H.R. 8021: More Preemption of State Taxing Authority

Posted on Nov. 6, 2024

By Richard L. Cram

Richard L. Cram is the director of the Multistate Tax Commission's National Nexus Program in Washington. Before that, Cram served as the director of policy and research in the Kansas Department of Revenue. The author thanks Helen Hecht, MTC uniformity counsel, and Bruce Fort, MTC senior counsel, for their generous help and suggestions concerning the article.

In this article, Cram says that recently introduced federal legislation (H.R. 8021) would dramatically expand P.L. 86-272's preemption of state taxing authority by broadening the range of protected activities that out-of-state sellers could engage in.

RICHARD L. CRAM

U.S. Rep. Scott Fitzgerald, R-Wis., and other Wisconsin lawmakers[1] introduced legislation (H.R. 8021) on April 16 to amend P.L. 86-272[2] by defining the term "solicitation of orders" and significantly expanding the scope of out-of-state seller activities considered protected from a state's net income tax. P.L. 86-272 preempts those taxes if the out-of-state seller of tangible personal property limits its in-state business activities to "solicitation of orders" — a term it does not define. "Without clear and concise guidance, overzealous states can pursue tax revenue from business owners simply for having a website," Fitzgerald claimed,[3] apparently reacting to some states' adoption of guidance from the "Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272"[4] (MTC statement).[5] The MTC statement provides generally that an out-of-state seller's interactions with in-state customers via apps or the seller's website should be considered business activities conducted in the taxing state for purposes of P.L. 86-272. The MTC statement cites examples of virtual interactions that are either protected solicitation activities or unprotected nonsolicitation activities, based on guidance from *Wrigley*,[6] which construed the term "solicitation of orders." *Wrigley* developed the "independent business function" test to determine whether certain in-state conduct by an out-of-state seller is protected under P.L. 86-272.[7] H.R. 8021 would legislatively overrule that test, expanding the scope of activities considered to be solicitation of orders to essentially include whatever a particular industry wants its salespeople to do.[8]

Fitzgerald seems concerned with states pursuing out-of-state sellers for income tax based solely on their virtual interactions with customers. But legislatively overruling *Wrigley* would instead massively

expand the scope of activities included in the term "solicitation of orders," whether those activities involve virtual or in-person interactions.

H.R. 8021 was introduced shortly before oral arguments[9] in the Minnesota Supreme Court's review of *Uline*,[10] a Minnesota Tax Court decision upholding the revenue commissioner's income tax assessment against Uline Inc., an industrial and packaging product business located in Wisconsin. Uline sent sales representatives into Minnesota and claimed protection from tax under P.L. 86-272. The state supreme court affirmed the tax court,[11] determining that Uline's sales representatives performed market research in Wisconsin, which was unprotected nonsolicitation activity under the independent business function test.

This article:

- reviews the background of P.L. 86-272;
- discusses *Wrigley* and explains its independent business function test;
- summarizes the MTC statement, describes how its guidance is based on the independent business function test, and identifies the states that have adopted that guidance;
- reviews *Uline* and *Santa Fe*,[12] recent decisions correctly applying the independent business function test; and
- shows how H.R. 8021 would broaden P.L. 86-272's preemption of state taxing authority far beyond the parameters established in *Wrigley*.

P.L. 86-272 Background

Before the New Deal era, the U.S. Supreme Court viewed the commerce clause as prohibiting states from taxing interstate commerce.[13] The Court drew a sharp distinction between drummers (itinerant salespeople who locally solicited orders for goods later shipped to the customer from out of state) and peddlers (itinerant salespeople carrying goods for delivery to the customer immediately upon sale). By making in-state sales, peddlers were considered to be engaged in intrastate commerce and subject to state and local taxation, whereas drummers — who were only taking orders for sales later fulfilled from out of state — were considered to be engaged in interstate commerce and immune from those taxes.[14] In 1959 Congress grew concerned after the Court decided *Portland Cement*[15] (upholding Minnesota's apportioned income tax on an out-of-state business that conducted primarily solicitation activities in the state) and dismissed or denied certiorari in appeals of two Louisiana court decisions upholding state income taxation of out-of-state businesses carrying on in-state solicitation activities.[16] The Court's shift in these cases raised fears that a company whose only contacts with a state consisted of sending in drummers could lawfully be subjected to that state's income tax.[17] P.L. 86-272 was soon enacted, essentially codifying the drummer-versus-peddler distinction.[18]

