



INDEPENDENT REGULATORY REVIEW COMMISSION  
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February 19, 1998

Honorable Robert A. Judge, Sr., Secretary  
Department of Revenue  
11th Floor, Strawberry Square  
Harrisburg, PA 17128

Re: IRRC Regulation #15-353 (#1908)  
Department of Revenue  
Sales and Use Tax; Books, Publications and Advertising Materials

Dear Secretary Judge:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #15-353. These comments outline areas of concern raised by Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact John Jewett at 783-5475. He has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Nyce".

Robert E. Nyce  
Executive Director

REN:kcg

cc: Anita M. Doucette  
Douglas A. Berguson  
Office of General Counsel  
Office of Attorney General  
Pete Tartline

**COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION**  
**ON**  
**DEPARTMENT OF REVENUE REGULATION NO. 15-353**  
**SALES AND USE TAX; BOOKS, PUBLICATIONS AND ADVERTISING MATERIALS**  
**FEBRUARY 19, 1998**

We have reviewed this proposed regulation from the Department of Revenue (Revenue) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to legislative intent, fiscal impact, consistency with other statutes and regulations, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

**1. Section 31.29(a). Definitions - Reasonableness and Clarity**

Two commentators, Vanguard Group, Inc., and Stradley, Ronon, Stevens and Young, LLP, expressed concerns with the regulation's definition of "direct mail advertising literature or materials." First, they object to the use of the term "vendor" in the definition. There is a statutory definition of "vendor" which may unduly restrict application of the direct mail exemption. Representative Karl Boyes, Chairman of the House Finance Committee, also expressed similar concerns with the use of the term "vendor" in a letter dated February 17, 1998. We agree and recommend that the phrase "by a vendor" be deleted from the definition of "direct mail advertising literature or materials."

Second, there is a concern with limiting the direct mail exemption to items distributed by the United States Postal Service (USPS). In response to this concern, Revenue staff claim that the common definition of direct mail limits it to items distributed by the USPS. We can find no statutory language that limits the term direct mail to USPS distribution. In the today's delivery market place, there are a variety of delivery services for advertising materials that individuals may use in efforts to gain the attention of potential target groups including electronic systems such as facsimile and electronic mail. Hence, we request that Revenue provide a detailed explanation for limiting this exemption to literature or materials delivered by the USPS.

**2. Section 31.29(a). Definitions - Reasonableness and Clarity**

The regulation creates a new definition of "advertising literature or materials." It reads:

Tangible personal property which is primarily intended to promote business interest, create goodwill or engage the attention or interest of a prospective purchaser.

This language was formerly a part of the existing definition for "direct mail advertising literature or materials" exemption. The revised definition for "direct mail advertising literature or materials" reads as follows:

Advertising literature or materials purchased and distributed by a vendor to prospective purchasers by the United States Postal Service. Property distributed to the prospective purchaser by other than the United States Postal Service is not direct mail advertising literature or materials. Advertising literature or materials includes printed matter, brochures, matchbooks, calendars, price lists, video and audio tapes, computer disks, investment prospectuses, corporate annual reports, playing cards, pens and similar promotional materials. The term also includes envelopes and address labels used in sending the advertising literature or materials but does not include proxy materials, shopping guides nor magazines and inserts therein.

The Department has offered no explanation of why it believes a separate definition of "advertising literature or materials" is necessary. Additionally, it is not clear whether or not these changes are intended to alter existing taxable or nontaxable interpretations of these terms or are just intended to improve the readability of these terms. Hence, the need for and intent of these definitions are unclear. We recommend that Revenue clarify its intent and revise the definitions to improve their clarity.

There is another concern with the proposed regulation's amendments to the definition of "direct mail advertising literature or materials." New language specifies that the exemption applies to "advertising literature or materials purchased and *distributed* by a vendor *to prospective purchasers* by the United States Postal Service" (emphasis added). We have found nothing in the statute that limits this exemption to mail sent to prospective purchasers. In addition, Representative Boyes, Chairman of the House Finance Committee, noted that "neither the statute nor existing regulation contain such limitations" in a letter dated February 17, 1998.

According to Section 204(35) of the Tax Reform Code (TRC) (72 P.S. § 7204(35)), the exclusion applies to "the sale at retail or use of mail order catalogs and direct mail advertising literature or materials." The function of advertising is not limited to contact between sellers and prospective purchasers. The word "advertise" is defined as "to advise, announce, apprise, command, give notice of, inform, make known, publish" by *Black's Law Dictionary*. Examples include the following: A nonprofit entity such as a citizens' group sends out direct mail to inform voters of a ballot measure related to local tax reform; or a professional association, such as the Pennsylvania Bar Association, uses direct mail to notify members of upcoming meeting. We request that Revenue explain its rationale for limiting this exemption to advertising literature or materials sent to prospective purchasers.

### **3. Section 31.29(a). Definitions - Fiscal impact, Consistency, Reasonableness and Clarity**

The House Finance Committee, Senator Melissa A. Hart, Chairman of the Senate Finance Committee, Senator James Gerlach and Rodale Press, Inc., object to the regulation's failure to include "address lists" or "mailing lists" in the direct mail exemption. The proposed regulation adds the term "address labels" to the definition of "direct mail advertising literature or materials." The commentators believe the exemption must be expanded to recognize new technologies.

