The Business Council

Testimony to

Senate Finance Committee and Assembly Ways and Means Committee

FY 2027 Executive Budget: Taxation and Revenue Issues

Submitted by

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My name is Ken Pokalsky and I am Vice President of The Business Council of New York State, Inc. We are New York's largest statewide employer association, representing 3,500 private sector employers from across New York, in all major business sectors.

We appreciate this opportunity to submit comments for inclusion in the record for today's joint hearing on taxation and revenue-related issues included in, and related to, the state's FY 2027 budget. These include proposals in the Executive Budget and related issues that may be considered by the Senate and Assembly for inclusion in their respective budget resolutions, and that may be negotiated into the final budget agreement. We also provide several pro-business, pro-growth tax reform proposals for consideration in the current budget discussions.

These comments, and our ongoing engagement with the Administration and Legislature, are intended to promote a more economically competitive tax climate in New York State, and to promote new investments, job growth and competitive wages.

Simply put, New York has a non-competitive tax code. The state's overall tax burden leave New York consistently near or at the bottom of the Tax Foundation's *State Tax Competitiveness Index.* Likewise, a recent study by the Council on State Taxation (an association of business tax professionals that focuses on state tax structure, but does not lobby on tax *rates*) showed that combined state and local taxes paid by New York businesses totaled $90.3 billion, nearly as high as Texas (at $90.9 billion) - a state with a significantly larger state economy and workforce - and almost double Florida's combined business tax burden. On a per-employee basis, New York's combined business tax burden was $12,100 per employee, second among states to only North Dakota whose tax revenues are skewed by high extractive industry taxes, and 55 percent above the national average.

Importantly, we strongly urge the Legislature to evaluate tax proposals not just from a revenue-impact perspective, but also from the perspective of the state's overall cost of doing business and overall economic development strategy.

A focus on business costs is consistent with the state's broad focus on "affordability." Business costs are pushed down to consumers, and high business taxes reduce funds available for wages, investments and returns to shareholders (including pension funds), and place an upward pressure on prices.

As always, we welcome the opportunity to discuss our concerns and recommendations with members of the Senate Finance and Assembly Ways and Means committee, and with other members of the State Legislature.

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Executive Budget Taxation Provisions

Part E – Extend the "Temporary" Article 9A Tax Rate for Three Years – We remain **strongly opposed** to increases in the Article 9-A corporate franchise tax rate.

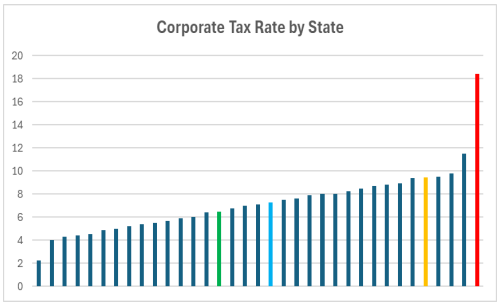
While labeled an "extension" in the Executive Budget, this proposal constitutes an increase in future business taxes compared to what would be collected under existing law, and in fact will cost businesses an additional $4.67 billion over the next three state fiscal years.

Even more concerning are calls from New York City and some advocates for even further increases in the state's corporate rates (and both the Senate and Assembly have proposed rate increases in their past two budget resolutions, to 9% by the Senate, 9.25% by the Assembly).

While our base 9-A rate of 6.5% is fairly competitive among the states, with our "temporary" 7.25% rate for large corporations and the layering of the MTA surcharge (30% of a taxpayer's 9-A liability based on in-region earnings) and the NYC corporate rate (8.5%, or 9% for financial corporations), some corporate taxpayers can already be hit with a combined rate of nearly 18.5% - way beyond the New Jersey rate used in comparison by some pro-tax advocates.

Top combined NYS of 18.425% is highest in the U.S.
- Combined Article 9A, MTA surcharge and NYC tax

- 6.5% base rate
- 7.25% temporary rate
- Rate w/ 30% MTA surcharge
- Aggregate NYS & NYC Rate



As background, under current law, the permanent Article 9-A corporate franchise tax rate is 6.5%, with a "temporary" rate of 7.25% applicable to taxpayers with taxable income (i.e., "business income base") over $5 million. This temporary 7.25% rate was first imposed in 2021 and was initially set to expire after the 2023 tax year. However, it was extended through the 2026 tax year as part of the state's FY 2024 state budget.

Further, under current law, the Article 9-A alternative capital base tax was scheduled to be fully phased out for the 2024 tax year, but was also extended through the 2026 tax year, and is proposed to be extended again through the 2029 tax year under Part E. As result, taxpayers will continue to pay the higher of their income-based tax calculation, or 0.1875% of their capital base, or the Article 9-A fixed dollar minimum. New York had been moving away from capital-based taxation as it is a disincentive to maintain physical and financial capital in the state.

