

**2010-11 NEW YORK STATE EXECUTIVE BUDGET**  
**REVENUE ARTICLE VII LEGISLATION**  
**MEMORANDUM IN SUPPORT**

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## REVENUE ARTICLE VII LEGISLATION

### MEMORANDUM IN SUPPORT

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## MEMORANDUM IN SUPPORT

A BUDGET BILL submitted by the Governor in  
Accordance with Article VII of the Constitution

AN ACT to amend the tax law, in relation to imposing a tax on the severing of natural gas (Part A); to amend the tax law, in relation to increasing the rate of the cigarette tax under article 20 of the tax law (Part B); to amend the tax law, in relation to imposing tax on beverage syrups and soft drinks (Part C); to amend the tax law, in relation to the statutory limitation on the biofuel production credit and the qualified emerging technology company facilities, operations and training credits (Part D); to amend the tax law, in relation to the inclusion of certain past employment related income in the calculation of the New York source income of nonresidents (Part E); to amend the tax law, in relation to clarifying that certain income constitutes New York source income of nonresident shareholders of an S corporation (Part F); to amend the tax law, in relation to taxation of certain resident trusts; and to repeal subparagraph (D) of paragraph 3 of subdivision (b) of section 605 of such law relating thereto (Part G); to amend the tax law, in relation to information reporting of payments made in settlement of payment card and third party network transactions (Part H); to amend the tax law, in relation to authorizing the use of generally accepted statistical sampling to determine the amount of sales and compensating use tax due under articles 28 and 29 of such law (Part I); to amend the tax law and the administrative code of the city of New York, in relation to the penalties imposed upon tax return preparers failing to electronically file returns and other tax documents when required by law to do so, to authorize reasonable correction periods for electronic tax filings and payments, and to prohibit tax return preparers and software companies from charging separately for electronic filing of New York tax documents (Part J); to amend the tax law, in relation to providing the department of taxation and finance with greater flexibility, and the ability to realize cost savings, by allowing the department to use alternative means by which tax notices and other tax documents are communicated to addressees (Part K); to amend the tax law, in relation to reforming the

offer-in-compromise program (Part L); to direct the department of taxation and finance to complete a report that makes recommendations about reforming and modernizing state and local taxes on communication services (Part M); to amend chapter 405 of the laws of 1999, amending the real property tax law relating to improving the administration of the school tax relief (STAR) program, in relation to eliminating the expiration and repeal of the Quick Draw lottery game; and to amend the tax law, in relation to the game of Quick Draw (Part N); to amend chapter 383 of the laws of 2001 amending the tax law and other laws relating to authorizing the division of the lottery to conduct a pilot program involving the operation of video lottery terminals at certain racetracks, in relation to the effectiveness thereof; to amend the tax law, in relation to the hours of operation of video lottery gaming and the recapture of the vendor fee at a certain track; and to repeal section 13 of chapter 140 of the laws of 2008 amending the racing, pari-mutuel wagering and breeding law and other laws relating to thoroughbred racing and to repeal section 5 of chapter 286 of the laws of 2008 amending the tax law relating to annual capital improvement credits for video lottery gaming operators, relating thereto (Part O); to amend the tax law and the uniform commercial code, in relation to imposing a recording tax on the filing of financing statements pertaining to cooperative interests in cooperative organizations (Part P); to amend the tax law, in relation to establishing a school tax circuit breaker tax credit; and to amend the state finance law, in relation to establishing a property tax circuit breaker reserve fund and annual spending growth cap, and increasing the rainy day reserve fund; and providing for the repeal of certain provisions upon expiration thereof (Part Q); to amend the tax law and the administrative code of the city of New York, in relation to allowing recognition of marriages performed outside New York state (Part R); to amend the tax law, in relation to narrowing the definition of vendor for purposes of the sales and compensating use taxes (Part S); to amend the alcoholic beverage control law and the state finance law, in relation to enacting the wine industry and liquor store revitalization act; to repeal certain provisions of the alcoholic beverage control law relating thereto; and providing for the repeal of certain provisions upon

expiration thereof (Part T); to amend the public housing law, in relation to providing a credit against income tax for persons or entities investing in low-income housing (Part U); to amend chapter 60 of the laws of 2004, amending the tax law relating to the empire state film production credit, in relation to the empire state film production credit and in relation to the effectiveness of such provisions; and to amend the tax law, in relation to the empire state film production credit (Part V); to amend the economic development law and the tax law, in relation to creating the excelsior jobs program act (Part W); to amend the general municipal law, in relation to the decertification of business entities located in empire zones; to amend the tax law, in relation to a refund or credit provided to certain zone businesses and to a report on empire zone businesses produced by the department of taxation and finance, and to amend chapter 57 of the laws of 2009, amending the general municipal law and the tax law relating to enacting reforms to the empire zones program, in relation to the effectiveness thereof (Part X); to amend chapter 298 of the laws of 1985, amending the tax law relating to the franchise tax on banking corporations imposed by the tax law, authorized to be imposed by any city having a population of one million or more by chapter 772 of the laws of 1966 and imposed by the administrative code of the city of New York and relating to other provisions of the tax law, chapter 883 of the laws of 1975 and the administrative code of the city of New York which relates to such franchise tax, to amend chapter 817 of the laws of 1987, amending the tax law and the environmental conservation law, constituting the business tax reform and rate reduction act of 1987, and to amend chapter 525 of the laws of 1988, amending the tax law and the administrative code of the city of New York relating to the imposition of taxes in the city of New York, in relation to the effectiveness of certain provisions of such chapters; and to extend the Gramm-Leach-Bliley transitional provisions under the franchise taxes on banking corporations under the tax law and the administrative code of the city of New York (Part Y); to amend the tax law, in relation to making technical corrections to certain tax enforcement and sales tax avoidance provisions; and to amend chapter 57 of the laws of 2009 amending the criminal procedure law, the penal law, and the tax law relating to creating the offense



of "tax fraud act", in relation to the effectiveness thereof (Subpart A); to amend the tax law, in relation to defining certain terms (Subpart B); and to amend the general municipal law and the public authorities law, in relation to statements of industrial agencies and their agents and project operators (Subpart C) (Part Z); to amend the racing, pari-mutuel wagering and breeding law, in relation to licenses for simulcast facilities, sums relating to track simulcast, simulcast of out-of-state thoroughbred races, simulcasting of races run by out-of-state harness tracks and distributions of wagers; to amend chapter 281 of the laws of 1994 amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting and to amend chapter 346 of the laws of 1990 amending the racing, pari- mutuel wagering and breeding law and other laws relating to simulcasting and the imposition of certain taxes, in relation to extending certain provisions thereof; and to amend the racing, pari-mutuel wagering and breeding law, in relation to extending certain provisions thereof (Part AA); to amend the tax law, in relation to the amount of the unified credit against the estate tax (Part BB); and to amend the tax law, the general municipal law, and the administrative code of the city of New York, in relation to the taxicab ride tax imposed in the metropolitan commuter transportation district by article 29-A of the tax law (Part CC) )

**PURPOSE:**

This bill contains provisions needed to implement the Revenue portion of the 2010-11 Executive Budget.

This memorandum describes Parts A through CC of the 2010-11 Article VII Revenue bill which are described wholly within the parts listed below.

**Part A – Impose a three percent tax on certain natural gas production.**

**Purpose:**

The purpose of this bill is to impose a three percent tax on the market value of natural gas severed from a gas pool in the Marcellus or Utica Shale formation using a horizontal well.

**Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:**

Section 1 of the bill would amend Tax Law § 171(26<sup>th</sup>)(a) by authorizing the Tax Commissioner (Commissioner) to set overpayment and underpayment rates of interest for purposes of administering the new tax structure created by the bill.

Section 2 of the bill would amend Tax Law § 171-a(1) to provide for the disposition of the funds collected under the new tax structure created by the bill.

Section 3 of the bill would create a new Tax Law Article 17 entitled, "Tax on Severing Natural Gas." More specifically:

Section 400 of new Article 17 would define terms used in such Article, including "producer," "purchaser," "market value," "sever," "completion" and "McF." "Sever" means to take or remove natural gas for commercial purposes from the soil or water by a well whose surface hole is located within this State, and "McF" is a unit of measurement that is equal to one thousand cubic feet.

Section 401 of new Article 17 would impose a three percent tax on the market value of natural gas severed from a gas pool in the Marcellus or Utica Shale formation using a horizontal well.

Section 402 of new Article 17 would set forth registration requirements for producers of natural gas.

Section 403 of new Article 17 would specify the records that producers must maintain.

Section 404 of new Article 17 would specify the requirements for the payment of tax and for the filing of returns.

Section 405 of new Article 17 would specify the circumstances in which the Commissioner would determine the amount of tax due.

Section 406 would specify the penalty and interest provisions applicable to this tax.

Section 407 of new Article 17 would provide that the mailing rules in Tax Law §289-d apply to this tax.

Section 408 of new Article 17 would require all monies collected under this article to be deposited and disposed of as provided by § 312 of the Tax Law.

Section 409 of new Article 17 would specify the procedures applicable to tax refunds.

Section 410 of new Article 17 would specify secrecy provisions applicable to the Article.

Section 411 of new Article 17 would specify that payment of the tax imposed by such Article by a producer does not affect the obligation of the producer to pay any other

taxes imposed upon the producer's real or personal property or the producer's operations.

Section 4 of the bill would add a new §1812-g to the Tax Law to specify criminal penalties applicable to violations of the Article.

Section 5 provides that the bill would take effect September 1, 2010, provided, however, that persons currently severing natural gas in this State and any other person who is or will be subject to the requirements of the bill on September 1, 2010 may submit applications to register as producers beginning July 1, 2010.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because this bill will increase revenues by \$1M in 2011-12.

Effective Date:

This bill would take effect September 1, 2010, provided, however, that persons currently severing natural gas in this State and any other person who is or will be subject to the requirements of the bill on September 1, 2010 may submit applications to register as producers beginning July 1, 2010.

**Part B – Increase Excise Tax on Cigarettes.**

Purpose:

This bill would: (1) increase the Article 20 excise tax on cigarettes by \$1.00 per pack; and (2) require the collection of a floor tax on cigarettes to prevent tax avoidance.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Sections 1 and 2 of the bill would increase the State cigarette excise and use taxes imposed under Tax Law §§ 471 and 471-a from \$2.75 per pack to \$3.75 per pack.

Section 3 of the bill would amend Tax Law § 482 to increase the percentage of the State cigarette excise tax to be deposited into the Tobacco Control and Insurance Initiatives Pool from 70.63 percent to 75 percent effective June 2, 2010.

Section 4 of the bill would require that the floor tax, with respect to the increase in the State cigarette excise tax, be calculated as of the close of business on May 31, 2010 and be payable on or before August 20, 2010.

Section 5 provides that this bill would be effective on June 2, 2010.

These amendments will further reduce the incidence of smoking—especially among young people—and will yield additional revenues to support health care programs.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because this bill would result in an additional \$210 million in revenue in 2010-11 and \$205 million in 2011-12 to support health care programs.

Effective Date:

This bill would take effect June 2, 2010 and will apply to all cigarettes possessed in the state by any person for sale and all cigarettes used in the state by any person on or after this date.

**Part C – Impose an excise tax on syrups or simple syrups, bottled soft drinks, or powders or base products.**

Purpose:

This bill would impose an excise tax on syrups or simple syrups, bottled soft drinks, and powders or base products (“beverage syrups and soft drinks”).

Statement in Support Summary of Provisions, Existing Law, and Prior Legislative History:

Section 1 of the bill would amend Tax Law § 171(26<sup>th</sup>)(a) by authorizing the Tax Commissioner (Commissioner) to set overpayment and underpayment rates of interest for purposes of administering the new tax structure created by the bill.

Section 2 of the bill would amend Tax Law § 171-a(1) to provide for the disposition of the taxes, interest, and penalties collected under the new tax structure.

