

State of Rhode Island and Providence Plantations
Rhode Island Department of Revenue
Division of Taxation

Public Notice of Proposed Rule-Making

Pursuant to the provisions of 42-35-3(a)(1) of the General Laws of Rhode Island, and in accordance with the Administrative Procedures Act Chapter 42-35 of the General Laws, the Division of Taxation hereby gives notice of its intent to amend a regulation regarding Nexus for Business Corporation Tax.

The purpose of this rule making is to implement Rhode Island General Laws (RIGL) Sections 44-11-4 and 44-11-4.1. This amendment provides guidance regarding Nexus for Business Corporation Tax. There is also a change in style and format. This regulation shall take effect **MONTH XX, 201X** and shall amend and supersede regulation CT 94-06, further identified by ERLID Number 523, promulgated April 1, 1995.

The proposed regulation and concise summary of non-technical requirements and proposed new rules are available for public inspection at www.tax.ri.gov, in person at The Rhode Island Division of Taxation, or requested by e-mail at Michael.Canole@tax.ri.gov or by calling Michael Canole at (401) 574-8729.

In the development of the proposed regulation, consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) whether the regulation, in and of itself, would have significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

All interested parties are invited to submit written or oral comments concerning the proposed regulations by December 14, 2015 to Michael Canole, Rhode Island Division of Taxation, One Capitol Hill, Providence, RI – telephone number (401) 574-8729 or via e-mail at Michael.Canole@tax.ri.gov. A public hearing to consider the proposed regulation will be held on Monday, December 14, 2015 at 11:30 a.m. at the Rhode Island Division of Taxation, One Capitol Hill, Providence, RI, at which time and place all persons interested therein will be heard. The room is accessible to the disabled and interpreter services for the hearing impaired will be provided if requested 48 hours prior to the hearing. Requests for this service can be made in writing to Michael Canole at Rhode Island Division of Taxation, One Capitol Hill, Providence, RI 02908 or by calling 401 574-8729.

**Rhode Island Department of Revenue
Division of Taxation**

**Concise Summary of Non-Technical Differences Between Existing and Proposed Regulation
Pursuant to R.I. Gen. Laws Section 42-35-3**

The purpose of this regulation is to implement Rhode Island General Laws (RIGL) Sections 44-11-4 and 44-11-4.1. This amendment provides guidance regarding Nexus for Business Corporation Tax. There is also a change in style and format. Regulation CT 15-02, Corporate Nexus, replaces Regulation CT 95-02, Nexus for Business Corporation Tax. The new regulation implements style and formatting changes to conform to a standardized presentation scheme. Much of the existing text from Regulation 95-02 remains unchanged, but there are several additions meant to clarify the Division of Taxation's policies with regard to nexus. In Rule 5, definitions have been established to clarify the meaning of certain key terms. In Rules 6 and 7, general explanations of the concept of nexus and how nexus principles apply to corporations have been included for taxpayer guidance. Rule 8 was included to acknowledge the introduction of mandatory combined reporting to Rhode Island and its relationship to nexus principles. Separate rules were included to distinguish between certain protected activities that do not establish nexus with Rhode Island (Rule 9), and activities that do establish nexus (Rule 10). The Regulation implements developments in the relevant case law dating from the effective date of the prior regulation, and maintains the Division's policy of applying nexus principles to the fullest extent permissible under federal law.

This regulation shall take effect **MONTH XX, 201X** and shall amend and supersede regulation CT 95-02, further identified by ERLID Number 523, promulgated April 1, 1995.

~~State of Rhode Island – Division of Taxation
Business Corporation Tax
Regulation CT-95-02
Nexus for Business Corporation Tax~~

~~Title 44, Chapter 11, Section 1(a) provides generally that a corporation will be subject to the business corporation tax if it is ". . . deriving any income from sources within this state or engaging in any activities or transactions within this state for the purpose of profit or gain, whether or not an office or place of business is maintained in this state, or whether or not such income, activities or transactions are connected with intrastate, interstate, or foreign commerce. . ."~~

~~For foreign corporations (corporations not organized under Rhode Island law) whose SOLE contact with Rhode Island is EXCLUSIVELY related to the sale of tangible personalty, Federal law provides generally that a state is prohibited from taxing the income of a business where the only connection is the solicitation of orders for tangible personalty where the orders are sent outside the state for approval and where the approved orders are filled from stocks of tangible personalty kept outside the state. (Public Law 86-272)~~

