

[Discussion draft 4: 12/9/19]

[Note: red edits indicate edits contained in the 9/28/19 draft; purple or orange edits indicate edits inserted subsequent to the October 2 meeting of the Work Group.]

**Statement of Information Concerning Practices of
Multistate Tax Commission and Signatory States
Under Public Law 86-272**

*Originally adopted by the Multistate Tax Commission on July 11, 1986
Revised version adopted by the MTC Executive Committee on January 22, 1993
Second revision adopted by the Multistate Tax Commission on July 29, 1994
Third revision adopted by the Multistate Tax Commission on July 27, 2001
Fourth revision adopted by the Multistate Tax Commission on [_____, 20__]*

Table of Contents

<u>Introduction</u>	<u>2</u>
<u>Article I Nature of Property Sold</u>	<u>3</u>
<u>Article II Solicitation of Orders and Activities Ancillary to Solicitation</u>	<u>4</u>
<u>Article III De Minimis Activities</u>	<u>4</u>
<u>Article IV Specific Listing of Unprotected and Protected Activities</u>	<u>4</u>
<u>Section A Unprotected Activities)</u>	
<u>Section B (Protected Activities)</u>	
<u>Section C (Activities Conducted Via the Internet)</u>	
<u>Article V Independent</u>	<u>10</u>
<u>Article VI Application of Destination State Law in Case of Conflict</u>	<u>11</u>
<u>Article VII Miscellaneous Practices</u>	<u>11</u>
<u>Section A (Application of Statement to Foreign Commerce)</u>	
<u>Section B (Application to Corporation Incorporated in State or to Person Resident or Domiciled in State)</u>	

Formatted: Font: Bold

Formatted: Indent: Left: 0", Hanging: 0.26"

Formatted: Tab stops: 3.75", Left

Formatted: Indent: Left: 1.49", First line: 0.51"

Section C (Registration or Qualification to Do Business)

Section D (Loss of Protection for Conducting Unprotected Activity During Part of Year)

Section E (Unitary Businesses)

Addendum—P.L. 86-272

13

INTRODUCTION

For purposes of this Statement, "Supporting State" means any State or any political subdivision of a State that either adopts this Statement or otherwise indicates support for this Statement by legislation or administrative action.

This Statement is intended set forth what the Supporting States agree is the proper application of Public Law 86-272, 15 U.S.C. §§381-384. It has no bearing on the application of constitutional nexus principles or state law limitations such as defining what constitutes doing business. Individual states may elect to shield persons from taxation, even in the absence of P.L. 86-272 immunity, by enacting a factor presence nexus statute. See, e.g., Factor Presence Nexus Standard for Business Activity Taxes, adopted by the Multistate Tax Commission on October 12, 2002).

Public Law 86-272, 15 U.S.C. 381-384, (hereafter P.L. 86-272) restricts prohibits a state from imposing a net income tax on the income of a person derived within its the state's borders from interstate commerce if the only business activities of the company within the state by or on behalf of the person 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 a person makes sales into a state, which is precluded by and P.L. 86-272 prohibits that state from taxing the income of the seller that person, such those 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 Supporting States 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 a determination of the fair meaning of that term in the first instance. The United States U.S. Supreme Court, has recently in Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992), established a standard for interpreting the term "solicitation" and this Statement has been revised to conform to such that standard. Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 112 S.Ct. 2447, 120 L.Ed.2d 174 (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 Supporting States will apply the principle that the

Formatted: Indent: Left: 0.99", First line: 0.51"

Formatted: Justified

Formatted: Font: Bold

Formatted: Space After: 0.15 pt

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Indent: Left: 1.99", First line: 0.51", Tab stops: 4.02", Left

Formatted: Indent: First line: 0.51"

preemption of state taxation that is required by P.L. 86-272 will be limited to those activities that fall within the "clear and manifest purpose of Congress." See *Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, 510 U.S. 332, ~~114 S.Ct. 843, 127 L. Ed.2d 165~~ (1994); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, ~~112 S.Ct. 2608, 120 L. Ed.2d 407, 422~~ (1992); *Heublein, Inc. v. South Carolina Tax Com.*, 409 U.S. 275, 281-282 (1972).

The Supreme Court recently opined, in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), as to when in-state business activity through the means of Internet transactions will create jurisdiction under the Commerce Clause. The Court's analysis in that opinion is relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of P.L. 86-272.

