



## ADOPTING RESOLUTION

### **Proposed Revisions to the Statement of Information Concerning Practices of the Multistate Tax Commission and Supporting States Under Public Law 86-272**

*WHEREAS*, the Multistate Tax Commission (Commission) approved the original Statement of Information Concerning Practices of the Multistate Tax Commission and Signatory States Under Public Law 86-272 (the Statement) in 1986, which was revised in 1993, 1994, and 2001; and

*WHEREAS*, the goal of the Statement is to provide notice to taxpayers of the interpretation and application of the federal statute and to provide for a more uniform and consistent application by the states; and

*WHEREAS*, on November 7, 2018, the Uniformity Committee determined to update the Statement and created a work group for that purpose; and

*WHEREAS*, on April 22, 2020, the Uniformity Committee approved proposed revisions to the Statement submitted by the work group; and

*WHEREAS*, on April 23, 2020 the Executive Committee instructed the Executive Director of the Commission to hold a public hearing on the proposed revisions; and

*WHEREAS*, the Executive Director appointed Robert J. Desiderio, Professor Emeritus, University of New Mexico School of Law, as the Hearing Officer; and

*WHEREAS*, on August 5, 2020, after a notice issued on June 9, 2020, a public hearing was held; and


*WHEREAS*, on November 20, 2020, the hearing officer provided his report to the Executive Committee, which approved the proposed revisions, with minor corrections, for a Bylaw 7 Survey; and

*WHEREAS*, a majority of the affected Compact Member States responded with approval to the Bylaw 7 survey;

now therefore, be it

RESOLVED, that the Multistate Tax Commission hereby approves the proposed revisions to the Statement, by vote taken in accordance with its Bylaws,

As attested this day, Aug. 4<sup>th</sup> of 2021.

  
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Gregory S. Matson,  
Executive Director  
Multistate Tax Commission



**Statement of Information Concerning Practices of  
Multistate Tax Commission and Supporting 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 August 4, 2021*

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## INTRODUCTION

In this Statement, “Supporting State” means a State that adopts or otherwise expressly indicates support for this Statement by legislation, regulation or other administrative action. Other states may adopt or otherwise indicate support for individual sections of this Statement.

This Statement addresses the application of Public Law 86-272, 15 U.S.C. §§381-384 (which is set forth in Addendum I). P.L. 86-272, which Congress adopted in 1959, prohibits a state from imposing a net income tax on the income of a person derived within the state from interstate commerce if the only business activities within the state conducted by or on behalf of the person consist of the solicitation of orders for sales of tangible personal property, provided that the orders are sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state.

In the decades since P.L. 86-272 was enacted, the way in which interstate business is conducted has changed significantly. Congress, however, has neither created a federal mechanism to provide administrative guidance to taxpayers nor has it updated the statute to indicate how it applies to new business activities. *See Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) (finding the statute’s minimum standard “to be somewhat less than entirely clear”). The contents of this Statement are intended to serve as general guidance to taxpayers and to provide notice as to how Supporting States will apply the statute.

This Statement is guided by the principle that sovereign authority of states to impose tax will not be preempted unless it is the “clear and manifest purpose of Congress” to do so. *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994). *See also Heublein, Inc. v. South Carolina Tax Comm’n*, 409 U.S. 275, 281-82 (1972) (noting that Congress must convey “its purpose clearly” or “it will not be deemed to have significantly changed the Federal-State balance”).

The Supreme Court recently opined, in *South Dakota v. Wayfair, Inc.*, construing the Commerce Clause, that an Internet seller “may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.” 138 S. Ct. 2080, 2095 (2018). Although the *Wayfair* Court was not interpreting P.L. 86-272, the Supporting States consider the Court’s analysis as to virtual contacts to be relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of the statute.

