

DEPARTMENT OF STATE
OFFICE OF THE STATE BANK COMMISSIONER
Statutory Authority: 5 Delaware Code, Section 121(b) (5 **Del.C.** §121(b))
5 DE Admin. Code 1110

PROPOSED

PUBLIC NOTICE

1110 Instructions for Preparation of Franchise Tax for Resulting Branches in this State of Out-of-State Banks

Summary

The State Bank Commissioner proposes to amend bank franchise tax Regulations 1103 (Instructions for Preparation of Franchise Tax) and 1110 (Instructions for Preparation of Franchise Tax for Resulting Branches in this State of Out-of-State Banks). The proposed amendments clarify the definition of the term "Securities Business". Neither of these proposed amendments are substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Other Regulations issued by the State Bank Commissioner are not affected by this proposal. The State Bank Commissioner is issuing these proposed amended Regulations in accordance with Section 121(b) of Title 5 of the Delaware Code. This Notice is issued pursuant to the requirements of Title 29 of the Delaware Code, Chapter 11, Subchapter III, Chapter 101, Subchapter II, and Chapter 104, Sections 10404A(b)(1) and 10404B(b)(1).

Comments

Copies of the proposed amended Regulations are being published in the July 1, 2019 edition of the Delaware *Register of Regulations*. Copies are also on file in the Office of the State Bank Commissioner, 43 South DuPont Highway, Edgehill Shopping Center, Dover, DE 19901, and are available for inspection during regular office hours. Copies are available upon request.

Interested parties may offer comments on the proposed amended Regulations or submit written suggestions, data, briefs or other materials to the Office of the State Bank Commissioner at the above address as to whether the proposed amended Regulations should be adopted, rejected or modified. Pursuant to 29 **Del.C.** §10118(a), public comments must be received on or before August 2, 2019. Written materials submitted will be available for inspection at the above address.

Adoption of Proposed Amended Regulations

On or after August 2, 2019, following review of the public comment, the State Bank Commissioner will determine whether to adopt the proposed amended Regulations, or make additional changes because of the public comments received.

1110 Instructions for Preparation of Franchise Tax for Resulting Branches in this State of Out-of-State Banks
5 Del.C. Ch. 11

Effective Date: ~~February 11, 2017~~ XX/X/XXXX

1.0 This regulation applies only to resulting branches in this State of out-of-state banks. The estimated and final franchise tax reports that accompany this regulation are found in regulations 1111 and 1112, respectively.

20 DE Reg. 654 (02/01/17)

2.0 Definitions

"Bank" means every bank and every corporation conducting a banking business of any kind or plan whose principal place of business is in this State, except a national bank.

"Banking organization" means:

A bank or bank and trust company organized and existing under the laws of this State;

A national bank, including a federal savings bank, with its principal office in this State;

An Edge Act corporation organized pursuant to §25(a) of the Federal Reserve Act, 12 U.S.C. §611 et seq. (an "Edge Act Corporation"), or a state chartered corporation exercising the powers granted thereunto pursuant to an agreement with the Board of Governors of the Federal Reserve System (an "Agreement Corporation"), and maintaining an office in this State;

A federal branch or agency licensed pursuant to §4 and §5 of the International Banking Act of 1978, 12 U.S.C. §3101 et seq., to maintain an office in this State;

A foreign bank branch, foreign bank limited purpose branch or foreign bank agency organized pursuant to Chapter 14 of Title 5, or a resulting branch in this State of a foreign bank authorized pursuant to Chapter 14 of Title 5; or

A resulting branch in this State of an out-of-state bank, or a branch office in this State of an out-of-state bank.

“International Banking Facility” means a set of asset and liability accounts, segregated on the books of a banking organization, that includes only international banking facility deposits, borrowings and extensions of credit.