The following information reflects the signatory s Supporting States' current practices with regard to: (1) whether a particular factual circumstance is considered under P.L. 86-272 or permitted under this Statement as either protected or not protected 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. It is the intent of the signatory s Supporting States to apply this Statement uniformly to factual circumstances, irrespective of whether such application involves an analysis for jurisdictional purposes in the state into which such tangible personal property has been shipped or delivered or for throwback purposes in the state from which such property has been shipped or delivered. The application of P.L. 86-272 under this Statement affects the determination of whether a state into which tangible personal property is delivered (the "destination state") may tax the seller, but it also affects the determination of whether the state from which that property is shipped (the "origin state") may subject the related receipts to that state's throwback rule. It is the intent of the Supporting States to apply this Statement uniformly, irrespective of whether the purpose is to determine the ability of the destination state to impose tax on the seller or whether it is to determine if the origin state may properly subject the related receipts to its throwback rule.

I

NATURE OF PROPERTY BEING SOLD

Only the solicitation to sell tangible personal property is afforded immunity under P.L. 86272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles property, such as franchises, patents, copyrights, trade marks, service marks and the like, or any other type of property are not protected activities under P.L. 86-272.

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

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 minimis* activities described in Article III- and those activities conducted by independent contractors described in Article 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. Activities that a seller would engage in apart from soliciting orders ~~shall are~~ 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 those~~ activities ancillary to the 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 e~~Conducting of activities ~~not falling within the foregoing definition of that are neither~~ solicitation nor ancillary to 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 Statement.

Formatted: Justified, Indent: First line: 0.5", Space After: 0.15 pt, Line spacing: Multiple 1.03 li

III DE MINIMIS ACTIVITIES

De minimis activities are those activities 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 will not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with ~~the a~~ 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, and is otherwise not protected, then ~~such the~~ activity exceeds the protection of P.L. 86-272. Establishing that ~~the disqualifying unprotected~~ activities only account for a relatively small part of the business conducted within the taxing State is not determinative of whether the activities are de minimis level of activity exists. The relative economic importance of ~~the disqualifying unprotected~~ in-state activities, as compared to ~~the~~ protected activities, does not determine whether the conduct of the ~~disqualifying unprotected~~ 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

The following two listings - IV.A- and IV.B- - set forth the in-state activities that are presently treated by the ~~signatory s~~ Supporting States as "Unprotected Activities" or "Protected

Activities." ~~Such~~ These listings, as well as the contents of IV.C., may be subject to an amendment by addition or deletion that appears on the individual signatory state's Signature Page attached to this Statement. ~~[Note: a list of states that have adopted this Statement, together with a compilation of such additions and deletions, is available from the MTC]~~ amended by each Supporting State.

~~Each Supporting State may choose, in its discretion, to treat any in-state activity as protected, even if P.L. 86-272 does not required protection. The signatory state has included on the list of "Protected Activities" those in-state activities that are either required protection under P.L. 86-272; or, if not so required, that the signatory state, in its discretion, has permitted protection. The mere inclusion of an activity on the listing of "Protected Activities" by a state, therefore, is not a statement or admission by the signatory that state that said the activity is required any protection under the Public Law.~~

A. UNPROTECTED ACTIVITIES:

The following in-state activities (assuming they are not ~~of a de minimis level~~ activities) are not considered ~~as either~~ solicitation of orders, ~~or~~ ancillary thereto, or otherwise protected under P.L. 86-272 and will cause ~~sellers otherwise protected sales~~ to lose their ~~protection immunity~~ 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 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.
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) at any one location 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. Consigning 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 P.L. 86-272](#) or under paragraph IV.B: of this Statement).

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 will be determined as the company maintaining within this state an office or place of business attributable to the company or to its employee or representative in a representative capacity . However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the company shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the company or its employee or representative.

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

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 an~~ an 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. ~~[RESERVED.]~~ In-state activities performed by employees who telecommute or otherwise work remotely on a regular basis (unless the activities constitute the solicitation of orders for tangible personal property or are ancillary to solicitation).
21. Conducting any activity not listed in paragraph IV.B- below which is not entirely ancillary to requests for orders, even if ~~such the~~ the activity helps to increase purchases.

B. PROTECTED ACTIVITIES:

The following in-state activities will not cause the loss of protection for otherwise protected sales: ~~sellers to lose their immunity under the Public Law~~

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~~ the employee or representative 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~~ are protected if such solicitation activities are otherwise immune.
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.
9. Checking of customers' inventories without a charge therefor (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 at any one location within the state during the tax year.
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.
12. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.
13. Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by this Statement under paragraph IV.B-~~shall~~will not, by itself, remove the protection under this Statement.

