

Multistate Tax Commission



May 3, 1996

TO: Dan R. Bucks, Executive Director

FROM: Michael Mazerov, Director of Policy Research

SUBJECT: Updated Status Report Regarding State Adoption of "Phase II" Revision of Public Law 86-272 "Statement of Information" (Please dispose of earlier versions of this memorandum).

As of the above date, the revenue directors of the following States have indicated that the "Phase II" revision of the "Statement of Information of Multistate Tax Commission and Signatory States Under Public Law 86-272" adopted by the MTC on July 29, 1994 (hereafter, "Phase II Statement"), represents their State's construction of said Public Law:

Alabama
Arizona
Arkansas
California
Colorado
Hawaii
Idaho
Louisiana
Montana
New Jersey
New Mexico
North Dakota
Oregon
Rhode Island
Utah

All of the above-named States except Alabama, Arizona, California, Oregon, Rhode Island, and Utah adopted the "Phase II Statement" without exception or addition.

State-Specific Exceptions and Additions

Alabama: In adopting the "Phase II Statement" as Reg. 810-27-1-4-.19, Alabama added the underlined text in the following phrase to paragraph 16.(v) under "Unprotected Activities": "16. Owing, leasing, using or maintaining any of the following facilities or property in-state: . . . (v) Meeting place for directors, officers, or employees when done on a regular or systematic basis

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during the tax year. Alabama deleted paragraph 19. under "Unprotected Activities" in the "Phase II Statement" ("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.") and substituted the following : "19. Selling or otherwise transferring intangible personal property which is neither an isolated or transient event nor intrinsic in the related tangible personal property sold or transferred within the state." With respect to Article VI of the "Phase II Statement," "Application of Destination State Law in Case of Conflict," Alabama's regulation substitutes "may" for "will" and "shall" where they appear in the following phrases in the "Phase II Statement": "will confer in good faith"; "shall identify what law, regulation, or written guideline, if any, has been adopted in the state of destination"; "preference shall be given to any clearly applicable law". Alabama entitled its version of Article VII (e) "Application of Attributional Nexus" rather than "Application of the *Joyce Rule*." Finally, Alabama deleted limited prefatory material from some Articles of the "Phase II Statement."

Arizona: In adopting the "Phase II Statement" as Arizona Corporate Tax Ruling CTR 95-2 (dated March 13, 1995), Arizona deleted Section VII.E., "Application of the *Joyce Rule*", and substituted the following language: "Application of the Finnigan/Airborne Navigation Rule. Pursuant to the principle reported in *Airborne Navigation Corporation v. Arizona Department of Revenue*, Feb. 5, 1987, CCH Ariz. Tax Reports, Paragraph 200-744, when a group of companies is conducting a unitary business and a part of that unitary business is conducted within this state, the activities of all members of the unitary group will be included in both the numerator and denominator of the sales factor." Arizona also modified Section VI ("Application of Destination State Law in Case of Conflict") of the MTC "Phase II Statement." The MTC Statement provides that "When it appears that two or more signatory states have included or will include the same receipts from a sale in their respective sales factor numerators, at the written request of the company, said states will in good faith confer with one another to determine which state should be assigned said receipts" Arizona's ruling provides that, under these circumstances, Arizona "may review what law, regulation, or written guideline, if any, has been adopted in the state of destination with respect to the issue." In addition, the MTC Statement provides that, "Should the state of destination not have any applicable definition of such term [tangible personal property] so that it could be reasonably determined whether the property at issue constitutes "tangible personal property", then each signatory state may treat such property in any manner that would clearly reflect the income-producing activity of the company within said state." Arizona substituted for this sentence, the following: "Should the state of destination not have any applicable definition of such term then this state shall treat such property in a manner that will clearly reflect the income-producing activity of the company within this state."

California: Due to its *Finnigan* decision, California did not adopt VII E., "Application of the *Joyce Rule*." California also did not adopt VII A., "Application of Statement to Foreign Commerce", and substituted for this paragraph the following: "A. Sales in Foreign Commerce Public Law 86-272 does not apply to sales made in foreign commerce. California will apply the standards required by the United States Constitution to sales made in foreign commerce for the purpose of determining whether such activity is immune from taxation in the foreign jurisdiction."