“International Banking Transaction” shall mean any of the following transactions, whether engaged in by a banking organization, any foreign branch thereof (established pursuant to 5 Del.C. §771 or federal law) or any subsidiary corporation directly or indirectly owned by any banking organization:

The financing of the exportation from, or the importation into, the United States or between jurisdictions abroad of tangible property or services;

The financing of the production, preparation, storage or transportation of tangible personal property or services which are identifiable as being directly and solely for export from, or import into, the United States or between jurisdictions abroad;

The financing of contracts, projects or activities to be performed substantially abroad, except those transactions secured by a mortgage, deed of trust or other lien upon real property located in this State;

The receipt of deposits or borrowings or the extensions of credit by an international banking facility, except the loan or deposit of funds secured by mortgage, deed of trust or other lien upon real property located in this State;

The underwriting, distributing and dealing in debt and equity securities outside of the United States and the conduct of any activities permissible to an Edge Act Corporation or an Agreement Corporation described above, or any of its subsidiaries, in connection with the transaction of banking or other financial operations; or

The entering into foreign exchange trading or hedging transactions in connection with the activities described in paragraphs (1) through (5) above.

“National Bank” means a banking association organized under the authority of the United States and having a principal place of business in this State.

“Net Operating Income Before Taxes” means the total net income calculated in accordance with Section 9.0 of this Regulation, with adjustments made for securities gains or losses and other appropriate adjustments.

“Out-of-State Bank” has the same meaning as in §795 of Title 5 of the **Delaware Code**, which is (i) a State bank, as defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. §1813(a), that is not chartered under Delaware law, or (ii) a national bank association created under the National Bank Act (12 U.S.C. §21 et seq.) whose organization certificate identifies an address outside Delaware as the place at which its discount and deposit operations are to be carried out.

“Resulting Branch In This State Of An Out-of-State Bank” has the same meaning as in §1101(a) of Title 5 of the **Delaware Code**, which is a branch office in this State of an out-of-state bank resulting from a merger as provided in Subchapter VII of Chapter 7 of Title 5 of the **Delaware Code**, and, in addition, a branch office in this State of an out-of-state bank.

“Securities Business” means to engage in the sale, distribution and underwriting of, and deal in, stocks, bonds, debentures, notes or other securities. For purposes of this regulation and Title 5, Section 1101(a)(1)b, a subsidiary that is a bank or insured institution, as those terms are defined in the federal Bank Holding Company Act, 12 USC 1841, is not considered to be “engaged in the sale, distribution or underwriting of, or dealing in, securities”.

“Trust Company” means a trust company or corporation doing a trust company business which has a principal place of business in this State.

3.0 Estimated Franchise Tax

- 3.1 A resulting branch or branches in this State of an out-of-state bank whose franchise tax liability for the current year, on a consolidated basis, is estimated to exceed \$10,000 shall file an estimated franchise tax report with the State Bank Commissioner and pay estimated tax.
- 3.2 Filing. The estimated franchise tax report shall be filed with the State Bank Commissioner on the first day of March of the current year.

- 3.3 Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the estimated franchise tax report required above in subsection 3.2, unless the State Bank Commissioner is satisfied that such failure was not willful.
- 3.4 Form. The estimated franchise tax report shall be in the form set out in Regulation 1111.
- 3.5 Calculation of estimated tax. The total estimated annual franchise tax shall be calculated as follows:
- 3.5.1 The estimated net operating income before taxes of the resulting branch or branches in this State of the out-of-state bank, which includes the income of any corporation making an election as provided in Regulation No. 1101;
 - 3.5.2 Adjusted for any estimated income from an insurance division or subsidiary;
 - 3.5.3 Less any deductions set forth in 5 **Del.C.** §1101;
 - 3.5.4 Multiplied by .56 to arrive at estimated taxable income;
 - 3.5.5 The appropriate rate of taxation set forth in 5 **Del.C.** §1105 shall be applied;
 - 3.5.6 The subtotal estimated annual franchise tax shall be adjusted for tax credits applicable pursuant 5 **Del.C.** §1105, which are calculated in accordance with Regulation No. 1109;
 - 3.5.7 The subtotal estimated annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements;
 - 3.5.8 The subtotal estimated annual franchise tax shall be adjusted for Historic Preservation Tax Credits calculated in accordance with 30 **Del.C.** §§1811 et seq. and the regulations thereunder. Claimed credits must be accompanied by a Certificate of Completion issued by the Delaware State Historic Preservation Office certifying that the credits have been properly earned, in accordance with 5 **Del.C.** §1105(g). If the credits have been transferred, sold or assigned to the taxpayer by another person, a Certificate of Transfer must also be attached, in accordance with 30 **Del.C.** §1814(c);
 - 3.5.9 The subtotal estimated annual franchise tax shall be adjusted for any other applicable tax credit(s) [attach supporting schedule identifying the credit(s)].
- 3.6 Payment of estimated tax. The estimated tax liability shall be due and payable as follows:
- 3.6.1 40% due on or before June 1 of the current taxable year;
 - 3.6.2 20% due on or before September 1 of the current taxable year;
 - 3.6.3 20% due on or before December 1 of the current taxable year.

