

*Multistate Tax Commission*



**RESOLUTION REGARDING ADOPTION OF REVISIONS TO THE  
STATEMENT OF INFORMATION CONCERNING PRACTICES OF  
MULTISTATE TAX COMMISSION STATES UNDER PUBLIC LAW 86-272**

**WHEREAS**, on July 11, 1986, the Executive Committee of the Multistate Tax Commission adopted its "Statement of Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272" (hereafter "Statement") wherein the full members of the Multistate Tax Commission agreed, in principal part, to jointly issue their interpretation of Public Law 86-272 as said Public Law may apply to certain activities of interstate sellers of tangible personal property; and

**WHEREAS**, said Statement has been followed by non-member, as well as member states to the Commission and has been relied upon by many other members of the taxpaying community for guidance; and

**WHEREAS**, the United States Supreme Court's recent decision in the case of Wisconsin Department of Revenue v. William Wrigley, Jr. Co., \_\_\_ U.S. \_\_\_, 112 S.Ct. 2447 (1992) has provided certain additional interpretation of the term "solicitation" contained in Public Law 86-272 which requires the revision of the Statement in order for it to be an accurate reflection of the meaning of said Public Law; and

**WHEREAS**, the Uniformity Committee of the Multistate Tax Commission has reviewed said Public Law in light of the construction placed upon the term "solicitation" by the United States Supreme Court and said Committee has reviewed the comments of representatives of both the private sector and other states with regard to the impact of the Wrigley case on the Statement; and

**WHEREAS**, after said review, the Uniformity Committee has met by teleconference on December 7, 1992 and has recommended to the Executive Committee that it approve its suggested revisions to the Statement; and

**WHEREAS**, the Executive Committee has reviewed said suggested revisions and has determined that said revisions are appropriate and necessary to make at this time.

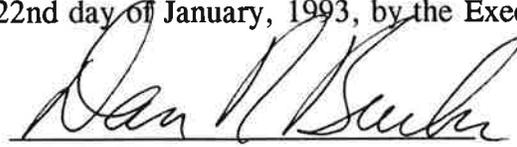
**NOW, THEREFORE, IT IS RESOLVED THAT** the Executive Committee hereby adopts the recommendations of the Uniformity Committee as reflected in the revised Statement attached hereto; and

**IT IS FURTHER RESOLVED THAT** the Executive Committee requests that tax administrators of Multistate Tax Commission Member States with tax laws affected by P.L. 86-272, as well as any other interested state, adopt and publish said revised Statement so that the taxpaying community may be better informed as to the current practices of each adopting state as to its application of Public Law 86-272 to activities occurring within that state; and

**IT IS FURTHER RESOLVED THAT**, by separate resolution, the Executive Committee has also approved the holding of a public hearing to receive, review and recommend additional revisions to any and all provisions of said Statement; and therefore, the Statement, including the recommended revisions approved herein, will be subject to further recommended revisions.

Adopted this 22nd day of January, 1993, by the Executive Committee of the Multistate Tax Commission.

Attest:



Dan R. Bucks  
Executive Director



*Multistate Tax Commission*



**RESOLUTION REGARDING CONTINUED REVIEW AND REVISION TO THE  
STATEMENT OF INFORMATION CONCERNING PRACTICES OF  
MULTISTATE TAX COMMISSION STATES UNDER PUBLIC LAW 86-272**

**WHEREAS**, on July 11, 1986, the Executive Committee of the Multistate Tax Commission adopted its "Statement of Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272" (hereafter "Statement") wherein the full members of the Multistate Tax Commission agreed, in principal part, to jointly issue their interpretation of Public Law 86-272 as said Public Law may apply to certain activities of interstate sellers of tangible personal property; and

**WHEREAS**, by its resolution dated January 22, 1993, The Executive Committee approved and recommended certain revisions to the Statement in order for it to conform to the recent United States Supreme Court opinion in Wisconsin Department of Revenue v. William Wrigley, Jr. Co. \_\_\_ U.S. \_\_\_, 112 S.Ct. 2447 (1992); and

**WHEREAS**, the Uniformity Committee of the Multistate Tax Commission has recommended that a further review and revision, if necessary, be made to the Statement after additional public input is received from state and private industry representatives; and

**WHEREAS**, the Executive Committee deems it in the interest of sound tax administration policy to provide an opportunity for additional public input regarding additional revisions to said Statement.

**NOW, THEREFORE, IT IS RESOLVED THAT** a public hearing be held pursuant to Article VII. of the Multistate Tax Compact at which the entire Statement, including any and all provisions thereof, shall be the subject to public comment and further recommendation; and

**IT IS FURTHER RESOLVED THAT** Alan H. Friedman, General Counsel to the Multistate Tax Commission, shall act as Hearing Officer for the purposes of said public hearing.

Adopted this 22nd day of January, 1993, by the Executive Committee of the Multistate Tax Commission.

Attest:

A handwritten signature in cursive script, reading "Dan R. Bucks", written over a horizontal line.

