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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE



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December 17, 1999

Mr. John Jewett
Regulatory Analyst
Independent Regulatory
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Dear Mr. Jewett:

Enclosed please find the Department of Revenue's draft final form regulation relating to books, publications and advertising materials.

We would appreciate it if you could convey your comments to this office by December 31, 1999. Comments received by this date will be considered in the drafting of the final form regulation.

Thank you for your anticipated input and assistance in promulgating this regulation.

Sincerely,

A handwritten signature in cursive script, reading "Douglas A. Berguson".

Douglas A. Berguson
Senior Assistant Counsel

Enclosure

DAB:AMD:tlch

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PA Department of Revenue

(Agency)

Document/Fiscal Note No. _____

Date of Adoption: _____

By: _____

Robert A. Judge, Sr.
Secretary of Revenue

Title: _____
(Executive Officer, Chairman or Secretary)

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By: _____

Date of Approval

(Deputy General Counsel)
(Chief Counsel, Independent Agency)
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within 30 days after submission

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF REVENUE

61 Pa. Code §§ 31.3, 31.29, 48.2 and 48.3

Sales and Use Tax

Books, Publications and Advertising Materials

PREAMBLE

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The Department of Revenue (Department), under authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P.S. § 7270), by this order amends 61 Pa. Code, Chapter 31. Imposition, by amending sections 31.3 and 31.29 (relating to exclusions; and books, publications and advertising materials) and by deleting sections 48.2 and 48.3 (relating to religious articles and sacramental wines) as set forth in Annex A.

Purpose of Regulation

The Department is amending § 31.29 to bring it into conformity with recent statutory changes and to reflect the Department's current policy.

Sections 31.3, 48.2 and 48.3 are amended or deleted in accordance with the Pennsylvania Supreme Court decision in *Haller v. Department of Revenue*, 556 Pa. 289, 728 A.2d 351 (1999), cert. denied, 120 S. Ct. 325 (1999). In *Haller*, the Court found the exclusion set forth in section 204(28) of the TRC (72 P.S. § 7204(28)) in violation of both the United States and Pennsylvania Constitutions. Section 204(28) provides a sales tax exclusion for the sale at retail or use of religious publications sold by religious groups and Bibles and religious articles.

Explanation of Regulatory Requirements

In accordance with *Haller*, § 31.3 (relating to exclusions) is amended to delete paragraph (22) relating to religious publications sold by religious groups. The remaining paragraphs in the section are re-numbered accordingly.

The Department amended subsection (a) by adding definitions of "advertising insert" and "newspaper" consistent with the statutory changes made in section 204(30) of the TRC (72 P.S. § 7204(30)). The definition of "direct mail advertising literature or materials" is amended to clarify the Department's interpretation of what constitutes direct mail advertising literature or materials as well as to incorporate the Act 45 of 1998 statutory change to section 204(30).

Consistent with section 204(50) of the TRC (72 P.S. § 7204(50)), the Department is adding a definition of "magazine." The Department is also adding the definitions of "advertising literature or material," "circulated among the general public," "mail order catalogue" and "subscription" to fill a void that existed in the regulation regarding these areas. Definitions for "publication," "religious publication" and "shopping guide" are

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also added to subsection (a) because of questions the Department received in these areas.

Subsection (b)(1) provides the scope of the regulation. Subsection (b)(2) provides a listing of items exempt from tax when sold at retail.

In response to *Haller*, sections 48.2 and 48.3 are deleted.

Affected Parties

A taxpayer making a sale at retail or use of publications, advertising inserts and advertising literature or materials may be affected by this regulation. In addition, sales of religious publications, bibles and religious articles will be affected by the *Haller* decision.

Comment and Response Summary

Notice of proposed rulemaking was published at 27 Pa.B. 6572 (December 20, 1997). This proposal is being adopted with changes as set forth in Annex A.

The Department received three comments from the public during the public comment period. The Department also received comments from the Independent Regulatory Review Commission (IRRC) and the Senate Finance Committee. No comments were received from the House Finance Committee.

