

August 11, 2010

New York State and City Tax Law Changes

2010-2011 New York State Budget Is Enacted Four Months Late – Imposes Tax Increases on Individuals and Corporations

SUMMARY

The 2010-2011 New York State Budget (the “Budget”) was enacted on August 4, 2010, over four months after the April 1st deadline. Most of the Budget’s provisions are effective as of January 1, 2010. The most significant provisions in the Budget are as follows:

Affecting Individuals

- creates a new top marginal New York City personal income tax rate of 3.876% for New York City residents with taxable income over \$500,000;
- reduces the charitable deduction that may be claimed by New York State residents earning more than \$10 million from 50% of the U.S. Federal deductible amount to 25%;
- imposes New York State tax on payments (including non-compete and termination payments) to non-residents in respect of services previously performed in New York State;
- in the case of an S corporation that was doing business in New York, imposes New York State tax on a non-resident shareholder’s gain from (i) a share sale treated, for U.S. Federal tax purposes, as an asset sale, or (ii) an installment sale of the S corporation’s assets followed by a liquidation of the S corporation or a termination of its New York State tax status; and
- preserves the \$1 million New York estate tax exemption for decedents dying in 2010 during the temporary repeal of the U.S. Federal estate tax.

Affecting Corporations

- imposes a temporary deferral on the use of certain tax credits for taxable years beginning on or after January 1, 2010 and ending on or before December 31, 2012;
- re-couples the New York State and New York City bad debt deduction methods to the Federal method for banks and certain other financial institutions;
- eliminates sales tax refunds or credits on unpaid private label credit card debts;
- requires a “payment settlement entity” that is obligated to file U.S. Federal information reports under a new U.S. Federal law to file duplicate reports with New York State; and
- makes the captive REIT/RIC provisions permanent.

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The version of the Budget initially passed by the New York State legislature (on August 3rd) included a provision that would have imposed New York State tax on profits allocated to a non-resident partner in respect of a partnership carried interest (or other similar interest in a partnership or S corporation) if the non-resident performed investment management services for the partnership (or S corporation) in New York State.¹ On the same day that this provision was enacted, it was repealed by a Governor's "program bill". Thus, the provision is not part of the law as enacted.

DISCUSSION

CERTAIN CHANGES AFFECTING INDIVIDUALS

Create a New Top New York City Income Tax Rate. The Budget² increases the New York City income tax rate for individuals (including married couples filing jointly), estates, and trusts resident in New York City with over \$500,000 of New York City taxable income, effective for years beginning on or after January 1, 2010.³

Prior to the Budget, the top New York City marginal tax rate was 3.648%, which was imposed on residents of New York City with taxable incomes over \$90,000 (for married individuals filing jointly), \$60,000 (for heads of households), and \$50,000 (for unmarried individuals, married individuals filing separately, and resident estates and trusts).⁴

The Budget creates a new top New York City marginal rate of 3.876%, which is imposed on New York City income over \$500,000, irrespective of the taxpayer's filing status.⁵

The Budget also provides a grace period to enable taxpayers subject to this new top rate in 2010 to increase their 2010 estimated tax payments without facing penalties for failure to make sufficient estimated payments for periods prior to the enactment of the Budget.⁶ For most individuals, this will require that they catch up the shortfall with the estimated tax payment due on September 15, 2010.

Reduction in the Charitable Deduction for Individuals with Income Over \$10 Million. The Budget reduces the deduction for charitable contributions that may be claimed by individuals with over \$10 million in New York State adjusted gross income from 50% of the charitable deduction permitted for U.S. Federal tax purposes to 25% of the U.S. Federal charitable deduction. This reduced charitable deduction applies for taxable years beginning on or after January 1, 2010 and ending on or before December 31, 2012.⁷

This change is similar to a change that was enacted as part of last year's budget and could be seen to be part of a trend. Specifically, the 2009 budget eliminated, for New York State tax purposes for all individuals with New York State adjusted gross income of over \$1 million, all itemized deductions permitted for U.S. Federal tax purposes (other than the charitable deduction, which was already limited at 50%).⁸

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Certain Payments to Non-Residents for Past Services Taxable by New York. The Budget imposes New York State income tax on payments (such as payments pursuant to a non-compete covenant or an employment termination agreement) to non-New York State residents in respect of prior services, if the non-resident individual previously carried on, in New York State, a business, trade, profession, or occupation (whether as an employee or otherwise).⁹ This change applies to taxable years beginning on or after January 1, 2010¹⁰ and does not apply if prohibited by Federal law¹¹.

