No. 24-

IN THE

Supreme Court of the United States

SANTA FE NATURAL TOBACCO COMPANY,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By its enactment of 15 U.S.C. § 381 ("Section 381"), Congress exercised its power to regulate interstate commerce under the Commerce Clause to immunize out-of-state businesses from a state's net income tax if their only business activity in the state is soliciting orders of tangible personal property from retailers or wholesalers, provided that the orders are approved or rejected from a location outside the state and shipped from out of state. More than 30 years ago in *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) ("*Wrigley*"), this Court held that Section 381 protected more in-state activities than just express solicitations of orders, with protected activities extending to both activities ancillary to solicitation and activities that are *de minimis*. Since this Court decided *Wrigley*, there has been a concerted effort by states by fiat and state judicial encroachment to further narrow the scope of federally protected activities to nullify the protection that Congress afforded multistate businesses through its enactment of Section 381. Oregon has been at the forefront of the state encroachment effort and crossed the federal line here.

The Question presented is:

(1) Whether Section 381 immunity applies for Santa Fe Natural Tobacco Company ("Santa Fe") when it engages in otherwise protected activities in Oregon to solicit requests for orders from retailers if it also sends successfully solicited retailer requests for orders to wholesalers (*i.e.*, Santa Fe's customers) for wholesalers to accept and process, and, if ultimately

fulfilled, to be fulfilled by the wholesaler (Santa Fe's customer) from the wholesaler's own inventory of product that it previously purchased from Santa Fe (*i.e.*, the wholesaler makes the sale to the retailer).

PARTIES TO THE PROCEEDINGS

Santa Fe is Petitioner here and was Plaintiff-Appellant below.

The Department of Revenue, State of Oregon ("Department") is Respondent here and was Defendant-Appellee below.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Santa Fe is an indirect wholly owned subsidiary of British American Tobacco p.l.c., a publicly held company.

PROCEEDINGS DIRECTLY RELATED

- *Santa Fe Natural Tobacco Company v. Department of Revenue, State of Oregon*, Docket No. SC S069820, Supreme Court of Oregon. Decision Filed June 20, 2024, reported at 372 Ore. 509 (the "Decision").

- *Santa Fe Natural Tobacco Company v. Department of Revenue, State of Oregon*, Oregon Tax Court Docket No. 5372, Oregon Tax Court, Regular Division. Decision Dated August 23, 2022, reported at 25 OTR 124.

- *Santa Fe Natural Tobacco Company v. Department of Revenue, State of Oregon*, Docket No. TC-MD 170251G, Oregon Tax Court, Magistrate Division. Decision Filed and Entered May 16, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Section 381 was enacted more than 65 years ago and prohibits states from imposing a net income tax on income of an out-of-state business where the business's activity is limited to solicitation of orders of tangible personal property from retailers or wholesalers. It is undisputed that Section 381 protects at least three business models from state income taxation: (1) drummers (travelling sales people) solicit the customer (*e.g.*, manufacturer solicits a wholesaler); (2) drummers solicit the customer's customer to pull a sale through the pipeline (*e.g.*, manufacturer solicits a retailer to get the wholesaler to order more goods); and (3) independent contractors make sales or solicit orders on the out-of-state seller's behalf (*e.g.*, manufacturer hires a third party that carries its and others' goods and sells goods in the state on the manufacturer's behalf).

This Court's decision in *Wrigley* found that the business at issue (a manufacturer soliciting retailers) breached Section 381 protection based on its *own* activity taking place within the taxing state, *i.e.*, by Wrigley bringing and storing inventory within the state, replacing stale product and setting up display racks, and making sales of product with the inventory that the taxpayer's employees brought into the state.

The Court has not revisited the interpretation of Section 381 in more than 32 years. Since then, businesses have relied on Section 381 and *Wrigley* in arranging their affairs, the landscape of how business is conducted has changed dramatically, and states have ignored *Wrigley*'s tenets.

The Oregon Supreme Court below found that two activities, only when taken together, breached Section 381 protection for Santa Fe. One of the activities was not even a Santa Fe activity: it was the activity of Santa Fe's Oregon customers, the Oregon wholesalers ("Oregon Wholesalers"), agreeing to "accept and process" retailer order requests sent to them by Santa Fe from the Oregon Wholesalers' customers, the Oregon retailers ("Oregon Retailers"). The second activity is the Santa Fe employee sending a fax on behalf of the Oregon Retailers to the Oregon Wholesalers requesting that an order by the retailer be placed. The court did not suggest that the Santa Fe employee sending the order request on behalf of the retailers, alone, would breach Section 381 protection for Santa Fe. And, indeed, the Oregon Supreme Court even acknowledged that the Department did not argue that sending the order request, alone, breaches protection. Activities undertaken by a third party, here the Oregon Wholesalers agreeing to accept and process retailer orders sent on behalf of Oregon Retailers, cannot breach immunity for Santa Fe.

The Oregon Supreme Court essentially found that the Oregon Wholesalers were acting on behalf of Santa Fe in agreeing to accept and process requests for orders from the Oregon Retailers, despite the fact that it was the Oregon Wholesalers' sale of the Oregon Wholesalers' own purchased inventory to the Oregon Wholesalers' own customer (the Oregon Retailers). Leaving aside that the Oregon Wholesalers' agreement to "accept and process" prebook orders did not guarantee a sale when a prebook order was sent, if indeed it were the case that the Oregon Wholesalers were selling on behalf of Santa Fe to Oregon Retailers, the Oregon Wholesalers would be so permitted

as protected independent contractors allowed to make sales without Santa Fe losing its protection because that activity falls under the third protected business model (Section 381(c)).

The Decision is in direct conflict with *Wrigley*, which explained that "missionary activities" on behalf of a customer that are ancillary to soliciting a request for an order for that customer "to ingratiate the salesman with the customer," *Wrigley*, 505 U.S. at 235, such as Santa Fe faxing the retailer request that results from the solicitation to their Oregon Wholesaler, are protected under Section 381.

The Santa Fe employee's ministerial act of pushing the "send" button on a fax machine to send a retailer's order request on behalf of a retailer does not breach Santa Fe's protection. Sending the retailer order request to the Oregon Wholesaler is inextricably intertwined with the solicitation activity of successfully obtaining the order request.

States, such as Oregon, are attempting to nullify federal law by reading Section 381 so narrowly as to interpret it out of existence – in direct conflict with how this Court interpreted Section 381 in *Wrigley*. It is time for this Court to step in to defend the supremacy of federal law that is a valid exercise of Congress's authority under the express language of the Commerce Clause of the United States Constitution and to clarify under what circumstances Section 381 protection applies.

Petitioner, Santa Fe, respectfully petitions for a writ of certiorari to review the decision of the Oregon Supreme Court in this matter.

OPINIONS BELOW

The Oregon Supreme Court decision, 372 Ore. 509, is reproduced at App.1-36. The Oregon Tax Court, Regular Division decision, 25 OTR 124, is reproduced at App.37-103.

JURISDICTION

The Oregon Supreme Court issued its decision in this case on June 20, 2024 (the "Decision"). On September 6, 2024, Justice Kagan granted a 60-day extension of time within which to file a petition for writ of certiorari to and including November 17, 2024. Pursuant to Rule 30.1, the due date to file this petition became November 18, 2024.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The Oregon Supreme Court's Decision qualifies as a "[f]inal judgment or decree[]" within the meaning of that statute.

STATUTORY PROVISION INVOLVED

15 U.S.C.§ 381 is reproduced at App.104-105.

STATEMENT OF THE CASE

A. Legal Background

Section 381(a)(1) and (2) protect an out-of-state business from a state's net income tax if its only business activity in the state is "solicitation of orders" of tangible personal property, provided that the orders are approved or rejected from a location outside the state and shipped

from out of state. The facts are undisputed. This case presents a question of pure statutory interpretation: what constitutes "solicitation" activity under Section 381.

Congress enacted Section 381 in haste more than 60 years ago, and the language of the statute has not been amended since its enactment. Tr.40:15-22; R.311. In the middle of the 20th Century, taxpayers were concerned about a lack of uniformity in state tax laws and the burden of complying with non-uniform tax laws and as explained by Santa Fe's expert, Professor Richard Pomp, "there was an understanding in the corporate community that as long as you were conducting interstate commerce, a state could not tax it." Tr.51:13-17; R.314. Professor Pomp further explained:

> [The corporate community's] view at the time was that . . . if all you did in a state was solicit, and then you sent the order outside the state for acceptance or rejection, and that order, if accepted, would then be fulfilled with a shipment from outside the state to the market state, that was interstate commerce and that could not be taxed.

Tr.52:4-11; R.314.

Section 381 was enacted in response to three actions by this Court. In 1959, this Court issued a decision, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), that was generally understood to expand state authority to tax the income of interstate businesses. *See U.S. Steel Corp. v. Multi-state Tax Comm'n*, 434 U.S. 452, 455 (1978). The *Northwestern*

States decision, along with this Court's denial of certiorari in two Louisiana cases where state courts determined that companies were subject to state income tax even though their in-state activities were limited to solicitation, caused alarm in the business community, which asked Congress to step in. Tr.54: 9-24; R.315.[1] Congress responded by enacting Section 381.

Professor Pomp testified that Section 381 "was codifying at least two or three common ways of conducting business, and that was the policy underlying 86-272," which was to "protect existing ways of doing business pending further investigation by Congress." Tr.57:21-25, R.315. The "existing way of doing business" had been to protect out-of-state taxpayers' interstate activities from state taxation, under the business model where the taxpayer sends orders outside of the state for approval or rejection and the orders are shipped to a state from points outside the state. Congress sought to protect activity from taxation that stopped short of consummating a sale. R.430.

The U.S. Supreme Court interpreted the meaning of Section 381 in *Wrigley*, where the issue was whether the Illinois-based gum manufacturer whose employees made sales calls to retailers located in Wisconsin engaged in activities that exceeded the scope of Section 381. Wisconsin argued for a narrow interpretation of what constitutes "solicitation of orders," while Wrigley argued for a broad interpretation of that phrase. *Wrigley*, 505 U.S. at 224-227. This Court rejected both Wisconsin's and

1. The two Louisiana cases were *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *cert denied*, 359 U.S. 28 (1959) and *Int'l Shoe Co. v. Fontenot*, 236 La. 279, 107 So. 2d 640 (1958), *cert denied*, 359 U.S. 984 (1959).

Wrigley's proffered interpretations and instead sought a reasonable middle ground. *Id.* at 238-241.

In attempting to ascertain the fair meaning of solicitation, this Court concluded that "the term *includes*, not just explicit verbal requests for orders, but also *any* speech or *conduct that implicitly invites an order.*" *Wrigley*, 505 U.S. at 223 (emphasis added). Solicitation "includes not merely the ultimate act of inviting an order but the entire process associated with the invitation." *Id.* at 225.

In addition to "what is strictly essential to making requests for purchases," the Court also found that the phrase "solicitation of orders" includes "those 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" (*id.* at 228-29 (emphasis in original)), which the Court explained as including activities (such as credit dispute resolution) "*to ingratiate the salesman with the customer, thereby facilitating requests for purchases.*" *Id.* at 234-35 (emphasis added).

The Court found three activities breached Section 381(a)(2) protection in Wisconsin for Wrigley. The first was Wrigley representatives replacing stale gum at retail locations with inventory that the Wrigley representatives had brought into Wisconsin. The second was supplying gum to retailers through "agency stock checks," whereby Wrigley representatives would furnish gum-filled display racks to retailers. Wrigley argued that the agency stock checks activity was protected as "missionary" activity (*i.e.*, solicitation of an indirect customer) under Section

381(a)(2). The Court found "[w]hat destroys this analysis, however, is the fact that 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." *Id.* at 234 (emphasis in original). The Court thereby identified a sale by Wrigley from Wrigley-owned inventory that was located in Wisconsin. Finally, the Court found that Wrigley's storage of gum in Wisconsin that it used to replace stale gum and for the agency stock checks was not ancillary to solicitation and therefore breached protection for Wrigley.

The Court also determined that Section 381 includes an exception with respect to in-state activities that are not solicitation or are not ancillary to solicitation when such activities are *de minimis*. *Id.* at 231-32.

Therefore, *Wrigley* interprets Section 381(a)(1) and (2) as having three levels of activities by an out-of-state seller that are protected: (1) solicitation of the out-of-State seller's customer or the out-of-state seller's customers' customer;[2] (2) activities ancillary to solicitation; and (3) *de minimis* activities.

Important to Santa Fe, in explaining the levels of protection, the Court concluded that in-state credit resolution activities were permitted and protected as ancillary to solicitation. *Wrigley*, 505 U.S. at 234-35. The

2. For example, in *Wrigley*, Wrigley's customer was the distributor, the distributor's customer was the supermarket, and the supermarket's customer was the gum chewer. The *Wrigley* construct includes solicitation of orders from the distributor (Section 381(a)(1)) and the solicitation of orders from the supermarket (Section 381(a)(2)).

Court stated that "[t]he purpose of the [credit resolution activities], in other words, *was to ingratiate the salesman with the customer, thereby facilitating requests for purchases*." *Id.* (emphasis added). Thus, when the purpose of an in-state activity is to ingratiate the seller with the customer, that activity is ancillary to solicitation.

B. Factual and Procedural Background

Santa Fe manufactures, markets, and distributes cigarettes and roll-your-own tobacco products ("Branded Products") to wholesale customers located in Oregon ("Oregon Wholesalers"). Oregon Wholesalers buy Branded Products from Santa Fe and, in turn, sell Branded Products to retailers located in Oregon ("Oregon Retailers"). R.45.

Orders for Branded Products that Santa Fe receives from its customers and potential customers located in Oregon are sent to Santa Fe outside of Oregon for approval or rejection. Santa Fe fills approved orders for Branded Products from customers located in Oregon by shipment or delivery from points located outside of Oregon. R.45.

Santa Fe had no offices in Oregon and had none of its inventory of Branded Products in Oregon. Oregon Wholesalers maintained their own inventory of Branded Products in Oregon that the Oregon Wholesalers purchased from Santa Fe. Santa Fe employees located in Oregon visit and solicit Oregon Retailers to carry and sell Branded Products to adult tobacco consumers. The employees do not carry inventory for sale. R.46-47.

If, during a visit to an Oregon Retailer, a Santa Fe employee observes that the Oregon Retailer's stock of

Branded Products is low or depleted, or if the employee makes a cold call on a new Oregon Retailer, the employee does one of two things. The employee can leave a "sell sheet order" with the Oregon Retailer that the Oregon Retailer can use to purchase Branded Products from the Oregon Wholesaler when the Retailer next connects with the Oregon Wholesaler.

Alternatively, the employee can also take what is called a "prebook order" (*i.e.*, an order before delivery of the next regularly scheduled order being filled via the order book) during the visit to the Oregon Retailer and forward it to an Oregon Wholesaler. A prebook order is a retail order request to an Oregon Wholesaler for Branded Products that is authorized by and signed by an Oregon Retailer. The request for the order is initiated by a Santa Fe employee during an in-person visit to the Oregon Retailer and forwarded to an Oregon Wholesaler. R.53.

Prebook orders may be forwarded to Oregon Wholesalers by fax, phone, email, accessing the Oregon Retailer's electronic ordering system, or in-person. Santa Fe employees forward prebook orders to the wholesalers primarily by fax. R.54.

Prebook orders were not sales by Santa Fe to Oregon Retailers. Through the prebook orders, the Oregon Retailers request product from Oregon Wholesalers who make the sale, and the Oregon Wholesaler fulfills the order from its own inventory. After the Santa Fe employee forwards the prebook order to the Oregon Wholesaler, and the prebook Order is accepted and processed, the Oregon Wholesaler then bills the Oregon Retailer. R.54.

During the relevant period (2010-2013) ("Years in Issue"), Santa Fe entered into Distributor Incentive Program Agreements ("incentive agreements") with Oregon Wholesalers. The incentive agreements provided incentive payments to the Oregon Wholesalers if they complied with all the terms of the agreements. One of the terms was that the Oregon Wholesalers agreed to "accept and process" prebook orders from their own customers. R.47-48, 87.

Santa Fe timely filed its Oregon Corporate Excise Tax ("CET") returns and timely paid $150.00 of minimum tax for each of the Years in Issue.[3] Santa Fe reported no Oregon taxable income on its CET return for each of the Years in Issue based on its determination that Section 381 immunized it from Oregon corporate income tax. R.57.

The Department audited Santa Fe's CET returns for each of the Years in Issue and issued Notices of Deficiency. After unsuccessful appeals within the Department and at the Oregon Tax Court, Magistrate Division (the "Magistrate"), Santa Fe timely appealed to the Oregon Tax Court, Regular Division ("Tax Court"). R.449, 1, 40.

During the Tax Court proceedings, the parties stipulated as to all facts, and on October 15, 2020, a trial was held where only expert witnesses testified. Tr.1-228, 301-358. Santa Fe called Professor Richard Pomp as an expert witness on tax policy. The Tax Court issued its decision dated August 23, 2022, affirming the Magistrate's decision that Santa Fe's activities in Oregon during the

3. When Section 381 applies, the amount due for CET is the $150.00 minimum tax.

Years in Issue exceeded the protections of Section 381 and reversing the Magistrate's decision that the Department had properly imposed understatement penalties.[4] R.405-448.

As to the Tax Court's decision on the applicability of Section 381, Santa Fe timely served and filed a Notice of Appeal on October 11, 2022, appealing the Tax Court judgment to the Oregon Supreme Court. R.449-460.

The Oregon Supreme Court affirmed the Tax Court's decision that Santa Fe was liable for CET for the Years at Issue. The court found that Santa Fe's employees in Oregon "went beyond soliciting orders. . . ." Specifically, the court found that "Santa Fe used prebook orders – bolstered by the incentive agreements – in the same way that the gum manufacturer in *Wrigley* used 'agency stock checks.'" App.32. The court found that because, under the incentive agreements, Oregon Wholesalers agreed to "accept and process" prebook orders, the Santa Fe employees went beyond soliciting orders and instead were soliciting sales. The Oregon Wholesalers' agreement to "accept and process" prebook orders, however, did not guarantee a sale, as the ultimate decision whether to fulfill the prebook order belonged to the Oregon Wholesalers (*e.g.*, after accepting and processing the prebook order, the Oregon Wholesaler discovers that the retailer placing the order has credit issues and decides not to fulfill the

4. The Tax Court also found that Oregon Wholesalers' activity of accepting returns of Branded Products that Oregon Wholesalers sold to Oregon Retailers exceeded Section 381 protection for Santa Fe. The Oregon Supreme Court, in its Decision, did not address whether the Oregon Wholesalers' activity in connection with accepting returns breached Section 381 protection for Santa Fe.

order). The court also found that the Oregon Wholesalers' inventory of product "functioned as if Santa Fe itself had stored the stock in-state. . . ." App.33. But, notably, Santa Fe had not in fact done so. Moreover, the court rejected Santa Fe's argument that the ministerial act of sending a prebook order by fax was *de minimis* and did not create a nontrivial additional connection with Oregon for Santa Fe. App.33-35.

REASONS FOR GRANTING THE PETITION

The Decision of the Oregon Supreme Court directly conflicts with this Court's decision in *Wrigley*, and if this Court were to decide the case under the stipulated facts, the outcome would be different. The Decision expands the activity that removes Section 381 protection to activity undertaken by an unrelated third party. Indeed, to the extent that any activity of Santa Fe itself was found to be unprotected activity in the Decision, it was Santa Fe entering into incentive agreements with wholesalers by which the wholesalers agreed to accept and process prebook orders from the wholesaler's own retailer customers. However, this Santa Fe activity did not guarantee a sale and occurred outside of Oregon, having been done from Santa Fe's headquarters in New Mexico and, later, in North Carolina and had no connection with the solicitation activities undertaken by Santa Fe's employees *in Oregon*. *Wrigley* found that the manufacturer exceeded Section 381 protection based on its own in-state activities. Specifically, the Court found that Wrigley's representatives replacing stale gum and providing gum for display racks (for which it made the retailer pay) out of the Wrigley representative's *own inventory that it brought into the state* breached Section

381 protection. Here, the Decision determined that Santa Fe was unprotected because the Oregon Wholesalers agreed to "accept and process" prebook orders. This activity undertaken by an unrelated third party does not guarantee a sale and does not breach Section 381 protection for Santa Fe under the standards set forth in *Wrigley*.