~~I. NATURE OF PROPERTY BEING SOLD~~

~~Only the solicitation to sell tangible personal property is afforded immunity 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 herein as a protected activity is also not protected under Public Law 86-272.~~

~~II. 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 minimus activities described in paragraph III and those activities conducted by independent contractors described in paragraph V below). 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. 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 a 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 regulation.~~

~~III. De Minimis Activities~~

~~De minimis activities are those that, when taken together, establish only a trivial connection with the taxing State. An activity conducted within a taxing State 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 the State is to be measured on both a qualitative and quantitative basis. If such activity either qualitatively or quantitatively creates a non-trivial connection with the taxing State, 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 the taxing State is not determinative of whether a 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 the taxing State is inconsistent with the limited protection afforded by P.L. 86-272.~~

~~IV. Specific Listing of Unprotected and Protected Activities~~

~~A. Unprotected Activities:~~

~~The following in-state activities (assuming they are not of a de minimis level) 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. Investigating credit worthiness.~~
- ~~4. Installation or supervision of installation at or after shipment or delivery.~~
- ~~5. Conducting training courses, seminars or lectures for personnel other than involved only in solicitation.~~
- ~~6. 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.~~
- ~~7. 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.~~
- ~~8. Approving or accepting orders.~~
- ~~9. Repossessing property.~~
- ~~10. Securing deposits on sales.~~
- ~~11. Picking up or replacing damaged or returned property.~~
- ~~12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.~~
- ~~13. Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel.~~
- ~~14. Maintaining a sample or display room in excess of two weeks (14 days) within the state during the tax year.~~
- ~~15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.~~
- ~~16. 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 as described as permitted under IV.A.18 and IV.B.2.~~
- ~~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.~~

~~17. Cosigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.~~

~~18. 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 paragraph IV.B. of this regulation).~~

~~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 tax 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 regulation.~~

~~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.~~

~~19. 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.~~

~~20. Conducting any activity not listed in paragraph IV.B. below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.~~

~~B. Protected Activities:~~

~~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 IV.A.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 to 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).~~
- ~~10. Maintaining a sample or display room for two weeks (14 days) or less 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 by this regulation under paragraph IV.B. shall not, by itself, remove the protection under this regulation.~~
- ~~14. Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.~~

~~V. INDEPENDENT CONTRACTORS~~

~~P.L. 86-272 provides protection to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the company or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the company's loss of immunity:~~

- ~~1. Soliciting sales.~~
- ~~2. Making sales.~~
- ~~3. Maintaining an office.~~

~~Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as those provided under P.L. 86-272 and this regulation.~~

~~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.~~

~~VI. MISCELLANEOUS PRACTICES~~

~~A. Application to Corporation Incorporated in State or to Person Resident or Domiciled in State:~~

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

~~B. Registration or Qualification to do Business:~~

~~A company that registers or otherwise formally qualifies to do business within this state 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 this state through activity not otherwise protected under P.L. 86-272 or this regulation, such protection shall be removed.~~

~~C. Loss of Protection for Conducting Unprotected Activity During Part of Tax Year:-~~

~~The protection afforded under P.L. 86-272 and the provisions of this regulation 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 regulation, no sales in this state or income earned by the company attributed to this state during any part of said tax year shall be protected from taxation under said Public Law or this regulation.~~

~~D. Activities of Affiliated Companies:-~~

~~In determining whether the activities of any company have been conducted within this state beyond the protection of P.L. 86-272 or paragraph IV.B. of this regulation, only those in-state activities that are conducted by or on behalf of said company shall be considered for this purpose. Activities that are conducted by any other person or business entity, whether or not said person or business entity is affiliated with said company, shall not be considered attributable to said company, unless such other person or business entity was acting in a representative capacity on behalf of said company.~~

~~VII. NEXUS OF CORPORATE PARTNERS~~

~~A. General Partners. Any corporation acting as a general partner of any partnership (limited or general) which is doing business in Rhode Island and which partnership owns property or maintains a place of business in the state and where the general partner is engaged, directly or indirectly, in the participation or in the domination or control of all or any portion of the business activities or affairs of the partnership shall be subject to the business corporation tax.~~