Section 3 of the bill would create a new Tax Law Article 16 entitled, “Tax on Beverage Syrups and Soft drinks.” More specifically:

Section 350 of new Article 16 would define terms used in that Article, including “bottle,” “bottled soft drink,” “distributor,” “powder or base product,” “simple syrup,” “syrup,” and “soft drink.” “Bottled soft drink” means any soft drink, contained in any bottle. “Soft drink” means any nonalcoholic beverage, whether naturally or artificially flavored, whether carbonated or noncarbonated, sold for human consumption, containing more than 10 calories per eight ounces, including, but not limited to, soda, water, sports drinks, “energy” drinks, colas and any flavored drinks, any fruit or vegetable drinks containing less than seventy percent (70%) of natural fruit juice or natural vegetable juice, or a combination of juices, any frozen, freeze-dried, or other concentrate to which water is added to produce a beverage containing less than seventy percent (70%) of

natural fruit juice or natural vegetable juice, and coffee and tea bottled as a liquid for sale.

Section 351 of new Article 16 would impose an excise tax at the following rates on:

- syrups or simple syrups, for which the tax rate would be \$7.68 per gallon;
- bottled soft drinks, for which the tax rate would be \$1.28 per gallon; and
- powders or base products, for which the tax rate would be \$1.28 per gallon of soft drink that is produced from each package or container by following the manufacturer's directions.

Section 352 of new Article 16 would exempt from this tax all dietary aids, infant formula, and milk, milk products, and milk substitutes. Soft drinks imported or manufactured in this state for sale or use outside the state shall be exempt. Soft drinks, up to one gallon per month, imported to this State for an individual's personal use and consumption are also exempt.

Section 353 of new Article 16 would permit the Commissioner to register distributors, and sets forth registration requirements for distributors of syrups and soft drinks if the Commissioner chooses to register distributors.

Section 354 of new Article 16 would specify bond requirements for distributors of syrups and soft drinks if distributors are required to be registered.

Section 355 of new Article 16 would provide for the cancellation or suspension of a distributor's registration if distributors are required to be registered.

Section 356 of new Article 16 would provide for the presumption that all syrups and soft drinks are taxable unless proved otherwise.

Section 357 of new Article 16 would specify the records that distributors must maintain.

Section 358 of new Article 16 would specify the requirements for the payment of tax and for the filing of returns.

Section 359 of new Article 16 would specify the circumstances in which the Commissioner would determine the amount of tax due.

Section 360 of new Article 16 would provide for proceedings for the department to recover any unpaid tax. These provisions are the same as those provided under Article 12-A of the Tax Law with regard to motor fuel taxes.

Section 361 of new Article 16 would specify the penalty and interest provisions applicable to this tax.

Section 362 of new Article 16 would specify the procedures applicable to tax refunds.

Section 363 of new Article 16 would specify the mailing rules applicable to this tax.

Section 364 of new Article 16 would require all monies collected under this article be deposited to the HCRA Resources Fund.

Section 4 of the bill would add a new § 1812-h to the Tax Law to specify criminal penalties applicable to violations of the Article.

Section 5 provides that the bill would take effect September 1, 2010.

This is a new bill.

This excise tax is equivalent to one cent per ounce on syrups and soft drinks. These include sugar-sweetened beverages that contain more than 10 calories per 8 ounces such as soda, water, sports drinks, "energy" drinks, colas, fruit or vegetable drinks containing less than 70% natural fruit or vegetable juice, and bottled coffee or tea. Milk, milk products, milk substitutes, dietary aids, and infant formula are exempt.

Obesity rates in the U.S. and New York have risen markedly over the past 30-40 years. Currently 25% of New York adults are obese and another 35% are overweight. Among low-income children, 15% are obese and another 17% are overweight. Sixty-one percent of adults in New York regularly consume soft drinks; 22% of adults and 25% of adolescents in New York drink at least one can/bottle of soft drink per day. Sugar-sweetened beverages are the food group most strongly linked with poor diet, increased rates of obesity, and risk for diabetes. They are the major source of added sugar in the American diet; soft drinks are the largest contributor of caloric intake in the U.S. and contribute 33% of total added sugar; fruit drinks contribute another 10%.

According to the New England Journal of Medicine, a 10 percent price increase on soft drinks will result in an 8 to 10 percent decrease in soft drink consumption. On average, this tax will increase the price of sugar-sweetened beverages by 17 percent, which will reduce consumption by approximately 15 percent, improve nutrition, raise revenue for health programs and recover some of the health costs caused by consumption of high calorie, nutrient poor foods and beverages. The price increase is expected to have the greatest impact on the consumers that consume a disproportionate amount of these products (i.e., adults who are overweight/obese, younger, less educated and/or low-income) and those who are most sensitive to price (youth and low-income individuals). Thus, the greatest reductions in intake and the greatest health benefits will accrue to those who are disproportionately affected by obesity and obesity-related diseases such as diabetes.

This excise tax goes into effect September 1, 2010.

Budget Implications: Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because it would increase revenues by \$465 million in 2010-11 and \$1 billion in the outyears.

Effective Date: This bill takes effect on September 1, 2010.

**Part D – Equalize the tax treatment of corporations and unincorporated businesses with respect to the calculation of the maximum allowable biofuel production and Qualified Emerging Technology Company tax credits.**

Purpose:

This bill would equalize the tax treatment of corporations and unincorporated businesses with respect to the calculation of the maximum allowable biofuel production and Qualified Emerging Technology Company (QETC) tax credits.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

The biofuel production, and the QETC facilities, operations and training credits in Articles 9-A and 22 of the Tax Law contain a dollar limitation on the amount of credit that is allowed to a “taxpayer” for a taxable year. In particular, Tax Law § 28 provides that a taxpayer subject to tax under Tax Law Articles 9, 9-A or 22 may receive a tax credit of up to \$2.5 million per taxable year for a portion of the taxpayer’s biofuel production. Likewise, Tax Law §§ 210 and 606 provide that a taxpayer may, under certain circumstances, claim a QETC tax credit of up to \$250,000 per taxable year. However, due to differences in the calculation methodology of these credits, corporations and sole proprietorships applying for these credits often receive disparate tax treatment from “flow-through entities” such as partnerships and S-Corporations seeking the same credits.

For example, in the case of partnerships and S corporations, each taxpayer partner or member of the entity may claim the relevant credit up to the statutory limit. Consequently, the actual aggregate amount of credit claimed by the members of such entities in any taxable year may substantially exceed the statutory dollar limitation. By contrast, corporate taxpayers or individuals conducting business as sole proprietorships may not claim a credit in excess of the statutory dollar limitation amount.

To equalize this asymmetrical tax treatment, section 1 of the bill would amend the biofuel production credit in subdivision (a) of Tax Law § 28 to provide that, if the taxpayer is a partner in a partnership, shareholder in a New York S corporation, or member of another flow-through entity, then the \$2.5 million cap in that subdivision is applied at the entity level, so that the aggregate amount of credit claimed by all the members of the entity in a taxable year does not exceed the cap amount.

Section 2 of the bill would make similar amendments to the QETC facilities, operations and training credit in paragraph (f) of Tax Law § 210.12-G. The amendment would provide that the \$250,000 limit in that paragraph is applied at the entity level so that the aggregate amount of credit claimed by all members of the flow-through entity in a taxable year does not exceed \$250,000.

Section 3 of the bill would make similar amendments to the QETC facilities, operations and training credit in paragraph (6) of Tax Law § 606(nn).

Section 4 would provide that the bill would take effect immediately and apply to taxable years beginning on or after January 1, 2010.

Budget Implications:

This bill would increase revenue by \$2 million annually beginning in SFY 2011-12. Therefore enactment of this bill is necessary to implement the 2010-11 Executive Budget.

Effective Date:

This bill takes effect immediately and applies to taxable years beginning on or after January 1, 2010.

**Part E – Make termination payments, non-compete covenants and other compensation for past services to nonresidents taxable unless specifically exempt under Federal Law.**

Purpose:

This bill would amend the Tax Law to include in New York source income the income from covenants not to compete and termination agreements received by nonresidents for past employment services in New York.

Statement in Support Summary of Provisions, Existing Law, and Prior Legislative History:

Sections 1 and 2 of the bill would add a new provision to the Tax Law to specifically include income from termination agreements and noncompetition agreements as New York source income for nonresidents. Although this had been the rule in New York for a long time, two cases decided by the Tax Appeals Tribunal held that such income was not taxable. See *Matter of Haas*, Tax App. Trib. (April 17, 1997); *Matter of Penchuk*, Tax App. Trib. (April 24, 1997). These decisions have led to widespread abuse of post-employment severance packages and have resulted in a significant revenue loss for the state. This bill would stem that abuse.



Section 3 of the bill provides the bill would take effect immediately and apply to taxable years beginning on or after January 1, 2010.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because this bill would increase revenue by \$5 million annually beginning in SFY 2011-12.

Effective Date:

This bill takes effect immediately and applies to taxable years beginning on or after January 1, 2010.

**Part F – Require certain S corporation gains from acquisition, liquidation, and installment sales of assets to be treated as New York source income by nonresident shareholders to the extent that the business was conducted in New York.**

Purpose:

This bill would ensure that nonresident shareholders of S corporations who sell their interest in the S corporation pursuant to an election under Internal Revenue Code (IRC) §§ 338(h)(10) or 453 are taxed in accordance with that election and that the transaction is treated as an asset sale producing New York source income.

Statement in Support, Summary of Provisions, Existing Law and Prior Legislative History:

Section 1 of the bill addresses two recent judicial decisions related to the tax treatment of acquisition and liquidation gains of nonresident shareholders of S corporations.

In the *Matter of Gabriel S. Baum*, the Tax Appeals Tribunal held that notwithstanding an election by subchapter S shareholders under IRC § 338(h)(10) to treat their sale of stock as an asset sale of the S corporation, the transaction at issue was a stock sale for New York tax purposes. Likewise, in the *Matter of Mintz*, an Administrative Law Judge of the Division of Tax Appeals held that an election by a subchapter S shareholder under IRC § 453, with respect to a liquidation by installment contract, did not apply for state tax purposes and treated the liquidation as a stock sale. These decisions are inconsistent with the longstanding policy of both the Internal Revenue Service and the Department of Taxation and Finance (Department) to treat such transactions as asset sales when the taxpayer so elects.

The outcome of both of these cases has also raised significant concerns about New York's continued conformity to the IRC. The Department has always taken the position that when shareholders of a S corporation make an election under IRC § 338(h)(10), that election is also made for New York State personal income tax purposes. This is

consistent with Article 22 of the Tax Law, under which a resident taxpayer's New York adjusted gross income starts with his or her Federal adjusted gross income, and a nonresident taxpayer's New York source income is his or her Federal adjusted gross income derived from New York sources with such income maintaining its Federal character.

The Tribunal's decision in *Baum* and the Administrative Law Judge's determination in *Mintz* effectively undid this by re-characterizing what had always been considered to be a sale of New York property, and thus New York source income for nonresidents, into a sale of an intangible asset which is not subject to New York income taxation. The Tribunal's decision will also cause uncertainty for purchasers where an election under IRC § 338(h)(10) is made. Prior to *Baum*, a purchaser received a step-up in the basis of the assets subject to the IRC § 338(h)(10) election. Because the Tribunal held that the transaction is a stock sale and not a sale of assets for purposes of New York income taxation, it is possible that the purchaser would not be entitled to step up its basis in the assets and use its Federal basis for purposes of calculating its New York depreciation deduction. This would create unwarranted inconsistencies with Federal tax law and would add additional cost and complexity because the purchaser would be required to maintain separate book-keeping procedures for any New York assets purchased in a IRC § 338(h)(10) transaction.

Section 2 of the bill would clarify that shareholders of a subchapter S corporation that made an election under IRC §§ 338(h)(10) and 453 are required to treat the income as income from the sale of New York assets, and not a stock sale as held in the *Baum* and *Mintz* cases.

