January 22, 2016

Subpart 6-2

Combined Reports

§ 1. Section 6-2.1 General. (Tax Law, [Section 211(4)] Section 210-C)

(a) [Every corporation is a separate taxable entity and shall file its own report. However, a combined report covering a group of corporations engaged in a unitary business is required in certain circumstances.] A combined report covering any taxpayer and another corporation or corporations is required where:

(1) the capital stock requirement (as described in section 6-2.2 of this Subpart) is met; and

(2) the [substantial intercorporate transactions] unitary business requirement set forth in section 6-2.3 of this Subpart has been met.

(b) [Where the capital stock requirement is met and substantial inter- corporate transactions are absent, a combined report covering corporations engaged in a unitary business may be required or permitted if the Commissioner deems such a report necessary, because of inter-company transactions or some agreement, understanding, arrangement, or trans- action, in order to properly reflect the tax liability under article 9-A of the Tax Law.] A group of commonly owned or controlled corporations may elect to file a combined report when the capital stock requirement is met. This election is referred to as the commonly owned group election. For more information, see section 6-2.7 of this Subpart.

(c) [Each corporation in the combined report must compute and show the tax which would have been required to be shown if filed on a separate basis.] Each combined group must have a designated agent to act for the combined group. The designated agent must be a taxpayer under Article 9-A of the Tax Law and must be identified on the combined report. Only the designated agent may act on behalf of all the members of the

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combined group in all matters relating to the combined group. The actions taken by the designated agent are binding on all members of the combined group.

(d) Each member of the combined group that is a taxpayer under Article 9-A of the Tax Law shall be jointly and severally liable for the tax due on the combined report for the combined group. The tax due on the combined report shall be the sum of (1) the highest of (i) the combined business income base multiplied by the tax rate specified in section 210.1(a) of the Tax Law, (ii) the combined capital base multiplied by the tax rate specified in section 210.1(b) of the Tax Law, or (iii) the fixed dollar minimum tax specified in section 210.1(d) of the Tax Law attributable to the designated agent of the combined group, and (2) the fixed dollar minimum tax specified in section 210.1(d) of the Tax Law attributable to each member of the combined group (other than the designated agent) that is a taxpayer under Article 9-A of the Tax Law.

§ 2. Section 6-2.2 Capital stock requirement. (Tax Law, [Section 211(4)] Section 210-C)

(a) [(1)] A taxpayer and another corporation meet the capital stock requirement if:

[(i)] (1) the taxpayer owns or controls, either directly or indirectly, [substantially all] more than fifty percent of the voting power of the capital stock of another corporation; or

[(ii) substantially all] (2) more than fifty percent of the voting power of the capital stock of the taxpayer is owned or controlled, either directly or indirectly, by another corporation; or

[(iii) substantially all] (3) more than fifty percent of the voting power of the capital stock of the taxpayer and [substantially all] more than fifty percent of the voting power of the capital stock of one or more other corporations are owned or controlled, either directly or indirectly, by the same interests (e.g., an alien, foreign or domestic corporation, partnership or individual).

[(2) Corporations that meet the capital stock requirements are "related corporations."

(3) The term substantially all means ownership or control of 80 percent or more of the voting power of] (b) Capital stock of a corporation means the issued and outstanding stock of the corporation.

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(c) Ownership includes actual or beneficial ownership, rather than mere record title as shown by the stock books of the corporation.. To be considered the owner, the stockholder must have the right to vote and the right to receive any dividends declared.

(d) The term control refers to all cases where [the taxpayer controls the stock of another corporation or the stock of the taxpayer is controlled by another corporation or the taxpayer and one or more other corporations are controlled by the same interests] one corporation directly or indirectly possesses the power to dictate or influence the management and policies of another corporation through the direct or indirect ownership of more than fifty percent of the voting power of the capital stock of that corporation. In addition, a corporation controls the voting power of capital stock if it has been given the right to vote that stock by proxy or otherwise. The determination as to whether or not a corporation is controlled by or controls another corporation or is controlled by the same interests will be determined by the facts in each case.