Amendments to the proposed rulemaking in response to comments are as follows:

(1) IRRC and two of the public comments questioned the Department's use of the term "vendor" in the definition of "direct mail advertising literature or materials," noting that the term would unduly restrict the application of the direct mail exclusion. The Department agrees with the concern raised and deleted the reference to "vendor" in the definition.

(2) In its comments, IRRC questioned why the Department created a separate definition for "advertising literature or materials" since the proposed definition is language that was formerly a part of the definition of "direct mail advertising literature or materials." IRRC suggests that the Department clarify its intent and revise the definitions to improve their clarity.

Prior to this proposal, the definition of "direct mail advertising literature or materials" attempted to address what was considered advertising literature or materials and when such items

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were exempt. The Department felt this definition was confusing and did not provide the public with an adequate definition of what constitutes "advertising literature or materials." The Department acknowledges the need for clarity and has therefore made significant organizational changes to both definitions. In response to IRRC and one of the public comments, the Department specifically references reply envelopes and application forms as items included in the definition of "advertising literature or materials."

(3) IRRC and the two public comments also raised the concern that the limitation of the phrase "to prospective purchasers" within the definition of "direct mail advertising literature or materials" was beyond the scope of the enabling statute. The Department acknowledges the concern and deleted "to prospective purchasers" and added "distributed directly to intended recipients."

(4) IRRC and a public comment suggested that the use of "corporate" when referring to annual reports in the definition of "advertising literature or materials" and "publication" was unduly restrictive and did not allow for non-corporate entities that publish annual reports. The Department agrees with the concern raised and amended both definitions to reference "financial and corporate annual reports."

(5) In addition to the revision to "publication" referenced above, the Department amended the listing for prospectuses by deleting the term "stock" and adding the term "investment" in response to a public comment.

(6) In response to the statutory changes made by Act 45-1998 relating to the one-time license to use a list of names and mailing addresses for each delivery of direct mail advertising literature or materials, the Department added a new subparagraph (vii) to subsection (b)(2). The language set forth in Act 45 responded to comments from the Senate, IRRC and the public regarding the use of mailing lists in direct mail advertising.

(7) Section 31.29(b)(1) relates to scope and provides the general rule regarding taxation of publications, advertising inserts and advertising literature or materials. In the proposal, paragraph (2) provided a listing of items and examples that are exempt from tax. In its comments, IRRC suggests that the examples in paragraph (2) need to be clarified and restructured in a more logical order. After reviewing the examples at issue, the Department concluded they were not necessary and deleted them from the regulation.

Revisions initiated during the Department's internal review of the regulation are as follows:

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(1) The proposed definitions of "magazine" and "textbook" are amended to more closely track the statutory definitions provided in section 204(50) and 204(33) of the TRC (72 P.S. § 7204(50) and (33)).

(2) Consistent with Act 45-1998, the definition of "mail order catalogue" is amended to require distribution through the United States Postal Service.

(3) Stylistic changes were made throughout the regulation for clarity.

Revisions initiated in response to *Haller* are as follows:

(1) Section 31.3 (relating to exclusions) is amended to delete paragraph (22) relating to religious publications sold by religious groups. The remaining paragraphs in the section are re-numbered accordingly.

(2) The definition of "religious organization" was deemed unnecessary and is deleted from § 31.29(a). Subsection (b)(1) relating to scope is amended by adding "bibles, religious publications, including religious publications sold by religious organizations" to the items subject to tax when delivered to a location within this Commonwealth. All references to bibles and religious publications are deleted from subsection (b)(2) relating to examples of items exempt from tax. The remaining examples in paragraph (2) are re-numbered accordingly.

(3) Sections 48.2 and 48.3 are deleted.