5 DE Reg. 647 (09/01/01)
20 DE Reg. 654 (02/01/17)

4.0 Final Franchise Tax

- 4.1 Filing. The December 31 call report, verified by oath, setting forth the net operating income, on a consolidated basis, of the resulting branch or branches in this State of the out-of-state bank and the final franchise tax report, setting forth the "taxable income", on a consolidated basis, of the resulting branch or branches in this State of the out-of-state bank, shall be filed with the Office of the State Bank Commissioner on or before January 30 each year; provided, however, that a resulting branch of an out-of-state bank may file the December 31 call report and the final franchise tax report with the Office of the State Bank Commissioner on or before any later date allowed by the Federal Financial Institutions Examination Council guidelines for filing its Report of Condition and Income.
- 4.2 Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the final franchise tax report required above in subsection 4.1, unless the State Bank Commissioner is satisfied that such failure was not willful.
- 4.3 Form. The final franchise tax report shall be in the form set out in Regulation No. 1112.
- 4.4 Calculation of final tax. The total final franchise tax shall be calculated as follows:
- 4.4.1 The net operating income before taxes of the resulting branch or branches in this State of the out-of-state bank, which includes the income of any corporation making an election as provided in Regulation No. 1101;
 - 4.4.2 Adjusted for any income from an insurance division or subsidiary; (include a report of income showing the name and federal employer identification number of the division or subsidiary);
 - 4.4.3 Less any deduction set forth in 5 **Del.C.** §1101; (include a report of income showing the name and federal employer identification number of each subsidiary taken as a deduction);
 - 4.4.4 Multiplied by .56 to arrive at "taxable income";
 - 4.4.5 The appropriate rate of taxation set forth in 5 **Del.C.** §1105 shall be applied to the taxable income to arrive at subtotal annual franchise tax;

- 4.4.6 The subtotal annual franchise tax shall be adjusted for tax credits pursuant to 5 **Del.C.** §1105, which are calculated in accordance with Regulation No. 1109;
- 4.4.7 The subtotal annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements;
- 4.4.8 The subtotal annual franchise tax shall be adjusted for Historic Preservation Tax Credits calculated in accordance with 30 **Del.C.** §§1811 et seq. and the regulations thereunder. Claimed credits must be accompanied by a Certificate of Completion issued by the Delaware State Historic Preservation Office certifying that the credits have been properly earned, in accordance with 5 **Del.C.** §1105(g). If the credits have been transferred, sold or assigned to the taxpayer by another person, a Certificate of Transfer must also be attached, in accordance with 30 **Del.C.** §1814(c).
- 4.4.9 The subtotal annual franchise tax shall be adjusted for any other applicable tax credit(s) [attach supporting schedule identifying the credit(s)].

5 DE Reg. 647 (09/01/01)

20 DE Reg. 654 (02/01/17)

5.0 Payment of Final Franchise Tax

- 5.1 Taxes owed for the previous calendar year are due and payable on or before March 1 of the following year. Checks or other forms of payment should be made payable or directed to the State of Delaware.
- 5.2 The amount due and payable on or before March 1 for the previous calendar year shall be the final franchise tax, less any estimated tax payments made for the taxable year, plus any additional tax due to underpayment of estimated franchise tax or installment. If the final franchise tax is not paid by March 1, a penalty for late payment of the final franchise tax shall be assessed.

