

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivisions (b), (e) and (i) of section 9, subdivision (i) of section 10, subdivision First of section 171, section 289-f (not subdivided), subsection (b) of section 315, subsection (a) of section 658, subsection (a) of section 697, subdivisions (1) and (8) of section 1142, and section 1250 (not subdivided) of the Tax Law, the Commissioner of Taxation and Finance hereby proposes to make and adopt as a permanent rule the following amendments to the Procedural Regulations, as published in Chapter IX of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, such amendments to read as follows:

Section 1. The index of Part 2396 of such regulations is amended to read as follows:

- Sec.
- 2396.1 Introduction and purpose
 - 2396.2 Definitions
 - 2396.3 Participating taxpayers
 - 2396.4 [Initial eligibility] Eligibility determinations, notification to taxpayers and selection of payment option
 - 2396.5 [Subsequent eligibility determinations and procedures] Reserved
 - 2396.6 [Electronic filing] Reserved
 - 2396.7 EFT [payment] and filing
 - 2396.8 [Examples] Reserved
 - 2396.9 Educational organizations and voluntarily participating health care providers

2396.10 Liability for EFT transaction costs

2396.11 When return and payment deemed made; [failure to enroll penalty;] reasonable cause

2396.12 Administrative and judicial proceedings

2396.13 Rule of construction

Section 2. Section 2396.1 of such regulations is REPEALED and a new section 2396.1 is added to read as follows:

Section 2396.1. Introduction and purpose.

Section 9 of the Tax Law requires the Commissioner of Taxation and Finance to promulgate regulations implementing both an electronic payment reporting system and an electronic funds transfer system for the collection of withholding taxes held in trust for New York State and local governments by large New York State business taxpayers. This part of the regulations is meant to complement Section 9 of the Tax Law by providing rules where required by the law or where necessary to achieve the success of the electronic filing and electronic funds transfer program.

Section 3. Section 2396.2 of such regulations is amended to read as follows:

Section 2396.2. Definitions.

[For the] The definitions provided by section 9(a) of the Tax Law for “commissioner”, “educational organization”, “electronic funds transfer” (hereinafter referred to as “EFT”), “health care provider”, “payment of tax” and “reconciliation of withholding” apply to this Part. In addition, the following terms are defined for purposes of this Part:

(a) The term “automated clearing house” (hereinafter referred to as “ACH”) means any Federal reserve bank, or an organization established by agreement with the National Automated Clearing House Association, which operates as a clearing house for transmitting or receiving entries between banks and/or bank accounts and which authorizes an electronic transfer of funds between such banks or bank accounts.

(b) The term “ACH debit” means a transaction [in] which the taxpayer initiates by accessing the electronic payment reporting system and which results in the [Department of Taxation and Finance] department, through its designated depository bank, [originates] originating an [ACH transaction] entry debiting the taxpayer's bank account and crediting the department's bank account for the amount of a [withholding tax] payment of tax.

(c) The term “ACH credit” means an ACH transaction in which the taxpayer, through its own bank, originates an entry crediting the [Department of Taxation and Finance's] department's bank account and debiting its own bank account for the amount of a [withholding tax] payment of tax.

(d) [The term “commissioner” means the Commissioner of Taxation and Finance or his delegates.] The term “business day” means a day other than Saturday, Sunday or the following holidays: New Year’s Day, Martin Luther King, Jr. Day, Presidents’ Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day and Christmas Day, except that such term shall only include the hours up to 6:00 p.m. (Eastern time) on the last business day before the otherwise applicable due date.

(e) The term “department” means the Department of Taxation and Finance.

(f) [The term “educational organization” means a higher educational institution which:

(1) is authorized by the New York State Board of Regents to confer degrees (“i.e.”, a college);

(2) offers a range of registered undergraduate and graduate curricula in the liberal arts and sciences, degrees in two or more professional fields and doctoral programs in at least three academic fields (“i.e.”, a university); or

(3) is authorized by the New York State Board of Regents to offer undergraduate curricula below the baccalaureate level which normally lead to the associate degree (“i.e.”, a junior or two-year college) as such higher educational institutions are described in section 50.1(k), (l) and (m) of Title 8 NYCRR.

(g) The term “electronic filing system” means the taxpayer initiated electronic tax reporting system.

(h) The term “electronic funds transfer” (hereinafter referred to as “EFT”) means any transfer of funds, other than a transaction originated by check, draft or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument or computer or magnetic tape so as to order, instruct or authorize a financial institution to debit or credit an account.

(i) The term “electronic payment reporting system” means the telephone assistance center and program website accessed by taxpayers in order to initiate certain EFT transactions.

(g) The term “Federal reserve wire transfer” (hereinafter referred to as “fedwire”) means any transaction utilizing the national electronic payment system to transfer funds through Federal Reserve banks. For purposes of the [Electronic Filing and Funds Transfer Program] program, it is similar to an ACH credit in that the taxpayer originates a transaction utilizing the Federal Reserve banking system, debiting its own bank account and crediting the [Department of Taxation and Finance's] department’s bank account for the amount of a [withholding tax] payment of tax.

(j) The term “health care provider” means any organization described in article 28 or 36 of the Public Health Law, or in article 31 of the Mental Hygiene Law.

(k) (h) The term “otherwise applicable due date” means the due date for remittance of a payment of tax prescribed by paragraph (1), (2) or (3) of subsection (a) of section 674 of the Tax Law, as applicable.

