.4(a)(2) of this Part.

2604 (c) (1) The business income base is equal to (i) the product of total business income and  
2605 the business apportionment fraction minus (ii) the prior net operating loss conversion subtraction  
2606 and the net operating loss deduction.

2607 (2) In computing total business income of the combined group, all intercorporate  
2608 dividends between corporations included in the combined report must be eliminated and all other

2609 intercorporate transactions between corporations included in the combined report must be  
2610 deferred in a manner similar to the United States treasury regulations relating to intercompany  
2611 transactions under IRC section 1502.

2612 SUBPART 3-6

2613 EXAMPLES OF INCOME AND CAPITAL

2614

2615 Example 1: Fossil Fuel Corporation (“Fossil”) is a vertically  
2616 integrated oil business. Fossil recently sold off 60%  
2617 of its 100% ownership interest in Northwest  
2618 Exploration, Inc. (“NWE”), a subsidiary engaged in  
2619 oil exploration in far northern latitudes. While  
2620 Fossil no longer owns a majority of NWE’s stock, it  
2621 remains the largest shareholder. In addition, NWE  
2622 continues to operate as part of Fossil’s vertically  
2623 integrated oil business, benefiting from functional  
2624 integration, centralized management and economies  
2625 of scale.  
2626 NWE and Fossil are engaged in a unitary business  
2627 but cannot be included in a combined report  
2628 because they do not meet the capital stock  
2629 requirement. Because Fossil and NWE are unitary,  
2630 Fossil’s NWE stock is other unitary corporation  
2631 stock. Fossil’s NWE stock is business capital

2632 because other unitary corporation stock is always  
2633 business capital. In addition, the dividend income  
2634 Fossil receives from NWE would constitute other  
2635 unitary corporation dividends and, as such, other  
2636 exempt income. Any gain on the sale of additional  
2637 NWE stock by Fossil would be business income.

2638 Example 2: NewsCo is a newspaper publisher incorporated in  
2639 Delaware and commercially domiciled in Illinois  
2640 that publishes local newspapers in New York and  
2641 10 other states. In 2015, anticipating a serious  
2642 shortage of newspaper print, NewsCo acquires 30%  
2643 of the stock of PaperCo, a paper mill company with  
2644 facilities in North Carolina, Georgia and Oregon.  
2645 This action is taken in an attempt to mitigate the  
2646 risk of a shortage of newsprint. Based on its  
2647 significant ownership share, NewsCo is given two  
2648 seats on PaperCo's 15-member board of directors.  
2649 No changes are made in PaperCo's senior  
2650 management, and the relationship of the two  
2651 businesses largely remains that of purchaser and  
2652 supplier. In 2017, when it appears the newsprint  
2653 shortage is over, NewsCo sells its stock in PaperCo  
2654 for a gain of \$80 million.

2655 NewsCo and PaperCo are not engaged in a unitary  
2656 business. They are in related but distinct lines of  
2657 business, and while NewsCo owns 30% of  
2658 PaperCo's stock and has two seats on the board of  
2659 directors, no steps were taken toward functional  
2660 integration or centralized management. However,  
2661 while the two corporations are not engaged in a  
2662 unitary business, NewsCo's investment in PaperCo,  
2663 Inc. serves an operational function for NewsCo –  
2664 that is, to facilitate NewsCo's access to newsprint  
2665 during the shortage. Consequently, the PaperCo  
2666 stock owned by NewsCo is not constitutionally  
2667 protected investment capital.

2668 If the stock meets all of the criteria in section 3-  
2669 4.1(a)(1) or (a)(2) of this Part, the stock would be  
2670 considered either actual or presumed investment  
2671 capital, respectively. Dividend income received  
2672 from PaperCo and the \$80 million gain from the  
2673 sale of PaperCo's stock would be income from  
2674 investment capital.

2675 If the stock did not meet the criteria in section 3-  
2676 4.1(a)(1) or (a)(2) of this Part, then the stock would  
2677 be business capital. As a result, any dividend

2678 income received from PaperCo would be business  
2679 income and the \$80 million gain from the sale of  
2680 PaperCo's stock would be business income.

2681 Example 3: Ore Corporation, a mining company incorporated  
2682 and commercially domiciled in Utah, routinely  
2683 invests its cash on hand in short-term debt  
2684 instruments that yield interest income. These  
2685 investments serve an operational function in Ore  
2686 Corporation's business and therefore are not  
2687 constitutionally protected investment capital.  
2688 Consequently, these debt instruments are business  
2689 capital, and the income they generate is business  
2690 income.

2691 Example 4: EquipmentCo, a manufacturer of farm equipment  
2692 incorporated in Delaware and commercially  
2693 domiciled in Iowa, operates sales and distribution  
2694 facilities in New York State. EquipmentCo  
2695 maintains a portfolio of stocks and bonds in the  
2696 telecommunications sector managed to generate  
2697 long-term gains. As such, its investments in  
2698 telecommunications stocks and bonds are not part  
2699 of EquipmentCo's unitary farm equipment business  
2700 in the State and do not serve an operational function

2701 in EquipmentCo’s business. The dividend and  
2702 interest income generated by the telecommunication  
2703 stocks and bonds do not have the constitutionally  
2704 required connection to the EquipmentCo’s business  
2705 in the State. The stocks and bonds qualify as  
2706 constitutionally protected investment capital and the  
2707 income from the stocks and bonds is income from  
2708 investment capital.

2709 Example 5: MMW, Inc. is engaged in a multistate  
2710 manufacturing and wholesaling business  
2711 incorporated and commercially domiciled in New  
2712 Jersey. In connection with that business, it  
2713 maintains a special reserve fund available for use in  
2714 the case of a natural disaster or other extraordinary  
2715 event. The securities in the reserve fund include  
2716 both “blue chip” stocks and AAA bonds. The fund  
2717 serves an operational function for MMW, Inc. –  
2718 ensuring the unitary business can remain  
2719 operational in the event of a natural disaster or other  
2720 extraordinary event. Since the securities in the fund  
2721 serve an operational function, the securities are not  
2722 constitutionally protected investment capital.  
2723 Because actual and presumed investment capital is



2724 limited by law to stocks, the bonds are prohibited  
2725 from being investment capital and any interest  
2726 income or net gains generated by those bonds is  
2727 business income. In order for the stocks in the  
2728 special reserve fund to be considered investment  
2729 capital, the stocks must satisfy the criteria in section  
2730 3-4.1(a)(1) or (a)(2) of this Part. If the stocks are  
2731 investment capital, the dividends from the stock and  
2732 the net gains from the sale of the stock would be  
2733 income from investment capital. If the stocks do not  
2734 satisfy these criteria, the stocks would be business  
2735 capital and the dividends and net gains from those  
2736 stocks would be business income.

2737       Example 6:       MNO is incorporated and commercially domiciled in  
2738 California. It develops software. In 2016, MNO  
2739 issued a stock offering, netting \$300 million. The  
2740 explicitly stated purpose of the offering was to  
2741 provide additional capital for the acquisition of  
2742 companies and products in the same line of business  
2743 as, or complementary to, MNO's line of business.  
2744 Consistent with that purpose, MNO kept the funds  
2745 acquired in segregated accounts. Within those

2746 accounts, MNO invested in a broad array of  
2747 securities, including both stocks and bonds.  
2748 Because the explicit stated purpose of the funds and  
2749 assets in the segregated accounts is clearly tied to the  
2750 unitary software development business of MNO, the  
2751 funds and securities serve an operational function for  
2752 all years the funds and securities are at MNO's  
2753 disposal. As such, the securities are not  
2754 constitutionally protected investment capital.  
2755 Because actual and presumed investment capital is  
2756 limited by law to stocks, the bonds are prohibited  
2757 from being investment capital and any income  
2758 earned from those bonds is business income. If the  
2759 stocks in the segregated accounts meet all the criteria  
2760 in section 3-4.1(a)(1) or (a)(2) of this Part, the stocks  
2761 would be considered actual or presumed investment  
2762 capital, respectively, and the dividends and net gains  
2763 from the stocks would be income from investment  
2764 capital. If the stocks do not satisfy all of those  
2765 criteria, the stocks would be business capital and the  
2766 dividends and net gains from those stocks would be  
2767 business income.

2768        Example 7:                    Retail Corp, incorporated and commercially  
2769    domiciled in North Carolina, earns substantial  
2770    revenue from its retail operations located solely  
2771    within New York. It invests a large portion of the  
2772    revenue in fixed income securities that are divided  
2773    into three categories: (a) short-term securities held  
2774    pending use of the funds in the taxpayer's retail  
2775    business; (b) short-term securities held pending  
2776    acquisition of other companies or favorable  
2777    developments in the long-term money market; and  
2778    (c) long-term securities held as an investment. The  
2779    income generated by both types of short-term  
2780    securities serves an operational function for Retail  
2781    Corp. As a result, the securities are not  
2782    constitutionally protected investment capital. If the  
2783    securities in category (a) or (b) include stocks and  
2784    the stocks meet all the criteria in section 3-4.1(a)(1)  
2785    or (a)(2) of this Part, the stocks would be considered  
2786    actual or presumed investment capital, respectively,  
2787    and the dividends and net gains from the stocks  
2788    would be income from investment capital. The  
2789    stocks in categories (a) and (b) above that do not  
2790    meet all the criteria to be considered actual or

2791 presumed investment capital and any other  
2792 securities in categories (a) and (b) above are  
2793 business capital and any interest income, dividends  
2794 or net gains from those securities are business  
2795 income. The interest income, dividends or net gains  
2796 from the long-term securities in category (c) held as  
2797 an investment do not have the constitutionally  
2798 required connection to the retail operations in the  
2799 State. These long-term securities qualify as  
2800 constitutionally protected investment capital and  
2801 any interest income, dividends or net gains from the  
2802 securities are income from investment capital.