This Court in *Wrigley* defined the scope of "solicitation." The Court explicitly held that indirect solicitation of a customer's customer (so-called "missionary" activity) is protected. *Wrigley*, 505 U.S. at 233-234. Activity that is ancillary to solicitation is also protected. *Id.* at 228-230. If the activity serves no independent business function apart from its connection to the solicitation of orders, and the business would not have hired employees separate from its sales force to perform the activity, it is ancillary to solicitation and protected. *Id.* Moreover, the Court held that activity meant to ingratiate a seller with an indirect customer is protected. *Id.* at 235. Finally, *de minimis* activity that fails to establish a nontrivial additional connection with the taxing state is protected activity, even if it falls within solicitation. *Id.* at 231-232.

Santa Fe arranged its business to follow the protected Section 381 model. Nevertheless, in the Decision, the Oregon Supreme Court found that Santa Fe employees faxing prebook orders to the Oregon Wholesalers for the Oregon Retailers, in conjunction with the Oregon Wholesalers agreeing to "accept and process" prebook orders, breached Section 381 protection. As previously noted herein, prebook orders are requests for sales a Santa Fe employee successfully solicits from the Oregon Retailer in advance of a regularly scheduled order that

had been established in the pre-existing order book. The solicitation of the order is undisputably a protected activity. Santa Fe's employees' ministerial act of sending a fax confirming an Oregon Retailer's order authorized by the Oregon Retailer is intertwined with the solicitation of the order and part of Santa Fe's protected "missionary activities" under Section 381 as described in *Wrigley*.

The Oregon Supreme Court's ruling that Santa Fe is not protected by Section 381 decides an important federal question, *i.e.*, what activity exceeds the protection of Section 381, in a way that directly conflicts with this Court's decision in *Wrigley*. The scope of what is included in the definition of "solicitation" is an important and recurring question. Section 381 was enacted to provide certainty to companies as to the activity in which they may engage within a state without being subject to income tax. Companies nationwide have arranged their interstate businesses to fall within the Section 381 safe harbor and require certainty and a uniform rule so that they can properly conduct business in interstate commerce without fear of being taxed in a jurisdiction where Section 381 properly shields the business from tax. States are adopting rules and regulations that interpret "solicitation" in a narrow way that conflict with the plain language of Section 381 and this Court's decision in *Wrigley*. And, as is the case with Oregon, states are disregarding the federal protection in Section 381 with near immunization by the certiorari process. Without a definitive, uniform rule, companies will be discouraged from conducting business in interstate commerce, which will be detrimental to all consumers and the U.S. economy.

Finally, this case provides an ideal vehicle for the Court to provide the certainty Section 381 was meant to

deliver. The facts are undisputed and raise the critical question of whether Section 381 may be breached by activities conducted by an unrelated third party, as the Oregon Supreme Court found in the Decision.

The Court should review, and reverse, the Oregon Supreme Court's Decision.

I. THE DECISION BELOW IS WRONG AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *WRIGLEY*

The Oregon Supreme Court Decision found that Santa Fe's activity with respect to prebook orders breached the Section 381 safe harbor. It is undisputed that Section 381 applies with respect to imposition of the CET because the CET is a "tax measured by or according to net income." ORS 317.010(5). It is also undisputed that: the Branded Products that Santa Fe sells to customers located in Oregon are tangible personal property; orders for Branded Products that Santa Fe receives from its customers and potential customers located in Oregon are sent outside of Oregon for Santa Fe's approval or rejection; Santa Fe fills approved orders for Branded Products from customers located in Oregon by shipment or delivery from points located outside of Oregon; Santa Fe has no offices located in Oregon; and Santa Fe owns no inventory of Branded Products in Oregon. This is the business paradigm that affords an out-of-state manufacturer Section 381 protection.

All activities in Oregon that are properly attributable to Santa Fe are activities protected by Section 381 and, therefore, federal law entitles Santa Fe to immunity

from imposition of the CET. The only issue in this case is whether activity by an unrelated third party can exceed the protective limits of Section 381 for *Santa Fe* under the standards established by this Court in *Wrigley*.

The Decision directly conflicts with *Wrigley* in finding that activities undertaken by an unrelated third party breached Section 381 protection for Santa Fe. This Court in *Wrigley* determined that the gum manufacturer breached Section 381 protection when its representatives physically replaced stale gum and provided display racks with gum to retailers out of inventory the representatives brought with them inside the state. The Court further held that the physical storage of gum within the state for such purposes removed Wrigley from protection. It was the *physical* activities that Wrigley engaged in, *in Wisconsin*, that breached the protection. The Decision directly conflicts with *Wrigley*. The Oregon Supreme Court relied on activity that Santa Fe's employees did not physically engage in *in Oregon*, and indeed, was not Santa Fe activity at all, in finding that Santa Fe was not protected. To the extent that entering into the incentive agreements with Oregon Wholesalers whereby they agreed to accept and process prebook orders was more than solicitation, this activity occurred outside of Oregon. The Decision relies on an Oregon Wholesaler's activity of agreeing in the incentive agreements to "accept and process" prebook orders in finding that Santa Fe was not protected. *Wrigley* does not sanction states to disregard Section 381 protection based on in-state activities conducted by an unrelated third party or based on out-of-state activities conducted by a Section 381 seller of tangible property.

The Decision acknowledged that prebook orders were similar to sell sheet orders in that both were prepared and

filled out by Santa Fe employees who would include the retailer's name, account number, shipping information, and the desired products requested. The Decision found, however, that Santa Fe used the prebook orders, "bolstered by the incentive agreements . . . in the same way that the gum manufacturer in *Wrigley* used 'agency stock checks.'" The Oregon Supreme Court determined that, because the Oregon Wholesalers agreed in the incentive agreements to "accept and process" prebook orders and risked forfeiting incentive payments if they failed to do so, a "transaction" was "complete[d]" upon the sending of the prebook order. The court reasoned that "the incentive agreements went beyond" facilitating the requesting of sales and instead facilitated sales.

The Decision conflicts with *Wrigley* on this point because the sending of the prebook order, with or without any agreement to "accept and process" a prebook order in the incentive agreement (which does not guarantee a sale), is nothing like the "stock agency check" in *Wrigley*. What made the difference in *Wrigley* was that the representative sold gum in Wisconsin *out of the representative's own in-state inventory* – a sale out of the trunk of a car – which led to Wrigley losing protection. *Wrigley*, 505 U.S. at 235. By contrast, Santa Fe did not sell any product in-state from its own physical in-state inventory to the retailers. Santa Fe also did not make the Oregon Retailers pay for the prebook orders. Billing and payment for any prebook order that was ultimately fulfilled at the discretion of the Oregon Wholesaler would have been handled between the Oregon Wholesaler and the Oregon Retailer, just as envisioned under Section 381(a)(2). The Decision's strained reasoning that, because the Oregon Wholesalers agreed to "accept and process" the prebook orders, the Wholesaler's

inventory of its own product somehow transformed into *Santa Fe* inventory that *Santa Fe* was storing in-state does not survive scrutiny. Santa Fe was diligent in not permitting its employees to bring product for sale into Oregon. Indeed, SFNTC's Trade Marketing Sampling Policy provides "[u]nder no circumstance are samples allowed to be used to replace old or damaged product at retail" (R.208), an activity *Wrigley* found was unprotected. *See also* R.206 ("Samples cannot be used to replace old or damaged product at retail."). Santa Fe was meticulous in arranging its business to fall within the Section 381 safe harbor.

Faxing the prebook order, with or without the incentive agreement, is unlike the unprotected activity of an out-of-state seller selling product to a retailer out of the seller's own in-state inventory. Activity undertaken by an unrelated third party does not remove Santa Fe's Section 381 protection.

The Decision also directly conflicts with *Wrigley* in finding that Santa Fe's missionary activity in forwarding sales orders authorized by the Oregon Retailers to Oregon Wholesalers removed Santa Fe's protection. It is undisputed that a Santa Fe employee could provide an Oregon Retailer with a sell sheet order, watch the Oregon Retailer sign the order sheet, and watch the Oregon Retailer send it to the Oregon Wholesaler on its own without Santa Fe losing Section 381 protection. The Oregon Supreme Court found, however, that when Santa Fe's employee sends a fax with the Oregon Retailer's authorized order to the Oregon Wholesaler, that ministerial act destroys protection.

Santa Fe's prebook order activity is protected "missionary" activity under Section 381 and *Wrigley*. "Section 381(a)(2) shields a manufacturer's 'missionary' request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's being filled by a § 381 '*customer*' of the manufacturer, *i.e.*, by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state." *Wrigley*, 505 U.S. at 233-234. Prebook orders are the prototypical "missionary" request. Santa Fe's employee requests that an indirect customer (*i.e.*, an Oregon Retailer) place an order for Branded Products. If the request is successful, it results in an order being filled by a Section 381 customer of Santa Fe, *i.e.*, an Oregon Wholesaler "who fills the orders of the retailer with goods shipped to the wholesaler from out of state." *Wrigley*, 505 U.S. at 234-235. The Decision directly conflicts with *Wrigley* in finding that Santa Fe's prebook order activity is not protected missionary activity.

Moreover, *Wrigley* found that activity that serves "to ingratiate the salesman with the customer, thereby facilitating requests for purchases," is protected. 505 U.S. at 235. A prebook order is a request for a sale from an Oregon Retailer to an Oregon Wholesaler. The Santa Fe employee's act of sending a fax ingratiated the Santa Fe employee with the retailer, thereby facilitating requests for sales. The Decision conflicts with *Wrigley* in finding that such activity breached Section 381 protection.

The Decision relies on the idea that when a prebook order was submitted, a sale was "complete." Notwithstanding the significance of the fact that the purported sale was not Santa Fe's sale, the Tax Court

found that a prebook order does not guarantee a sale. R.436.

The Tax Court concluded that the phrase "accept and process" in the incentive agreement was ambiguous. Reading the agreement as a whole, as is required, it is clear that "accept and process" in the incentive agreement does not mean that Oregon Wholesalers would automatically fulfill prebook orders. The incentive agreements also use "accept and process" in another context. Oregon Wholesalers agreed in the incentive agreements to "accept and process" returns of Branded Products from their retailers. A cardinal principle of construction is that similar words or phrases used in one place in a text should be given the same meaning when used elsewhere. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) at 170-173. "Accept and process" does not mean a sale is completed in the context of Oregon Wholesalers taking returns of product, and the phrase also does not mean an order would be "fulfilled" in the context of prebook orders. The Oregon Supreme Court ignored this point.

Moreover, even if a prebook order ensured a sale (it does not), the sale would be an Oregon Wholesaler's sale to an Oregon Retailer, not a sale by Santa Fe out of Santa Fe inventory. This means that such a sale would not establish a connection between Santa Fe and Oregon and cannot be used as a basis to remove Santa Fe from the Section 381 safe harbor. Further, this would be a protected sale by the Oregon Wholesaler under Section 381(c), which allows a manufacturer to hire a third party to make sales on behalf of the manufacturer.

The ultimate question to determine whether an activity is protected activity that is ancillary to solicitation under *Wrigley* is whether it serves an independent business function apart from its connection to the soliciting of orders or whether instead it constitutes activity that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force. *Wrigley*, 505 U.S. at 228-229. The Santa Fe employee's sending the fax with the Oregon Retailer's order is part and parcel of the solicitation process, and it would make no sense for Santa Fe to hire someone for the specific task of sending the Oregon Retailer-authorized order to the Oregon Wholesaler.

There should be no distinction between the Santa Fe employee providing a sale order sheet to the Oregon Retailer and the employee sending a fax with the order to the Oregon Wholesaler. Under the Oregon Supreme Court's Decision, Section 381 protection would depend on who input the Oregon Wholesalers' fax number into the machine and pressed "send." If the Oregon Retailer input the number, protection would remain, but if the Santa Fe employee inputs the number, Santa Fe loses protection. This cannot be what Congress intended in enacting Section 381. Sending the fax is not a distinct activity from the solicitation process; and there is no indication in the statute language, legislative history, or *Wrigley* that Congress intended such a strangled safe harbor. As the Tax Court acknowledged, the sending of the order could happen "casually as part of a routine sales call." App.89. While the Oregon Supreme Court claims that prebook orders cannot be reduced to a Santa Fe employee pushing the button on the fax machine, it does not suggest that the incentive agreement, alone, or

in conjunction with an Oregon Retailer sending in a sell sheet order, breaches Section 381 protection. Thus, the Decision does, in fact, turn on who pressed "send" on the fax machine. The Decision strays from *Wrigley* because sending a prebook order does not serve an independent business function apart from soliciting orders. A prebook order itself is solicitation, *i.e.*, a request for an order.

Implicit in the Oregon Supreme Court's Decision is the fact that if Santa Fe did not have a sales force in Oregon, Santa Fe would have hired or contracted with another party to go into Oregon and fax prebook orders from Oregon Retailers to Oregon Wholesalers. But there is no prebook order without solicitation. If, as is undisputed, putting the prebook order in front of the Oregon Retailer is solicitation, then faxing the order must be ancillary to solicitation. There is no way to pull those two activities apart. There is no independent business reason to fax a prebook order to an Oregon Wholesaler other than because the prebook order was just requested.

Alternatively, Santa Fe's activity in connection with prebook orders was *de minimis*. Under *Wrigley*, where an activity that is found not to fall within the definition of solicitation activities or activities ancillary to solicitation, such activity will breach Section 381 protection only if it "establishes a nontrivial additional connection with the taxing State." *Wrigley*, 505 U.S. at 232. The Oregon Supreme Court determined that a sell sheet order does not breach protection for Santa Fe. The only difference between the sell sheet order and the prebook order is who sends the fax with the order request to the Oregon Wholesaler. The ministerial act of the Santa Fe employee sending a fax with the prebook order does not create "a

nontrivial additional connection with" Oregon for Santa Fe. *Wrigley*, 505 U.S. at 232. For that reason, even if sending the prebook order does not fall within solicitation or ancillary to solicitation, it still does not cause Santa Fe to lose Section 381 protection. *Wrigley*, 505 U.S. at 231 ("the venerable maxim de minimis non curat lex ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.").

In *Wrigley*, the unprotected activities by the out-of-state seller were not *de minimis* because the out-of-state seller maintained inventory of its products worth several thousand dollars in the state (in the salesmen's cars) for the unprotected purposes of replacing stale product, selling to retailers, and storage (for replacement and sales purposes). *Id.* at 233, 235. Here, conversely, Santa Fe maintains no inventory of products in Oregon for any alleged unprotected purpose and it does not make sales to Oregon Retailers.

The Oregon Supreme Court's Decision boils down to finding that Santa Fe's employees breached Section 381 by pressing "send" on the fax machine. This is a ministerial, clerical act that does not create an additional, nontrivial connection to Oregon. If Santa Fe's activities in Oregon with respect to the prebook orders do not fall within solicitation or ancillary to solicitation protection under Section 381(a)(2), such activities are protected sales by wholesalers under Section 381(c) or are protected under the *de minimis* standard. The Decision's finding that sending the prebook orders was not alternatively *de minimis* directly conflicts with *Wrigley*.

II. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT NATIONWIDE AND IS RECURRING

The question of what constitutes solicitation under Section 381 is an important and recurring one that affects businesses that sell goods across the United States. This Court's clarification is needed to resolve conflicting and inconsistent interpretations of this federal statute by state courts and agencies, which threaten to undermine the uniformity and clarity that Congress intended to provide by enacting Section 381.

One source of confusion and controversy is a "Statement of Information" issued by the Multistate Tax Commission ("MTC"), an intergovernmental state tax agency, which was created as an effort by states to protect their tax authority. The MTC issues guidelines intending that states adopt them by regulation, legislation, or other administrative action.[5] The Statement of Information issued by the MTC in 2021 purports to interpret Section 381 in light of the modern economy and technology but is an impermissible attempt to override federal law.[6]

The MTC Statement of Information goes beyond interpretation and effectively rewrites the statute by creating new categories of unprotected activities that

5. The MTC submitted an *amicus* brief in support of the Department when this proceeding was before the Tax Court.

6. The MTC originally issued a Statement of Information regarding Section 381 in 1986, which was revised in 1993, 1994, and 2001.

are not based on the plain language or legislative history of Section 381. For example, the MTC Statement of Information asserts that any internet activity that is not limited to solicitation of orders for tangible personal property is sufficient to subject an out-of-state business to state income tax, regardless of whether such activity occurs within or outside the taxing state. This expansive view of what activities breach Section 381 contradicts the statute's express limitation of state taxing power and disregards the statute's purpose of protecting businesses that merely solicit orders for interstate sales.

Several states, including New York, California, New Jersey, and Oregon, have adopted rules or regulations based on the MTC Statement of Information. These rules and regulations create uncertainty, inconsistency, and unfairness for businesses that have relied on the plain meaning and settled interpretation of Section 381 for decades. These rules and regulations expose businesses to potential tax liability for conduct that they could not have anticipated would violate Section 381, and that does not establish sufficient nexus with the taxing state.

Oregon seeks an expansive interpretation of activity that falls outside of the Section 381 safe harbor. As relevant here, like the MTC Statement of Information, Oregon seeks to tax Santa Fe based on activity that does not establish a physical connection between Santa Fe and Oregon and, in fact, is not a Santa Fe activity at all (*i.e.*, Oregon Wholesalers agreeing in the incentive agreements to "accept and process" prebook orders).

There already have been legal challenges to states' interpretations of Section 381 based on the Statement of Information. Absent clarification from this Court, such challenges will undoubtedly continue.

This Court should grant certiorari to review the Decision of the Oregon Supreme Court, as it is inconsistent with the text, history, and purpose of Section 381, as well as with this Court's precedent interpreting the statute. This issue has significant national importance. Businesses require certainty, and there should be uniformity across the country as to what activities violate Section 381 protection. Businesses have arranged themselves based on the Section 381 safe harbor. This Court should resolve this conflict and provide a clear and uniform rule for determining what constitutes solicitation under Section 381.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE ISSUE

Finally, this case provides an ideal vehicle on stipulated facts for this Court to resolve the issue of what activity is protected under Section 381 and whether *Wrigley* still provides the proper framework for determining whether Section 381 protection applies. Moreover, the activities at issue in this case squarely involve activities undertaken by third parties unrelated to the out-of-state Section 381 seller and whether those activities undertaken by an unrelated third party can breach Section 381 for the out-of-state seller. There is great uncertainty in the field of state taxation as to the extent to which Section 381 may be breached for an out-of-state seller based on its

contractual relationships with in-state unrelated third parties. *See* Walter Hellerstein, 1 *State Taxation* (3d ed 2022) ¶ 6.26[2]. The facts of this case will allow the Court to address this important and unanswered question.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 13, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF OREGON, FILED JUNE 20, 2024

IN THE SUPREME COURT
OF THE STATE OF OREGON

No. SC S069820

SANTA FE NATURAL TOBACCO COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Defendant-Respondent.

Filed June 20, 2024

OPINION

(TC 5372) (SC S069820)
En Banc
On appeal from the Oregon Tax Court*
Robert T. Manicke, Judge
Argued and submitted November 9, 2023

MASIH, J.

The judgment of the Tax Court is affirmed.

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* 25 OTR 124 (2022).

Appendix A

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent.

[ ] No costs allowed.
[X] Costs allowed, payable by: Plaintiff-Appellant.
[ ] Costs allowed, to abide the outcome on remand, payable by:

MASIH, J.

This appeal concerns whether Santa Fe Natural Tobacco Company ("Santa Fe") is liable for Oregon income tax for tax years 2010-13. Santa Fe is a New Mexico corporation selling branded tobacco products to wholesalers, who in turn sell to Oregon retailers. The primary issue is whether a federal statutory limit on a state's ability to impose income tax on out-of-state corporations, 15 USC section 381 ("Section 381," frequently also referred to as "Public Law 86-272"), precludes Oregon from taxing Santa Fe because its business in Oregon is limited. In its simplest form, Section 381 creates a safe harbor against state income tax for out-ofstate businesses that who limit their in-state actions to the "solicitation of orders," provided that the orders are accepted out of state and the goods are shipped from out of state. The Oregon Department of Revenue (department) concluded that Santa Fe's various actions in Oregon had taken it out-side the safe harbor of Section 381, thus rendering Santa Fe liable to pay Oregon tax. The Tax Court agreed with the department that Santa Fe's actions had made it subject

to taxation in this state. *Santa Fe Natural Tobacco Co. v. Dept. of Rev.*, 25 OTR 124, 165 (2022).[1]

Santa Fe has appealed that decision. For the reasons that follow, we agree with the Tax Court that Santa Fe, by having its representatives take "prebook orders" from Oregon retailers, took itself outside the safe harbor of Section 381(a)(2). Accordingly, we conclude that Santa Fe is subject to tax by this state, and we affirm the judgment of the Tax Court.[2]

I. BACKGROUND LAW

As noted, the issue in this case involves the proper interpretation of 15 USC section 381. As explained below, Congress enacted that law because the United States Supreme Court's prior interpretation of constitutional

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1. Strictly speaking, the tax at issue is Oregon's corporate excise tax, rather than its corporate income tax. Those taxes are related but distinct. *See Capital One Auto Fin. Inc. v. Dept. of Rev.*, 363 Or 441, 442-45, 423 P3d 80 (2018) (so explaining). The distinction, however, does not affect the proper resolution of the issues here; the parties do not dispute that, if the federal statute applies, it protects Santa Fe against being subject to Oregon's corporate excise tax. *See* 15 USC § 383 ("For purposes of this chapter, the term 'net income tax' means any tax imposed on, or measured by, net income."). To avoid confusing shifts of terminology, we will use the term "income tax" as a shorthand throughout this opinion.

