

[Draft 2: 2/4/2020]

## 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. 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. Article IV.C of this Statement indicates that certain business activities conducted via the Internet are protected by P.L. 86-272; the Supporting States recognize, however, that in some cases an alternative interpretation concluding that these activities are unprotected might not be unreasonable. *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.”).

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 Com.*, 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” and called these virtual connections to the state “substantial.” 138 S. Ct. 2080, 2095 (2018). Although the Court was not interpreting P.L. 86-272, the Supporting States consider the Court’s analysis in that opinion 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.