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DEPARTMENT OF TAXATION

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September 12, 1995

TAX INFORMATION RELEASE NO. 95-3

Re: Immunity from Net Income Taxation Under Public Law 86-272

Public Law 86-272, 15 U.S.C. §§381-384, generally restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which 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.

The Multistate Tax Commission (MTC), a multistate organization of which Hawaii is a member, has established a Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272 (Phase Two Statement). On September 20, 1994, Hawaii became a signatory to the Phase Two Statement.

Interested persons may obtain a copy of the Phase Two Statement from the Department's Technical Review Office.

This release supersedes Tax Information Release No. 80-4.

RAY K. KAMIKAWA
Director of Taxation

HRS Sections Explained: HRS §235-7(a)(1)

Rules Sections Explained: §18-235-7-01

STATEMENT OF INFORMATION CONCERNING PRACTICES OF
MULTISTATE TAX COMMISSION AND SIGNATORY STATES UNDER
PUBLIC LAW 86-272

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 of the company within the state consists of the solicitation of orders for sales of tangible personal property, which 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 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. *Wisconsin Department of Revenue v. William Wtigky, Jr., Co.*, ___ U.S. ___, 112 S. Ct. 2447, 120 L.Ed.2d 174 (1992). In those cases where there may be reasonable differences of opinion as to whether the disputed activity exceeds what is protected by P.L. 86-272, the signatory States will apply 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 the "clear and manifest purpose of Congress". See *Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, ___ U.S. ___, 114 S. Ct. 843, 127 L. Ed.2d 165 (1994), *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608, 120 L. Ed.2d 407, 422 (1992); *Heublein, Inc v. South Carolina Tax Com.*, 409 U.S. 275, 281-282 (1972).

The following information reflects the signatory states' current practices with regard to: (1) whether a particular factual circumstance is considered under P.L. 86-272 or permitted under this Statement as either protected or not protected from taxation by reason of P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another state for purposes of applying a throwback rule (if applicable) with respect to such sales. It is the intent of the signatory states 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 throwback purposes in the state from which such property has been shipped or delivered.

I. NATURE OF PROPERTY BEING SOLD

Only the solicitation to sell personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trade marks, 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) ancillary to solicitation or (2) otherwise set forth as a protected activity under the Section IV.B. hereof is also not protected under Public Law 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.

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 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 activities ancillary to 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.

III. DE MINIMIS ACTIVITIES

De minimis activities are those that, when taken together, establish only a trivial connection with the taxing State. An activity conducted within a taxing State on a regular or systematic basis or pursuant to a company policy (whether such policy is in writing or not) shall normally not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with the State is to be measured on both a qualitative and quantitative basis. If such activity either qualitatively or quantitatively creates a

non-trivial connection with the taxing State, then such activity exceeds the protection of P.L. 86-272. Establishing that the disqualifying activities only account for a relatively small part of the business conducted within the taxing State is not determinative of whether a *de minimis level* of activity exists. The relative economic importance of the disqualifying in-state activities, as compared to the protected activities, does not determine whether the conduct of the disqualifying activities within the taxing State is inconsistent with the limited protection afforded by P.L. 86-272.

IV. SPECIFIC LISTING OF UNPROTECTED AND PROTECTED ACTIVITIES

The following two listings—IV.A. and IV.B.—set forth the in-state activities that are presently treated by the signatory state as “Unprotected Activities” or “Protected Activities”. Such listings may be subject to an amendment by addition or deletion that appears on the individual signatory state’s Signature Page attached to this Statement.

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, in its discretion, has permitted protection. The mere inclusion of an activity on the listing of “Protected Activities”, therefore, is not a statement or admission by the signatory state that said 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 ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under the Public Law:

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 or to employees or agent(s) of the company in their representative status.
 - h. Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.

- hi 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 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 or to the employee or representative of the company in an employee or representative capacity, and (ii) so long as the use of such office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the company; or for such other activities that are protected under Public Law 86-272 or under paragraph IV.B. of this Statement).

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

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

For the purpose of this subsection it is not relevant whether the company pays directly, indirectly, or not at all for the cost of maintaining such 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 franchiser or licensor to its franchisee or licensee within the state.

- 20. 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.
- 21. Conducting any activity not listed in paragraph IV.B. below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

B. PROTECTED ACTIVITIES:

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

- 1. Soliciting orders for sales by any type of advertising.
- 2. Soliciting of orders by an in-state resident employee or representative of the company, so long as such person does not maintain or&e 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 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 goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if such 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 not, by itself, remove the protection under this Statement.

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

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

Sales representatives 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, except for purposes of display and solicitation, shall remove the protection.

VI. APPLICATION OF DESTINATION STATE LAW IN CASE OF CONFLICT

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. Such conference shall identify what law, regulation or written guideline, if any, has been adopted in the state of destination with respect to the issue. The state of destination shall be that location at 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 given to any clearly applicable law, regulation or written guideline that has been adopted in state of destination. However, except in the case of the definition of what constitutes "tangible personal property", this state is not required by this Statement to follow any other state's law, regulation or written guideline should this state determine 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 within this state.

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 definition of "tangible personal property" that exists in the state of destination to determine the application of P.L. 86-272 and issues of throwback, if any. Should the state of destination not have any applicable definition of such term 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.