(e) Voting power of capital stock of a corporation means the shares of stock, under the applicable law, corporate charter, articles of incorporation, or shareholder agreements, which have the power to elect the board of directors of the corporation. In determining whether the stock owned by a person or entity possesses a certain percentage of the total combined voting power of all classes of stock of a corporation entitled to vote, consideration will be given to all the facts and circumstances of each case. A share of stock will generally be considered as possessing the voting power accorded to such share by the corporate charter, by-laws, or share certificate. If there is any agreement, whether express or implied, that a stockholder will not vote its stock in a corporation, the formal voting rights possessed by that stock may be disregarded in determining the percentage of the total combined voting power possessed by that stockholder in the corporation. Moreover, if a stockholder agrees to vote its stock in a corporation in the manner specified by another stockholder in the corporation, the voting rights possessed by the stock owned by the first stockholder may be considered to be possessed by the stock owned by such other stockholder.

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(f) The capital stock requirement may be satisfied through direct or indirect ownership, direct or indirect control or through a combination of direct or indirect ownership or control. The following examples are intended to illustrate the indicia of ownership and control set forth above. Generally, the examples are meant to illustrate either ownership or control since both do not need to be met concurrently in order for the capital stock requirement to be met.

Example 1: The taxpayer, X Corporation, owns [70] 40 percent of the [voting] capital stock with voting rights of Y Corporation. The remaining [voting] capital stock of Y Corporation with voting rights is owned by three employees of X Corporation. These employees have agreed in writing to sell their stock to X Corporation when they leave the corporation. As part of the agreement, the employees have given X Corporation their voting proxy. Thus, X Corporation [owns or] controls [80 percent or] more than fifty percent of the voting power of the capital stock of Y Corporation. X and Y Corporations satisfy the capital stock requirement to be included in a combined report.

Example 2: The taxpayer, R Corporation, has issued 900 shares of common stock with voting rights equal to one vote per share. These shares are owned by P Corporation. R Corporation has also issued 1000 shares of preferred stock. These shares possess voting rights equal to one-tenth of one vote (.10) per share of preferred stock. Those shares are owned by Q Corporation. Even though P Corporation owns less than 50 percent of the number of voting shares (900 shares out of a total of 1900 shares), it owns more than 50 percent of the voting power of the capital stock of R Corporation (900 votes out of a total of 1000 votes). Thus, P Corporation and R Corporation satisfy the capital stock requirement to be included in a combined report. While Q Corporation owns more than 50 percent of the number of shares of R Corporation (1000 shares out of a total of 1900 shares), it only owns one-tenth of the voting power of the capital stock of R Corporation (100 votes of a total of 1000 votes). Q Corporation does not satisfy the capital stock requirement to be included in a combined report with P Corporation and R Corporation.

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Example 3. The taxpayer, Corporation A, owns 51 percent of the capital stock of Corporation B. Corporation B in turn owns 51 percent of the capital stock of Corporation C. The capital stock in both corporations has voting rights. By owning 51 percent of the capital stock with voting rights of Corporation B, Corporation A controls more than 50 percent of the voting power of the capital stock of Corporation B. Because Corporation A controls more than 50 percent of the voting power of the capital stock of Corporation B, it also controls indirectly more than 50 percent of the voting power of the capital stock of Corporation C. Corporations A, B and C satisfy the capital stock requirement to be included in a combined report.

Example 4. The taxpayer, Corporation A, is a 60 percent partner of Partnership Y. Partnership Y owns 40 percent of the capital stock with voting rights of Corporation B. Thus, Corporation A indirectly owns only 24 percent of the voting power of the capital stock of Corporation B (60 percent multiplied by 40 percent). However, because Corporation A holds more than a 50 percent interest in Partnership Y, it can control how Partnership Y votes its stock in Corporation B. Thus, Corporation A controls indirectly the voting power of the capital stock owned by Partnership Y. In this case, because Partnership Y owns only 40 percent of the voting power of the capital stock of Corporation B, Corporation A controls indirectly only 40 percent of voting power of the capital stock of Corporation B. Because Corporation A does not own or control, directly or indirectly, more than 50 percent of voting power of the capital stock of Corporation B, Corporation A and Corporation B do not satisfy the capital stock requirement to be included in a combined report.

Example 5. The taxpayer, Corporation A, is a 60 percent partner of Partnership Y. Partnership Y owns 80 percent of the capital stock with voting rights of Corporation B. Because Corporation A owns 60 percent of the interest in Partnership Y, it controls Partnership Y. In turn, it controls the voting power of the capital stock of Corporation B owned by Partnership Y. Thus, Corporation A controls indirectly more than 50 percent of the voting power of the capital stock of Corporation B, and Corporations A and B satisfy the capital stock requirement to be included in the combined report.