(l) The term “payment of tax” means the amount of tax that is actually remitted upon the filing of a withholding tax return, or is actually remitted for the purposes of obtaining an extension to file such a return.

(m) (i) The term “program” means the Electronic Filing and Funds Transfer Program described by this Part.

(n) The term “reconciliation of withholding” means the quarterly combined withholding and wage reporting return required to be filed on or before February 28th of each year, as prescribed by paragraph (4) of subsection (a) of section 674 of the Tax Law.

(o) (j) The term “taxpayer” means any person qualifying as an employer for Federal income tax withholding purposes and maintaining an office or transacting business within New York State, whether or not a paying agency is maintained within New York State.

[(p)] (k) The terms “withholding tax” or “withholding taxes” mean the taxes required to be deducted and withheld from wages pursuant to part V of article 22 of the Tax Law (New York State personal income tax), or pursuant to an equivalent provision enacted under the authority of Tax Law article 30 (New York City personal income tax on residents), 30-A (City of Yonkers income tax surcharge on residents), or 30-B (City of Yonkers earnings tax on nonresidents) [,or article 2-E of the General City Law (New York City earnings tax on nonresidents)].

Section 4. The unnumbered opening paragraph and paragraph (l) of subdivision (a) of section 2396.3 of such regulations are amended to read as follows:

Subject to the provisions of subdivisions (b) and (c) of this section, relating to exemptions and special entities, respectively, every taxpayer which is required to deduct and withhold \$35,000 or more of tax for either of the semi-annual periods ending June 30th or December 31st pursuant to part V of article 22 of the Tax Law, or pursuant to an equivalent provision enacted under the authority of article 30, 30-A or 30-B of the Tax Law, [or article 2-E of the General City Law,] shall be required to participate in the program.

(1) \$35,000 or more an aggregate amount. For purposes of determining whether the \$35,000 or more threshold is met, New York State, City of New York and City of Yonkers withholding taxes shall be aggregated.

Section 5. Subparagraph (i) of paragraph (2) of subdivision (a) of such section is REPEALED.

Section 6. Paragraph (1) of subdivision (b) of such section is amended to read as follows:

(1) General rule. A taxpayer described in subdivision (a) of this section shall be exempt from participation in the program if the aggregate tax withheld by the taxpayer, pursuant to the most recent annual reconciliation of withholding required to be filed is less than [\$400,000] \$100,000.

Section 7. Subdivisions (c) and (d) of such section are REPEALED and new subdivisions (c) and (d) are added to read as follows:

(c) “Special entities.” (1) Health care providers. Health care providers, as defined by section 9(a)(4) of the Tax Law, are exempt from the requirements to participate in the program.

(2) Educational organizations. Educational organizations, as defined by section 9(a)(2) of the Tax Law, are required to participate in the program if the eligibility requirements in subdivisions (a) and (b) of this section are met. (See section 2396.9 for special rules governing the program participation of educational organizations.)

(d) “Voluntary participation.” (1) Application. Any withholding tax taxpayer not required to participate in the program may, at any time, submit a request to the department for permission to voluntarily participate in the program.

(2) Standard. Any taxpayer that applies to voluntarily participate shall be granted permission to participate unless the department determines that the administrative costs associated with accepting new enrollees into the program outweigh the revenue and tax administration benefits associated with payment by EFT or certified check. The administrative costs considered in the determination include, but are not limited to, increasing systems capacities, adding depository bank resources and adding program specialists within the department.

(3) Notice. The department shall notify the taxpayer of the decision within 30 calendar days of the receipt of the request to voluntarily participate. If the department grants permission to the taxpayer, it shall also

make available to the taxpayer all the instructions and information necessary to ensure successful participation in the program.

(4) Conditions of participation. (i) General. The provisions of section 2396.7 of this Part shall apply to all withholding tax taxpayers voluntarily participating in the program, other than those taxpayers specified in subparagraph (ii) of this paragraph, and with the limitation described in subparagraph (iii).

(ii) Health care providers and educational organizations. The provisions of section 2396.9 of this Part shall apply to health care providers and educational organizations voluntarily participating in the program, with the limitation described in subparagraph (iii).

(iii) Payment options available. The department may limit the selection of payment options available to voluntary participants in the program. If the department limits the selection of options, it will inform taxpayers during the enrollment process about the payment options available. (See sections 2396.7 and 2396.9 of this Part for more information about payment options.)

(5) Duration of Participation. (i) General. A taxpayer accepted to voluntarily participate in the program shall be required to participate in the program through at least the succeeding June 30, unless otherwise notified by the department.

(ii) Ceasing voluntary participation.

(“a”) Automatic taxpayer election. No later than June 20, if in writing, or June 30, if online, of each year, a taxpayer voluntarily participating in the program may notify the department that it no longer elects to participate in the program for the succeeding period beginning after June 30. The department shall advise the taxpayer of whether the notification was timely made. If such notification is not timely made, such taxpayer must continue to participate in the program for the upcoming program year.

(“b”) Taxpayer hardship. If a taxpayer wishes to cease participation before the period ending June 30, the taxpayer may apply to the department to do so at any time. The department shall advise the taxpayer of the

decision within 30 calendar days of the receipt of the request. The request shall not be granted unless the taxpayer demonstrates that continuation of its voluntary participation will result in hardship to the taxpayer. If the request is granted, the department shall advise the taxpayer of the date for final filing and payment by an EFT method.