Comment that did not result in an amendment to the regulation is as follows:

IRRC and two of the public comments questioned limiting the direct mail exclusion to items distributed by the United States Postal Service. Although the Department understands the argument that today's delivery market place provides an array of delivery services, Act 45-1998 specifically references "through the United States Postal Service;" therefore, the Department is unable expand the scope of the exclusion to include other types of delivery services.

In its comments, IRRC asked the Department to 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, IRRC also requested examples of both situations. E-mail advertising is

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an example of an enhanced telecommunication service and is not taxable as a telecommunication service. The Department has created the term "enhanced telecommunication service" to provide guidance to taxpayers who might be confused about the application of tax to services that involve telecommunication services yet, due to rapid changes in technology, are not what the Department has historically considered to be taxable telecommunications services, see Department's statement of policy, § 60.20 (relating to telecommunications service).

Fiscal Impact

The Department determined that the amendments will result in a minimal loss of revenue for the Commonwealth.

Paperwork

The amendments will not generate significant additional paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

The amendments will become effective upon final publication in the Pennsylvania Bulletin. The regulation is scheduled for review within five years of final publication. No sunset date has been assigned.

Contact Person

The contact person for an explanation of the amendments is Anita M. Doucette, Office of Chief Counsel, PA Department of Revenue, Dept. 281061, Harrisburg, Pennsylvania 17128-1061.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on December 9, 1997, the Department submitted a copy of the notice of proposed rulemaking, published at 27 Pa.B. 6572, to IRRC and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment. In compliance with section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing these final-form regulations, the Department considered the comments received from IRRC, the Committees and the public.

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These final-form regulations were (deemed) approved by the Committees on _____ and were (deemed) approved by IRRC on _____, in accordance with section 5.1(e) of the Regulatory Review Act (71 P.S. § 745a(e)).

Findings

The Department finds that:

(1) Public notice of intention to amend the regulations has been duly given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendments are necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code, are amended by amending sections 31.3 and 31.29 to read as set forth in Annex A and deleting sections 48.2 and 48.3.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the Pennsylvania Bulletin.

ROBERT A. JUDGE, SR.
SECRETARY OF REVENUE

12/17/99

CONTINUATION SHEET
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ANNEX A

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Title 61. Revenue, Part I. Department of Revenue, Subpart B.
General Fund Revenues, Article II. Sales and Use Tax, Chapter
31. Imposition.

§ 31.3. Exclusions.

The tax does not apply to the following:

* * *

(22) ~~Religious publications sold by religious groups.~~

~~Sales or use of bibles and religious articles are exempt.~~

~~(23) * * * *~~

~~(24) (23) * * * *~~

~~(25) (24) * * * *~~

~~(26) (25) * * * *~~

~~(27) (26) * * * *~~

~~(28) (27) * * * *~~

~~(29) (28) * * * *~~

~~(30) (29) * * * *~~

~~(31) (30) * * * *~~

§ 31.29. Books, [printed matter] publications and advertising materials.

(a) Definitions. The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

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Advertising insert - Printed advertising material ~~which~~ THAT is circulated as a component of a newspaper or magazine WITH ANOTHER PUBLICATION.

Advertising literature or materials - Tangible personal property ~~which~~ THAT is primarily intended to promote business interest, create goodwill or engage the attention or interest of a prospective purchaser RECIPIENT. THE TERM INCLUDES PRINTED MATTER, BROCHURES, MATCHBOOKS, CALENDARS, PRICE LISTS, VIDEO AND AUDIO TAPES, COMPUTER DISKS, INVESTMENT PROSPECTUSES, FINANCIAL AND CORPORATE ANNUAL REPORTS, ELECTORAL LITERATURE OR MATERIALS, PLAYING CARDS, ENVELOPES, ADDRESS LABELS, REPLY ENVELOPES, APPLICATION FORMS, PENS AND SIMILAR PROMOTIONAL MATERIALS. THE TERM DOES NOT INCLUDE PROXY MATERIALS.