New York (like most states with a corporate income tax) uses market-based sourcing of business receipts for apportioning income to New York, which reduces the tax "penalty" for having in-state employees and capital, high state corporate rates still have an adverse impact on businesses, reducing funds available for wages, investments and returns to shareholders (including pension funds), and places an upward pressure on prices.

As a final point, for all the talk of needing corporations to pay "a fair share," New York's corporate tax collections are up significantly. Starting with SFY 2017, after the former bank corporation tax was folded into Article 9-A, corporate franchise tax receipts have increased dramatically in New York, nearly tripling to $9.3 billion by FY 2024. And while corporate franchise tax receipts represented 3.3% of the "state operating funds" spending (i.e., state tax and fee-supported spending, excluding capital) in FY 2017, that share has more than doubled to 7.3% by FY 2024, showing the state's growing reliance on increased Article 9-A taxation to support its annual spending plan. There

is a similar pattern under NYC's business taxes, with corporate tax receipts more than doubling from 2017 to 2023, and representing a greater share of NYC's total tax receipts.

A more detailed discussion of corporate franchise tax issues is provided below (starting on page 10).

Part F – Decouple State Taxes from Certain H.R.1 Provisions – Given New York's recent efforts to promote science-based industry, in-state supply chains for advanced manufacturing, and investments in computer chips among other sectors, there is a strong argument for New York to conform to new federal incentive for production property and R&D investments. However, in Part F, the Executive Budget proposes to "decouple" from recent pro-investment changes to federal tax law. Specifically, it would eliminate enhanced state tax benefits for investments in "qualified production equipment" and "research and experimentation" investments, with these changes impacting the state's personal income, corporate franchise and insurance taxes. Federal tax law changes adopted in 2025 would allow the immediate expensing deduction for these expenditures, rather than multi-year depreciation, thereby providing businesses with improved cash flow, allowing businesses to reinvest in growth more quickly.

We **oppose** this decoupling proposal, as it reduces incentives for investments in advanced manufacturing and technological advances. Instead, it would limit these investments to "standard" depreciation deductions.

In addition to our tax policy concerns, we have several tax compliance and administration concerns as well:

- As proposed, both Part F and Part G (NYC decoupling provisions) are applicable to the 2025 tax year. This retroactive application raises possible constitutional issues, and also raises the practical issue of businesses underpaying for 2025 (e.g., through lower mandated estimated payments.) However, neither Part F nor Part G provides any penalty or interest relief for tax liabilities related to their retroactive application. This is simply unfair, as taxpayers would have no way of knowing that state or city-level rules for their 2025 tax years would be modified in 2026. At minimum, any retroactive change in tax calculations should come with a waiver of any interest or penalty for underpayment based on then-applicable state and city tax law.

- While Part F and Part G address some of the same provisions of H.R.1, their provisions and treatment of deductions are not identical. As result, taxpayers would be required to maintain three separate sets of books for tax purposes, for their federal, New York State and New York City returns, respectively. At minimum, state and New York City provisions addressing the same provisions of H.R.1 should be harmonized. This would reduce compliance burdens for taxpayers, and administration and audit burdens for the state and city tax departments.

As background, New York (like many states) uses federal taxable income as the starting point for calculating state-level personal and business income taxes. As such, when Congress makes significant changes to the Internal Revenue Code, those changes can impact state-level taxation and have a significant impact on business taxpayers' state-level tax liability. New York is considered a "rolling conformity" state, meaning that federal changes to IRC definitions of taxable income automatically impact its state-level tax calculations -- unless the state legislature acts to "decouple" from specific provisions of federal tax law (which the New York legislature has done multiple times over the years.)

H.R.1 enacted new IRC §174A, which permanently allows taxpayers to fully expense domestic research or experimental (R&E, often referred to research and development) expenditures paid or incurred in taxable years beginning after December 31, 2024 and provides transition rules permitting taxpayers to deduct unamortized domestic R&E expenditures incurred in 2022 through 2024. As a newly adopted provision of federal tax law, there is no New York State-level limitation to or decoupling from IRC §174A, meaning that this new federal deduction will flow into the calculation of state taxable income. The state may also want to consider how this federal change interacts with New York's existing, targeted R&D incentives, such as those for "qualified life sciences" companies, the investment tax credit R&D provisions, and the Excelsior Jobs Program R&D credit. Historically (i.e., pre-TCJA), the IRC allowed R&D investments to be fully expensed in the year they were incurred. H.R. 1 reversed a TCJA provision that phased-in a mandatory five-year amortization of research and development investments (referred to as "research and experimental expenditures" in the IRC).