2803 Example 8: Manu Corp. is a manufacturer incorporated and  
2804 commercially domiciled in California with facilities  
2805 in New York and other states. In 2015, Manu Corp.  
2806 purchases, at a deep discount, corporate bonds  
2807 issued by Grocery, Inc., a large supermarket chain  
2808 in default on its interest payments and on the verge  
2809 of bankruptcy. Manu Corp. believes that Grocery,  
2810 Inc. will be able to emerge from its difficulties as a  
2811 viable business and that the Grocery, Inc. bonds it  
2812 holds will sell at a considerably higher price at  
2813 some future date. Manu Corp. sells the bonds in

2814 2019 for a significant gain. Even though Manu  
2815 Corp's investment is in corporate bonds, the nature  
2816 of the investment is more akin to an investment in  
2817 stock held for long-term appreciation. Manu Corp.  
2818 will not be receiving interest income from the bonds  
2819 or using the bonds as collateral. The bonds,  
2820 therefore, are not serving an operational function.  
2821 The investment in the bonds is an investment  
2822 separate and apart from the unitary business of  
2823 Manu Corp. The net gain on the sale of the bonds  
2824 does not have the constitutionally required  
2825 connection to Manu Corp's operations in New  
2826 York. The bonds are constitutionally protected  
2827 investment capital and the net gain is income from  
2828 investment capital.

2829 Example 9: Same facts as example 9, except that the purchaser  
2830 of the Grocery, Inc. corporate bonds is FISCO,  
2831 which is incorporated and commercially domiciled  
2832 in Connecticut and operates a diversified financial  
2833 services business. In addition to being a dealer in  
2834 securities, it buys and sells securities for its own  
2835 account. The purchase of the Grocery, Inc. bonds is  
2836 within the scope of FISCO's unitary financial

2837 services business of buying and selling securities.  
2838 Therefore, the bonds are not constitutionally  
2839 protected investment capital. In the hands of  
2840 FISCO, the Grocery Inc. corporate bonds are  
2841 business capital and the net gain on the sale of the  
2842 bonds is business income.

2843 Example 10: VinylCo is incorporated and commercially  
2844 domiciled in Delaware and is a manufacturer of  
2845 rubber and vinyl products. In 2015, it purchased a  
2846 15% interest in SupplierCo, which supplies  
2847 VinylCo with synthetic rubber, to obtain status as a  
2848 preferred customer. In all other respects, VinylCo  
2849 and SupplierCo operate independently. VinylCo and  
2850 SupplierCo are not engaged in a unitary business.  
2851 However, VinylCo's investment in SupplierCo  
2852 serves an operational function for VinylCo by  
2853 helping VinylCo to maintain an ongoing supply of  
2854 synthetic rubber. As such, the stock VinylCo owns  
2855 in SupplierCo is not constitutionally protected  
2856 investment capital. If the stock meets all the criteria  
2857 in section 3-4.1(a)(1) or (a)(2) of this Part, the stock  
2858 would be considered actual or presumed investment  
2859 capital, respectively, and the dividends and net

2860 gains from the stock would be income from  
2861 investment capital. If the stock does not satisfy all  
2862 of these criteria, the stock would be business capital  
2863 and the dividends and net gains from the stock  
2864 would be business income.

2865 Example 11: RDS is incorporated and commercially domiciled  
2866 in Connecticut, and is principally engaged in the  
2867 operation of a chain of retail department stores  
2868 within and without New York. RDS also holds  
2869 stock in several corporations, including QRS Inc.,  
2870 which designs, develops and markets “off-the-  
2871 shelf” computer programs. In 2016, RDS sells its  
2872 stock in QRS Inc. which it purchased in 2009, at a  
2873 \$100 million net gain. Because RDS’s investment  
2874 in the stock of QRS Inc. was not part of RDS’s  
2875 unitary retail business and did not serve an  
2876 operational function, the stock is constitutionally  
2877 protected investment capital and the net gain is  
2878 income from investment capital.

2879 Example 12: Corporation A has entire net income of \$15,000.  
2880 Included in that amount is \$0 of gross other  
2881 exempt income and \$2,000 of gross investment  
2882 income before the gross investment income

2883 limitation provided for in section 3-4.5(c) of this  
2884 Part, broken down as follows:

- 2885 • \$1,700 from constitutionally protected investment capital; and
- 2886 • \$300 from actual investment capital.

2887 The gross investment income limitation in section  
2888 3-4.5(c) of this Part provides that gross investment  
2889 income is limited to greater of the income from  
2890 constitutionally protected investment capital of  
2891 \$1,700 or 8% of entire net income of \$15,000, or  
2892 \$1,200. As a result, Corporation A has \$1,700 of  
2893 gross investment income in the tax year.

2894 Corporation A elects to use the safe harbor  
2895 reduction method of this Part when computing  
2896 investment income and therefore reduces the \$1,700  
2897 of gross investment income by 40%. The result is  
2898 \$1,020 of investment income claimed in the tax  
2899 year.

2900 Example 13: Same facts as example 12, except that Corporation  
2901 A did not elect to use the safe harbor method  
2902 election and determines it has \$400 of interest  
2903 deductions directly or indirectly attributable to gross  
2904 investment income and investment capital



2905 Corporation A must reduce its gross investment  
2906 income of \$1,700 by \$400, the total interest  
2907 deductions directly or indirectly attributable to gross  
2908 investment income and investment capital. The  
2909 result is \$1,300 of investment income claimed in the  
2910 tax year.

2911 Example 14: Corporation A has entire net income of \$100,000 in  
2912 the 2015 tax year. Included in that amount is \$0 of  
2913 gross other exempt income and \$20,000 of gross  
2914 investment income before the gross investment  
2915 income limitation in section 3-4.5(c) of this Part,  
2916 broken down as follows:

- 2917 • \$2,000 from constitutionally protected investment capital;
- 2918 • \$7,000 from actual investment capital; and
- 2919 • \$11,000 from presumed investment capital.

2920 The gross investment income limitation in section  
2921 3-4.5(c) of this Part provides that gross investment  
2922 income is limited to the greater of the \$2,000 of the  
2923 income from constitutionally protected investment  
2924 capital or 8% of entire net income, which is \$8,000.  
2925 As a result, Corporation A has gross investment  
2926 income of \$8,000 in the 2015 tax year.

2927 Corporation A does not elect to use the safe harbor  
2928 reduction method and determines it has \$1,750 of  
2929 interest deductions directly or indirectly attributable  
2930 to gross investment income and investment capital.  
2931 Corporation A must reduce the \$8,000 of gross  
2932 investment income by \$1,750, the total amount of  
2933 interest deductions directly or indirectly attributable  
2934 to gross investment income and investment capital.  
2935 The result is \$6,250 of investment income claimed  
2936 in the 2015 tax year.

2937 After filing the report for the 2015 tax year,  
2938 Corporation A disposes of its 2015 presumed  
2939 investment capital before it is held for more than  
2940 one year. Based on the ordering rules in section 3-  
2941 4.5(b) of this Part, the \$8,000 of gross investment  
2942 income claimed in the 2015 tax year was comprised  
2943 of \$2,000 from constitutionally protected  
2944 investment capital and \$6,000 from actual  
2945 investment capital. Corporation A is not subject to  
2946 the requirements in section 3-4.4 of this Part  
2947 because the amount of investment income claimed  
2948 in the 2015 tax year, after applying the gross  
2949 investment income limitation in section 3-4.5(c) of

2950 this Part, did not include income from presumed  
2951 investment capital that failed to meet the holding  
2952 period requirement.

2953 Example 15: Corporation D has \$50,000 in entire net income in  
2954 the 2015 tax year. Included in that amount is \$0 of  
2955 gross other exempt income and \$20,000 of gross  
2956 investment income before the gross investment  
2957 income limitation in section 3-4.5(c) of this Part,  
2958 broken down as follows:

- 2959 • \$3,000 from stock A that is actual investment capital;
- 2960 • \$2,000 from stock B that is presumed investment capital;
- 2961 and
- 2962 • \$15,000 from stock C that is presumed investment capital.

2963 The gross investment limitation in section 3-4.5(c)  
2964 of this Part provides that gross investment income is  
2965 limited to the greater of income from  
2966 constitutionally protected investment capital, which  
2967 is \$0, or 8% of entire net income, which is \$4,000.

