

This is to amend Section 103 of the BIRT Regulations to update the nexus standard to reflect the ruling of the Supreme Court of the United States in the case of *South Dakota v. Wayfair, Inc.*, decided on June 21, 2018, that businesses' economic and virtual connections to the taxing jurisdiction are sufficient to create constitutional nexus.

CITY OF PHILADELPHIA

BUSINESS INCOME AND RECEIPTS TAX REGULATIONS

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**Section 103. What Constitutes Doing Business (Having Nexus) in Philadelphia.**

A. GENERAL

The presence of taxable activity in the City within the meaning of the Business Income and Receipts Tax ("BIRT") Ordinance is essentially a factual determination to be made on a case by case basis. In general, taxable activity includes any trade, business, profession, vocation or any manufacturing, commercial, service, financial or utility business or activity that originates from, is carried on through, directed from or otherwise attributable to Philadelphia.

Any person who engages in a taxable activity in Philadelphia or attributable to Philadelphia is subject to this tax whether or not such person is a resident and whether or not such person has a permanent place of business in Philadelphia. Any person is subject to this tax if such person carries on a taxable activity in Philadelphia or attributable to Philadelphia, whether or not such person is licensed to do business in Philadelphia. **[Whether such taxpayer is subject to the full BIRT tax or only to the Gross Receipts portion depends on the level and the nature of the taxpayer's activity within Philadelphia.]**

A taxpayer is subject to the Gross Receipts portion and the Net Income portion of the BIRT when it has sufficient contact with the City to be taxed without violating the United States Constitution. **[A taxpayer is subject to the Net Income portion of the BIRT when it has sufficient contact with the City to be taxed without violating the United States Constitution and Public Law 86-272.] However, if the taxpayer's activities in Philadelphia are limited to the sale of tangible personal property, Public Law 86-272 may apply and prevent the imposition of the Net Income portion of the BIRT.** Only the sale of tangible personal property is afforded immunity under Public Law 86-272. The provision of services for a fee, the sale of other than tangible personal property, the leasing, renting, licensing or other disposition of tangible, intangible or any other type of property is not immune from taxation by reason of Public Law 86-272.

Carrying on or engaging in business contemplates activities such as but not limited to:

1. Making sales in the City or performing activities in the City which affect sales; and/or
2. Providing services or performing activities in the City which affect the rendition of services in the City; and/or
3. Performing acts regularly and continuously in the City for the purpose of making a profit.

**B. [NEXUS STANDARDS] ACTIVE PRESENCE STANDARD – PRIOR TO 2019**

**1. Effective July 1, 1998[,] through tax years beginning prior to January 1, 2019, for the purpose of this tax, no more than an “active presence” is required to constitute “doing business” in Philadelphia. “Active presence” means purposeful, regular and continuous efforts in Philadelphia in the pursuit or profit or gain and the performance in Philadelphia of activities essential to those pursuits. Limited activities of a taxpayer’s sales force in Philadelphia, such as anticipating the needs and requirements of the customer and following up regarding any difficulties the customer may have after delivery, may be sufficient nexus to sustain the levy of this tax. This is true as long as sales force physically performs some activities in Philadelphia, even if the taxpayer’s sales force does not take any sales orders from its customers in the City and all orders are made, paid, and fulfilled outside the City. Active presence is deemed to exist to the extent that the activities of the sales force in the City make possible the realization and continuance of valuable contractual relations between the taxpayer and its customers in the City. The maintenance of an office or property in the City is not necessary to establish “active presence”. Any person who is otherwise subject to the Business Income and Receipts Tax under the “active presence” test but whose business activities in Philadelphia are limited to mere “solicitation” shall not be subject to the net income portion of the tax.**

Following is a list of business activities that will subject an out-of-Philadelphia business to the Philadelphia Business Income and Receipts Tax **“active presence” test** when it engages in any one of such activities. The description of activities in these examples shall not be construed as limiting the meaning of the term “doing business” to those specifically enumerated. **[Also, the determination of whether or not certain of such activities exceeds “solicitation” depends on the nature of the activity and the facts of each case and has to be made on a case by case basis.]**

Examples:

1. An out-of-Philadelphia business will be deemed to have created “nexus” if it regularly and systematically conducts business activity in Philadelphia through employees, agents, representatives, independent contractors, brokers or others acting on its behalf, whether or not these individuals or organizations reside in Philadelphia;

a. Regular and systematic business activity exists if 10 or more days of business activity occurs in Philadelphia on an annual (“annual” meaning a 12 month taxable year) basis;

b. Regular and systematic business activity may exist, depending on the facts and circumstances of the taxpayer, if less than 10 days of business activity occur in Philadelphia on an annual (“annual” meaning a 12 month taxable year) basis;

(1) When examining the facts and circumstances of the business activity in Philadelphia, conducting any of the following activities in Philadelphia for between 3 and 10 days on an annual basis will be **re[p]b**utably presumed to constitute regular and systematic business activity:

(a) Soliciting sales;

(b) Making repairs or providing maintenance or service to property sold or to be sold;

(c) Collecting current or delinquent accounts related to sales of tangible personal property through assignment or otherwise;

(d) Installing or supervising installation at or after shipment or delivery;

(e) Conducting training for employees, agents, representatives, independent contractors, brokers or others acting on its behalf, or for customers or potential customers related to sales activities;

(f) Providing customers any kind of technical assistance or service including, but not limited to, engineering assistance, design service, quality control, product inspections, or similar services related to sales activities;

(g) Investigating, handling, or otherwise assisting in resolving customer's complaints related to sales;

(h) Providing consulting services related to sales;

(i) Having goods delivered to Philadelphia in vehicles it owns, rents, leases, uses, or maintains or delivered by a related party acting as its representative;

(2) Conducting any of the activities listed in subparagraph 1.b. (1) in Philadelphia for 10 days or more will constitute regular and systematic business activity.

c. The activities of lawyers, accountants, investment bankers, and other similar independent professionals who perform services in Philadelphia for an out-of-Philadelphia business in their independent professional capacity shall not subject, on its own, the out-of-Philadelphia business to the Philadelphia Business Income and Receipts Tax. These activities, however, would subject the independent professionals to the Business Income and Receipts Tax.

2. If none of the business activities in Philadelphia fall under subparagraph 1.b. (1) and the only contact with Philadelphia is conducting any of the activities listed below for less than 10 days, such contacts will be presumed not to create nexus. Conducting any of the activities listed below for 10 or more days will not necessarily create nexus. Whether or not nexus has been created will depend on the facts and circumstances of the business activity in Philadelphia.

a. Meeting with suppliers of goods or services in Philadelphia;

b. Meeting in Philadelphia with government representatives in their official capacity;

c. Attending occasional meetings in Philadelphia (e.g., Board meetings, general internal corporate policy meetings and training, retreats, seminars and conferences sponsored by others, etc.);

d. Holding recruiting or hiring events in Philadelphia; or

e. Attending and/or participating at trade show in Philadelphia at which no orders for goods are taken and no sales are made.

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**[C. ACTIVE PRESENCE AND SOLICITATION PLUS STANDARDS IN CONNECTION WITH THE SALE OF TANGIBLE PERSONAL PROPERTY**

In connection with the sale of tangible personal property, the test for nexus (sufficient contact to be subject to the Business Income and Receipts Tax) will be administered in two steps: Active Presence will subject a taxpayer to at least the Gross Receipts portion of the tax; activity rising to the level of "solicitation plus" will result in the imposition of both the Gross Receipts and Net Income portions of the tax.

**1. Active Presence**

"Active presence" means purposeful, regular and continuous efforts in Philadelphia in the pursuit or profit or gain and the performance in Philadelphia of activities essential to those pursuits. Limited activities of a taxpayer's sales force in Philadelphia, such as anticipating the needs and requirements of the customer and following up regarding any difficulties the customer may have after delivery, may be sufficient nexus to sustain the levy of this tax. This is true as long as sales force physically performs some activities in Philadelphia, even if the taxpayer's sales force does not take any sales orders from its customers in the City and all orders are made, paid, and fulfilled outside the City. Active presence is deemed to exist to the extent that the activities of the sales force in the City make possible the realization and continuance of valuable contractual relations between the taxpayer and its customers in the City. The maintenance of an office or property in the City is not necessary to establish "active presence". Any person who is otherwise subject to the Business Income and Receipts Tax under the "active presence" test but whose business activities in Philadelphia are limited to mere "solicitation" shall not be subject to the net income portion of the tax.

The following are examples of activities that meet the "Active Presence" standard:

a. Having agents, representatives, independent contractors, brokers or others, acting on behalf of an out-of-Philadelphia business own, rent, lease, use or maintain an office or other establishment in Philadelphia, when such establishment is used in the representation of the out-of-Philadelphia business in Philadelphia and is significantly associated with its ability to establish and maintain a market in Philadelphia;

b. Having employees own, rent, lease, use, or maintain an office or in-home office or other establishment in Philadelphia, even if the business does not pay (directly or indirectly) for the use of the property;

c. Having independent contractors or representatives with in-home offices in Philadelphia, where the business reimburses the independent contractors or representatives only for telephone or travel expenses.]