(“c”) Department’s determination. The department may, at any time after enrollment and on 30 business days’ notice, advise the taxpayer that it will no longer be permitted to participate in the program on a voluntary basis.

Section 8. Section 2396.4 of such regulations is REPEALED and a new section 2396.4 is added to read as follows:

Section 2396.4 Eligibility determinations, notification to taxpayers and selection of payment option.

(a) “Annual determination.” The department shall conduct annual eligibility determinations for the program, using the most recent annual reconciliation of withholding required to be filed and such other information as the department deems necessary for this purpose. Taxpayers identified as being required to participate in the program shall do so for the succeeding July 1st-June 30th period.

(b) “Notification and procedures.” (1) By June 1 of each year, the department shall, by certified mail, send a notice to taxpayers newly identified as being required to participate in the program for the immediately following July 1- June 30 period. The notice will:

(i) provide the taxpayer with a description of the program, and the means to access or obtain the information necessary to ensure successful participation in the program;

(ii) provide the applicable due date for the taxpayer’s first payment, provided, that such due date must occur on or after 30 calendar days following receipt by the taxpayer of the notice of required participation but no later than 60 calendar days after receipt by the taxpayer of that notice; and

(iii) inform taxpayers of their obligation to enroll in such program within 20 calendar days of the postmark date of the notice unless the taxpayer challenges the determination of required participation by requesting a hearing within such 20-day period.

(2) If a newly identified taxpayer believes that it is exempt from participation in the program because its aggregate tax withheld, pursuant to its most recent reconciliation of withholding, is less than \$100,000, or because it is a health care provider, the taxpayer must submit a Statement of Exemption from Mandatory Participation, with all information necessary to prove that it qualifies for exemption. The taxpayer must submit this Statement to the department within 20 calendar days of the postmark date of the notice described in paragraph (1) of this subdivision. The statement shall be signed by the chief fiscal officer of the taxpayer. The department shall notify the taxpayer of the decision to grant or deny the exemption within 14 calendar days of receipt of the taxpayer's statement. If the department denies the exemption, the denial notice will also advise the taxpayer of the procedural steps which must then be taken to enroll in the program.

(3) A taxpayer newly required to participate in the program shall transmit a completed enrollment form to the department. The taxpayer shall, at this point in the enrollment process, select its chosen payment option from ACH debit, ACH credit, fedwire, or certified check.

(4) If a taxpayer newly required to participate in the program has not enrolled within 20 calendar days of the postmark date of the notice described in paragraph (1) of this subdivision, or where a taxpayer files for a hearing and such protest is not sustained, and the taxpayer does not enroll in the program within 10 calendar days of the postmark date of the notification thereof, the department shall send, by certified mail, another notice, in addition to making other reasonable attempts (including follow-up telephone calls and correspondence which shall be sent by certified mail) to inform the taxpayer of the civil penalty that has been assessed for failure to enroll, of the opportunity for abatement of such penalty, and of the future penalties that may result from continued failure to enroll.

(5) Taxpayers no longer required to participate. By June 1 of each year, the department shall notify currently participating taxpayers identified as no longer meeting the program eligibility criteria. The notice will inform taxpayers that they will continue in the program as voluntary participants unless they choose not to participate. The notice will include information explaining how taxpayers can notify the department of the choice not to participate.

(6) Taxpayers whose eligibility has not changed. The department will not provide notice to participating taxpayers whose eligibility status for the program has not changed. If a taxpayer believes that its eligibility status has changed, it may submit a Statement of Exemption from Mandatory Participation to the department. (See paragraph (2) of this subdivision for a description of the information needed in the Statement.) The department shall notify the taxpayer of the decision within 14 calendar days of receipt of the statement. If it grants the exemption, the notice shall also advise the taxpayer of the earliest possible date for final filing and payment by EFT method.

Section 9. Sections 2396.5 and 2396.6 of such regulations are REPEALED and reserved.

Section 10. Section 2396.7 of such regulations is REPEALED and a new section 2396.7 is added to read as follows:

Section 2396.7 EFT and filing.

(a) "Choice of payment option." Taxpayers who are mandatory participants can elect one of the four options available to make payments to the program. Taxpayers may elect to make payments by ACH debit, ACH credit, fedwire, or certified check. Where any of the methods require or allow electronic filing, that filing will serve as a substitute for the filing on a paper New York State employer's return of tax withheld (NYS-1).

(b) "Taxpayers electing ACH debit." (1) Taxpayers who are participating in the program who elect the ACH debit payment option must, on or before 6:00 p.m. (Eastern Time) on the last business day before the applicable due date, report their tax payment for the applicable period by telephone or through the program's

website to the electronic payment reporting system. (This is the case because there is a one-day lag between the date on which payment is authorized and the date on which the transfer is executed, i.e., funds are deducted from the taxpayer's bank account and transferred to the department's depository bank.) The electronic payment reporting system can be accessed using the toll-free number or through the program's website. Information on both methods of accessing the system will be provided to taxpayers as part of the notification and enrollment process.

(2) (i) Prior to making its first payment of tax by ACH debit, a taxpayer must have furnished the department with the banking information necessary to generate ACH debits against its designated account. If a taxpayer's banking information changes after the first payment, the taxpayer must immediately inform the department of the changes to ensure timely payments. The method of changing bank information will be described in the program materials.