Some argue that acceptance of these federal expensing provisions at the state level would provide a tax benefit based on investments made outside of New York State. Even so, such out-of-state investments can

support economic growth in those taxpayers' New York operations. And as recognized by the state's corporate taxation of unitary business groups, it does not make economic sense to segregate in-state and out-of-state activities that work together for domestic (US) production.

If this decoupling provision is accepted by the legislature, at minimum the Executive, Senate and Assembly should consider enhancing state-level incentives for targeted strategic sectors, including manufacturing, as well as for R&D investments.

Part G – Decouple New York City Taxes from Certain H.R.1 Provisions – This provision goes beyond the state-level decoupling proposals included in the Executive Budget. It also decouples city taxes from provisions of H.R.1 that increase the maximum depreciation deduction from $1.25 to $2.5 million, and that increase in the "phase out threshold" from $3.13 million to $4,000,000 and full phase-out at $6,500,000 (i.e., the allowable deduction is limited based on total capital expenditures.)

Oddly, while Part G provisions apply to the city's unincorporated business, general corporation, banking corporation and corporate franchise taxes, it does not apply to the city's personal income tax (an omission that we had assumed would be addressed in the Executive's 30-day amendments.) We also note that the city's decoupling provisions related to research and experimental expenses only address domestic expenditures, again resulting in different tax calculations at the federal, state and city levels. Likewise, Part G would impose changes to the calculation of interest expense deductions that are not provided in Part F for state taxpayers, again resulting in different tax calculations for the three jurisdictions.

Otherwise, we have the same comments and concerns regarding Part G as we raised regarding Part F above, including any relief from penalties or interest from underpayments by taxpayers that were relying on tax law as it applied during the 2025 tax year.

If the final budget is to include any decoupling provisions, they should be harmonized at the state and city level to avoid excess compliance burdens on taxpayers and administrative and audit burdens on the state and city tax departments.

Part H – Enact Pass-Through Entity Tax Flexibility - The Business Council **supports** this proposal to allow taxpayers to make an election to be taxed under the pass-through entity tax (PTET) at both the state and New York City level by September 15 of the tax year to which the election applies. Current law requires the election to be made by March 15 of the tax year. As of November 2023, thirty-six states, including New York, have adopted a PTET, and a significant majority of those states allow this election to be made with the filing of their tax returns (typically March 15 or April 15 following the end of the applicable tax year) or have no limitation on their election date. Our research shows that only three other states follow New York's approach to require elections to be on March 15 of the tax year to which the election applies. (Note, the FY 2023 state budget allowed for an extended election period for the 2022 tax year, until February 15, 2023, to accommodate taxpayers impacted by a technical amendment to the PTET law, illustrating the state's ability to accommodate later elections.)

The PTET was adopted at the state level in 2021 and for New York City in 2022, for the purpose of restoring the federal deductibility of state taxes on business income paid under the personal income tax, such as for Sub-S corporations, partnerships and LLCs. Since then, this program has provided benefits to nearly 100,000 (mostly small) unincorporated businesses.

In extending the election date for the PTET election, this legislation will better fulfill the legislative intent of making the PTET mechanism available to eligible New York businesses. This will allow existing taxpayers more time to assess the impact of the election, and allow unincorporated businesses created after March 15 of a tax year to take advantage of the PTET program for that year.

Importantly, both the state and city PTET are designed to be revenue neutral to New York State and New York City (and if fact the PTET should result in some net increase in tax revenues for both jurisdictions, based on how the tax and offsetting credits are structured), although they can result in the shift of revenues from one fiscal year to another.

This limited amendment to the statute gives taxpayers more time to assess and make this annual election and provides access to the program to businesses created after March 15 of a given tax year. It is a useful technical

correction to valuable tax reform that will benefit unincorporated New York businesses. The Business Council strongly supports its adoption.

Part U –Extension of Telecomm Assessment Ceiling – We **support** this extension of Real Property Tax Law Article 4, Title 5 which establishes a mechanism for a standardized, state-level assessment of major telecommunication properties. The Business Council has supported this reform since its initial adoption in 2013 (Chapter 475). It creates a uniform process of taxation on utility transmission property (wires; poles etc.). Previous law assessed such property on public lands under a state standard set by the Department of Taxation and Finance (DTF), while such property located on private lands was assessed under local government standards. In effect, Chapter 475 assessed utility transmission property on private property as it was done for public property.

