

Pennsylvania Department of Revenue
Issued: April 13, 2004

Corporation Tax Bulletin 2004-01

Application of P.L. 86-272 and de minimis standards.

I. Application of P.L. 86-272 to the Corporate Net Income Tax and Pennsylvania activities.

A. Solicitation to sell tangible personal property. Only the solicitation to sell tangible personal property is afforded immunity from the corporate net income tax under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trade marks, service marks and the like, or any other type of property are not protected activities under P.L. 86-272.

The sale or delivery and the solicitation for the sale or delivery of any type of service that is not either (1) ancillary to solicitation; or (2) otherwise set forth as a protected activity under subsection I.D hereof is also not protected under Public Law 86-272 or this Bulletin.

B. Solicitation of orders and activities ancillary to solicitation.

For the in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to solicitation (except for de minimis activities described in Part II and those activities conducted by independent contractors described in subsection I.E). Solicitation means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.

Ancillary activities are those activities that serve no independent business function for the seller apart from their connection to the solicitation of orders. Activities that a seller would engage in apart from soliciting orders shall not be considered as ancillary to the solicitation of orders. The mere assignment of activities to sales personnel does not, merely by such assignment, make such activities ancillary to solicitation of orders. Additionally, activities that seek to promote sales are not ancillary, because P.L. 86-272 does not protect activity that facilitates sales; it only protects ancillary activities that facilitate the request for an order. The conducting of activities not falling within the foregoing definition of solicitation will cause the company to lose its protection from the corporate net income tax afforded by P.L. 86-272, unless the disqualifying activities, taken together, are either de minimis or are otherwise permitted under this Bulletin.

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C. Activities that go beyond the protection of P.L. 86-272. The following in-state activities (assuming they are not of a de minimis level; see Section II.A of this Bulletin) are not considered as either solicitation of orders or ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under the Public Law:

1. Making repairs or providing maintenance or service to the property sold or to be sold.
2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
3. Installation or supervision of installation at or after shipment or delivery.
4. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
5. Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders.
6. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
7. Approving or accepting orders.
8. Repossessing property.
9. Securing deposits on sales.
10. Picking up or replacing damaged or returned property.
11. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
12. Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel.

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13. Maintaining a sample or display room in excess of two weeks (14 calendar days) at any one location within the state during the tax year.
14. Carrying samples from which sales, exchanges or distributions are made in any manner for consideration or other value.
15. Owning, leasing, using or maintaining any of the following facilities or property in-state:
 - a. Repair shop.
 - b. Parts department.
 - c. Any kind of office other than an in-home office located within the residence of the employee or representative that (i) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity, and (ii) so long as the use of such office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the company; or for such other activities that are protected under Public Law 86-272.
 - d. Warehouse.
 - e. Meeting place for directors, officers, or employees.
 - f. Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
 - g. Telephone answering service that is publicly attributed to the company or to employees or agent(s) of the company in their representative status.
 - h. Mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles.
 - i. Real property or fixtures to real property of any kind.
16. Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.

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17. Maintaining, by any employee or other representative, an office or place of business of any kind (other than an in-home office located within the residence of the employee or representative, that (i) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity, and (ii) so long as the use of such office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the company; or for such other activities that are protected under Public Law 86-272 or under subsection I.D of this Bulletin.)

A telephone listing or other public listing within the state for the company or for an employee or representative of the company in such capacity, or other indications through advertising or business literature that the company or its employee or representative can be contacted at a specific address within the state, shall normally be determined as the company maintaining within this state an office or place of business attributable to the company or to its employee or representative in a representative capacity. However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the company shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the company or its employee or representative.

The maintenance of any office or other place of business in this state that does not strictly qualify as an "in-home" office as described above shall, by itself, cause the loss of protection under this Bulletin.

For the purpose of this subsection it is not relevant whether the company pays directly, indirectly, or not at all for the cost of maintaining such in-home office.

18. Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state.

