



MULTISTATE INCOME/FRANCHISE TAX

## New York releases “final update” to draft corporate apportionment regulations – impact to investment managers

### Tax Alert

### Overview

On July 1, 2022, the New York State Department of Taxation and Finance (“Department”) released a “final update” to its draft Article 9-A Business Corporation Franchise Tax Regulations (“Draft Regulations”) addressing apportionment as part of its comprehensive effort to update the regulations to reflect New York’s tax reform generally effective for tax years beginning in 2015. Among the many updates in the [July 1, 2022 release](#), the Department made revisions to sourcing receipts from services provided to “passive investment customers,” which may have a significant impact on certain corporate investment managers.

This Tax Alert summarizes the apportionment rules for sourcing receipts from services provided to passive investment customers in the Draft Regulations and provides taxpayer considerations.

### Draft Regulations addressing services to passive investment customers

Under New York’s Tax Reform legislation enacted in 2014 and generally effective for tax years beginning on or after January 1, 2015, New York changed its apportionment methodology for sourcing receipts from services generally from a place of performance approach to a market-based approach. Under New York Tax Law section 210-A.10, “receipts from other services and other business receipts” are sourced to New York based on a hierarchy of methods where the first level requires that receipts are sourced to the location where the benefit is received by the customer.

The Draft Regulations provide details and examples further interpreting the statute, including carving out special sourcing rules for certain types of services (such as services related to real property or tangible personal property), or, as relevant here, based on the type of customer.

Most notably for investment managers, the Draft Regulations include provisions addressing receipts received for performing services to a “passive investment customer.” A “passive investment customer” is defined in the July 1, 2022 release of the Draft Regulations as “a customer that is an unincorporated entity, such as a 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.” Draft Regulation section 4-4.1(b)(3).

Receipts from services provided to passive investment customers generally are sourced to the location where the passive investment customer manages the contract. Draft Regulation section 4-4.4(c). However, if a separate statutory provision applies, such as the provision for sourcing receipts from certain services provided to a regulated investment company (under New York Tax Law section 210-A.5(d)) or the provisions for sourcing receipts from broker or dealer activities (under New York Tax Law section 210-A.5(b)), then sourcing is determined based on the applicable statutory provision.

The location where a contract is managed by the customer is defined as “the primary location at which an employee or other representative of a customer serves as the person with responsibility for monitoring or managing the day-to-day execution of the contract of sale with the corporation.” Draft Regulation section 4-4.1(e).

The Department indicated that the updates to the rules for sourcing receipts from services provided to passive investment customers are “based on rules adopted by other states and the Multistate Tax Commission.”

## Considerations

The Draft Regulations provide guidance on, among other things, the Department’s view as to how receipts from services provided to passive investment customers should be sourced. If adopted, this guidance may have a significant impact on certain corporate investment managers.

The Draft Regulations do not specify whether they will apply retroactively to prior tax periods or apply prospectively. Given that the Draft Regulations are addressing a statute effective January 1, 2015, taxpayers should be aware that they may be adopted with retroactive effect.

The Department is accepting comments on the Draft Regulations addressing apportionment through August 26, 2022, after which time the Department intends to begin the State Administrative Procedure Act (SAPA) process to formally propose and adopt these regulations.

## Get in touch

[Don Roveto](#)

[Jack Trachtenberg](#)

[Dennis O’Toole](#)

[Todd Hyman](#)

[Greg Bergmann](#)

[Roburt Waldow](#)

[Joshua Ridiker](#)

[Mary Jo Brady](#)

[Alyssa Keim](#)



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30 Rockefeller Plaza  
New York, NY 10112-0015  
United States

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