Section 3 of the bill would amend Tax Law § 631 to provide that where an S corporation has terminated its taxable status in New York, the income from an installment sale contract would continue to constitute New York source income for the nonresident shareholders as it is received. Under current law, if an S corporation terminates its taxable status in New York, a loophole allows the S corporation's nonresident shareholders to avoid a tax on income that relates to the business the S corporation conducted in New York.

Section 4 of the bill provides the bill would take effect immediately; provided that section 2 shall apply to all the tax years for which the statute of limitations for seeking refund or assessing additional tax are still open. Section 3 would be applicable to taxable years beginning on or after January 1, 2010.

#### Budget Implications:

This bill would increase revenue by \$30 million in SFY 2010-11 and \$12 million per year thereafter. Therefore enactment of this bill is necessary to implement the 2010-11 Executive Budget.

Effective Date:

This bill would take effect immediately, provided that section 2 would apply to all tax years for which the statute of limitations for seeking a refund or assessing additional tax are still open, and section 3 would apply to taxable years beginning on or after January 1, 2010.

**Part G – Amend the definition of resident trusts in the personal income tax to reduce tax avoidance opportunities through the use of nonresident trustees.**

Purpose:

This bill would help prevent tax avoidance by: (1) eliminating the tax exemption for resident trusts whose trustees are domiciled outside New York; and (2) classifying all testamentary trusts (i.e., trusts that are created by a will and that become active after the grantor dies) created by a decedent who was a New York domiciliary as resident trusts.

Statement in Support, Summary of Provisions, Existing Law and Prior Legislative History:

Under Tax Law § 605(b)(3)(D), a resident trust is exempt from tax if: (1) all of the trustees are domiciled outside the state; (2) the entire corpus of the trust, including real and tangible property, is located outside the state; and (3) all income and gains of the trust are derived from sources outside the state. Because intangible property is not considered to be located within the state, and income from intangible property is not treated as New York source income, trusts containing no tangible in-state property avoid taxation completely by appointing only out-of-state trustees.

This bill would eliminate the three conditions for tax exemption currently contained in Tax Law § 605 (b)(3)(d)(i). All testamentary trusts created by the will of a decedent domiciled in New York would be considered resident trusts, and their income would be fully taxable. Nontestamentary trusts whose grantors are residents would also be considered resident trusts. All resident nontestamentary trusts with any New York source income would continue to be fully taxable. However, resident nontestamentary trusts with no New York source income would now be taxed based on the percentage of identifiable beneficiaries who are New York residents.

The three part test under Tax Law § 605 (b)(3)(d)(i) was enacted in 2003 in order to codify the rule originally set forth by the New York courts in Mercantile-Safe Deposit & Trust Company v. Murphy, 19 AD2d 765 (3d Dep't 1963), aff'd 15 NY 2d 579 (1964) and then set forth in the personal income tax regulations. However, recent state and federal appellate decisions have upheld the constitutionality of taxing a percentage of trust income in cases where the trust grantor is a state resident according to the

percentage of trust beneficiaries who are state residents. Many states also tax all of the income from testamentary trusts when the decedent was domiciled in that state, a practice that has also been upheld by state and federal courts.

A number of states, including California, Connecticut, Delaware, Maryland, and Rhode Island tax trusts in a manner similar to this proposal, in which nontestamentary trusts created by a grantor domiciled in the state are considered resident trusts, and the income from these trusts is taxed according to the percentage of beneficiaries who are state residents.

Budget Implications:

This bill would increase revenue by \$25 million annually beginning in SFY 2011-12. Therefore, enactment of this bill is necessary to implement the 2010-2011 Executive Budget.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2010.

**Part H – Mirror Federal law by requiring certain financial institutions to file information returns with the state annually regarding amounts of credit/debit card settlements and third party network transactions.**

Purpose:

This bill would enhance the collection of taxes by requiring payment settlement entities, third party settlement organizations, electronic payment facilitators, or others deemed to be acting on behalf of payment settlement entities to annually report by payee the gross amount of settled payment card and third party network transactions.

Statement in Support, Summary of Provisions, Existing Law and Prior Legislative History:

Current law imposes a variety of information reporting and withholding requirements on employers, financial institutions, and other entities providing income to individuals. These requirements are intended to assist taxpayers in preparing their tax returns and to help the Department of Taxation & Finance (Department) determine whether such returns are correct and complete. The mere existence of this information significantly increases voluntary compliance and the use of the information during audits provides the State with hundreds of millions of dollars of revenue each year.

However, current law does not provide for a good source of information that permits the Department to validate the sales and other taxable transactions reported by New York State businesses. Inadvertent or deliberate underreporting of taxable transactions is a

significant source of lost revenue to the State. This bill will require financial institutions and other major organizations that handle payment transactions to report annually the aggregate amount of payment card and third party payments settled with New York payees, including firms with New York addresses, New York taxpayers, and persons registered with the Commissioner of Taxation and Finance (Commissioner) for sales tax purposes (vendors of tangible personal property and services, hotel and motel operators, and amusement charge recipients). Settled payment transactions from sources such as credit or debit cards are more likely than not a result of a sale that should be reflected on business tax returns. The gross payment information would be used to analyze sales and other tax returns to determine if there may be underreporting of sales and other taxable transactions and associated sales tax and/or income tax.

The increased use of debit, credit, and other electronic payments and recent developments in automation of the banking industry make this reporting feasible. Advanced use of electronic filing reduces the administrative burden for the financial institutions and the Department.

The federal government has already recognized the value of this approach. In Public Law 110-289 of 2008, Congress required payment settlement entities to file with the Internal Revenue Service annual information returns reflecting the transactions of their payees. This bill enables the State to obtain this information about those doing business in New York State.

The bill adds a new Tax Law § 1703 concerning information returns relating to payments made in settlement of payment card and third party network transactions. Subdivision (a)(1) requires those payment settlement entities, third party settlement organizations, electronic payment facilitators, and other third parties acting on behalf of payment settlement entities, that are required to file an information return pursuant to the newly enacted Internal Revenue Code § 6050W, to file a duplicate information return with the State within 30 days of that filing in such form and manner as prescribed by the Commissioner or, in the alternative, to file a duplicate of any information returns related to payees who are New York taxpayers or who have New York State addresses or are registered with the Commissioner for sales tax purposes.

Subdivision (a)(2) requires the Department to maintain and make available to reporting entities no later than 45 days prior to the reporting deadline a list or database of New York State taxpayers and persons registered for sales tax purposes and prohibits reporting entities from using such information for any purpose other than the required information reporting. Subdivision (a)(3) prohibits the Department from using for any purpose information received from reporting entities concerning non-New York taxpayers. Subdivision (b) establishes a penalty of \$50 for each failure to file an information return, with an annual maximum of \$250,000, and permits the Commissioner to waive all or any portion of such penalty for reasonable cause or in the interests of effective tax administration.

### Budget Implications:

Initial information returns are not due until early in calendar year 2012 for the calendar year 2011 reporting period. As a result, this bill would increase revenue by \$35 million in SFY 2012-13 and \$83 million per year thereafter. Therefore enactment of this bill is necessary to implement the Financial Plan submitted with the 2010-11 Executive Budget.

### Effective Date:

This bill would take effect immediately.

## **Part I – Authorize the use of statistical sampling techniques for sales tax purposes.**

### Purpose:

This bill would expand the authority of the Commissioner of Taxation and Finance (the “Commissioner”) to perform statistical sampling audits to determine the sales tax and compensating use tax liability of taxpayers.

### Statement in Support, Summary of Provisions, Existing Law and Prior Legislative History:

Current law does not permit the Department of Tax and Finance (the Department) to estimate the additional sales and use tax owed by a taxpayer that has adequate books and records. An administrative decision of the Tax Appeals Tribunal held that statistical sampling is a type of estimate and thus cannot be used to determine tax due without the consent of the taxpayer with adequate books and records. This rule presents the Department with a Hobson's choice: it must either devote its scarce audit resources to performing a time-draining invoice-by-invoice audit of a taxpayer with adequate records, thus limiting the number of audits it can perform, or find an ad hoc, non-scientific method of estimating tax due on audit that is agreeable to the taxpayer.

Statistical sampling is a method for estimating a particular value in a population based on a randomly chosen sample from that population. Statistical sampling is in some sense a form of an estimate. But unlike other estimation methods, it is based on mathematical principles and permits an exact determination of the confidence that may be placed in the result (e.g., there is 90percent confidence that the additional tax due fell in a given precision range). Moreover, statistical sampling does not use external indices; rather, it is a means of estimate that draws randomly from all the taxpayer's books and records. In fact, statistical sampling can only be used when the taxpayer has complete books and records because otherwise the sample would not be random, and therefore would not be statistically valid. For this reason statistical sampling is widely used by other taxing jurisdictions and by the Department in other contexts, and has

been upheld by the Court of Appeals for use in Medicaid audits (*Matter of Mercy Hosp. of Watertown v. New York State Dept. of Social Services*, 79 NY2d 197 (1992)).

Invoice-by-invoice audits are extremely time-intensive and costly for both the Department and the taxpayer, especially in the case of large taxpayers that may have thousands of invoices to review. Accordingly, the only practical approach to auditing a large taxpayer is to estimate liability based on projecting the audit results of some sample of invoices to the whole population. Because the Department cannot require the use of the best method for doing an estimate, statistical sampling, in which the sample group is chosen randomly, the Department generally is forced to determine the sample group through negotiations with the taxpayer, as in a test period audit where the results from some part of the audit period are projected to the whole period. Thus, the upshot of the approach dictated by current law is that the audit liability of large taxpayers with adequate books and records is usually determined through statistically-invalid estimates that rely on non-random samples and which allow for minimal certainty as to the accuracy of the result. This bill would change that.

Section 1 of the bill would amend Tax Law § 1138(a)(1) to expand the Department's discretion to use generally accepted statistical sampling techniques to determine the amount of sales and compensating use taxes due when a taxpayer's records are adequate and made available for review to the Commissioner. Otherwise, section 1 codifies the current case law regarding estimated audits, as it does not allow the Department to use any method (other than generally accepted statistical sampling techniques) for estimating the audit liability of a taxpayer with adequate books and records unless the taxpayer agrees.

Section 2 of the bill would add a new subdivision 6-a to Tax Law §1142 to expressly expand the authority of the Commissioner to use generally accepted statistical sampling techniques. This section of the bill would also require the Commissioner to give notice to a taxpayer whose tax due is going to be determined through statistical sampling techniques.

Furthermore, section 2 of the bill would also preclude the Commissioner from using statistical sampling techniques for audits of small businesses. The lesser volume of records for such entities generally obviates the need for statistical sampling. Specifically, the Commissioner would be prohibited from using statistical sampling techniques to determine the tax liability of a person whose "gross receipts or sales" for Federal income tax reporting purposes are less than \$1 million for each of three prior Federal taxable years (or a lesser number of years, if three years are not available), unless the person consents to the use of such sampling. Thus, small businesses could choose not to be subject to statistical sampling audit techniques to determine tax or, if they want to take advantage of the efficiencies offered by statistical sampling, they could authorize the Department to perform such an audit. In addition, no provision of new subdivision 6-a or any other law would limit the Commissioner's authority to use statistical sampling techniques, for purposes other than determining the amount of tax due, including examining records as a means of determining categories of sales or purchases worthy of audit.

A similar proposal was included as part of the Governor's budget bill in 2009.

Budget Implications:

This bill would increase revenue by \$8 million in SFY 2010-11 and \$12 million per year thereafter. Therefore enactment of this bill is necessary to implement the Financial Plan submitted with the 2010-11 Executive Budget

Effective Date:

This bill would take effect immediately; provided, however, that the provisions of this bill would apply, with respect to the determination of tax due under Article 28 of the Tax Law or pursuant to the authority of other provisions of the Tax Law which incorporate or make reference to such Article 28, to any tax due that has not been assessed on the date this act becomes a law.