2968 As a result, Corporation D has gross investment  
2969 income of \$4,000 in the 2015 tax year.

2970 Corporation D does not elect to use the safe harbor  
2971 reduction method and determines it has \$1,170 of

2972 interest deductions directly or indirectly attributable  
2973 to gross investment income and investment capital.  
2974 Corporation D must reduce its gross investment  
2975 income of \$4,000 by \$1,170, the total amount of  
2976 interest deductions directly or indirectly attributable  
2977 to gross investment income and investment capital.  
2978 The result is \$2,830 in investment income claimed  
2979 in the 2015 tax year.  
2980 After filing the report for the 2015 tax year,  
2981 Corporation D disposes of Stock B after it is held  
2982 for more than one year and Stock C before it is held  
2983 for more than one year. Based on the ordering rules  
2984 in section 3-4.5(b) of this Part, the \$4,000 of gross  
2985 investment income claimed in the 2015 tax year was  
2986 comprised of \$3,000 from Stock A (the actual  
2987 investment capital) and \$1,000 from Stock B (the  
2988 presumed investment capital held for more than one  
2989 year). Corporation D is not subject to the  
2990 requirements in section 3-4.4 of this Part because  
2991 the amount of investment income claimed in the  
2992 2015 tax year, after applying the gross investment  
2993 income limitation in section 3-4.6(c) of this Part,  
2994 did not include income from presumed investment

2995 capital that failed to meet the holding period  
2996 requirement.  
2997 Example 16: InvestCo is a foreign corporation that owns a  
2998 minority interest in Asset Manager, a partnership  
2999 operating solely in New York State that performs a  
3000 variety of investment activities. InvestCo and Asset  
3001 Manager are not engaged in a unitary business.  
3002 Aside from its investment in Asset Manager,  
3003 InvestCo has no physical presence or activities in  
3004 New York State.  
3005 In 2022 InvestCo sells its interest in Asset Manager  
3006 for a gain. Because the increase in Asset Manager's  
3007 value was a result of its activities within New York  
3008 State and the benefits provided by New York State,  
3009 InvestCo's interest in Asset Manager is not  
3010 constitutionally protected investment capital. As  
3011 such, the interest in Asset Manager is business  
3012 capital and the gain from disposition of such interest  
3013 is business income.

3014  
3015 SUBPART 3-7

3016 CAPITAL LOSSES

3017 Sec.

- 3018 3-7.1 New York investment capital gains or losses in taxable years beginning on or  
3019 after January 1, 2015
- 3020 3-7.2 New York business capital gains or losses in taxable years beginning on or after  
3021 January 1, 2015
- 3022 3-7.3 Capital losses sustained in taxable years beginning before January 1, 2015
- 3023 3-7.4 Capital losses sustained in taxable years beginning on or after January 1, 2015
- 3024 3-7.5 Application of New York net capital losses
- 3025 3-7.6 Rules for combined reports
- 3026 3-7.7 Record keeping
- 3027 3-7.8 Appendix – Subpart 3-7 capital loss examples
- 3028 Section 3-7.1 New York investment capital gains or losses in taxable years beginning on  
3029 or after January 1, 2015.
- 3030 (a) Definitions.
- 3031 (1) “New York investment capital gains or losses” mean the amount of Federal capital  
3032 gains generated or losses sustained in taxable years beginning on or after January 1, 2015 that are  
3033 attributable to investment capital.
- 3034 (2) “New York net investment capital gain” means the amount of New York investment  
3035 capital gains in excess of New York investment capital losses for the taxable year.
- 3036 (3) “New York net investment capital loss” means the amount of New York investment  
3037 capital losses in excess of New York investment capital gains for the taxable year.
- 3038 (b) New York investment capital gains generated or losses sustained do not include any  
3039 amount of Federal capital gains generated or losses sustained in a year in which a corporation is:
- 3040 (1) not a taxpayer or a member of a New York combined group under article 9-A (an

3041 article 9-A New York non-filing year);

3042 (2) a New York S corporation (a New York S year);

3043 (3) a non-captive real estate investment trust REIT (a non-captive REIT filing year);

3044 (4) a non-captive regulated investment company RIC (a non-captive RIC filing year); or

3045 (5) a captive insurance company that is not a combinable captive insurance company (a  
3046 non-combinable captive insurance company filing year).

3047 Section 3-7.2 New York business capital gains or losses in taxable years beginning on or  
3048 after January 1, 2015.

3049 (a) Definitions.

3050 (1) “New York business capital gains or losses” mean the amount of Federal capital gains  
3051 generated or losses sustained in taxable years beginning on or after January 1, 2015 that are  
3052 attributable to business capital.

3053 (2) “New York net business capital gain” means the amount of New York business  
3054 capital gains in excess of New York business capital losses for the taxable year.

3055 (3) “New York net business capital loss” means the amount of New York business capital  
3056 losses in excess of New York business capital gains for the taxable year.

3057 (b) New York business capital gains generated or losses sustained do not include any  
3058 amount of Federal capital gains generated or losses sustained in:

3059 (1) an article 9-A non-filing year;

3060 (2) a New York S year;

3061 (3) a non-captive REIT filing year;

3062 (4) a non-captive RIC filing year; or

3063 (5) a non-combinable captive insurance company filing year.

3064 Section 3-7.3 Capital losses sustained in taxable years beginning before January 1, 2015.

3065 (a) Except as provided in subdivisions (b) and (c) of this section, a corporation subject to  
3066 tax under article 9-A or article 32, or a member of a combined group subject to tax under Article  
3067 9-A or article 32, that sustained a Federal net capital loss under IRC section 1212 in a taxable  
3068 year beginning before January 1, 2015 shall carry back and forward such Federal net capital loss  
3069 as required by Subpart 3-7 of this Part and section 18-2.5(b) of Subchapter B of this Chapter, as  
3070 such provisions existed on December 31, 2014.

3071 (b) The carryover of any amount of a Federal net capital loss that was sustained in a  
3072 taxable year beginning before January 1, 2015 to a taxable year beginning after December 31,  
3073 2014 shall be governed by these Subpart 3-7 provisions as subsequently enacted.

3074 (c) Any Federal net capital loss available for carryforward as of the end of the last taxable  
3075 year beginning before January 1, 2015 shall be deemed to be a New York net business capital  
3076 loss (regardless of whether such capital loss was from business capital, investment capital, or  
3077 subsidiary capital as such terms were previously defined in article 9-A regulations or, to the  
3078 extent relevant, Article 32 regulations as such regulations existed on December 31, 2014). Such  
3079 New York net business capital loss shall be carried forward to the next succeeding taxable year  
3080 beginning on or after January 1, 2015, and must be applied only against New York business  
3081 capital gains. Such New York net business capital loss may only be carried forward to the 5  
3082 taxable years immediately succeeding the loss year and nothing in this Subpart extends this  
3083 capital loss carryforward period.

3084 Section 3-7.4 Capital losses sustained in taxable years beginning on or after January 1,  
3085 2015.

3086 (a) In computing the business income base, taxpayers generally start with Federal taxable



3087 income that includes capital gains in excess of capital losses without differentiation between  
3088 New York investment capital gains and losses and New York business capital gains and losses.  
3089 For New York State purposes, taxpayers must ensure that investment capital losses do not offset  
3090 business capital gains and that business capital losses do not offset investment capital gains when  
3091 calculating the business income base.

3092 (b) A corporation or combined group, in the case of a combined report, subject to tax  
3093 under article 9-A must properly classify and separate any amount of Federal capital losses and  
3094 Federal capital gains, as such terms are defined in IRC section 1222, into New York business  
3095 capital gains or losses and New York investment capital gains or losses. To calculate the  
3096 business income base, Federal taxable income must be increased by the amount of New York net  
3097 investment capital loss that offsets New York net business capital gains. Similarly, to calculate  
3098 the business income base, Federal taxable income must be increased by the amount of New York  
3099 net business capital loss that offsets New York net investment capital gains.

3100 (c) For any amount of Federal capital loss sustained in an article 9-A New York non-  
3101 filing year that is used on a Federal return in an article 9-A New York filing year, Federal taxable  
3102 income in that New York filing year must be increased by the amount of Federal capital loss that  
3103 was used from that Article 9-A New York non-filing year.

3104 (d) For any amount of Federal capital loss sustained in a New York S year that is used on  
3105 a Federal return in a New York C year, Federal taxable income in that New York C year must be  
3106 increased by the amount of the Federal capital loss that was used from the New York S year.

3107 (e) For any amount of Federal capital loss sustained in a non-captive REIT filing year  
3108 that is used on a Federal return in a captive REIT filing year, Federal taxable income in that  
3109 captive REIT filing year must be increased by the amount of the Federal capital loss that was

3110 used from the non-captive REIT filing year.

3111 (f) For any amount of Federal capital loss sustained in a non-captive RIC filing year that  
3112 is used on a Federal return in a captive RIC filing year, Federal taxable income in that captive  
3113 RIC filing year must be increased by the amount of the Federal capital loss that was used from  
3114 the non-captive RIC filing year.

3115 (g) For any amount of Federal capital loss sustained in a non-captive REIT filing year  
3116 that is used on a Federal return in a year that the corporation, trust, or association fails to meet  
3117 the definition and requirements of a REIT under section 10-4.1(b) of this Subchapter, Federal  
3118 taxable income of that filing year must be increased by the amount of the Federal capital loss that  
3119 was used from the non-captive REIT filing year.

3120 (h) For any amount of Federal capital loss sustained in a non-combinable captive  
3121 insurance company filing year that is used on a Federal return in a combinable captive insurance  
3122 company filing year, Federal taxable income in that non-combinable captive insurance company  
3123 filing year must be increased by the amount of the Federal capital loss that was used from the  
3124 combinable captive filing year.

3125 Section 3-7.5 Application of New York net capital losses.

3126 (a) Except as otherwise provided in this Subpart, the amount of New York net business  
3127 capital loss and the amount of New York net investment capital loss must be carried back to each  
3128 of the 3 taxable years immediately preceding the taxable year of each such loss and, to the extent  
3129 that any capital loss remains, must be carried forward to the 5 taxable years immediately  
3130 succeeding the taxable year of each such loss, but only to the extent that the amount of New  
3131 York net business capital loss or New York net investment capital loss does not increase or  
3132 produce a net operating loss for New York State purposes. New York net business capital loss

3133 must be carried back or forward in accordance with this Subpart to offset only New York  
3134 business capital gains in other taxable years, for New York State purposes. New York net  
3135 investment capital loss must be carried back and forward in accordance with this Subpart to  
3136 offset only New York investment capital gains in other taxable years, for New York State  
3137 purposes.