2. We need not reach the department's other contentions or the other aspects of the Tax Court's holding, for reasons discussed at ___ Or at ___ n 12 (slip op at 20 n 12).

limits on state power to tax out-of-state businesses had resulted in too much uncertainty. We begin by summarizing the circumstances that led Congress to enact that statute, then turn to an overview of the statute itself.

A. *Prior Law Regarding State Taxation of Interstate Commerce*

The Commerce Clause of the United States Constitution gives Congress plenary authority to control state taxation of interstate commerce, but for most of the nation's existence Congress had never exercised it. Jerome R. Hellerstein, *Foreword: State Taxation under the Commerce Clause: An Historical Perspective*, 29 Vand L Rev 335, 335 (1976); *see also* US Const, Art I, § 8, cl 3 (setting out Commerce Clause). As a result, the only limits on state taxation of interstate commerce were imposed by the United States Supreme Court, mainly as "violations of the unexercised power of Congress to regulate interstate commerce." *Id.* (so noting and adding that due process and equal protection were involved to a lesser extent).[3]

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3. The underlying restriction comes from an aspect of the Commerce Clause. The Commerce Clause itself grants positive authority for Congress "[t]o regulate Commerce * * * among the several States." US Const, Art I, § 8, cl 3. The United States Supreme Court, however, has "consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Comptroller of Treasury of Maryland v. Wynne*, 575 US 542, 548-49, 135 S Ct 1787, 1794, 191 L Ed 2d 813 (2015) (internal quotation marks and citation omitted).

Up until the New Deal Era, that amounted to a simple prohibition on states taxing interstate commerce. *See* Jerome R. Hellerstein, *State Franchise Taxation of Interstate Businesses*, 4 Tax L Rev 95, 95 (1948) (noting "the traditional view that under the Commerce Clause interstate commerce may not be taxed at all").

During that earlier period, the Supreme Court had observed a distinction between "drummers" and "peddlers." Itinerant salespeople carrying goods for immediate delivery after sale were classified as "peddlers"; they were considered to be engaged in *intra*state commerce and thus subject to state taxation. Comment, *Taxation of Itinerant Salesmen*, 40 Yale LJ 1094, 1094-95 (1931) (discussing distinction and citing cases); Andrew T. Hoyne, *Public Law 86-272 – Solicitation of Orders*, 27 St Louis U LJ 171, 181-82 (1983) (same, and including more recent decisions); *see, e.g.*, *Memphis Steam Laundry v. Stone*, 342 US 389, 394 & n 12, 72 S Ct 424, 427, 96 L Ed 436 (1952) (explaining that the Court "has sustained state taxation upon itinerant hawkers and peddlers on the ground that the local sale and delivery of goods is an essentially intrastate process whether a retailer operates from a fixed location or from a wagon"). By contrast, itinerant salespeople who solicited orders for goods that would be later delivered from outside the state were classified as "drummers"; they were considered to be engaged in *inter*state commerce because they were only "drumming" up business, not selling and delivering products within the state, so they were considered immune from state and local taxation. Comment, 40 Yale LJ at 1094-95; Hoyne, 27 St Louis U LJ at 181-82; *see, e.g.*,

West Point Grocery Co. v. Opelika, 354 US 390, 391, 77 S Ct 1096, 1097, 1 L Ed 2d 1420 (1957) (holding that "a municipality may not impose a * * * tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce").

That understanding of the Commerce Clause gradually changed during the twentieth century, when the Supreme Court began to allow states to tax a broader range of activities than would have been permitted by the earlier blanket protection against taxing interstate commerce. "[S] uch levies were [now] regarded as invalid only if the Court thought they subjected interstate commerce to a risk of multiple taxation not borne by local commerce." Hellerstein, 29 Vand L Rev at 337. As long as each state's tax was apportioned to reasonably measure that state's nexus with income, it was constitutional. *Id.*[4]

4. The current test for the constitutionality of state taxation of interstate commerce is somewhat more complex. As the United States Supreme Court noted in *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S Ct 1076, 51 L Ed 2d 326, *reh'g den*, 430 US 976 (1977), the Commerce Clause does not prohibit state taxation of interstate commerce as long as "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279 (summarizing prior case law). *See* Charles A. Trost, *Federal Limitations on State and Local Tax* § 2:22 (Westlaw 2d ed, updated Nov 2023) (identifying *Complete Auto Transit* as the "landmark case" on the subject).

B. *Enactment of Section 381*

Three decisions by the Court in 1959, however, led Congress to have substantial concerns about the state of the law. That year, the Court decided *Northwestern Cement Co. v. Minn.*, 358 US 450, 79 S Ct 357, 3 L Ed 2d 421 (1959), followed shortly afterward by the Court dismissing an appeal in *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La 651, 101 So 2d 70 (1958), *appeal dismissed*, 359 US 28 (1959), and then denying *certiorari* in *International Shoe Co. v. Fontenot*, 236 La 279, 280, 107 So 2d 640 (1958), *cert den*, 359 US 984 (1959). The details of those rulings are not important here, but all three decisions effectively upheld a state's ability to tax out-of-state businesses whose in-state activities were largely limited to the solicitation of orders.[5]

Congress became concerned that the constitutional standards for when an out-of-state business could be subject to state income tax were so unpredictable that that lack of predictability would itself burden interstate commerce. *See Heublein, Inc. v. South Carolina Tax Comm'n*, 409 US 275, 280 n 5, 93 S Ct 483, 34 L Ed 2d 472 (1972) ("'Persons engaged in interstate commerce are in doubt as to the amount of local activities within a State that will be regarded as forming a sufficient "nexus," that

5. Those decisions are reviewed briefly in *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 US 214, 220-21, 112 S Ct 2447, 120 L Ed 2d 174 (1992). Substantially more details on all three decisions are available in Brian S. Gillman, Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*: A Step out of the Definitional Quagmire of Section 381*, 78 Iowa L Rev 1169, 1171-75 (1993).

is, connection, with the State to support the imposition of a tax on net income from interstate operations * * *.'" (Quoting S Rep No. 658, 86th Cong, 1st Sess at 2-3.)). The burden of compliance could be substantial, especially for small or medium-sized businesses. They might have to "file tax returns in what may eventually be each of the 50 States as well as an unpredictable number of cities, even where the firm maintains no fixed establishment in those States and cities." HR Rep No. 936, 86th Cong, 1st Sess, at 2. That would require those businesses to retain "legal counsel and accountants who are familiar with the tax practice of each jurisdiction." *Id.* The result would be "increases in overhead charges, in some cases to an extent that will make it uneconomical for a small business to sell at all in areas where volume is small." *Id.*

Those concerns led Congress to enact Section 381. *See Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 US 214, 222, 112 S Ct 2447, 2453, 120 L Ed 2d 174 (1992) (so explaining); Paul E. Guttormsson, *Gumming Up the Works: How the Supreme Court's* Wrigley *Opinion Redefined Solicitation of Orders under the Interstate Commerce Tax Act (15 U.S.C. 381)*, 1993 Wis L Rev 1375, 1379-80 (1993); Paul J. Hartman, *Solicitation and Delivery under Public Law 86-272: An Uncharted Course*, 29 Vand L Rev 353, 358-59 (1976).

C. *Relevant Provisions of Section 381*

The case before us involves Section 381(a). Section 381(a), which has two related restrictions, provides, in part:

> "(a) Minimum standards. No State * * * shall have power to impose * * * 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)."

The first provision, Section 381(a)(1), generally protects an out-of-state business from taxation so long as it restricts the actions of its representatives to the solicitation of orders for sales within the taxing state. The solicitation must stop short of closing the sale, though; the order must be accepted outside the state, and the goods must be shipped from outside the state. 15 USC § 381(a)(1); *see* Charles A. Trost, *Federal Limitations on State*

and Local Tax § 10:9 (Westlaw 2d ed, Nov 2023 update) (summarizing provision).[6]

The requirement that the order be accepted outside the taxing state implies an actual decision taking place out-side the state. As one commentator noted:

> "[I]n-state acts which tend to diminish the need for or make a total sham of the already highly formal out-of-state approval or rejection phase of the interstate solicitation process would seem to be properly outside the protection intended by Congress."

Berndt Lohr-Schmidt, *Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income*, 22 Hastings LJ 1035, 1083-84 (1971).

The second provision, Section 381(a)(2), explicitly incorporates Section 381(a)(1) and functionally extends the same protections one additional step beyond direct customers. As noted, Section 381(a)(1) allows a business to solicit orders directly from customers, provided the resulting orders are accepted outside the taxing state. Though the phrasing is cumbersome, Section 381(a)(2) allows the business to *also* solicit orders from *indirect* customers – persons who will order, not from the business

6. The provision bears a strong resemblance to the Supreme Court's earlier case law allowing regarding state and local taxation of "peddlers" but not "drummers."

itself, but from the business's in-state direct customers.[7] But the business's solicitation of such orders is limited to activities that "enable" the business's in-state customers to fill those orders.

Under both parts of Section 381(a), however, the statutory text requires that the business's "*only* business activities" in the taxing state fall within the scope of "solicitation of orders" for interstate sales. 15 USC § 381(a) (emphasis added); *see Wrigley*, 505 US at 223 (same); *Herff Jones Co. v. Tax Com.*, 247 Or 404, 412, 430 P2d 998 (1967) (same). "Solicitation of orders" stops short of the business making sales. *See* 15 USC § 381(c) (which permits independent contractors not only to solicit orders, but also

7. To make that abstraction more concrete: A business's direct customers may be wholesalers, while its indirect customers are retailers. Orders from the retailers go to the wholesalers, and the wholesalers in turn fill their inventory by ordering from the business. Under Section 381(a)(2), the business's representatives can solicit retailers to order from wholesalers, provided that (1) the solicitation is designed "to enable" the wholesalers to fill the orders; and (2) the *wholesalers'* orders to the business will still come within the safe harbor of Section 381(a) (1) – that is, the wholesalers' orders are approved, and the products are shipped, from outside the taxing state. *See* 15 USC § 381(a)(2); Trost, *Federal Limitations on State and Local Tax* § 10.9 (summarizing provision); *Wrigley*, 505 US at 233-34 (explaining that Section 381(a)(2) "shields a manufacturer's 'missionary' request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's being filled by a [Section] 381 'customer' of the manufacturer, i.e., by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state.").

to make sales); *Wrigley*, 505 US at 229 n 5 (noting that the "activities that are most clearly *not* immunized by the statute" include "actual sales" (emphasis in original)). Although *de minimis* violations will not take a business outside the protections of Section 381(a), *see Wrigley*, 505 US at 231, the statute protects a business whose activities are limited to "solicitation of orders" alone. That is the point on which this case turns: whether the in-state actions of Santa Fe's representatives went beyond the "solicitation of orders."

D. *Limits on "Solicitation of Orders"*

The meaning of the term "solicitation of orders," as used in Section 381(a), has been one of the most difficult issues for courts attempting to interpret that statute. Prior to the Court's decision in *Wrigley*, the state courts had offered various interpretations. *See* Guttormsson, 1993 Wis L Rev at 1381-85 (reviewing state court cases to date). This court had addressed the issue more than once. *See Herff Jones Co.*, 247 Or at 411-12 (discussing "broad interpretation" seemingly adopted in *Smith Kline & French v. Tax Com.*, 241 Or 50, 403 P2d 375 (1965), but later rejected by *Cal-Roof Wholesale v. Tax Com.*, 242 Or 435, 410 P2d 233 (1966)).

In *Wrigley*, the United States Supreme Court interpreted the term "solicitation of orders" in detail. Because that interpretation guides our decision in this case, we discuss the facts and the Court's opinion in that case in some detail.

Appendix A

William Wrigley, Jr., Co., a gum manufacturer, was headquartered in Chicago, but it sent sales representatives into Wisconsin. 505 US at 216. The Supreme Court had to determine whether actions taken by Wrigley's representatives exceeded the safe harbor of Section 381(a). It concluded that they did. *Id.* at 232-33.

The Court first considered what "solicitation of orders" meant as used in the statute. It began by examining the meaning of "solicitation" generally:

> "'Solicitation,' commonly understood, means 'asking' for, or 'enticing' to, something, see Black's Law Dictionary 1393 (6th ed 1990); Webster's Third New International Dictionary 2169 (1981) ('solicit' means 'to approach with a request or plea (as in selling or begging)')."

Id. at 223 (brackets omitted). The Court went on to conclude that "solicitation of orders" was not limited to the request for a purchase; instead, it included "the entire process associated with the invitation." *Id.* at 225. Nor was "solicitation of orders" limited to activities "essential" to the request to purchase: If the wording were limited in that way, the Court explained, then

> "it would not cover salesmen's driving on the State's roads, spending the night in the State's hotels, or displaying within the State samples of their product. We hardly think the statute had in mind only day-trips into the taxing jurisdiction by emptyhanded drummers on foot."

Id. at 226. Again, however, "solicitation of orders" does not include "actual sales" – which the Court described as one of the "activities that are most clearly *not* immunized by the statute." *Wrigley*, 505 US at 229 n 5 (emphasis in original).

At the same time, the Supreme Court also rejected the suggestion that "solicitation of orders" should be understood to mean whatever conduct might be considered routine or customary in the course of a solicitation. Accepting that suggestion, the Court reasoned, would

> "convert[ ] a standard embracing only a particular activity ('solicitation') into a standard embracing all activities routinely conducted by those who engage in that particular activity ('salesmen'). If, moreover, the approach were to be applied (as respondent apparently intends) on an industry-by-industry basis, it would render the limitations of [Section] 381(a) toothless, permitting 'solicitation of orders' to be whatever a particular industry wants its salesmen to do."

Id. at 227 (footnote omitted).

The Court instead concluded that a business activity would be a protected "solicitation of orders" as long as the *only* business purpose for the activity was to help solicit orders. The "clear line" separating a protected "solicitation" from unprotected activities was drawn

> "between those 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 – and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force."

Id. at 228-29 (emphasis in original; footnote omitted).

The Supreme Court then offered some examples of how that test would apply. A business activity would not exceed the scope of the "solicitation of orders" if it involved giving a sales representative a car and a stock of samples: "the only reason to do it is to facilitate requests for purchases." *Id.* at 229. But having sales representatives repair or service the business's products would exceed the "solicitation of orders," and so would not be protected by Section 381, because

> "there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to increase purchases; but it is not ancillary to requesting purchases, and cannot be converted into 'solicitation' by merely being assigned to salesmen."

Id. (citing *Herff Jones* for proposition that there is "no [Section] 381 immunity for sales representatives' collection activities").

The Court then turned to the facts before it and considered whether the activities by Wrigley's

representatives exceeded the scope of "solicitation of orders." Three activities were important to the Court's decision. The first two involved representatives contacting Wrigley's indirect customers – retailers – on behalf of Wrigley's direct customers – wholesalers. *See* 505 US at 218; *William Wrigley, Jr. Co. v. Dept. of Rev.*, 160 Wis 2d 53, 64-65, 465 NW2d 800, 804 (1991), *rev'd on other grounds, Wrigley*, 505 US 214 (providing additional details). First, the representatives would offer free gum displays and seek to have them prominently displayed. *Wrigley*, 505 US at 218. If the retailer did not have sufficient gum in stock to fill the displays, then the representative would fill the display with a stock of gum that the representative had brought. *Id.* The retailer would be charged for the gum, however, by a mechanism – the "agency stock check" – that involved the retailer paying the wholesaler, not directly paying Wrigley. *Id.* Second, the representatives would check the retailer's stock and replace any gum that had gone stale. *Id.* at 218-19. The replacement of stale stock was done without charge. *Id.* And third, Wrigley gave its sales representatives – who resided in Wisconsin – approximately $1,000 worth of gum each to perform those two actions. *Id.* at 217-18. The Court concluded that all three of those activities exceeded the scope of "solicitation of orders."

First, the Supreme Court explained that Wrigley's representatives had exceeded the scope of "solicitation of orders" when they replaced stale gum:

> "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."

Id. at 233. The Court rejected the argument that replacement was a "'promotional necessity' designed to ensure continued sales." *Id.* For an activity to be protected by Section 381's safe harbor, the Court explained, "it is not enough that the activity facilitate *sales*; it must facilitate the *requesting of sales*, which this did not." *Id.* (emphases in original; footnote omitted).

Second, the Court concluded that Wrigley's representatives had exceeded the scope of "solicitation of orders" when they placed gum into retailers' displays (the "agency stock checks"). Specifically addressing Section 381(a)(2), the Court explained that Wrigley's actions had an independent business purpose beyond mere solicitation:

> "It might seem * * * that setting up gum-filled display racks, like Wrigley's general advertising in Wisconsin, would be immunized by [Section] 381(a)(2). What destroys this analysis, however, is the fact that 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.'"

Id. at 234 (emphasis in original; footnote omitted). Even though the retailers were making those payments to the wholesalers and not to Wrigley directly, the payments were sufficient to take Wrigley out of the safe harbor of Section 381(a)(2).

Finally, the Court concluded that Wrigley, by storing gum in-state, also exceeded the scope of "solicitation of orders" because the vast majority of that gum was used to replace stale gum or the "agency stock checks," which were not themselves protected activities. *Id.*

With that understanding of the background of Section 381 and how it has been interpreted by the Supreme Court, we turn to the facts developed in the Tax Court regarding the scope of Santa Fe's activities in relation to wholesalers and retailers in Oregon, before explaining why those activities took Santa Fe outside of Section 381's safe harbor.

II. FACTS AND PROCEEDINGS

A. *Facts*

The parties stipulated to the underlying facts. We set out below only those facts relevant to our decision, taken from the stipulation and its attached exhibits. All facts should be understood to refer to tax years 2010-13.

Santa Fe is a New Mexico corporation operating out of state. Santa Fe had no offices or inventory of its own located in Oregon.

During the relevant tax years, Santa Fe sold tobacco products only to wholesalers.[8] Wholesalers in turn sold Santa Fe's products to retailers; retailers then resold the products to consumers.

Santa Fe sent its employees into Oregon to persuade Oregon retailers to order Santa Fe's products from wholesalers. Many of those wholesalers were also located in Oregon. When a representative visited an Oregon retailer in person and convinced the retailer to agree to order Santa Fe's products from a wholesaler, the representative could take one of two actions.

One option was for the representative to leave the retailer a "sell sheet order." The sell sheet order forms were prepared by Santa Fe. They were captioned "Santa Fe Natural Tobacco Account Profile" and included blank spaces for the retailer's account name, number, shipping information, and Santa Fe product selection. The representative would "write the quantities of each item on the appropriate wholesaler sell sheet and leave the sheet with the retailer" for the retailer to send to the wholesaler. A sell sheet order was just a "suggestion" to buy; "[i]t is up to the retailer to follow through and purchase the product." Thus, a sell sheet order would seem to be a classic example of the type of solicitation that falls within the safe harbor of Section 381, and the department

8. During 2010, Santa Fe made some direct sales to Oregon retailers. The department does not rely on those sales to establish Santa Fe's tax liability. Accordingly, our analysis will proceed as though Santa Fe had not made any in-state sales during the relevant tax years.

does not contend that Santa Fe's actions regarding sell sheet orders took it outside the safe harbor of Section 381.

Another option for the representative, however, was to take a "prebook order." In some ways, prebook orders were similar to sell sheet orders. Like the sell sheet order forms, the prebook order forms were also prepared by Santa Fe and had a caption at the top identifying Santa Fe rather than the wholesaler. A prebook order would also be filled out by Santa Fe's representative.