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Example 6. The taxpayer, Corporation A, is an 80 percent partner of Partnership Y. Partnership Y owns 40 percent of the capital stock with voting rights of Corporation B. Corporation A also directly owns 22 percent of the capital stock with voting rights of Corporation B. Through its 80 percent interest in Partnership Y, Corporation A can control how Partnership Y votes its stock in Corporation B. Thus, Corporation A controls indirectly 40 percent of the voting power of the capital stock of Corporation B. When that 40 percent is combined with the 22 percent of the voting power of the capital stock of Corporation B that Corporation A controls directly through its ownership of Corporation B stock, Corporation A controls more than 50 percent of the voting power of the capital stock of Corporation B and Corporations A and B satisfy the capital stock requirement to be included in a combined report.

Example 7. The taxpayer, Corporation A, is a 60 percent partner of Partnership Y. Partnership Y owns 40 percent of the capital stock with voting rights of Corporation B. Corporation A also directly owns 30 percent of the capital stock with voting rights of Corporation B. By combining its direct and indirect ownership of the stock of Corporation B, Corporation A owns, directly and indirectly, 54 percent of the voting power of the capital stock of Corporation B (30 percent plus 60 percent multiplied by 40 percent). Because Corporation A directly or indirectly owns more than 50 percent of the voting power of the capital stock of Corporation B, Corporations A and B satisfy the capital stock requirement to be included in a combined report.

Example 8. The taxpayer, Corporation A, owns 100 percent of the voting power of the capital stock of Corporation B. Corporation B owns 51 percent of the voting power of the capital stock of Corporation C. Corporation C owns 40 percent of the voting power of the capital stock of Corporation D. Individual X owns 100 percent of the voting power of the capital stock of Corporation A and also owns 20 percent of the voting power of the capital stock of Corporation D. Corporations A, B, C and D satisfy the capital stock requirement to be included in a combined report because they are all directly or indirectly controlled by the same interests (Individual X).

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Example 9. The taxpayer, Corporation A, owns 60 percent of the capital stock with voting rights of Corporation C and 60 percent of the capital stock with voting rights of Corporation D. Corporation B, also a taxpayer, owns 40 percent of the capital stock with voting rights of Corporation C and 40 percent of the capital stock with voting rights of Corporation D. Corporations C and D each own 30 percent of the capital stock with voting rights of Corporation E. Corporation B directly owns the remaining 40 percent of the capital stock with voting rights of Corporation E. Corporation A directly owns more than 50 percent of the voting power of Corporations C and D. Corporation A, acting indirectly through its control of Corporations C and D, controls Corporation E. Corporation B directly and indirectly owns 64 percent of the voting power of the capital stock of Corporation E (B's 40 percent ownership of C multiplied by C's 30 percent ownership of E plus B's 40 percent ownership of D multiplied by D's 30 percent ownership of E plus B's direct ownership of 40 percent of E). Corporations A, B, C, D and E satisfy the capital stock requirement to be included in a combined report.

§ 3. Regulation section 6-2.3 is repealed and a new section 6-2.3 is added to read as follows:

Section 6-2.3 Unitary business requirement. (Tax Law, Section 210-C)

(a) General. For purposes of determining the corporations required to be included in a combined report pursuant to section 210-C.2 of the Tax Law, the term unitary business shall be construed to the broadest extent permitted under the U.S. Constitution as interpreted by the U.S. Supreme Court, the courts of this State and the New York State Tax Appeals Tribunal.

(b) Attributes of a unitary business.

(1) A unitary business is characterized by a flow of value as evidenced by functional integration, centralized management and economies of scale.

(i) Functional integration is characterized by transfers between, or pooling among, business activities that significantly affect the operation of the business activities. Functional integration includes, but is not

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limited to, transfers or pooling with respect to the business's products or services, technical information, marketing information, distribution systems, purchasing and intangibles. The use of market-based or arm's length pricing for such transactions does not negate the presence of functional integration.

(ii) Centralized management exists when directors, officers, and/or other management employees jointly participate in the management decisions that affect the respective business activities and that may also operate to the benefit of the entire economic enterprise. Centralized management may exist even when day-to-day management responsibility and accountability have been decentralized, so long as the management has an operational role with respect to the business activities, such as participation in overall operational strategy for the business.

(iii) Economies of scale refers to a relation among and between business activities resulting in a significant decrease in the average per unit cost of operational or administrative functions due to the increase in operational size. Economies of scale may exist from the inherent cost savings that arise from the presence of functional integration or centralized management.