Certain Gains Derived by Non-Resident S Corporation Shareholders to be Treated as New York Source Income. The Budget includes three provisions affecting non-resident shareholders of S corporations that were doing business in New York and are sold or liquidated.¹²

The first two provisions apply retroactively to all open tax years beginning on or after January 1, 2007, and are a reaction to two 2009 Tax Appeals Tribunal decisions which found that a non-resident was not subject to New York State tax when he disposed of S corporation shares in a transaction that was treated, for U.S. Federal tax purposes, as a disposition of the S corporation's assets pursuant to a U.S. Federal tax election (*i.e.*, a Section 338(h)(10) election).¹³ The decisions held that, for New York State tax purposes, the two transactions were treated as dispositions of the shares, with the result that the non-resident shareholders were not subject to New York State tax.

Under the first provision, gain on an S corporation share sale is sourced as if it were derived from a disposition of the S corporation's assets if the share sale is treated as an asset sale for U.S. Federal tax purposes pursuant to a Section 338(h)(10) election.¹⁴

The second provision applies if the S corporation sells its assets in exchange for an installment note and distributes the installment note in liquidation.¹⁵ For U.S. Federal tax purposes, the shareholder is not taxed upon the receipt of the installment note and the payments on the installment note are treated as payments in exchange for the shares.¹⁶ The Budget re-characterizes those payments as payments in exchange for the S corporation's assets and the gain attributable to those payments would, to the extent allocable to New York assets, be subject to New York State tax.¹⁷

Under both of these provisions, treating the gain as gain from the sale of the S corporation's assets will subject some or all of the gain to New York State tax. Both of these provisions apply generally to taxable years beginning on or after January 1, 2007 for which the statute of limitations for seeking refunds or assessing tax is still open.¹⁸ The Budget does not impose an affirmative obligation on taxpayers affected by these provisions to file amended returns for the open years.

The third provision applies when the S corporation sells assets in exchange for an installment obligation and then terminates its taxable status in New York before all the installment payments have been received.¹⁹ Under this provision, in the hands of non-resident shareholders the installment payments are

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sourced by reference to the law and facts in effect in the year of the asset sale.²⁰ This provision applies to taxable years beginning on or after January 1, 2010.²¹

Preserve the \$1 Million Exemption Against New York Estate Tax for Decedents Dying in 2010 During the Temporary Repeal of the Federal Estate Tax. New York law provides for an exemption against New York estate tax equal to the Federal estate tax exemption amount (subject to a maximum of \$1 million), effectively exempting the first \$1 million in value of New York taxable estates from New York estate tax. Because of the current temporary “repeal” of the Federal estate tax, there is no Federal exemption amount for decedents dying in 2010. As a result, for decedents dying in 2010, there has been no New York estate tax exemption.²²

The Budget remedies this unintended result by preserving the New York estate tax exemption at \$1 million for New York estate tax purposes irrespective of changes to Federal law.²³ This change takes effect immediately and applies to estates of decedents dying on or after January 1, 2010.²⁴

Carried Interest Proposal Passed by The Legislature and Then Promptly Repealed. The version of the Budget initially passed by the New York State legislature (on August 3rd) included a provision that would have imposed New York State tax on profits allocated to a non-resident partner in respect of a partnership carried interest (or other similar interest in a partnership or S corporation) if the non-resident performed investment management services for the partnership (or S corporation) in New York State.²⁵ On the same day that this provision was passed, it was repealed by a Governor’s “program bill”.²⁶ Thus, the provision is not part of the law as enacted.