Chapter 475 creates uniformity and predictability in the valuation of public utility infrastructure regardless of where the property is located, thereby relieving the burden placed on utilities that must contend with hundreds of assessing jurisdictions with varying standards of valuation. Centralizing this task within the Tax Department was an efficient, effective reform, as they have the staff, the resources, and the history to properly perform these tasks statewide. This program also alleviates costs to local governments for performing these assessments, relieving a burden that could save some municipalities millions of dollars. Ultimately this measure creates a more efficient and less costly process for utilities while putting more money in the pockets of taxpayers.

For these reasons, we strongly support adoption of Part U as part of the final budget agreement.

Part K – Impose Tax on Alternative Nicotine Products – We **oppose** this proposal that would extend the state's Tax Law Article 20 "tobacco products tax," imposed at a rate of 75% of a product's wholesale prices, to "alternative nicotine products." The Executive Budget provides little rationale for this proposal, only that these products are current "untaxed" under the state's tobacco excise tax, even though their sales are subject to state and local sales taxes. The proposal would raise an estimated $50 million or more annually.

Significant concerns have been raised that this tax proposal will reduce usage of tobacco alternatives, incentivize out-of-state purchases, and have an outsized impact on lower-income consumers.

Nicotine, while addictive, is not a carcinogen and is not known to cause cancer. The FDA has determined that smoke-free products, including some nicotine pouches, are "appropriate for the protection of public health" and that the benefits to adult smokers who completely switch to a less harmful product outweigh the potential risks to non-users including youth. This authorization does not mean the product is FDA approved as a smoking cessation therapy.

New York's highest-in-the-nation tobacco taxes drive illegal purchases, with one recent study suggesting that the majority of cigarette packs sold in New York City were through illegal channels. A 75% tax on nicotine pouches would drive consumers across state lines to neighboring jurisdictions that do not tax nicotine pouches. The result will be lost sales for New York retailers and limited revenues to the state.

Finally, lower-income adults remain disproportionately represented among smokers in New York, and very high taxes discourage the most at-risk smokers from switching to smoke-free alternatives.

For these reasons, we oppose adoption of Part K.

Part N – Sales Tax Vendor Registration Program – We support efforts to assure payment and remittance of all taxes owed to the state. But given the Governor's interest in reducing regulatory burdens on business, we question the need to require several hundred thousand **fully compliant** sales tax vendors to re-register with the state.

Importantly, this proposal contains a "tax amnesty" element. Eligible vendors would be required to pay the full amount of sales tax due to the state, provided that the amount is subject to a "fixed and final" determination (i.e., the vendor has exhausted or waived its appeals) by September 1, 2026, plus fifty percent of accrued interest and no payment of penalties. Taxpayers that have been convicted of a criminal violation of the Tax Law, or subject to a court order to pay a tax liability under a Penal Law conviction, are ineligible.

The criteria, mechanism and timing for this incentive are limited, and the program does not provide a clear mechanism for vendors with violations not already known to the Department to apply for this partial amnesty program.

The Department already has full authority to bring enforcement against non-compliant vendors and to revoke their registrations, so that it can act against vendors identified as eligible for this partial amnesty that do not participate.

However If the waiving of penalties and interest is seen as an effective incentive to bring vendors into compliance, and securing remittances of sales tax revenues due to the state, it seems that the legislature could approve that mechanism without the added burden – on taxpayers and the Department alike – of requiring the re-registration of an estimated 500,000 plus compliant sales tax vendors.

Business Council Tax Reform Proposals

Below is our list of tax reform proposals for the 2026 state legislative session.

Sales Tax – Under current Tax Department policy, the bundling of any (otherwise non-taxable) services with tangible property, including prewritten software, renders the entire bundled transaction taxable. This policy can be applied even in transactions where the software is a *de minimis* share of the total transaction, e.g., when software is used to facilitate the provision of services. This also creates uncertainty for the vendors, with the Tax Department potentially challenging any nontaxable service as having some software component. The result is to apply the sales tax to services that are clearly intended to be sales tax exempt under Article 28. To address this unfair outcome, the state should adopt a mechanism (i.e., as proposed in model legislation drafted by the Streamline Sales Tax Governing Board and Multistate Tax Commission) to require a primary function analysis to determine whether bundled transactions including taxable tangible personal property or enumerated service and non-taxable services are subject to the sales tax.

Interest Limitation – Adopt legislation (similar to the reforms proposed in S.7922) that provides that if the state or NYC tax tribunal does not make a final determination of the amount of tax payable within eighteen months from the date a petition is filed, no additional interest on any underpayment of taxes would accrue after that eighteen month date. Taxpayers are experiencing delays in final decisions from both the city and state tribunals, which can result in significant additional interest being applied in the event of a taxpayer-adverse final decision.