This Statement does not attempt to take into account limitations on the application of business income taxes other than P.L. 86-272, including those limitations that may be provided under state law. For example, the Multistate Tax Commission has adopted a model factor presence nexus statute and recommends that states adopt that statute to shield from taxation small businesses or businesses that have minimal contacts with the state. *See Factor Presence Nexus Standard for Business Activity Taxes*, adopted by the Multistate Tax Commission on October 12, 2002 (which is set forth in Addendum II).

Finally, P.L. 86-272 not only affects the determination of whether a state into which tangible personal property is delivered (the “destination state”) may tax the income of the seller, but it also affects the determination of whether the state from which tangible personal property is shipped (the “origin state”) may subject the related receipts to that state’s throwback rule. The Supporting

States intend to apply this Statement uniformly, irrespective of whether the destination state is determining whether it can tax the income of the seller, or whether the origin state, is determining whether the related receipts are subject to that state's throwback rule.

### **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 intangible property, such as franchises, patents, copyrights, trademarks, 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) entirely ancillary to solicitation of orders for sales of tangible personal property or (2) otherwise set forth as a protected activity under Section IV.B of this Statement is also not protected under P. L. 86-272.

### **II. SOLICITATION OF ORDERS AND ACTIVITIES ANCILLARY TO SOLICITATION**

For 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). 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. *See Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992).

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 are not ancillary to the solicitation of orders. The assignment of activities to sales personnel does not, merely by such assignment, make 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.

Activities that are neither solicitation of orders for sales of tangible personal property nor entirely ancillary to solicitation, and that are not *de minimis*, are not protected.

### **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 the policy is in writing or not) normally will not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with a state is measured on both a qualitative and quantitative basis. If an

activity either qualitatively or quantitatively creates a non-trivial connection with the taxing state, and is otherwise not protected, then the activity exceeds the protection of P.L. 86-272. Establishing that-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*. The relative economic importance of unprotected in-state activities, as compared to protected activities, does not determine whether the conduct of the-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 -- Section IV.A and Section IV.B -- set forth in-state activities that are presently treated by the Supporting States as "Unprotected Activities" or "Protected Activities." These listings, as well as the contents of Section IV.C, which addresses activities conducted via the Internet, may be-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 require protection, provided that the state treats such activity consistently for purposes of imposing tax and applying the state's throwback rule. The mere inclusion of an activity on the listing of "Protected Activities" by a state, therefore, is not a statement or admission by that state that P.L. 86-272 protects that activity.

##### **A. UNPROTECTED ACTIVITIES:**

The following in-state activities are not considered solicitation of orders for sales of tangible personal property, entirely ancillary thereto, or otherwise protected under P.L. 86-272:

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 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 business or to employees or agent(s) of the business 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 an 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 business or to the employee or representative of the company in an employee or representative capacity, (ii) so long as the use of the office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the business; or for such other activities that are protected under P.L. 86-272).

A telephone listing or other public listing within the state for the business or for an employee or representative of the business in such capacity or other indications through advertising or business literature that the business or its employee or representative can be contacted at a specific address within the state normally will be determined as the business maintaining within this state an office or place of business attributable to the business 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, street address, email address, telephone and fax numbers and affiliation with the business shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the business or its employee or representative.

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

For the purpose of this subsection it is not relevant whether the business pays directly, indirectly, or not at all for the cost of maintaining 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. Activities performed by an employee who telecommutes on a regular basis from within the state unless the activities constitute the solicitation of orders for sales of tangible personal property or are entirely ancillary to such solicitation.
21. Conducting an activity not listed in Section IV.B below which is not entirely ancillary to requests for orders, even if the activity helps to increase purchases.

**B. PROTECTED ACTIVITIES:**

The following in-state activities are protected:

1. Soliciting orders for sales of tangible personal property by any type of advertising.

2. Soliciting of orders for sales of tangible personal property by an in-state resident employee or representative of the business, so long as 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.
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 business'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 business's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers is protected if these 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 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 will not, by itself, remove the protection.