P.L. 86-272 provides in relevant part:

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).[19]

Subparagraph (1) protects the out-of-state seller's or representative's in-state direct solicitation of customers when the orders taken are approved out of state and the purchased merchandise is shipped or delivered to the in-state customer. Subparagraph (2) protects in-state solicitation of customers of the out-of-state seller's wholesale customers, requesting that purchases be made from those wholesalers (labeled missionary[20] sales).

Wrigley

Until *Wrigley*, state tax authorities and businesses struggled to understand the scope of in-state activities that an out-of-state business could engage in as "solicitation of orders" and still be protected from tax by P.L. 86-272.[21] In *Wrigley*, the Wisconsin Department of Revenue assessed apportioned income tax against Wrigley, a Chicago-based chewing gum manufacturer with sales representatives in Wisconsin. Wrigley claimed protection from Wisconsin's income tax under P.L. 86-272. The case focused on whether Wrigley's Wisconsin activities fell within "solicitation of orders." The DOR contended that the term should be narrowly construed to include only explicit requests for orders;[22] Wrigley argued for a broader interpretation that would include any activities "customarily performed by sales[people]."[23]

The Court rejected the DOR's narrow interpretation, which "would reduce section 381(a)(1) to a nullity."[24] The Court also rejected Wrigley's broad interpretation — otherwise, "solicitation of orders" would include "whatever a particular industry wants its sales[people] to do."[25] The Court construed the term to include not only explicit requests for orders "but also any speech or conduct that implicitly invites an order"[26] and "activities that are *entirely ancillary* to requests for purchases — those that serve no independent business function apart from their connection to the soliciting of orders."[27] Activities that the company would have engaged in anyway but chose to allocate to its in-state sales force fail the *Wrigley* independent business function test and fall outside of protected solicitation of orders conduct.

Wrigley's regional sales manager resided in Wisconsin and supervised the sales representatives — recruiting, training, evaluating, and meeting with them in homes or hotel rooms, and at times helping to resolve credit disputes with important accounts. Wisconsin sales representatives were each

provided a car and gum inventory valued at about $1,000, display racks, and promotional literature, which the sales representative stored and used as needed. Sales representatives would provide free display racks to retailers, help locate them in the stores and fill the racks with the retailers' gum inventory or stock the racks with the sales representatives' gum if the retailers' inventory was insufficient. When sales representatives used their own gum to stock the display racks, they would issue "agency stock checks" to the retailers and send copies to Wrigley or to wholesalers servicing the retailers, and the retailers would be billed for that gum. Sales representatives also inspected the retailers' gum inventory and removed any stale gum, replacing it with fresh gum free of charge.[28]

The Court found a mixture of solicitation or "ancillary to solicitation" activities along with nonsolicitation activities. The "ancillary to solicitation" activities included in-state recruitment, training, and evaluation of sales representatives; use of hotels and homes for sales-related meetings; sales representatives' staying in hotels and using cars and phones in making sales calls; displaying samples; and manager intervention in credit disputes involving important accounts.[29]

The Court identified sales representatives' replacement of retailers' stale gum, supplying gum to retailers through agency stock checks, and in-state storage of gum inventory as nonsolicitation activities[30]:

Wrigley would wish to attend to the replacement of spoiled product whether or not it employed a sales force. Because that activity serves an independent business function quite separate from requesting orders, it does not qualify for [section] 381 immunity.[31]

. . . .

