

State and Local Tax



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New York Governor Releases 2021-22 Executive Budget

On January 19, 2021, New York State Governor Andrew M. Cuomo submitted his Executive Budget, applicable to the state's fiscal year beginning April 1, 2021. The governor's proposal, which will now be the subject of public hearings and negotiations, contains several potentially significant tax provisions:

S Corporation Conformity. Under the proposal, all federal S corporations would be treated as pass-through New York State S corporations. Currently, New York State S corporation treatment is elective, except for federal S corporations with investment income above 50 percent of federal gross income, for which the S corporation election is mandatory. The governor's memorandum in support notes that this proposal would not only simplify tax filings and conform with S corporation treatment in most states, but would also "eliminate potential tax avoidance schemes."

Enact a Pass-Through Entity Tax. As a work-around to the cap on federal state and local tax deductions under the 2017 Tax Cuts and Jobs Act, the proposal would create a new voluntary pass-through entity tax (at 6.85 percent) on electing partnerships (including LLCs taxable as partnerships) and S corporations. Since the tax would

be deductible by the entities for federal income tax purposes, individual partners and S corporation shareholders would receive the benefit of the entity-level tax deduction before the income is passed-on to them (with a New York State tax credit to offset the entity-level tax). If enacted, New York would join a handful of states that have already enacted similar pass-through entity taxes as work-arounds, nearly all of them voluntary rather than mandatory. The tax would not go into effect until 2022, and it is possible that the federal limitation could be modified or even eliminated by then.

Personal Income Tax Surcharge on High-Income Individuals.

For individuals with taxable income over five million dollars, a temporary surcharge of between 0.5 percent and 2 percent on taxable income would be imposed for 2021 through 2023. This would bring the top New York State personal income tax rate from the current 8.82 percent to a maximum 10.82 percent (not including the New York City income tax on city residents).

Enact a Cannabis Regulation and Taxation Act. For the third consecutive year, the governor is proposing to legalize adult-use cannabis, and to impose a new three-part tax on such cannabis products.

Authorize Mobile Sports Wagering and Establishing a

Casino Petition Process. The Executive Budget contains a proposal to authorize mobile sports wagering in New York State, which is already permitted in New Jersey and Pennsylvania. It would also provide a petition process for Upstate New York casinos—which, the governor’s memorandum points out, have struggled financially—to demonstrate a need for a lower tax rate on their slot machine revenues.

Impose a Sales Tax Collection Obligation on Vacation

Rental Marketplace Providers. Vacation rental marketplace providers (such as Airbnb and VRBO) would be required to collect and remit state and local sales taxes on vacation rentals that they facilitate. If enacted, it would go into effect beginning September 1, 2021.

Allow New York State Tax Department the Right to

Appeal Tribunal Decisions. Reviving similar proposals made in prior years, the governor seeks to allow the New York State Tax Department the right to appeal adverse Tax Appeals Tribunal decisions. Since the Tribunal’s formation more than 30 years ago, only taxpayers have had the

right to appeal Tribunal decisions to the New York courts. The governor’s memorandum cites to several recent Tribunal decisions as either “neutraliz[ing]” the legislature’s authority, not being susceptible to the governor seeking corrective legislation, or as involving matters of constitutional law (although the decisions cited ruled on constitutionality *as applied*, rather than on *facial* unconstitutionality).

Both the New York State Senate and Assembly are expected to release their own tax proposals. The New York State budget must be enacted by April 1, 2021.

Please contact Irwin M. Slomka or Craig B. Fields if you have any questions about the New York State Executive Budget.

Irwin M. Slomka

212.885.5167 | islomka@blankrome.com

Craig B. Fields

212.885.5170 | cfields@blankrome.com