The prebook order process, however, diverged from the sell sheet order process in ways that, as we will explain, made the process more like the facilitation of sales within Oregon, rather than solicitation of orders that could be accepted or rejected by Santa Fe's Oregon wholesalers. Below the caption "Santa Fe Natural Tobacco Company Prebook Order Form," the form included the words "Sold To," "Date," and "Delivery Date." The prebook order form would immediately be signed by the retailer on the line labeled "Buyer Name" and "Buyer Signature." The representative would then personally send the order to the wholesaler by hard copy, phone, fax, or email/electronic delivery (but usually by fax).

When a wholesaler received a prebook order, that triggered a provision of a contractual agreement with Santa Fe: the "Distributor Incentive Program Agreements" ("incentive agreements"). As relevant here, the incentive agreements required every wholesaler to "accept and process" prebook orders. The 2011 incentive agreement, for example, provided that wholesalers must

> "[a]ccept and process pre-book orders initiated by [Santa Fe] on behalf of their retail accounts. These pre-books will be in the form of hard copy, fax, and/or email."

The other incentive agreements were functionally identical. As we will explain, the incentive agreements imposed substantial economic penalties on any wholesaler who refused to accept a prebook order.

The incentive agreements provided for wholesalers to receive incentive payments as a rebate from Santa Fe for each carton that the wholesaler sold.[9] Each of the incentive agreements provided that a breach of the agreement would be cause for Santa Fe to cease making incentive payments on cartons sold. Beginning with the 2011 version of the incentive agreement, Santa Fe's declaration of a breach would not only entitle it to discontinue future payments to the wholesaler; Santa Fe expressly had the right to require the wholesaler to *repay* all those payments already made under the incentive agreement. Santa Fe

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9. Under the 2010 incentive agreement, the rebate was 20 cents per carton, rising to 40 cents per carton for every carton sold beyond the previous year's sales.

Under the 2011 and 2012 incentive agreements, a wholesaler could receive up to 50 cents per carton: 20 cents credited to the invoice when the product was shipped, with additional quarterly payments of 30 cents per carton "to those [wholesalers] which fully meet * * * all [incentive agreement] Rules and Procedures." Whether a wholesaler had fully met all incentive agreement rules and procedures was "to be determined by [Santa Fe] in its sole discretion."

was also given exclusive discretion to determine whether a wholesaler had complied with the terms of the incentive agreements. Moreover, a wholesaler was not permitted to purchase Santa Fe's products "unless [the wholesaler] entered into a[n] [incentive agreement]."[10]

Because the incentive agreements expressly required wholesalers to accept and process prebook orders and imposed substantial economic penalties on any wholesaler who refused to do so, Santa Fe trained its trade representatives to emphasize prebook orders, not sell sheet orders. Those materials expressly described a prebook order as "a guaranteed order." Those materials added that prebook orders "ensure the order will be placed" and "ensure that line extensions sold in [*sic*] during the sales call will be ordered and placed in distribution within the outlet/account."

Santa Fe also set a "specific prebook goal" for its trade representatives; "only valid prebooks [could] be counted towards that goal." Santa Fe's materials for its

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10. The 2011 and 2012 incentive agreements were emphatic on the point:

> "[The wholesaler] agrees that all of its obligations under this [incentive agreement] are material, that full performance of all of its obligations under this [incentive agreement] is essential, and that [Santa Fe] has no obligation to accept any product orders from, or make any monetary payments to, [the wholesaler] if [the wholesaler] breaches or in any way fails to perform in whole or part any provision or requirement of this [incentive agreement]."

representatives directed them to "[a]lways attempt to place prebooked orders." Santa Fe had a "role play" for its representatives where the stated objective was "[t]o get a pre-book"; it concluded with the representative asking the retailer, "How about if I prebook these styles through your wholesaler for you today[?]"

During the relevant tax years, Santa Fe's trade representatives placed an average of 13.3 prebook orders per month from Oregon retailers.

In contrast to prebook orders, none of the incentive agreements addressed sell sheet orders in any way. Sell sheet orders, the materials state, are not guaranteed and are a mere "suggestion" for the retailer to order.

B. ***Proceedings Below***

During the relevant years, Santa Fe timely filed Oregon tax returns. It reported no Oregon taxable income, instead asserting that its activities in Oregon fell within the protections of Section 381.

The department audited Santa Fe's tax returns and rejected Santa Fe's claimed immunity. The department assessed deficiencies for every tax year, from a low of $395,947 for tax year 2010, to a high of $771,122 for tax year 2013 (not including substantial understatement penalties and interest for each year).

Santa Fe appealed to the Regular Division of the Tax Court,[11] where the matter was tried on stipulated facts. Santa Fe argued that prebook orders were the mere solicitation of orders from indirect customers and so protected by Section 381(a)(2). Santa Fe contended that prebook orders differed from sell sheet orders only through the "ministerial act" of having Santa Fe's sales representative, rather than the retailer, transmit the order by pressing the button on a fax machine.

The department conceded that prebook orders, "in isolation," could have been protected by Section 381(a)(2). But it emphasized that the prebook orders did not exist in isolation, because Santa Fe had used the incentive agreements to require wholesalers to "accept and process" those orders. The department contended that Santa Fe "went beyond mere solicitation" because its employees, while in Oregon, delivered signed orders to wholesalers who had already agreed, in advance, to "accept and process" orders transmitted by Santa Fe's employees.

On that point, Santa Fe replied that the incentive agreements only required wholesalers to "accept and process" prebook orders, not to "fulfill" them.

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11. There was an initial appeal to the Magistrate Division of the Tax Court. For purposes of this opinion, it is sufficient for us to discuss only the proceedings in the Regular Division; the Magistrate Division is not a court of record, and the Regular Division hears appeals from the Magistrate Division *de novo*. *See Village at Main Street Phase II v. Dept. of Rev.*, 356 Or 164, 167-68, 339 P3d 428 (2014) (so explaining). We will generally use "Tax Court" to refer to the Regular Division.

Although the Tax Court ultimately was not persuaded by the department's argument regarding the "accept and process" requirement of the incentive agreements (the court concluded that "accept" was ambiguous, *see* 25 OTR at 151-53), the court nevertheless ruled in favor of the department. Relying on the Supreme Court's decision in *Wrigley*, the court held that the prebook orders were more than a "solicitation" because those orders had served an independent business purpose for Santa Fe beyond requesting the orders. "Writing down and forwarding the order for the [r]etailer on the spot made the difference between a potentially meaningless oral 'yes' and an actual order that was more likely to result in a sale." 25 OTR at 155-56. The Tax Court also concluded that Santa Fe's actions had exceeded the scope of Section 381 in a way that was not *de minimis*. *Id.* at 156-58. Because Santa Fe had exceeded the protections of Section 381(a)(2), the court concluded that it was subject to taxation in Oregon.[12] Santa Fe appealed that decision to this court.

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12. The Tax Court also ruled in favor of the department on a separate question. The department had made an alternative argument that, because the incentive agreements required wholesalers to accept any and all returns of products by retailers, Santa Fe had also exceeded the protections of Section 381(c). That subsection provides that an out-of-state business is protected against being taxed in-state for the actions of "independent contractors," provided that the activities of the independent contractors on behalf of the business "consist solely of making sales, or soliciting orders for sales, of tangible personal property." 15 USC § 381(c). The department contended – and the Tax Court agreed – that Santa Fe's act of requiring wholesalers to accept all returns took Santa Fe outside the protections of Section 381. 25 OTR at 134-150.

III. DISCUSSION

The only issue before us is whether Section 381 "cuts off" Oregon's authority to tax Santa Fe's transactions within this state. It is undisputed that Oregon otherwise has authority to tax Santa Fe for income obtained here.[13] In other words: Santa Fe is liable for Oregon income tax unless the Section 381 safe harbor applies.

A. *Standard of Review and Burden of Proof*

In the Tax Court, Santa Fe (as the party challenging the department's decision) had the burden to show, by a preponderance of the evidence, that its actions fell within the protections of Section 381. *See* ORS 305.427 (both before Tax Court and on appeal, "the party seeking affirmative relief" has burden of proof by "a preponderance of the evidence"); *Baisch v. Dept. of Rev.*, 316 Or 203, 211, 850 P2d 1109 (1993) ("A taxpayer seeking relief from a decision of the Department denying a deduction bears the burden

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As related to the "prebook orders," however, Santa Fe's representatives were not "independent contractors," but Santa Fe employees, and so they were not entitled to make in-state "sales" by Section 381(c); instead, their activities were limited to "solicitation of orders." And because we conclude in this opinion that Santa Fe's activities in Oregon fell outside the safe harbor of Section 381(a)(2), we need not reach the merits of the Tax Court's alternative holding that Santa Fe had also fallen outside the safe harbor created by Section 381(c).

13. Santa Fe does not contend, for example, that Oregon's income tax here would violate the federal constitutional limitations imposed by the "dormant Commerce Clause."

of showing by a preponderance of the evidence that the deduction is allowable.").

We rely on the stipulated facts and exhibits, and we review the Tax Court's legal conclusions for errors of law. ORS 305.445.

B. *Analysis*

As we will explain, Santa Fe's representatives went beyond soliciting orders on behalf of wholesalers. Because the wholesalers had already been committed by the terms of their incentive agreements to accept any prebook order, Santa Fe's representatives were doing more than "enabling" wholesalers to sell Santa Fe products to retailers. Instead, they were "requiring" wholesalers to sell those products and facilitating those sales. That exceeded the scope of the permitted "solicitation of orders."

We begin with the "prebook order" itself. As noted, such orders used a form prepared by Santa Fe and filled out by Santa Fe's representatives on behalf of their indirect customers, the Oregon retailers. Under the terms of all the incentive agreements, wholesalers were contractually obligated to accept and process those orders, and their right to receive future payments under the incentive agreements was contingent on complying with that contractual requirement.[14] Starting in 2011, Santa

14. We do not suggest that that the prebook order requirements were the only duties that the incentive agreements required

Fe added "sticks" to the incentive agreements to match the "carrot" of future payments. *See* ___ Or at ___ (slip op at 17) (discussing in detail). First, all wholesalers had to participate in the incentive agreements, so all future business with Santa Fe depended on the wholesalers accepting and processing those prebook orders. Second, a wholesaler who breached the incentive agreements by failing to accept and process prebook orders would not only lose those future payments under the incentive agreements, it would also be required to repay any payments already received. Again, the 2011 and 2012 incentive agreements expressly provided that

> "all of [the wholesaler's] obligations under this [incentive agreement] are material, that full performance of all of its obligations under this [incentive agreement] is essential, and that [Santa Fe] has no obligation to accept any product orders from, or make any monetary payments to, [the wholesaler] if [the wholesaler] breaches or in any way fails to perform in whole

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wholesalers to undertake. The incentive agreements imposed at least one other primary and affirmative duty on the wholesalers: to accept product returns. The wholesalers had other duties, though those largely seem to have been negative (*e.g.*, wholesalers were prohibited from selling Santa Fe's products in a manner that would violate state or federal law) or in support of the main duties (*e.g.*, wholesalers were required to retain records and permit Santa Fe to perform audits). The point remains, however: Santa Fe considered the acceptance and processing of prebook orders to be so important that it put the requirement into a contract that imposed substantial economic penalties for any breach.

> or part any provision or requirement of this [incentive agreement]."

When Santa Fe contractually required wholesalers to "accept and process" prebook orders, then, the wholesaler understood that it must comply with that obligation or the wholesaler would face substantial economic penalties and lose the right to continue selling Santa Fe products. As a result, the incentive agreements went beyond "facilitat[ing] the requesting of sales" and instead "facilitate[d] sales" by Santa Fe's representatives, *Wrigley*, 505 US at 233 (emphasis omitted), because the wholesalers had already been committed, by contract and by financial penalties, to complete the transaction. As such, prebook orders went beyond the scope of "solicitation of orders."[15]

The term "solicitation of orders" is used in both Section 381(a)(1) and Section 381(a)(2). The Supreme

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15. As noted, the Tax Court had concluded that the "accept and process" provision was ambiguous in a legal sense. For wholesalers, however, the economic realities represented by the phrase were entirely unambiguous: wholesalers had to accept prebook orders or become subject to immediate economic penalties by Santa Fe. That economic reality is much more relevant than the mere possibility that expensive litigation might eventually lead to a court decision that would permit a wholesaler to refuse a prebook order without penalty.

For its part, Santa Fe argues that it is significant that the incentive agreements use the words "accept and process," rather than "fulfill." "Fulfill" is not a legal term of art, however. Santa Fe offers no authority or support for its implicit suggestion that the phrase "accept and process" unambiguously *excludes* a requirement that the wholesalers "fulfill" the order.

Court's ordinary principles of statutory interpretation direct us to construe "solicitation of orders" to have the same meaning in both sections. *See Sullivan v. Stroop*, 496 US 478, 484, 110 S Ct 2499, 2504, 110 L Ed 2d 438 (1990) (the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); *Wrigley*, 505 US at 225 (noting same principle).

Section 381(a)(1) shows that a "solicitation" does not include accepting the order (or shipping the goods). Again, that subsection protects "solicitation of orders" so long as "[the] 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." The requirement that the approval occur outside the state might seem to be a mere formality, *see* Lohr-Schmidt, 22 Hastings LJ at 1083-84 (so noting), but it is necessary.

The requirement that acceptance occur *outside the state* does not apply to Section 381(a)(2), of course; the text of Section 381(a)(2) shows that a business's representatives may solicit orders on behalf of direct customers within the taxing state. But in both contexts, the activity must be limited to a "solicitation" of orders.

In *Wrigley*, the Supreme Court explained that "solicit" means "asking for" or "enticing to" or "approach with a request or plea." 505 US at 223 (internal quotation marks and citations omitted)). Nothing suggests that Santa Fe's representatives told retailers about the provision

of the incentive agreements requiring wholesalers to "accept and process" prebook orders, much less that the representatives used it as a selling point to encourage the retailer to buy Santa Fe's products. To the contrary: The sample "role plays" for representatives did not mention the "accept and process" obligation at all. From the perspective of the retailer, a prebook order was just a sell sheet order that someone else turned in for them. But it was no such thing from the perspective of a wholesaler – or from the perspective of Santa Fe, which had used the incentive agreements to make prebook orders amount to "guaranteed order[s]." Prebook orders, as something that wholesalers had already committed themselves to accept, thus facilitated the *sale* and not the *solicitation. See Wrigley*, 505 US at 233 ("[I]t is not enough that the activity facilitate *sales*; it must facilitate the *requesting of sales*, which this did not." (Emphases in original.)).

That conclusion also follows from the full definition of "solicitation of orders" that the Supreme Court articulated in *Wrigley.* The "accept and process" obligation that Santa Fe imposed was not "entirely ancillary to requests for purchases." *Id.* at 228 (emphasis omitted). 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," *id.* at 228-29: It allowed Santa Fe's representatives to go beyond requesting sales and into facilitating sales on behalf of wholesalers, and to quickly have orders filled from stock that Oregon wholesalers were, in effect, holding for Santa Fe in-state. A wholesaler could not refuse to "accept and process" a single Santa Fe prebook order without risking

future incentive payments for *every* Santa Fe product that it sold to *every* retailer, and, starting in 2011, a wholesaler risked being required to repay *every* incentive payment that it had already received for sales to *every* retailer. Thus, Santa Fe was doing far more than simply "enabling" Oregon wholesalers to sell Santa Fe's products.[16]

As we will explain, Santa Fe used prebook orders – bolstered by the incentive agreements – in the same way that the gum manufacturer in *Wrigley* used "agency stock checks." Again, Wrigley's representatives would fill free gum displays using the stock of gum that the representative had brought into the state, requiring the retailer to pay a wholesaler for the gum. *See Wrigley*, 505 US at 218. Wrigley thus had exceeded the scope of Section 381(a)(2) in two different ways. First, "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." *Id.* at 234 (emphasis in original). Second, the representatives' in-state stock of gum to fill the displays – a stock that the retailers had to pay for – also exceeded the protections of Section 381. *Id.*

16. The Tax Court reached a similar conclusion, but on much narrower grounds. It correctly recognized that prebook orders increased the chances of a sale of Santa Fe's products, but the court's analysis seems to have relied almost entirely on the act of Santa Fe's representative transmitting the prebook order to the wholesaler. *See* 25 OTR at 154-56. Our holding does not rely on the narrow act of transmission. We conclude that prebook orders should be considered in light of the contractual obligations and economic realities that Santa Fe's incentive agreements imposed on wholesalers.

That parallels what Santa Fe did here. When Santa Fe's representatives obtained a prebook order from an Oregon retailer, they were not just soliciting orders. They were facilitating sales on behalf of wholesalers, who were for practical purposes already committed to accept those sales. And, because Oregon wholesalers had no true ability to decline the sale, the wholesaler's stock of Santa Fe products functioned as if Santa Fe itself had stored the stock in-state – also falling outside the scope of Section 381(a).

In our view, then, prebook orders cannot be reduced to a Santa Fe representative performing the "ministerial" act of "push[ing] the button on a fax machine," as Santa Fe argues. (Emphasis omitted.) That framing would ignore the economic structure that Santa Fe had constructed around "prebook orders," using its incentive agreements with wholesalers.

Considered in its factual and legal context, then, Santa Fe and its representatives exceeded the scope of "solicitation of orders" as that term is used in Section 381(a)(2) when they obtained prebook orders from Oregon retailers.

C. *Prebook Orders Were Not De Minimis*

That does not end our analysis. In *Wrigley*, the Supreme Court further explained that "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles')" applies to Section 381. 505 US at 231. A company should not become "liable for hundreds of thousands of

dollars in taxes if one of its salesmen sells a 10-cent item in state." *Id.* In the context of Section 381, the Court held that

> "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.

The Court then explained why it concluded that the *de minimis* principle did not protect Wrigley under those facts:

> "Wrigley's sales representatives exchanged stale gum, as a matter of regular company policy, on a continuing basis, and Wrigley maintained a stock of gum worth several thousand dollars in the State for this purpose, as well as for the less frequently pursued (but equally unprotected) purpose of selling gum through 'agency stock checks.' Although the relative magnitude of these activities was not large compared to Wrigley's other operations in Wisconsin, we have little difficulty concluding that they constituted a nontrivial additional connection with the State."

Id. at 235.

Here, the parties stipulated that Santa Fe's representatives obtained an average of 13.3 prebook orders per month from Oregon retailers. That, combined with exhibits showing Santa Fe's strong emphasis on its representatives obtaining prebook orders, is sufficient for us to conclude that its actions were not *de minimis*. Like Wrigley, Santa Fe was engaging in the unprotected activity "as a matter of regular company policy, on a continuing basis." *Id.* The number of such orders per month is also not *de minimis*. Thus, "we have little difficulty concluding that they constituted a non-trivial additional connection with the State." *Id.*[17]

III. CONCLUSION

For the reasons set out above, we conclude that Santa Fe's business activities – specifically, the pursuit of

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17. Although the record does not give the value of prebook orders or compare the size of those orders to Santa Fe's other sales within the state, we agree with the Tax Court: In this context, the burden rested on Santa Fe to come forward with evidence that the sales were trivial. ORS 305.427 (both before Tax Court and on appeal, "the party seeking affirmative relief " has burden of proof by "a preponderance of the evidence"); *see* 25 OTR at 157-58 (so concluding).

Unlike the Tax Court, however, we would add that it is far from clear that the size of a business's protected activities has any bearing on whether the unprotected activities create a nontrivial additional connection. *See Wrigley*, 505 US at 235 (unprotected activities made nontrivial additional connection, even though "the relative magnitude of these activities was not large compared to Wrigley's other operations in Wisconsin").

prebook orders by its representatives in Oregon, invoking incentive agreement contractual provisions used by Santa Fe to ensure that wholesalers treated each one of those orders favorably – exceeded the scope of permitted "solicitation of orders" under Section 381(a)(2). We further agree that Santa Fe's activities were not *de minimis*. Accordingly, Santa Fe was subject to Oregon income tax.

The judgment of the Tax Court is affirmed.

APPENDIX B — OPINION OF THE OREGON TAX COURT, REGULAR DIVISION, DATED AUGUST 23, 2022

IN THE OREGON TAX COURT
REGULAR DIVISION
CORPORATION EXCISE TAX

TC 5372

SANTA FE NATURAL TOBACCO COMPANY,

Plaintiff,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Defendant.

August 23, 2022, Decided

OPINION

I. INTRODUCTION

The substantive issue[1] in this case is whether 15

1. The court previously decided certain evidentiary issues. (*See Santa Fe Natural Tobacco Co. v. Dept of Rev.* OTR (May 3, 2021) (Order).) The Order invited submission of one or more *amicus* briefs under Tax Court Rule 48, and the court granted the application of *amicus* Multistate Tax Commission (MTC) in support of Defendant (the Department). The court appreciates the discussion of historical

USC § 381[2] (PL 86-272) protected Plaintiff (Taxpayer) from Oregon's net income tax for the tax years ending December 31, 2010 through 2013 (Years at Issue).