Wrigley *made the retailers pay for the gum,* thereby providing a business purpose for supplying the gum quite independent from the purpose of soliciting consumers. Since providing the gum was not entirely ancillary to requesting purchases, it was not within the scope of "solicitation of orders." And because the vast majority of the gum stored by Wrigley in Wisconsin was used in connection with stale gum swaps and agency stock checks, that storage (and the indirect rental of space for that storage) was in no sense ancillary to "solicitation."[32]

With Wrigley conducting nonsolicitation activities in Wisconsin that were not de minimis,[33] P.L. 86-272 immunity did not apply, and Wrigley's apportioned income was properly subject to Wisconsin's income tax.

The Court described other activities falling outside of protected "solicitation of orders" conduct, including sales representatives routinely approving orders or making sales on the spot; their accepting payments on past-due accounts;[34] or the company maintaining an office in the state.[35] The Court gave an example of an activity failing the independent business function test: assigning to sales representatives the activity of making repairs or servicing purchased items. The Court acknowledged that such an activity "may help to *increase* purchases; but it is not ancillary to *requesting purchases,* and cannot be converted into 'solicitation' by merely being assigned to sales[people]."[36] Repairing and servicing purchased items would have an independent business

function: The company would want to engage in that activity anyway, aside from requesting orders, to build goodwill with customers.

The *Wrigley* independent business function test provided sorely needed, practical guidance to courts in sorting out sales representative conduct between protected solicitation activity and unprotected nonsolicitation activity.

MTC Statement

The MTC comprises tax agency heads of its member states that have adopted the Multistate Tax Compact,[37] as well as other member states that participate in its programs. Its mission is to promote uniform and consistent tax policy and administration among the states, assist taxpayers in achieving compliance with existing tax laws, and advocate for state and local sovereignty in the development of tax policy. The MTC statement is intended to provide guidance to taxpayers on how supporting states apply P.L. 86-272 and to encourage uniform and consistent application by states. It was initially issued in 1986 and has been updated several times, most recently in August 2021.

The MTC statement provides a list of out-of-state seller activities that — if conducted in the taxing state — are not protected by P.L. 86-272, and another list of protected activities. Those lists reflect adherence to the independent business function test for determining whether activities are protected as ancillary to solicitation or are unprotected. The August 2021 revision adds a list of examples of various types of virtual interactions between an out-of-state seller and in-state customer, indicating whether those activities are protected or unprotected based on that same test. The MTC statement quotes *Wayfair*[38] in stating that for commerce clause purposes, 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."

Although P.L. 86-272 was not at issue in *Wayfair*, the MTC statement considers *Wayfair* relevant to the question of whether virtual interaction between an out-of-state seller and in-state customer should be considered engaging in business activities in that state for purposes of P.L. 86-272. The MTC statement's revised guidance derives from the general rule that "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."[39]

Examples of unprotected nonsolicitation activities in the MTC statement include:

- soliciting and receiving online applications for branded credit cards via the business's website;
- inviting website viewers to apply for nonsales positions with the out-of-state seller;
- remotely fixing or upgrading products previously purchased by in-state customers;
- offering and selling extended warranty plans to in-state customers via the website; and
- using cookies to 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.

Although these activities may increase customer goodwill and sales, they are obviously not entirely ancillary to solicitation. Each has an independent business function. Some examples of protected solicitation activities include providing post-sale assistance to in-state customers by posting a list of static frequently asked questions with answers on the business's website; using cookies to gather customer information that is only used for purposes entirely ancillary to the solicitation of orders of tangible personal property; and offering for sale only items of tangible personal property on the business's website.

Some practitioners have raised concerns with the MTC statement's treatment of virtual interactions between out-of-state sellers and in-state customers as in-state business activities under P.L. 86-272.[40] But they have not challenged as incorrect the MTC statement's application of the independent business function test to categorize those activities in the examples provided as either protected solicitation conduct or unprotected nonsolicitation conduct.