**Part J – Improve the Administration of the Tax Department's Electronic Filing and Electronic Payment Programs.**

Purpose:

This bill would: (1) eliminate taxpayer opt-out from e-filing as automatic grounds for abatement of the penalty imposed on tax return preparers for failure to e-file tax returns and other tax documents when required by law to do so; (2) authorize the Commissioner of Taxation and Finance (Commissioner) to establish correction periods for electronic filings and payments that are not accepted for processing; and (3) prohibit tax return preparers and software companies from charging separately for e-filing of New York tax documents.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Sections 1, 4 and 5 of the bill would address abuses in the administration of the Tax Department's mandatory e-filing programs for tax return preparers. The Tax Department has received complaints from a number of tax return preparers that other tax return preparers are avoiding their obligations under Tax Law sections 29 and 658(g)(10) to e-file tax returns and other tax documents by convincing taxpayers that they should not e-file. These provisions of the Tax Law require tax return preparers who meet specified filing thresholds and use tax software to prepare returns or other tax documents to e-file all "authorized tax documents" (in the case of section 29) or all "authorized returns" (in the case of section 658(g)(10)). Penalties are imposed by Tax Law §§ 29(e) and 685(u)(5) on tax return preparers who fail to e-file when required. However, both penalty provisions allow for abatement of the penalty for reasonable cause, which includes, but is not limited to, the circumstance where the taxpayer elects not to e-file.



By removing the explicit language providing that taxpayer opt-out from e-filing will constitute reasonable cause for abatement of the failure to e-file penalty imposed on tax return preparers, the bill would ensure that this factual circumstance will not, in every case, require abatement of the penalty. However, since the bill would leave in place the general language allowing for abatement of the penalty for reasonable cause, the Tax Department is evidencing recognition of the fact that reasonable cause could, in legitimate but limited circumstances, consist of taxpayer election not to e-file. Because the preparer may be required to prove the legitimacy of that opt-out, such circumstances would have to be documented by the taxpayer by providing a certification to the tax return preparer justifying the opt-out and indicating that the taxpayer's election not to e-file was made voluntarily and without coercion from the preparer. This certification would have to be maintained by the preparer and made available to the Tax Department upon its request.

Section 2 of the bill would authorize the Commissioner to establish correction periods for electronically filed tax documents and authorizations for electronic funds withdrawals that are not accepted for processing. If an electronic tax document or authorization for an electronic funds withdrawal is submitted on or before the due date (including extensions of time), but such electronic filing or authorization is rejected, the Commissioner would be authorized to provide for a reasonable period of time during which the taxpayer could re-submit the tax document or authorization for an electronic funds withdrawal. If the Tax Department receives the tax document and/or payment, as applicable, on or before the expiration of the correction period but after the due date (including extensions of time), the filing and/or payment would be considered timely made. It is anticipated that the provision of correction periods by the Commissioner will provide a better customer experience for current participants in the Tax Department's e-file and e-pay programs, and will encourage those persons not already participating in such programs to do so. This proposal is modeled on a similar IRS program (see Pub. 4164, section 1.4.2, page 8).

Section 3 of the bill would prohibit tax return preparers and software companies from charging separately for electronic filing of New York tax documents. This provision also would make it unlawful for a software company to offer any version of its software product that imposes a separate charge for electronic filing of New York tax documents. A civil penalty of \$500 would be imposed for a first violation. The penalty would be increased to \$1000 for each subsequent violation. The penalty must be paid to the Commissioner upon notice and demand, and would be assessed, collected, and paid in the same manner as taxes under Article 27 of the Tax Law.

The Tax Department has become aware that some tax return preparers and software developers are using dual pricing policies for e-filing Federal and New York State tax documents; i.e., e-filing Federal tax documents is available at no charge, but e-filing New York tax documents requires payment of a separate charge. This bill is intended to remove this disincentive to e-filing New York tax documents by making it unlawful for tax return preparers and software developers to impose a separate charge for e-filing New York tax documents.

All provisions of the bill are new except for section 3. A similar provision to section 3 of the bill was included in the Governor's 2009-10 Executive Budget (see Part VV of S.59/A.159).

Budget Implications:

Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because of the cost saving features associated with this bill.

Effective Date:

The bill would take effect immediately, provided, however, that sections one, four and five of the bill would apply to tax returns and other tax documents required to be filed electronically by tax return preparers on or after December 31, 2010, and section two of the bill would apply to electronic returns and payments made for tax years beginning after December 31, 2010.

**Part K – Authorize the Department of Taxation and Finance to use less costly alternative means of communication when providing tax bills, notices and other tax documents to addressees in order to reduce mailing costs.**

Purpose:

This bill would provide the Department of Taxation and Finance ("Department") with greater flexibility and cost savings by allowing the Department to use alternative means of sending tax bills, notices and other tax documents to addressees.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

There are numerous provisions in New York State law requiring the Department to mail tax notices and other tax documents by first class mail, certified mail, registered mail, certified mail return receipt requested, or registered mail return receipt requested. Some examples include the collection provisions that the Department must follow under the Civil Practice Law and Rules, the notification provisions as outlined in the Abandoned Property Law, and the numerous statutory notice provisions in the Tax Law itself. The State could save millions of dollars in costly and unnecessary postal fees if the Department was permitted to use alternative means of communication (e.g., e-mail or other electronic communication delivery systems) in situations where the Commissioner of Taxation and Finance ("Commissioner") determined such means were reasonably calculated to provide the addressee with the tax bill, notice or other tax document.

This bill would authorize the Commissioner to provide by alternative means such notices and documents that the Department is currently required by New York State law to mail by first class mail, certified mail, registered mail, certified mail return receipt

requested, or registered mail return receipt requested. If the Tax Department transmits the tax notice or other tax document by such alternative means, using its standard business processes for that communication method, a presumption would arise that the tax notice or other tax document was delivered to, and received by, the addressee.

This is a new proposal.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because of the cost savings associated with this bill.

Effective Date:

This bill takes effect immediately.

**Part L – Reform the Offer in Compromise Program of the Department of Taxation and Finance.**

Purpose:

This bill would reform the Offer in Compromise Program of the Department of Taxation and Finance (Tax Department) by adopting standards for assisting all deserving taxpayers, while at the same time protecting the interests of the State.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

The compromise provisions in subdivisions Fifteenth and Eighteenth-a of Tax Law § 171, are outdated and do not reflect current realities or the experiences of the Tax Department in administering the offer in compromise program. These provisions of the Tax Law are overly restrictive, depriving the Commissioner of Taxation and Finance (Commissioner) of the authority to provide relief to all deserving taxpayers and inhibiting the Commissioner's ability to generate revenue on otherwise uncollectible liabilities. Moreover, a consensus has emerged among taxpayers, tax practitioners, taxpayer advocates, and professional associations that the offer in compromise process is often an ineffective or futile avenue for relief of tax debts.

Currently, subdivision Fifteenth authorizes the Commissioner to compromise fixed and final tax liabilities, including penalties and interest, only if: (1) the taxpayer has been discharged in bankruptcy or been proven to be insolvent; and (2) the amount payable in compromise equals or exceeds what the Tax Department could conceivably recover through legal proceedings. These restrictions require the Tax Department to assume a full exercise of its levy and garnishment powers in establishing a minimally acceptable offer, even if specific circumstances render enforcement of the debt impractical, contrary to public policy, or unlikely to succeed. The existing statutory restrictions also

prohibit the Tax Department from compromising a liability in order to avoid the imposition of an undue economic hardship or where other exceptional or unique circumstances justify the acceptance of an offer.

The existing restrictions in subdivision Fifteenth are contributing to a failure of the offer-in-compromise program to reach its public policy goals, which include: (1) resolving tax liabilities that cannot be satisfied in full; (2) collecting what can reasonably be collected at the earliest time possible and at the least cost to the state; (3) giving taxpayers with overwhelming liabilities a fresh start, enabling them to comply voluntarily with the tax laws and become productive, taxpaying members of society; and (4) collecting funds that may not be collectible by other means, thereby encouraging taxpayers to stay, and keep their productive assets, in New York. Instead, the statutory restrictions to compromise are contributing to an increasing number of taxpayers facing overwhelmingly large, aging, uncollectible, and sometimes erroneous tax debts.

The new provisions in this bill are designed to address the unintended negative consequences of the restrictions contained in subdivision Fifteenth. Under the bill, the Commissioner of Taxation and Finance would be authorized to consider an increased pool of applicants for a potential offer, based not only on the tax debtor's status as having been discharged in bankruptcy or having been proven to be insolvent, but also based on undue economic hardship or other exceptional mitigating circumstance. This is consistent with most states that have formal offer in compromise programs, where the taxpayer need not be insolvent or bankrupt to participate.

Additionally, the bill would authorize the Commissioner to compromise such fixed and final tax liabilities as long as the amount payable in compromise reasonably reflects collection potential or is otherwise justified by proofs submitted by the taxpayer. These statutory modifications would allow the Tax Department to bring more distressed tax debtors into the offer in compromise program. They would also permit the Tax Department, in considering an offer in compromise, to account for not only its legal authority to collect a tax debt, but also its actual ability to collect in light of the specifics of a given case. These changes would allow the Tax Department to compromise currently ineligible liabilities and generate revenue where the tax debt is, in effect, uncollectible, or where the debt should not be collected in full for other justifiable reasons. This bill would not, however, create new personal exemptions or income standards beyond those authorized by current law.

Under the bill, an offer in compromise could not be accepted for any reason where acceptance of such an offer would not be in the best interests of the State or would undermine voluntary compliance with the Tax Law. These concepts are critical because there are circumstances in which a taxpayer may meet the offer in compromise standards, but the State does not want to enter into an offer in compromise for policy reasons (e.g., the taxpayer may be a particularly notorious criminal). These standards also make it clear that offers in compromise cannot be used as a tax planning device by businesses or individuals. In addition to these standards on the acceptance of offers in

compromise, the requirements of judicial oversight and an opinion of counsel for larger amounts to be compromised have been retained and updated.

Some of the new language in the bill is derived from the Internal Revenue Code, the regulations of the Internal Revenue Service, or the Internal Revenue Manual. Accordingly, the Tax Department intends to follow the federal meanings, except when a different construction is warranted to reflect the particular economic or other circumstances of New York, the differing collection provisions of New York law versus federal law or for other good reason.

Section 1 of this bill would amend subdivision Fifteenth of section 171 of the Tax Law to allow tax debtors to apply for an offer in compromise if collection in full would cause them undue economic hardship or if they can show any other exceptional mitigating circumstance that would render acceptance of the compromise just and appropriate. Under current law, only debtors who are insolvent or discharged from a bankruptcy proceeding may make such application as a result of their financial circumstances. The amount payable through an offer in compromise would no longer be no less than the amount recoverable through legal proceedings but an amount reasonably reflecting collection potential or as otherwise justified by the tax debtor. And, in any event, no offer in compromise would be accepted if it would undermine tax compliance or be adverse to the interests of the State. Finally, section 1 would retain the threshold for requiring approval of an offer in compromise by a New York State Supreme Court Justice of more than \$100,000, not including penalties or interest.

Section 2 of this bill would amend subdivision Eighteenth-a of section 171 of the Tax Law to modernize the language of the provisions for an offer in compromise for liabilities that are not fixed and final and to raise the limits for requiring an Opinion of Counsel to \$100,000 or more, including any penalties or interest.

Section 3 of the bill provides that it would take effect immediately.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because it would result in a revenue increase of \$1 million annually beginning in SFY 2010-11.

Effective Date:

This bill takes effect immediately.