Circulated among the general public - The A publication THAT is MADE available for purchase from a retail outlet, such as a newsstand or BOOKSTORE, OR MAY BE PURCHASED by subscription. In the case of an organizational publication, the organization shall provide evidence of REGULAR sales to purchasers other than members of the organization.

Direct mail advertising literature or materials - [Tangible personal property which is distributed through the mail and is intended to promote business interest, create good will or engage the attention or interest of the prospective purchaser. The property] Advertising literature or materials ~~purchased and~~ THAT ARE distributed by a vendor to prospective purchasers by DIRECTLY

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TO INTENDED RECIPIENTS THROUGH the United States Postal Service.
The term does not include property distributed to the prospective
purchase by ADVERTISING LITERATURE OR MATERIALS THAT ARE
DISTRIBUTED IN ANY MANNER other than BY the United States Postal
Service. 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.

Magazine - A publication which THAT is both of the
following:

(i) Published PUBLISHED at regular intervals not exceeding
3 months.,

(ii) Circulated THAT IS CIRCULATED among the general
public, and either of the following:

(A) Contains AND CONTAINS matters of general interest
and reports of current events THAT ARE published for the purpose
of disseminating information of a public character.

(B) Is OR IS devoted to literature, the sciences, art
or some special industry. THE TERM SHALL NOT INCLUDE LOOSE LEAF
INFORMATION SERVICES.

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Mail order catalogue - A publication that contains a printed enumeration LISTING of items with descriptive details and includes a mail order form. A mail order catalogue need not be AND IS distributed through the United States Postal Service.

Newspaper - A "legal newspaper" or a publication containing matters of general interest and reports of current events that qualifies as a "newspaper of general circulation" authorized to carry a "legal advertisement" as those terms are defined in 45 Pa.C.S. § 101 (relating to legal notices). The term does not include magazines.

Publication - Information transferred by means of ~~paper and ink or electronic~~ TANGIBLE media. Examples include printed ~~matter~~; MATERIAL, SUCH AS books; FINANCIAL AND corporate annual reports; ~~stock~~ INVESTMENT prospectuses; proxy materials; shopping guides; magazines; tabloid newspapers; AND printed material which THAT may supplement, explain, amend, revise or otherwise alter, expand or render current a loose leaf information service, or a book or bound volumes of books previously issued, including a supplement or pocket part, whether the additional material is periodically distributed or purchased independently of the basic book to which it is applicable. THE TERM ALSO INCLUDES video and audio tapes, computer disks and similar items, including advertising inserts incorporated into the publication.

Religious organization - An organization defined under § 32.1 (relating to definitions), which is registered with and

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holds [an] ~~a current and valid exemption number issued by the Department under § 32.21 (relating to charitable, volunteer firemen's and religious organizations, and nonprofit educational institutions).~~

Religious publication - Religious commentaries and other publications primarily devoted to religious instruction, promotion or information.

Shopping guide - A publication primarily devoted to consumer awareness, promotion or information and which THAT is GENERALLY provided to a consumer free of charge.

Subscription - The ADVANCE purchase in advance of a series of issues of a magazine delivered by the publisher to an address designated by the purchaser. The term also includes a series of magazines provided by an organization to its members in consideration of the payment of membership dues, if PROVIDED the magazine is also sold on BY subscription or by individual copy to the public. The term does not include a purchase of an issue or series of issues of a magazine from a retail outlet A PERSON OTHER THAN THE PUBLISHER.

Textbook - A publication [which is required] used in conjunction with educational curriculum by an educational institution[, recognized] approved by the Department of Education[, for use by its students in conjunction with its educational curriculum and which is exempt under § 58.9 (relating to school textbook exemption)]- A NEW OR USED BOOK THAT IS

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REQUIRED OR APPROVED FOR USE IN CONJUNCTION WITH AN EDUCATIONAL CURRICULUM PROVIDED BY AN INSTITUTION OF LEARNING RECOGNIZED BY THE DEPARTMENT OF EDUCATION.

(b) Scope.