Dan R. Bucks  
Executive Director



**STATEMENT OF INFORMATION CONCERNING PRACTICES OF  
MULTISTATE TAX COMMISSION AND SIGNATORY STATES UNDER PUBLIC LAW 86-272**

Public Law 86-272, 15 U.S.C. 381-384, (hereafter P.L. 86-272) restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term net income tax includes a franchise tax measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

It is the policy of the state signatories hereto to impose their net income tax, subject to State and Federal legislative limitations, to the fullest extent constitutionally permissible. Interpretation of the solicitation of orders standard in P.L. 86-272 requires an ascertainment of the fair meaning of that term in the first instance. The United States Supreme Court has recently established a standard for interpreting the term "solicitation" and this Statement has been revised to conform to such standard. *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2447 (1992). In those cases where there may be reasonable differences of opinion as to whether the disputed activity exceeds what is protected by P.L. 86-272, the signatory States will apply the principle that the pre-emption of state taxation afforded by P.L. 86-272 will be narrowly interpreted. See *Cipollone v. Liggett Group, Inc.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2608 (1992). Therefore, it is the policy of those states to construe the provisions of P.L. 86-272 so as to apply that law to the circumstances clearly and reasonably intended by Congress.

The following information reflects the signatory states' current practices with regard to: (1) whether a particular factual circumstance is considered either immune or not immune from taxation by reason of P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another state for purposes of applying a throwback rule (if applicable) with respect to such sales.

**I  
NATURE OF PROPERTY BEING SOLD**

Only the sale of tangible personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, intangibles or any other type of property is not immune from

taxation by reason of P.L. 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

## II SOLICITATION OF ORDERS

For the in-state activity to be immune, it must be limited solely to *solicitation* (except for *de minimis* activities described in this Article II.B. and those activities conducted by independent contractors described in Article III. 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. 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 conduct of activities not falling within the foregoing definition of solicitation will cause the company to lose the exemption from a net income tax afforded by P.L. 86-272, unless the disqualifying activities, taken together, are *de minimis*.

*De minimis* activities are those that, when taken together, establish only a trivial additional connection with the taxing State. An activity regularly conducted within a taxing State pursuant to a company policy or on a continuous basis shall normally not be considered trivial. Whether or not an activity consists of a trivial or non-trivial additional 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.

Examples of activities presently treated by the signatory states (unless otherwise stated as an exception or addition) as either non-immune or immune are as follows:

A. NON-IMMUNE ACTIVITIES:

The following in-state activities conducted (assuming they are not of a *de minimis* level) will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting current or delinquent accounts.
3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
6. Providing any kind of technical assistance or services, including, but not limited to, engineering assistance or services, 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. Providing shipping information and coordinating deliveries.
14. Maintaining a sample or display room in excess of two weeks (14 days) at any one location during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.

16. Owning, leasing, or maintaining any of the following facilities or property in-state:
  - a. Repair shop.
  - b. Parts department.
  - c. Purchasing office.
  - d. Employment or recruiting office.
  - e. Warehouse.
  - f. Meeting place for directors, officers, or employees.
  - g. Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
  - h. Telephone answering service that is formally attributed to the company or to the agent(s) of the company in their agency status.
  - i. Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.
  - j. Real property or fixtures to real property of any kind.
17. Consigning tangible personal property to any person, including an independent contractor.
18. Maintaining, by any employee, an office or place of business (in-home or otherwise) that is paid for directly or indirectly by the company and that is formally attributed to the company or to the agent(s) of the company in their agency status, even if such office is for the exclusive use of soliciting orders. (For example, a telephone listing for the company or for the agents of the company in their capacity as agents or other indications through advertising or business literature that the company or its agents can be contacted at a specific place shall normally be determined as the company maintaining within this state an office or place of business attributable to the company or to its agents in their agency status.)
19. Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel.
20. Conducting any activity not listed in paragraph II.B. below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

B. IMMUNE ACTIVITIES:

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

1. Soliciting orders for sales by any type of advertising.
2. Carrying samples only for display or for distribution without charge or other consideration.
3. Owning or furnishing autos to sales personnel.
4. Passing inquiries and complaints on to the home office.
5. Missionary sales activities.
6. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control).
7. Maintaining a sample or display room for two weeks (14 days) or less at any one location during the tax year.
8. Soliciting of orders for sales by an in-state resident employee of the company; provided the employee maintains no in-state sales office or place of business (in-home or otherwise) that is attributable to the company or to the company's agent(s) in their agency capacity.
9. Recruitment, training or evaluation of sales personnel, including occasional use of homes, hotels or similar places for meetings with sales personnel.
10. Maintaining, by any sales employee, an in-home office that is not paid for directly or indirectly by the company and which is not attributable to the company or to the company's agent(s) in their agency capacity.
11. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.

### III INDEPENDENT CONTRACTORS

P.L. 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the company or its agents 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 Articles II. and III. of this Statement.

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 immunity.