### **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 general analysis as with respect to persons that sell tangible personal property by other means. Thus, an Internet seller is shielded from taxation in the customer's state if the only business activity it engages in within that state is the solicitation of 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 the activities of such a seller within a state extend beyond solicitation of orders for sales of tangible personal property and are neither entirely ancillary to solicitation nor de minimis, P.L. 86-272 does not shield the seller from taxation by the customer's state.

As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state. However, for purposes of this Statement, when a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business's customers are located.

Following are examples of activities conducted by a business 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 business has no contacts with the customer's state other than what is indicated.

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

2. The business 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 business's website. For example, the business regularly advises customers on how to use products after they have been delivered. This in-state business activity defeats the business's P.L. 86-272 immunity in states where the customers are located because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

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

4. The business's website invites viewers in a customer's state to apply for non-sales positions with the business. 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 business’s P.L. 86-272 immunity in the customer’s state because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

5. The business places Internet “cookies” onto the computers or other electronic devices of in-state customers. These cookies gather customer search information that 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 business’s P.L. 86-272 immunity because it does not constitute, and is not entirely ancillary to, the in-state solicitation of orders for sales of tangible personal property.

6. The business 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. The cookies perform no other function, and these are the only types of cookies delivered by the business to its customers’ computers or other devices. This in-state business activity does not defeat the business’s P.L. 86-272 immunity because it is entirely ancillary to the in-state solicitation of orders for sales of tangible personal property.

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

8. The business offers and sells extended warranty plans via its website to in-state customers who purchase the business’s products. Selling, or offering to sell, a service that is not entirely ancillary to the solicitation of orders for sales of tangible personal property, such as an extended warranty plan, defeats the business’s P.L. 86-272 immunity—*see* Article I.

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

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

11. The business offers for sale only items of tangible personal property on its website. The website enables customers to search for items, read product descriptions, select items for purchase, choose among delivery options, and pay for the items. The business does not engage in

any in-state business activities that are not described in this example, such as the activities described in examples 2-5 and 7-10 above. This business activity does not defeat the business's P.L. 86-272 immunity because the business engages exclusively in in-state activities that either constitute solicitation of orders for sales of tangible personal property or are entirely ancillary to solicitation.

## **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 business or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the business's loss of immunity:

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

Sales representatives and others who represent a single principal are not considered to be independent contractors.

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the business, except for purposes of display and solicitation, removes the protection.

Performance of unprotected activities by an independent contractor on behalf of a seller, such as performing warranty work or accepting returns of products, also removes the statutory protection.

## **VI. APPLICATION OF DESTINATION STATE LAW IN CASE OF CONFLICT**

When it appears that two or more Supporting States have included or will include the same receipts from a sale in their respective receipts factor numerators, at the written request of the business, these states will confer with one another in good faith to determine which state should be assigned the receipts. Such conference will identify what law, regulation or written guideline, if any, has been adopted in the destination state with respect to the issue. The destination state is the state in 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 is given to any clearly applicable law, regulation or written guideline that has been adopted by the destination state. However, except in the case of the definition of what constitutes "tangible personal property," 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 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 business within its borders.

Notwithstanding any provision set forth in this Statement to the contrary, each Supporting State will apply the destination state's definition of "tangible personal property" to determine the application of P.L. 86-272 as it relates to the origin state's throwback rule, if any. If the destination state lacks a definition that would enable a determination of whether the sale in question is a sale of "tangible personal property," then each state may treat the sale in any manner that would clearly reflect the income-producing activity of the business within its borders.

## **VII. MISCELLANEOUS PRACTICES**

### **A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE.**

Congress explicitly applied P.L. 86-272 only to "interstate commerce." Therefore, by its terms, the statute does not apply to foreign commerce. *See Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149 (D.C. Cir. 1948) (explaining that Congress may choose to protect or regulate interstate but not foreign commerce). States, however, may elect to apply P.L. 86-272 in the context of foreign commerce. If a Supporting State applies P.L. 86-272 in the context of foreign commerce, it will do so consistently whether it is determining if activities of a foreign seller are protected or whether it is determining if sales into the foreign jurisdiction will be thrown back.

