NEW YORK BANKERS ASSOCIATION

SUMMARY OF COMMENTS

DRAFT AMENDMENTS TO CORPORATIONS SUBJECT TO TAX REGULATION AND

DRAFT AMENDMENTS TO METROPOLITAN TRANSPORTATION

BUSINESS TAX SURCHARGE REGULATION

BOTH POSTED BY DEPARTMENT ON JUNE 13, 2018

I. Corporations Subject to Tax Regulation

Foreign Corporations Subject to Tax (Regulation Section 1-3.2):

1. **Definition of "Effectively Connected Income"** (pages 12-13). For the sake of clarity, section 1-3.2(a)(10)(iii) should be amended as follows: Income, gain, or loss excluded from federal taxable income under a United States treaty obligation, as described in subparagraph (ii) of this paragraph, will be deemed to be treated as effectively connected with the conduct of a trade or business within the United States <u>if such income, gain, or loss would be treated, in the absence of such exclusion, as effectively connected with the conduct of a trade or business within the United States</u>, unless such treaty prohibits state taxation of such income, gain, or loss.

2. **"Deriving Receipts"** (pages 16-20 and Example 13 on page 24)
   (a) Exception for certain receipts. As NYBA previously commented, section 1-3.2(f)(4) on page 18, lines 370 through 376, should be amended as follows so that the deriving receipts exception applies where the $1 million threshold is not met when the receipts from the listed financial instruments are excluded from the calculation.
      i. Proposed Language: (4) <u>Notwithstanding anything to the contrary in this subdivision,</u> [A]<u>a</u> corporation will not be deemed to be deriving receipts from activity in the state if the <u>corporation has less than $1,000,000 of receipts from within the state determined without inclusion</u> [only New York receipts included] in the numerator of its apportionment fraction (as described in Subpart 4-1) [are] (i) interest income and net gains received by a corporation from securities issued by government agencies, including but not limited to securities issued by the government national mortgage association, the federal national mortgage association, the federal home loan mortgage corporation, and the small business administration, (ii) interest income from federal funds, or (iii) interest and net gains from sales of debt instruments issued by <u>the</u>

United States, any state, [other states] or [their] political subdivision[s] of a state.[1]

ii. Nexus for MTA Surcharge. As NYBA previously commented, a provision similar to section 1-3.2(f)(4) (as revised to reflect our proposed language in comment 2(a)(i) above) needs to be added in the Metropolitan Transportation Business Tax Surcharge regulation as well.

iii. Example related to the exception for certain receipts. To be consistent with our comments above, example (13) on page 24, lines 497 through 500 should be revised as follows:

(13) A foreign corporation organized as a bank in another state has $100,000 of interest income from loans to customers in New York State and $12,000,000 of total interest income from federal funds but no other New York receipts. [Since the corporation's only New York receipts are from interest income from federal funds, t]The corporation is not subject to tax under subdivision (f) of this section, because it is not deemed to be deriving receipts from activity in New York State.

II. Metropolitan Transportation Business Tax Surcharge Regulation

Section 9-6.1. The tax surcharge rate:

1. Applicable rate (page 18). As NYBA previously commented, while section 209-B.1(f) of the Tax Law grants to the Commissioner the right to determine the Metropolitan Transportation Business Tax Surcharge rate for taxable years beginning on or after January 1, 2016, that section does not provide a time frame in which the rate must be determined. The timing of the change in rate, as well as the notice of such change, can cause considerable financial statement issues for taxpayers. In order to avoid these issues, we recommend that section 9-6.1 of the regulation adopt a timing methodology for any subsequent Metropolitan Transportation Business Tax Surcharge rate changes. Given that any adjustment to the rate is made only if necessary to "meet and not exceed the financial projections…as reflected in [an] enacted budget," it appears appropriate to require the Commissioner to make any such adjustment to the rate for a particular calendar year (and to notify the public of such adjustment) within a reasonable period of time after the enactment of the budget for the state fiscal year in which the beginning of a particular calendar year falls. NYBA continues to believe that a period of 30 to 60 days after enactment of the budget would provide the Commissioner with sufficient time to make his or her determination. For example, assuming a budget is timely enacted on March 31, 2019, the

[1] We are uncertain as to the need for (iii) in the draft regulation as posted given that such interest and net gains are excluded from the numerator of the receipts factor. However, if (iii) is retained, we believe that the language we propose for (iii) is more appropriate.

Commissioner should be in a position to determine the appropriate rate for taxable years beginning on or after January 1, 2020 by May 30, 2019. This timing gives sufficient advance notice to taxpayers and practitioners and, assuming a timely enacted budget, avoids the potential for quarter-end or year-end financial statement issues for calendar year taxpayers and would enable taxpayers to better anticipate the effects of any rate change in their own financial projections. With respect to taxable years beginning on or after January 1, 2019 and before January 1, 2020, given that it is already September 2018, we recommend that the Commissioner notify taxpayers of any rate change on or before November 1, 2018.