Interest Parity – Adopt interest rate parity for under- and over-payments. The same interest rate should apply to tax underpayments and to refunds to taxpayers for overpayments, under both the personal income tax and corporate franchise tax. Failure to equalize interest rates diminishes the value of the taxpayer's remedy of recovering tax monies to which it is legally entitled. Under current law, both taxes impose significantly greater interest on taxes due. We recognize that there should be financial disincentives against taxpayers' late or underpayment of taxes owed to the state, but rather than interest rate disparity these disincentives should be penalties with safeguards for reasonable cause. But the state should also face financial disincentives against undue delays in paying tax refunds. Fairness suggests a comparable interest rate for both under and overpayments, recognizing that the Tax Law provides the Tax Department with other enforcement tools to address egregious taxpayer behavior.

For the personal income tax, current statute provides the overpayment rate of interest (for refunds) is the sum of the federal short-term rate plus 2%, while the underpayment rate is the federal rate plus 5.5%. For the corporate franchise tax, the overpayment (refund) rate is the sum of the federal short-term rate plus 2%, while the underpayment interest assessment is the federal rate plus 7%. For both programs, statute provides that the underpayment rate cannot fall below 7.5%.

Since interest rates for both underpayments and refunds are meant to compensate for the lost time-value of money, they should be set at a reasonable level, such as the mechanism for setting the overpayment rate under both Article 9A and 22, i.e., the sum of the federal short-term rate plus two percentage points.

Broadband Tax Stabilization - Adopts the "broadband investment tax stabilization" (BITS) act -- S.2177-A (Parker)/A.3804-A (Alvarez) – to provide that all equipment used for the transmission and switching of radio signals for the provision of commercial mobile radio service or mobile internet access service does not constitute real property. This legislation addresses a New York Court of Appeals decision (T-Mobile Northeast, LLC v. DeBellis) that revised a longstanding interpretation of the Real Property Tax Law to re-characterized moveable wireless

network equipment (such as cell site electronics, computers, and antennas) as real property. The case also impacts the longstanding exemption of fiber optic cable on private property.

Sales Tax Direct Pay – Tax Law §1132(c)(2) allows the Tax Department to authorize "direct pay" of sales tax by purchasers of tangible personal property in instances where a vendor cannot discern the exact sales tax due to the state. As example, a New York business purchases software that is invoiced to its New York headquarters address and that will be used in three different states, including New York, but at the time of purchase is not certain of the extent to which the software would be used in each state. State law provides that the purchaser only owes sales tax to New York for the share of the software's use in New York. However, vendors often cannot or do not issue invoices that allocate sales tax liability among multiple states. The result is that the purchasing business pays the sales tax to the vendor, who remits it to the state, with the purchaser subsequently having to pursue partial refunds from New York. Under Tax Law direct pay provisions, the purchaser is allowed to remit sales tax directly to New York once it determines its correct liability, thereby reducing compliance burdens on both the taxpayer and the Department.

However, §1132(c)(2) only allows for direct pay "under circumstances which make it **impossible** at the time of acquisition to determine the manner in which the tangible personal property or services will be used." This high and unworkable threshold results in infrequent Departmental authorization of direct pay, though direct pay would result in no loss of revenue rightly owed to the State and would decrease administrative burdens on taxpayers and the Department of Taxation and Finance.

The Tax Law should be amended to allow for broader use of direct pay where it reduces Departmental and taxpayer compliance burdens, with authorization for the Department to establish acceptable tax liability allocation methods for use by direct pay taxpayers. We will provide the legislature with draft legislation based on workable provisions used in other states.

Division of Tax Appeals – In response to the Department's new authority to appeal decisions to the Appellate Division, taxpayers need more discovery tools to prepare for hearings. The state should adopt limited additional discovery mechanisms, including the authority for limited depositions, requests for production and interrogatories. In addition, reforms should provide that taxpayers that win a tax case would be entitled to the costs of defending its filings in litigation (not audit), and the Tax Department would be required to either appeal Department of Tax Appeals ALJ decisions to the Tax Tribunal or acquiesce to ALJ decisions.