(2) Functional integration, centralized management and economies of scale should be analyzed in conjunction with one another for their cumulative effect. The determination of a unitary business depends on all of the facts and circumstances of each case.

(c) Presumptions. Without limiting the scope of a unitary business, a unitary business will be presumed in the following factual scenarios. The taxpayer or the Commissioner may overcome the presumption that the corporations in question are engaged in a unitary business by the presentation of clear and convincing evidence. If the activities of the corporations do not give rise to one of the presumptions set forth below, the presence of a unitary business will be determined based on all of the facts and circumstances of the case without the application of a presumption in favor of or against a finding of unitary.

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(1) Horizontal integration. Corporations that satisfy the capital stock requirement described in section 6-2.2 of this Subpart are presumed to be engaged in a unitary business when all of their activities are in the same general line of business.

(2) Vertical integration. Corporations that satisfy the capital stock requirement described in section 6-2.2 of this Subpart are presumed to be engaged in a unitary business when the corporations are engaged in different steps in a vertically structured enterprise.

(3) Strong centralized management. Corporations that satisfy the capital stock requirement described in section 6-2.2 of this Subpart, and that might otherwise be considered as engaged in more than one unitary business, are presumed to be engaged in one unitary business where there is strong central management coupled with the existence of centralized departments or affiliates for such functions as financing, advertising, research and development, or purchasing.

(4) Newly-formed corporations. A newly-formed corporation is presumed to be engaged in a unitary business with its forming corporation or corporations from the date the corporations satisfy the capital stock requirement described in section 6-2.2 of this Subpart.

(5) Newly-acquired corporations. A newly-acquired corporation is presumed to be engaged in a unitary business with its acquiring corporation in the first taxable year that the corporations satisfy the capital stock requirement described in section 6-2.2 of this Subpart if the corporations are engaged in a relationship described in paragraph 1, 2 or 3 of this subdivision.

(d) The following examples are intended to illustrate the presumptions set forth above. For purposes of the illustrations, the corporations referenced in the examples satisfy the capital stock requirement described in section 6-2.2 of this Subpart.

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Example 1. Corporations A and B sell natural and organic foods at their retail stores located throughout the United States. Corporation C sells the same types of foods at its retail stores located in Canada. Corporations A, B and C are presumed to be engaged in a unitary business.

Example 2. Corporation A is engaged in the exploration of oil. Corporation B extracts the oil found by Corporation A. Corporation C processes the oil extracted by Corporation B. Corporation D sells the oil processed by Corporation C. Corporations A, B, C and D are presumed to be engaged in a unitary business.

Example 3. Corporations A, B and C manufacture and sell children's apparel to customers located throughout the United States. Corporations D and E operate a chain of restaurants located in New York and Florida. Corporation F provides centralized purchasing, advertising and finance services to Corporations A, B, C, D and E. The executive officers of Corporation F are also actively engaged in the operations of Corporations A, B C, D and E. Corporations A, B, C, D, E and F are presumed to be engaged in one unitary business.

Example 4. Corporation A provides centralized cash management services to Corporations B, C and D. All cash earned by Corporations B, C and D is swept into one central account and managed by Corporation A. Corporation A is not otherwise engaged in the operations of Corporations B, C and D. Corporations B, C and D borrow funds from the central account for use in their business operations. No interest is charged on the funds borrowed. Corporations A, B, C and D are presumed to be engaged in a unitary business.

Example 5. Corporation A contributes all of its intellectual property to Corporation B for 100 percent of Corporation B's capital stock. Corporations A and B are presumed to be engaged in a unitary business.

Example 6. Corporation A acquires 51 percent of the capital stock of Corporation B. Corporation B distributes the products manufactured by Corporation A such that Corporations A and B are part of a vertically structured business apart from satisfying the capital stock requirement described in section 6-2.2 of this Subpart. Corporations A and B are presumed to be engaged in a unitary business in the first taxable year that includes the acquisition.

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(e) Passive holding companies. If a passive holding company and one or more operating companies satisfy the capital stock requirement described in section 6-2.2 of this Subpart, the passive holding company shall be deemed to be engaged in a unitary business with such operating company or companies.