C. ACTIVITIES CONDUCTED VIA THE INTERNET:

To determine whether a person that sells tangible personal property via the Internet is shielded from taxation by P.L. 86-272 requires the same analysis as with respect to persons that sell tangible personal property by other means. Thus, such a seller is shielded from taxation in the customer's state if the only business activity in which it engages in that state is the solicitation of

Formatted: Justified, Indent: Left: 0.75", Space After: 0 pt, Line spacing: Multiple 1.03 li

orders for sales of tangible personal property, which orders are sent outside that state for approval or rejection, and if approved, are shipped from a point outside of that state.

If such a seller engages in an activity via the Internet that: (i) extends beyond solicitation of orders for sales of tangible personal property, (ii) is neither ancillary to solicitation nor de minimis, and (iii) takes place in the customer's state, then P.L. 86-272 does not shield the seller from taxation by the customer's state.

As a general rule, when a company interacts with a customer via the company's website or app, the company engages in an activity in the customer's state. Presenting static text or photos on a website does not in itself constitute an activity in those states where customers are located.

Following are examples of activities conducted by a company that operates a website offering for sale only items of tangible personal property, unless otherwise indicated. In each case, customer orders are approved or rejected, and the products are shipped from a location, outside of the customer's state. The company has no contacts with the customer's state other than what is indicated. [Examples should not be interpreted to mean that other scenarios either are protected or not protected, since every scenario requires a separate assessment of all relevant facts.]

1. The company provides post-sale assistance to in-state customers by posting a list of static FAQs with answers on the company's website. This business activity does not defeat the company's P.L. 86-272 immunity because it does not take place in the state.

2. The company regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the company's website. This activity defeats the company's P.L. 86-272 immunity in states where the customers are located because this activity does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.

3. The company solicits and receives on-line applications for its branded credit cards via the company's website. Issued cards will generate interest income and fees for the company. This in-state business activity defeats the company's P.L. 86-272 immunity in states where the applications for cards are available to customers because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.

4. The company's website invites viewers in a customer's state to apply for non-sales positions with the company. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and resume. This in-state business activity defeats the company's P.L. 86-272 immunity in the customer's state because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.

5. The company places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information which will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. This in-state business activity defeats the company's P.L. 86-272 immunity because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.

6. The company places Internet “cookies” onto the computers or other devices of in-state customers. These cookies gather customer information that is only used for purposes entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller’s website, and to remind customers what products they have considered during previous sessions. This in-state business activity does not defeat the company’s P.L. 86-272 immunity because it is entirely ancillary to the in-state solicitation of orders for tangible personal property.

7. The company remotely fixes products previously purchased by in-state customers from the company by transmitting code or other electronic instructions to those products via the Internet. This in-state business activity defeats the company’s P.L. 86-272 immunity because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.

8. The company contracts with a marketplace facilitator that facilitates the sale of the company’s products on an on-line marketplace. The marketplace facilitator maintains inventory, including some of the company’s products, at fulfillment centers in various states where the company’s customers are located. This maintenance of the company’s products defeats the company’s P.L. 86-272 immunity in those states where the fulfillment centers are located—see Article V.

9. The company contracts with in-state customers to stream videos and music to electronic devices for a charge. This in-state business activity defeats the company’s P.L. 86-272 immunity because streaming does not constitute the sale of tangible personal property for purposes of P.L. 86-272.

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 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 protection.

Performance of in-state warranty service by the independent contractor on behalf of a seller shall also remove the statutory protection.

VI APPLICATION OF DESTINATION STATE LAW IN CASE OF CONFLICT

When it appears that two or more ~~signatory~~ Supporting States have included or will include the same receipts from a sale in their respective ~~sales receipts~~ factor numerators, at the written request of the company, ~~said these~~ states will ~~in good faith~~ confer with one another in good faith to determine which state should be assigned ~~said the~~ receipts. Such conference ~~shall will~~ identify what law, regulation or written guideline, if any, has been adopted in the destination state of destination with respect to the issue. The ~~state of destination state is the state in~~ shall be that location at which the purchaser or its designee actually receives the property, regardless of f.o.b. point or other conditions of sale.

In determining which state is to receive the assignment of the receipts at issue, preference ~~shall be is~~ given to any clearly applicable law, regulation or written guideline that has been adopted in the state of destination state. However, except in the case of the definition of what constitutes "tangible personal property," ~~this a Supporting State~~ is not required by this Statement to follow any other state's (including the destination state's) law, regulation or written guideline ~~should this state if it determines~~ that to do so (i) would conflict with its own laws, regulations, or written guidelines and (ii) would not clearly reflect the income-producing activity of the company within this state its borders.