**Part M – Require the Department of Taxation and Finance to provide recommendations to reform State and local taxes on telecommunications services.**

Purpose:

This bill would require the Department of Taxation and Finance (Tax Department) to complete a report that makes recommendations about reforming and modernizing state and local taxes on telecommunication services.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

New York’s taxation of telecommunication services has not kept pace with the service changes and technological advances in the telecommunications industry over the past decade. Moreover, New York’s many layers of government — state, county, city, town and village — impose a variety of taxes on telecommunication services and providers. Although the state last reformed its telecommunications taxes in the mid-1990s, many local governments still impose telecommunications taxes that reference laws from the 1950s. The patchwork of different taxes imposed by multiple jurisdictions leads to consumer confusion about what taxes are appearing on their monthly bills.

This bill would require the Tax Department, in consultation with the Department of Public Service and the Office of Real Property Services, to submit to the Governor and legislative leaders a report that makes recommendations about reforming state and local taxes on telecommunications services. The report required by this bill would build upon the report required by Part NN of Chapter 59 of the Laws of 2009 and issued by the Department on October 1, 2009, describing the various State and local taxes relating to the telecommunications industry. The report would be due 245 days after the bill becomes a law.

Budget Implications:

State and local finances could change contingent on adoption of study recommendations.

Effective Date:

This bill would take effect immediately.

**Part N – Eliminate the sunset of Quick Draw and eliminate certain restrictions on the game.**

Purpose:

This bill would make permanent the authority of the Division of the Lottery (Lottery) to operate the Quick Draw game, and eliminate the current restrictions on the game's hours of operation, and on locations that can operate the game.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Section 1 would amend Chapter 405 of the Laws of 1999, as amended by Chapter 57 of the Laws of 2008, to extend permanently the authorization to operate Quick Draw.

Section 2 would amend Tax Law § 1612(a)(1) to eliminate a number of restrictions associated with conducting Quick Draw, including those: (1) restricting Quick Draw to no more than 13 hours of daily operations, no more than 8 of which may be consecutive; (2) limiting Quick Draw ticket sales to premises licensed for the sale of alcoholic beverages for on-premises consumption where at least 25% of gross sales are sales of food; (3) requiring premises that do not sell alcoholic beverages to be a minimum of 2,500 square feet; and (4) requiring a person to be 21 years of age or older to play Quick Draw while in the premises of a licensee who holds an alcoholic beverages license. Removal of these restrictions makes it unnecessary to provide exceptions for bowling establishments and pari-mutuel facilities; therefore, those exceptions are also deleted. An obsolete authorization of emergency rulemaking at the time of Quick Draw start-up is also deleted.

Quick Draw was first authorized in 1995 and was extended in 1999, 2004, 2006, 2007 and 2008. It is currently due to expire on May 31, 2010.

This game supports education and provides commissions for Lottery retailers. Sales from the Quick Draw game have generated over \$1.6 billion in revenue for education since it was first authorized. It is played at over 3,400 locations across the State.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because the elimination of game restrictions will generate an additional \$33 million in 2010-11 and \$54 million thereafter to support education.

Effective Date:

This bill takes effect immediately.

**Part O – Extend the hours of Video Lottery Terminal operation, repeal the sunset date for the VLT program, and make technical corrections.**

Purpose:

This bill would remove the sunset date of the Video Lottery Gaming (“VLG”) Program, amend the Tax Law to allow the VLG hours of operations to be prescribed by the Division of the Lottery (Lottery), and correct the amount of VLG revenue to be retained by the Lottery for operation, administration and procurement purposes at a certain track.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Sections 1 through 4 of the bill would remove the sunset date of the VLG Program by amending Chapters 140 and 286 of the Laws of 2008 to make Lottery's authorization to license all current VLT facilities permanent and to eliminate duplicated language. The VLG program is currently scheduled to expire on various dates beginning on December 31, 2017. The elimination of this sunset would allow participating VLT facilities to better plan for the long-term operation of these facilities.

Section 5 of the bill would amend Tax Law §1617-a(b) to allow the hours of operation of VLG to be prescribed by the Lottery. Current law only permits the operation of VLG for no more that sixteen consecutive hours per day, and such operation may not be conducted past 2:00 a.m. The elimination of this restriction would allow the Lottery the ability to extend the hours of VLG operation as may be determined by the Lottery.

Section 6 of the bill would amend Tax Law §1612(1)(ii)(G) to correct the amount of VLG revenue after payout of prizes to be retained by the Lottery for operation, administration and procurement purposes at a vendor track located at the site of the former Concord Resort to restore the general rule that the Lottery shall retain ten percent for such purposes and removes a date related to an employment shortfall provision for such vendor track which, if not removed, could prevent the application of a recapture provision.

Section 7 of the bill would provide for an immediate effective date.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because elimination of hour restrictions would generate an additional \$45 million in revenue in 2010-11 and annually to support education.

Effective Date:

This bill would take effect immediately.



**Part P – Expand the base of the mortgage recording tax to include sales of cooperatives.**

Purpose:

This bill would expand the scope of the mortgage recording tax, which is currently imposed on the recording of mortgages on real property with the county clerk, to include the filing of a financing statement securing a loan for the purchase of an ownership interest in a cooperative housing unit.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

A cooperative housing unit, which is represented by shares of stock in a cooperative housing corporation and a proprietary leasehold, is the functional equivalent of real property. In order to perfect its security interest in a cooperative housing unit, a lender must file a financing statement with the county clerk. However, even though financing statements are akin to mortgages, no recording tax is imposed on such statements when they are filed.

This bill would subject the filing of a financing statement with the county clerk to a tax that is calculated, administered, collected and distributed according to the laws pertaining to the tax on mortgages under Article 11 of the Tax Law. Section 1 of the bill would include the filing of financing statements in the mortgage recording taxes applicable statewide. Remedies for enforcement of the financing statement under the UCC would not be available if the recording tax has not been paid. Counties and cities in New York State that have been authorized to impose local mortgage recording taxes would be authorized under this bill to impose and collect an equivalent tax on the filing of financing statements.

Section 2 of the bill would make specific amendments to New York City's mortgage recording tax pertaining to a cooperative housing unit. Section 3 amends the UCC to require that a cooperative addendum form be filed along with a financing statement and that the form provide the principal amount of the debt secured. Section 4 would amend the UCC to prevent enforcement of a security agreement backed by an ownership interest in a cooperative housing unit unless the tax on filing of the financing statement has been paid. Section 5 provides that this act would take effect on the first day of the third month after it becomes law and apply to financing statements filed on or after the effective date of this act.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because it provides the City of New York and county governments with potential additional receipts. This is an element of the mandate relief package.

Effective Date:

The act takes effect on the first day of the third month after it becomes law and applies to financing statements filed on or after that date.

**Part Q – Provide an income tax (circuit breaker) credit to help offset local school tax burden, establish an annual spending growth cap to restore structural budgetary balance and improve the chances of a year-end surplus, establish a property tax circuit breaker reserve fund, and increase the rainy day reserve fund.**

Purpose:

This bill would establish a spending cap for the State, a Property Tax Circuit Breaker Reserve Fund (“Circuit Breaker Reserve Fund”) and a School Tax Circuit Breaker Tax Credit (“Circuit Breaker Tax Credit”), and increase the Rainy Day Reserve Fund.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Section 1 of this bill would amend the Tax Law to remove a reference to a credit which no longer exists.

Section 2 of this bill would amend the Tax Law to establish a Circuit Breaker Tax Credit. Subject to the availability of moneys in the Circuit Breaker Reserve Fund, a qualified taxpayer would be allowed a tax credit equal to a percentage of the excess amount of net school taxes he or she pays over and above the maximum school tax amount applicable to him or her. However, no credit would be allowed where a qualified taxpayer’s household gross income in the city of New York, and the counties of Nassau, Suffolk, Rockland, Westchester, Putnam, Orange, and Dutchess, exceeds \$300,000 or where a qualified taxpayer’s household gross income exceeds \$200,000 in all other counties. Section 2 also contains an adjustment factor which would function as an implicit property tax growth cap to ensure that the benefits of the Circuit Breaker Tax Credit do not disproportionately accrue to jurisdictions which have allowed tax rates to rise the fastest.

Section 3 of the bill would establish the Property Tax Circuit Breaker Reserve Fund in the State Finance Law. This fund would hold any state surplus, which would be paid over to eligible taxpayers in the form of a personal income tax credit.

Section 4 of this bill would amend State Finance Law § 92-cc(2) to raise the maximum Rainy Day Reserve Fund balance from 3 percent to 10 percent. After the increased deposits to the Tax Stabilization Reserve Fund and Rainy Day Reserve Fund, any remaining surplus would be transferred to the Circuit Breaker Reserve Fund to be used solely for the purpose of funding the Circuit Breaker Tax Credit for New York State resident homeowners.

Section 5 of the bill would establish a spending cap effective for fiscal years 2010-11 through 2013-14 to restore structural balance to the budget and improve the chances of a year-end budgetary surplus. The Circuit Breaker Tax Credit established by section 2 of this bill would ensure that a substantial amount of the surplus is returned to taxpayers in the form of meaningful property tax relief.

Section 6 of the bill would provide that the bill takes effect immediately; provided however, that section 2 of this bill would apply to tax years beginning on or after January 1, 2011.

Budget Implications:

Enactment of this bill is necessary to implement the intent of the 2010-11 Executive Budget. The spending cap will help to restore structural balance to the Budget and improve the chances of a year-end budgetary surplus, which would fund the Circuit Breaker Tax Credit and provide meaningful property tax relief.

Effective Date:

This bill takes effect immediately; provided however, that section 2 of this bill applies to tax years beginning on or after January 1, 2011 and that section 5 would sunset on March 31, 2014.

**Part R – Clarify tax treatment of marriages recognized by New York State but not by Federal Law.**

Purpose:

This bill would amend the Tax Law and the Administrative Code of the City of New York to clarify that marriages recognized in New York, but not recognized by the federal government, receive the same treatment as other marriages under the Tax Law.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Sections 1, 2, 3, 6 and 7 of the bill would amend the Tax Law and the Administrative Code of the City of New York to allow terms referring to marital status, such as “Married,” “Spouse,” “Husband,” “Wife,” and “Widow,” to encompass individuals in a

marriage recognized in New York, including under principles of comity, regardless of whether such marriage is recognized in federal law.

Section 2 of the bill would create a new Tax Law § 30 to decouple the Tax Law from provisions of laws of the United States, and specifically the Internal Revenue Code, that prevent recognition of a legally performed same-sex marriage.

Section 4 of the bill would provide that married couples that are recognized by state but not federal law, shall file their returns in the same status as would have been available had the marriage been recognized by federal law.

Section 5 of the bill would make a conforming change to the estate tax relating to the qualified terminable interest property deduction.

Section 8 of the bill provides the bill would take effect immediately; provided however, that sections 3, 4, 6, and 7 of this act shall apply to tax years beginning on or after January 1, 2010.

New York generally recognizes marriages that take place outside of New York and are valid under the laws of the jurisdiction in which they take place. This is the case, for example, with common law marriages. *Matter of Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289 (1980). More recently, virtually all courts to decide the issue have determined that New York affords recognition to same-sex marriages legally performed in other jurisdictions, under principles of comity, so long as no New York statute dictates otherwise in particular circumstances. *E.g.*, [Martinez v. County of Monroe, 850 N.Y.S.2d 740 \(4th Dep't 2008\)](#).

Applying such recognition in the tax area has proven complex, and the law in this area is in need of clarification. The New York State personal income tax generally conforms to the federal personal income tax. Sections 607(b) and 651(b) of the Tax Law provide that a New York taxpayer's filing status is determined by his or her Federal filing status. Section 3 of the Federal Defense of Marriage Act (P.L. 104-199 [September 21, 1996] [DOMA]), provides, however, that, "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus or agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." Thus, under DOMA, the Internal Revenue Service does not recognize same-sex marriage for purposes of filing a Federal Income Tax return with a "married" filing status, even when those marriages are recognized as valid in the jurisdiction in which they are performed. Therefore, partners in a same-sex marriage are not treated as "married" under federal tax law.