§ 4. Section 6-2.4 Filing combined reports. (Tax Law, [Section 211(4)] Section 210-C)

(a)(1) As provided in this Subpart, a group of corporations may be required or, in the case of the commonly owned group election described in section 6-2.7 of this Subpart, permitted to file on a combined basis. To file on a combined basis, the designated agent of the group must file a completed combined report. The first year the designated agent of the group files on a combined basis, and each year thereafter in which the composition of the group changes, the designated agent of the group must include the following information with the report:

(i) the exact name, address, employer identification number and the state of incorporation, or in the case of an alien corporation, country of incorporation, of each corporation included in the combined report, including the designated agent;

(ii) information showing that each of the corporations meets the capital stock requirement of section 6-2.2 of this Subpart for the taxable year; and

(iii) the exact name, address, employer identification number and the state of incorporation or , in the case of an alien corporation described in paragraph (i) or (ii) of subdivision (c) of section 6-2.5 of this Subpart, country of incorporation , of all corporations [(except alien corporations)] that meet the capital stock requirement of subdivision (a) of section 6-2.2 of this Subpart for the taxable year, but are not included in the combined report.

(2) In addition, the following information may be required to be submitted for the taxable year at another time, such as in conjunction with an audit:

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(i) a statement providing details as to why a filed combined report [which includes] includes only the corporations listed in subparagraph (1)(i) of this subdivision that meet the capital stock requirement of section 6-2.2 of this Subpart and the details as to why the corporations listed pursuant to subparagraph (1)(iii) of this subdivision are excluded from that combined report; and

(ii) except in the case of a combined report filed using the commonly owned group election in section 6-2.7 of this Subpart, information establishing that each of the corporations included in the report meets the [requirements] unitary business requirement of section 6-2.3 of this Subpart with respect to the other corporations in the group.

(b) [The] Except as provided in section 6-2.7 of this Subpart, the filing of a combined report or the inclusion of a corporation in or the exclusion of a corporation from a combined report is subject to revision or disallowance on audit. (See section 8-1.2 of this Title-Limitation on Assessment and section 8-1.3 of this Title-Assessment of Tax on Combined Reports.)

[(c) If a corporation properly reports on a combined basis, the corporation must continue to file its reports on a combined basis until the facts relevant to sections 6-2.2 and 6-2.3 of this Subpart materially change.]

§ 5. Section 6-2.5 is repealed and a new section 6-2.5 is added to read as follows:

Section 6-2.5 Other rules. (Tax Law, Section 210-C) (a)(1) A captive real estate investment trust (REIT), as defined in subdivision 9 of section 2 of the Tax Law, that is not required to be included in a combined report under paragraph 4 of subdivision (f) of section 1515 of Article 33 of the Tax Law, is required to be included in a combined report under Article 9-A of the Tax Law. A captive regulated investment company (RIC), as defined in subdivision 10 of section 2 of the Tax Law, that is not required to be included in a combined report under paragraph 4 of subdivision (f) of section 1515 of Article 33 of the Tax Law, is required to be included in a combined report under Article 9-A of the Tax Law.

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(2) A captive REIT or captive RIC is required to be included in a combined return under Article 33 of the Tax Law in either of these circumstances:

(i) When the corporation that directly owns or controls more than fifty percent of the voting power of the capital stock of the captive REIT or captive RIC is a life insurance corporation subject to tax or required to be included in a combined return under Article 33 of the Tax Law; or, if this condition in this subparagraph is not satisfied , then

(ii) When the closest controlling stockholder of the captive REIT or captive RIC is a life insurance corporation subject to tax or required to be included in a combined return under Article 33 of the Tax Law.

(3) The term "closest controlling stockholder" means the corporation that indirectly owns or controls over fifty percent of the voting power of the capital stock of a captive REIT or captive RIC, is subject to tax under section 1501 of the Tax Law or Article 9-A of the Tax Law or required to be included in a combined return under Article 33 of the Tax Law or a combined report under Article 9-A of the Tax Law, and is the fewest tiers of corporations away in the ownership structure from the captive REIT or captive RIC.

Example 1: Insurance Company X, which is licensed as a life insurance company in New York State and subject to tax under section 1501 of the Tax Law, owns 100 percent of the voting power of the capital stock of Corporation Y, a general business corporation subject to tax under Article 9-A of the Tax Law. Corporation Y owns 75 percent of the voting stock of a captive REIT. Because over 50 percent of the voting power of the capital stock of a captive REIT is not directly owned or controlled by a life insurance corporation subject to tax or required to be included in a combined return under Article 33 of the Tax Law, the captive REIT must be included in a combined report or return with its closest controlling stockholder, which is Insurance Company X.