VII. MISCELLANEOUS PRACTICES

A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE.

Public Law 86-272 specifically applies, by its terms, to "interstate commerce" and does not directly apply to foreign commerce. The states are free, however, to apply the same standards set forth in the Public Law and in this Statement to business 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.

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.

**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 apply to any corporation incorporated within this state or to any person who is a resident of or domiciled in this state.

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

A company that registers or otherwise formally qualifies to do business within this state does not, by that fact alone, lose its protection under P.L. 86-272. Where, separate from or ancillary to such registration or qualification, the company receives and seeks to use or protect any additional benefit or protection from this state through activity not otherwise protected under P.L. 86-272 or this Statement, such protection shall be removed.

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

The protection afforded under P.L. 86-272 and the provisions of this Statement shall be determined on a tax year by tax year basis. Therefore, if at any time during a tax year the company conduct 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.

E. APPLICATION OF THE JOYCE RULE

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.

STATE SIGNATURE PAGE

Except as may be set forth below, the foregoing "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272" accurately describes the practices presently followed by the State of Hawaii in applying said Public Law and incorporates the qualifications set forth in the Resolution of

the Executive Committee of the Commission dated July 29, 1994 adopting such Statement and attached hereto.

DELETIONS: None.

ADDITIONS: None.

Executed by: /s/ Richard F. Kahle, Jr.

Title: Director of Taxation

Date of execution: September 20, 1994

Effective date: September 20, 1994

**Resolution Regarding Adoption of
Statement of Information Concerning Practices of
Multistate Tax Commission and Signatory States under
Public Law 86-272**

WHEREAS, on January 22, 1993, the Executive Committee of the Multistate Tax Commission by resolution directed that a two-phase process be followed in the review and modification of the 1986 "Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272" ("Guideline"); and

WHEREAS, Phase One was a modification of said Guideline that was limited to the requirements of the United States Supreme Court's decision in *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.* ___ U.S. ___, 112 S. Ct. 2447; 120 L.Ed.2d 174 (1992), Phase Two was a modification of said Guideline based upon further input through a public hearing process conducted under Article VII of the Multistate Tax Compact; and

WHEREAS, on January 22, 1993, Phase One of said review was completed with the modifications made to said Guideline being approved by the Executive Committee; and

WHEREAS, the public hearing sessions on the Phase Two modifications to the Guideline were held on May 28, 1993 in Los Angeles, California, on June 29, 1993 in Salt Lake City, Utah, and on October 1, 1993 in Washington, D. C., with Alan H. Friedman, Hearing Officer, presiding; and

WHEREAS, time for public comment and for any additional testimony as made available through the public hearing process has expired; and

WHEREAS, pursuant to Article VII of the Multistate Tax Compact the Hearing Officer filed his Report dated March 21, 1994, recommending that the Multistate Tax Commission adopt the proposed "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272" (statement") attached as Attachment 7 to said Report; and

WHEREAS, pursuant to Multistate Tax Commission Bylaw 7, and authorization by the Executive Committee of the Commission, said recommendation by the Hearing Officer has been circulated to the members of the Commission to determine whether affected member states would consider adoption of the proposed Statement; and

WHEREAS, a majority of the affected members of the Multistate Tax Commission surveyed pursuant to Bylaw 7 have affirmatively indicated their willingness to consider adoption of the proposed Statement; and

WHEREAS, a majority of said affected member states of the Commission have also agreed to a Hearing Officer recommendation that the Uniformity Committee of the Commission study further the "appropriateness and feasibility of establishing "de minimis" gross receipts or apportionment factor standards for inclusion in the [Statement] at some future date"; and

WHEREAS, the Multistate Tax Commission finds that adoption of the proposed Statement as proposed by the Hearing Officer in Attachment 7 to said Report, furthers the goals of the Commission to promote uniformity in the administration of significant components of state tax systems and to avoid duplicative taxation; and

WHEREAS, the adoption and publication of the proposed Statement describing the states' current practices under Public Law 86-272 provides one method by which to make generally available information concerning such practices.

NOW, THEREFORE, IT IS RESOLVED that the Multistate Tax Commission hereby adopts the "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272" attached hereto, with the qualification that any signatory state may find it necessary to make limited deletions or additions to render such Statement consistent with their respective laws and practices; and

IT IS FURTHER RESOLVED that the Commission shall cause said Statement, along with each signatory state's additions or deletions, if any, to be published and otherwise made publicly available; and

IT IS FURTHER RESOLVED that the Multistate Tax Commission recommends that the Statement be distributed to all interested states for their review and, should they approve thereof, their adoption of the Statement; and

IT IS FURTHER RESOLVED that the Multistate Tax Commission member states, along with any other interested signatory states re-examine, from time to time, the Statement to determine what, if any, changes should be made thereto; and

IT IS FURTHER RESOLVED that the Multistate Tax Commission's Uniformity Committee conduct a review of the appropriateness and feasibility of establishing "de minimis" gross receipts or apportionment factor standards for inclusion in the Statement at some future date.

Adopted this 29th day of July, 1994.

Multistate Tax Commission

Attest: /S/ Dan R. Bucks
Executive Director