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19. Conducting any activity not listed in subsection D below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

D. Activities that are protected under P.L. 86-272:

The following in-state activities will not cause the loss of protection for otherwise protected sales:

1. Soliciting orders for sales by any type of advertising.
2. Soliciting of orders by an in-state resident employee or representative of the company, so long as such person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in subsection C.18 above.
3. Carrying samples and promotional materials only for display or distribution without charge or other consideration.
4. Furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration.
5. Providing automobiles to sales personnel for their use in conducting protected activities.
6. Passing orders, inquiries and complaints on to the home office.
7. Missionary sales activities; i.e., the solicitation of indirect customers for the company's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if such solicitation activities are otherwise immune.
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.
9. Checking of customers' inventories without a charge therefore (for re-order, but not for other purposes such as quality control).

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10. Maintaining a sample or display room for two weeks (14 calendar days) or less at any one location within the state during the tax year.
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.
12. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.
13. Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted under subsection 1.D shall not, by itself, remove the protection of P.L. 86-272.

E. Activities conducted by independent contractors.

1. Definition. An independent contractor means a commission agent, broker, or other independent contractor who is engaged in selling, or in soliciting orders for the sale of tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities.

2. Consignment sales. Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the company, except for purposes of display and solicitation, shall remove the protection.

3. Protection of principal. Independent contractors may engage in the following limited activities in the state without causing the principal's loss of immunity:

- (a) Soliciting sales.
- (b) Making sales.

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(c) Maintaining an office.

4. Sales representatives who represent a single principal. Sales representatives who represent a single principal are not considered to be independent contractors and activities conducted by them will subject their principal to tax to the same extent as if they were performed by the principal.

F. Application to corporation incorporated in Pennsylvania or to person resident or domiciled in Pennsylvania. The protection afforded by P.L. 86-272 and the provisions of this bulletin do not apply to any corporation incorporated within Pennsylvania or to any person who is a resident of or domiciled in Pennsylvania.

G. Registration or qualification to do business. A company that registers or otherwise formally qualifies to do business within Pennsylvania does not, by that fact alone, lose its protection under P.L. 86-272. Where, separate from or ancillary to such registration or qualification, the company receives and seeks to use or protect any additional benefit or protection from Pennsylvania through activity not otherwise protected under P.L. 86-272 or this bulletin, such protection shall be removed.

H. Loss of protection for conducting unprotected activity during part of tax year. The protection afforded under P.L. 86-272 and this bulletin shall be determined on a tax year by tax year basis. Therefore, if at any time during a tax year the company conducts activities that are not protected under P.L. 86-272 or this statement, no sales in Pennsylvania or income earned by the company attributed to Pennsylvania during any part of said tax year shall be protected from taxation under said Public Law or this statement.

II. De minimis activities for purposes of filing tax reports under the corporate net income tax and the franchise tax.

A. In general. De minimis activities are those that, when taken together, establish only a trivial connection with Pennsylvania. An activity conducted within Pennsylvania on a regular or systematic basis or pursuant to a company policy (whether such policy is in writing or not) shall normally not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with Pennsylvania is to be measured on both a qualitative and quantitative basis. If such activity either qualitatively or quantitatively creates a non-trivial connection with Pennsylvania, then such activity exceeds the protection of P.L. 86-272. Establishing that the disqualifying activities only account for a relatively small part of the business conducted within Pennsylvania is not determinative of whether a

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de minimis level of activity exists. The relative economic importance of the disqualifying in-state activities, as compared to the protected activities, does not determine whether the conduct of the disqualifying activities within Pennsylvania is inconsistent with the limited protection afforded by P.L. 86-272.