3138 (b) A New York net business capital loss or New York net investment capital loss cannot  
3139 be carried back to a taxable year beginning before January 1, 2015.

3140 (c) Except as provided in subdivision (b) of this section, a New York net business capital  
3141 loss or New York net investment capital loss is carried first to the earliest of the 3 taxable years  
3142 immediately preceding the tax year in which the loss was sustained. If such net capital loss is not  
3143 entirely used in that tax year, the remaining amount is then carried to the second taxable year  
3144 preceding the loss year, and any amount thereafter remaining is carried to the first taxable year  
3145 immediately preceding the tax year in which the net capital loss was sustained. Any unused  
3146 amount after the application of the carryback rules is then carried forward to the first 5 taxable  
3147 years immediately succeeding the loss year. Such net capital loss is carried forward first to the  
3148 taxable year immediately following the loss year and then to the next immediately succeeding  
3149 taxable year or years until the loss is used up or the fifth taxable year following the loss year,  
3150 whichever comes first. Any unused capital loss carryforward is forfeited after the fifth taxable  
3151 year following the loss year.

3152 (d) For purposes of determining the number of tax years to which a capital loss may be  
3153 carried back or forward, the following years are counted:

3154 (1) a New York filing year;

3155 (2) a New York non-filing year;

3156 (3) a New York S filing year;

3157 (4) a non-captive REIT filing year;

3158 (5) a non-captive RIC filing year; and

3159 (6) a non-combinable captive insurance filing year.

3160 (e) A corporation that reports as part of a consolidated group for Federal income tax  
3161 purposes but on a separate basis for purposes of article 9-A must compute its New York net  
3162 business capital loss and New York net investment capital loss as if it is filing separately for  
3163 Federal income tax purposes. This requires such corporation, when computing its Federal taxable  
3164 income as if it had filed its Federal tax return on a separate basis, to also compute its Federal net  
3165 capital gain or loss as if it had filed separately for Federal income tax purposes. The corporation  
3166 then computes its New York net investment capital gain or loss and New York net business  
3167 capital gain or loss in accordance with this Subpart.

3168 (f) In computing its tax bases, a New York State combined group is generally treated as a  
3169 single corporation subject to the same Federal income tax limitations that would apply if such  
3170 corporation had filed for such taxable year on a consolidated Federal income tax return with the  
3171 members of the combined group. When applying this rule to the computation of combined  
3172 business income, Federal taxable income must be computed as if all the corporations in the  
3173 combined group had filed a Federal consolidated return including such group members. When  
3174 the New York State combined group is comprised of corporations different than those that filed  
3175 on the same Federal consolidated return, a re-computation of Federal taxable income is required  
3176 and, as a result, a re-computation of Federal net capital gain or loss is required as if the Federal  
3177 net capital gain or loss was computed by a Federal consolidated group comprised of the same  
3178 members as the New York State combined group. A New York State combined group must then,

3179 for the purpose of computing its New York combined business income, compute its New York  
3180 net business capital loss and New York net investment capital loss, pursuant to this Subpart, as if  
3181 all the corporations included in the combined group are a single corporation.

3182 Section 3-7.6 Rules for combined reports

3183 (a) In computing the New York net capital loss of corporations included in a combined  
3184 report pursuant to section 210-C, the New York net capital loss of the combined group is  
3185 computed in accordance with this Subpart, substituting “combined group” for “corporation”.

3186 (b) A member leaving a combined group must compute its own share of New York net  
3187 business capital loss carryover and New York net investment capital loss carryover. New York  
3188 net capital loss carryover is net capital loss that may be carried back or forward as the case may  
3189 be.

3190 (1) To compute the leaving member’s share of the New York net business capital loss  
3191 carryover, multiply the combined group’s New York net business capital loss carryover for the  
3192 taxable year by a fraction, the numerator of which is the total New York business capital losses  
3193 for that taxable year of the departing member and the denominator of which is the total New  
3194 York business capital losses for that taxable year of all members of the combined group having  
3195 such New York business capital losses to the extent such capital losses are included in the capital  
3196 loss carryover amount of the combined group in accordance with this section.

3197 (2) To compute the departing member’s share of New York net investment capital loss  
3198 carryover, multiply the combined group’s New York net investment capital loss carryover for the  
3199 taxable year by a fraction, the numerator of which is the total New York investment capital  
3200 losses for that taxable year of the departing member and the denominator of which is the total  
3201 New York investment capital losses for that taxable year of all members of the combined group

3202 having such New York investment capital losses to the extent such capital losses are included in  
3203 the capital loss carryover amount of the combined group in accordance with this section.

3204 (c) If a corporation is a member of a combined group for any taxable year beginning on  
3205 or after January 1, 2015 and leaves that group in a later taxable year, the departing member takes  
3206 its share of the combined group's New York net business capital loss carryover and New York  
3207 net investment capital loss carryover. If the departing corporation joins another combined group,  
3208 its New York net business capital loss carryover is added to, or becomes, the new combined  
3209 group's New York net business capital loss carryover and its New York net investment capital  
3210 loss carryover is added to, or becomes, the new combined group's New York net investment  
3211 capital loss carryover, subject to the rules in this Subpart. If the departing corporation files a  
3212 separate New York return, it is allowed to use its New York net business capital loss carryover or  
3213 New York net investment capital loss carryover on a separate basis, subject to the rules in this  
3214 Subpart.

3215 (d) If a corporation that was subject to tax under article 9-A and was not a member of a  
3216 combined group in any taxable year beginning on or after January 1, 2015 subsequently joins a  
3217 combined group, that incoming member's New York net business capital loss carryover is added  
3218 to, or becomes, the combined group's New York net business capital loss carryover and its New  
3219 York net investment capital loss carryover is added to, or becomes, the combined group's New  
3220 York net investment capital loss carryover, subject to the rules in this Subpart.

3221 Section 3-7.7 Record keeping.

3222 A taxpayer or a combined group that claims a New York net capital loss carryback or  
3223 carryforward, either business or investment, must submit a copy of its Federal schedule of capital  
3224 gains and losses used and a schedule of New York capital gains and losses used for the loss year

3225 and for any year(s) to which the losses are to be carried. A claim for refund based on a New  
3226 York capital loss carryback or carryforward must be filed on the forms and in the manner  
3227 prescribed by the commissioner.

3228 Section 3-7.8. Appendix – Subpart 3-7 capital loss examples.

3229

3230

SUBPART 3-8

3231

COMPUTATION OF THE PRIOR NET OPERATING LOSS

3232

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3248 Section 3-8.1 Definitions.

3249 For purposes of this Subpart, the following terms shall have the following meaning.

3250 (a) The term “base year” means a corporation’s last taxable year beginning on or after  
3251 January 1, 2014 and before January 1, 2015.

3252 (b) The term “base year BAP” means either of the following, whichever is applicable:

3253 (1) the taxpayer's or combined group’s, in the case of a combined report in the base year  
3254 (“base year combined group”), business allocation percentage for purposes of calculating entire  
3255 net income (ENI) for the base year (whether or not liability was in fact based on ENI), as  
3256 calculated under section 210(3)(a) as such section was in effect on December 31, 2014; or

3257 (2) the taxpayer’s or base year combined group’s allocation percentage for purposes of  
3258 calculating ENI for the base year (whether or not liability was in fact based on ENI), as  
3259 calculated under section 1454 as such section was in effect on December 31, 2014.

3260 (c) The term “base year tax rate” means the taxpayer's or base year combined group’s tax  
3261 rate for purposes of computing the tax on ENI for the base year (whether or not liability was in  
3262 fact based on ENI), as calculated under either section 210(1)(a) or section 1455(a), whichever is  
3263 applicable, as such sections were in effect on December 31, 2014.

3264 (d) The term “first 2015 taxable year” means a corporation’s first taxable year that begins  
3265 on or after January 1, 2015 and before January 1, 2016.

3266 (e)(1) The term “small business taxpayer” means a corporation that, in the first 2015  
3267 taxable year, satisfied all of the criteria specified in subparagraphs (i), (ii), and (iii) of paragraph  
3268 (2) of this subdivision as of the last day of the base year; and, in the case of a combined report,  
3269 means a combined group that in the first 2015 taxable year would have satisfied the criteria  
3270 specified in subparagraphs (i) and (ii) of paragraph (2) of this subdivision on the last day of the



3271 base year if the group had filed a combined report in such base year, provided that each member  
3272 of the combined group would have satisfied the criteria specified in subparagraph (iii) of  
3273 paragraph (2) of this subdivision on the last day of the base year.

3274 (2) The criteria that must be satisfied to qualify as a small business taxpayer are:

3275 (i) the ENI of the corporation or the combined group for the base year before allocation  
3276 was not more than \$390,000 (such amount will be annualized for a base year that constitutes a  
3277 short taxable year);

3278 (ii) the total amount of money and other property that the corporation or combined group  
3279 received for stock, as a contribution to capital and as paid-in surplus, was not more than \$1  
3280 million as of the last day of the base year; and

3281 (iii) the corporation was not part of an affiliated group, as defined in IRC section 1504,  
3282 unless the group itself would have satisfied the requirements in subparagraphs (i) and (ii) of this  
3283 paragraph if it had filed a combined report.

3284 Section 3-8.2 Computation of the unabsorbed net operating loss (UNOL).

3285 (a) The “unabsorbed net operating loss” (hereinafter referred to in this Subpart as the  
3286 UNOL) means the unabsorbed portion of net operating loss (NOL) as calculated under section  
3287 208(9)(f) or section 1453(k-1) as such sections were in effect on December 31, 2014, that was  
3288 not deductible in previous taxable years (including the base year) and was eligible for carryover  
3289 on the last day of the base year, including any NOL sustained by the taxpayer during the base  
3290 year. The computation of such UNOL is subject to the rules in subdivisions (b) through (e) of  
3291 this section.