The California Franchise Tax Board,[41] the New York State Department of Taxation and Finance,[42] and the New Jersey Division of Taxation[43] have adopted parts of the MTC statement. The American Catalog Mailers Association (ACMA) successfully challenged in state court the FTB's adoption of parts of the MTC statement for failure to comply with the Administrative Procedure Act provisions concerning regulation promulgation.[44] The board did not appeal that decision.[45]

The ACMA substantively challenged the New York State Department of Taxation and Finance's adoption by regulation of parts of the MTC statement, filing a complaint in state court alleging that the department's recent implementation of regulations based on the MTC statement is invalid as an attempt to rewrite P.L. 86-272.[46] The ACMA claims that treating an out-of-state seller's non-solicitation-related internet interaction with New York customers (like online interactive chat assistance for customers, soliciting and obtaining employment or credit card applications, selling warranties, remotely fixing products, using cookies for product development purposes, and so forth) as occurring in New York violates P.L. 86-272.[47] The ACMA does not argue that the internet interactions listed as unprotected in the regulation should be considered protected as solicitation of orders. The ACMA's motion for summary judgment filed in August remains pending,[48] so no court has yet considered whether internet interaction between an out-of-state seller and in-state customer constitutes activities within the state for purposes of P.L. 86-272.

Uline and *Santa Fe*

Uline and *Santa Fe* are recent state court decisions relying on *Wrigley* guidance to correctly determine that out-of-state businesses conducted nonsolicitation activities with an independent business function in the taxing state, thereby losing P.L. 86-272 protection.

In *Uline*, sales representatives regularly visited customers in Minnesota. They were required to prepare a sales note after every customer visit and at least two market news notes per week. Sales notes included information about the visit, the customer's business, product needs, and contact information. Market news notes included customer product and delivery needs, product or service complaints, and information on products customers bought from competitors — like the

manufacturer, brand, pricing, lead time, payment terms, rebates, and discounts. Two dozen sales representatives prepared approximately 1,600 market news notes during the two-year audit period. The market news notes were entered into a shared database that Uline's other departments regularly accessed.

The commissioner's audit staff assessed Uline for income tax, determining that the sales representatives' preparation of market news notes amounted to market research that went beyond mere solicitation of orders and was not de minimis activity.[49] Uline contested the assessment, arguing that its sales representatives' activities in Minnesota were limited to soliciting orders; any market research activity was de minimis and protected by P.L. 86-272. The Minnesota Supreme Court affirmed the tax court decision,[50] agreeing with the commissioner that the sales representatives' market research activity went beyond solicitation, so any protection under P.L. 86-272 was lost.

The court applied the independent business function test to determine whether the sales representatives' preparation of market news notes was entirely ancillary to requests for purchases, or an activity that Uline would have reason to engage in anyway but chose to allocate to its in-state sales force. The court determined that although "this information would be *helpful* to sales representatives in their endeavor to solicit orders,"[51] Uline "had good reason to prepare the Notes whether it has a sales force or not."[52] Observing that the market news notes "detail information more relevant to *other* departments in the company than to the sales department,"[53] the court held that this activity was not protected by P.L. 86-272.[54] Although market research is certainly an activity that can increase sales generally by expanding the seller's knowledge of the market, it has an independent business function separate from solicitation of orders from customers. As *Wrigley* stated: "It is not enough that the activity facilitate *sales*; it must facilitate the *requesting of sales*."[55]

In *Santa Fe*, the Oregon Supreme Court affirmed[56] the Oregon Tax Court[57] and the DOR's income tax assessment against Santa Fe Natural Tobacco Co., a New Mexico corporation that sold tobacco products to wholesalers, including some in Oregon. Santa Fe had no offices or inventory in Oregon but regularly sent employee sales representatives there to solicit retailers to place tobacco product orders with Santa Fe's wholesale customers. Thus, the missionary sales provision in P.L. 86-272[58] was at issue.[59]