II. FACTS

The parties submitted the case for trial on stipulated facts, which are found in the parties' 17-page narrative stipulation and stipulated exhibits, all of which the court admits into evidence. (*See* Stip Facts.) During the Years at Issue, Taxpayer was an out-of-state manufacturer, marketer, and distributor of cigarettes and certain other tobacco products (collectively, Products), selling to customers throughout the United States. (Stip Facts at 1-2, ¶¶ 1-3.) Taxpayer had no offices in Oregon and had none of its own inventory of Products in Oregon for sale or return. (Stip Facts at 3, ¶¶ 12-13.)

Taxpayer sold its products to wholesalers, including wholesalers located in Oregon (Oregon Wholesalers or Wholesalers), which sold the products to retailers, including retailers located in Oregon (Oregon Retailers or Retailers). (Stip Facts at 2, ¶ 7.)[3]

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and policy issues in the MTC brief; however, the court today decides the case solely on the basis of the authorities cited in this opinion.

2. Unless otherwise indicated, references to the United States Code (USC) and the Oregon Revised Statutes (ORS) are to the 2013 editions.

3. During 2010, Taxpayer also sold its products directly to some Oregon Retailers, although many Oregon Retailers bought Taxpayer products from wholesalers, including Oregon Wholesalers. After

Appendix B

A. Facts related to product returns

1. "100% Product Guarantee"

Taxpayer "provided * * * Oregon Retailers[ ] a '100% Product Guarantee' on SFNTC Brand Cigarettes[4] that Oregon Retailers purchased from Oregon Wholesalers." (Stip Facts at 3, ¶ 11.) The "100% Product Guarantee" is a one-page document that Taxpayer updated approximately annually. (*See* Stip Exs 1-5.) During 2010 and the first half of 2011, the 100% Product Guarantee stated:

> **"SANTA FE NATURAL TOBACCO COMPANY**
>
> **"100% PRODUCT GUARANTEE**
>
> "All products manufactured by Santa Fe Natural Tobacco Company (Natural American Spirit) or represented by SFNTC (Dunhill and State Express) (collectively, 'Tobacco Products') are 100% guaranteed. Non-saleable Tobacco Products may be returned, at our expense, for product replacement or refund.

2010, Taxpayer no longer accepted orders from Oregon Retailers. (Stip Facts at 3, ¶¶ 9-10.)

4. As defined in the parties' stipulation, "SFNTC" refers to Taxpayer, and "SFNTC Brand Cigarettes" is synonymous with the Products as defined in this opinion. (*See* Stip Facts at 1-2, ¶ 2.)

Appendix B

> "Customers making returns directly to SFNTC must include a Return Authorization Number issued by SFNTC with the return shipment. To request a Return Authorization Number, call 1 (866) [redacted] and ask for Returns.
>
> "Retailers making returns to a distributor are not required to obtain authorization from SFNTC. SFNTC's representatives will not sticker or mark Tobacco Products at retail or require paperwork authorizing a retailer to return such Tobacco Products to its distributor.
>
> "Distributors may accept returns from retailers for any reason. Distributors are not required to obtain SFNTC authorization in order to accept returns from retailers.
>
> "Please inspect the contents of your shipment upon receipt to ensure that any problems are discovered and reported as soon as possible. Any problems should be reported immediately by calling us at 1 (866) [redacted]."

(Stip Ex 1; *see* Stip Ex 2 (identical text, except referring to "State Express 555" rather than "State Express.") Effective through June 30, 2012, the "100% Product Guarantee" stated:

Appendix B

"SANTA FE NATURAL TOBACCO COMPANY

"100% PRODUCT GUARANTEE

"'All products manufactured by Santa Fe Natural Tobacco Company (SFNTC) (Natural American Spirit cigarettes and roll-your-own) or represented by SFNTC (Dunhill cigarettes; State Express 555 cigarettes) (collectively, 'Tobacco Products') are 100% guaranteed.'

"Retail customers may return unintentionally damaged, non-saleable and stamped Tobacco Products through their Direct Supplier of SFNTC products. Retailers making returns to a Direct Supplier are not required to obtain authorization from SFNTC. SFNTC's Representatives will not sticker or mark Tobacco Products at retail or provide paperwork authorizing a retailer to return such Tobacco Products to their Direct Supplier. Return procedures between retailers and Direct Suppliers are solely determined by the Direct Supplier.

"Direct Suppliers may accept Tobacco Product returns from retailers for any reason and are not required to obtain SFNTC authorization in order to accept returns from retailers.

> "All questions regarding our Retail Returned Goods Policy should be directed to your local SFNTC Representative or to our SFNTC Customer Care Center at (800) [redacted].
>
> "Retailers should process Tobacco Product returns through their Direct Supplier. In the event the Direct Supplier does not process retail returns, retail customers may contact the SFNTC Customer Care Center directly for assistance. Retailers are responsible for processing and returning product to SFNTC that will not be accepted through their Direct Supplier and adhering to all requirements of the SFNTC Retail Returned Goods Policy."

(Stip Exs 3-4; *see* Stip Ex 5 (identical text, except omitting reference to "products represented by SFNTC (Dunhill cigarettes; State Express 555 cigarettes.") Effective for the remainder of the subject years, the "100% Product Guarantee" stated:

> **"SANTA FE NATURAL TOBACCO COMPANY**
>
> **"100% PRODUCT GUARANTEE**
>
> "'All products manufactured by Santa Fe Natural Tobacco Company (SFNTC) (Natural American Spirit cigarettes and roll-your-own) (collectively, 'Tobacco Products') are 100% guaranteed.'

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"A retail customer may return unintentionally damaged, non-saleable and stamped Tobacco Products through its Direct Supplier of SFNTC products. A retailer making a return to a Direct Supplier is not required to obtain authorization from SFNTC. SFNTC's Representatives will not sticker or mark Tobacco Products at retail or provide paperwork authorizing a retailer to return such Tobacco Products to its Direct Supplier.

"A retailer should process Tobacco Products returns through its Direct Supplier. Return procedures between a retailer and Direct Supplier are solely determined by the Direct Supplier. If a Direct Supplier does not have a procedure and/or form for processing returns, the chart below shows the type of information a Direct Supplier may desire for a return.

"Direct Suppliers may accept Tobacco Products returns from retailers for any reason and are not required to obtain SFNTC authorization in order to accept returns from retailers.

"All questions regarding our Retail Returned Goods Policy should be directed to your local SFNTC Representative or to our SFNTC Customer Service Representative at (866) [redacted].

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> "In the event the Direct Supplier does not process retail returns, retail customers may contact SFNTC Customer Service directly for assistance. A retailer is responsible for processing and returning Tobacco Products to SFNTC that will not be accepted through its Direct Supplier and adhering to all requirements of the SFNTC Retail Returned Goods Policy.

"Supplier	**Customer Name**	**Store Phone/ Contact**	**Supplier Fax**	**Item Number**	**Returned Qty. (Cartons)"**

(Stip Ex 5.)

Taxpayer had employees (Representative Employees) located in Oregon, who visited and solicited Oregon Retailers to carry and sell Products to adult tobacco consumers. Representative Employees were trained to, and did, inform Retailers about Taxpayer's 100% Product Guarantee during sales calls. (*See, e.g.*, Stip Ex 12 at 7 (Account Executive Training Manual, encouraging trainees to "[b]e prepared with appropriate materials (style brochure, our 100% product guarantee, etc.) to help introduce the retailer to our brands."); Stip Ex 10 at 1, 5, 19, 20 (entries from Representative Employee logs indicating mention of guarantee to Retailers).)

2. "Wholesale Returned Goods Policy"

Taxpayer had a Wholesale Returned Goods Policy that was part of the terms and conditions of sale of Taxpayer products to Oregon Wholesalers. (Stip Facts at 6, ¶ 20.) Relevant text, taken from a representative policy, is reprinted as part of the analysis below. (*See* Stip Ex 9.)

3. "DIP Agreements" with Oregon Wholesalers

Taxpayer entered into Distributor Incentive Program (DIP) Agreements with Oregon Wholesalers. The Oregon Wholesalers were not related to Taxpayer by ownership or common control and did not solicit orders for, or sell, any of the products at issue on behalf of Taxpayer. (Stip Facts at 4-5, ¶¶ 15-17.) Taxpayer had no right to prohibit the Wholesalers from selling cigarettes that were manufactured by companies other than Taxpayer and competitive with Taxpayer's Products, or from accepting returns of cigarettes of such other companies. (Stip Facts at 7, ¶ 24.) Taxpayer had DIP Agreements with six or seven Oregon Wholesalers at various times. (*See id.*) Certain relevant provisions of DIP Agreements are reprinted below. (*See* Stip Exs 6-8.)

Starting July 1, 2011, the Oregon Wholesalers could not purchase Taxpayer Products unless the Oregon Wholesalers entered into a DIP Agreement. (Stip Facts at 5, ¶ 18.) The DIP Agreements included a requirement that the Oregon Wholesaler accept and process returns of Products from Oregon Retailers who purchased from the Oregon Wholesaler Products for the purpose of selling them at retail. (Stip Facts at 5, ¶ 19.)

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Taxpayer had no right to control the Oregon Wholesalers' employment or personnel decisions, the way tasks (including those related to accepting Product returns) were delegated among employees or others, or the hours or days to conduct business (including accepting Product returns). (Stip Facts at 6, ¶¶ 21-23.) Except as allowed under the DIP Agreements and the Wholesale Returned Goods Policy, Taxpayer had no right to monitor how the Oregon Wholesalers fulfilled orders placed by Oregon Retailers or how the Oregon Wholesalers performed the task of accepting returns of Products from Oregon Retailers. (Stip Facts at 7, ¶ 25.) As provided in the DIP Agreements, Taxpayer had the right to conduct physical counts of the Oregon Wholesalers' inventory of Products. However, Taxpayer did not send Taxpayer employees to conduct such counts during the subject years. (Stip Facts at 7, ¶ 26.)

Pursuant to the DIP Agreements, the Oregon Wholesalers reported data to a third party that included the amount of Product that the Oregon Wholesalers sold to Oregon Retailers and the amount of Product that Oregon Retailers returned to the Oregon Wholesalers. (Stip Facts at 7, ¶ 27.) Those data indicate the following:

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Subject Year[5]	Cartons[6] Sold by Oregon Wholesalers to Oregon Retailers	Cartons Accepted by Oregon Wholesalers from Oregon Retailers	Cartons Accepted by Taxpayer from Oregon Wholesalers
2010 Period	586,041	1,825	503
2011 Period	668,062	1,769	503
2012 Period	704,772	2,289	503
2013 Period	764,464	1,993	503

(Stip Facts at 8-10, ¶¶ 30-31.) In accepting returns of Products from Oregon Wholesalers, Taxpayer did not distinguish between Products that were returned by an Oregon Retailer to an Oregon Wholesaler, and those that were not. (Stip Facts at 10, ¶ 32.)

B. Facts related to "Pre-Book Orders"

Taxpayer's Representative Employees did not carry inventory for sale. (Stip Facts at 4, ¶ 14.) They sometimes took "Pre-Book Orders," which were orders authorized by an Oregon Retailer that a Representative Employee forwarded to an Oregon Wholesaler. (Stip Facts at 10, ¶ 33.) For example, if, during a visit to an Oregon Retailer, a Representative Employee observed that the Oregon Retailer's stock of Products was low or depleted, or if

5. The "periods" shown correspond closely, although not precisely, with the calendar year. (See Stip Facts at 8-10, ¶¶ 30-31.)

6. A "carton" contained ten "packs" of cigarettes.

the Representative Employee made a cold call on a new Oregon Retailer, the Representative Employee could leave a "sell sheet order" with the Retailer as a suggestion for the Retailer to use to purchase Products when the Retailer next visited the Oregon Wholesaler. Alternatively, the Representative Employee could take a Pre-Book Order during the visit and forward it to an Oregon Wholesaler. During the Years at Issue, Representative Employees primarily forwarded Pre-Book Orders by fax, but they could do so by phone or email, or by accessing the Oregon Retailer's electronic ordering system. (Stip Facts at 10-11, ¶¶ 33-36.)

The DIP Agreements included a requirement that the Oregon Wholesaler "accept and process" Pre-Book Orders. (Stip Facts at 5, ¶ 19.) During the Years at Issue, Representative Employees placed an average of 13.3 Pre-Book Orders a month for Oregon Retailers. (Stip Facts at 11-12, ¶ 40.)

The parties agree that Pre-Book Orders were not sales by Taxpayer to Oregon Retailers. (Stip Facts at 11, ¶ 39.) The Oregon Wholesaler, not Taxpayer, fulfilled the order from the Wholesaler's own inventory and billed the Oregon Retailer for the Products after Representative Employees placed the Pre-Book Orders by forwarding them to the Oregon Wholesaler. (Stip Facts at 11, ¶ 39.)

C. Procedural background

Taxpayer timely filed Oregon corporation excise tax returns for each of the Years at Issue and paid only the

annual $150 minimum tax imposed under ORS 317.090. Taxpayer reported no Oregon taxable income, based on Taxpayer's determination that PL 86-272 immunized its income from Oregon's net income tax imposed under ORS 317.070. (*See* Ptf's Compl at 2, ¶¶ 7-9.) Taxpayer attached to each return a page containing a large-font statement: "The taxpayer's activities in this state are limited to the solicitation of sales and are therefore protected by Public Law 86-272." (Stip Ex 16-19.) The Department audited Taxpayer's returns, concluded that PL 86-272 did not protect Taxpayer, and after an administrative conference, issued notices of assessment of tax and interest, as well as penalties for substantial understatement of taxable income (ORS 314.402) and failure to pay tax when due (ORS 314.400). (*See* Ptf's Compl at 3, ¶¶ 10-14.) Taxpayer appealed to the Magistrate Division, which granted summary judgment in favor of the Department. (*See id.* at 4-5, ¶¶ 16-21.)

Taxpayer appealed to this division from the magistrate's decision. In the stipulation, filed before trial, each party reserved the right to call an expert witness, and each party did so at a one-day trial. (*See* Stip Facts at 16-17, ¶ 57; Transcript at 28-38, 141-46; Order at 2.) The evidence in the case, other than the stipulation and stipulated exhibits, consists of those portions of expert witness testimony that the court later admitted; neither party proffered exhibits at trial other than previously stipulated exhibits. (Order at 13.)

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III. ISSUES

A. *Returns of goods: activities of independent contractors under 15 USC § 381(c).* Did Taxpayer lose immunity under 15 USC § 381(c) because Oregon Wholesalers accepted returns from Oregon Retailers of goods manufactured by Taxpayer, including returns of salable goods that Oregon Wholesalers placed into their own inventory and returns of nonsalable goods that Oregon Wholesalers were allowed to send to Taxpayer for credit, where DIP Agreements required the Oregon Wholesalers to accept returns from Oregon Retailers regardless of reason?

B. *Pre-book orders: "missionary" activities of Taxpayer employees under 15 USC § 381(a)(2).* Did Taxpayer lose immunity under 15 USC § 381(a)(2) because Representative Employees in Oregon placed "Pre-Book Orders" with Wholesalers for shipment of Taxpayer Products to Retailers, where DIP Agreements required the Wholesalers to accept and process the pre-book orders?

C. *De Minimis activities.* Did Taxpayer retain immunity because it conducted both of the foregoing activities at a *de minimis* level?

D. *Penalties.* Do the positions Taxpayer took on its Oregon returns subject Taxpayer to the

penalty under ORS 314.402(1) for "substantial understatement of taxable income"?

IV. ANALYSIS

Taxpayer claims immunity from Oregon corporation excise tax under PL 86-272, which provides, in pertinent part:

> "(a) No state, or political subdivision thereof, shall have power to impose, for any taxable year 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).

" * * * *

"(c) 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) For purposes of this section ---- (1) the term 'independent contractor' means a commission agent, broker, or 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."

15 USC § 381; *see also id.* § 383 ("For purposes of this chapter, the term 'net income tax' means any tax imposed on, or measured by, net income."). Congress enacted PL 86-272 in 1959 and has never amended it.

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In its pre-trial memorandum, the Department identifies the activities described in Issues A (return of goods) and B (Pre-Book Orders) as the bases for its position that PL 86-272 does not protect Taxpayer from Oregon's net income taxes. (Def's Pre-Trial Memo at 1.) If the court agrees with the Department regarding either issue, the court must conclude that PL 86-272 does not protect Taxpayer and must uphold the assessments.

A. Returns of Goods

With respect to returns of goods, the parties disagree whether, under 15 USC § 381(c),[7] (1) the Wholesalers acted "on behalf of" Taxpayer and if so, (2) the Wholesalers' activity was within or outside the scope of "making sales, or soliciting orders for sales."

1. Did Oregon Wholesalers accept returns "on behalf of" Taxpayer?

The Department asserts that the Wholesalers acted on behalf of Taxpayer because Taxpayer "delegated" to Wholesalers the activity of accepting returns from Retailers in satisfaction of Taxpayer's "100% Product Guarantee" to Retailers. (Def's Post-Trial Br at 20.) Taxpayer disputes that the facts show the Wholesalers

7. The parties frame their positions under 15 USC § 381(c), which covers "independent contractors." In its post-trial brief, the Department acknowledged that the Oregon Wholesalers were "acting as independent contractors" under 15 USC § 381(c), rather than as "representatives" under 15 USC § 381(a). (Def's Post-Trial Br at 24-25 & n 13.)

acted on its behalf. Before addressing the facts, the court seeks to understand the meaning of the statutory term "on behalf of," looking to the text, structure and legislative history of PL 86-272. *See Etter v. Dep't of Revenue*, 377 P.3d 561, 360 Ore. 46, 52 (2016); *Health Net Life Ins. Co. v. Dept. of Rev.*, OTR (May 3, 2021) (slip op at 7). When interpreting the text of a federal statute, the job of a court "is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Central Ltd. v. U.S.*, US , 138 S Ct 2067, 2070-71, 201 L Ed 2d 490 (2018) (ellipses in original) (quoting *Perrin v. United States*, 444 US 37, 42, 100 S Ct 311, 62 L Ed 2d 199 (1979)).

For the ordinary meaning of a term, the court starts with contemporaneous dictionary definitions. *Cf. id.* A leading dictionary included the following definition:

> "**behalf** *** INTEREST, BENEFIT, SUPPORT — used as the object of *in* or *on* and with a possessive noun or pronoun < a good word in a friend's ~ > < the senator who is now stumping the state on his own ~ > < intervening in her ~ -- Warren Beck > -- **in behalf of** *or* **on behalf of** *prep* : in the interest of : as the representative of : for the benefit of < this letter is written *in behalf of* my client >"

Webster's Third New International Dictionary 198 (unabridged ed 1961) (typeface in original; archaic definition omitted). The court finds nothing in contemporaneous legal dictionaries suggesting a meaning different from that in

Webster's. See James A. Ballentine, *Self-Pronouncing Law Dictionary* 88 (1948) ("The word is defined by Webster as meaning in the name of; on account of; benefit; advantage; interest; profit; defense; vindication."); *Black's Law Dictionary* 197 (4th ed 1957) ("Benefit, support, defence, or advantage."). The court concludes that the ordinary meaning of "on behalf of," as of 1959, was "in the interest of," "as representative for," or "for the benefit of."

