



MULTISTATE INCOME/FRANCHISE TAX

## New York formally proposes corporate income tax regulations

### Tax Alert

## Overview

On August 9, the New York State Department of Taxation and Finance (“Department”) formally proposed regulations (“[Proposed Regulations](#)”) implementing the sweeping reform of New York’s corporate tax framework enacted in 2014, with related amendments enacted in 2015 and 2016 (“New York Tax Reform”). The Proposed Regulations, which were submitted for publication in the [August 9, 2023 edition of the State Register](#), are intended to provide detailed guidance relating to New York Tax Reform, updating the regulations to conform with the new law.

As part of the required State Administrative Procedure Act documentation, the Department provided a [Regulatory Impact Statement](#) (“RIS”) containing its response to certain taxpayer comments received addressing certain draft regulations which preceded the Proposed Regulations. The Department commented in the RIS that the “2014 Tax Reform legislation represents the most extensive restructuring of New York State’s corporate tax framework since the 1940s” and that as part of developing the Proposed Regulations, more than 40 drafts of various portions of the Proposed Regulations have been posted for review by taxpayers.

Among the updates in the Proposed Regulations, as compared to the most recent version of draft regulations issued by the Department in the summer of 2022, are revisions to apportionment provisions sourcing receipts from services provided to passive investment customers, and sourcing receipts from the sale of goodwill, as well as changes to the billing address safe harbor and the process for requesting alternative apportionment. Taxpayers may provide comments on the Proposed Regulations or before October 9th. This Tax Alert takes a closer look at some of the Proposed Regulations.

## Highlights

### Passive investment customer

The Proposed Regulations revise previously issued draft regulations addressing

receipts received for performing services to a passive investment customer, to generally provide for sourcing based on investor location.

A passive investment customer is defined as a customer that is an entity, such as a company or corporation (other than a publicly traded corporation or a regulated investment company), limited partnership, general partnership, limited liability company, limited liability partnership, or trust, that pools capital from passive investors for the purpose of trading or making investments in stocks, bonds, securities, commodities, loans, or other financial assets, but that does not otherwise conduct a trade or business.

The benefit of management, distribution, and administration services provided to a passive investment customer is presumed to be received at the location of the investors in such passive investment customer unless the investor is holding the interest in the passive investment customer for a beneficial owner, in which case the benefit of such services is presumed to be received at the location of the beneficial owner. The location of individual investors or beneficial owners is their billing address while the location for other customers is the investor or beneficial owner's principal place of business, and where that is not known, the billing address. If location information cannot be determined, the benefit of management, distribution, and administration services provided to a passive investment customer is presumed to be received at the location where the contract for such services is managed by the passive investment customer.

#### **Receipts from unusual events**

The Proposed Regulations eliminated the rule in effect prior to New York Tax Reform excluding receipts not earned in the regular course of business and receipts from the sale of capital assets from the receipts factor. The Department rejected taxpayer arguments that the pre-New York Tax Reform unusual events policy should continue, as discussed in the RIS, and indicated that if the inclusion of certain receipts distorts the business allocation factor or is not appropriate, either the Department or the taxpayer may pursue a discretionary adjustment to the factor.

#### **Net gains from the sale of intangible property**

The Proposed Regulations state that with respect to the net gains (not less than zero) from the sale of intangible property not otherwise addressed in the apportionment statute, the benefit of such gain is presumed to be received at the location where the value of the intangible was accumulated. The Proposed Regulations add that the location where the value of goodwill is accumulated is determined using a three-year average of the business apportionment factor or other percentage used to apportion or allocate income to New York of the entity that is sold, unless the facts and circumstances indicate another period of time is a better measure of where the value is accumulated.

#### **Receipts from cryptocurrency**

The Proposed Regulations no longer address cryptocurrency or other similar asset digitally delivered, whereas previous draft regulations treated cryptocurrency as a digital product and indicated that net gains should be sourced in accordance with the applicable hierarchy of methods set forth in New York Tax Law.

#### **Request to the Department to vary from the business apportionment factor**

Consistent with prior draft regulations, under the Proposed Regulations, a request to vary the apportionment factor must be submitted in writing and

must be submitted before any report to which it relates. A taxpayer must compute its tax using the apportionment factor determined pursuant to the apportionment statute on its original report for a taxable year unless the commissioner has approved its request. The Proposed Regulations add that a taxpayer may file an amended report using its proposed apportionment percentage if the commissioner did not respond to the taxpayer's written request for an adjustment to the business apportionment factor before the taxpayer filed its original report. In addition, a taxpayer may request reconsideration of a denial of a proposed discretionary adjustment on audit.

### **Billing address safe harbor**

In response to taxpayer comments noted in the RIS that using the applicable statutory hierarchies to source receipts from digital products/services and other business receipts/services is extremely time consuming and costly, the Proposed Regulations include a billing address safe harbor. This rule provides that if a corporation has more than 250 business customers purchasing substantially similar digital products/services or other business receipts/services as purchased by the particular customer that would be sourced under those rules and no more than 5% of receipts from such digital products/ services or other business receipts/services are from that particular customer, then the primary use location of the digital product/ service or benefit of the receipt/service is presumed to be at the customer's billing address. The prior draft regulation based the rule on a corporation having more than 10,000 business customers.

### **Considerations**

As noted above, the Department is accepting comments on the Proposed Regulations through October 9th. Under the State Administrative Procedure Act (SAPA) process, after publication in the State Register and receipt of public comment, an agency may either adopt, revise or withdraw the proposal. If adopted, the agency must file the full text of the rule with the Department of State and submit a "Notice of Adoption" for publication in the Register, to indicate that the proposal has been adopted. If the agency wishes to make substantial changes to the proposed rule, the agency must submit a "Notice of Revised Rule Making" and accept public comment for at least another 45 days.

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