~~B. Limited Partners. Any corporation acting as a limited partner of any partnership (limited or general) which is doing business in Rhode Island, and which separate from or ancillary to its rights and obligations as a limited partner, is not conducting other activity not otherwise protected under P.L. 86-272 or this regulation shall not be subject to the business corporation tax.~~

~~Corporations exempted from the business corporation tax under 44-11-1(a) and which are subject to taxation according to their specific industry--banks and financial institutions, utilities and insurance companies--are NOT subject to this regulation.~~

~~R. GARY CLARK TAX ADMINISTRATOR~~

~~EFFECTIVE DATE: APRIL 1, 1995~~

~~THIS REGULATION AMENDS AND SUPERSEDES REGULATION CT-88-2 EFFECTIVE DECEMBER 31, 1988.~~

STATE OF RHODE ISLAND – DIVISION OF TAXATION
Business Corporation Tax – Corporate Nexus
Regulation CT 15-02

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Rule 1. Purpose

These rules and regulations implement RIGL §§ 44-11-1, 44-11-2, 44-11-4.1, 44-11-14, and other sections within Chapter 44-11 of the Rhode Island General Laws. These sections allow taxation of net income from businesses within and partially within the state.

Rule 2. Authority

These rules and regulations are promulgated pursuant to RIGL § 44-1-4, which authorizes and empowers the Rhode Island tax administrator to make rules and regulations, as the administrator may deem necessary for the proper administration and enforcement of the tax laws of this state. The rules and regulations have been prepared in accordance with the requirements of RIGL § 42-35-1 et seq. of the Rhode Island Administrative Procedures Act.

Rule 3. Application

These rules and regulations shall be liberally construed so as to permit the Division of Taxation the authority to effectuate the purpose of RIGL §§ 44-11-1, 44-11-2, 44-11-4.1, 44-11-14, and other applicable Rhode Island state laws and regulations.

Rule 4. Severability

If any provision of these rules and regulations, or the application thereof to any person or circumstances, is held invalid by a court of competent jurisdiction, the validity of the remainder of the rules and regulations shall not be affected thereby.

Rule 5. Definitions

“Combined Group” means a group of two or more corporations in which more than fifty percent (50%) of the voting stock of each member corporation is directly or indirectly owned by a common owner or owners, either corporate or non-corporate, or by one or more of the member corporations, and that are engaged in a unitary business.

“Corporation” has the meaning set forth in RIGL § 44-11-1(4), and includes an LLC, partnership or other entity electing to be taxed as a corporation for federal tax purposes. When a partnership or other pass-through entity is directly or indirectly held by a corporation, the business conducted by such a partnership or pass-through entity is considered the business of the corporation to the extent of the corporation’s distributive share of the partnership or pass-through entity net income.

“Foreign Corporation” means a corporation not organized under the laws of Rhode Island.

“General Partner” has the meaning set forth in RIGL § 7-13-1(7), as amended.

“Income” encompasses both profits and losses, whether active or passive.

“Limited Partner” has the meaning set forth in RIGL § 7-13-1(8), as amended.

“Nexus” means a connection or link with the state sufficient to subject a person to tax by the state, as described in Rule 6 of this Regulation.

“Office” means a permanent or temporary location where any person or other entity makes sales or holds itself out to the public as conducting a business. An in-home office of a sales representative is generally not considered an “office” of a corporation for purposes of this regulation, provided that the representative does not hold himself out as doing business on behalf of the corporation at that location by either publishing the home address or phone number as a corporate business address or phone number or through other actions.

“Partnership” has the meaning set forth in RIGL § 7-12-17, as amended.

Rule 6. Nexus – Generally

(a) Establishing nexus generally means that a business has sufficient connection or presence in Rhode Island for the State to have taxing authority. A foreign corporation is subject to Rhode Island corporate income tax if it conducts business activity in Rhode Island and has income properly apportionable to Rhode Island pursuant to RIGL § 44-11-14, et seq., regardless of whether it is authorized to do business in Rhode Island. The State Tax Administrator construes Rhode Island law to assert the tax jurisdiction of Rhode Island to the fullest extent permitted by the United States Constitution and the laws of the United States. Some type of physical or economic presence is necessary to establish nexus with the State. The United States Constitution places limitations on a state’s jurisdiction to tax. These constitutional limitations derive from two clauses in the United States Constitution: the Due Process Clause, in Amend. XIV, Section 1; and

the Commerce Clause, in Art. 1, Section 8, cl. 3. The nexus requirement of both clauses must be satisfied before an out-of-state business may be subject to the taxing jurisdiction of a state.