(ii) Upon reaching the electronic payment reporting system, the taxpayer will be asked for the unique password and access code provided to the taxpayer as part of the notification and enrollment process. The password, access code, identity of the taxpayer and choice of payment option will be verified, and after approval, the taxpayer will be granted access to the electronic payment reporting system. Upon accessing such system, the taxpayer will be asked to report the following information:

- “(a)” the reporting period;
- “(b)” New York State liability;
- “(c)” City of New York liability;
- “(d)” City of Yonkers liability;
- “(e)” payment amount;
- “(f)” final payment indicator; and

“(g)” any other information the department deems necessary for filing and payment reporting purposes.

If the above-enumerated information is reported by telephone, the information will be verified over the telephone. If the information is reported using the program’s website, it will be verified by the taxpayer online. Once the taxpayer agrees that all information reported is correct, the taxpayer will be given a confirmation number for the transaction. This number will serve as proof that the taxpayer has filed its withholding return for the applicable payroll or payrolls and has complied with the signature requirements of Part 153 of this Title.

(c) “Taxpayers electing ACH credit or fedwire.” (1) Participating taxpayers who elect the ACH credit or fedwire payment option must initiate each payment of tax by contacting their own financial institution and requesting such institution to transfer both the appropriate payment of tax and the necessary addenda record information to the department's depository bank via an ACH credit or fedwire transfer, as applicable. An ACH credit taxpayer must initiate each payment transaction with its financial institution on or before the last business day before the applicable due date at such time as designated by its bank to assure that the department's depository bank receives the payment and accompanying addenda record information on or before the applicable due date. A fedwire taxpayer must initiate each payment transaction on or before the applicable due date at such time as designated by its bank to assure that the department's depository bank receives the payment and accompanying addenda record information on or before the applicable due date.

(2) Taxpayers electing to use ACH credit or fedwire transfer must provide the filing information prescribed by the department with their ACH credit or fedwire transfer, as applicable. These taxpayers need not report their withholding tax liability for applicable payroll or payrolls by telephone or through the program’s website to the electronic payment reporting system.

(d) “Certified check taxpayers.” (1) General rule. Taxpayers, other than educational organizations, that are required to participate in the program and who elect to make payments by certified check, are required to

file paper withholding tax returns and make payments of tax by certified check in accordance with the provisions of this subdivision.

(i) Required mailing date. In order to comply with the requirements of the program and to timely file such withholding tax return and pay the tax, a taxpayer that chooses the certified check payment option must either mail the paper return and a certified check for the amount of the tax liability on or before the second business day before the otherwise applicable due date or assure that the department's depository bank receives the certified check and the paper return on or before the otherwise applicable due date.

(ii) Electronic filing not applicable. Because taxpayers choosing the certified check payment option are required to file paper withholding tax returns, the provisions in this section for electronic filing are not applicable to those taxpayers.

(e) "Acknowledgement of payment." To provide an acknowledgement of payment, the department will post a record of deposits to the taxpayer's online account which can be accessed through the program's website. Taxpayers may also request that the department mail an advice of deposit or payment. Information will be provided by the program to participating taxpayers at the time of enrollment about how taxpayers may choose to have an advice of deposit or payment mailed to them.

(f) "Correcting mistakes." If a taxpayer does not make a correct payment of tax for a particular period or reports the wrong amount, the taxpayer must, on the nearest business day to the date on which the error is discovered, make proper adjustment for such period. Information will be provided by the program about how to make this adjustment. If the taxpayer error involves an underpayment of tax, interest will be charged and penalties may apply.

(g) "Changing payment option." (1) Taxpayers may elect to change their payment option at any time during the program period. The department will make the methods of electing to change payment option available to taxpayers in the printed program description or on the program's website.

(2) Payment contingency options for use in emergency situations. If a taxpayer is unable to utilize its chosen payment option for a particular payroll or payrolls due to circumstances beyond its control, such taxpayer may utilize any of the other payment options, excluding ACH debit, as an alternative payment mechanism for such payroll or payrolls. The procedures specified in subdivision (c) or (d) of this section, as applicable, will govern in such cases.

Section 11. Section 2396.8 of such regulations is REPEALED and reserved.

Section 12. Section 2396.9 of such regulations is REPEALED and a new section 2396.9 is added to read as follows:

Section 2396.9 Educational organizations and voluntarily participating health care providers

(a) "Participation." (1) Educational organizations which meet the eligibility requirements shall be subject to the same requirements as all other participants in the program other than those relating to the date on which filing and payment arrangements must be initiated.

(2) Educational organizations which do not meet the eligibility requirements and health care providers (which are exempt from the mandatory requirements), may both choose to voluntarily participate in the program. They are subject to the same requirements and limitations as all other voluntary participants, other than those relating to the date on which filing and payment arrangements must be initiated.

(b) "EFT payment." (1) General Payment rule. Taxpayers described in subdivision (a) of this section which elect the ACH debit, ACH credit or fedwire payment option must ensure that each payment of tax is received by the department's depository bank on or before the third business day following the otherwise applicable due date.

(2) Taxpayers described in subdivision (a) of this section who elect ACH debit must make the appropriate arrangements to initiate payments on or before the second business day following the otherwise applicable due date.

(3) Taxpayers described in subdivision (a) of this section which elect the ACH credit or fedwire must initiate the filing and payment transaction with their financial institution at such time as to ensure that their filing information and payment are received within the time period prescribed in paragraph (l) of this subdivision.

(c) “Certified check option.” (1) Taxpayers described in subdivision (a) of this section which elect the certified check option must mail or deliver the paper return and a certified check for the amount of the tax liability on or before the first business day following the otherwise applicable due date.