Example 2: Insurance Company X, which is licensed as a life insurance company in New York and subject to tax under section 1501 of the Tax Law, owns 100 percent of the voting power of the capital stock of Corporation Y, a general business corporation subject to tax under Article 9-A of the Tax Law. Corporation Y

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owns 100 percent of the voting power of the capital stock of Corporation Z, also a general business corporation subject to tax under Article 9-A. Corporations Y and Z are engaged in a unitary business. Corporation Z owns 100 percent of the voting power of the capital stock in a captive RIC. Corporation Y is the closest controlling stockholder in the captive RIC. Because over 50 percent of the voting power of the capital stock of the captive RIC is not directly owned or controlled by Insurance Company X, and the closest controlling stockholder in the captive RIC is not a life insurance corporation subject to tax under Article 33 of the Tax Law, the captive RIC is is required to be included in a combined report under Article 9-A with Corporations Y and Z.

Example 3. Same facts as in Example 2 except that Corporations Y and Z are not engaged in a unitary business. In this case, the captive RIC is required to be included in a combined report with Corporation Z.

(b) A combinable captive insurance company, as defined in subdivision (11) of section 2 of the Tax Law, is required to be included in a combined report if more than 50 percent of the voting power of its capital stock is owned or controlled directly or indirectly by a corporation subject to tax under Article 9-A of the Tax Law or a corporation required to be included in a combined report under Article 9-A of the Tax Law.

(c) An alien corporation that (i) under any provision of the Internal Revenue Code is treated as a "domestic corporation" as defined in section 7701 of the Internal Revenue Code, or (ii) has effectively connected income for the taxable year pursuant to clause (iv) of the opening paragraph of subdivision 9 of section 208 of the Tax Law, is required to be included in a combined report with other corporations satisfying the capital stock requirement and unitary business requirements described in sections 6-2.2 and 6-2.3, respectively, of this Subpart. The combined report may include domestic corporations as well as alien corporations.

§ 6. Section 6-2.6 is amended to read as follows:

Section 6-2.6 [~~Combined reports: Other entities.~~] Corporations prohibited from filing a combined report. (Tax Law, [Section ~~211(4)~~] Section 210-C) (a) The following corporations are prohibited from being

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included in a combined report under Article 9-A of the Tax Law, including a combined report under the commonly owned group election described in section 6-2.7 of this Subpart:

[~~(a) Any corporation which owns or controls either directly or indirectly substantially all of the capital stock of a taxable DISC, as defined in section 3-9.2 of this Title, will be allowed, at its election, to file a combined report which includes such DISC. However, if the corporation fails to make the election allowed by this section, the Commissioner is not prohibited from requiring a combined report covering the corporation and such DISC.~~](1) a corporation that is taxable under a franchise tax imposed by Article 9 or Article 33 of the Tax Law;

[~~(b) For information relating to the inclusion of a real estate investment trust (REIT) in a combined report, see section 211(4) of the Tax Law.~~](2) a corporation that would be taxable under a franchise tax imposed by Article 9 or Article 33 of the Tax Law if subject to tax;

[~~(c) For information relating to the inclusion of a regulated investment company (RIC) in a combined report, see section 211(4) of the Tax Law.~~](3) a real estate investment trust (REIT) that is not a captive REIT;

(4) a regulated investment company (RIC) that is not a captive RIC;

(5) a New York S corporation; or

(6) an alien corporation that under any provision of the Internal Revenue Code is not treated as a "domestic corporation" as defined in section 7701 of the Internal Revenue Code and has no effectively connected income for the taxable year pursuant to clause (iv) of the opening paragraph of subdivision nine of section 208 of the Tax Law.

(b) If a corporation is subject to tax under Article 9-A of the Tax Law solely as a result of its ownership of a limited partner interest in a limited partnership, as described in section 1-3.2(a)(7) of Part 1 of this chapter or its membership interest in a limited liability company that is equated to the interest of a limited partner, as described in section 1-3.2(a)(8) of Part 1 of this chapter, and none of the corporation's related corporations are subject to tax under Article 9-A, such corporation shall not be required or permitted to file a combined report under section 210-C of the Tax Law with such related corporations. For purposes of this Subpart, the term

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"related corporations" means corporations that meet the capital stock requirement, as described in section 6-2.2 of this Subpart, and the unitary business requirement, as described in section 6-2.3 of this Subpart.