Address labels are now rarely used in mass mailings. Retailers purchase or rent address lists on computer disk or tape, and the addresses are printed directly on the envelope or outside panel of advertising materials. As written, the proposed regulation provides an exemption when address lists are purchased as labels. However, there is no exemption for purchasing or renting mailing address lists on disk or tape. An address is an essential part of direct mail. The commentators believe that purchasing or renting mailing address lists should be exempt.

We agree with the commentators' position for two reasons. First, direct mail could not be delivered without addresses. Addresses, whether they be on labels or stored on a disk, are an essential part of "direct mail." Hence, they should be included under the statutory exemption for "direct mail advertising literature or materials." As Senators Hart and Gerlach wrote in their letter dated February 6, 1998:

The regulation, however, specifically exempts envelopes and address labels. If the regulation is intended to include these types of direct mail promotions, the definition should be extended to include mailing address lists. With increasing reliance on computer databases and electronic media for mailing promotions, these lists largely have replaced "address labels."

Inclusion of this terminology will preserve the intent of the regulation while addressing the growth of the electronic media as a resource for information transmission. Exclusion of this language will create a financial disincentive for utilizing this significant and rapidly-growing technology.

The House Finance Committee took the same position. It added "it would be appropriate to take into consideration the methods by which current and future technology will handle the function of putting a name and address on a piece of direct mail" in its letter dated February 5, 1998. For these reasons, we recommend that Revenue add the term "address mailing lists" to the regulation's definition of "direct mail advertising literature or materials."

Second, the General Assembly repealed the tax on computer services in 1997 including "computer processing, data preparation or processing services" and "information retrieval services" at Section 201(ff) and 201(gg) of the Tax Reform Code (72 P.S. §§ 7201(ff) and (gg)). The addresses for direct mail on disk or tape come from computer databases. The retrieval of this information is a computer service. We request that Revenue explain why mailing address lists on disk or tape are not exempt from taxation as a computer service.

#### **4. Section 31.29(a). Definitions - Reasonableness and Clarity**

Stradley, Ronon, Stevens and Young, LLP, suggested that terms such as "application forms and return envelopes" be added to the definition of "direct mail advertising literature or materials." These items are often an integral part of direct mail advertising materials. Second, the commentator suggested that the word "corporate" in this definition and the definition of "publications" was unduly restrictive and should be amended or deleted. The word "corporate" appears in front of the term "annual reports." Since corporations are not the only entities that publish annual reports, we agree. We recommend that Revenue respond to both suggestions with the appropriate amendments to the final-form regulation.

## **5. Subsections 31.29(b)(1) and (2). Scope - Clarity**

Subsection 31.29(b)(1) states that publications are generally subject to tax when delivered to a location within Pennsylvania except as provided elsewhere in the regulation. Subsection 31.29(b)(2) lists the items which are exempt from tax. Certain items in the list of exemptions include examples of items that are exempt as well as examples of items that are subject to tax. In this format, a reader must look into the provisions on exemptions to ascertain what items are subject to tax. We suggest that examples of items that are subject to tax be moved to Subsection 31.29(b)(1). This is where a typical reader would look for information about the type of publications that are subject to tax.

## **6. Subsection 31.29(b)(2)(iv). Scope - Clarity and Consistency**

For consistency with the definition of "direct mail advertising literature or materials," we suggest that Revenue replace the word "pamphlet" used in the examples in Subsections 31.29(b)(2)(iv)(B) and (C) with the term "brochure" if the terms are intended to be interchangeable. Alternatively, the term "pamphlet" could be added to the list of items in the regulation's definition of "direct mail advertising literature or materials." If the terms "pamphlet" and "brochure" are not interchangeable, then a definition of the term "pamphlet" is necessary.

## **7. Subsection 31.29(b)(2)(vi). Scope - Clarity**

The proposed regulation's examples of when "newspapers" are taxable or non-taxable appear to be incomplete or inappropriate. First, they do not include examples involving newspapers. Second, they do not clearly indicate what is exempt or subject to tax. For these reasons, we recommend that both examples at Subsections 31.29(b)(2)(vi)(A) and (B) be deleted.

## **8. Section 31.29(a). Definitions - Reasonableness and Clarity**

Rapid changes in technologies allow direct mail advertising to be delivered or transmitted to different audiences through a wide variety of systems. These systems allow a sender of information to target specific groups in the general public to receive certain messages or data designed for a particular group. These delivery systems have already progressed beyond the USPS carrying printed matter, video tapes or computer disks, to electronic mail (e-mail) advertising transmitted across computer networks. Above in **Issue #1**, we asked Revenue to provide a detailed explanation for limiting the "direct mail advertising literature or materials" exemption to literature or materials delivered by the USPS. In addition, we request that Revenue explain whether and when e-mail advertising is taxable or nontaxable, and the statutory basis for its taxation or its exemption if it is not taxed. If there are circumstances when e-mail advertising is subject to tax and other circumstances when it is not taxed, please provide examples of both situations.

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## INDEPENDENT REGULATORY REVIEW COMMISSION

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From: Kristine M. Shomper, Executive Assistant  
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Commission  
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Date: February 19, 1998  
# of Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Revenue Department's regulation #18-353. Upon receipt, please sign below and return to me immediately at our fax number 783-2884. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Anita M. Doucette Date: 19 February 1998