- (1) Due Process Clause nexus is satisfied when a person has minimum contacts with a state such that maintenance of a lawsuit against the person would not offend traditional notions of fair play and substantial justice. Due process clause nexus is satisfied when the person has a physical presence in the state, but physical presence is not always necessary to establish Due Process Clause nexus. Even without physical presence in the taxing state, Due Process Clause nexus is satisfied when an out-of-state commercial actor's efforts are purposefully directed toward residents of the taxing state.
- (2) A state tax satisfies the Commerce Clause if it meets the following four requirements: the tax is applied to an activity with a substantial nexus with the taxing state, the tax is fairly apportioned, the tax does not discriminate against interstate commerce, and the tax is fairly related to services provided by the state. The Commerce Clause nexus requirement limits the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce. The Commerce Clause "substantial nexus" requirement is not satisfied when the only contacts of a vendor of tangible goods with the taxing state are by mail or common carrier. However, in the area of corporate income taxation, the substantial nexus requirement can be satisfied through a showing of significant economic presence, absent any finding of physical presence. Significant economic presence can be demonstrated through activities such as the solicitation of orders for services and intangibles by in-state residents, and through the provision of significant services and intangibles to in-state residents.

(b) Federal statutory law places additional limits on a state's ability to tax interstate commerce. Section 101 of Public Law 86-272, codified at 15 U.S.C. §§ 381-384, prohibits a state from taxing the income of a foreign corporation whose only business activities within the state consist of "solicitation of orders" for tangible personal property, provided that the orders are sent outside the state for approval or rejection and the tangible personal property is shipped or delivered from out of state. The leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trademarks, service marks and the like, are not protected under the act. Also, solicitation, sale, or performance of any type of services is not protected under the act unless entirely ancillary to facilitate the request for an order for the sale of tangible personal property. Corporations incorporated within Rhode Island have physical presence in Rhode Island. For more detailed guidance regarding interpretation of Public Law 86-272, including what activities constitute solicitation, what activities constitute activities ancillary to solicitation, what activities are protected, and what activities are unprotected, refer to Rule 9 of this Regulation.

Rule 7. Corporations Subject to Taxation – Generally

(a) General nexus standards require the physical presence or economic presence of the taxpayer within the state for the taxpayer to be subject to taxation by the state.

(b) The term “corporation” is defined in RIGL § 44-11-1(4) to include various entities that are “deriving any income from sources within the state or engaging in any activities or transactions within this state for the purposes of profit or gain, whether or not an office or place of business is maintained in this state, or whether or not such income, activities or transactions are connected with intrastate, interstate, or foreign commerce,” subject to certain limitations. Correspondingly, RIGL § 44-11-2 subjects such corporations to an income tax by the State of Rhode Island.

(c) The Rhode Island corporate income tax is levied on corporations with Rhode Island business activity, unless prohibited by Public Law 86-272. For more detailed guidance regarding corporations that are members in a combined group, refer to Rule 8 of this Regulation.

(d) *Imputed Activity.* For the purposes of determining whether a foreign corporation is subject to Rhode Island’s tax jurisdiction, the activities of the corporation’s employees, agents, or representatives, however designated, will be imputed to the corporation. An agent or representative may be an individual, corporation, partnership or other entity. Activities conducted in Rhode Island on behalf of a foreign corporation by an independent contractor will be imputed to the corporation to the extent permitted by the United States Constitution and the laws of the United States.

Rule 8. Combined Reporting Requirement for C corporations and Combined Groups – Factor-Based Nexus Approach for Tax Years Beginning on or after January 1, 2015.

(a) For tax years beginning on or after January 1, 2015, all C corporations that do business in Rhode Island and are members in a combined group are subject to combined reporting, whether the combined group does business in multiple states or only in Rhode Island.