IRC §962 – New York needs to amend the personal income tax (Article 22) to avoid double taxation for taxpayers who have made an election under IRC §962. That provision of federal law allows individuals to elect to be taxed at corporate rates on certain foreign income (i.e., "subpart F income," or "GILTI" income derived from controlled foreign corporations) as if it were earned as a U.S. corporation, applying the federal 21% corporate tax rate in lieu of higher PIT rates. New York conforms to federal law and has not decoupled from this federal election provision by statute. However, the Department of Taxation and Finance ("DTF") has amended its PIT forms to decouple from the federal 962 election without legislative approval by adding an addition modification for PIT taxpayers in the year of election. This results in double taxation in subsequent tax years when the subpart F income or GILTI income is repatriated and included in federal AGI a second time. DTF's forms, which add these earnings back to federal AGI in the year of the election, have no corresponding subtraction modification in the year of repatriation. Consequently, these earnings are included in federal AGI a second time when the actual distribution of income occurs. While at the federal level, this double-counting is offset by the a combination of difference in tax rates, a section 250 deduction and the ability to use foreign tax credits, no such offset exists in New York Tax Law – in fact, few if any states have adopted any formal mechanism for minimizing the potential state-level double-taxation of §962 income. This can be done by enacting statutory addition and subtraction modifications governing the state PIT treatment under Article 22 for individuals who choose to make the federal 962 election addressing the tax treatment in the year of the election and the tax treatment in the year of repatriation.

Green Buildings Credit – Adopt a new "green building" tax credit, based on achievement of high EnergyStar building scores, with additional credit components based on other environmental stewardship factors, with a

workable cap on both project-specific and aggregate statewide credits; allow for limited transferability of credits.

Agency Deference – Adopt legislation addressing the issue of agency deference by the courts. Under *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court overturned the agency deference standard established by

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., which directed courts to defer to an agency's reasonable interpretation of an ambiguity in a law. In its decision, the court said that the Chevron deference was inconsistent with the Administrative Procedure Act, which sets out rulemaking procedures for federal agencies as well as provisions for judicial review of agency actions. Since the APA directs courts to "decide legal questions by applying their own judgment," agency interpretations of statutes are not entitled to deference.

Examples of recent state enactments include:

- Texas S.B.14, effective 9/1/25, states that "in a judicial proceeding in this state… a court is not required to give deference to a state agency's legal determination regarding the construction, validity, or applicability of the law or a rule adopted by the state agency responsible for the rule's administration, implementation, or other enforcement." This essentially codifies the U.S. Supreme Court's Loper Bright decision at the state level.

- Kentucky S.B. 84, The bill would provide that: (1) the interpretation of a statute or administrative regulation by an administrative body will not be entitled to deference from a reviewing court, and (2) a court reviewing an administrative body's action must apply de novo review to the administrative body's interpretation of statutes, administrative regulations, and other questions of law. (Note: adopted over a gubernatorial veto.)

And several recent proposals include:

- Illinois H.B. 1048, sponsored by Rep. John M. Cabello (R-90), was introduced on January 9. The bill would provide that, when interpreting the provisions of any State law or rule, a court must not defer to an agency's interpretation of the law or rule and must interpret its meaning and effect *de novo*. In an action brought by or against an agency, after applying all customary tools of interpretation, a court must exercise any remaining doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty.

- West Virginia S.B. 888, the *Judicial Deference Reform Act* sponsored by Sen. Christopher Rose (R-2), was introduced and referred to the Senate Judiciary Committee on February 9. The bill states that its purpose is to "ensure that state courts and administrative hearing officers interpret state statutes, regulations, and sub-regulatory documents independently, without deference to state agency interpretations, and to prioritize individual liberty and limited agency authority in resolving interpretive ambiguities."

- Alabama S.B. 167, sponsored by Sen. Arthur Orr (R-3), passed the Senate and was transmitted to the House and assigned to the House Judiciary Committee on February 5. The bill would provide that, during review, when interpreting any statute or rule, the court may consider, but not defer to, an agency's interpretation and must instead interpret its meaning and effect without any presumption as to correctness. In an action brought by or against an agency, after applying all customary tools of interpretation, the court must exercise any remaining doubt in favor of a reasonable interpretation. For questions on this development, please contact Leonore Heavey.

As always, we appreciate this opportunity to submit comments and look forward to working with legislative leadership, members of the Senate Finance Committee and the Assembly Ways and Means Committee, as well as other members of the state Legislature and Administration, on adoption of a more economically competitive tax code.

Opposition to Increased Corporate Franchise Tax

There is growing talk about increased "corporate" taxes in 2026.

Newly-elected NYC Mayor Zohran Mamdani has proposed increasing the "top state Corporate Tax rate to 11.5 percent—the same rate as New Jersey's," claiming that this would raise $5 billion a year. Among his justifications is that "Our state corporate tax rate is lower than all our neighboring states—New Jersey, Connecticut, Massachusetts, Pennsylvania, Vermont, Rhode Island, and even New Hampshire."