While the carried interest proposal was introduced by the legislature and essentially removed by the Governor, two provisions that were in the Governor’s January Executive Budget Proposal that were not included in the enacted Budget were:

- a proposal to repeal a rule that exempts from New York State tax a resident trust that (1) has no New York domiciled trustees; (2) has no New York State property; and (3) has no New York source income. (Perhaps in response to this development, on July 23, 2010 the New York State Department of Taxation and Finance issued a TSB-M requiring each resident trust meeting this exemption to file a New York State fiduciary income tax return stating that no New York State tax is due.);²⁷ and
- a proposal to impose mortgage recording tax on the recording of a mortgage on a residential co-op unit in New York State.²⁸

CERTAIN CHANGES AFFECTING CORPORATIONS

Temporary Deferral on the Use of Certain Tax Credits. The Budget limits the use of certain tax credits for corporations to a maximum of \$2 million for each taxable year beginning on or after January 1, 2010 and ending on or before December 31, 2012.²⁹ Under the Budget, the portion of the total amount of a taxpayer’s credits that are subject to deferral under this provision (“specified credits”)³⁰ in excess of \$2 million is deferred to taxable years beginning on or after January 1, 2013.³¹ No interest will be paid by

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New York State as a result of this deferral.³² Taxpayers with \$2 million or less of specified tax credits are not affected by this provision.

Each credit is reduced proportionately by a specified fraction³³ with the result that the taxpayer is only able to use up to \$2 million of credits in each taxable year.³⁴ In calculating and making its estimated payments, a taxpayer is required to take into account the reduction and deferral of tax credits pursuant to this provision, subject to an underpayment penalty grace period in the 2010 taxable year.³⁵

The amount of each credit that is reduced and deferred under this provision is carried forward to taxable years beginning on or after January 1, 2013. Depending on whether a credit is, under pre-existing New York State tax law, non-refundable or refundable, the credit carried forward is categorized as either a “temporary deferral non-refundable payout credit” or a “temporary deferral refundable payout credit”. For a temporary deferral non-refundable payout credit, a taxpayer is allowed to claim the full amount of this credit, if the taxpayer otherwise has sufficient income, starting in taxable years beginning on or after January 1, 2013 until such credit is exhausted.³⁶ A taxpayer’s claim of a temporary deferral refundable payout credit is limited to 50% of such credit in the taxable year beginning on or after January 1, 2013 and before January 1, 2014, 75% of the remaining credit in the taxable year beginning on or after January 1, 2014 and before January 1, 2015, and any residual credit in the taxable year beginning on or after January 1, 2015 and before January 1, 2016.³⁷

Re-couple Bad Debt Deduction Method to Federal Method for Banks and Certain Other Financial Institutions. For taxable years beginning on or after January 1, 2010, the Budget conforms New York State and New York City tax law to U.S. Federal tax law that allows certain banks to deduct bad debts on a specific charge-off method³⁸ (the “direct write-off method”), rather than a deduction based on reserves for bad debts (the “reserve method”).³⁹ Small banks (and thrift institutions that qualify as small banks) that use the experience method for U.S. Federal tax purposes continue this method for New York State tax purposes.

Under New York State tax law and the administrative code of New York City prior to amendment by the Budget, large banks⁴⁰ and thrift institutions⁴¹ were allowed deductions for New York State and New York City tax purposes for all or a portion of the amounts reserved for bad debts.⁴² The Budget provides that such deductions are allowed only for taxable years beginning prior to January 1, 2010.⁴³

Eliminate Sales Tax Refunds on Private Label Credit Cards. Under New York State tax law prior to amendment by the Budget, a vendor that accepted a private label credit card, or the issuer of such card, could deduct from subsequent remittances of sales tax or seek a refund for sales tax previously remitted by the vendor to the extent a taxable sale was attributable to private label credit card debt that was later uncollectible.⁴⁴ This was in accord with older law which provided that a vendor was not required to remit sales tax to New York State if a customer purchased items from the vendor and then failed to pay his or her debt to the vendor arising out of the purchase. As noted by last year’s memorandum in support,

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requiring the collection of sales tax in that circumstance provided a windfall to New York State as the vendor did not receive anything from the customer (to the net economic detriment of the vendor).⁴⁵ In contrast, the executive branch argued in the memorandum in support that the imposition of another party in the transaction – *i.e.*, the private label credit card issuer – changed the nature of the transaction and that a deduction or refund would not be appropriate.