§ 7. Regulation section 6-2.7 is repealed and a new regulation section 6-2.7 is added to read as follows:

Section 6-2.7 Commonly owned group election. (Tax Law, Section 210-C)

(a) (1) Subject to the restrictions in section 6-2.6 of this Subpart, a taxpayer may elect to treat as its combined group all corporations that meet the capital stock requirement described in section 6-2.2 of this Subpart (such corporations collectively referred to as the "commonly owned group"). If the election is made, all of the corporations that are members of the commonly owned group shall be treated as the members of a single combined group for combined reporting purposes, irrespective as to, for example, whether:

(i) these corporations are included in more than one federal consolidated return filed by more than one federal consolidated group, or

(ii) these corporations in fact are engaged in one or more unitary businesses.

(2) Upon making the election, the commonly owned group shall calculate the combined group's combined business income, combined capital and fixed dollar minimum bases of all members of the commonly owned group in accordance with subdivision four of section 210-C of the Tax Law and the respective regulations under this Subchapter.

(3) Upon making the election, the commonly owned group is deemed to be engaged in a single unitary business for all purposes, including for purposes of calculating business and investment capital, business and investment income and the apportionment factor.

Example. Corporation A is in the business of producing paper, packaging and office supplies. It has three wholly owned subsidiaries. Corporation B is in the business of producing school supplies. Corporation C is in the business of selling the paper, packaging and office supplies produced by Corporations A and B. Corporation D is in the business of operating an electronic legal research service that it sells to law firms. In 2015 and 2016, Corporations A, B and C properly file a combined report as a unitary business and Corporation

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D properly files a separate return. The dividends Corporation A receives from Corporation D are properly treated as exempt investment income on the combined report as income received from stock in a non-unitary corporation. In 2017, Corporation A makes the commonly owned group election and Corporations A, B, C and D file a combined report. On that report, the dividends Corporation A receives from Corporation D are properly eliminated in computing combined business income. In 2018, Corporation A sells all of its stock in Corporation D to a third-party, realizing a capital gain on the sale. Corporation A's capital gain on the sale of its stock in Corporation D is treated as a capital gain from the sale of a unitary subsidiary and is properly reported as business income on the combined report of the commonly owned group.

(b) Mechanics for making the election. A commonly owned group election shall be made by the designated agent of the combined group. The election shall be made on an original, timely filed return, determined with regard to extensions for time for filing. Any commonly owned group election made on a return that is filed late will be invalid and ineffective. To be valid, the commonly owned group election, must indicate, in the manner required by the Commissioner, that every corporation that is a member of the commonly owned group has acknowledged that it is bound by such election.

(c) Effect of election in subsequent tax years. A commonly owned group election shall be binding for and applicable to the taxable year for which it is made and for the next six taxable years, and shall be binding on all corporations included in the commonly owned group. The election shall continue in place irrespective as to whether a federal consolidated group to which the combined group belongs discontinues the filing of a federal consolidated return. Any corporation that enters a commonly owned group during the time that the commonly owned group election is in effect shall be included in the combined group beginning with the tax reporting period during which the corporation enters the group, and shall be considered to have consented to the application of the election and to have waived any objection to its inclusion in the combined group. The disposition of or the failure to meet the capital stock requirement described in section 6-2.2 of this Subpart of

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one or more members of a combined group will not sever an election and the departing member or members are not bound by the election. However, reverse acquisition rules based on the federal rules set forth in U.S. Treas. Reg. Section 1.1502-75(d)(3) shall be applied in determining whether a corporation is bound by a commonly owned group election. The entrance or departure of a corporation from the commonly owned group does not change the seven year period in which the election is in effect.

(d) Revocation, renewal of election. A commonly owned group election, once made, cannot be revoked until after it has been effective for seven taxable years. When an election is made, it will be automatically renewed after seven taxable years for another seven taxable years, unless the designated agent of the commonly owned group affirmatively revokes the election. In the case of a revocation, a new election shall not be permitted in any of the three taxable years immediately following the revocation. A revocation shall be effective for the first taxable year after the completion of the seven taxable years for which the prior election was in place and shall be made on an original, timely filed return, determined with regard to extensions, by the designated agent on the combined report filed by such agent for such first taxable year. To be valid, any revocation must indicate, in the manner required by the Commissioner, that every corporation that is a member of the commonly owned group acknowledges that it is bound by such revocation. If a prior commonly owned group election is affirmatively revoked after seven taxable years, the election shall terminate for the subsequent taxable year, and no commonly owned group election by any member of the commonly owned group shall apply for that year and the subsequent two taxable years. In such cases, the commonly owned group may make a new election for a seven taxable year period beginning in the fourth taxable year after the revocation.