Section 13. Subdivision (b) of section 2396.10 of such regulations is amended to read as follows:

(b) ACH credit – the taxpayer shall not be liable for the transaction costs associated with ACH credit transactions. If the taxpayer wishes New York State to pay such costs, it may deduct the transaction fee which it is charged from both the amount of tax which it is reporting for each payroll or payrolls, and from the corresponding payment of tax. If the taxpayer does so deduct, it shall also, at the same time as it submits its quarterly combined withholding [and], wage reporting and unemployment insurance return for the calendar quarter, submit a statement summarizing such transaction costs and the banks which it utilized for program purposes for the calendar quarter.

Section 14. Paragraph (1) of subdivision (a) of section 2396.11 of such regulations is amended to read as follows:

(1) ACH debit, ACH credit and fedwire taxpayers. The mailing rules specified in section 691 of the Tax Law and in regulations promulgated thereunder shall not be applicable to returns filed and payments made by taxpayers participating in the program and electing the ACH debit, ACH credit or fedwire payment option. Instead, such taxpayers (including educational organizations and health care providers voluntarily participating) shall be deemed to have timely filed their return when they comply with the applicable filing requirements described in section 2396.3, [2396.6] 2396.7 or 2396.9 of this Part. Such taxpayers shall be deemed to have

timely paid the tax when the department's depository bank receives the payment of tax on or before the [specified] applicable due date.

Section 15. Subdivision (b) of such section is amended to read as follows:

(b) "Penalty for failure to enroll." [For the program year July 1, 1995 – June 30, 1996, and each succeeding program year, when] When a taxpayer required to participate in the program fails to enroll in the program in accordance with the provisions of section [2396.5(b)] 2396.4 (b) of this Part, such taxpayer shall pay a penalty equal to \$5,000; provided, however, that if such taxpayer enrolls in the program within 20 calendar days after notification of the assessment of such penalty is sent by the department by certified mail, then such penalty shall be abated. Where the taxpayer continues to fail to enroll in the program after such 20-day period, the taxpayer shall pay an additional \$500 if such failure is for not more than one month, with an additional \$500 for each additional month or part thereof during which such failure continues.

Section 16. Clause ("a") of subparagraph (i) of paragraph (1) and subparagraph (i) of paragraph (2) of subdivision (c) of such section are amended to read as follows:

("a") failure to enroll in the Electronic Funds Program in accordance with the provisions of section [2396.5(b)(1)(iii)] 2396.4(b) of this Part (see section 9(h) of the Tax Law for the penalty);

(i) taxpayer inability to access the electronic [filing] payment reporting system on the required due date because of a systems failure beyond the taxpayer's control (i.e., a failure in the electronic [filing] payment reporting system);

Section 17. Paragraph (3) of subdivision (c) of such section is REPEALED.

Section 18. The unlettered paragraph in section 2396.13 of such regulations is amended to read as follows:

The provisions of Parts [160 through 167] 171 through 178 of this Title shall apply to taxpayers participating in the program unless the provisions of this Part are inconsistent therewith, in which case the provisions of this Part shall govern.

Section 19. The heading of Part 2397 of such regulations is amended to read as follows:

Part 2397

ELECTRONIC FUNDS TRANSFER PROGRAM FOR CERTAIN TAXPAYERS
REMITTING TAXES UNDER AND PURSUANT TO THE AUTHORITY OF
ARTICLES 12-A, 13-A, 28 AND 29 OF THE TAX LAW

(Statutory authority: Tax Law, §§ 9, 10, 171, 289-f, 315, 697, 1142, 1250)

[“Note”: This Part does not reflect amendments to section 10 of the Tax Law made by chapter 309 of the Laws of 1996.]

Section 20. The unnumbered opening paragraph of section 2397.1 of such regulations is amended to read as follows:

[For the purpose] The definitions provided by section 9(a) of the Tax Law for “electronic funds transfer” (hereinafter referred to as “EFT”) and by section 10(a) of the Tax Law for “commissioner”, “payment of tax”, and “taxpayer” apply to this Part. The definitions provided by section 2396.2 of the Title for “automated clearing house”, “ACH credit”, “ACH debit”, “department”, “electronic payment reporting system”, “Federal reserve wire transfer” and “program” also apply to this Part. In addition, the following terms are defined for purposes of this Part:

Section 21. Subdivisions (a), (b), (e), (f), (g), (h) and (i) of such section are REPEALED and subdivisions (c), (d), (j) and (k) are relettered to be (a), (b), (c) and (d).

Section 22. Subdivisions (b) and (c) of such section, as relettered by section 22, are amended to read as follows:

(b) The term “look-back period” means the June 1st through May 31st period which immediately precedes the previous June 1st through May 31st period and which is used to determine required participation in the program for a given program year. For example, the look-back period of June 1, [1993] 2004, through May 31, [1994] 2005, is used to determine required participation in the program for the September 1, [1995] 2006, through August 31, [1996] 2007, program year. [Similarly, the look-back period of June 1, 1994, through May 31, 1995, is used to determine required participation in the program for the September 1, 1996, through August 31, 1997, program year.]