### **B. APPLICATION TO CORPORATION INCORPORATED IN STATE OR TO PERSON RESIDENT OR DOMICILED IN STATE.**

The protection afforded by P.L. 86-272 does not apply to a corporation incorporated under the laws of the taxing state or to a person who is a resident of or domiciled in the taxing state.

### **C. REGISTRATION OR QUALIFICATION TO DO BUSINESS.**

Merely registering or qualifying to do business within a state, without more, will not forfeit the protection that may otherwise apply under P.L. 86-272 in that state. Seeking to use or protect any additional benefit under state law through engaging in other activity not protected under P.L. 86-272 (such as protecting a trade secret or corporate name) will forfeit the protection.

### **D. LOSS OF PROTECTION FOR CONDUCTING UNPROTECTED ACTIVITY DURING PART OF TAX YEAR.**

The protection afforded by P.L. 86-272 is determined on a tax year by tax year basis. Therefore, if at any time during a tax year a business conducts activities that are not protected under P.L. 86-272, the business will not be considered protected under P.L. 86-272 for the entirety of that year.

**Addendum I - 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.

**Addendum II – MTC Factor Presence Nexus Standard for Business Activity Taxes**

*Approved by the Multistate Tax Commission October 17, 2002*

A. (1) Individuals who are residents or domiciliaries of this State and business entities that are organized or commercially domiciled in this State have substantial nexus with this State.

(2) Nonresident individuals and business entities organized outside the State that are doing business in this State have substantial nexus and are subject to [list appropriate business activity taxes for the state, with statutory citations] when in any tax period the property, payroll or sales of the individual or business in the State, as they are defined below in Subsection C, exceeds the thresholds set forth in Subsection B.

B. (1) Substantial nexus is established if any of the following thresholds is exceeded during the tax period:

(a) a dollar amount of \$50,000 of property; or

(b) a dollar amount of \$50,000 of payroll; or

(c) a dollar amount of \$500,000 of sales; or

(d) twenty-five percent of total property, total payroll or total sales.

(2) At the end of each year, the [tax administrator] shall review the cumulative percentage change in the consumer price index. The [tax administrator] shall adjust the thresholds set forth in paragraph (1) if the consumer price index has changed by 5% or more since January 1, 2003, or since the date that the thresholds were last adjusted under this subsection. The thresholds shall be adjusted to reflect that cumulative percentage change in the consumer price index. The adjusted thresholds shall be rounded to the nearest \$1,000. As used in this subsection, “consumer price index” means the Consumer Price Index for All Urban Consumers (CPI-U) available from the Bureau of Labor Statistics of the United States Department of Labor. Any adjustment shall apply to tax periods that begin after the adjustment is made.

C. Property, payroll and sales are defined as follows:

(1) Property counting toward the threshold is the average value of the taxpayer's real property and tangible personal property owned or rented and used in this State during the tax period. Property owned by the taxpayer is valued at its original cost basis. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals. The

average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(2) Payroll counting toward the threshold is the total amount paid by the taxpayer for compensation in this State during the tax period. Compensation means wages, salaries, commissions and any other form of remuneration paid to employees and defined as gross income under Internal Revenue Code § 61. Compensation is paid in this State if (a) the individual's service is performed entirely within the State; (b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or (c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

(3) Sales counting toward the threshold include the total dollar value of the taxpayer's gross receipts, including receipts from entities that are part of a commonly owned enterprise as defined in D(2) of which the taxpayer is a member, from

(a) the sale, lease or license of real property located in this State;

(b) the lease or license of tangible personal property located in this State;

(c) the sale of tangible personal property received in this State as indicated by receipt at a business location of the seller in this State or by instructions, known to the seller, for delivery or shipment to a purchaser (or to another at the direction of the purchaser) in this State; and

(d) The sale, lease or license of services, intangibles, and digital products for primary use by a purchaser known to the seller to be in this State. If the seller knows that a service, intangible, or digital product will be used in multiple States because of separate charges levied for, or measured by, the use at different locations, because of other contractual provisions measuring use, or because of other information provided to the seller, the seller shall apportion the receipts according to usage in each State.