3292 (b) To compute the UNOL, the rules in paragraphs (1) and (2) of this subdivision must be  
3293 followed.

3294 (1) Federal and New York State NOLs available for carryover. A corporation must first  
3295 compute its Federal and New York State NOLs available for carryover, from taxable years  
3296 beginning before January 1, 2015, as of the last day of such corporation's base year (Federal and  
3297 New York State NOLs available for carryover), by applying the following rules:

3298 (i) NOLs are carried back and carried forward to taxable years beginning before January  
3299 1, 2015, and included in the determination of deductible NOLs, as well as remaining NOLs  
3300 available for carryover, subject to NOL deduction limitations, as set forth in either section  
3301 208(9)(f) and Subpart 3-8 of this Part or section 1453(k-1), whichever is applicable as such  
3302 provisions were in effect and applicable on December 31, 2014. NOLs available for carryover  
3303 do not include any NOLs that were deductible in a taxable year beginning prior to January 1,  
3304 2015, regardless of whether or not the corporation actually deducted the NOL. However, if the  
3305 amount of NOL actually deducted in any taxable year is greater than the amount deductible, the  
3306 NOL available for carryover is reduced by the excess amount deducted. When computing the  
3307 amount of NOLs available for carryover, New York State NOLs must be applied against ENI to  
3308 reduce ENI to zero or the greatest extent possible, regardless of the tax base on which the  
3309 franchise tax was actually paid.

3310 (ii) If the carryforward period for an NOL, as determined in subparagraph (i) of this  
3311 paragraph, ends prior to, or on, the last day of the corporation's base year, no portion of such  
3312 NOL is included in the NOLs available for carryover.

3313 (2) Eligible NOL carryover amounts. After computing its Federal and New York State  
3314 NOLs available for carryover, the corporation must then compute its Federal and New York  
3315 State carryover amounts as of the last day of the corporation's base year (its eligible NOL

3316 carryover amounts), to be used in the computation of the UNOL, by applying the following rules  
3317 and limitations in subparagraphs (i) through (v) of this paragraph.:

3318 (i) A corporation's Federal and New York State NOLs available for carryover are  
3319 included in the eligible Federal and New York State NOL carryover amount, respectively, only  
3320 when there is both a Federal and New York State NOL sustained in the same taxable year and  
3321 available for carryover as of the last day of the corporation's base year.

3322 (ii) A corporation's Federal NOL sustained in a separate return limitation year (SRLY)  
3323 beginning before January 1, 2015, and any corresponding New York State NOL, that was not  
3324 deductible in taxable years beginning before January 1, 2015, and that was available for  
3325 carryover as of the last day of the corporation's base year, is included in its entirety in the  
3326 eligible Federal and New York State NOL carryover amount, respectively, subject to the rules in  
3327 this section.

3328 (iii) If, under IRC section 381, a corporation, in a taxable year beginning prior to January  
3329 1, 2015, succeeded to the tax attributes, including Federal NOL carryovers, of another  
3330 corporation, and the acquiring or successor corporation also succeeded to the New York State  
3331 NOL carryovers of the acquired or predecessor corporation, then any such Federal and New  
3332 York State NOLs that were not deductible by the acquiring or successor corporation in taxable  
3333 years beginning before January 1, 2015, and that were available for carryover as of the last day  
3334 of the corporation's base year, are included in their entirety in the eligible Federal and New York  
3335 State NOL carryover amounts, respectively, subject to the rules in this section.

3336 (iv) A corporation's Federal NOLs subject to the limitations imposed by IRC section 382  
3337 as a result of an ownership change (pre-change losses) that were not deductible in taxable years  
3338 beginning before January 1, 2015, and that were available for carryover as of the last day of the

3339 corporation's base year, are included in the eligible Federal NOL carryover amount, subject to  
3340 the rules in this section, but only to the extent that such pre-change losses, in the aggregate, that  
3341 relate to such ownership change, do not exceed the amount computed as follows: (A) the  
3342 applicable annual IRC section 382 limitation for a post-change year for such ownership change,  
3343 multiplied by 20; less (B) any such pre-change losses that were deductible in taxable years  
3344 beginning before January 1, 2015. Such amount shall be computed separately for each ownership  
3345 change.

3346 (v) In the case of a corporation operating on a cooperative basis under IRC section 1381  
3347 that is taxable under article 9-A or article 32 for its base year, the corporation's Federal  
3348 patronage and non-patronage source NOLs, and the corporation's New York State patronage and  
3349 non-patronage source NOLs, respectively, that were not deductible in taxable years beginning  
3350 before January 1, 2015, and that were available for carryover as of the last day of the  
3351 corporation's base year, are combined and included in the eligible Federal and New York State  
3352 NOL carryover amount, respectively, subject to the rules in this section.

3353 (c) (1) After applying all other rules and limitations in this section to compute the eligible  
3354 Federal and New York State NOL carryover amount, respectively, whichever of the two eligible  
3355 NOL carryover amounts (Federal or New York State) is the lesser amount is the corporation's  
3356 UNOL.

3357 (2) When subparagraph (v) of paragraph (2) of subdivision (b) of this section applies, for  
3358 purposes of applying the limitation under paragraph (1) of this subdivision to eligible Federal  
3359 and New York State NOL carryover amounts to compute a corporation's UNOL, a corporation's  
3360 eligible Federal NOL carryover amount arising from Federal NOLs subject to IRC section 382  
3361 limitations is used to apply such limitation to any corresponding eligible New York State NOL

3362 carryover amount, and a corporation's eligible Federal NOL carryover amount arising from  
3363 Federal NOLs not subject to IRC section 382 limitations is used to apply such limitation to any  
3364 corresponding eligible New York State NOL carryover amount. The corporation's UNOL is then  
3365 the sum of the following amounts: (i) the lesser of the eligible Federal or New York State NOL  
3366 carryover amounts arising from Federal NOLs subject to IRC section 382 limitations; and (ii) the  
3367 lesser of the eligible Federal or New York State NOL carryover amounts arising from Federal  
3368 NOLs not subject to IRC section 382 limitations.

3369 (d) In computing the UNOL of a corporation that was included in a combined report for  
3370 the base year, the UNOL of the base year combined group first is computed in accordance with  
3371 subdivisions (a) through (c) of this section, substituting combined group for corporation. Each  
3372 corporation included in the base year combined group then must compute its own UNOL for its  
3373 base year, by multiplying the base year combined group's UNOL by a percentage that represents  
3374 that base year combined group member's contribution of losses to the base year combined  
3375 group's UNOL. Such percentage is calculated by: (1) dividing the total New York State NOLs of  
3376 the corporation by the total New York State NOLs of all members of the combined group having  
3377 such New York State NOLs (to the extent such New York State NOLs are included in the  
3378 eligible New York State NOL carryover amount of the base year combined group in accordance  
3379 with this section); and (2) multiplying the result by one hundred.

3380 Section 3-8.3 – Appendix – Subpart 3-8 UNOL Examples.

3381 Section 3-8.4 PNOLC subtraction overview.

3382 A corporation that has a UNOL must convert the UNOL to a PNOLC subtraction pool  
3383 using the rules in section 3-8.6 of this Subpart. A taxpayer or combined group, in the case of a  
3384 combined report, is then allowed a PNOLC subtraction as computed in sections 3-8.7 and 3-8.8

3385 of this Subpart, applied before the NOL deduction, in the computation of its business income  
3386 base for tax years beginning on or after January 1, 2015. A taxpayer or combined group, in the  
3387 case of a combined group, that is allowed a PNOLC subtraction in a taxable year, must claim  
3388 that subtraction in that taxable year.

3389 Section 3-8.5 Corporations that are not allowed a PNOLC subtraction.

3390 The following corporations are not allowed a PNOLC subtraction:

3391 (a) A corporation that does not have a UNOL, including a corporation that was a RIC in  
3392 its base year;

3393 (b) A corporation that has or is a member of a combined group that has a base year BAP  
3394 of zero percent, whether or not such corporation has a UNOL;

3395 (c) A corporation that has or is a member of a base year combined group that has a base  
3396 year tax rate of zero percent, including a corporation that in its base year was a New York S  
3397 Corporation, as defined in section 208(1-A), whether or not such corporation has a UNOL;

3398 (d) A corporation that in its base year was not a member of a combined group subject to  
3399 tax under article 9-A or article 32 and that was not subject to tax itself under article 9-A or article  
3400 32, whether or not such corporation has a UNOL;

3401 Section 3-8.6 Computation of PNOLC subtraction pool.

3402 (a) The PNOLC subtraction pool for a taxpayer that was not a member of a combined  
3403 group in its base year is computed as follows:

3404 (1) Determine the tax value of the taxpayer's UNOL. The tax value of the UNOL is the  
3405 product of (i) the amount of the taxpayer's UNOL; (ii) the taxpayer's base year BAP; and (iii) the  
3406 taxpayer's base year tax rate.

3407 (2) Compute the PNOLC subtraction pool. Divide the tax value of the UNOL, as

3408 determined pursuant to paragraph (1) of this subdivision, by 6.5% (the conversion percentage).

3409 The result is the taxpayer's PNOLC subtraction pool.

3410 (b) The PNOLC subtraction pool for a corporation that was a member of a combined  
3411 group in its base year, whether or not the corporation was a taxpayer in its base year, is computed  
3412 as follows:

3413 (1) Determine the tax value of the corporation's UNOL. The tax value of the  
3414 corporation's UNOL is the product of (i) the amount of the corporation's UNOL; (ii) the  
3415 combined group's base year BAP; and (iii) the combined group's base year tax rate.