(b) In such situations, the C corporation must, for Rhode Island tax purposes, include in its combined report the income and apportionment factors of all members in its combined group. As long as one member in a combined group has corporate income tax nexus with Rhode Island and also engages in activities that exceed the protection of Public Law 86-272, then all members in the combined group, including those protected from state taxation by Public Law 86-272 and those that do not have nexus with Rhode Island, must be included when calculating the combined group’s net income and apportionment factors. The Rhode Island receipts of a combined group member that lacks nexus with Rhode Island or that is protected from Rhode Island taxation by Public Law 86-272 must always be included in the numerator of an apportionment fraction on the combined return, as set forth in Regulation CT 15-04.

(c) The purpose of apportionment in the context of a combined report is to determine the combined group’s Rhode Island source income, which is taxable. In determining the combined group’s taxable income in this manner, the Division of Taxation is merely measuring the in-state activities of the combined group, and not imposing a tax on members in the combined group that lack nexus with Rhode Island or that are protected from Rhode Island taxation by Public Law 86-272. After determining through such an apportionment formula the amount of a combined

group's net income apportioned to Rhode Island, combined group net income is solely attributed to and tax is solely imposed on those members in the combined group that have corporate income tax nexus with Rhode Island.

Examples. Corporations M, N, and O, all foreign corporations, are engaged in a unitary business and are members in the same combined group. Only Corporation M has nexus with Rhode Island. The combined group of Corporations M, N, and O must file a combined report with Rhode Island as a single taxpayer, including the receipts of Corporations N and O that are attributable to Rhode Island in the numerator of the combined group's apportionment formula, without regard to whether Corporations N or O have nexus with Rhode Island or are protected from state taxation under Public Law 86-272. The apportioned Rhode Island income will then be attributed to taxable members in the combined group, as set forth in Regulation CT 15-04.

Books.com is a corporation operating a website and internet business headquartered in New York with no physical presence in Rhode Island. It has an affiliated corporation, Booksellers, Inc. which has three stores in Rhode Island. The two corporations share common ownership, cross marketing, book return policy, and gift card/customer loyalty program, and are therefore engaged in a unitary business. As a result, the businesses are subject to mandatory combined reporting in Rhode Island and must file a combined return as a combined group. The Rhode Island sales of Books.com would be included in the numerator of the combined group's sales factor. In order to determine the amount of the combined group's net income apportioned to Rhode Island, it is not necessary for the Books.com corporation to have nexus with Rhode Island.

Rule 9. Public Law 86-272 – Solicitation Defined; Protected Activities.

(a) Section 101 of Public Law 86-272, codified at 15 U.S.C. §§ 381-384, prohibits a state from taxing the income of a foreign corporation whose only business activities within the state consist of "solicitation of orders" for tangible personal property, provided that the orders are sent outside the state for approval or rejection and the tangible personal property is shipped or delivered from out of state. For purposes of Public Law 86-272, solicitation is defined as follows:

(1) Solicitation means speech or conduct which explicitly or implicitly invites an order and activities that neither explicitly, nor implicitly, invite an order, but which are entirely ancillary to requests for an order.

(i) Ancillary activities are those activities that serve no independent business function for the seller apart from their connection 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. Activities not

entirely ancillary include those that the company would have reason to engage in anyway, but chooses to allocate to its in-state sales force. Activities that seek to promote sales are not ancillary unless, taken as whole, they are *de minimis*.

(ii) *De minimis* activities are those that, when taken together as a whole, establish only a trivial connection with the taxing state. An activity conducted within a taxing state on a regular or systematic basis or pursuant to a company policy, whether such policy is in writing or not, shall not ordinarily be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with the State is to be measured on both a qualitative and quantitative basis. If such activity either qualitatively or quantitatively creates a non-trivial connection with the taxing state, then such activity exceeds the protection of P.L. 86-272.

Example. Corporation H, a manufacturer located outside Rhode Island, sends a small team of officers and employees into Rhode Island to meet with potential suppliers for purposes of a plant tour. The officers and employees are in Rhode Island for two days and conduct no other activity in the state. This is *de minimis* activity and the connection with Rhode Island is only trivial. As a result of the immunity afforded by PL 86-272, Rhode Island is not permitted to impose tax.

(2) Only the solicitation for orders of tangible personal property is afforded protection under PL 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trademarks, service marks, and the like, or any other type of property are not protected activities under PL 86-272. The solicitation, sale, or performance of any type of service is also not protected under PL 86-272 unless entirely ancillary to solicitation for an order for tangible personal property, *de minimis*, or otherwise protected under this regulation.