The parties have not argued that the structure or legislative history of PL 86-272 suggests an understanding of "on behalf of" that is different from the ordinary meaning.[8] For additional context, the court has examined the cases that (according to *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 US 214, 220-22, 112 S Ct 2447, 120 L Ed 2d 174 (1992).) prompted Congress to enact PL 86-272. *See Northwestern States Portland Cement Co. v. Minnesota*, 358 US 450, 454, 79 S Ct 357, 3 L Ed 2d 421 (1959); *Brown-Forman Distillers Corp.*

8. The Department discusses the structure and legislative history to the extent of arguing that 15 USC § 381(c) should be read narrowly, such that an independent contractor's engaging in any in-state activity on behalf of the out-of-state taxpayer other than making sales, or soliciting orders for sales as allowed under 15 USC § 381(a), potentially jeopardizes the taxpayer's immunity under PL 86-272. (*See* Def's Post-Trial Br at 23-25.) Taxpayer does not contest that reading as a general proposition, but rather argues that Wholesalers did not accept returns on Taxpayer's behalf. (*See* Ptf's Reply at 6-7 ("[T]he Department attempts to establish a point that is not in dispute--namely, that an independent contractor can breach P.L. 86-272 for the out-of-state seller if the independent contractor performs unprotected activities in the State on behalf of the out-of-state seller.").

v. Collector of Revenue, 234 La 651, 101 So 2d 70 (1958), *appeal dism'd*, 359 U.S. 28, 79 S. Ct. 602, 3 L. Ed. 2d 625 (1959); *International Shoe v. Fontenot*, 236 La 279, 280, 107 So 2d 640 (1958), *cert den* 359 US 984, 79 S Ct 943, 3 L Ed 2d 933 (1959). However, none of these opinions focus on whether an in-state non-employee acted "on behalf of" an out-of-state seller. Nor do the few cases interpreting PL 86-272 that are binding on, or precedential for, this court. *Wrigley* involved the activities of salespersons who evidently were employees. *See* 505 US at 232-33. In *Herff Jones Co. v. Tax Com.*, 247 Ore. 404, 410, 430 P2d 998 (1967), the court concluded, upon analysis, that the Oregon-resident sales personnel were not independent contractors. In *Ann Sacks Tile & Stone, Inc. v. Dep't of Revenue*, 20 OTR 377, 382 (2011), *appeal dismissed on procedural grounds*, 352 Or 380, 287 P3d 1062 (2012), this court expressly assumed that plumbers performing warranty work pursuant to contracts with Kohler, Inc. (Kohler) were independent contractors. The court also implicitly concluded that the plumbers performed their work on behalf of Kohler, but the court did not discuss a basis for that conclusion. The court will apply the plain meaning of "on behalf of."

The court now examines the facts in greater detail, to determine whether the Wholesalers' activities with respect to returns amounted to activities "on behalf of" Taxpayer. The Department, asserting that Taxpayer "delegated" to Wholesalers the activity of accepting Retailer returns, bases its position on the terms of Taxpayer's Wholesale Returned Good Policy and Taxpayer's DIP Agreements with Wholesalers. The Wholesale Returned

Goods Policy stated that the objective of the "Wholesale Returned Goods Program" was to "establish reasonable policies regarding returning unintentionally damaged and unsalable, stamped product at the direct supplier level." (Stip Ex 9 at 1.) Among other topics, the document instructed Wholesalers on handling goods damaged at the time the Wholesaler received them from Taxpayer, and on handling goods received from Retailers:

> "In the event a case is damaged during delivery from the factory please follow the directions listed below:
>
> "1. Direct supplier[9] must accept the damaged case.
>
> "2. Direct Supplier must clearly indicate the type of damage as well as total damaged carton and/or packs on the carrier manifest at time of acceptance.
>
> "3. Return ONLY damaged cartons to SFNTC Product Recovery Operations (PRO) per guidelines in this manual.
>
> "4. Place undamaged cartons in existing inventory.

9. In Taxpayer's documents, "Direct Supplier" is synonymous with "Oregon Wholesaler" as defined in this order. (*See* Ptf's Opening Post-Trial Br at 4.)

> "In the event that direct supplier receives returned goods from retail customers, please follow the directions listed below:
>
> "1. Direct supplier should accept the returned, stamped product.
>
> "2. Direct Supplier should clearly inspect the total returned carton and/or packs returned at time of acceptance.
>
> "3. Direct Supplier must return ONLY damaged or unsaleable, stamped (out dated) cartons to SFNTC Product Recovery Operations (PRO) per guidelines in this manual.
>
> "4. Place undamaged and/or saleable stamped cartons in existing inventory."

(Stip Ex 9 at 1-2.) The DIP Agreements provided, among other things:

> "BY SIGNING THE DISTRIBUTOR AGREES:
>
> "To accept and process returns for all SFNTC products. Distributor will allow their Retailers to return any SFNTC product to them regardless of reason. Saleable SFNTC products should be returned to inventory and products deemed unsalable can be returned to SFNTC for credit."

(Stip Ex 6 at 1; *see also* Stip Ex 7 at 7, Stip Ex 8 at 9; Stip Facts at 4-5, ¶¶ 15-17.)

Taxpayer argues that the activity of accepting returns from Retailers is a "best practice[ ]" that "benefits both [Taxpayer] and the Oregon Wholesaler," and that this "best practice" does not support an inference that the Wholesalers performed that activity on Taxpayer's behalf. (Ptf's Opening Post-Trial Br at 20.) Taxpayer's legal premise seems to be that only an activity that *solely* benefits the out-of-state seller fits within the definition of an activity "on behalf of" the out-of-state seller. However, the ordinary meaning of "on behalf of" does not support that legal premise. An activity may be in the "interest" of, or may "benefit," more than one person, as when a business donates goods or services to a charitable cause and enjoys public goodwill for doing so. A person may "represent" the interests of another while also benefiting personally from the result, as when a company lobbies on behalf of the trade association of which it is a member. Even if the court assumes that Wholesalers had their own interest in accepting returns (presumably, to maintain long-term relationships with their Retailer customers), that proves nothing about whether the Wholesalers accepted the returns on behalf of Taxpayer.

Turning to the facts, the record provides no evidence to support Taxpayer's assertion. Even if, as a matter of law, a finding that Wholesalers also acted in their own interests could eliminate the possibility that they acted "on behalf of" Taxpayer, nothing in the record establishes that wholesalers of goods in general followed a "best

practice" of accepting *all* returns of goods, salable or unsalable, and "for any reason." Nor does anything in the record allow the court to conclude that such a practice was the norm or a standard among wholesalers of other cigarette brands in Oregon during the years at issue. (*See* Stip Facts at 7, ¶ 24 (stating Taxpayer could not prohibit Wholesalers from selling other manufacturers' brands).) The only evidence of policies and practices with respect to returns is in Taxpayer's own forms--the "Santa Fe Natural Tobacco Company Wholesale Goods Return Policy" and Taxpayer's forms of DIP Agreement. These documents, in the absence of anything else, persuade the court that requiring the Wholesalers to accept all returns served *Taxpayer's* interest and thus establish that the Wholesalers acted on Taxpayer's behalf in accepting returns.

Finally, Taxpayer argues that there is no evidence that any Wholesalers actually accepted any returns on Taxpayer's behalf. Taxpayer starts by seeking to reduce the field of transactions in question, arguing that only returns of *nonsalable* Products arguably could have counted as returns accepted "on behalf of" Taxpayer, because when Retailers returned *salable* Products to Wholesalers, the Wholesalers placed them back into their own inventory, in their own interests and for their own benefit. (Ptf's Opening Post-Trial Br at 19-20.) The court rejects this premise for the reasons discussed above: just because accepting salable Products may have benefited the Wholesalers themselves does not mean that the Wholesalers were not also benefiting, and therefore acting on behalf of, Taxpayer. Taxpayer required Wholesalers

to accept *all* returns, and there is no evidence they would have accepted all returns if Taxpayer had not required them to.

Even if the court were to agree that only returns of nonsalable Products should count, Taxpayer's argument still fails on evidentiary grounds. Taxpayer asserts that there is no evidence that any of the approximately 5,000 packs the Wholesalers returned to Taxpayer each year as unsalable had been sold to Retailers and returned to the Wholesalers; for example, they might have been damaged when first received from Taxpayer, or they might have become stale in a Wholesaler's warehouse, before the Wholesaler could manage to sell them to any Retailer. Therefore, according to Taxpayer, the court cannot find that the Wholesalers acted as "conduits" for the return of unsalable products from Retailers to Taxpayer. (*See id.* at 20-21.)

Taxpayer is correct that there is no evidence in the record that tracks the progress of packs of cigarettes from Retailers, back to Wholesalers, and finally back to Taxpayer; however, that lack of evidence harms Taxpayer's position rather than aiding it. The parties have stipulated only that two streams of returns existed, without specifying any relation between them: Retailers returned approximately 20,000 packs of cigarettes to Wholesalers annually, and Wholesalers returned approximately 5,000 packs to Taxpayer annually. (See Stip Facts at 8-10, ¶¶ 30-31.) Based on the stipulations, any amount, from zero to all 5,000 of the packs Taxpayer received, might have been returned by Retailers. On this point,

however, Taxpayer bears the burden of going forward with evidence to persuade the court, and Taxpayer has not carried that burden. Taxpayer contests an income tax assessment and therefore is the "party seeking affirmative relief" from that assessment. ORS 305.427. It falls to Taxpayer to persuade the court of its factual position by "a preponderance of the evidence." *Id.* If the court were to accept Taxpayer's legal premise that the Wholesalers acted on Taxpayer's behalf only to the extent that they served as a "conduit" for returns of nonsalable products from Retailers, and if Taxpayer wished to rely on the absence of any such returns to support its argument, then Taxpayer would have to persuade the court of the absence of the *returns*, not just the absence of *data* going either way. If, as Taxpayer asserts, Wholesalers had no interest in, or benefit from, tracking returns of nonsalable products from Retailers because they accepted all returns solely in order to benefit their independent wholesaling businesses, then Taxpayer would have to try to marshal evidence elsewhere, for example from witnesses working for Retailers, Wholesalers, or both, or possibly from statistical sampling. Taxpayer has made no such effort and has therefore failed to carry its burden of persuasion.

Taxpayer also misses the mark when it explains at some length that it did not control the manner or means by which Wholesalers accepted returns. (*See* Ptf's Reply at 4-6.) Here, Taxpayer seems to conflate the relationship of acting "on behalf of" another with the relationship of agency. (*See also* Ptf's Opening Post-Trial Br at 7.) The absence of a right to control might negate an agency relationship, but it does not negate the possibility of action

on behalf of another. As a matter of federal statutory interpretation, the court may look to the contemporaneous common law as a source of relevant context. *See, e.g., Standefer v. U.S.*, 447 US 10, 19, 100 S Ct 1999, 64 L Ed 2d 689 (1980) (construing "principal" in criminal provision of Internal Revenue Code by reference to term's "common-law background"); *Burlington Industries, Inc. v. Ellerth*, 524 US 742, 754-55, 118 S Ct 2257, 141 L Ed 2d 633 (1998) (looking to "general common law," as summarized in restatements, for meaning of "agents" in Civil Rights Act of 1964). Congress in 1959 would have understood that the elements of an agency relationship are action on behalf of the principal, control by the principal, and consent by the principal. *See Restatement (Second) of Agency* § 1 (1958) (defining "agency" as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf *and* subject to his control, *and* consent by the other so to act.") (emphasis added)). Acting on another's behalf is a separate type of relationship that does not require that the other person control the actor; therefore, Taxpayer's evidence that it *lacked* control over the Wholesalers does not prove that the Wholesalers were not acting on Taxpayer's behalf.[10]

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10. Commentary in the *Restatement* explains that the relationship is something other than an agency if the element of control is lacking:

> "The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. It is the element of continuous subjection to the will of the principal which

The court concludes that, by requiring the Oregon Wholesalers to accept and process returns of all Products regardless of reason, as a condition of buying any Products from Taxpayer, Taxpayer obligated the Wholesalers to accept the returns on its behalf. The record is clear that Wholesalers accepted and processed approximately 20,000 packs (2,000 cartons) of Products per year returned by Retailers. (Stip Facts at 8-9, ¶ 30.) Taxpayer asserts that Wholesalers would have accepted and processed some or all of these returns even if the DIP Agreement had not required them to do so, but Taxpayer has not carried its burden to substantiate that assertion. The court concludes that all of the returns counted as part of the Wholesalers' activity on Taxpayer's behalf.

2. Did the Oregon Wholesalers' acceptance of returns on Taxpayer's behalf exceed "making sales, or soliciting orders for sales"?

Taxpayer argues that, even if the Wholesalers acted on its behalf in accepting returns, their conduct remained within the bounds of "making sales," as that term is used in 15 USC § 381(c).[11] Taxpayer argues that, since

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distinguishes the agent from other fiduciaries and the agency agreement from other agreements."

Restatement (Second) of Agency § 1 (1958) at 8 (Comment on Section 1).

11. Subsection (c) of 15 USC § 381 "expands the immunity of subsection (a) when the out-of-state seller does its marketing through independent contractors, to include not only solicitation of orders for sales, but also actual sales, and in addition 'the maintenance . . . of

section 381(c) allows independent contractors to actually make sales on behalf of the out-of-state taxpayer without jeopardizing the taxpayer's immunity, Congress logically must have intended to also allow those contractors to "reverse" those sales by accepting returns and providing refunds. (Ptf's Opening Post-Trial Br at 26.) And if independent contractors actually making sales on behalf of a taxpayer can accept returns, surely the Oregon Wholesalers, as independent contractors that were *not* making sales on behalf of Taxpayer, can accept returns as well.[12] A contrary conclusion would, according to Taxpayer, read into section 381(c) an extraordinary requirement that "all sales must be final." (*Id.* at 25-26.)

Although Taxpayer frames this point as a matter of pure logic, the court must deal with the facts at hand. In this case, the DIP Agreement does not merely *allow* Wholesalers to accept returns, it *requires* them to accept *all returns* for *any reason*, in effect specifying that "*no* sales are final." As recounted above, Taxpayer offers no evidence that the Wholesalers would have adopted that return policy on their own. This additional fact differs from

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an office . . . by one or more independent contractors whose activities . . . consist solely of making sales, or soliciting orders for sales . . . ." *Wrigley*, 505 US at 224-25 (emphasis omitted). In this case, there is no issue regarding "maintenance of an office," and Taxpayer does not argue that accepting the returns was within the scope of "soliciting orders" under 15 USC § 381(c).

12. Neither party argues that the Wholesalers in this case made sales on behalf of Taxpayer; the parties proceed on the assumption that the Wholesalers made sales solely on their own behalf. (*See, e.g.*, Ptf's Opening Post-Trial Br at 25.)

the hypothetical scenario Taxpayer proffers.[13] Therefore, the court must consider whether the Wholesalers' contractual obligation to accept all returns for any reason has significance under 15 USC § 381(c).

Neither the United States Supreme Court nor the Oregon Supreme Court has had occasion to determine a test for whether an independent contractor's activity exceeds the scope of "making sales" under 15 USC § 381(c). This court considered the issue in *Ann Sacks* and concluded that performing warranty repairs was an activity that destroyed immunity; however, that case was not heard by the Oregon Supreme Court because of a procedural flaw in the filing of the appeal. The court today will analyze this case under *Ann Sacks* but will also consider whether the activity of the Oregon Wholesalers would be "ancillary" to "making sales," by extension of the United States Supreme Court's reasoning in *Wrigley* as to activities ancillary to "soliciting orders" under 15 USC § 381(a)(2).

In *Ann Sacks*, this court considered repair work on Kohler plumbing products that was performed by plumbers referred to as "authorized service representatives" (ASRs), as well as repair work on Kohler engine and electrical generator products that was performed by distributors. 20 OTR at 378. Kohler, based outside Oregon,

13. The court expresses no view on whether an independent contractor (making or not making sales on behalf of an out-of-state taxpayer) may accept returns on its own terms and solely for its own benefit without destroying immunity for the out-of-state seller under 15 USC § 381(c).

was the corporate parent of a federal affiliated group that included Oregon subsidiary Ann Sacks Tile & Stone, Inc. At issue was whether the repair work was protected under PL 86-272 such that the in-state property, payroll and sales of Kohler were properly excluded from the numerator of the apportionment factors for the affiliated group. *Id.* at 393; *see* ORS 314.650 (2003) (three-factor apportionment); ORS 317.715(3)(b) (2003) (members of affiliated group not treated as single taxpayer regarding taxability or composition of apportionment factors). Kohler contracted with the plumbers and distributors to make the repairs, in order to satisfy Kohler's warranty obligations under sales contracts or under federal law. *Id.* at 378-79. The court had no occasion to fashion a test to determine whether an activity is within the definition of "making sales," because the court concluded early in its analysis, based on its reading of *Wrigley*, that performing the repair work was "activity beyond the protections of PL 86-272." *Id.* at 382 (also stating that "activities such as warranty work, that serve an independent business purpose apart from the solicitation of orders for sales, do not qualify for immunity under PL 86-272."). The court found that the taxpayer in *Ann Sacks* "d[id] not appear to contest" that point. *Id.* The court went on to address Kohler's argument that the mere use of an in-state independent contractor to perform certain discrete functions should not destroy immunity, ultimately returning to the conclusion that "the statute cannot protect Kohler in this case, for the reason that the activities of the distributors and ASRs extend beyond activities allowed by the statute." *Id.* at 385-88.[14]

14. This latter portion of the *Ann Sacks* decision has prompted debate regarding whether the United States Constitution imposes

In the absence of a test under the court's own case law for what constitutes "making sales," the court now turns to *Wrigley* for guidance based on the U.S. Supreme Court's test for the "solicitation of orders." The taxpayer in *Wrigley* was an Illinois-based chewing gum manufacturer whose employees made in-person sales calls on retailers in Wisconsin. *Wrigley*, 505 US 214. The issue was whether certain of the employees' activities during these visits exceeded the scope of 15 USC § 381(a), which immunizes a taxpayer whose in-state activities are limited to the "solicitation of orders" to be approved and filled from outside the state.

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limitations on attributing the acts of in-state independent contractors to out-of-state taxpayers. *See* Walter Hellerstein, 1 *State Taxation* (3d ed 2022) ¶ 6.26[2][b]-[c]. Professor Hellerstein asserts that the Constitution prohibits imposition of tax "when the relationship between the [contractor and the taxpayer] is so attenuated that asserting jurisdiction over the out-of-state taxpayer on the basis of the acts of its in-state contractor would exceed even the most expansive view of 'attributional nexus.'" *Id.* at ¶ 6.26[2][b]; *see also id.* at ¶ 6.26[2][c] (applying such limitations, court would focus on "fact-sensitive inquiry into whether the 'independent contractor' is really carrying on its own business or that of its out-of-state principal" and "'whether the activities performed in the state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in the state for sales.'") (quoting *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 US 232, 250, 107 S Ct 2810, 97 L Ed 2d 199 (1987) (internal citation to Washington Supreme Court decision omitted)). The court need not consider in this case whether any constitutional limitation exists or has been exceeded, as Taxpayer does not argue the constitutionality of the assessment of tax.

Appendix B

The Court considered various approaches to the interpretation of PL 86-272, rejecting a "narrow[ ]" reading proffered by Wisconsin and *amici* consisting of other states and the Multistate Tax Commission, rejecting as well the taxpayer's "broad" interpretation as "toothless," and describing the Court's task as "simply to ascertain the fair meaning" of "solicitation of orders." *Id.* at 223-28. The Court began with dictionary definitions of "solicitation" in order to understand how the term was "commonly understood." *Id.* at 223. The Court added its conclusion that "solicitation" must include implicit proposals to sell, not merely explicit ones. *Id.* As to activities that neither explicitly nor implicitly propose a sale, the Court looked to the context supplied by the statute's opening text, which refers to the solicitation of orders, the making of sales, and the maintenance of an office as "business activities." *Id.* at 225-26. The Court found Congress's use of that term significant, because "activities" connotes "courses of conduct" rather than isolated acts. *Id.* From there, the Court reasoned that "solicitation of orders" must include "some accompanying action," such as driving to the customer's location, and even non-"essential" actions such as spending the night at an in-state hotel. *Id.* at 226.

Having examined the term "solicitation" in its common understanding and in the context of the rest of the statutory text, the Court announced that a fair reading of the term includes activities "entirely ancillary" to the solicitation of orders. *Id.* at 228-29. The Court stated that the

> "clear line is the one between those 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--and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force."

Id. (emphasis in original). The Court went on to state:

> "Providing a car and a stock of free samples to salesmen is part of the 'solicitation of orders,' because the only reason to do it is to facilitate requests for purchases. Contrariwise, employing salesmen to repair or service the company's products is not part of the 'solicitation of orders,' since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to increase purchases; but it is not ancillary to requesting purchases, and cannot be converted into 'solicitation' by merely being assigned to salesmen."

Id. at 229.

The Court, applying this test, decided that the following activities by taxpayer employees were ancillary to the solicitation of orders:

- Providing a car and a stock of free samples to the sales employees. *Id.*[15]

- The district manager's "in-state recruitment, training and evaluation of sales representatives" and the "use of hotels and homes for sales-related meetings," because these activities "served no purpose apart from their role in facilitating solicitation." *Id.* at 234.

- Sales employees' contacting the taxpayer's headquarters to mediate credit disputes between customers and the taxpayer's credit department, because if an on-site salesperson had not done this, no other employee of the taxpayer would have performed this task. *Id.* at 235 ("It hardly appears likely that this mediating function between the customer and the central office would have been performed by some other employee--some company ombudsman, so to speak--if the on-location sales staff did not exist."). The only purpose of this conduct was to ingratiate the sales employee with the customer, thereby facilitating requests for purchases. *Id.* at 234-35.