The representative could leave a sell sheet order with the retailer, which he would fill out with the products and quantities to be ordered from the wholesaler. The retailer would send the sell sheet order to the wholesaler if the retailer followed through with the order. The representative could also fill out and take a rebook order from the retailer, which the retailer would sign and the representative would then send to the wholesaler. If a wholesaler received a prebook order from a representative, it was contractually obligated to accept and process that order under its incentive agreement with Santa Fe.[60] Otherwise, the wholesaler was subject to substantial penalties. Under the incentive agreement, a wholesaler received rebates for each cigarette carton sold to a retailer. But if the wholesaler breached the incentive agreement by failing to accept and process prebook orders, Santa Fe could discontinue future rebates and require the wholesaler to repay previous rebates received.[61] Santa Fe also trained its representatives to emphasize the prebook orders to retailers and

established prebook order goals for them. The representatives placed an average of 13.3 prebook orders per month from Oregon retailers during the audit period.[62]

The Oregon Supreme Court court determined that the representatives' activities in obtaining prebook orders from retailers went beyond the scope of solicitation of orders, because the incentive agreement required wholesalers receiving these prebook orders to accept and process them.[63] The representatives were actually facilitating sales with the prebook orders, not merely soliciting orders, because the wholesalers were contractually required to accept those prebook orders.[64] The court determined that Santa Fe was using prebook orders the same way that Wrigley had used agency stock checks.[65] Santa Fe's representatives were using prebook orders to require wholesalers to sell those products, thus facilitating those sales and exceeding the scope of solicitation of orders.[66] The court also determined that this activity was not de minimis.[67]

The court applied the independent business function test in determining that Santa Fe's representatives' use of prebook orders and the wholesalers' contractual obligation to accept and process them was not an activity entirely ancillary to solicitation: "The prebook order process, as set up by the incentive agreements, instead served an 'independent business function apart from their connection to the soliciting of orders.'"[68] Santa Fe's representatives went beyond "requesting sales and into facilitating sales on behalf of wholesalers."[69] In essence, the court viewed Santa Fe as a peddler for purposes of P.L. 86-272, based on its prebook orders policy.

H.R. 8021

H.R. 8021 would define the term "solicitation of orders" in P.L. 86-272 as follows: "Any business activity that facilitates the solicitation of orders even if that activity may also serve some independently valuable business function apart from solicitation." As noted, under *Wrigley*, if the activity in question has an independent business function apart from solicitation, then that activity is not ancillary to solicitation and is not protected. H.R. 8021's proposed amendment to P.L. 86-272 would legislatively overrule *Wrigley* and dispose of the independent business function test.

By eliminating that test, H.R. 8021 would ignore *Wrigley*'s rejection of the broad interpretation of solicitation of orders offered by Wrigley in that case. Such an interpretation would include as protected conduct all activities routinely associated with solicitation or customarily performed by salespeople.[70] It would disregard the Supreme Court's concern that such a broad interpretation would "render the limitation of section 381(a) toothless, permitting 'solicitation of orders' to be whatever a particular industry wants its sales[people] to do."[71]

Under H.R. 8021, a court applying the proposed definition of solicitation of orders could no longer differentiate between activities that serve "no independent business function apart from their connection to the soliciting of orders"[72] and those "that the company would have reason to engage in any way but chooses to allocate to its in-state sales force."[73] Any activity "that facilitates the solicitation of orders" will fall within the definition — even if it has a significant independent business purpose apart from solicitation. A court interpreting H.R. 8021 would have no way to separate

activities that generally increase sales — like simply building customer goodwill — from those that are ancillary to requesting purchases under the *Wrigley* criteria.

H.R. 8021 would obliterate the peddler-versus-drummer distinction codified in P.L. 86-272. Had the legislation been in place at the time of the *Uline* and *Santa Fe* decisions, both results would probably be different. Market research or taking prebook orders could likely qualify as protected conduct. If the activity merely facilitates or increases sales, then it may well fit within the H.R. 8021 definition of solicitation of orders. Any activity customarily performed by a sales representative or that an industry wants its sales representatives to perform would appear to qualify as protected solicitation conduct. The host of activities that the Court in *Wrigley* considered as outside the scope of solicitation of orders under the independent business function test would possibly be protected, like sales representatives issuing agency stock checks to retailers for replenished or refreshed gum displays, storing inventory, making repairs or servicing purchased items, routinely approving orders or making sales on the spot, accepting payments on past-due accounts, or maintaining an office in the state.[74]