3416 (2) Compute the PNOLC subtraction pool. Divide the tax value of the corporation's  
3417 UNOL, as determined pursuant to paragraph (1) of this subdivision, by 6.5% (the conversion  
3418 percentage). The result is the corporation's PNOLC subtraction pool.

3419 Section 3-8.7 Computation of the PNOLC subtraction.

3420 (a) PNOLC subtraction available for use.

3421 (1) In the case of a taxpayer that is not a member of a combined group, its PNOLC  
3422 subtraction available for use in its first 2015 taxable year is equal to its tax period PNOLC  
3423 subtraction allotment (as described in subdivision (b) of this section) for such taxable year. The  
3424 amount of PNOLC subtraction available for use in any taxable year following the taxpayer's first  
3425 2015 taxable year is equal to its tax period PNOLC subtraction allotment for the taxable year  
3426 plus any unused PNOLC subtraction carryforward.

3427 (2) In the case of a combined group, the PNOLC subtraction available for use in its first  
3428 2015 taxable year is the sum of the tax period PNOLC subtraction allotments for such taxable  
3429 year of all members of the combined group. The amount of PNOLC subtraction available for  
3430 use by a combined group in any taxable year following its first 2015 taxable year is the sum of

3431 the tax period PNOLC subtraction allotments for each such taxable year of all members of the  
3432 combined group plus the sum of any unused PNOLC subtraction carryforwards of all members  
3433 of the combined group.

3434 (b) Tax period PNOLC subtraction allotment.

3435 (1) A corporation's tax period PNOLC subtraction allotment is the percentage of its  
3436 PNOLC subtraction pool that may be claimed in a taxable year as provided in paragraph (2). If a  
3437 corporation cannot utilize the entire tax period PNOLC subtraction allotment in a taxable year,  
3438 the unused portion for that taxable year is considered an unused PNOLC subtraction  
3439 carryforward.

3440 (2) Tax period PNOLC subtraction allotment methods.

3441 (i) One hundred percent allotment method for small business taxpayers. A small business  
3442 taxpayer's tax period PNOLC subtraction allotment for its first 2015 taxable year is equal to  
3443 100% of its PNOLC subtraction pool. A small business taxpayer has no tax period PNOLC  
3444 subtraction allotment after the first 2015 taxable year but any unused portion of its 2015 PNOLC  
3445 subtraction allotment is considered an unused PNOLC subtraction carryforward, eligible to be  
3446 utilized without any allotment limitations.

3447 (ii) Ten percent allotment method. For any corporation that is not a small business  
3448 taxpayer or electing the 50% method in subparagraph (iii), the tax period PNOLC subtraction  
3449 allotment is equal to 10% of its PNOLC subtraction pool in each of its first 10 taxable years after  
3450 the base year. There is no tax period PNOLC subtraction allotment after the tenth taxable year.  
3451 Unused portions of each allotment are considered PNOLC subtraction carryforwards. Taxpayers  
3452 with unused PNOLC subtraction carryforwards are eligible to use them in future periods without  
3453 regard to the 10% allotment limitation.



3454 (iii) Fifty percent allotment method.

3455 (a) In the case of a corporation electing the 50% allotment method, the tax period  
3456 PNOLC subtraction allotment in each of the corporation's first two taxable years after its base  
3457 year is equal to 50% of its PNOLC subtraction pool. There is no tax period PNOLC subtraction  
3458 allotment after the second taxable year. Unused portions of the subtraction allotments are  
3459 considered unused PNOLC subtraction carryforwards. This method may be used only for  
3460 taxable years beginning before January 1, 2017. However, PNOLC subtraction carryforwards  
3461 cannot be used to exceed 50% of the PNOLC subtraction pool in any tax period beginning prior  
3462 to January 1, 2017.

3463 (b) For the 50% allotment method to be valid and effective, a taxpayer, or designated  
3464 agent in the case of a combined report, must make the election to use the 50% allotment method  
3465 on an original, timely filed return for the first 2015 taxable year, determined with regard to  
3466 extensions of time for filing. Such election is binding on the taxpayer or, in the case of a  
3467 combined group, all members of the combined group, whether or not that corporation remains in  
3468 that combined group in subsequent taxable years. However, the election may be revoked by a  
3469 taxpayer or, in the case of a combined group, the designated agent of a combined group by  
3470 timely filing an amended return for each year the taxpayer or combined group used the 50%  
3471 allotment method. If the election is revoked, the revocation shall apply to the taxpayer or, in the  
3472 case of a combined report, all members of the combined group at the time the election is  
3473 revoked.

3474 (3) Combined groups. In the case of a combined group, each member of the group:

3475 (i) shall compute its own tax period PNOLC subtraction allotment using the allotment  
3476 method determined by its designated agent in the group's first 2015 taxable year if it was

3477 included in the combined report in the group's first 2015 taxable year; or

3478 (ii) compute its own tax period PNOLC subtraction allotment determined by the method  
3479 used in the member's first 2015 taxable year if the member was not included in a combined  
3480 report in that year. The combined group's tax period PNOLC subtraction allotment in a taxable  
3481 year is the sum of the tax period PNOLC subtraction allotments for all members of the combined  
3482 group for the taxable year.

3483 (c) PNOLC subtraction.

3484 (1) 100% allotment method for small business taxpayers and 10% allotment method.

3485 (i) For all corporations not electing the 50% allotment method, the amount of PNOLC  
3486 subtraction in a given taxable year is the lesser of:

3487 (a) the applicable PNOLC subtraction allotment plus available PNOLC subtraction  
3488 carryforwards (the PNOLC subtraction available for use); or

3489 (b) The amount required to reduce the tax on total business income prior to the deduction  
3490 of a PNOLC subtraction and net operating losses to the higher of the tax on the capital base or  
3491 the fixed dollar minimum tax (the maximum amount of PNOLC subtraction to be deducted).

3492 (ii) For corporations not electing the 50% allotment method, a PNOLC subtraction may  
3493 be claimed for no longer than 20 taxable years or the taxable year beginning on or after January  
3494 1, 2035 but before January 1, 2036, whichever comes first.

3495 (2) Fifty percent allotment method.

3496 (i) In the case of a corporation electing the 50% allotment method, the amount of PNOLC  
3497 subtraction in a taxable year (regardless of the number of taxable years the taxpayer has during  
3498 the period beginning on and after January 1, 2015 and before January 1, 2017) is the lesser of:

3499 (a) the applicable PNOLC subtraction allotment plus available PNOLC subtraction

3500 carryforwards (the PNOLC subtraction available for use); or

3501           (b) The amount required to reduce the tax on total business income prior to the deduction  
3502 of a PNOLC subtraction and net operating losses to the higher of the tax on the capital base or  
3503 the fixed dollar minimum tax (the maximum amount of PNOLC subtraction to be deducted).

3504           (ii) The amount computed in subparagraph (i) is further limited in each taxable year to  
3505 50% of the corporation's PNOLC subtraction pool.

3506           (iii) In the case of a corporation utilizing the 50% allotment method, a PNOLC  
3507 subtraction is allowed only in taxable years beginning before January 1, 2017. Any amount of a  
3508 corporation's unused PNOLC subtraction carryforward is forfeited and cannot be carried forward  
3509 and subtracted in any tax year beginning on or after January 1, 2017.

3510           (d) Maximum amount of the PNOLC subtraction to be deducted.

3511           (1) In the case of a taxpayer that is not a member of a combined group, the maximum  
3512 amount of the PNOLC subtraction to be deducted in a taxable year is computed as follows:

3513           (i) multiply the business income tax rate for the taxable year by the apportioned business  
3514 income before the PNOLC subtraction and the net operating loss deduction for the taxable year;

3515           (ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater  
3516 of the capital base tax or the fixed dollar minimum tax for the taxable year; and

3517           (iii) divide the result in subparagraph (ii) of this paragraph by the taxpayer's business  
3518 income tax rate for the taxable year.

3519           (2) In the case of a combined report, the maximum amount of PNOLC subtraction to be  
3520 deducted in a taxable year is computed as follows:

3521           (i) multiply the business income tax rate for the taxable year by the combined  
3522 apportioned business income before the PNOLC subtraction and the net operating loss deduction

3523 for the taxable year;

3524 (ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater  
3525 of the combined capital base tax or the fixed dollar minimum tax attributable to the designated  
3526 agent for the taxable year; and

3527 (iii) divide the result in subparagraph (ii) of this paragraph by the combined group's  
3528 business income tax rate for the taxable year.

3529 Section 3-8.8 Impact of combined group changes on the PNOLC subtraction.

3530 (a) If a taxpayer that was not a member of a combined group in any taxable year  
3531 beginning on or after January 1, 2015 subsequently joins a combined group in a later taxable  
3532 year, the taxpayer's PNOLC subtraction allotment and unused PNOLC subtraction carryforward  
3533 are added to the combined group's PNOLC subtraction allotment and unused PNOLC  
3534 subtraction carryforward respectively, subject to the rules in section 210(1)(a)(viii)(B) and this  
3535 Subpart.