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15. Although stated in a separate portion of the opinion (*see Wrigley*, 505 US at 229), this court regards the Supreme Court's statement about providing a car and free samples as part of the holding.

By contrast, the Court determined[16] that the following activities were not ancillary to the solicitation of orders:

- Replacing stale gum at no cost to the retailer. *See id.* at 233. The court concluded that the taxpayer "would wish to attend to the replacement of spoiled product whether or not it employed a sales force." *Id.* The Court rejected the taxpayer's argument that gum replacement was a "'promotional necessity' designed to ensure continued sales," stating that "it is not enough that the activity facilitate *sales*; it must facilitate the *requesting of sales*, which this did not." *Id.* (internal quotations omitted; emphasis in original).

- Providing 15 to 20 dollars' worth of gum to a retailer occasionally,[17] in order to fill new display racks the sales employee provided and set up for the retailer. *See id.* at 218. The sales employee gave the retailer a receipt known as an "agency stock check" and arranged for the local wholesaler to bill the retailer

16. The Court also stated that using sales employees to repair or service the taxpayer's products is not part of the solicitation of orders, and the Court cited with approval the Oregon Supreme Court's conclusion in *Herff Jones Co. v. State Tax Commission*, 247 Or 404, 412, 430 P2d 998 (1967) that sales representatives' collection activities exceeded the protection of PL 86-272. *See Wrigley*, 505 at 229-30. However, this court regards these statements as *dicta* because neither repairs or servicing of products, nor collection activities, were at issue in *Wrigley*.

17. Any one sales representative might do this once a month in total in the course of calling on multiple retailers.

for the amount provided. *Id.* The fact that "Wrigley *made the retailers pay for the gum*" gave this activity a purpose independent of soliciting orders. *Id.* at 234 (emphasis in original).

- The storage of fresh gum, and of stale, swapped-out gum awaiting disposal, primarily at the homes of the sales representatives, in connection with gum replacement and "agency stock check" activities. *See id.*

The first conclusion this court draws from *Wrigley* is that the Supreme Court expressly limited its holding to the "solicitation of orders," which was the only activity permitted under the portion of PL 86-272 that was at issue in the case, 15 USC § 381(a). The Court distinguished activities that "facilitate the *requesting of sales*" (a protected category of activities) from "activit[ies that] facilitate sales," (an unprotected category when conducted by employees), *Id.* at 233 (emphasis in original); *see also id.* at 227 (rejecting a taxpayer-proffered "customarily-performed-by-salesmen" standard because such a standard would embrace more than the "particular activity ('solicitation')"). For that reason, this court does not automatically conclude that an activity that the Court characterized as ancillary (or not ancillary) to the solicitation or requesting of orders must likewise be ancillary (or not ancillary) to the making of sales.

Second, this court concludes that the appropriate approach to resolve the issue of Product returns in this case is to follow the analytical path laid out in *Wrigley*. As

relevant to this case, the common understanding of "sale," when Congress enacted PL 86-272 in 1959, was

> "the act of selling : a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration) *specif* : a present transfer of such ownership of and title to all of or a part interest in personal property (as existing identifiable movable and tangible or fungible goods) under a contract by the seller to the buyer for a price paid or payable in money or other personal property — distinguished from *gift*
>
> "<arranged the *sale* of a large estate to a syndicate of home builders>"

Webster's Third New Int'l Dictionary 2003 (unabridged ed 1961).[18] As of that time, state legislatures

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18. The full definition at that time read:

> **"1:** the act of selling : a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration) *specif* : a present transfer of such ownership of and title to all of or a part interest in personal property (as existing identifiable movable and tangible or fungible goods) under a contract by the seller to the buyer for a price paid or payable in money or other personal property —distinguished from *gift* <arranged the *sale* of a large estate to a syndicate of home builders>

"**2:** exhibition for selling : the status of being purchasable —usu. used in the phrases *for sale* and *on sale* <put a house up for *sale* > <on *sale* at most stationery stores>

"**3a:** opportunity of selling or being sold : demand, market <counting on a large *sale* for their latest publication>

"**b:** distribution (as of goods or services) by selling <the average total *sale* for books in this category — *Saturday Rev.*>

"**4:** public disposal to the highest bidder : auction <art dealers flocking to the *sale* of a famous collection of early Renaissance masters>

"**5a:** a selling off of goods (as surplus or shopworn stock) at bargain prices <a clearance *sale*> <rummage *sale*>

"**b:** an advertised disposal of marked-down goods <a dress bought at a department-store *sale*>

"**6 sales** *pl*

"**a:** operations and activities involved in promoting and selling goods or services <a *sales* department> <vice-president in charge of *sales*>

"**b:** gross receipts <*sales* were over five million dollars>"

Webster's Third New Int'l Dictionary 2003 (unabridged ed 1961).

A contemporaneous legal dictionary defined "sale" in pertinent part

"as a transfer of the property in a chattel for a

were beginning to adopt the Uniform Commercial Code, which similarly defined a "sale" of goods as "the passing of title from the seller to the buyer for a price * * *." Uniform Laws Annotated, Uniform Commercial Code § 2-106; *see also, e.g.*, Conn Pub Act No. 133, § 2-106, 1959 Public Acts at 237. The court concludes that the common understanding of "sale" was entering into a contract to transfer ownership of property for a price.

Turning to the context supplied by the statute's remaining text, the court follows *Wrigley* in concluding that Congress intended "making sales" as an "activit[y]." *Wrigley*, 505 US at 225-26.[19] This means that "making

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> consideration. To constitute a sale in its broader sense, the price need not necessarily be money, but if the property is sold for a fixed money price, whether it be paid in cash or in goods, it is a sale. In its more strict sense, a sale is a transfer of the absolute or general property in a thing for a price in money, which the buyer pays or promises to pay for the thing bought and sold."

James A. Ballentine, *Self-Pronouncing Law Dictionary* 754 (1948).

19. The court notes that the majority in *Wrigley* did not comment on the legislative history of PL 86-272. This court has reviewed the committee reports and the statements on the Senate floor leading up to the enactment of PL 86-272. In those materials, members of Congress or their staff used the term "making sales" to mean concluding or consummating a contract, in contrast to "soliciting orders," which stopped short of concluding a contract. *See, e.g.*, S Rep No 86-658 at 2554 (Aug 11, 1959) (immunity preserved even if independent contractor "also accepts the orders on behalf of that company and thereby binds the company to the contracts of

sales," like "solicitation," must be viewed as part of a course of conduct that includes more than simply giving the oral or written statement of assent to an offer required to enter into a contract. *See Wrigley*, 505 US at 227. Continuing the focus on *Wrigley*, the court observes that most of the in-state activities that the Supreme Court treated as ancillary to solicitation helped to prepare the employee representatives for solicitation: providing them with cars, free samples, and a temporary location at a hotel to be hired and trained. The other ancillary activity was the representatives' intervention in credit disputes, which the Court found was a task that Wrigley would not have bothered to assign to anyone else if the sales representative had not done it. By contrast, replacing stale gum for free, and making small-dollar, on-the-spot sales to fill out a display (and the storage of the gum used to do these things) were not ancillary to solicitation.

In this case, requiring Wholesalers to accept all returns for any reason is not a behind-the-scenes, preparatory activity like providing basic tools (a car, or free samples) and training. And the evidence in this case shows that Taxpayer had a keen interest in its methodically publicized 100% Product Guarantee, which announced

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sale"); 105 Cong Rec (Senate) 17834 (Sept 3, 1959) (statements of Sens. Javitz and Byrd) (independent contractor may "conclude the contract" in the state, need not have "orders accepted" outside the state); *see also* 105 Cong Rec 16354 (Aug 19, 1959) (statement of Sen. Byrd) (salesman "could not consummate a sale within the State"); Conf Rep 86-1103 (1st Sess Sept 1, 1959). However, the court has found nothing suggesting an intention to treat an activity that is "entirely ancillary" to making sales as one that destroys immunity.

the same return policy found in the DIP Agreement. In contrast to mediating one-off credit disputes, which Wrigley apparently found too insignificant to delegate to "some company ombudsman," the court finds it likely that Taxpayer would have found another way to fulfill its return policy if the Wholesalers had been unwilling or unable to do so.[20]

3. Conclusion as to returns of goods

Applying *Wrigley*'s analytical approach to 15 USC § 381(c), and in the absence of evidence that the Wholesalers would have accepted all returns for any reason if the DIP Agreement had not required them to do so, the court concludes that the Wholesalers' acceptance of returns was not ancillary to "making sales" and thus destroyed Taxpayer's immunity from Oregon corporation excise tax.

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20. The court notes its understanding of the following passage from *Wrigley*:

> "Although Wrigley argues that gum replacement was a 'promotional necessity' designed to ensure continued sales, Brief for Respondent 31, it is not enough that the activity facilitate *sales*; it must facilitate the *requesting of sales*, which this did not."

505 US at 233. This court does not read the foregoing as an affirmative statement that replacing stale gum facilitates sales, and therefore would have been "ancillary" to "making sales" under 15 USC § 381(c) if independent contractors had been involved. The Court merely rejected the taxpayer's argument as to "solicitation" under 15 USC § 381(a).

B. Pre-Book Orders

Independent of the return of goods issue, the Department asserts that, by taking Pre-Book Orders from Oregon Retailers and forwarding them to Oregon Wholesalers for fulfillment, the Representative Employees engaged in an activity that exceeded the protection of PL 86-272. Taxpayer argues that this activity was protected "missionary"[21] activity under paragraph (2) of 15 USC § 381(a), and that it was "ancillary" to the solicitation of orders as allowed under *Wrigley*.

1. Department's argument: Placing Pre-Book Orders amounted to making sales

The Department relies heavily on the position that Pre-Book Orders constituted actual sales on behalf of the Oregon Wholesalers because the DIP Agreements required Oregon Wholesalers to "accept and process" Pre-Book Orders. (Stip Ex 7 at 7; Stip Ex 8 at 9; *see, e.g.*, Def's Post-Trial Br at 33 (Pre-Book Order "ensured a sale"; Representative Employees "engaged in consummation of an in-state purchase").) From this premise, the Department argues that the taking and placement of Pre-Book Orders went beyond the "solicitation of

21. The parties ultimately agree that 15 USC § 381(a)(2) would protect Taxpayer's use of representatives to solicit orders from Retailers on behalf of Wholesalers, and that those activities commonly are referred to as "missionary activities." (*See* Def's Post-Trial Brief at 31.) The disagreement is over whether the activities of Taxpayer's representatives exceeded the "solicitation of orders."

orders" under the plain language of PL 86-272;[22] was not a protected "ancillary" activity under *Wrigley*;[23] and constituted "intrastate" or "domestic" commerce under case law predating PL 86-272,[24] which the legislative history shows Congress intended to leave undisturbed.[25] As discussed below, the court concludes that the record does not establish the Department's premise; therefore, the court expresses no view on the Department's follow-on arguments.

The Department seems to interpret the undefined term "accept" in the DIP Agreements in a particular legal sense, namely that the Pre-Book Order constituted an offer by the Retailer (assisted by the Representative Employee) to the Wholesaler to purchase Products, and a contract was formed automatically because the DIP Agreement prohibited the Wholesaler from doing anything other than accepting that offer. *See Black's*

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22. (*See* Def's Post-Trial Br at 30.)

23. (*See id.* at 31 (asserting that Pre-Book Orders facilitate sales rather than requesting of sales).)

24. (*See id.* at 37-38 & n 18 (citing *Cheney Brothers Co. v. Commonwealth of Massachusetts*, 246 US 147, 155, 38 S Ct 295, 62 L. Ed. 632 (1918) ("the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another— and may be taxed by the state * * *.").)

25. (*See* Def's Post-Trial Br at 39 (citing statements in Congressional floor debate indicating intention to "preserve the entire body of decisions" predating enactment of PL 86-272) (internal citing references omitted).)

Legal Dictionary 12 (8th ed 2004) (defining "acceptance" as "assent * * * to the terms of an offer in a manner authorized or requested by the offeror, so that a binding contract is formed"). The court agrees that this is one possible meaning of "accept"; however, the DIP Agreement admits other possible interpretations of that term. The DIP Agreements were governed by North Carolina law, which, like Oregon law, looks to the plain meaning of terms as the starting point to interpret a contract. (*See* Stip Ex 7 at 6; Stip Ex 8 at 7.) *See Singleton v. Haywood Elec. Membership Corp.*, 357 NC 623, 629, 588 SE2d 871 (2003) ("Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.") (internal quotation omitted). Under North Carolina case law, "[d]ictionaries can be used to determine the common and ordinary meaning of words and phrases." *Marcuson v. Clifton*, 154 NC App 202, 204, 571 SE2d 599 (2002) (internal quotation omitted). The ordinary meaning of "accept" does include a sense similar to the *Black's* definition: "to make an affirmative or favorable response to (as an invitation or offer)." *Webster's Third New International Dictionary* 11 (unabridged ed 2002). However, other senses include "to regard as proper, suitable, or normal" and "to receive with consent * * *." *Id.* at 10-11.[26] If one of the latter two

26. The full definition, omitting obsolete senses, reads:

"**2a:** to receive with consent (something given or

offered) <*accepted* the medal> : assent to the receipt of <*accepted* lower wages>

"**b:** to be able to take or hold or be designed to take or hold (something applied, affixed, or impressed) <a glazed surface that will not *accept* ink>

"**3:** to give admittance to (as into one's company or into a particular group) <the town's best families *accepted* her> : give approval to<those people will never *accept* abstract sculpture>

"**4a:** to take without protest : endure or tolerate with patience <queueing is one aspect of English life he will never wholly *accept* — *London Calling*>

"**b:** to regard as proper, suitable, or normal <it came to be *accepted* that there should be universal education> : acknowledge or recognize as appropriate, permissible, or inevitable : agree to <refused to *accept* the dangerous working conditions — P. E. James>

"**c:** to regard and hold as true : believe in <by *accepting* the proposition that all humans are created equal>

"**d:** to receive into the mind : UNDERSTAND <words mean . . . what we *accept* them as meaning — J. L. Lowes>

"**5a:** to make an affirmative or favorable response to (as an invitation or offer) <*accepting* an invitation to speak> : undertake the responsibility of (as a task or employment) <if he *accepts* a junior partnership in the firm>

"**b:** to allow (a train) onto the particular section of a line under local control —used of a block operator in the manual block-signal system

senses were to apply, "acceptance" would merely require the Wholesaler to "receive" Pre-Book Orders and to treat them as "properly" submitted.

Such an alternative reading seems consistent with the full text of the DIP Agreement's provision on Pre-Book Orders, which states that the Wholesaler

> "agrees to * * * [a]ccept and process pre-book orders initiated by SFNTC on behalf of their retail accounts. These pre-books will be in the form of hard copy, fax, and/or email."

(Stip Ex 7 at 7; *see* Stip Ex 8 at 9 (omitting "these" in second sentence).) The court finds it reasonable to read the first sentence as requiring the Wholesaler to treat a Pre-Book Order the same as any other order from the Retailer, even though a Pre-Book Order comes from a person not employed by the Retailer. The second sentence can reasonably be read to override any requirement Wholesalers otherwise might impose on Retailers to use specific software or other procedures for ordering, allowing the Representative Employee to place Pre-Book Orders by hard copy, fax or email.[27] Finally, the fact

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> "**6:** to assume orally, in writing, or by conduct an obligation to pay <*accepting* a bill of exchange> *also* : to take (something) in payment <a store that doesn't *accept* credit cards>"

Webster's Third New Int'l Dictionary 10-11 (unabridged ed 2002).

27. As described in Taxpayer's training materials: "Many accounts use some form of cigarette ordering system." (Stip Ex 12 at 1.)

that the provision specifically requires the Wholesaler to "process" Pre-Book Orders supports a fair reading that the placing of an order did not, by itself, oblige the Wholesaler to fulfill the order; if it did, there would be no need to specify that the Wholesaler must undertake the intermediate step of "process[ing]" the order.

The court does not here determine any specific meaning of "accept," as that term is used in the DIP Agreement. The court concludes only that the term may be ambiguous and that the parties did not necessarily intend it to have the meaning on which the Department relies for its position that Representative Employees were "making sales" for Oregon Wholesalers.[28] Accordingly, the court rejects as unpersuasive the Department's argument that any immunity Taxpayer enjoyed under PL 86-272 was destroyed by the actual making of sales by Representative Employees on behalf of Oregon Wholesalers.

2. Did Placing Pre-Book Orders exceed "solicitation of orders"?

The court proceeds to analyze whether the taking and forwarding of Pre-Book Orders by Representative Employees nevertheless exceeded the protection of

28. The court also notes that the DIP Agreement purports to give Taxpayer wide latitude to interpret terms. In addition to an integration clause and a prohibition against parol evidence, the agreement states: "All issues arising from the DIP including, but not limited to, interpretation or application of the DIP Rules and Procedures and Reporting Requirements will be resolved by SFNTC in its sole discretion." (Stip Ex 7 at 4.)

PL 86-272, even if those activities did *not* amount to the actual making of sales. The court applies the test in *Wrigley*, asking whether the activities are "entirely ancillary" to the solicitation of orders because they "serve no independent business function apart from their connection to the soliciting of orders," or whether instead they constitute "activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Wrigley*, 505 US at 228-30.

The court starts by focusing on what Representative Employees actually did when they placed Pre-Book Orders, and what legal significance their actions had. The DIP Agreement contemplates that the Representative Employees "initiate[ ]" orders "on behalf of" a Retailer. The parties have stipulated that the Retailer "authorized" the orders, and that the Representative Employee "forwarded" them to the Wholesaler. (Stip Facts at 10, ¶ 33.) A "Prebook Order Form" that Taxpayer produced to the Department in response to a discovery request for training materials shows a line for "Buyer Signature," in addition to a line for the name and phone number of the Representative Employee. (Stip Ex 12 at 2.) Although Representative Employees could place Pre-Book Orders by phone, they primarily did so by fax. (Stip Facts at 11, ¶ 35.) There is no disagreement that the Retailer "signed and authorized" Pre-Book Orders. (Def's Post-Trial Br at 31.) Therefore, the court finds that the activity of Representative Employees consisted of reducing to writing the Retailer's oral shopping list during a sales call, obtaining the Retailer's signature, and delivering that list to the Wholesaler.

Appendix B

Taxpayer characterizes its Representative Employees' forwarding of Pre-Book Orders as a "ministerial" act, which Taxpayer claims is "ancillary" to soliciting orders. (*E.g.*, Ptf's Opening Post-Trial Br at 2, 28.) The court agrees that the activity is clerical, as the Retailer's signature leaves no room to conclude that the Retailer had delegated any authority to the Representative Employee to decide what Products to order. But the fact that the Representative Employees had no special authority does not necessarily make their activity ancillary to the solicitation of orders. The question is whether the activity is something that Taxpayer would have had reason to engage in anyway, apart from soliciting orders.

The record shows that Retailers sometimes failed to follow through on their stated intentions to buy Products.[29] Taxpayer trained its Representative Employees to use Pre-Book Orders to overcome this problem, and Taxpayer assigned a "specific prebook goal" to each account executive, specifying in its training materials that

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29. Taxpayer's "Account Executive Guide" distinguishes a Pre-Book Order from a "sell sheet order," which the Retailer had to send to a Wholesaler on its own, using a form that the Representative Employee would leave behind at the end of the sales call:

> "A sell sheet order is not a guaranteed order like a prebook -- it is a *suggestion* left by you for the retailer. It is up to the retailer to follow through and purchase the product. You should only use a sell sheet order if you are 100% sure that the retailer will purchase the product on his / her next visit to the wholesaler. Prebooks are always preferable, as they ensure the order will be placed."

(Stip Ex 12 at 3 (emphasis in original).)

> "only valid prebooks can be counted towards that goal.
>
> "All of the following are considered valid prebooks:
>
> - You fill out a prebook form and fax / e-mail it to the wholesaler.
>
> - You (or the store manager) enter the order into the order book or electronic ordering system (e.g., Telxon).
>
> - You call the wholesaler and place the order over the telephone.
>
> - You see in APEX that the retailer *placed* the order you recommended *the last time* you were in the account. (Only actual orders can be counted.)
>
> "A verbal agreement from the retailer is not a prebook!"

(Stip Ex 12 at 2 (emphases in original).)