While the de minimis levels of activity provided below are sufficient to subject a person to tax, the Department will not require the filing of a tax return based solely upon such de minimis activities. However, the taxpayer may be required to document its eligibility for such consideration. This documentation may take the form of a business activities questionnaire, a check off on a tax return or a separate form for this purpose. For the purpose of determining whether a tax report must be filed de minimis activities include the following:

1. The following activities are de minimis if the total number of calendar days during which any of these activities are conducted in Pennsylvania during the taxable year is no more than 7 days and all such activities produce total Pennsylvania sales of \$10,000 or less during the taxable year. (In the event a taxable year is less than 12 months, the 12-month period ending with end of the short taxable year shall be considered.):

(a) Installation activities for which a separate charge is made.

(b) Repair, maintenance, and service activities.

(c) Technical assistance or service activities, including but not limited to, engineering assistance or design service.

(d) The conduct of training courses, seminars or lectures by the vendor which is incidental to the use of personal property sold by him to persons in this Commonwealth if free or for a nominal charge as compared to actual expenses and if, viewed as a whole, the training is a trivial part of the sale.

(e) Attendance at an organized "show" or "flea market" for the purpose of exhibiting goods and making sales of the exhibited goods.

2. Installation for which no separate charge is made. Installation activities, including supervision of installation, that are customarily performed by the seller of personal property and for which there is no separate charge will generally be de minimis. Installation activities, which customarily would be arranged separately from the purchase of personal property and for which a charge is made, will not be de minimis except as provided in 1 above. For example, connecting a clothes dryer to existing venting and electrical outlets is a

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de minimis activity. Installation of electrical outlets or vents into the structure is not de minimis.

3. Purchasing activities. The presence of employees in Pennsylvania solely for the purpose of purchasing goods from in-state vendors.

4. Incidental travel in Pennsylvania. Travel into Pennsylvania that is incidental to a person's principal business is de minimis if it is done on an occasional basis. For example, a New Jersey contractor travels into Pennsylvania for the purpose of purchasing supplies which it uses in its contracting business in New Jersey. The travel in this Commonwealth is de minimis. Note: Trucking companies are subject to the de minimis standards set forth in subsection II.B.

5. Solicitation (Franchise Tax). Solicitation - franchise tax only. For purposes of the franchise tax, solicitation activities in Pennsylvania for 7 calendar days or less per year and which produce annual sales in Pennsylvania of \$10,000 or less are de minimis.

6. Personal property incidentally present in Pennsylvania. The physical presence in Pennsylvania of an out-of-state entity's equipment, tooling, inventory and employees on a temporary basis for the purpose of having work or services performed by an in-state provider is de minimis provided that the activity engaged in is not the pursuit of a market in Pennsylvania, the equipment is not used or held by an affiliated, in-state entity, and the employees have no control over work done in Pennsylvania by the in-state entity.

7. Commercial printers. Section 3003.10 of the Tax Reform Code, 72 P.S. § 10003.10, excludes from taxation taxpayers whose activities in Pennsylvania are limited to:

(1) Owning or leasing of tangible or intangible property by a person who has contracted with an unaffiliated commercial printer for printing, provided that:

(i) the property is for use by the commercial printer; and
(ii) the property is located at the Pennsylvania premises of the commercial printer.

(2) Visits by a person's employees or agents to the premises in Pennsylvania of an unaffiliated commercial printer with whom the person has contracted for printing in connection with said contract.

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(3) Owning of printed matter and other items packaged therewith by a person who has contracted with an unaffiliated commercial printer for printing on the premises of such unaffiliated commercial printer prior to delivery of the property regardless of to whom or by whom the printed matter is delivered or mailed.

8. Questions and answers.

(a) Question: Company exhibits at a Pennsylvania trade show for eight days in a taxable year. It makes no sales at the trade show. It has no other Pennsylvania contacts during the taxable year. However, it has \$9,000 of Pennsylvania sales during the taxable year. Must the company file a Pennsylvania franchise tax report?

Answer: Yes. It has exceeded the seven-day limitation.

(b) Question: Company exhibits at a Pennsylvania trade show for five days during the taxable year but makes no sales at the show. It has \$15,000 of Pennsylvania sales during the same taxable year. Is a franchise tax report due?