Both the Senate and Assembly have also recently endorsed higher business taxes. In its SFY 2026 budget resolution, the Senates proposed a rate of 9% if taxable income is above $5 million, applicable to tax years 2025 to 2029. The Assembly proposed a rate of 7.25% for businesses with taxable income between $5 and $10 million, and 9.25% if taxable income is above $10 million, also applicable to tax years 2025 to 2029. The Assembly's resolution would also extend the set-to-expire capital base tax at a rate of 0.1875% through tax year 2029.

These proposals have been supported by a number of groups, including the "Invest in New York" coalition, which includes labor, housing, health care and renewable energy advocates, among others – even a group called the "New York Sustainable Business Council."

We strongly oppose these proposals. This memo provides an overview of the state's corporate franchise tax (Tax Law Article 9A), and provides important context for assessing the impact of increased business taxes

<u>Background</u>

- Corporations are taxed under New York's corporate franchise tax, Tax Law Article 9-A, and pay taxes on the highest of three calculations – one based on "entire net income" (ENI), one based on in-state physical and financial capital, and a fixed-dollar minimum. Some categories of business – manufacturers, "qualifying emerging technology companies," and subchapter S corporations -- are exempt from the ENI base tax, but are subject to one or more of the alternative calculations. In the 2021 tax year, 90% of Article 9A revenues were based on the ENI tax rates, with 8% under the capital base alternative tax.

- Under current law, the "permanent" Article 9-A corporate franchise tax rate is 6.5%, with a "temporary" rate of 7.25% applicable to taxpayers with taxable income over $5 million. The "temporary" 7.25% rate was first imposed in 2021 and was set to expire after the 2023 tax year. However, it was extended through the 2026 tax year as part of the SFY 2024 state budget. That budget also extended the 0.1875% capital base tax rate for the same period. As part of the state's 2014 corporate franchise tax restructuring law, the capital base alternative tax was scheduled to be fully phased out for the 2024 tax year.

- New York has already expanded the reach of its corporate franchise tax, bringing in more earnings from more businesses with limited New York business activity. First, the state adopted mandatory combined reporting, requiring that a corporate tax return include all businesses connected by more than 50% stock ownership and that are engaged in "unitary" business ("unitary" is not defined in statute or regulation, but the state's tax regulations describe the "attributes" of a unitary business as "characterized by a flow of value as evidenced by functional integration, centralized management and economies of scale.") The state also extended its corporate franchise tax to businesses with an economic nexus provision, applying to any business deriving more than $1 million in receipts from within the state.

<u>Proposals in Context</u>

- Interestingly, Mayor-elect Mamdani proposes to increase the **state-level** corporate tax rate, with the implication that the state will allocate some or all of his projected $5 billion in increased revenue to support New York City's budget. This raises an obvious concern about taxing businesses located across New York State, including those with little or no operations or earnings in New York City, to support expanded NYC spending.

- Proponents of increased corporate tax rates often compare New York to neighboring states, but those comparisons rarely tell "the whole story." In addition to the base Article 9-A tax, corporations **also** pay a 30%

surcharge on their Article 9A liability attributed to profits earned within the 12-county "metropolitan commuter transportation district." This surcharge is projected to add $1.959 billion to these businesses' tax bills in SFY 2026. **This produces a top combined rate of 9.45%**, the fourth highest in the nation, behind only New Jersey, Illinois and Alaska.

- Pro-tax-increase advocates rarely mention New York City's own corporation tax. Corporations doing business in New York City **also** pay taxes under the city's "corporate tax of 2015" **at a rate of 9% for financial and 8.85% for all other corporations**.

- As result of these multiple tax mechanisms, corporations doing business in New York City **already pay** up to a combined tax rate of **more than 18%**, a rate **40% greater** than New Jersey's, and **the highest in any jurisdiction in the U.S.**

- New York's permanent corporate franchise tax rate of 6.5 percent is somewhat competitive, being "only" the 21st highest among the states. However, it still contributes to a very high total tax burden on New York businesses. A recent study by the Council on State Taxation (an association of business tax professionals that focuses on state tax structure, but does not lobby on tax *rates*) showed that combined state and local taxes paid by New York businesses totaled $90.3 billion, nearly as high as Texas (at $90.9 billion) - a state with a significantly larger state economy and workforce - and almost double Florida's combined business tax burden. On a per-employee basis, New York's combined business tax burden was $12,100 per employee, second among states to only North Dakota whose tax revenues are skewed by high extractive industry taxes, and 55 percent above the national average.

- As a final point, C-corporations pay entity-level taxes on their profits, and those profits are subject to a second level of taxes once dividends are paid to individuals, as dividends are subject to federal, state and municipal (including New York City and Yonkers) personal income taxes. According to New York State data for the 2023 tax year, New Yorkers reported $35 billion in taxable dividend income on their tax returns, including $4 billion by taxpayers with under $100,000 in adjusted gross income.

