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August 26, 2002

Ms. Diane M. Ohanian
Tax Regulations Specialist 4
NYS Department of Taxation & Finance
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Albany, New York 12227

Re: **Draft Proposed Regulations**

Dear Ms. Ohanian:

Thank you for offering us this opportunity to comment on the draft proposed regulation that you sent to us on July 11. Inasmuch as we have not had sufficient time for our full Executive Committee to review the proposal, the comments in this letter are those of individual members of the Tax Section. We have focused solely on the provisions relating to "trade shows."

The proposal would amend the regulations pertaining to Article 9-A by providing, in summary, that a corporation's mere participation in a trade show in New York for 14 days or less during a taxable year will not be considered sufficient to subject a corporation to the corporation franchise tax imposed pursuant to Article 9-A of the Tax Law.

We fully support the result that would be achieved by the adoption of this amendment for three distinct reasons. First, there is clearly an area of de minimis in-state activity that cannot result in a state having sufficient nexus with a corporation to support that state's right to impose tax; the proposal's recognition of this is commendable. Second, a quantified, bright-line indication of the Division of Taxation's interpretation of the de minimis threshold will enable corporations to make informed decisions rather than having to gamble that their interpretation of the threshold is consistent with the Division of Taxation's. Third, the proposal should encourage corporations to participate in New York trade shows and thereby enhance the New York economy.

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It is important to note, however, that announcing a de minimis threshold for corporation franchise tax purposes without a similar announcement for sales and use taxes may be seen as setting "a trap for the unwary." If a corporation participates in a New York trade show relying on the amended regulation but, not being fully advised, does not consider the sales and use tax implication of its New York presence, it may find itself liable for substantial sales and use tax liabilities for taxes it failed to collect in contexts unrelated to the trade show. For example, if a mail order seller with no other New York nexus participates in a New York trade show for, say, ten days, the Division of Taxation might take the position that the corporation is liable to collect use taxes on all of its sales into New York for some period of time (and for use tax on any property used at the trade show). Thus, the corporation, having been enticed into participating in a New York trade show by the amended regulation, would be "ambushed" for sales and use taxes. To remedy this problem, we strongly urge the Division of Taxation to promulgate an amendment to the sales and use tax regulation that would replicate the de minimus threshold in the proposal.

From a technical perspective, the placement of the amendment and the manner in which the amendment is described in your covering letter may lead a reader to conclude that the amendment is merely an interpretation of the "solicitation" activity that is protected by Public Law 86-272. The text of the proposal, of course, shows this not to be so. Accordingly, we suggest that it be made more clear that this provision is independent of Public Law 86-272 and is an interpretation of the Tax Law's criteria for subjecting a corporation to the franchise tax.

Lastly, we commend the Division of Taxation and the New York City Department of Finance for working together on these proposed amendments so that the regulations in this area will be substantially similar for both the New York City General Corporation Tax and Article 9-A of the Tax Law.

Once again, we thank you for the opportunity to provide our thoughts. We look forward to working further with you on this regulation project.

Respectfully submitted,

Samuel J. Dimon
Chair

cc: Ellen Hoffman
NYC Department of Finance