(b) In accordance with Section 101 of Public Law 86-272, certain activities of foreign corporations shall be considered protected activities for purposes of corporate income tax nexus. This means that companies engaged in such activities, and nothing more, shall not through such activities alone be considered to have corporate income tax nexus with the State. The protection from state taxation afforded by Public Law 86-272 and under the provisions of this Rule 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 by Public Law 86-272 or this regulation, then no sales in this state or income earned by a company attributed to this state during any part of that year will be protected from taxation under Public Law 86-272 or this Regulation. The effect of a company's activities is cumulative and all activities must be considered as a whole when determining corporate income tax nexus. The protected activities enumerated below are intended as guidelines; they are not exhaustive and will not precisely describe the activities of many foreign corporations. In light of the foregoing, the following activities shall be considered protected activities for purposes of corporate income tax nexus in this State:

- (1) Soliciting orders for sales of tangible personal property through advertising activities that do not make use of a physical presence in the State.
- (2) Soliciting of orders for tangible personal property 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 this Regulation.
- (3) Carrying samples of tangible goods and related promotional materials only for display or distribution without charge or other consideration.
- (4) Furnishing and setting up display racks of tangible goods 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 related to tangible goods on to the home office.
- (7) Missionary sales activities; i.e., the solicitation of indirect customers for the company's tangible 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 to or subsequent to the placement of an order for tangible goods.
- (9) Checking of customers' inventories without a charge therefore (for re-order, but not for other purposes such as quality control).
- (10) Maintaining a sample or display room for two weeks (14 days) or less 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 of tangible goods.
- (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. The use of personal property such as a cellular telephone, fax

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, by itself, will not remove the protection under regulation.

(14) Shipping or delivering tangible goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.

(15) Non-controlling ownership of shares in a corporation that does business in Rhode Island.

(16) Depositing of funds or maintaining securities brokerage accounts with financial institutions unrelated to the foreign corporation that do business in Rhode Island.

(c) Independent contractors.

(1) Independent contractors may engage in the following limited activities within the State on behalf of an out-of-state hiring company, without the hiring company's loss of immunity:

- (i) Soliciting orders for sales of tangible personal property.
- (ii) Making sales of qualifying tangible personal property.
- (iii) Maintaining an office.

(2) Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as those provided under Public Law 86-272. Maintenance of a stock of goods in the State by the independent contractor under consignment or any other type of arrangement with the out-of-state hiring company, except for purposes of display and solicitation, shall remove the hiring company's protection from taxation under Public Law 86-272, unless such activities are *de minimis*.

(d) A company that registers or otherwise voluntarily qualifies to do business within this state does not, by that fact alone, lose its protection under Public Law 86-272. Where, separate from or ancillary to such registration or qualification, a company receives and seeks to use or protect any additional benefit or protection from the State through activity not otherwise protected under Public Law 86-272 or this Regulation, the protection afforded by Public Law 86-272 shall be lost.

(e) *Federal Limitations.* A foreign corporation's activities will not subject it to the corporate income tax jurisdiction of Rhode Island if the United States Constitution or laws of the United States preclude the exercise of jurisdiction.

Rule 10. Activities that Create Nexus.

(a) This Rule describes activities that are sufficient for creating corporate income tax nexus between the State of Rhode Island and a foreign corporation. The activities enumerated in this Rule below are intended merely as guidelines. The activities enumerated are not exhaustive and will not precisely describe the activities of many foreign corporations.

(b) Any amount of physical presence, however limited, will presumptively trigger income tax nexus between a foreign corporation and the State. Physical presence is determined on a case-by-case basis, according to the applicable facts and circumstances. Physical presence can be established through the holding of property or the activities of agents, representatives, or independent contractors who act as representatives of a foreign corporation in maintaining the foreign corporation's ability to market goods and services in the State. The burden is on the taxpayer to rebut the presumption of corporate income tax nexus when there is any amount of physical presence.

Example. Intangible, Inc. is a foreign corporation that holds intangible assets. Intangible has no employees, tangible property, or sales. However, the majority of its corporate functions are performed in Rhode Island. These functions include maintaining books and records, holding directors' meetings and making day-to-day business decisions. The corporate functions are performed in Rhode Island by the directors or by employees of an affiliate. Intangible has nexus with Rhode Island.