Other Jurisdictions

- While Pennsylvania has a top corporate rate higher than New York's, it is **implementing a significant reduction in its corporate tax rates.** In 2023, its net income tax rate on corporations fell by one percentage point to 8.99 percent and is scheduled to decrease 0.5 percentage points annually until it reaches 4.99 percent at the beginning of 2031.

- Northeast states do have comparably high corporate tax rates - including New York, whose top rate of 7.25% is among the highest rates nationally. On the other hand, other key East Coast states have lower rates, including Virginia (6.0%), North Carolina (2.25%), Georgia (5.39%), and Florida (5.5%). And other than Pennsylvania, no northeast state layers **any municipal corporate income taxes** on their state level business taxes.

Impact of Corporate Taxes

- The Mamdani platform argues that "a majority of all corporate tax revenue is paid by fewer than 1000 super-profitable corporations," apparently referring to state Tax Department data showing that Article 9A taxpayers with a liability of at least $1 million paid 74.9% of total Article 9A taxes in 2021. It is debatable whether a corporation with $1 million in taxable income is "super profitable." Moreover, since the state's Department of Taxation and Finance no longer publishes detailed Article 9A return data, there is no current data on these taxpayers' profit margins, or whether their individual earnings or profit margins are increasing or decreasing.

- Importantly, large businesses targeted by these tax increases are the backbone of the state's economy. Based on federal business census data, New York businesses with 500 or more employees, while just 1 percent of all businesses are responsible for a disproportionately large share of state business activity, providing just over half of all of New York's private sector jobs (50.2%) and an even larger share (59.5%) of all private sector wages.

- Even with earlier rate reductions, New York's corporate tax collections are up significantly. Starting with SFY 2017, after the former bank corporation tax was folded into Article 9A, corporate franchise tax receipts have increased dramatically in New York, nearly tripling to $9.3 billion by SFY 2024. And while corporate franchise tax receipts represented 3.3% of the "state operating funds" spending (i.e., state tax and fee-supported spending, excluding capital) in FY 2017, that share more than doubled to 7.3% by FY 2024, showing the state's growing reliance on increased Article 9A taxation to support its annual spending plan. There is a similar pattern under NYC's businesses taxes, which corporate tax receipts more than doubling from 2017 to 2023, and representing a greater share of NYC's total tax receipts.

State Fiscal Year	Article 9A All Funds Receipts ($ billions)	State Operating Funds Spending ($ billions)	9A Receipts as Share of SOF Spending
2017	3.166	96.2	3.3%
2018	3.080	98.1	3.1%
2019	4.297	100.1	4.3%
2020	4.824	102.1	4.7%
2021	4.954	104.2	4.8%
2022	7.235	117.4	6.2%
2023	9.017	123.7	7.3%
2024	9.262	127.0	7.3%

- Under case law reflecting the U.S. Constitution's Due Process and Commerce Clauses, states may only tax the portion of a multistate or multinational business' profits that are fairly apportioned to the state, to avoid state-level double taxation. Like most states with a corporate income or franchise tax, New York has adopted "single sales factor" apportionment, meaning that the state taxes the share of a corporation's income equal to the proportion of its New York receipts to total receipts. This is a departure from earlier three-factor apportionment, that also looked at the location of a corporation's workforce and capital assets. States have moved away from three-factor apportionment to eliminate a direct disincentive for a business to maintain employees and capital in a high-tax state. **But that change hardly eliminates the adverse impact of high corporate tax rates, including the adverse impact on jobs and consumer prices.**

- New York – like most other states with a corporate income tax – uses market-based sourcing of business receipts for apportioning income to New York. In other words, New York taxes corporations based on a business' share of in-state receipts compared to its total receipts. This leads some pro-tax advocates to argue that businesses are not likely to reduce their in-state sales in response to corporate rate increases. While applicable to retail sales, that is not true for business-to-business sales. Corporations can certainly alter their sales and distribution practices to reduce their New York sales factor, e.g., move distribution to out-of-state entities and locations, with those third-party distributors responsible for in-state sales.

- Businesses have three options to pay higher taxes: raise prices, reduce costs (including wages and investments), or lower returns to investors. Research shows that in reality, they do all three, with just over half the cost of higher corporate taxes borne by consumers in the form of higher prices, another 28% borne by workers in the form of lower wages, and the remaining 20% borne by shareholders (which includes retirement accounts) in the form of lower returns. (see Scott R. Baker et al., Corporate Taxes and Retail Prices, National Bureau of Economic Research