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

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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, (hereafter (which is set forth in Addendum I). P.L. 86-272) restricts, which Congress adopted in 1959, prohibits a state from imposing a net income tax on the income of a person derived within its borders the state from interstate commerce if the only business activity of the company activities within the state consists conducted by or on behalf of the person consist of the solicitation of orders for sales of tangible personal property, which provided that the 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 In the decades since P.L. 86-272 requires a determination 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 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, 112 S.Ct. 223, 120 L.Ed.2d 174 (1992). In those cases where there may be reasonable differences of opinion (finding the statute’s minimum standard “to be somewhat less than entirely clear”). The contents of this Statement are intended to serve as to whether the disputed activity exceeds what is protected by P.L. 86-272, the signatory 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 the preemption of state taxation that is required by P.L. 86-272 will be limited to those activities that fall within sovereign authority of states to impose tax will not be preempted unless it is the “clear and manifest purpose of Congress”. —See” to do so. 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);). See also Heublein, Inc. v. South Carolina Tax Com., 409 U.S. 275, 281-282 (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.~~

~~The following information reflects~~ This Statement does not attempt to take into account ~~limitations on the signatory states’ current practices with regard to: (1) whether a particular factual circumstance is considered under application of business income taxes other than P.L. 86-272 or permitted under this Statement as either protected or not protected, 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 reason of the Multistate Tax Commission on October 12, 2002 (which is set forth in Addendum II).~~

~~Finally, P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another state for purposes of applying a 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 (if applicable) with respect to such sales. It is the intent of the signatory states. The Supporting States intend 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 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 purposes in the state from which such property has been shipped or delivered rule.~~

I

NATURE OF PROPERTY BEING SOLD

Only the solicitation to sell tangible personal property is afforded immunity under P.L. ~~86-272~~86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving ~~intangibles~~intangible property, such as franchises, patents, copyrights, ~~trade marks~~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 ~~the Section IV.B. hereof of this Statement~~ is also not protected under ~~Public Law~~P. L. 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. *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 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 conducting of activities not falling within the foregoing definition of 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.~~

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~~state. An activity conducted within a taxing ~~State~~state on a regular or systematic basis or pursuant to a company policy (whether ~~such the~~ 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 State a state is to be~~ measured on both a qualitative and quantitative basis. ~~If such an~~ activity either qualitatively or quantitatively creates a non-trivial connection with the taxing ~~State~~state, and is otherwise not protected, then ~~such the~~ activity exceeds the protection of P.L. ~~86272. 86-272~~. Establishing that ~~the disqualifying unprotected~~ activities only account for a relatively small part of the business conducted within the taxing ~~State~~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~~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 ~~the~~ in-state activities that are presently treated by the signatory state Supporting States as "Unprotected Activities" or "Protected Activities". ~~Such.~~ These listings, as well as the contents of Section IV.C, which addresses activities conducted via the Internet, 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. 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~~ Each Supporting State may choose, in its discretion, has permitted protection 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 ~~the signatory that~~ state that ~~said P.L. 86-272 protects that~~ 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~~) are not considered ~~as either solicitation of orders or for sales of tangible personal property, entirely ancillary thereto or otherwise protected under P.L. 86-272 and will cause, or otherwise protected sales to lose their protection under the Public Law; 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 ~~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~~business or to employees or agent(s) of the ~~company~~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 ~~any~~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 ~~company~~business or to the employee or representative of the company in an employee or representative capacity ~~-, and,~~ (ii) so long as the use of ~~such the~~ office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the

companybusiness; 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 companybusiness or for an employee or representative of the companybusiness in such capacity or other indications through advertising or business literature that the companybusiness or its employee or representative can be contacted at a specific address ~~within the state shall~~ normally will be determined as the companybusiness maintaining within this state an office or place of business attributable to the companybusiness 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 companybusiness shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the companybusiness or its employee or ~~representative~~.

The maintenance of any office or other place of business in ~~this~~the 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 companybusiness pays directly, indirectly, or not at all for the cost of maintaining ~~such inhome~~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.]~~

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 any activity not listed in ~~paragraph~~Section IV.B. below which is not entirely ancillary to requests for orders, even if ~~such~~the activity helps to increase purchases.

~~B.~~

B. PROTECTED ACTIVITIES:

The following in-state activities ~~will not cause the loss of protection for otherwise~~are protected ~~sales;~~

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 companybusiness, 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 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 company's business's goods.- For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers ~~would be~~ is protected if ~~such~~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 ~~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 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 extends beyond solicitation of orders for sales of tangible personal property and is 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 [SHOULD WE REPEAT THE NEW PARENTHETICAL IN EXAMPLE 2 HERE?] 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 (i.e., advice on how to use a product after the product has been delivered to the customer) via either electronic chat or email that customers initiate by clicking on an icon on the business's website. 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 ~~company~~business or its employees or other representatives. -Independent contractors may engage in the following limited activities in the state without the ~~company's~~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 ~~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~~business~~, except for purposes of display and solicitation, ~~shall remove~~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 ~~signatory states~~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~~business, 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 ~~state of~~ destination state with respect to the issue. -The ~~state of~~ destination ~~shall be that location at~~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 ~~shall be~~ is given to any clearly applicable law, regulation or written guideline that has been adopted ~~in state of by the~~ destination- state. However, except in the case of the definition of what constitutes "tangible personal property", ~~this state,~~ 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 determine 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 business~~ 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 state agrees to apply the~~ each Supporting State will 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 state of destination not have any applicable state lacks a definition of such term so that it could be reasonably determined that would enable a determination of whether the property at issue constitutes sale in question is a sale of "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 business~~ within said state, its borders.

VII MISCELLANEOUS PRACTICES

A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE.

~~Congress explicitly applied P.L. 86-272 only~~ Public Law 86-272 specifically applies, by its terms, to "interstate commerce" ~~and.~~ Therefore, by its terms, the statute does not ~~directly~~ apply to foreign commerce. ~~The states are free~~ See Border Pipe Line Co. v. Fed. Power Commission, 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 the same standards set forth P.L. 86-272 in the Public Law and context of foreign commerce. If a Supporting State applies P.L. 86-272 in this Statement to business the context of foreign commerce, it will do so consistently whether it is determining if 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. a foreign seller

~~This state will apply the provisions of Public Law 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 state or by (ii) either company selling such property into this 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 immune from taxation in either this state or in the foreign country, as the case might be,~~

~~and whether, if applicable, this state will apply its throwback provisions 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 ~~and the provisions of this Statement do not~~ does not apply to ~~any~~ any corporation incorporated ~~within this~~ under the laws of the taxing state or to ~~any~~ 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~~
~~Merely registering or qualifying~~ to do business within ~~this~~ a state ~~does, without more, will not, by that fact alone, lose its~~ forfeit the protection that may otherwise apply under P.L. 86-272. ~~Where, separate from or ancillary to such registration or qualification, the company receives and seeks in that state. Seeking to use or protect any additional benefit or protection from this under state law through engaging in other activity not otherwise protected under P.L. 86-272 or this Statement, (such as protecting a trade secret or corporate name) will forfeit the protection shall be removed.~~

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

The protection afforded ~~under by~~ under P.L. 86-272 ~~and the provisions of this Statement shall be~~ is determined on a tax year by tax year basis. ~~Therefore, if at any time during a tax year the company a business 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 business will not be considered protected under P.L. 86-272 for the entirety of that year.~~

~~APPLICATION OF THE JOYCE RULE.~~

~~E.~~

~~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: I:

Public Law 86-272 ~~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 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~~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~~ 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~~ 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~~ 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 ~~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

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.