3536 (b) If a corporation is a member of a combined group for any taxable year beginning on  
3537 or after January 1, 2015 and subsequently leaves that group in a later taxable year, the outgoing  
3538 member of the combined group takes its own PNOLC subtraction allotment with it to use in  
3539 future taxable years. In addition, such member also takes its own share of the combined group's  
3540 combined unused PNOLC subtraction carryforward, which shall be based upon its share of the  
3541 combined group's PNOLC subtraction available for use in the last year it was included in the  
3542 combined group. If the departing corporation joins another combined group, its PNOLC  
3543 subtraction allotment and unused PNOLC subtraction carryforward are added to the combined  
3544 group's PNOLC subtraction allotment and unused PNOLC subtraction carryforward,  
3545 respectively, subject to the rules in section 210(1)(a)(viii)(B) and this Subpart. If such

3546 corporation does not join another combined group, it is allowed its PNOLC subtraction allotment  
3547 and unused PNOLC subtraction carryforward on a separate basis, subject to the rules in section  
3548 210(1)(a)(viii)(B) and this Subpart.

3549 Section 3-8.9 – Appendix – Subpart 3-8 PNOLC Examples.

3550 Section 3-8.10 Impact of certain corporate acquisitions on the PNOLC subtraction.

3551 In a transaction to which IRC section 381(a) applies, the acquiring corporation shall  
3552 succeed to the balance of the PNOLC subtraction allotments and unused PNOLC subtraction  
3553 carryforward of the distributor or transferor corporation, subject to the same restrictions and  
3554 limitations on the use of that PNOLC subtraction allotments and unused PNOLC subtraction  
3555 carryforward to which the distributor or transferor corporation was subject.

3556 Section 3-8.11 Record-keeping.

3557 A taxpayer or combined group with a PNOLC subtraction pool must attach to its report,  
3558 Form CT-3.3 and a detailed schedule showing the computation of the UNOL, amount of unused  
3559 PNOLC subtraction allotment carryforward and, in the case of a combined group, each  
3560 member's UNOL and amount of unused PNOLC subtraction allotment carryforward, together  
3561 with all material and pertinent facts related to the taxpayer's or combined group's, if applicable,  
3562 claim. Such records shall be retained during the period in which the statute of limitations for a  
3563 change to the PNOLC subtraction may be made by the taxpayer or the department.

3564 Section 3-8.12 Subsequent changes.

3565 (a) Any change in the amount of a corporation's UNOL must be made by the taxpayer or  
3566 the Department within the statute of limitations referenced in section 1083(a), determined with  
3567 regard to an extension of such time period agreed to pursuant to section 1083(c)(2) and the  
3568 extension of such time period allowed by section 1083(c)(12), for the report on which a PNOLC

3569 subtraction as computed in section 3-8.7 of this Subpart is first claimed by the taxpayer. Any  
3570 Federal changes that are finalized after the statute of limitations described in the preceding  
3571 sentence has expired will not be considered in the computation of the UNOL.

3572 (b) Any change in the base year tax rate or base year BAP must be made within the  
3573 statute of limitations referenced in section 1083(a) for the base year, determined with regard to  
3574 an extension of such time period agreed to pursuant to section 1083(c)(2) and the extension of  
3575 such time period allowed by section 1083(c)(12). Any Federal changes that are finalized after the  
3576 statute of limitations described in the preceding sentence has expired will not be considered in  
3577 the computation of the base year tax rate or base year BAP.

3578 (c) Except as otherwise provided in this section, if it is determined by either the  
3579 department or the taxpayer that an error was made in the calculation or application of the UNOL  
3580 or the PNOLC subtraction in a tax year or tax years for which the statute of limitations  
3581 referenced in section 1083(a), as determined with regard to an extension of such time period  
3582 agreed to pursuant to section 1083(c)(2) and the extension of such time allowed by section  
3583 1083(c)(12), has expired, the taxpayer and the department shall be bound by the position taken  
3584 by the taxpayer on the report or reports for such year or years as they pertain to the calculation of  
3585 the UNOL and the PNOLC subtraction, and the PNOLC subtraction and the unused PNOLC  
3586 subtraction carryforward shall be corrected for the taxable years for which the statute of  
3587 limitations is still open and for future taxable years. In the first year in which such correction  
3588 may be made, the amount of recomputed PNOLC subtraction pool shall be reduced by the  
3589 amount of PNOLC subtraction that was used erroneously in the tax year or tax years for which  
3590 the statute of limitations has expired. A new PNOLC subtraction allotment must be computed  
3591 for the remaining years of the corporation's allotment method using the re-computed PNOLC

3592 subtraction pool, and any unused PNOLC subtraction carryforward from the tax year or tax years  
3593 for which the statute of limitations has expired is disallowed.

3594 (d) Examples.

3595 Example 1: Taxpayer A files its 2014 report using a BAP of 15%. However, on its  
3596 2015 report, it computes its PNOLC subtraction using a base year BAP of  
3597 100%. Taxpayer A had a UNOL of \$1,500,000 and a base year tax rate of  
3598 7.1%. It computed a PNOLC subtraction pool of \$1,638, 461 and used the  
3599 10% allotment method in the determination of its PNOLC subtraction.

3600

3601 In 2015, Taxpayer A had a PNOLC subtraction of \$100,000 and claimed a  
3602 PNOLC subtraction carryforward of \$63,846 (10% allotment of \$163,846  
3603 - \$100,000).

3604

3605 The department does not audit Taxpayer A's 2014 and 2015 reports and  
3606 does not discover the discrepancy in the 2014 reported BAP and the base  
3607 year BAP used in the PNOLC subtraction pool computation until it audits  
3608 Taxpayer A's 2016 report in 2019, after the statute of limitations for the  
3609 2014 and 2015 tax years has expired. Taxpayer A is bound by the BAP it  
3610 used on its 2014 report when computing the PNOLC subtraction pool.

3611 Thus, as part of the audit of the 2016 report, the department properly  
3612 recomputes Taxpayer A's PNOLC subtraction pool using the 15% BAP  
3613 Taxpayer claimed on its 2014 report. Accordingly, Taxpayer A's PNOLC  
3614 subtraction pool should have been \$245,769 ( $\$1,500,000 \times .15 \times$

3615 .071/.065). The re-computed PNOLC subtraction pool is reduced by the  
3616 \$100,000 used in 2015 to determine the remaining PNOLC subtraction  
3617 pool of \$145,769. Since Taxpayer A used the 10% allotment  
3618 method and there are 9 remaining years of allotments to determine, the  
3619 remaining PNOLC subtraction pool is divided by 9. The PNOLC  
3620 subtraction allotment for 2016 and the next 8 tax years is \$16,197. The  
3621 PNOLC subtraction carryforward of \$63,846 reported on its 2015 return is  
3622 disallowed. As a result, Taxpayer A has a PNOLC subtraction available  
3623 for use of \$16,197 in the 2016 taxable year.

3624 Example 2: On its 2014 report, Taxpayer B claims to be a qualified manufacturer and  
3625 used a zero percent tax rate for its entire net income base. However, on its  
3626 2015 report, it computed a PNOLC subtraction using a base year tax rate  
3627 of 7.1% and the 10% allotment method. The department does not audit  
3628 Taxpayer B's 2014 and 2015 reports and does not discover the  
3629 discrepancy in the 2014 reported tax rate and the base year tax rate used in  
3630 the PNOLC subtraction pool computation until it audits Taxpayer B's  
3631 2016 report in 2019, after the statute of limitations for the 2014 and 2015  
3632 tax years has expired. Taxpayer B is bound by the tax rate it used on its  
3633 2014 report and, as part of the 2016 audit, the department properly re-  
3634 computes a PNOLC subtraction pool of \$0 and denies the PNOLC  
3635 subtraction in 2016. Taxpayer B is not entitled to use any PNOLC  
3636 subtraction in future years.

3637 Example 3: Same facts as Example 2, except that Taxpayer B is a small business



3638 taxpayer as defined in section 3-8.1(e)(1) of this Subpart and Taxpayer B  
3639 used 100% of its PNOLC subtraction pool on its 2015 report. Because the  
3640 statute of limitations for the 2015 tax year has expired, the department is  
3641 bound by the taxpayer's actions in 2015 and cannot recoup the PNOLC  
3642 subtraction the taxpayer used in 2015.

3643

## 3644 SUBPART 3-9

3645 NET OPERATING LOSS AND NET OPERATING LOSS

3646 DEDUCTIONS FOR TAXABLE YEARS

3647 BEGINNING ON OR AFTER JANUARY 1, 2015

3648 Sec.

3649 3-9.1 Definitions

3650 3-9.2 Net operating loss deduction

3651 3-9.3 Application of net operating losses (NOLs)

3652 3-9.4 Overpayments and underpayments resulting from NOL carrybacks

3653 3-9.5 Income from discharge of indebtedness

3654 3-9.6 Carryforwards in certain corporate reorganizations and acquisitions

3655 3-9.7 Appendix – Subpart 3-9 NOL Examples.

3656

3657 Section 3-9.1 Definitions. (Tax Law, sections 210(1)(a)(ix) and 210-C(4)(d))

3658 (a)(1) “Net operating loss” (NOL) means the amount of a total business income in a

3659 particular taxable year multiplied by the business apportionment factor for that taxable year,

3660 when such total business income is less than zero. The amount of NOL cannot include any New

3661 York investment capital losses, as defined in section 3-7.1 of this Part.

3662 (2) In the case of a combined report, the NOL is the combined business loss incurred in a  
3663 particular taxable year multiplied by the combined business apportionment factor for that taxable  
3664 year. The amount of combined business loss cannot include any New York investment capital  
3665 losses.

3666 (3) In the case of an alien corporation, the NOL is calculated using effectively connected  
3667 income as a starting point for the business income base.

3668 (b) A “separate return year” means a taxable year of a corporation for which it files a  
3669 separate return or for which it filed as a member of a different combined group.