(e) If the seller does not know where a service, intangible, or digital product will be used or where a tangible will be received, the receipts shall count toward the threshold of the State indicated by an address for the purchaser that is available from the business records of the seller maintained in the ordinary course of business when such use does not constitute bad faith. If that is not known, then the receipts shall count toward the threshold of the State indicated by an address for the purchaser that is obtained during the consummation of the sale, including the address of the purchaser's payment instrument, if no other address is available, when the use of this address does not constitute bad faith.



(4) Notwithstanding the other provisions of this Subsection C, for a taxpayer subject to the special apportionment methods under [Multistate Tax Commission Regulations IV.18.(d) through (j)], the property, payroll and sales for measuring against the nexus thresholds shall be defined as they are for apportionment purposes under those regulations. Financial institutions subject to an apportioned income or franchise tax shall determine property, payroll and sales for nexus threshold purposes the same as for apportionment purposes under the [MTC Recommended Formula for the Apportionment and Allocation of Net Income of Financial Institutions]. Pass-through entities, including, but not limited to, partnerships, limited liability companies, S corporations, and trusts, shall determine threshold amounts at the entity level. If property, payroll or sales of an entity in this State exceeds the nexus threshold, members, partners, owners, shareholders or beneficiaries of that pass-through entity are subject to tax on the portion of income earned in this State and passed through to them.

D. (1) Entities that are part of a commonly owned enterprise shall determine whether they meet the threshold for nexus as follows:

(a) Commonly owned enterprises shall first aggregate the property, payroll and sales of their entities that have a minimum presence in this State of \$5000 of combined property, payroll and sales, including those entities that independently exceed a threshold and separately have nexus. The aggregate number shall be reduced based on detailed disclosure of any intercompany transactions where inclusion would result in one State's double counting assets or revenue. If that aggregation of property, payroll and sales meets any threshold in Subsection B, the enterprise shall file a joint information return as specified by the [tax agency] separately listing the property, payroll and sales in this State of each entity.

(b) Those entities of the commonly owned enterprise that are listed in the joint information return and that are also part of a unitary business grouping conducting business in this State shall then aggregate the property, payroll and sales of each such unitary business grouping on the joint information return. The aggregate number shall be reduced based on detailed disclosure of any intercompany transactions where inclusion would result in one State's double counting assets or revenue. The entities shall base the unitary business groupings on the unitary combined report filed in this State. If no unitary combined report is required in this State, then the taxpayer shall use the unitary business groupings the taxpayer most commonly reports in States that require combined returns.

(c) If the aggregate property, payroll or sales in this State of the entities of any unitary business of the enterprise meets a threshold in Subsection B, then each entity that is part of that unitary business is deemed to have nexus and shall file and pay income or franchise tax as required by law.

(2) "Commonly owned enterprise" means a group of entities under common control either through a common parent that owns, or constructively owns, more than 50 percent of the voting power of the outstanding stock or ownership interests or through five or fewer individuals (individuals, estates or trusts) that own, or constructively own, more than 50 percent of the voting

power of the outstanding stock or ownership interests taking into account the ownership interest of each such person only to the extent such ownership is identical with respect to each such entity.

E. A State without jurisdiction to impose tax on or measured by net income on a particular taxpayer because that taxpayer comes within the protection of Public Law 86-272 (15 U.S.C. § 381) does not gain jurisdiction to impose such a tax even if the taxpayer's property, payroll or sales in the State exceeds a threshold in Subsection B. Public Law 86-272 preempts the state's authority to tax and will therefore cause sales of each protected taxpayer to customers in the State to be thrown back to those sending States that require throwback. If Congress repeals the application of Public Law 86-272 to this State, an out-of-state business shall not have substantial nexus in this State unless its property, payroll or sales exceeds a threshold in this provision.