(c) The term “business day” shall mean [the hours of 9:00 a.m. to 5:00 p.m. (Eastern time) on] a day other than Saturday, Sunday or the following holidays: New Year’s Day, Martin Luther[King’s Birthday] King, Jr. Day, [Washington’s Birthday (President’s Day)] Presidents’ Day, Memorial Day, Independence Day, Labor Day, Columbus Day, [Veteran’s] Veterans’ Day, Thanksgiving Day and Christmas Day, except that such term shall only include the hours [of 9:00 a.m.] up to [3:00] 6:00 p.m. (Eastern time) on the last business day before the applicable due date.

Section 23. Subparagraph (i) of paragraph (1) of subdivision (a) of section 2397.2 of such regulations is amended to read as follows:

(i) If a taxpayer is liable during the applicable look-back period for more than [\$1,000,000] \$500,000 of State and local sales and compensating use taxes imposed by article 28 and pursuant to the authority of article 29 of the Tax Law (where such taxes are administered by the department), the taxpayer is required to participate in the program.

Section 24. Subdivision (b) of such section is amended to read as follows:

(b) “Hardship.” A taxpayer may, within 40 calendar days of the postmark date of the notice informing the taxpayer of its required participation in the program (see subdivision (b) of section 2397.3 of this Part), or after having already enrolled in the program, apply to the department for a hardship exemption using a form

prescribed by the department for such purpose. To be granted a hardship exemption, the taxpayer must demonstrate that the criteria set forth in paragraph (4) of subdivision (b) of section 10 of the Tax Law, as applicable, have been met. The [commissioner] department shall advise the taxpayer of [the commissioner's] its determination within 14 calendar days of receipt of the taxpayer's completed application.

Section 25. Subdivision (c) of such section is REPEALED and a new subdivision (c) is added to read as follows:

(c) When a taxpayer is required to pay prepaid sales tax on cigarettes during the look-back period used to determine program eligibility, only the amount of sales tax on cigarettes for which a cigarette retailer is liable will be included in its total State and local sales and compensating use tax liability used to determine mandatory participation in the program under subparagraph (a) of paragraph (1) of subdivision (a) of this section.

Section 26. Paragraphs (2), (3) and (4) of subdivision (d) of such section are amended to read as follows:

(2) Any taxpayer described in paragraph (1) of this subdivision shall be granted permission to participate in the program unless the [commissioner] department determines that the administrative costs associated with accepting new enrollees into the program (including, but not limited to, increasing systems capacities, adding depository bank resources and adding program specialists within the department) outweigh the revenue and tax administration benefits associated with payment by EFT or certified check.

(3)(i) Within 30 calendar days after receipt of the completed request, the [commissioner] department shall notify the taxpayer of the decision. If the [commissioner] department grants the taxpayer permission to voluntarily participate, the [notice] department shall [include] make available all the information and instructions [specified in subdivision (b) of section 2397.3 of this Part and shall also specify the date by which the taxpayer shall be required to make its payment of tax by EFT or certified check] necessary to ensure successful participation in the program.

(ii) The department may limit the selection of payment options available to voluntary participants in the program. If the department limits the selection of options, it will inform taxpayers during the enrollment process about which payment options are available. (See section 2397.4 of this Part for more information about payment options.)

(4) Duration of participation. (i) A taxpayer accepted to voluntarily participate in the program shall be required to continue in the program through at least the end of the applicable program year unless otherwise notified by the department.

(ii) (“a”) No later than August [1st], 21st, if in writing, or August 31st, if online, of each year, a taxpayer voluntarily participating in the program may notify the department [in writing] that it no longer elects to participate in the program beyond the end of the applicable program year. The [commissioner] department shall advise the taxpayer of whether the notification was timely made. If such notification is not timely made, a taxpayer voluntarily participating in the program must continue to participate in the program for the upcoming program year.

(“b”) Notwithstanding the rules specified in clause (a) of this subparagraph and in subparagraph (i) of this paragraph, a taxpayer may request release from voluntary participation in the program at any time [by applying in writing to the department for release]. To be granted such release, the taxpayer must demonstrate to the [commissioner] department that continuation of its voluntary participation will result in [an undue burden upon] hardship to such taxpayer. [Within 30 calendar days of receipt of the completed request, the commissioner] If the request is granted, the department shall advise the taxpayer, within 30 calendar days of receipt of the completed request, of the date for its final payment by EFT or certified check.

(iii) [Notwithstanding the rule specified in subparagraph (i) of this paragraph, the commissioner] The department may, at any time after enrollment and on 30 business days’ notice, advise the taxpayer that it will no longer be permitted to participate in the program on a voluntary basis.

Section 27. Subdivision (b) of section 2397.3 of such regulations is amended to read as follows:

(b) “Notification and procedures.” Within 45 calendar days after June 1st of each year, the department shall, by certified or registered mail, send a notice to taxpayers newly identified as having to participate in the program. The notice shall advise these taxpayers of their required participation in the program and include the following information:

(1) a description of the program and the means to access or obtain the information necessary to ensure successful participation in the program;

(2) [a description of the payment options afforded to taxpayers participating in the program, which shall include ACH debit, ACH credit, Fedwire and certified check] the applicable due date for the taxpayer’s first payment; and

(3) enrollment information, including the obligation to enroll within 40 calendar days of the postmark date of the notice, a description of the penalty for failure to enroll when required, as well as a taxpayer’s right to challenge the determination of required participation by requesting a hearing within such 40-day period[;

(4) information regarding procedures for requesting exemption from mandatory participation in the program (see subdivision (c) of this section);

(5) a description of future program communications to be sent by the department to taxpayers required to participate therein;

(6) a form requesting the name, address and telephone number of a designated primary contact person to whom all future program communications will be sent; and

(7) such other information as the department deems necessary].