6.0 Additional Tax Due to Underpayment of Estimated Franchise Tax or Installment

- 6.1 In the case of any underpayment of estimated franchise tax or installment of estimated tax required by Chapter 11 of Title 5 of the **Delaware Code**, there shall be added to the tax for the taxable year an amount determined at the rate of 0.05 percent per day upon the amount of the underpayment for the period of the underpayment. The amount of the underpayment shall be the excess of:
 - 6.1.1 The amount of the estimated franchise tax or installment payment which would be required to be made if the estimated tax were equal to 80 percent of the tax shown on the final return for the taxable year, or if no return were filed, 80 percent of the tax for such year, over;
 - 6.1.2 The amount, if any, of the estimated tax or installment paid on or before the last date prescribed for payment.
- 6.2 The period of the underpayment shall run from the date the estimated franchise tax or installment was required to be paid to the earlier of the date when such estimated tax or installment is paid or the date of the final payment of tax for the year.
- 6.3 Notwithstanding the above, the addition to the tax with respect to any underpayment of estimated franchise tax or any installment shall not be imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment thereof equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were the tax shown on the final return of the resulting branch(es) of the out-of-state bank for the preceding taxable year.

20 DE Reg. 654 (02/01/17)

7.0 Penalty - Late Payment of Final Franchise Tax

- 7.1 In the case of a late payment of final franchise tax as required by Chapter 11 of Title 5 of the **Delaware Code**, there shall be added to the tax a penalty in an amount determined at the rate of 0.05 percent per day until required payment is made.

8.0 Election to be listed as a "Subsidiary Corporation"

- 8.1 Any corporation which has elected to be treated as a "subsidiary corporation" of the resulting branch(es) of the out-of-state bank pursuant to §1101(f) and filed with the State Bank Commissioner the required election form in accordance with Commissioner's Regulation No.1101 shall provide (a) a tentative report of income for the electing corporation covering estimated bank franchise tax liability for the current income year to be submitted in conjunction with the estimated franchise tax report due March 1 for the resulting branch(es) of the out-of-state bank whose franchise tax liability for the current year is estimated to exceed \$10,000, and (b) a report of

income for the electing corporation as of December 31 of each year to be submitted in conjunction with the Final Franchise Tax Report due January 30 or any later date allowed as provided in subsection 4.1 above.

- 8.2 As long as the election remains in effect, the ownership and employment tests must be met. Therefore, the election form in Regulation 1101 must be completed each year for each Electing Corporation and submitted with the final franchise tax report.

