



# This Week in State Tax (TWIST)

August 14, 2023



To listen to the podcast please [click here](#)

## New York: Corporate Franchise Tax Regulations Officially Proposed

On August 9, 2023, the New York Department of Taxation and Finance (Department) published the comprehensive Article 9-A corporate franchise tax regulations in the New York State Register. In doing so, the Department has started the process under the State Administrative Procedure Act (SAPA) of formally adopting these regulations, which have been in draft form for over a year. The 417 pages of regulatory text can be accessed [here](#). These regulations implement New York's substantially reformed corporate and bank tax laws that have generally been in effect since tax years beginning on or after January 1, 2015 (the enactment of a zero percent tax rate on entire net income for Qualified New York Manufacturers was effective for the 2014 tax year). It is likely that almost every New York business taxpayer will be affected by some aspect of the revised regulations. Most of the significant changes are in Parts 1 through 9 of Subchapter A of Chapter I of Title 20 of the Codes, Rules and Regulations of the State of New York, which will be repealed and replaced with entirely new language.

The expectation is that the Department will likely apply these regulations back to the inception of New York State corporate tax reform. Below is a summary of what is covered in Parts 1 through 9 of the proposed regulations.

Part 1 addresses which corporations are subject to New York tax and incorporates the state's post-reform economic nexus standard whereby a corporation or combined group will be subject to New York tax if it derives receipts from activity in New York that equals or exceeds \$1 million (adjusted periodically for inflation and set at \$1.138 million for the 2022 tax year).

This part also provides examples of activities that are, and are not, protected under P.L. 86-272. These examples cover situations where a foreign corporation will be subject to New York tax, and the regulations incorporate aspects of the Multistate Tax Commission's revised Statement on P.L. 86-272. Notably, a business that provides post-sales assistance to customers via email or chat will not be protected under P.L. 86-272 because these activities are not entirely ancillary to solicitation of orders for sales of tangible personal property. Other activities that exceed the scope of P.L. 86-272 protection include a corporation receiving branded credit card applications over its website and allowing prospective employees to submit an electronic application over a website for non-sales positions. The regulations also incorporate the MTC's guidance on the use of cookies by Internet sellers. Cookies placed on customer devices to gather information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer customers are not protected activities under P.L. 86-272.

Part 2 addresses accounting periods and methods and is largely unchanged from its predecessor regulations.

Part 3 provides guidelines for the computation of tax on the business income base, capital base and the fixed dollar minimum tax. This part is substantially revised and, in addition to capturing the New York tax reform related changes to computing the business income tax base, the regulation also addresses certain federal tax reform items, such as 163(j). Post-reform, New York NOLs are computed on an apportioned basis and are no longer limited to the allowed federal NOL amount. The regulation addresses the post reform NOL computation, and provides guidance on computing the prior net operating loss conversion subtraction used to convert pre-reform NOLs into a new subtraction to be used in post-reform years.

Part 4: New York's tax reform bills significantly overhauled the state's apportionment rules, including generally adopting customer-based sourcing rules for service receipts in lieu of sourcing service receipts to the location where services were performed. Under the sourcing rules, there is

a hierarchy that must be applied to determine a customer's location. The first step in the hierarchy is to look to the location where the customer receives the benefit of the service.

While the general rule sources service receipts to customer location, specific statutory provisions address various types of service receipts. In fact, per the Department's summary of the changes to the Article 9-A regulations, post-reform, there are over 50 categories of receipts and income addressed in the statutory apportionment provisions. The regulation does not address each and every category but, per the Department, provides guidance "where needed." For each category of receipts addressed in the regulation, there are numerous illustrative examples.

The statute was silent with respect to sourcing asset management fees. Of interest to those in the asset management industry, the regulation provides a hierarchy to determine where the benefit of a service is received if services are provided to a "passive investment customer" as opposed to an individual customer or a business customer. 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. If the investor is holding the interest in the passive investment customer for a beneficial owner, the benefit of the services is presumed to be received at the beneficial owner's location. The location of an individual investor or beneficial owner is its billing address; the location of a non-individual is its principal place of business. Management, distribution and administration services provided to a passive investment customer are apportioned to New York in proportion to the average value of the interests in the passive investment customer held by the passive investment customer's investors and beneficial owners located in New York. To calculate the average value of the interests in, taxpayers are instructed to add the percentage of the value of the interests held by investors and beneficial owners located in New York at the beginning of the taxable year to the percentage of the value of the interests held by investors and beneficial owners located in New York at the end of the taxable year and divide by two. If a corporation cannot determine the location under the general rule, 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.

Another point to note is that the regulation recognizes the increasing use of intermediaries to facilitate sales and adopts specific rules for "intermediary transactions." An intermediary transaction means a transaction where the business customer derives value from a product or service (digital or otherwise) at the location of the consumer rather than the location of the business customer itself. Various examples illustrate what, in the Department's view, is and is not considered an intermediary transaction.

Part 5 addresses tax credits and makes minimal changes to its predecessor regulations.

Part 6 provides guidance on New York's reporting requirements. Importantly, Subpart 6-2 implements the tax change to mandatory unitary combined reporting by defining terms, providing explicit guidance, and presenting illustrative examples of the application of the new combined reporting rules in specific circumstances.

Part 7 relates to the payment of tax and estimated tax, as well as collection. It is largely unchanged.

Part 8 is dedicated to the computation of the Metropolitan Transportation Business Tax Surcharge and Part 9 provides definitions of terms and rules pertaining to the following special entities: qualified New York manufacturers, corporate partners, New York S corporations, real estate investment trusts and regulated investment companies, and domestic international sales corporations.

**Next Steps and Contacts:** Although comments were accepted on the regulations while in draft form, SAPA procedures require that the proposed regulations will be subject to a 60-day public comment period. This period will end October 10, 2023. Please contact [Russ Levitt](#) or [Aaron Balken](#) with questions.

[kpmg.com/socialmedia](https://kpmg.com/socialmedia)



© 2023 KPMG LLP, a Delaware limited liability partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. USCS000670-1H

The following information is not intended to be "written advice concerning one or more federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.