Since the New York State personal income tax law requires taxpayers to conform to federal rules for tax filing purposes, partners in same-sex marriages cannot file state returns jointly or as married filing separately. Also, current law is unsettled as to whether partners in a same-sex marriage may be treated as married for purposes of the

Tax Law's estate tax (Article 26) and for purposes of other tax rules, such as the deductibility of spousal health benefits. A State legislative change would conform the treatment of same-sex couples (and others recognized only via State law, including by comity principles) to the legal treatment they receive under other aspects of New York law. It would thereby provide clarity regarding the tax rules, and remove the current problematic situation where a couple may be recognized by New York State for virtually all purposes as married, including for financial issues such as entitlement to benefits, but then must be treated as single for tax purposes, or face significant ambiguity in a host of tax questions which precludes adequate financial planning.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because each of the components of this bill each have a fiscal impact.

The married filing income tax filing status would lead to higher tax liabilities. These higher liabilities would be offset by the revenue losses associated with the income tax exclusion for family coverage under employer health plans, and the estate tax marital deduction.

Therefore the components of this bill, when considered in toto, would have no impact on the State Financial Plan.

Effective Date:

This bill takes effect immediately, provided that sections 3, 4, 6 and 7 apply and applies to tax years beginning on or after January 1, 2010.

**Part S – Narrow the affiliate nexus provisions by excluding as a basis for sales tax vendor-status an affiliate’s control over the seller.**

Purpose:

This bill would narrow the definition of “vendor” by providing that the in-state activities of an affiliate in providing accounting or legal services or advice, or in directing the activities of a seller, do not make the seller a vendor.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Vendors must obtain a certificate of authority, collect sales tax, maintain certain records, file returns, and remit tax (Tax Law §§ 1132[a][1], 1134, 1135, 1136, and 1137). The SFY 2009-10 Budget amended the definition of “vendor” to include, among others, sellers making taxable sales in New York that have affiliates in-state that engage in activities in the State that inure to the benefit of the seller in its development or maintenance of a market for its goods or services in the State, to the extent that those

activities of the affiliate have a sufficient nexus with New York State to satisfy constitutional requirements. Section 1 of this bill would amend the legislation enacted in SFY 2009-10 to provide that the in-state activities of an affiliate in providing accounting or legal services or advice, or in directing the activities of a seller, including but not limited to, making decisions about (a) strategic planning, (b) marketing, (c) inventory, (d) staffing, (e) distribution, or (f) cash management, do not make the seller a vendor. Section 2 would make the bill effective on June 1, 2009, and applicable to sales made or uses occurring on or after that date.

Budget Implications:

Enactment of this bill is assumed in the 2010-11 Executive Budget and would provide \$5 million of tax relief to New York affiliates.

Effective Date:

This bill takes effect on June 1, 2009 and applies to sales made and uses occurring on or after that date.

**Part T – Enact the Wine Industry and Liquor Store Revitalization Act**

This bill would permit the sales of wine in grocery or drug stores which currently qualify for a beer license and make other changes to the Alcoholic Beverage Control (ABC) Law to modernize the sale of alcohol.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Section 1 of the bill would provide the title of this act to be the Wine Industry and Liquor Store Revitalization Act.

Section 2 of the bill would provide the expanded opportunity for liquor stores to sell items complimentary to their business, allow such stores to install ATM machines on the premises, provide for multiple licenses, authorizes liquor stores to sell to retail establishments licensed for consumption on the premises and provide for a limitation on the number of licenses issued under ABC Law § 63. This section also would remove the prohibition against multiple licenses.

Furthermore, section 2 would create a "medallion" system, through which existing liquor store owners would be able to auction off their existing licenses to the highest bidder, and sell the one additional license this section allows them to obtain from the State Liquor Authority (SLA).

Section 3 of the bill would allow licensees under ABC Law § 79 to sell to restaurants and certain grocery stores. This section would also remove the prohibition against multiple licenses.

Section 4 of the bill would provide for an annual fee of \$500 for the licensure of each grocery or drug stores to sell wine. Any applicant that holds 2 or more grocery or drug store licenses would pay an annual fee of \$1,000. This section would also provides that 10 percent of the new license fees, up to \$1 million would be dedicated to the New York Wine Marketing Program to promote New York's wine industry.

Section 5 of the bill would provide that any person under eighteen years of age may handle and deliver the wine and that any person under eighteen years of age may accept payment for wine sales when under direct supervision of someone older.

Section 6 of the bill would provide that information regarding the number of licenses applied for, renewals sought and the length of time required for approval shall be included in the annual report of the SLA.

Section 7 of the bill would provide for hours of operation to sell wine and liquor.

Section 8 of the bill would provide for cooperative agreements so that smaller liquor stores may agree to jointly purchase larger, more cost effective, quantities than would be possible without cooperative agreements.

Sections 9 and 10 of the bill would repeal antiquated provisions impacting liquor stores.

Section 11 of the bill would provide for licensure of grocery stores and drug stores to sell wine for consumption off the premises, would provide further opportunities for wine tastings, would institute a fee structure for such licensure, and would authorize grocery stores and drug stores under 1,000 square feet to purchase wine from stores licensed to sell such products. A graduated franchise fee due as part of the license would be required.

Section 12 of the bill would remove advertising restrictions within the licensed premises.

Section 13 of the bill would be identical to section 6 of the bill and needs to be removed.

Section 14 of the bill would provide for temporary permits to sell as licensed in order for those premises awaiting licensure and renewals to continue to do business uninterrupted by the extended licensure process.

Sections 15, 16, 18 and 20 of the bill would amend provisions related to the "credit period."

Section 17 of the bill would amend the criteria for alcohol training awareness programs.

Section 19 of the bill would provide for the sale of mixed cases of wine for resale.

Section 21 of the bill would provide the effective date.

Section 8 of the bill would require that qualified facilities meet minimum square footage, heating and cooling and sound proofing requirements and would exclude armories as a qualified facility within the City of New York unless no qualified facility was available at the time of shooting. Qualified independent film production companies would be exempt from the provision.

Section 9 of the bill would define a qualified independent film production company.

Section 10 of the bill would allow the Department of Taxation and Finance and the Governor's Office of Motion Picture and Television Development to share information about the credits applied for and awarded.

Section 11 of the bill would remove the current law program sunset date of January 1, 2014 to facilitate the payment of credit claims.

Section 12 of the bill would provide for an immediate effective date.

#### Budget Implications:

Due to the credit claim lag, this bill would not reduce annual tax receipts until SFY 2012-13. This bill would reduce receipts by \$168.1 million in 2012-13, \$291.9 million in 2013-14, \$420 million in each of 2014-15 through 2016-17, \$270.6 million in 2017-18 and \$109.4 million in 2018-19. Enactment of this bill is necessary to implement the Financial Plan submitted with the 2010-11 Executive Budget.

#### Effective Date:

This bill would take effect immediately, provided that sections 1 through 9 apply to applications for credits awarded from additional pool 2.

### **Part W – Establish the Excelsior Jobs Program.**

#### Purpose:

This bill would establish the Excelsior Jobs Program that would provide three distinct tax credits to businesses in targeted industries that create jobs.

#### Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Selected businesses in targeted industries that create and maintain at least 50 net new jobs in New York for five years would be eligible for the three tax credits, each of which is fully refundable:

- The Excelsior Jobs Tax Credit would be a refundable tax credit between \$2,500 and \$10,000 per new job created for up to five years.



Budget Implications:

Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because it would provide \$93 million in 2010-11 through various franchise fees, excise taxes, sales taxes and license fees. In 2011-12 it is expected that this proposal will generate \$52 million.

Effective Date:

This bill would take effect immediately.

**Part U – Authorize an additional credit of \$4 million for low-income housing credit.**

Purpose:

This bill would increase the aggregate amount of low-income housing tax credit the Commissioner of Housing and Community Renewal may allocate from \$24 million to \$28 million in 2010.

Statement in Support Summary of Provisions, Existing Law, and Prior Legislative History:

The bill would amend §22 of the Public Housing Law by increasing the aggregate amount of low-income housing tax credit the Commissioner may allocate from \$24 million to \$28 million. Current law provides for total allocation authority of \$24 million.

Budget Implications:

This bill will decrease annual tax receipts by an estimated \$4 million beginning with SFY 2010-11 and ending with SFY 2019-20. Enactment of this bill is necessary to implement the Financial Plan submitted with the 2010-11 Executive Budget.

Effective Date:

The bill would take effect immediately.

**Part V – Extend the film production tax credit, provide \$2.1 billion in additional tax credit allocations over tax years 2010-14, and impose various restrictions that enhance the economic impact of this program.**

Purpose:

This bill would provide an additional tax credit allocation of \$2.1 billion over tax years 2010 through 2014, while new restrictions would enhance the economic impact of this program to the State.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Section 1 of the bill would define the \$350 million that was allocated for allocation year 2009 in the 2009-10 Enacted Budget as "additional pool 1."

Section 2 of the bill would allocate an additional \$420 million in each of 2010, 2011, 2012, 2013, and 2014 and define this as "additional pool 2." This section would also require the Governor's Office for Motion Picture and Television Development to list the allocation year assigned to a taxpayer on the Certificate of Tax Credit provided to the taxpayer if the credit is from additional pool 2 and would require the taxpayer to report this assigned allocation year on its Empire State film production credit tax form. Lastly, this provision would establish a time frame for claiming a credit awarded from additional pool 2 and would require the credit not be claimed before the later of: 1) the taxable year the production of a qualified film is complete, or 2) the taxable year immediately following the allocation year assigned to the taxpayer on the Certificate of Tax Credit. For example, if the production of a qualified film is completed in 2010, and the Certificate of Tax Credit lists 2011 as the credit allocation year assigned for that film credit, the taxpayer would first be able to claim the Empire State film production credit for that film when the taxpayer files its 2012 tax return.

Section 3 of the bill would add "qualified independent film production company" as an entity eligible for the film production tax credit.

Section 4 of the bill would add the requirement that at least 10 percent of principal photography shooting days be spent at a qualified film production facility in order to qualify for the credit. A qualified independent film production company is exempt from this requirement. This section would also add language for the time frame for claiming a credit awarded from allocation pool 2 that is described above.

Section 5 of the bill would require that all productions include either an end credit acknowledging financial support from the State of New York or a New York promotional video accompanying the secondary market (e.g. DVD) release of the production. Further, this section would require that qualified productions must purchase taxable goods and services from New York registered sales tax vendors for such purchases to qualify for the credit.

Section 6 of the bill would require that at least 75 percent of post production costs be incurred in New York in order to be considered a qualified cost.

Section 7 of the bill would exclude armories as a qualified production facility within the City of New York unless an armory meets the requirements outlined in Section 8 below or is being used by a qualified independent film production company.

- The Excelsior Investment Tax Credit would be a refundable tax credit of 2% of qualified investments.
- The Excelsior Research & Development Tax Credit would be a refundable tax credit equal to 10% of the program participant's federal research & development (R&D) tax credit, for R&D activities performed in New York State.

Participants would have to provide verification of the new jobs and investments before qualifying for the credits. In addition, the selected firms would be subject to enhanced monitoring, verifying and evaluation by the State.

Targeted industries would include the fields of biotechnology, pharmaceutical, high-tech, clean-tech, green-tech, financial services back-office operations, and manufacturers.

The Excelsior Jobs Program would keep New York competitive in attracting jobs and capital investment through targeted and cost-effective investments in firms creating jobs to ensure that New York emerges as a leader in the knowledge, technology, and innovation-based economy.

#### Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget. However, the Excelsior Jobs Program costs would be capped at \$50 million per year for five years for new entrants beginning in tax year 2011 and ending with tax year 2015. With this structure, annual fiscal year costs would not exceed \$250 million. During the Financial Plan period, this bill would reduce receipts by \$50 million in 2012-13, \$100 million in 2013-14, and \$150 million in 2014-15.

#### Effective Date:

This bill would take effect on July 1, 2010.