The Budget repeals the provision that allowed vendors or private label credit card issuers to claim a sales tax credit or refund for claims made on or after July 1, 2010.⁴⁶

Duplicate Certain Information Reporting Required by U.S. Federal Law in New York State. The Budget requires any entity subject to the new Federal information reporting requirement for payment settlement entities⁴⁷ to provide to New York State either (1) a duplicate of the information returns that were provided to the Internal Revenue Service under the Federal information reporting regime or (2) a duplicate of the information returns for payees with New York addresses or for payees that are otherwise New York State taxpayers.⁴⁸ The New York State Department of Taxation and Finance will provide a list or database of New York State taxpayers to facilitate accurate reporting. Failure to file information returns with New York State without reasonable cause would result in penalties of \$50 for each failure but not exceeding \$250,000 in any year.⁴⁹

This provision emanated primarily from New York State's concerns over sales tax evasion and is modeled after the Federal information reporting requirement that was enacted for payment settlement entities in 2008 and becomes effective for transactions after December 31, 2010.⁵⁰ Under this Federal information reporting regime, payment settlement entities that make settlement payments to participating payees in credit or debit card transactions or in third-party network transactions must report to the Internal Revenue Service the gross amount of such settlement payments made to each payee.⁵¹

Make The Captive REIT/RIC Provisions Permanent. Under New York State tax law, so-called "captive REITs" and "captive RICs"⁵² are generally required to file as part of a combined group with their closest controlling New York State shareholder.⁵³ According to the New York executive branch, these provisions were enacted in order to prevent taxpayers from inappropriately claiming a dividends paid deduction (at the REIT or RIC level) and also excluding all or a portion of the income when paid as dividends (at the corporate shareholder level).⁵⁴

These provisions were scheduled to sunset as of January 1, 2011.⁵⁵ The Budget makes these provisions permanent.⁵⁶

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ENDNOTES

- 1 See Budget, Part KK.
- 2 Senate Bill No. 6610-C and Assembly Bill No. 9710-D, as modified by Senate Bill No. 8465 and Assembly Bill No. 11678.
- 3 Budget, Part EE, §§ 2, 3.
- 4 The 3.648% rate is composed of two pieces: a top marginal rate of 3.2%, and a surcharge of 14%. Administrative Code of the City of N.Y. §§ 11-1701, 11-1704.1; N.Y. TAX LAW §§ 1304, 1304-B. All citations to “N.Y. TAX LAW” and “Administrative Code of the City of N.Y.” are to the law in effect prior to enactment of the Budget.
- 5 Budget, Part EE, §§ 2, 3. This new 3.876% rate is composed of a top marginal rate of 3.4%, and the existing 14% surcharge.
- 6 Budget, Part EE, § 5 (no additions to tax will be imposed on any underpayments of estimated tax for 2010 which result from this tax rate increase and are due prior to September 4, 2010, provided that the underpayments are paid by the first estimated tax payment due after such date). Similarly, the Budget also requires the Commissioner to develop new wage withholding regulations and, in particular, to develop regulations for the remainder of 2010 which result in the full amount of tax for 2010 wages having been withheld by December 31, 2010. *Id.* § 4.
- 7 Budget, Part HH, § 3. The \$10 million threshold is the same for all taxpayers irrespective of filing status. Similar changes were also made to the New York City tax law, although New York City was also given authorization to elect not to impose the new 25% rule. *Id.* § 7 and § 9-a. The provision adding the 25% to the New York City tax law appears to contain a technical error in that it fails to provide that the 25% rule is effective only through 2012. The surrounding changes make it clear that this is a technical error. It is likely to be revised through a technical correction.
- 8 N.Y. TAX LAW § 615(f)(3). This threshold is the same for all taxpayers irrespective of filing status. *Id.* Similar reductions are applicable under New York City tax law. Administrative Code of the City of N.Y. § 11-1715(f)(3).
- 9 Budget, Part B, § 1. This provision was included in the Governor’s January Executive Budget Proposal, and the accompanying memorandum in support (“January Memorandum in Support”) explained that such payments had always been subject to New York State tax, but that two 1997 New York State Tax Appeals Tribunal decisions had held that such income was not subject to New York State tax. The January Memorandum in Support went on to state that, “[t]hese decisions have led to widespread abuse of post-employment severance packages and have resulted in a significant revenue loss for the state. This bill would stem that abuse.”
- 10 Budget, Part B, § 2. If the payments are attributable to a prior business carried on partly within and partly outside New York State, only a portion of the payments will be subject to New York State tax.
- 11 A Federal statute, 4 U.S.C. § 114, prohibits states from taxing certain types of pension and retirement income.
- 12 Budget, Part C. This provision was included in the January Executive Budget Proposal and is discussed in the Sullivan & Cromwell LLP publication entitled “New York State Executive Budget Proposal Would Make Important Changes to Tax Laws Affecting Individuals and Trusts” (January 21, 2010), which may be obtained by following the instructions at the end of this publication. See also January Memorandum in Support, Part F.
- 13 See *Matter of Baum*, New York Division of Tax Appeals, Tax Appeals Tribunal, DTA Nos. 820837 and 820838 (February 12, 2009); *Matter of Mintz*, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA Nos. 821807 and 821806 (June 4, 2009). For more background on this provision, see New York State Bar Association Report Regarding the 2010-11