5 DE Reg. 647 (09/01/01)

20 DE Reg. 654 (02/01/17)

9.0 Separate Accounting by Resulting Branches

- 9.1 Books and Records. Each resulting branch must keep a separate set of books and records as if it were an entity separate from the rest of the bank that operates such resulting branch. These books and records must reflect the following items attributable to the resulting branch:
- 9.1.1 Assets and the credit equivalent amounts of offbalance sheet items used in computing the riskbased capital ratio under 12 C.F.R. part 325;
 - 9.1.2 Liabilities;
 - 9.1.3 Income and gain;
 - 9.1.4 Expense and loss.
- 9.2 Consolidation of Delaware Branches. If a bank operates more than one resulting branch, it may treat all resulting branches as a single separate entity for purposes of computing the assets, liabilities, income, gain, expense, and loss referred to above.
- 9.3 Determining Assets Attributable to a Resulting Branch
- 9.3.1 General Principle of Asset Attribution. The general principle will be to attribute assets to a resulting branch if personnel at the resulting branch actively and materially participate in the solicitation, investigation, negotiation, approval, or administration of an asset.
 - 9.3.2 Loans and Finance Leases. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the solicitation, investigation, negotiation, final approval, or administration of a loan or financing lease. Loans include all types of loans, including credit and travel card accounts receivable.
 - 9.3.3 Stocks and Debt Securities. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the acquisition of such assets.
 - 9.3.4 Foreign Exchange Contracts and Futures, Options, Swaps, and Similar Assets. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the solicitation, investigation, negotiation, acquisition, or administration of such assets.
 - 9.3.5 Patents, Copyrights, Trademarks, and Similar Intellectual Property. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the licensing of such asset.
 - 9.3.6 Currency. U.S. and foreign currency will be attributed to a resulting branch if physically stored at the resulting branch.
 - 9.3.7 Tangible Personal and Real Property. These assets (including bullion and other precious metals) will be attributed to a resulting branch if they are located at or are part of the physical facility of a resulting branch.
 - 9.3.8 Other Business Assets. Other business assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the acquisition of such assets.
 - 9.3.9 Credit Equivalent Amounts of Regulatory Off-Balance Sheet Items Taken Into Account in Determining Risk-Based Capital Ratio. These are the credit equivalent amounts of off-balance sheet items described in Appendix A to 12 C.F.R. part 325 (the "Appendix") not otherwise addressed above (e.g., guarantees, surety contracts, standby letters of credit, commercial letters of credit, risk participations, sale and repurchase agreements and asset sales with recourse if not already included on the balance sheet, forward agreements to purchase assets, securities lent (if the lending bank is exposed to risk of loss), bid and performance bonds, commitments, revolving underwriting facilities, note issuance facilities described in the Appendix). These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the solicitation, investigation, negotiation, acquisition, or administration of such assets.
- 9.4 Liabilities Attributable to a Resulting Branch. The liabilities attributable to a resulting branch shall be the deposits recorded on the books of the resulting branch plus any other legally enforceable obligations of the resulting branch recorded on the books of the resulting branch or its parent.
- 9.5 Income of a Resulting Branch.

- 9.5.1 Income from Assets. Income and gain from assets (including fees from off-balance sheet items) attributed to a resulting branch in accordance with the rules in section 9.3 above will be attributed to the resulting branch.
- 9.5.2 Income from Fees. Fee income not attributed to a resulting branch in accordance with paragraph 9.5.1. above will be attributed to the resulting branch depending on the type of fee income.
 - 9.5.2.1 Fee income from letters of credit, travelers checks, and money orders will be attributed to the resulting branch if the letters of credit, travelers checks, or money orders are issued by the resulting branch, except to the extent that paragraph 9.5.1 above requires.
 - 9.5.2.2 Fee income from services (e.g., trustee and custodian fees) will be attributed to the resulting branch if the services generating the fees are performed by personnel at the resulting branch. If services are performed both within and without Delaware, the fees from such services must be allocated between Delaware and other states based on the relative value of the services or upon the time spent in rendering the services or on some other reasonable basis. The basis for allocation must be disclosed and applied consistently from period to period.
- 9.6 Determining the Expenses of a Resulting Branch.
 - 9.6.1 Interest. The amount of interest expense of a resulting branch shall be the actual interest booked by the resulting branch, which should reflect market rates.
 - 9.6.2 Direct Expenses of a Resulting Branch. Expenses or other deductions that can be specifically identified with the gross income, gains, losses, deductions, assets, liabilities or other activities of the resulting branch are direct expenses of such resulting branch. Examples of such expenses are payroll, rent, depreciation and amortization of assets attributed to the resulting branch, some taxes, insurance, the cost of supplies and fees for services rendered to the resulting branch.
 - 9.6.3 Indirect Expenses of a Resulting Branch. Expenses or other deductions that cannot be specifically identified with the gross income, gains, losses, deductions, assets, liabilities, or other activities of a resulting branch must be allocated between the resulting branch and the rest of the bank operating the resulting branch. If the bank makes such an allocation on any reasonable basis, and applies such basis consistently from period to period, the allocation likely will be respected. If the bank makes no such allocation, such expenses could be allocated on the basis of the ratio of assets of the resulting branch to the assets of the entire bank or based on the ratio of gross income of the resulting branch to gross income of the entire bank.

5 DE Reg. 661 (09/01/01)

20 DE Reg. 654 (02/01/17)

23 DE Reg. 26 (07/01/19) (Prop.)