Section 28. Subparagraphs (i) and (iv) of paragraph (1) of subdivision (c) of such section are amended to read as follows:

(i) Except as otherwise provided in this paragraph, within 40 calendar days of the postmark date of the notice described in subdivision (b) of this section, a taxpayer required to participate in the program shall transmit a completed enrollment form to the department. The taxpayers shall, [in such enrollment form] at this point in the enrollment process, select its chosen payment option from among ACH debit, ACH credit, [Fedwire] fedwire or certified check.

(iv) Additionally, if applicable, a taxpayer may, in lieu of or in addition to the actions described in subparagraphs (ii) and (iii) of this paragraph, submit an application to request release from mandatory participation due to required prepayment of sales tax on cigarettes (see subdivision (c) of section 2397.2 of this Part) within 40 calendar days of the postmark date of the notice described in subdivision (b) of this section.

Section 29. Paragraphs (2) and (3) of subdivision (c) of such section are REPEALED.

Section 30. Subdivision (d) of such section is amended to read as follows:

(d) Within 45 calendar days after June 1st of each year, the department shall, by certified or registered mail, send a notice to currently participating taxpayers identified as no longer meeting the program eligibility criteria [specified in paragraph (1) of subdivision (a) of section 2397.2 of this Part]. This notice shall advise such taxpayers that they are no longer required to participate in the program for the upcoming program year [and shall also inform them of the date for final payment by EFT or certified check. These taxpayers may, however,] but will continue to participate voluntarily in the program [in accordance with the provisions of subdivision (d) of section 2397.2 of this Part] unless they choose not to participate.

Section 31. Paragraphs (1), (2) and (3) of subdivision (a) of section 2397.4 of such regulations are amended to read as follows:

(1) Taxpayers who are participating in the program [pursuant to the provisions of section 2397.2 of this Part and] who elect the ACH debit payment option must, on or before [3:00] 6:00 p.m. (Eastern time) on the last business day before the applicable due date, report their tax payment for the applicable period by telephone or

through the program's website to the electronic payment reporting system. (This is the case because there is a one-day lag between the date on which payment is authorized and the date on which the transfer is executed; i.e., funds are deducted from the taxpayer's bank account and transferred to the department's depository bank.) The electronic payment reporting system can be accessed using the toll-free number [provided to taxpayers as part of the notification and enrollment process (see section 2397.3 of this Part). Taxpayers may use either a touch tone or a rotary phone to call the electronic payment reporting system] or through the program's website. Information on both methods will be provided to taxpayers as part of the notification and enrollment process.

(2) (i) Prior to making its first payment of tax by ACH debit, a taxpayer must have furnished the department with the banking information necessary to generate ACH debits against its designated account. If a taxpayer's banking information changes after the first payment, the taxpayer must immediately inform the department of the changes to ensure timely payments. The method of changing information will be described in the program materials.

(ii) Upon reaching the electronic payment reporting system, the taxpayer will be asked for the unique password and access code provided to such taxpayer as part of the notification and enrollment process [(see section 2397.3 of this Part)]. The password, access code, identity of the taxpayer and choice of payment option will be verified, and after approval, the taxpayer will be granted access to the electronic payment reporting system. Upon accessing such system, the taxpayer will be asked to report the following information:

(a) payment amount;

(b) taxable period; and

(c) such other information as the department deems necessary for filing and payment reporting purposes.

[After the taxpayer reports] If the above-enumerated information is reported by telephone, the information will be [repeated back to the taxpayer to ensure that such information has been correctly received] verified over the telephone. If the information is reported using the program's website, it will be verified by the taxpayer online.

Once the taxpayer agrees that all information reported is correct, the taxpayer will be given a [reference] confirmation number for the transaction.

(iii) Successful completion of the [call] reporting of the required information to the electronic payment reporting system functions as an authorization for the payment of tax to be transferred to the department's depository bank. [At the end of the business day, the taxpayer's reported information will be processed by the department's depository bank in order to generate ACH debit fund instructions. These instructions will be delivered via the ACH network, transferring funds from the taxpayer's designated account to New York State's account at the department's depository bank. If a taxpayer calls the electronic payment reporting system before the first business day prior to the applicable due date, the ACH debit transfer will also be initiated on the day of the taxpayer's call to such system.]

(3) If a taxpayer utilizing the ACH debit payment option is not remitting a payment of tax for an applicable period, the taxpayer must, on or before [3:00] 6:00 p.m. (Eastern time) on the last business day before the applicable due date, [call] access the electronic payment reporting system to report a zero remittance for such period [, using the toll-free number provided as part of the notification and enrollment process (see section 2397.3 of this Part)].

Section 32. Paragraph (4) of such subdivision is REPEALED.

Section 33. Subdivision (b) of such section is amended to read as follows:

(b) "Taxpayers electing ACH credit or [Fedwire] fedwire." (1) Taxpayers who are participating in the program [pursuant to the provisions of section 2397.2 of this Part and] who elect the ACH credit or [Fedwire] fedwire payment option must initiate each payment of tax by contacting their own financial institution and requesting such institution to transfer both the appropriate payment of tax and the necessary addenda record information to the department's depository bank via an ACH credit or a [Fedwire] fedwire transfer, as applicable. An ACH credit taxpayer must initiate each payment transaction with its financial institution on or

before the last business day before the applicable due date at such time as designated by its bank to assure that the department's depository bank receives the payment and accompanying addenda record information on or before the applicable due date. A [Fedwire] fedwire taxpayer must initiate each payment transaction on or before the applicable due date at such time as designated by its bank to assure that the department's depository bank receives the payment and accompanying addenda record information on or before the applicable due date.