Notwithstanding any provision set forth in this Statement to the contrary, ~~as between this state and any other signatory state, this~~ each Supporting State agrees to apply the destination state's definition of "tangible personal property" ~~that exists in the state of destination~~ to determine the application of P.L. 86-272 ~~and issues of as it relates to the origin state's throwback rule~~, if any. ~~Should If the destination state of destination not have any applicable, lacks a definition that would enable a determination of whether the sale in question is a sale of such term so that it could be reasonably determined whether the property at issue constitutes~~ "tangible personal property," then each ~~signatory~~ state may treat such property the sale in any manner that would clearly reflect the income-producing activity of the company within ~~said state its borders~~.

VII MISCELLANEOUS PRACTICES

A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE.

~~Public Law P.L.~~ 86-272 specifically applies, by its terms, to "interstate commerce" and does not directly apply to foreign commerce. The states are free, however, to apply the same standards set forth in the Public Law and in this Statement to business activities in foreign commerce to ensure that foreign and interstate commerce are treated on the same basis. Such an application also avoids the necessity of expensive and difficult efforts in the identification and application of the varied jurisdictional laws and rules existing in foreign countries.

~~This state~~The Supporting States will apply the provisions of ~~Public Law P.L.~~ 86-272 and of this Statement to business activities conducted in foreign commerce. Therefore, whether business activities are conducted by (i) a foreign or domestic company selling tangible personal property into a country outside of the United States from a point within ~~this a~~ state or by (ii) ~~either a foreign or domestic~~ company selling such property into ~~this a~~ state from a point outside of the United States, the principles under this Statement apply equally to determine whether the sales transactions are protected and the company is immune from taxation in either ~~this the~~ state or ~~in~~ the foreign country, as the case might be, and whether, if applicable, ~~this the~~ state will apply its throwback provisions.

B. 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 Statement do not apply to ~~any~~ corporation incorporated ~~within this~~ under the laws of the taxing state or to ~~any~~ person who is a resident of or domiciled in ~~this the~~ taxing state.

C. REGISTRATION OR QUALIFICATION TO DO BUSINESS.

A company that registers or otherwise formally qualifies to do business within ~~this a~~ state does not, by that fact alone, lose its protection under P.L. 86-272 in that state. Where, separate from ~~or ancillary to~~ such registration or qualification, the company receives and seeks to use or ~~protect otherwise assert a right to~~ any additional benefit ~~or protection~~ from ~~this a~~ state through activity not otherwise protected under P.L. 86-272 or this Statement, ~~such the~~ protection under P.L. 86-272 will ~~shall~~ be removed. [Delete second sentence? What is it addressing?]

D. 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 Statement ~~shall be~~ are determined on a tax year by tax year basis. Therefore, if at any time during a tax year the company conducts activities that are not protected under P.L. 86-272 or this Statement, ~~no sales in 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 Statement~~ the company will lose its immunity under P.L. 86-272 for the entirety of that year.

E. APPLICATION OF THE JOYCE RULE.

~~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 Statement, the principle established in *Appeal of Joyce, Inc.*, Cal. St. Bd. of Equal. (11/23/66), commonly known as the "Joyce Rule", shall apply. Therefore, 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.~~

**Addendum:
Public Law 86-272**

••• §381. Imposition of net income tax.

(a) Minimum Standards.

No state or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) Domestic corporations; persons domiciled in or residents of a State.

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to ----

- (1) any corporation which is incorporated under the laws of such State; or
- (2) any individual who, under the laws of such State, is domiciled in, or a resident, of such State.

(c) Sales or solicitation of orders for sales by independent contractors .

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) Definitions.

For purposes of this section ----

- (1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principle and who holds himself out as such in the regular course of his business activities; and
- (2) the term "representative" does not include an independent contractor.

•• §382. Assessment of net income taxes; limitations; collection.

- (a) No State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title.
- (b) the provisions of subsection (a) of this section shall not be construed ----
 - (1) to invalidate the collection, on or before September 14, 1959, of any net income tax imposed for a taxable year ending on or before such date, or
 - (2) to prohibit the collection, after September 14, 1959, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

•• §383. Definition.

For purpose of this chapter, the term "net income tax" means any tax imposed on, or measured by net income.

•• §384. Separability of provisions.

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.