- New York State Executive Budget (February 22, 2010), available at <http://www.nysba.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=36438>.
- 14 Budget, Part C, § 2. For U.S. Federal tax purposes, the Section 338(h)(10) election results in the transaction being treated as a sale of the S corporation's assets followed by a liquidation of the S corporation. See Section 338(h)(10) of the Internal Revenue Code of 1986, as amended (the "Code").
- 15 Budget, Part C, § 2.
- 16 See Section 453(h) of the Code.
- 17 Budget, Part C, § 2.
- 18 *Id.* § 4. The initial Budget passed by the legislature applied this provision to all open years without limitation. The Governor's program bill (Senate Bill No. 8465, Part B and Assembly Bill No. 11678, Part B), enacted on the same day, limits the retroactive effect of this provision to taxable years beginning on or after January 1, 2007, except that the provision still applies to all open years in case of a failure to file, failure to report U.S. Federal changes, filing a false or fraudulent return with intent to evade tax, or where there was a substantial omission of income.
- 19 Budget, Part C, § 3.
- 20 *Id.*
- 21 *Id.* § 4.
- 22 See January Memorandum in Support, Part BB. In 2009, the Federal exemption amount was \$3.5 million. See Section 2010(c) of the Code.
- 23 Budget, Part T, § 1.
- 24 See *id.* § 2.
- 25 See Budget, Part KK.
- 26 See Senate Bill No. 8465, Part A and Assembly Bill No. 11678, Part A.
- 27 See TSB-M-10(5)I.
- 28 These two provisions were discussed in the Sullivan & Cromwell LLP publication entitled "New York State Executive Budget Proposal Would Make Important Changes to Tax Laws Affecting Individuals and Trusts" (January 21, 2010).
- 29 Budget, Part Y, § 1.
- 30 The full list of tax credits that are subject to deferral is set forth in Budget, Part Y, § 1, and includes the investment tax credit, the employment incentive credit and the empire zone wage tax credit. Two of the tax credits on this list pertain to taxpayers who are individuals: the solar energy system equipment credit and the historic homeownership rehabilitation credit. Among other credits, the research and development tax credits are not subject to deferral.
- 31 Budget, Part Y, § 1.
- 32 *Id.*
- 33 The fraction has a numerator of \$2 million and a denominator of the total amount of the credit (before any reduction).
- 34 Budget, Part Y, § 1. There appears to be a technical error in the statute. The Budget adds new N.Y. TAX LAW § 33(b) which provides for the calculation of the allowable tax credit each year prior to 2013. The calculation specified in the bill text could be read to have the effect of *increasing* a

taxpayer's tax credits to \$2 million even when the taxpayer's actual credits are less. For instance, a taxpayer with \$500,000 of investment tax credits (and no other credits) could be allowed to use \$2 million of investment tax credits after the calculation specified in N.Y. TAX LAW § 33(b) (\$500,000 multiplied by (\$2 million/\$500,000)).

35 Budget, Part Y, § 1.

36 *Id.* § 2. If a taxpayer has sufficient tax liabilities in its 2013 taxable year, it may use up all of the temporary deferral non-refundable payout credit without limitation.