Answer: Yes. It has exceeded the \$10,000 limit.

(c) Question: Company exhibits at a Pennsylvania trade show for three days during a taxable year, but makes no sales at the trade show. Company also solicits sales in Pennsylvania for five days during the same taxable year and has \$8,000 of Pennsylvania taxable sales for the taxable year. Is a franchise tax report due?

Answer: Yes. Exhibiting at a trade show is solicitation; therefore, the trade show days must be included in determining the total number of days upon which solicitation activities occurred. As solicitation activities occur on eight days during the taxable year, the seven-day limitation is exceeded and the company must file a franchise tax report.

(d) Question: Company exhibits and sells for three days at a Pennsylvania trade show during a taxable year. Trade show sales are \$4,000. Company also solicits sales in Pennsylvania for three days during the same taxable year producing additional sales of \$7,000. Total Pennsylvania sales for the taxable year are \$11,000 including the trade show sales. Is a franchise tax report due?

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Answer: Yes. The trade show days are counted as solicitation days; therefore, there are six solicitation days, which does not exceed the seven-day limit. The trade shows sales and other sales must be added together to determine the total Pennsylvania sales for the taxable year; therefore, the total sales for the taxable year are \$11,000, which exceeds the \$10,000 limit. Exceeding either limit alone requires the filing of a franchise tax report. Here the company has exceeded the \$10,000 limitation.

(e) Question: If a Company exhibits at a Pennsylvania trade show and does not exceed any of these de minimis standards, then must it still file a franchise tax report?

Answer: No. However, based on information received by the Department of Revenue, an entity may be requested to complete a Business Activities Questionnaire (BAQ) to assist in the determination of appropriate tax report filing requirements.

(f) Question: Do these de minimis filing standards apply to my company's sales and use tax filing requirements?

Answer: No. The standards outlined in this bulletin apply **only** to corporate net income tax and foreign franchise tax. The company must refer to the applicable statutes and regulations to determine its separate sales and use tax responsibilities.

(g) Question: A company exceeded the de minimis standard last year, but is below the standard this year. Must a return be filed this year?

Answer: Yes. Companies are required to file a return for years they fall below the de minimis standard to document the basis of their claim. However, the Department of Revenue is reviewing whether this requirement can be satisfied by the filing of an affidavit or some alternative documentation.

B. Truck and bus company de minimis activities for purposes of filing tax reports under the corporate net income tax and foreign franchise tax.

1. Eligible truck and bus companies. This bulletin applies only to truck and bus companies that meet all of the following criteria:

(a) The truck or bus company is a "corporation" as defined in TRC 401(1) or a "foreign entity" as defined in TRC 601(a) that is or would be taxed as a truck or bus company under TRC 401(3)2.(b) and which is principally engaged directly

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in the movement of tangible personal property or persons by motor vehicle or charter bus operations; and

(b) The truck or bus company engages solely in interstate commerce in Pennsylvania and does not own or rent any real or personal property in Pennsylvania except for motor vehicles and trailers used in such commerce.

2. De Minimis activities for truck and bus companies. A truck or bus company shall be required to file a corporate net income tax or foreign franchise tax report if its activities during the taxable year exceed either of the following standards (In the event a taxable year is less than 12 months, the 12-month period ending with the end of the short taxable year shall be considered.):

(a) The company travels more than 50,000 loaded miles in Pennsylvania and makes at least 1 trip with pick-ups or deliveries in Pennsylvania; or

(b) The company has a Pennsylvania apportionment fraction of more than 5 percent and has more than 12 trips with pick-ups or deliveries in Pennsylvania.

For bus companies, a trip with pick-ups or deliveries means a trip involving stops in Pennsylvania for the purpose of picking up or discharging passengers or freight or stops related to charter service, touring, sightseeing, excursions and any similar activities.

For truck and bus companies, all pick-ups and deliveries or stops made during the same trip into Pennsylvania shall count as one trip. A trip may not extend beyond one 24-hour time period and any travel continuing beyond that period of time shall be considered another trip.