Conclusion

Fitzgerald may have introduced H.R. 8021 out of concern that states might pursue businesses for taxes simply because they have websites, but his solution far exceeds that prospect. H.R. 8021 would legislatively overrule the *Wrigley* independent business function test. This would drastically expand the current P.L. 86-272 preemption of state taxing authority, significantly broadening the range of protected activities that out-of-state sellers or their representatives could engage in. The independent business function test provides practical guidance to courts for sorting out whether those activities are protected solicitation activities or unprotected, as evidenced by the *Uline* and *Santa Fe* rulings. H.R. 8021 would insert into P.L. 86-272 a definition of solicitation of orders so broad that it could protect any activity that increases sales, even if it has an independent business function, hopelessly blurring the distinction between solicitation and nonsolicitation conduct.

FOOTNOTES

[1] Republican U.S. Reps. Glenn Grothman, Bryan Steil, and Thomas P. Tiffany.

[2] 15 U.S.C. sections 381-384.

[3] Rep. Fitzgerald release, "Fitzgerald Introduces Bill to Protect Businesses From Double Income Taxation" (Apr. 16, 2024).

[4] The MTC adopted this most recent revision on Aug. 4, 2021.

[5] Michael J. Bologna, "House Bill Seeks to Raise Limits on States Taxing Remote Sellers," Bloomberg Law, May 28, 2024. Bologna's article views H.R. 8021 as responding to the MTC statement, quoting Fitzgerald's spokesperson as complaining that the MTC statement would "open the floodgates for the roughly 2.5 million online retailers to have to pay income taxes to many more states, vastly increasing compliance burdens." The California Department of Tax and Fee Administration, the New York State

Department of Taxation and Finance, and the New Jersey Division of Taxation have adopted parts of the MTC statement, as discussed *infra*.

[6] *Wisconsin Department of Revenue v. William Wrigley Jr. Co.*, 505 U.S. 214 (1992).

[7] *Id.* at 228-229.

[8] *Id.* at 226.

[9] *See* Bologna, *supra* note 5 (indicating that oral arguments took place on April 29 and that the founders of Uline had made campaign contributions to Fitzgerald).

[10] *Uline Inc. v. Commissioner*, File No. 9435-R (Minn. Tax Ct. June 23, 2023).

[11] *Uline Inc. v. Commissioner*, No. A23-1561 (Minn. Aug. 7, 2024).

[12] *Santa Fe Natural Tobacco Co. v. Department of Revenue*, 372 Or. 509 (2024).

[13] *McLeod v. Dilworth Co.*, 322 U.S. 327, 330 (1940) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States."). See Oregon Supreme Court's discussion of the legal background leading up to enactment of P.L. 86-272 in *Santa Fe*, 372 Or. at 512. *See also Wrigley*, 505 U.S. at 220-223.

[14] *Santa Fe*, 372 Or. at 513-514 (citing, among other sources, *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 394, n.12 (1952); and *West Point Grocery Co. v. Opelika*, 354 U.S. 390, 391 (1957)).

[15] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[16] *Santa Fe*, 372 Or. at 514-515 (citing *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So. 2d 70 (La. 1958), *app. dismissed*, 359 U.S. 28 (1959); and *International Shoe Co. v. Fontenot*, 107 So. 2d 640 (La. 1958), *cert. denied*, 359 U.S. 984 (1959)). *See Wrigley*, 505 U.S. at 220-222.

[17] *Wrigley*, 505 U.S. at 221.

[18] A few years after enactment of P.L. 86-272, the Court abandoned the notion that the commerce clause prohibited states from taxing interstate commerce in *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977) by overruling *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 (1951) and putting in its place the four-part test for determining whether a state may tax interstate commerce:

A tax is not an unconstitutional burden on interstate commerce if the taxed activity [1] is sufficiently connected to the state to justify the tax, [2] the tax is fairly related to benefits provided to the taxpayer, [3] the tax does not discriminate against interstate commerce, and [4] the tax is fairly apportioned.

[19] 15 U.S.C. section 381(a).