**Part X – Make technical corrections to Part S-1 of Chapter 57 of the Laws of 2009 to clarify that the legislative intent was to make the Empire Zones decertification provisions applicable to tax year 2008.**

#### Purpose:

This bill would clarify and confirm that the amendments to the General Municipal Law (GML) made by Chapter 57 of the Laws of 2009 requiring the decertification of certain Empire Zone business entities were intended to be effective for the taxable year commencing on or after January 1, 2008 and before January 1, 2009.

Statement in Support, Summary of Provisions, Existing Law and Prior Legislative History:

Section 1 of the bill would clarify the Legislature's intent concerning the effective date of the amendments to the GML, so that decertifications that occur in 2009 are in effect for the taxable year commencing on or after January 1, 2008 and before January 1, 2009.

Section 2 of the bill would amend GML § 959(a) to specify the effective date of the decertifications.

Section 3 of the bill would make a technical amendment to GML § 959(w) to clarify the standard of proof to be used by the Empire Zone Designation Board in reviewing decertifications.

Section 4 of the bill would amend Tax Law § 1119(d)(6) to provide that local laws, ordinances and resolutions adopted by counties and cities to opt into the former section 1115(z) sales and use tax exemptions, now repealed, will be deemed to have opted into the new section 1119(d)(6) refund/credit. This treatment would be consistent with the intent of the Legislature in repealing the exemptions and replacing them with a refund/credit.

Section 5 of the bill would amend Tax Law § 17(a) to change the date on which the Department of Taxation and Finance must publish an annual report on tax benefits claimed by Empire Zone business enterprises. This amendment would also advance the publishing date for the first annual report from January 31, 2013 to June 30, 2011.

Section 6 of the bill advances the date for repeal of the provision requiring an annual report by the Commissioner of Taxation and Finance on Empire Zone tax credits, from January 1, 2012 to January 1, 2010.

Sections 7 and 8 of the bill would amend Tax Law §§ 210(12)(B) and 210(12)(C) to allow qualified investment projects to continue to claim the investment tax credit, and the employment incentive tax credit, respectively, for the remainder of their current tax year plus nine additional tax years.

Budget Implications:

The bill is necessary to preserve revenue savings in 2009-10 of an estimated \$72 million reflected in the State Financial Plan that would be generated by these amendments in light of the pending litigation that challenges the administrative interpretation of the effective date for decertifications that occur in 2009.

Effective Date:

This bill would take effect immediately, except that the provisions of section 4 of the bill would take effect on the same date and apply in the same manner that section 31 of part S-1 of Chapter 57 of the Laws of 2009 took effect and applied.

**Part Y – Extend for one year, major provisions of the 1985 and 1987 bank tax reforms, as well as the transitional provisions in New York’s bank tax enacted in response to the Federal Gramm-Leach-Bliley Act.**

Purpose:

This bill would extend the provisions of the New York State and New York City bank taxes dealing with the taxation of commercial banks, and the Federal Gramm-Leach-Bliley Act (GLBA) transitional provisions, for one additional year.

Summary of Provisions, Existing Law, Prior Legislative History and Statement in Support:

The bill would extend the transitional provisions in the State and City bank taxes relating to the GLBA (which eliminated many of the prohibitions against the affiliation of banks, insurance companies, and securities firms) for one year to taxable years beginning before January 1, 2011. The bill also would extend the provisions concerning the New York State and New York City taxation of commercial banks, which were added to the bank tax in 1985, for one more year to taxable years beginning before January 1, 2011. Finally, the bill would extend the provisions concerning the allocation of trading and investment activities of banks, which were added in 1987 and 1988.

Significant changes were made to the franchise tax on banking corporations under the Tax Law and the New York City Administrative Code in 1985. Many of those amendments, however, were made subject to a sunset provision. That provision has been extended numerous times, so that the amendments in question currently expire for taxable years beginning on or after January 1, 2010.

Starting in 2000, transitional provisions relating to the GLBA, which removed the prohibition against the affiliation of banks, securities firms, and insurance companies, were added to both the Tax Law and the New York City Administrative Code. The current GLBA transitional provision, which is set forth in Tax Law section 1452(m), expires in 2010.

The GLBA provisions were first enacted to provide banks and securities firms with certainty about their taxable status under the State and City taxes when the firms exercised the expanded powers authorized by the Federal law while the possible consolidation of the bank tax and the general corporation tax was studied. The initial study did not result in any legislation, and the transitional provisions have been extended for ten years. But the present system of taxation, which treats banks and

securities firms differently, is outdated. These businesses are now often affiliated as part of a single large financial organization. In addition, banks and securities firms today are competing against each other more and more. Separate systems of taxation also encourage tax planning strategies that result in substantially different tax liabilities for businesses conducting the same or comparable activities.

Recognizing these inherent problems, the Department of Taxation and Finance has undertaken a project to eliminate the separate tax on banking corporations, and reform the current taxation of general business corporations. The goal of the project is structure a tax that treats general business corporations and financial institutions in the same manner under a tax system that promotes the principles of equity, economic efficiency, simplicity, ease of compliance and administration, reliability and stability, and economic competitiveness. As part of this project, the Department of Taxation and Finance is consulting with, and receiving input from, the New York general business, securities broker-dealer, and banking communities. The project is expected to be completed during 2010. To facilitate the transition to this unified tax system and eliminate any uncertainty about tax status in the interim, this additional extension of the bank tax provisions and the temporary Gramm-Leach-Bliley transitional provisions is warranted.

Budget Implications:

This bill preserves current Financial Plan revenue. Therefore, enactment of this bill is necessary to implement the Financial Plan submitted with the 2010-2011 Executive Budget.

Effective Date:

This bill will take effect immediately.

**Part Z – Authorize technical clean up of 2009-10 tax enforcement and sales tax avoidance and restore the requirement that IDA-agent statements be submitted to the Tax Department.**

Purpose:

This bill would: (1) make technical corrections to certain tax enforcement and sales tax avoidance provisions enacted by Chapter 57 of the Laws of 2009; and (2) renew the requirement that industrial development agencies file statements with the Department of Taxation and Finance (Tax Department) that provide important information including the value of all sales and use tax exemptions claimed by a project operator

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

*Subpart A – Tax Enforcement Provisions*

Several tax enforcement provisions were enacted by Chapter 57 of the Laws of 2009. These included revised criminal penalties under Article 37 of the Tax Law and the establishment of an expedited hearing under certain circumstances. This bill would correct certain technical flaws in these provisions, as described below.

*Repeated Failure to File Personal Income and Earnings Tax and Corporate Tax Returns or Reports*

Section 1 of the bill would add sections 1808 and 1809 to Part III of Article 37 of the Tax Law to restore the provisions concerning repeated failure to file personal income and earnings tax returns and corporate tax returns or reports. These provisions are identical to Tax Law §§ 1802 and 1803 as they existed until April 7, 2009. Section 1808 would provide that the failure to file a return for three consecutive years in each of which there is a tax liability, with the intent to evade tax under Tax Law Article 22, or any related income or earnings tax statute, is a class E felony. Section 1809 would provide that failure to file a corporate tax return or report for three consecutive years in each of which there is a tax liability, with the intent to evade tax under Articles 9 (except section 180 or 181), 9-A, 13, 32, 33 or 33-A of the Tax Law, is a class E felony. Both sections would, as before, provide a defense that the defendant had no unpaid tax liability for any of the three consecutive taxable years.

When Tax Law Article 37 was recently amended, Tax Law §§ 1802 and 1803 were mistakenly repealed. This unintentionally weakened two of the most effective provisions in Article 37 of the Tax Law. Sections 1802 and 1803 were mainstays of previous enforcement efforts, forming the basis on which most income tax non-filing cases were referred to prosecutors and accepted by them for investigation and potential prosecution. Because of this oversight, there is now no consistently effective way to deal with repeated failures to file personal and corporate income tax returns, even as the State is plagued by such failures to file, which number in the hundreds of thousands each year.

*Expedited Hearings*

Subpart C of Part V-1 of Chapter 57 of the Laws of 2009 added new provisions establishing an expedited hearing for: (1) the proposed cancellation, revocation, or suspension of a license, permit, registration or other credential issued under the Tax Law; (2) the denial of an application for a license, permit, registration or other credential issued under the Tax Law (other than an application to renew a sales tax certificate of authority); or (3) the imposition of a fraud penalty. These provisions require that a conciliation conference be requested within 30 days of the receipt of the notice of the proposed cancellation, revocation, suspension or denial. However, measuring the

deadline for requesting an expedited hearing based on the date the notice is received is problematic, because the time between mailing and receipt may vary and the date of receipt cannot be verified by the Tax Department. Subpart C also inadvertently repealed the language in Tax Law § 170(3-a)(b), which specified the process by which a party can discontinue a conciliation conference.

Sections 2 through 4 of this bill would restore the original language of Tax Law § 170(3-a)(b) about discontinuing a conciliation conference, and would provide that the 30-day period in which to request an expedited hearing begins to run from the date of mailing of the notice, rather than the date of receipt. Sections 3 and 4 of the bill also clarify that the expedited hearing provisions do not apply to a denial of an application for, or a cancellation, revocation or suspension of a certificate of registration as a retail dealer of cigarettes and tobacco products, which is the rule provided for in Tax Law § 480-a(4)(c).

### *Aggregation*

Subpart I of Part V-1 of Chapter 57 of 2009 added new Tax Law § 1807, which provided that the amounts of tax due but not paid under a common plan or scheme within one year may be aggregated and charged in a single count. Chapter 57 inadvertently reversed the words “one article” to “article one” of the Tax Law. Limiting the aggregation provision to Article One of the Tax Law was clearly not intended, as that article contains no tax impositions. Section 5 of this bill would correct this error.

### *Effective Date of Subpart I of Chapter 57 of the Laws of 2009*

Subpart I of Part V-1 of Chapter 57 of the Laws of 2009 amended various provisions of the Tax Law and Penal Law relating to criminal offenses. Section 34 of that subpart provided that the subpart took effect immediately, and applied to offenses occurring on and after the effective date. However, section 1 of that subpart did not relate to a criminal offense; rather, it related to the venue in which certain Tax Law and Penal Law crimes could be prosecuted. Section 6 of this bill would amend the effective date clause to provide, as originally intended, that the venue provision in section 1 of that subpart is effective on April 7, 2009, the date the bill became law, and sections 2-33 of Subpart I, which relate to Tax Law and Penal Law offenses, apply to offenses committed on and after that date.

### *Subpart B – Sales Tax Avoidance Provisions – Aircraft and Vessels*

Part N-1 of Chapter 57 of the Laws of 2009 amended the exemptions applicable to non-residents and commercial aircraft to thwart certain schemes that attempted to avoid sales and use tax on aircraft, motor vehicles and vessels through transactions between affiliated entities. This bill seeks to preclude a similar tax avoidance scheme that uses transactions between affiliated parties to exploit the exclusions from the definition of retail sale. For example, big-ticket items, such as aircraft or vessels, are often purchased out-of-state and are then transferred to an affiliated entity in one of the ways that are excluded from the definition of retail sale in Tax Law § 1101(b)(4)(iv), such as a



capital contribution to a newly formed subsidiary. When the transferee then brings the vessel or aircraft into the State, no use tax is due under Tax Law § 1110 because the transferee did not acquire the property in a retail sale.