3. Questions and answers.

(a) Question: A truck or bus makes two deliveries and one pick-up on the same trip. For purposes of the 12 trip limitation is this counted as one trip?

Answer: Yes. Note: The pick-up of property or a passenger at one location in Pennsylvania and delivery of the same property or passenger to another location in Pennsylvania during the same trip constitutes intrastate commerce not permitted under clause B.1.(b) of this subsection and means the truck or bus company does not come within the de minimis standard.

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(b) Question: If the company's activities exceed the de minimis standard will it be entitled to exclude the first 50,000 loaded miles and or 12 pick-ups and deliveries from its taxable activity?

Answer: No. Exceeding the de minimis standard causes all Pennsylvania activity to become reportable.

(c) Question: Are truck or bus companies subject to the capital stock tax eligible for relief under this de minimis standard?

Answer: No. The de minimis standard applies only to truck and bus companies subject to the franchise tax and not to truck and bus companies subject to the capital stock tax.

(d) Question: Are all truck or bus companies subject to the corporate net income tax eligible for relief under this de minimis standard?

Answer: Yes.

(e) Question: A company exceeded the de minimis standard last year, but is below the standard this year. Must a return be filed this year?

Answer: Yes. Truck or bus companies are required to document the basis of their claim that they fall below the de minimis standard. However, the Department of Revenue is reviewing the form that documentation will take.

(f) Question: A truck or bus company merely passes through Pennsylvania without making a pick-up or delivery. Is this considered a trip for purposes of the 12-trip limitation?

Answer: No. Trips merely through Pennsylvania without a pick-up or delivery are not counted for purposes of the 12-trip limit.

(g) Question: A truck or bus company merely passes through Pennsylvania without making a pick-up or delivery. Are the loaded miles on such a trip counted toward the 50,000 mile limitation?

Answer: Yes.

(h) Question: A truck or bus company merely passes through Pennsylvania without making a pick-up or delivery; however, it's loaded miles in Pennsylvania exceed 50,000 miles. Is it subject to tax?

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Answer: No. Regardless of the loaded mileage in Pennsylvania, current taxing policy does not subject to tax truck and bus companies that merely pass through Pennsylvania.

(i) Question: A truck or bus company travels less than 50,000 loaded miles in the taxable year but has 15 trips with either pick-ups, deliveries or stops and an apportionment fraction of 6%. Is it required to file tax reports?

Answer: Yes. Exceeding either of the standards listed in 2.(a) or 2.(b) results in the activity being more than de minimis. As the company has exceeded the standard in 2(b) for pickups, deliveries or stops and apportionment fraction, its activity is not de minimis and corporate net income and foreign franchise tax reports must be filed. If the apportionment fraction were 5% or less or if the number of pick-ups, deliveries or stops was 12 or less, the company would not be required to file tax reports.

(j) Question: A truck or bus company has one pick-up during the year, travels 55,000 loaded miles and has a Pennsylvania apportionment of 3%. Is the company required to file a tax reports?

Answer: Yes. The company has exceeded the standard in section 2.(a). If the company had no pickups, deliveries or stops or if its mileage was 50,000 miles or less, it would not be required to file tax reports.

(k) Question: A bus company makes a stop at a restaurant or truck stop for the convenience of its passengers to use the facilities during a lengthy trip. Is this considered a "stop" for purposes of the de minimis standard?

Answer: No. Stops which are incidental to the purpose of the trip, such as rest stops during a long trip, are not counted.

(l) Question: What are "loaded miles and how are traveled miles treated between point of delivery in State to point of pick up?

Answer: Loaded miles are whenever the vehicle is carrying property for hire. Loaded miles do not include deadhead miles which are miles the vehicle travels empty going to load the property or travels empty between loads or travels empty when returning to home base after unloading the property hauled.

III. Effective Date. This bulletin shall be effective immediately and shall apply to all open cases, tax settlements, and appeals.