(e) In determining the seven and three year periods described in this section, short taxable years shall not be considered or counted. However, the election or revocation may be made on a report for a short taxable year.

Example: Corporation A is a calendar year taxpayer for federal income tax purposes. On April 1, 2015, Corporation A, which has 25 wholly owned subsidiaries, purchases an office building in New York State. Prior

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to April 1, 2015, neither Corporation A nor any of its subsidiaries had nexus with New York. Thus, Corporation A's first taxable year in New York is a short taxable year (4/1/15-12/31/15). Corporation A, as the designated agent, makes the commonly owned group election on its first report and includes all of its 25 wholly owned subsidiaries in a combined report. The commonly owned group election therefore will apply from April 1, 2015 until the tax year ending on December 31, 2022, assuming there are no other short taxable years during this time period.

(f) The purpose of the commonly owned group election is to simplify the filing of returns for commonly owned corporations by avoiding the fact-intensive analysis associated with determining the scope of a unitary business. The election may in application result in an increase or decrease in New York franchise tax liability from taxable year to taxable year, but it is made binding for a seven year period to ensure that elections are made for purposes of simplification rather than for tax reduction. The composition of the commonly owned group is subject to verification on audit. Although a commonly owned group election does not require the consent of the Commissioner, in light of this legislative purpose, the Commissioner may disregard the tax effects of such an election, where it appears, from facts available at the time of the election, that the election will not have meaningful continuing application. For example, and without limitation, the Commissioner would disregard the tax effects of a commonly owned group election made in anticipation of the sale of substantially all of a business conducted in New York where a material part of the anticipated gain from the disposition would be apportioned to New York in the absence of the election and where the sale results in the winding up of the seller's business in New York, such that the continued application of the commonly owned group election would be anticipated to have no meaningful continuing impact in New York. Conversely, the Commissioner would not seek to disregard an otherwise proper election that results in a reduction of New York tax liability, whether or not such reduction is foreseeable at the time of the election, provided that, at the time of the election,

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the taxpayer anticipates continuing material business operations in New York subject to and affected by the filing requirements of the election.

NOTE THAT SECTION 6-2.8 WILL BE FURTHER UPDATED AS THE REGULATIONS ARE FINALLY DEVELOPED.

§ 8. Section 6-2.8 Combined reports: cross-references. The following is a list of cross-references to other sections of this Subchapter which pertain to combined reports:

(a) Combined corporations ceasing to exercise franchise or to be subject to tax under article 9-A, see section 2-3.1(d) of this Title.

(b) Computation of tax on a combined report, see section 3-1.3 of this Title.

(c) Computing entire net income on a combined report, see section 3-2.10 of this Title.

(d) Computing business capital and investment capital on a combined report, see section 3-3.8 of this Title.

(e)[Computing minimum taxable income on a combined report, see section 3-4.5 of this Title.

(f)] Fixed dollar minimum on a combined report, see section 3-5.3 of this Title [(for New York S corporations, see section 3-1.3(d) of this Title)].

(g) Computing subsidiary capital on a combined report, see section 3-6.6 of this Title.]Prior net operating loss conversion subtraction on a combined report, see section XXX of this Title.

(h) Net operating loss deduction - combined reports, see section 3-8.7 of this Title.

[(i) Combined reports (DISC), see section 3-9.6 of this Title.]

(j) Combined reports (Real Estate Investment Trusts), see section 3-11.1(c) of this Title.

(k) Combined reports (Regulated Investment Companies), see section 3-12.1(c) of this Title.

(l) [Allocation]Apportionment factor on combined reports, see section 4-1.2 of this Title.

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[(m) Rented real and tangible personal property, see section 4-3.2(c)(1) of this Title.]

(n) Receipts factor on combined reports, see section 4-4.8 of this Title.

(o) Form of reports on combined basis, see section 6-3.2 of this Part.

(p) A corporation reporting on a combined basis ceasing to be subject to tax, or ceasing to exercise its franchise but remaining subject to tax, see section 6-4.3(c) of this Part.

(q) Assessment of tax on combined reports, see section 8-1.3 of this Title.

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