Section 3 of this bill would short-circuit that scheme by making the retail sale exclusions inapplicable to transfers of aircraft and vessels between affiliated parties. Thus, in the case of an aircraft that was purchased out-of-state and contributed by the purchaser to its wholly-owned subsidiary, the subsidiary's subsequent use of the aircraft in New York would be subject to use tax under this bill unless an exemption applied, such as the non-resident exemption in Tax Law § 1118(2) or the commercial aircraft exemption in Tax Law § 1115(a)(21). If the aircraft was purchased in the State and then contributed to a wholly-owned subsidiary, the transfer to the subsidiary would be subject to sales tax unless an exemption applies. But section 3 would give the seller or purchaser a credit for sales or use tax paid to New York or any other State in relation to the seller's purchase or use of the aircraft or vessel that is the subject of a transfer, distribution or contribution ("transfer") treated as a retail sale under this bill. The amount of the credit would be limited to the amount of the sales or use tax due as a result of this new subdivision. The refund would be governed by the procedural rules in section 1139, one requirement of which is that an application be filed to claim a refund or credit. Section 3 would also authorize the Commissioner to waive that requirement for any purchaser or seller, or class of purchasers or sellers, where the amount of the refund or credit covers the tax due. As is the case with refunds and credits covered by Tax Law § 1139(e), no interest would be paid for refunds granted or credits allowed by bill section 3. This section also provides that the base on which sales tax would be computed on any sale of an aircraft or vessel by virtue of a transfer covered by this bill is the price the seller paid to acquire the aircraft or vessel unless the seller has owned the property for six months or more at the time of the transfer, in which case the sales tax due may be computed based on the current market value of the aircraft or vessel at the time of the transfer of the property. This parallels the rule that would apply for use tax purposes found in section 1111(b). Sections 1, 2, and 4 of the bill would amend various related Tax Law sections to insert cross-references to the new subdivision in Tax Law § 1111 that would be added by this bill.

#### Subpart C – IDA agent filing requirement

This sub part would renew the requirements of industrial development agencies to file statements with the Tax Department of the appointment of agents and project operators. It would extend that requirement to the Troy and Auburn industrial development authorities. It would also clarify that an agent of the Troy or Auburn IDAs must file annual statements with the Tax Department.

All but two IDAs are established under the General Municipal Law (GML). The Troy and Auburn IDAs are established under the Public Authorities Law (PAL). The GML and PAL each authorize an IDA to establish projects, to appoint an agent or project operator (together, "agent") to manage a project, and to provide financial assistance to the agent in the form of, among other things, State and local sales and use tax exemptions. Until

January 31, 2008, GML § 874(9) required an IDA to file a statement with the Tax Department within 60 days of appointing such an agent. The statement had to indicate the beginning and end dates of the agent's appointment, and the amount of the sales and use tax exemption benefits. Since 1993, GML § 874(8) has required the agent to file an annual statement with the Tax Department indicating the amount of the sales and use tax exemptions taken for the project. While the GML-IDA agent-appointment requirement expired in 2008, the agent continues to be required to file the annual statement.

The expired IDA agent-appointment statement was important to notify the Tax Department that the IDA had established a project for which it was extending sales and use tax benefits. It also alerted the Department to expect the agent to file the annual statement of the tax benefits taken that year. IDA sales and use tax exemption benefits can amount to millions of dollars per project. There are more than 140 IDAs. A single IDA can create many projects in a single year. It is essential for the Tax Department to be aware of the existence of projects and who the project operators are in order to administer and enforce State and local sales taxes. Thus, section 1 of subpart C would add section 874(9) to restore the statement filing requirement.

Sections 2 and 3 of subpart C of the bill would add the same requirement to the PAL regarding the Troy and Auburn IDAs. Sections 2 and 3 would also add the GML § 874(8) provision to the applicable PAL section to clarify that the agent of the IDA must file the annual statement with the Tax Department, so that all IDA agents are treated similarly and to ensure that Tax Department can administer the sales and use taxes for these IDA projects.

This is a new bill. Chapter 444 of the Laws of 1997 likewise added a similar subdivision (9) to GML § 874. The relevant GML provision in Chapter 444 was to expire July 1, 1999, but was renewed several times, until it expired January 31, 2008.

#### Budget Implications:

Enactment of this bill is necessary to implement the 2010-2011 Executive Budget because it maintains revenue currently in the Financial Plan.

#### Effective Date:

Sub parts A and B shall be deemed to have taken effect on the same date and apply in the same manner that part E of chapter 25 of the laws of 2009 took effect.

Subpart C provides the act takes effect immediately and would be deemed to have been in full force and effect as of January 31, 2008, the date that the prior requirement expired, so that GML-IDA agents would be subject to this requirement continually. Sections 2 and 3 would be deemed to have been in full force and effect as of January 1, 2010. The statement of an IDA to the Tax Department required by this bill with respect to having appointed an agent or project operator before the bill's effective date would be deemed timely if it is filed within 90 days of such date.

**Part AA – Extend for one year lower Pari-Mutuel tax rates and rules governing simulcasting of out-of-state races.**

Purpose:

This bill would extend for a period of one year various provisions of the Racing, Pari-Mutuel Wagering and Breeding (Racing) Law which expire during the 2010-11 fiscal year.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

Section 1 would amend Racing Law § 1003(1)(a) to extend in-home simulcasting from June 30, 2010 to June 30, 2011.

Section 2 would amend Racing Law §1007(3)(d)(iii) to extend the current percentage of total pools allocated to purses that a track located in Westchester County receives from a franchised corporation from June 30, 2010 to June 30, 2011.

Section 3 would amend Racing Law § 1014(1) to continue the provisions allowing simulcasting of out-of-state thoroughbred races on any day the Saratoga thoroughbred track is operating from June 30, 2010 to June 30, 2011, and to delay the operation of these provisions in regard to the simulcasting of out-of-state thoroughbred races on all days whether or not the Saratoga thoroughbred track is operating, until June 30, 2011.

Section 4 would amend Racing Law § 1015(1) to extend the provisions governing the simulcasting of races conducted at out-of-state harness tracks from June 30, 2010 to June 30, 2011.

Section 5 would amend Racing Law §1016(1) to extend the provisions governing the simulcasting of out-of-state thoroughbred races on any day the Saratoga thoroughbred track is closed from June 30, 2010 to June 30, 2011.

Section 6 would amend Racing Law § 1018 to extend the current distribution of revenue from out-of-state simulcasting during the Saratoga meet through September 8, 2010.

Section 7 would amend § 32 of chapter 281 of the Laws of 1994 to extend the current amount of off-track betting wagers on New York Racing Association, Inc. (NYRA) pools dedicated to purse enhancement from July 1, 2010 to July 1, 2011.

Section 8 would amend § 54 of chapter 346 of the Laws of 1990 to extend binding arbitration for disagreements from July 1, 2010 to July 1, 2011.

Sections 9 and 10 would amend Racing Law § 238(1)(a) to extend the current distribution of revenue from on-track wagering on NYRA races from December 31, 2010 to December 31, 2011.

Section 11 would amend Racing Law § 1012(5) to extend the authorization for account wagering from June 30, 2010 to June 30, 2011.

Section 12 would provide the effective date.

The extension of these provisions will maintain the pari-mutuel betting and simulcasting structure that is currently in place in New York State. The provisions extended by sections one through six of this bill were first enacted in 1994 and section seven was enacted in 1990. These provisions were most recently extended in 2009.

Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because it maintains the current pari-mutuel betting structure in New York State. The extension of these provisions will reduce pari-mutuel tax receipts by \$5 million in 2010-11.

Effective Date:

This bill takes effect immediately.

**Part BB – Maintain the New York Estate Tax Unified Credit amount currently allowed independent of federal estate law in effect on the date of death.**

Purpose:

This bill would preserve the unified credit against the New York estate tax, in light of the scheduled expiration of the federal estate tax.

Statement in Support, Summary of Provisions, Existing Law, and Prior Legislative History:

This bill is needed to preserve the existing unified credit allowed against the New York estate tax. The bill would amend Tax Law section 951(a) to eliminate the reference to the unified credit in effect in the Internal Revenue Code on the decedent's date of death, and fix the credit at the amount that would be allowed if the federal unified credit did not exceed the tax due on an estate of \$1 million.

New York's estate tax is generally conformed to the Internal Revenue Code with all amendments enacted on or before July 22, 1998. However, existing law provides that the unified credit against the estate tax is the federal unified credit in effect on the decedent's date of death, but not to exceed \$1 million. This provision was intended to incorporate periodic increases in the federal unified credit after 1998, up to the \$1 million limitation.

The federal estate tax is set to expire on December 31, 2009. If Congress does not timely extend the federal estate tax, there would be no federal unified credit in effect on

dates of death after the expiration of the federal tax and, consequently, no unified credit for purposes of New York's estate tax. This would result in most estates being subject to tax from the first dollar, which would vastly expand the number of individuals subject to the estate tax, and thereby expand the tax beyond anything that was ever intended. This bill would avoid that result by eliminating the reference in the Tax Law to the federal unified credit in effect on the decedent's date of death, and fixing the unified credit at its current level. The bill would maintain current estate tax treatment, independent of Congressional action.

#### Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because this provision would maintain the unified credit against the New York estate tax independent of the Federal tax.

#### Effective Date:

This bill takes effect immediately and applies to estates of decedents dying on and after January 1, 2010.

### **Part CC – Simplify and improve the imposition and administration of the taxicab ride tax imposed by Article 29-A of the Tax Law to preserve revenue for the MTA.**

#### Purpose:

This bill would amend provisions of Article 29-A of the Tax Law to improve the administration of the Metropolitan Commuter Transportation District (MCTD) taxicab ride tax to preserve revenue.

#### Statement in Support Summary of Provisions, Existing Law, and Prior Legislative History:

Article 29-A of the Tax Law imposes a 50-cent tax on taxicab owners for each taxi ride beginning in New York City (NYC) and ending in any part of the MCTD. With roughly 13,270 taxicabs in NYC, owned by approximately 8,140 individuals and business entities, compliance with the tax and its administration may be unnecessarily difficult. Indeed, in order to comply with the tax, each owner must know the number of rides provided by each vehicle he or she owns. Because of certain TLC regulations, and other practical realities involving debit and credit transactions for taxis, some owners cannot as easily obtain the information necessary to comply with the law.

For example, NYC Taxi and Limousine Commission (TLC) regulations require that taximeter information, including the number of taxicab trips and the amounts charged for those trips be provided to the medallion owner – as opposed to the vehicle owner. As many taxicab owners are not medallion owners, a significant portion of taxpayers lack the ready access to information necessary to comply with the law. In addition, credit

and debit card transaction devices installed in every NYC cab are in the name of the medallion owner, and not the vehicle owner or driver. This further compounds compliance issues.

This bill would amend Article 29-A of the Tax Law to: (1) change the imposition of the MCTD taxicab tax from vehicle owners to medallion owners; and (2) impose the MCTD taxicab tax as a flat tax, instead of a per ride tax. Imposing the tax on medallion owners – instead of taxicab owners – would reduce the number of taxpayers who must comply with the tax. It would also alleviate compliance burdens on vehicle owners without access to the information and resources necessary to comply. In addition, imposing the tax as a flat tax – \$1,750 to be paid on a quarterly basis – would further simplify compliance and enforcement of the tax. The quarterly payments would amount to \$7,000 annually. Taken together, these changes would help ease administrative and compliance burdens while ensuring the flow of revenue from this tax.

The bill would also amend Tax Law § 1290 to delete a reference to criminal penalties in Tax Law § 1820, which authorizes misdemeanors applicable to the Boxing and Wrestling Exhibitions Tax imposed by Article 19 of the Tax Law. Instead, this bill would add a new Tax Law § 1821 to provide identical misdemeanor penalties clearly applicable to Article 29-A.

#### Budget Implications:

Enactment of this bill is necessary to implement the 2010-11 Executive Budget because it would preserve revenues for the Metropolitan Transportation Authority.

#### Effective Date:

This bill takes effect June 1, 2010, and applies to uses made and privileges exercised on and after that date. The provisions of Article 29-A in existence prior to the effective date would continue to apply to tax liabilities arising before the effective date. However, persons liable for the expiring “rides” tax will file a return and pay tax for the final, shortened two-month period of April and May, 2010, by June 20, 2010. Bill sections 9, 11 and 12, regarding information sharing, procedure, and the technical penalty correction, would take effect on the date that Article 29-A first took effect, which was November 1, 2009.

The provisions of this act shall take effect immediately, provided, however, that the applicable effective date of each part of this act shall be as specifically set forth in the last section of such part.