**C. ECONOMIC PRESENCE – Effective for tax years beginning January 1, 2019 and thereafter**

**Effective for tax years beginning January 1, 2019, a business with no physical presence in Philadelphia is considered to have nexus in Philadelphia and, as such, is subject to BIRT if it:**

- **Has generated at least \$100,000 in Philadelphia gross receipts during any 12-month period ending in the current year and**
- **Has sufficient connection with Philadelphia to establish nexus under the U.S. Constitution.**

**D. SOLICITATION PLUS STANDARDS IN CONNECTION WITH THE SALE OF TANGIBLE PERSONAL PROPERTY**

**[2. Solicitation Plus]**

**If the seller’s activities in Philadelphia are strictly limited to solicitation of orders for sales of tangible personal property (including activities entirely ancillary to solicitation), that are approved or accepted outside of Philadelphia, and that are filled by shipment or delivery from a point outside Philadelphia, as a result of limitation imposed by Public Law 86-272 (15 U.S.C. Section 381-384), the seller will not be subject to the Net Income portion of the BIRT.**

When the business activities of a taxpayer in Philadelphia exceed solicitation, the taxpayer is subject to both the [g]Gross [r]Receipts and the [n]Net [i]Income portion of the tax. For example, obtaining sales through salespersons who solicit orders on the business’s behalf and/or displaying the business’s merchandise in leased space on a prolonged or recurring basis is deemed to exceed “solicitation” and would subject the business to both the gross receipts and the net income portion of the tax.

For the purpose of this tax, 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 seek to promote sales are not ancillary.

The following activities meet the “Solicitation Plus” standard:

- a. Owning, renting, leasing, maintaining, or having the right to use and using tangible personal or real property physically located in Philadelphia;
- b. Having employees own, rent, lease, use, or maintain an office or in-home office or other establishment in Philadelphia, if the use of such property is paid for directly or indirectly by the business;
- c. Having independent contractors or representatives with in-home offices in Philadelphia where the business reimburses the independent contractors or representatives for expenses other than just telephone or travel.

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**E[D]. EXAMPLES OF ACTIVITIES, OTHER THAN THE SALE OF TANGIBLE PERSONAL PROPERTY, WHICH CONSTITUTE DOING BUSINESS IN PHILADELPHIA AND SUBJECT THE TAXPAYER TO THE FULL BUSINESS INCOME AND RECEIPTS TAX**

The following are examples

1. Contracting: Performance of a contract in Philadelphia regardless of whether the person brings its own employees into the City, hires local labor, or subcontracts with another.

2. Providing services:

a. Providing any service in Philadelphia, regardless of whether the employees, independent contractors, agents, or other representatives performing the services reside in Philadelphia;

b. Maintaining or repairing property located in Philadelphia whether under warranty or by separate contract; or

c. Installing, erecting, or modifying property in Philadelphia;

3. Inventory in the City: Having an inventory in Philadelphia or having spot inventory for the convenient delivery to customers, even if the bulk or orders are filled from outside of the City;

4. Dealings in real estate: Holding, acquiring, leasing, or disposing of any property located in Philadelphia;

5. Shows and performances: The staging of shows, theatrical performances, or other events in Philadelphia;

6. Transportation:

a. Carrying passengers or freight (any personal property including oil and gas transmitted by pipeline) from one point in Philadelphia to another point inside or outside the City, if pickup or delivery, regardless of origination or ultimate destination, occurs in Philadelphia; or

b. Having facilities and/or employees, independent contractors, agents, or other representatives in Philadelphia, regardless or whether they reside in Philadelphia for:

(1) Storage, delivery, or shipment of goods;

(2) Servicing, maintaining, or repair of vehicles, trailers, containers, and other equipment;

(3) Coordinating and directing the transportation of passengers or freight; or

(4) Doing any other business of the person;

7. Franchisors: Entering into one or more contracts with persons, corporations, or other business entities located in Philadelphia, by which:

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a. The franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor; and

b. The operation of a franchisee's business pursuant to such plan is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate;

8. Processing: Assembling, processing, manufacturing, or storing goods in Philadelphia;

9. Advertising: Entering Philadelphia to place or display advertising when the advertising is for the benefit of another and in the ordinary course of business (e.g., the foreign corporation makes signs and brings them into Philadelphia, sets them up, and maintains them);

10. Contracting for processing and shipment: Sending materials to a Philadelphia manufacturer, processor, repairer, or printer to be processed and stored in completed form awaiting orders for their shipment;

11. Loan production activities: Soliciting sales contracts or loans, gathering financial data, making credit checks, or performing other financial activities in Philadelphia through employees, independent contractors, or agents, regardless of whether they reside in Philadelphia or have a permanent place of business in Philadelphia;

12. Holding companies: Maintaining a place of business in Philadelphia or managing, directing, and/or performing services in Philadelphia for subsidiaries or investee corporations;

13. Place of business: Maintaining a place of business in Philadelphia;

14. Federal enclaves: Doing business in any area in Philadelphia, even if the area is leased or owned by, ceded to, or under the control of federal government;

15. Consignments: Having consigned goods in Philadelphia;

16. Leasing: leasing tangible personal property that is used in Philadelphia.

**Section 104. Complete Termination or Liquidation of a Business.**

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Underline    and **Bold** denote new matter

Brackets [ ] and **Bold** is matter deleted



Date: 1/24/19

**Frank Breslin CPA, Revenue Commissioner**

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