3670 Section 3-9.2 Net operating loss deduction. (Tax Law, sections 210 and 210-C)

3671 (a) (1) A corporation that reports as part of a consolidated group for Federal income tax  
3672 purposes but on a separate basis for purposes of article 9-A computes its NOL and its net  
3673 operating loss deduction (NOLD) as if it were filing on a separate basis for Federal income tax  
3674 purposes.

3675 (2) If the combined group is different than the consolidated group for Federal income tax  
3676 purposes, then the combined group computes its NOL and NOLD as if it were filing a  
3677 consolidated return for Federal income tax purposes with the combined group members.

3678 (b) The NOLD for taxable years beginning on or after January 1, 2015 is not limited to  
3679 the Federal NOLD amount. However, such deduction is determined using the same limitations  
3680 that would apply for Federal income tax purposes under the IRC and the related regulations  
3681 regarding the NOLs of the acquired or merged loss companies.

3682 (c) The NOLD that is required to be utilized in a taxable year is the amount that reduces  
3683 the tax on apportioned total business income after the prior net operating loss conversion  
3684 (PNOLC) subtraction and prior to the NOLD to the higher of the tax on the capital base or the

3685 fixed dollar minimum tax. In the case of a combined report, the NOLD that is required to be  
3686 utilized in a taxable year is the amount that reduces the tax on apportioned total combined  
3687 business income after the PNOLC subtraction and prior to the NOLD to the higher of the tax on  
3688 the combined capital base or the fixed dollar minimum tax of the designated agent.

3689 (d) (1) A corporation is allowed an NOLD in computing its business income base or, in  
3690 the case of a combined report, in computing the combined group's business income base.

3691 (2) The NOLD is the amount of NOL from one or more taxable years that is carried  
3692 forward or carried back to a particular taxable year, subject to the limitations in this Subpart. In  
3693 the case of a combined report, the NOLD is the aggregate amount of the combined group  
3694 members' NOL from one or more taxable years that is carried forward or carried back to a  
3695 particular taxable year, subject to the limitations in this Subpart.

3696 (3) When both a PNOLC subtraction and an NOLD are being claimed for a particular  
3697 taxable year, the PNOLC subtraction must be applied against the business income base before  
3698 the NOLD.

3699 (e) A corporation will not be allowed an NOLD for any NOL sustained in any of the  
3700 taxable years listed in paragraph (1), (2) or (3) of this subdivision:

3701 (1) a New York S year. The New York S year must, however, be treated as a taxable year  
3702 for purposes of determining the number of taxable years to which an NOL may be carried  
3703 forward or back.

3704 (2) any taxable year beginning prior to January 1, 2015; or

3705 (3) any taxable year in which the corporation was not subject to tax under Article 9-A or  
3706 not a member of a combined group subject to tax under article 9-A.

3707 Section 3-9.3 Application of NOLs. (Tax Law, sections 210(1) and 210-C)

3708           (a) Except as otherwise provided in this Subpart, an NOL must be carried back three  
3709 years preceding the taxable year of the loss (the “loss year”). However, no NOL can be carried  
3710 back to a taxable year beginning before January 1, 2015. The NOL is first carried to the earliest  
3711 of the three taxable years preceding the loss year. If the NOL is not entirely used to offset  
3712 income in that year, the remainder is carried to the second taxable year preceding the loss year,  
3713 and any remaining amount is carried to the taxable year immediately preceding the loss year.  
3714 Any unused amount of NOL then remaining may be carried forward for as many as twenty  
3715 taxable years following the loss year. NOLs carried forward are carried first to the taxable year  
3716 immediately following the loss year and then to the next immediately succeeding taxable year or  
3717 years until the NOL is used up or to the twentieth taxable year following the loss year, whichever  
3718 comes first.

3719           (b) When there are two or more NOLs, or portions thereof, to be carried back or carried  
3720 forward and deducted in one particular taxable year, the earliest NOL incurred must be applied  
3721 first.

3722           (c) An NOL from a separate return year of a corporation that is filing as a new member of  
3723 a combined group may not be carried back to offset income of that combined group in a taxable  
3724 year in which the corporation was not a member of the combined group.

3725           (d) In the case of a combined report, the portion of the combined NOL attributable to  
3726 any member of the group that files a separate report, or to a member of a different group that  
3727 files a combined report for a preceding or succeeding taxable year will be an amount bearing the  
3728 same relation to the combined loss as the NOL of such corporation bears to the total NOLs of all  
3729 members of the group having such losses, to the extent that such losses are taken into account in  
3730 computing the combined NOL. The NOL attributable to a member filing a separate report, or as

3731 a member of a different group filing a combined return, is to be calculated by applying the  
3732 business apportionment factor of the combined group to that member's proportional share of the  
3733 group's business loss. A corporation's share of the combined group's NOL may be carried back  
3734 to a separate return year of such corporation to offset only that corporation's business income in  
3735 such year. A NOL of a combined group may not be carried back to offset the income of a  
3736 corporation that was not a member of the combined group when the loss was incurred.

3737 (e) A corporation may elect to waive the entire carry back period with respect to an NOL  
3738 by making an election on the corporation's original, timely filed report (determined with regard  
3739 to extensions) for the taxable year of the NOL for which the election is to be in effect. Once  
3740 such an election is made for a taxable year, it shall be irrevocable for that taxable year. In the  
3741 case of a combined report, the election is made by the designated agent and applies to all  
3742 members of the combined group. Therefore, a member of a combined group that has elected to  
3743 waive the entire carry back period may not carry back its share of the combined group's NOL to  
3744 a separate return year. A separate election must be made for each loss year. Failure to  
3745 affirmatively waive the entire carryback period in the manner prescribed by the commissioner  
3746 means that such NOL must be carried back.

3747 (f) If a corporation calculates a higher tax liability for a taxable year under the capital  
3748 base tax or the fixed dollar minimum tax than under the business income base, it does not need to  
3749 utilize an NOLD. However, the year will be treated as a taxable year for purposes of  
3750 determining the number of taxable years to which an NOL may be carried forward or back.

3751 Section 3-9.4 Overpayments and underpayments resulting from NOL carrybacks.

3752 (a) A corporation claiming a credit or refund of franchise tax paid under article 9-A for a  
3753 taxable year to which an NOL is carried back as a deduction must file an amended return for that

3754 taxable year within the statute of limitations on credit or refund pursuant to section 1087.

3755 (b) For those instances in which an NOL is carried back and the amount of NOL is  
3756 subsequently changed:

3757 (1) The Department may assess additional tax at any time that a deficiency for the taxable  
3758 year of the loss can be assessed in accordance with section 1083(c)(4). This applies whether or  
3759 not the NOL was affected by a change in business income or change to the business  
3760 apportionment factor or both.

3761 (2) The Department may refund an overpayment at any time that a refund for the taxable  
3762 year of the loss can be claimed in accordance with section 1087. This applies whether or not the  
3763 NOL was affected by a change in business income or change to the business apportionment  
3764 factor or both.

3765 (3) The Department will apply the rules in paragraphs (1) and (2) above to all years  
3766 affected by the revised NOL amount.

3767 Section 3-9.5 Income from discharge of indebtedness.

3768 In a year in which the corporation has income from the discharge of indebtedness that  
3769 was excluded from Federal taxable income, the corporation must reduce any New York NOLs in  
3770 the same manner as provided under IRC section 108(b) and related regulations, provided  
3771 reductions to federal tax attributes that are not applicable to New York State are excluded. The  
3772 amount by which the New York NOLs must be reduced is computed by multiplying the New  
3773 York business apportionment factor for the year of discharge by the amount of federal NOL that  
3774 is required to be reduced.

3775 Section 3-9.6 Carryforwards in certain corporate reorganizations and acquisitions.

3776 (a) For purposes of this section, a “separate return limitation year” (SRLY) means any

3777 separate return year of a corporation. The carryforward of any NOL incurred by a corporation  
3778 for any taxable year beginning on or after January 1, 2015 is limited after a reorganization or  
3779 merger by the same principles for the limitation of the carryforward of an NOL for Federal tax  
3780 purposes as required under the provisions of IRC sections 381 through 384 and related  
3781 regulations and any other section of the IRC or related regulations. NOLs arising in taxable years  
3782 beginning on or after January 1, 2015 and carried forward to a combined report from a SRLY  
3783 may be used to reduce the combined group's apportioned business income only to the extent of  
3784 the apportioned business income of the combined group attributable to the acquired loss  
3785 corporation that carried forward the loss from the SRLY (SRLY limitation).

3786 (b) NOL carryforward that is subject to limitation under IRC section 382 and related  
3787 provisions. If the corporation's federal NOL carryforward is limited in a particular year under  
3788 IRC section 382, the amount of NOL carryforward allowed for New York State purposes is  
3789 similarly limited. The IRC section 382 limitation adjusted for New York is the product of the  
3790 annual IRC section 382 limitation and the BAF for the current tax year. In addition, if the  
3791 NOLD of the combined group is less than such annual limitation in a given tax year, the annual  
3792 IRC section 382 limitation adjusted for New York in the next taxable year shall be increased by  
3793 such excess.

3794 (c) The amount of NOL available for deduction from an acquired corporation will be  
3795 limited to the lesser of:

- 3796 (1) the IRC section 382 limitation adjusted for New York State purposes; or  
3797 (2) the SRLY limitation.

3798 (d) In the event the NOLs described in subdivision (a) or (b) of this section are from the  
3799 same loss year as losses of the acquiring corporation, the amount of SRLY limited carryforward

3800 under subdivision (a) or the IRC section 382 limited carryforward under subdivision (b) shall be  
3801 applied before applying any other NOL against the remaining business income of the combined  
3802 group.

3803 Section 3-9.7 – Appendix – Subpart 3-9 NOL Examples.