(c) In the absence of physical presence, substantial nexus with a foreign corporation can be established through the foreign corporation's economic presence in the State. Substantial nexus for corporate income tax purposes requires that a foreign corporation has created continuing obligations and relationships with State residents such that the foreign corporation has purposefully availed itself of State markets, benefits, or protections, or that the corporation is subject to State regulation and sanctions for the consequences of its actions. Additional factors that serve to demonstrate sufficient economic presence to establish substantial nexus with the State include, but are not limited to, the presence of a foreign corporation's moveable property or lease interests in the State, the presence of a foreign corporation's representatives in the State, and a foreign corporation's controlling ownership of in-state pass-through entities, as well as other activities enumerated in Rule 10(d) of this Regulation.

(d) The in-state activities by a foreign corporation that are enumerated in this provision shall trigger corporate income tax nexus with the State, so long as they are not of a *de minimis* character. The activities enumerated in this provision shall not be considered as either solicitation of orders for tangible personal property or as activities that are entirely ancillary to such solicitation. In-state activities by foreign corporations that will trigger corporate income tax nexus with the State include, but are not limited to, the following:

(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) Investigating creditworthiness or issuing lines of credit or credit cards to in-state residents.
- (4) Installation or supervision of installation at or after shipment or delivery.
- (5) Conducting training courses, seminars, or lectures for personnel other than personnel involved only in solicitation.
- (6) 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.
- (7) 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.
- (8) Approving or accepting orders.
- (9) Repossessing property.
- (10) Securing deposits on sales.
- (11) Picking up or replacing damaged or returned property or stale or unsaleable inventory.
- (12) Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
- (13) Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel.
- (14) Maintaining a sample or display room in excess of two weeks (14 days) within the state during the tax year.
- (15) Carrying samples for sale, exchange, or distribution in any manner for consideration or other value.
- (16) Owning, leasing, using, or maintaining any of the following facilities or property in-state:
 - (i) Repair shop
 - (ii) Parts department
 - (iii) Any kind of office other than an in-home office

- (iv) Warehouse
- (v) Meeting place for directors, officers, or employees
- (vi) Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation
- (vii) Telephone answering service that is publicly attributed to the company or to employees or agent(s) of the company in their representative status
- (viii) Mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles
- (ix) Real property or fixtures to real property of any kind

(17) Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.

(18) Maintaining wholesaling activities directed into the State.

(19) 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.

- (i) The maintenance of an in-home office as described above shall only be considered a protected activity so long as the in-home office (1) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity; and (2) so long as the use of such office is strictly 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.
- (ii) 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. This includes the posting of such information on a company website. 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.
- (iii) 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 regulation. 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.

(20) Entering into franchising or licensing agreements, including licensing the use of trade names to in-state affiliates; selling or otherwise disposing of such 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.

Example. Rhode Island Retailer transfers its trademarks to Friendly Corporation in Delaware which then licenses these intangibles back to Rhode Island Retailer in exchange for royalty payments. Rhode Island Retailer and Friendly Corporation are closely related affiliates. Friendly Corporation has no physical presence in this state. Because Friendly Corporation licenses trademarks to an in-state affiliate, Friendly Corporation has nexus in Rhode Island.

(21) Licensing the use of non-trademark intangible property to in-state affiliates.

(22) Conducting any activity not enumerated in Rule 11 of this Regulation as a protected activity, which is not entirely ancillary to solicitations for orders of tangible personal property, even if such activity helps to increase sales.

(23) Ownership of in-state LLCs, partnerships, and other pass-through entities. Owning an interest in any partnership or other pass-through entity whose activities, if conducted by a foreign corporation, would give Rhode Island jurisdiction over the foreign corporation under Chapter 44-11 of the Rhode Island General Laws, unless the activities of the partnership or pass-through entity are limited to activities protected under Public Law 86-272.

(24) Performing services.

(25) Installing or supervising installation at or after shipment or delivery.

(26) Providing consulting services.

Rule 11. Effective Date

The effective date of this regulation is **MONTH DAY, YEAR**. This regulation supersedes regulation CT 95-02 effective April 1, 1995.

DAVID M. SULLIVAN
TAX ADMINISTRATOR