Oregon: Oregon did not adopt IV A.20, which provides that "unprotected activities" includes: "Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser."

Rhode Island: In adopting the "Phase II Statement" as Regulation CT95-2 (effective April 1, 1995), Rhode Island substituted its own prefatory material for the prefatory material that precedes "I. Nature of Property Being Sold" in the "Phase II Statement." Rhode Island also deleted the two paragraphs that precede the list of "Unprotected Activities" in the "Phase II Statement" as well as Section VI., "Application of Destination State Law in Case of Conflict" and Section VII. A. "Application of Statement to Foreign Commerce." Rhode Island also added new material as Section VII. Nexus of Corporate Partners." Finally, Rhode Island took the language in the "Phase II Statement" listing as an "unprotected activity": "Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser" and included it instead in the list of "protected activities." (There are a few additional minor language differences between the Rhode Island regulation and the "Phase II Statement").

Utah adopted the "Phase II Statement" in substantial part as Rule R865-6F-6, effective April 23, 1996. The lists of "protected" and "unprotected" activities are substantially similar. However, the prefatory material is structured differently and much of the information regarding treatment of in-home offices is treated in a separate definitions section. In addition, rather than incorporating the following language included in the "Phase II Statement":

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 ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under the Public Law:

Utah substituted the following:

The following in-state activities, assuming they are not of a *de minimis* level, will constitute doing business in Utah under P.L. 86-272 and will subject the corporation to the Utah corporation franchise tax.

Other State Action

The State of Maine has adopted a comprehensive corporate income tax nexus rule, Rule No. 808 (08-125 CMR 808) effective October 2, 1994. Maine's rule incorporates in substantially similar (although not identical) form the lists of "Unprotected Activities" and "Protected Activities" contained in Article IV. of the "Phase II Statement." One substantive difference between the lists contained in the Maine rule and the "Phase II Statement" is Maine's addition of the following language to the list of "Unprotected Activities":

"19. Owning an interest in any partnership, grantor trust, or other pass-through entity whose activities, if conducted directly by a foreign corporation, would give Maine jurisdiction over the foreign corporation, unless the activities of the pass-through entity are limited to solicitation protected by P.L. 86-272."

States Adopting the "Phase I Statement"

On January 22, 1993, the Executive Committee of the MTC recommended State adoption of a "Phase I" revision to the MTC's 1986 P.L. 86-272 Guideline intended to ensure its conformity with the U.S. Supreme Court decision in *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, ___ U.S. ___, 112 S. Ct. 2447 (1992). The following States adopted this "Phase I" "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272" (hereafter "Phase I Statement"), but have not yet acted on the "Phase II Statement": Connecticut, District of Columbia, Florida, Illinois, Kansas, Missouri, South Dakota, Tennessee, and Texas.

Connecticut, Kansas, and Texas adopted the "Phase I Statement" with exceptions or additions. Connecticut adopted the "Phase I Statement" with the following exception: "To the extent that the provisions of this Statement of Information are inconsistent with Conn. Agencies Regs. §12-214-1(a), the provisions of this Statement of Information are not adopted. The provisions of Conn. Agencies Regs. §12-214-1(a) are to be construed so as not to conflict with *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. ___, 112 S. Ct. 2447 (1992)." Kansas adopted the "Phase I Statement" with additional language: "This Statement shall be construed in a manner that follows K.A.R. 92-12-112."; and the addition of "by or on behalf" to paragraph 1, line 4, which would then read as follows: "Public Law 86-272, 15 U.S.C. 381-384 (hereafter P.L. 86-272) restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity by or on behalf of the company within the state consists of the solicitation of orders. . . ." Texas adopted the "Phase I Statement" (as 34 TAC 3.554) with the following addition to the list of "Non-Immune Activities": "(20) conducting any activity listed as doing business in §3.546 of this title (relating to Taxable Capital: Nexus), which is not protected by Public Law 86-272. . . ."