[20] *Wrigley*, 505 U.S. at 233.

[21] *Id.* at 223.

[22] *Id.* at 224.

[23] *Id.* at 227.

[24] *Id.* at 226.

[25] *Id.*

[26] *Id.* at 223.

[27] *Id.* at 228-229 (emphasis in original).

[28] *Id.* at 217-219.

[29] *Id.* at 234.

[30] *Id.* at 233.

[31] *Id.*

[32] *Id.* at 234 (emphasis in original).

[33] The Court promulgated the following de minimis standard to determine whether nonsolicitation activities reached the significance level to lose protection under P.L. 86-272: "Whether in-state activity other than 'solicitation of orders' is sufficiently de minimis to avoid loss of the tax immunity conferred by [section] 381 depends upon whether that activity establishes a nontrivial additional connection with the taxing State." *Id.* at 232.

[34] *Id.* at 228, n.4.

[35] *Id.*

[36] *Id.* (emphasis in original).

[37] *See* MTC, Multistate Tax Compact.

[38] *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080, 2095 (2018).

[39] MTC statement, at 8.

[40] *See, e.g.*, Michael J. Bowen, Lauren A. Ferrante, and Lorie A. Fale, "Nexus Post-*Wayfair*: What Is the Relevance of Virtual Contacts?" *Tax Notes State,* Apr. 1, 2024, p. 11.

[41] TAM 2022-01 and Publication 1050.

[42] N.Y. Comp. Codes R. & Regs tit. 20, section 1-2.10.

[43] N.J. TB-108 (Sept. 5, 2023).

[44] Paul Jones, "ACMA Wins P.L. 86-272 Case Against California FTB," *Tax Notes State*, Dec. 18, 2023, p. 73.

[45] Laura Mahoney, "California Misses Deadline to Appeal Internet Activity Tax Ruling," Bloomberg Law, Mar. 19, 2024.

[46] *ACMA v. New York Department of Taxation and Finance*, Index No. 903320/2024, Complaint at para. 36 (N.Y. Apr. 5, 2024).

[47] Christopher Jardine, "New York's P.L. 86-272 Reg Is Invalid, ACMA Says," *Tax Notes State*, Apr. 11, 2024, p. 260.

[48] Jardine, "New York's P.L. 86-272 Rule Is Invalid, ACMA Tells Trial Court," *Tax Notes Today State*, Sept. 5, 2024.

[49] *Uline*, No. A23-1561, slip op. at 4.

[50] *Id.* at 2.

[51] *Id.* at 10 (emphasis in original).

[52] *Id.* at 11.

[53] *Id.* (emphasis in original).

[54] *Id.* at 12.

[55] *Wrigley*, 505 U.S. at 233 (emphasis in original). *See Blue Buffalo Co. v. Comptroller of Treasury*, 221 A.3d 1130 (Md. Ct. Spec. App. 2019) (Connecticut company selling dog food products in Maryland conducted activities beyond solicitation in Maryland and therefore lost the protection of P.L. 86-272. Pet detectives hired by the company solicited sales in retail stores in Maryland selling Blue Buffalo

products but also reported to management information on competitors and where defective products were returned).

[56] *Santa Fe*, 372 Or. 509.

[57] *Santa Fe Natural Tobacco Co. v. Department of Revenue*, 25 Or. Tax 124, 165 (Or. Tax Ct. Reg. Div. 2022).

[58] 15 U.S.C. section 381(a)(2).

[59] *Santa Fe*, 372 Or. at 511.

[60] *Id.* at 523.

[61] *Id.* at 528.

[62] *Id.* at 524.

[63] *Id.*

[64] *Id.* at 530-531.

[65] *Id.* at 531.

[66] *Id.* at 527.

[67] *Id.* at 532.

[68] *Id.* at 530 (quoting *Wrigley*, 505 U.S. at 228-229).

[69] *Id.*

[70] *Id.* at 227.

[71] *Id.*

[72] *Id.* at 228-229.

[73] *Id.* at 229.

[74] *Id.* at 228, n.4, 233.

END FOOTNOTES