(1) [The] Except as otherwise provided in this subsection, the sale at retail or use of [all books, printed matter] publications, advertising inserts, BIBLES, RELIGIOUS PUBLICATIONS, INCLUDING RELIGIOUS PUBLICATIONS SOLD BY RELIGIOUS ORGANIZATIONS and advertising literature or materials[,] is subject to tax when delivered to a location within this Commonwealth.

(2) The sale at retail or use of the following items is exempt from tax:

[(1) Bibles] ~~(i) Bibles, or similar texts, whether printed or transferred in any format, provided the product is a verbatim transcription of the text.~~

[(2) Religious publications. Religious commentaries and other religious publications primarily devoted to religious instruction, promotion or information are exempt from tax when sold by a religious organization.] ~~(ii) Religious publications sold by a religious organization. The mere approval or sanction of publications by a religious organization does not [render the sale of] qualify the publications as religious publications exempt from tax[, if they are otherwise taxable.~~
The payment of a royalty or license fee by a seller to a

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religious organization does not constitute the seller an agent of the religious organization.]. ~~To constitute an exempt sale, the religious organization shall sell the religious publication and receive payment of the full purchase price [for the publications, less a reasonable commission to its agents, if any].-~~

[(3) Mail order catalogues and direct mail advertising literature or materials. See § 32.36 (relating to printing and related businesses)] ~~(iii)~~ (I) Mail order catalogues. ~~Examples are as follows:-~~

~~(A) Mail order catalogues purchased by vendors for distribution at retail locations are exempt from tax.~~

~~(B) Catalogues that do not contain a mail order form are subject to tax regardless of the method of distribution or the identity of the purchaser.~~

~~(C) Product sample books are subject to tax.~~

~~(iv)~~ (II) Direct mail advertising literature or materials. See § 32.36 (relating to printing and related businesses). ~~Examples are as follows:-~~

~~(A) The purchase of advertising materials by a manufacturer for distribution by the United States Postal Service to a retailer for hand out by a retailer is subject to tax.~~

~~(B) The purchase of pamphlets by a retailer when the pamphlets are distributed by the United States Postal~~

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~~Service by the retailer to prospective purchasers is exempt from tax.~~

~~(C) The purchase of pamphlets by a retailer for hand out to prospective purchasers is subject to tax even though the pamphlets may be distributed to the retailer by the United States Postal Service.~~

~~[(4)] (v) (III) Textbooks.~~

~~(vi) (IV) Newspapers. Examples are as follows:~~

~~(A) Race track "R" sells a racing program.~~

~~A purchaser may only obtain the racing program through admission to the race track. The racing program is not circulated among the general public.~~

~~(B) "O" organization publishes a magazine which is provided to each of its members. The magazine is also available for sale to nonmembers. "O" is able to demonstrate that it has made sales to the public. The magazine is circulated among the general public.~~

~~(vii) (V) Magazines sold by subscription. This exemption applies to subscriptions purchased on or after July 1, 1994. Examples are as follows:~~

~~"O" organization sells a magazine to its members on subscription. "O" also sells the magazine on subscription and individual copies to the public. The sale of the magazine on subscription to its members and the public is exempt from tax.~~

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~~The sales of individual copies of the magazine by "O" are subject to tax.~~

~~(viii)~~ (VI) Advertising inserts THAT BECOME A PART OF A NEWSPAPER OR MAGAZINE. Examples are as follows:

~~(A) Advertising inserts placed into magazines sold by subscription or newspapers are exempt from tax.~~

~~(B) Inserts circulated with publications such as magazines not sold by subscription or shopping guides are subject to tax.~~

(VII) ONE TIME LICENSE FEES PAID FOR THE USE OF A LISTING OF NAMES AND MAILING ADDRESSES FOR EACH DELIVERY OF DIRECT MAIL ADVERTISING LITERATURE OR MATERIALS.

Chapter 48. Exempt Organizations.

§ 48.2. RESERVED.

§ 48.3. RESERVED.

12/17/99