37 *Id.*

38 See Section 166(a) of the Code.

39 Budget, Part Z. See Sections 166(a) and 585(a)-(c) of the Code. Under U.S. Federal tax law, small banks (*i.e.*, banks that are not "large banks" (see note 40)) may use the "experience method" to compute the additions to reserves for bad debt. See Section 585(a)-(c) of the Code.

40 A bank is a large bank if for the taxable year (or for any preceding taxable year beginning after December 31, 1986) the average adjusted bases of all assets of such bank exceeded \$500 million, or if the bank was a member of a parent-subsidiary controlled group (for U.S. Federal tax purposes) and the average adjusted bases of all assets of the group exceeded \$500 million. Section 585(c)(2) of the Code.

41 A thrift institution is defined as a "banking corporation" that meets a certain asset test and is either a New York corporation or association created or authorized to engage in banking under Article 6 or 10 of the New York banking law, a non-New York corporation or association organized in the United States which is engaged in business substantially similar to the business that a corporation or association may be created or authorized to do under Article 6 or 10 of the New York banking law, or a Federal savings bank or Federal savings and loan doing a banking business. N.Y. TAX LAW § 1453(h)(1), Administrative Code of the City of N.Y. § 11-641(h)(1).

42 See N.Y. TAX LAW §§ 1453(h)(3), 1453(i)(1), Administrative Code of the City of N.Y. §§ 11-641(h)(3), 11-641(i)(1).

43 Budget, Part Z, §§ 7, 8, 16, 17. This provision does not affect the bad debt deductions of thrift institutions that qualify as small banks on the experience method for U.S. Federal tax and New York State tax purposes.

44 N.Y. TAX LAW § 1132(e-1)(3)(i).

45 Memorandum in Support of Executive Budget Proposal 2009-2010, Part BB ("When a vendor self-finances a credit sale and the customer fails to pay the debt, the vendor has paid the tax to the State but has not received payment for the sale. Thus, under the authority of Tax Law §1132(e), 20 NYCRR 534.7(b)(3) rightly limits the eligibility for bad debt credits or refunds to sales financed by the vendor itself.").

46 Budget, Part W, §§ 1, 2.

47 See Section 6050W of the Code. Payment settlement entities are typically banks and third-party settlement organizations. Some examples of third-party settlement organizations include PayPal™ and Amazon Payments™. Payment settlement entities also include intermediaries and electronic payment facilitators, where such intermediaries or payment facilitators make payments to payees on another entity's behalf. In such cases, the intermediaries and the electronic payment facilitators are responsible for filing the information returns.

48 Budget, Part E, § 1.

49 *Id.*

ENDNOTES (*continued*)

- 50 See January Memorandum in Support, Part H. See Section 6050W of the Code.
- 51 See Section 6050W(b) and (f) of the Code.
- 52 Generally defined as a real estate investment trust or regulated investment company that is owned 50% or more by a single corporation (measured by vote). N.Y. TAX LAW §§ 2.9, 2.10.
- 53 See, *for example*, N.Y. TAX LAW § 211.4(a).
- 54 See Memorandum in Support of Executive Budget Proposal for 2008-2009, Part H.
- 55 A sunset of these provisions would mean that captive REITs and captive RICs would be taxed based on the law prior to the enactment of Chapter 57 of the Laws of 2008. For more information on the previous law, see Sullivan & Cromwell LLP publication entitled "New York State Enacts New Corporate Tax Laws" (May 4, 2007).
- 56 See Budget, Part MM.

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CONTACTS

New York

Andrew S. Mason	+1-212-558-3759	masona@sullcrom.com
Diana L. Wollman	+1-212-558-4055	wollmand@sullcrom.com
Marina Bezrukova	+1-212-558-1621	bezrukovam@sullcrom.com
Nelle P. Jennings	+1-212-558-7258	jenningsn@sullcrom.com
King Kai Chu	+1-212-558-3141	chuk@sullcrom.com
Ellis Levy	+1-212-558-4023	levye@sullcrom.com
Dexter D.J. Samida	+1-212-558-4262	samidad@sullcrom.com