(2) Taxpayers utilizing the ACH credit or [Fedwire] fedwire payment option need not [call] access the electronic payment reporting system to initiate a payment of tax for a taxable period. However, if such a taxpayer is not remitting a payment of tax for an applicable period, the taxpayer must, on or before [3:00] 6:00 p.m. (Eastern time) on the last business day before the applicable due date, [call] access the electronic payment reporting system to report a zero remittance for such period [, using the toll-free number provided as part of the notification and enrollment process (see section 2397.3 of this Part). The procedure specified in paragraph (2) of subdivision (a) of this section shall apply in such cases].

Section 34. Paragraphs (1) and (2) of subdivision (d) of such section are amended to read as follows:

(1) Taxpayers who are participating in the program [pursuant to section 2397.2 of this Part] and who do not elect the ACH debit, ACH credit or [Fedwire] fedwire method of payment, shall be required to make payments of tax by certified check in accordance with the provisions of paragraph (2) of this subdivision.

(2) In order to comply with the requirements of the program and to timely make a payment of tax, a taxpayer electing the certified check payment option must either mail the certified check for the amount of the payment of tax and a completed transmittal form prescribed by the department on or before the second business day prior to the applicable due date or assure that the department's depository bank receives the certified check [for the amount of the payment of tax] and the completed transmittal form on or before the applicable due date.

Section 35. Subdivision (e) of such section is REPEALED and a new subdivision (e) is added, to read as follows:

(e) “Acknowledgement of payment.” To provide an acknowledgement of payment, the department will post a record of deposits to the taxpayer’s online account which can be accessed through the program’s website. Taxpayers may also request that the department mail an advice of deposit or payment. Information will be provided by the program to participating taxpayers at the time of enrollment about how taxpayers may choose to have an advice of deposit or payment mailed to them.

Section 36. Subdivision (f) of such section is amended to read as follows:

(f) “Correcting mistakes in payments of tax.” If a taxpayer does not make a correct payment of tax for a particular period, such taxpayer shall, on the nearest business day to the date on which the error is discovered, make proper adjustment for such period [by calling the taxpayer assistance hotline, using the toll-free telephone number furnished as part of the notification and enrollment process (see section 2397.3 of this Part), to receive instructions for resolving the discrepancy]. Information will be provided by the program about how to make this adjustment. If the taxpayer's error involves an underpayment of tax, interest shall be charged and penalties may apply.

Section 37. Subdivision (g) of such section is REPEALED and a new subdivision (g) is added, to read as follows:

(g) “Changing payment option.” Taxpayers may elect to change their payment option at any time. The department will make the methods of electing to change payment option available to taxpayers in the printed program description or on the program’s website.

Section 38. Paragraphs (1) and (3) of subdivision (b) of section 2397.5 of such regulations are amended to read as follows:

(1) A taxpayer participating in the program which has liability described in either subparagraph (i), (ii) or (iii) of paragraph (1) of subdivision (a) of section 2397.2 of this Part, shall file the monthly, part-quarterly or quarterly returns prescribed by section 287, 308, 1102, 1136 or 1251 of the Tax Law, as applicable, and shall

pay to the [commissioner] department the amounts required to be paid with such returns, less the amounts remitted by electronic funds transfer or certified check, for each period for which such returns are filed. (See paragraph (2) of subdivision (c) of section 10 of the Tax Law.)

(3) Where a taxpayer participating in the program establishes to the satisfaction of the department that it has made an overpayment of tax for a particular period by EFT or certified check, as applicable, the taxpayer shall claim the overpayment as a credit on the return covering the period for which the overpayment was made. A taxpayer may call the taxpayer [assistance hotline, using the toll-free telephone number furnished as part of the notification and enrollment process (see section 2397.3 of this Part),] contact center or utilize the program's website for help in resolving any questions involving credits.

Section 39. Subdivision (a) of section 2397.6 of such regulations is amended to read as follows:

(a) "ACH debit, ACH credit and [Fedwire] fedwire." The taxpayer shall be liable for the transaction costs associated with ACH debit, ACH credit or [Fedwire] fedwire transactions.

Section 40. Paragraph (1) of subdivision (a) of section 2397.7 of such regulations is amended to read as follows:

(1) ACH debit, ACH credit and [Fedwire] fedwire taxpayers. The mailing rules specified in sections 289-d, 315 and 1147 of the Tax Law and in regulations promulgated thereunder shall not be applicable to payments made by taxpayers electing the ACH debit, ACH credit or [Fedwire] fedwire payment option. Such taxpayers shall be deemed to have timely made their payment of tax when the department's depository bank receives the payment of tax on or before the applicable due date.

Section 41. Section 2397.9 of such regulations is amended to read as follows:

The provisions of [Subchapter E of Chapter I, and] Subchapters [F and J] A and B of

Chapter III, and Subchapter A of Chapter IV, of this Title, shall apply to taxpayers participating in the program unless the provisions of this Part are inconsistent therewith, in which case the provisions of this Part shall govern.

Dated: Albany, New York
July 27, 2005

Andrew S. Eristoff
Commissioner of Taxation and Finance