The court finds that addressing Retailers' failure to follow through was something Taxpayer had reason to do apart from soliciting orders. The Supreme Court has defined "soliciting" an order as "[a]sking * * *, enticing * * *, request[ing] or plea[ding] * * * or begging" the Retailer for an order. *Wrigley*, 505 US at 223 (quoting dictionary

definitions of "solicit"; internal quotations omitted). Yet the record strongly implies that even seemingly successful solicitation could be in vain if a Retailer who agreed to an order later turned out to be forgetful, distracted, or insincere. Writing down and forwarding the order for the Retailer on the spot made the difference between a potentially meaningless oral "yes" and an actual order that was more likely to result in a sale. The court thus disagrees with Taxpayer's argument that "the ministerial act of sending a fax is ancillary to solicitation because there is no independent business reason to send a Pre-Book Order to an Oregon Wholesaler other than because the Pre-Book Order was just requested." (Ptf's Reply at 12.)

3. Conclusion as to Pre-Book Orders

The record shows that Taxpayer "allocated" to the representatives the task of facilitating the *placement* of orders by means of the Pre-Book Order process. This task served an independent business purpose for Taxpayer and thus destroyed Taxpayer's immunity from Oregon corporation excise tax.[30]

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30. The court does not rely on the temporal relationship between soliciting an order and placing it. At one point, Taxpayer cites a discussion in *Wrigley* in which the Court rejected a pre- vs. post-*sale* distinction, at least as a blanket test for all activities, on the grounds that merchants typically have ongoing relationships that make it difficult to tell when an activity facilitates an order already agreed to or the solicitation of the next one. (*See* Ptf's Opening Post-Trial Br at 28-29.) *See Wrigley*, 505 US at 230-31 (stating in dicta that "[a]ctivities that take place after a sale will ordinarily not be entirely ancillary" but finding a blanket pre- vs. post-sale test

C. De minimis analysis

The Court in *Wrigley* recognized that "a particular in-state activity" other than solicitation of orders may be sufficiently *de minimis* to avoid loss of the tax immunity conferred by PL 86-272, depending on whether that activity "establishes a nontrivial additional connection with the taxing State." *Wrigley*, 505 US at 232. Although the Court framed the test in the singular, it applied the test to all of Wrigley's nonimmune activities "taken together." *Id.* at 235. The combination of circumstances that destroyed immunity for that taxpayer consisted of (1) maintaining an in-state stock of fresh gum "worth several thousand dollars" to swap out for stale gum on retailers' shelves, "several hundred dollars" of which Wrigley transferred to retailers through orders memorialized by "agency stock checks"; and (2) exchanging the gum "deliberately," on a "regular and systematic" basis. *Id.* at 233 n 8, 235; *see id.* at 234 ("[T]he vast majority of the gum stored by Wrigley in Wisconsin was used in connection with stale gum swaps and agency stock checks * * *.").

"hopelessly unworkable"). Here, the basis for the court's conclusion is not that forwarding the order occurs after solicitation; rather, the court concludes that placing the order is a separate, necessary step on the path to a sale. It might not take long to execute, and a Representative Employee might make it happen casually as part of a routine sales call, but if it does not happen the Representative Employee (and indirectly, Taxpayer) risks missing out on the order. Thus, even if placing an order for a Retailer during one sales call helps to ingratiate the Representative Employee with the Retailer for a future round of solicitation during the next sales call, it also serves the immediate and independent purpose of making an order much more likely to pan out.

Apart from rather famously noting that "several thousand dollars per year * * * is a lot of chewing gum," the Court did not announce a bright-line quantitative test in terms of the value or number of in-state goods that might exceed a *de minimis* threshold in future cases. *Id.* at 233 n 8.

In this case, the court readily concludes that each of Taxpayer's activities at issue was "regular and systematic," as in *Wrigley*. Taxpayer enshrined both the acceptance of returns and the acceptance of Pre-Book Orders in the DIP Agreements with which Wholesalers were obligated to comply. Furthermore, Taxpayer's training materials make clear that Taxpayer set Pre-Book Order performance goals for its representatives and specified the types of orders that did and did not "count" toward those goals.

As to the numeric part of the *Wrigley* standard, Taxpayer has not carried its burden of proof. The court reiterates that Taxpayer has not shown the number of packs or cartons of cigarettes that Oregon Wholesalers accepted on Taxpayer's behalf--the number may have been as high as 5,000 packs (500 cartons) per year or even 20,000 packs (2,000 cartons) per year. Taxpayer argues that these numbers constitute only a tiny fraction of the Wholesalers' sales during the Years at Issue (*see* Ptf's Opening Post-Trial Br at 31), but the *Wrigley* Court expressly rejected similar comparisons in favor of relying on an absolute (if unspecified) number. *See Wrigley*, 505 US at 235 (rejecting taxpayer's argument that "'agency stock checks' accounted for only 0.00007% of Wrigley's annual Wisconsin sales"). On this record, the court finds that the

number of returns that Oregon Wholesalers accepted was more than *de minimis*. With respect to the number of Pre-Book Orders, the record states only that the average was 13.3 *orders* per month, which Taxpayer argues was trivial. (Ptf's Reply at 17-18.) However, Taxpayer has the burden to show triviality in terms of the absolute numbers of packs or dollar amounts, as determined in *Wrigley*, but Taxpayer has not done so.[31] On this record, the court concludes that the number of Pre-Book Orders, of an undetermined quantity of Products, was more than *de minimis*. The court concludes that neither the acceptance of returns nor the making of Pre-Book Orders occurred at a *de minimis* level; therefore, each of those activities independently destroyed Taxpayer's immunity from Oregon corporation excise tax.

D. Penalties

The Department assessed penalties for each Subject Year, including the 20-percent penalty for "substantial

31. The court rejects Taxpayer's additional argument that the ministerial nature of the act of forwarding Pre-Book Orders necessarily makes that activity *de minimis*. The court has already concluded that the activity had an independent business purpose that made sales more likely. It was important enough that Taxpayer created specific forms and procedures for Representative Employees to use, referred to it numerous times in training materials, and even created a specific role-play training session that culminated with the scripted line: "How about if I pre-book these styles through your wholesaler for you today, and make a small upward adjustment in your order book to the few styles of NAS to ensure that you are not losing out on business and revenue. What do you think?" (Stip Ex 14 at 2.)

understatement of taxable income" pursuant to ORS 314.402(2). (*See* Stip Facts at 15-16, ¶¶ 55-56.) Taxpayer seeks relief from the substantial understatement penalty, claiming that it satisfied the requirements for each of three alternative statutory exceptions:

(1) Under *ORS 314.402(4)(b)(A)* "there is or was substantial authority" for Taxpayer's position of immunity under PL 86-272;

(2) Under *ORS 314.402(4)(b)(B)* Taxpayer

   a. "adequately disclosed in the return" the relevant facts regarding its position of immunity, and

   b. "there is a reasonable basis" for Taxpayer's position; or

(3) Under *ORS 314.402(6)* the Department improperly failed to waive the penalty based on Taxpayer's showing that it acted with "reasonable cause" and "in good faith."

(Ptf Opening Post-Trial Br 32-35.) The Department has promulgated an administrative rule that defines key terms in these exceptions. *See* OAR 150-314.402(4)(b) (2013) (currently codified, without substantive amendment, as OAR 150-314-0209). The Department's rule, in turn, adopts by reference certain definitions in Treasury regulations. OAR 150-314.402(4)(b)(1) (2013) ("'Substantial authority' has the same meaning as used in Treasury

Regulation 1.6662-4(d). *** 'Reasonable basis' has the same meaning as used in Treasury Regulation 1.6662-3(b)(3).''). The referenced federal regulations were last amended in 2003 and thus are the same today as during the Years at Issue.

Treas Reg § 1.6662-4(d) discusses "substantial authority," stating in part:

> "The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50—percent likelihood of the position being upheld), but more stringent than the reasonable basis standard as defined in § 1.6662-3(b)(3).
>
> "* * *
>
> "There is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.
>
> "* * *
>
> "The weight accorded an authority depends on its relevance and persuasiveness, and the

type of document providing the authority. For example, a case or revenue ruling having some facts in common with the tax treatment at issue is not particularly relevant if the authority is materially distinguishable on its facts, or is otherwise inapplicable to the tax treatment at issue. An authority that merely states a conclusion ordinarily is less persuasive than one that reaches its conclusion by cogently relating the applicable law to pertinent facts. * * * The type of document also must be considered. For example, a revenue ruling is accorded greater weight than a private letter ruling addressing the same issue. An older private letter ruling, technical advice memorandum, general counsel memorandum or action on decision generally must be accorded less weight than a more recent one. Any document described in the preceding sentence that is more than 10 years old generally is accorded very little weight. However, the persuasiveness and relevance of a document, viewed in light of subsequent developments, should be taken into account along with the age of the document. There may be substantial authority for the tax treatment of an item despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.

"* * *

Appendix B

"[O]nly the following are authority for purposes of determining whether there is substantial authority for the tax treatment of an item: Applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre—1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a

> particular case, however, may give rise to substantial authority for the tax treatment of an item. Notwithstanding the preceding list of authorities, an authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority. In the case of court decisions, for example, a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district. However, a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals.
>
> "Similarly, a private letter ruling is not authority if revoked or if inconsistent with a subsequent proposed regulation, revenue ruling or other administrative pronouncement published in the Internal Revenue Bulletin."

Treas Reg § 1.6662-3(b)(3) addresses "reasonable basis":

> "Reasonable basis is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonably based on one or more

> of the authorities set forth in § 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in § 1.6662-4(d)(2). (See § 1.6662-4(d)(3)(ii) for rules with respect to relevance, persuasiveness, subsequent developments, and use of a well-reasoned construction of an applicable statutory provision for purposes of the substantial understatement penalty.) In addition, the reasonable cause and good faith exception in § 1.6664-4 may provide relief from the penalty for negligence or disregard of rules or regulations, even if a return position does not satisfy the reasonable basis standard."

The court starts its analysis with the second of Taxpayer's three arguments. ORS 314.402(4)(b)(B) provides that no "understatement" exists, and the penalty therefore does not apply, if the relevant facts are adequately disclosed and there is a reasonable basis for the taxpayer's tax treatment of the item. The court begins here because the Department states in briefing that it "does not dispute that SFNTC adequately disclosed on its returns that it relied on PL 86-272," thus eliminating the need for the court to adjudicate one of the two elements of ORS 314.402(4)(b)(B). (Def's Post-Trial Br at 46-47.) Furthermore, the plain text of the federal regulations shows that the "reasonable basis" standard is a lower

standard than the "substantial authority" test, because a position taken on a tax return may satisfy the "reasonable basis" standard "even though it may not" satisfy the "substantial authority" standard. Treas Reg § 1.6662-3(b)(3); *see* Treas Reg § 1.6662-4(d)(2) ("The substantial authority standard is less stringent than the more likely than not standard * * * but more stringent than the reasonable basis standard."). Therefore, if Taxpayer's position were to satisfy the "reasonable basis" test, the substantial underpayment penalty would not apply, and there would be no need to consider whether Taxpayer's position also satisfies the higher "substantial authority" standard under Taxpayer's first argument. In addition, a decision in Taxpayer's favor on the second argument would obviate the need to decide Taxpayer's third argument, which *assumes that the penalty applies* but asks the court to decide that the Department should have exercised its discretion to *waive* the penalty.

As quoted above, "reasonable basis" means something less than "substantial authority," but still a "relatively high standard of tax reporting," which is significantly higher than "not frivolous or not patently improper," and is "not satisfied by a return position that is merely arguable or that is merely a colorable claim." Treas Reg § 1.6662-3(b)(3).[32] The court sees its task as determining

32. The adequacy of support required by a particular federal tax standard sometimes is expressed in percentage terms. The more-likely-than-not standard (required for certain tax shelter positions) is met "when there is a greater than 50-percent likelihood of the position being upheld." Treas Reg § 1.6662-4(d)(2). Regulations under *former* IRC § 6694 (2006) governing return preparers

whether Taxpayer's "return position[s are] reasonably based on one or more of the authorities" listed in Treas Reg § 1.6662-4(d).

The Department contends that Taxpayer lacked a reasonable basis for its positions that PL 86-272 immunizes the Wholesalers' acceptance of returns and the Representative Employees' placement of Pre-Book Orders. The Department asserts that "no cases or administrative decisions from Oregon or other jurisdictions" offer a reasonable basis for either position, and the Department cites *Wrigley, Ann Sacks*, and *Miles Laboratories v. Dept. of Rev.*, 274 Or 395, 546 P2d 1081 (1976) as authorities contrary to Taxpayer's positions. (Def's Post-Trial Br at 47 (accepting returns); *see id.* at 48 ("no case involving a

---

required that a return position have a "one in three" likelihood of success on the merits. Treas Reg § 1.6694-2(b)(1) (2006). Congress's Joint Committee on Taxation has reported a "general consensus of scholars and practitioners" that the substantial authority standard requires an approximately 40-percent likelihood of success and that the reasonable basis standard requires an approximately 20-percent likelihood of success. Joint Comm. on Tax'n, Study of Present-Law Penalty and Interest Provisions as Required by Section 3801 of the Internal Revenue Service Restructuring and Reform Act of 1998 (Including Provisions Relating to Corporate Tax Shelters) at 160 (Table 7) (July 22, 1999). A leading commentator on federal tax procedure states: "The cases are notoriously fact specific, but courts have found that a taxpayer has not acted negligently (and implicitly had reasonable basis) if there are unsettled areas of the law or if the issue is susceptible to honest differences of opinion. On the other hand, where the authorities are 'overwhelmingly' in the nature of the Service's position as contrasted with the taxpayer's position, a court will find no reasonable basis." Saltzman & Book, IRS Practice & Procedure, ¶ 7B.03.

fact pattern similar to the prebook orders that reasonably supports SFNTC's position").) The court finds the absence of case law neither surprising nor fatal to Taxpayer's argument. The Treasury Department (including the Internal Revenue Service) does not administer PL 86-272 and thus has neither litigated the statute nor created the numerous kinds of federal administrative guidance referred to in Treas Reg § 1.6662-4. It is up to each state that imposes an income tax to enforce PL 86-272, and resource constraints on both sides doubtless limit the number of disputes in which both parties are incented to litigate to the point of a reported decision. Apparently recognizing the possibility that an issue might not have attracted the attention of courts and tax administrators, the regulations provide that "authority" on which a taxpayer may rely includes "[a]pplicable provisions of the Internal Revenue Code *and other statutory provisions*." Treas Reg § 1.6662-4(d)(3)(iii) (emphasis added). In fact, "despite the absence of certain types of authority," a "well-reasoned construction of the applicable statutory provision" may even suffice as "substantial" authority. Treas Reg § 1.6662-4(d)(3)(ii).

Regarding the Wholesalers' acceptance of returns, no case (including the three that the Department cites) addresses in what circumstances an independent contractor is acting "on behalf of" an out-of-state taxpayer, and whether accepting returns may be ancillary to "making sales" for purposes of 15 USC § 381(c). *Wrigley* and *Miles Laboratories* involved activities of employees; therefore, the courts had no occasion to apply 15 USC § 381(c). *Ann Sacks* involved activities of independent

contractors, but the court had no occasion to determine a test for "making sales" because the court concluded that the taxpayer did not appear to contest that its warranty repair activities exceeded the protection of PL 86-272. Taxpayer's argument in this case rested on the proposition that an independent contractor, which according to the definition in 15 USC § 381(d) can sell for "more than one principal," must, as a matter of logic, possess sufficient autonomy to choose to accept returns. Taxpayer also argued that an independent contractor that does so is not acting "on behalf" of the out-of-state manufacturer because the independent contractor has its own business reason to satisfy customers wishing to return products. The court rejected these arguments, in part because the court determined that Taxpayer had misinterpreted the statutory phrase "on behalf of" and had failed to analyze whether acceptance of the returns might be "ancillary" to "making sales" under an extension of *Wrigley*. Those are legal points that might fairly be described as matters of first impression. The court concludes that Taxpayer's position regarding the returns was sufficiently grounded in the statutory text that it had a reasonable basis under ORS 314.402(4)(b)(B)(ii).

Regarding the Representative Employees' placement of Pre-Book Orders, after rejecting the Department's argument that the Representative Employees engaged in the unprotected activity of "making sales," this court decided the issue under *Wrigley*. But the fact that the court did not interpret *Wrigley* in Taxpayer's favor does not mean that Taxpayer's position lacked a reasonable basis. Taxpayer asserted that placing Pre-Book Orders

amounted to nothing more than the ministerial act of sending a fax for a Retailer, behavior that was "entirely ancillary" to solicitation because it merely "ingratiated" the Representative Employee with the Retailer. And as Taxpayer pointed out, language in *Wrigley* cautions against treating an activity as non-ancillary merely because it occurs after a sale. The court agreed that the act was likely quick, casual, and potentially ingratiating, but the court concluded that it was not ancillary to solicitation because it had the independent business purpose of ensuring that an order the Retailer agreed to would actually be placed. Although incorrect, Taxpayer's position had sufficient basis in *Wrigley* to avoid imposition of the penalty under ORS 314.402(4)(b)(B).

Because each of Taxpayer's positions was reasonably based on PL 86-272 or *Wrigley*, and the Department acknowledges that Taxpayer satisfied the disclosure requirement, no "understatement" existed under ORS 314.402(4)(b)(B), and no penalty applies under ORS 314.402(1). The court need not address Taxpayer's arguments based on "substantial authority" under ORS 314.402(4)(b)(A) or failure to waive the penalty under ORS 314.402(6).

V. CONCLUSION

Now, therefore,

IT IS THE OPINION OF THIS COURT that Plaintiff was not immune from Oregon corporation excise tax under 15 USC § 381 for the tax years ending December 31, 2010 through 2013; and

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IT IS THE FURTHER OPINION OF THIS COURT that Plaintiff is not subject to the penalty under ORS 314.402(1).

Dated this 23rd day of August, 2022.

/s/ ROBERT T. MANICKE
Judge Robert T. Manicke

APPENDIX C — RELEVANT STATUTORY PROVISION

15 USCS §381

§ 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 the date of the enactment of this Act [enacted Sept. 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).

(b) Domestic corporations; persons domiciled in or residents of a State. The provisions of subsection (a) 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), 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 contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal 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.

APPENDIX D — MULTISTATE TAX COMMISSION STATEMENT OF INFORMATION, FINAL REVISION, DATED AUGUST 4, 2021

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

Originally adopted by the Multistate Tax Commission on July 11, 1986
Revised version adopted by the MTC Executive Committee on January 22, 1993
Second revision adopted by the Multistate Tax Commission on July 29, 1994
Third revision adopted by the Multistate Tax Commission on July 27, 2001
Fourth revision adopted by the Multistate Tax Commission August 4, 2021

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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 (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. *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"). 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.

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 Comm'n*, 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").

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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.

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.

I. NATURE OF PROPERTY BEING SOLD

Only the solicitation to sell tangible 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 intangible property, such as franchises, patents, copyrights, 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 Section IV.B of this Statement is also not protected under P. L. 86-272.

II. SOLICITATION OF ORDERS AND ACTIVITIES ANCILLARY TO SOLICITATION

For 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). 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*

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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 are not ancillary to the solicitation of orders. The assignment of activities to sales personnel does not, merely by such assignment, make 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.

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. An activity conducted within a taxing state on a regular or systematic basis or pursuant to a company policy (whether the policy is in writing or not) normally will not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with a state is measured on both a qualitative and quantitative basis. If an activity either qualitatively or quantitatively

creates a non-trivial connection with the taxing state, and is otherwise not protected, then the activity exceeds the protection of P.L. 86-272. Establishing that unprotected activities only account for a relatively small part of the business conducted within the taxing state is not determinative of whether the activities are *de minimis*. The relative economic importance of unprotected in-state activities, as compared to protected activities, does not determine whether the conduct of the unprotected 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 -- Section IV.A and Section IV.B -- set forth in-state activities that are presently treated by the Supporting States as "Unprotected Activities" or "Protected Activities." These listings, as well as the contents of Section IV.C, which addresses activities conducted via the Internet, may be amended by each Supporting State.

Each Supporting State may choose, in its discretion, 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 that state that P.L. 86-272 protects that activity.

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A. UNPROTECTED ACTIVITIES:

The following in-state activities are not considered solicitation of orders for sales of tangible personal property, entirely ancillary thereto, or otherwise protected 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 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 instate:

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 business or to employees or agent(s) of the 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 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 business or to the employee or representative of the company in an employee or representative capacity, (ii) so long as the use of the office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the business; or for such other activities that are protected under P.L. 86-272).

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

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

For the purpose of this subsection it is not relevant whether the business pays directly, indirectly, or not at all for the cost of maintaining 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. 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 an activity not listed in Section IV.B below which is not entirely ancillary to requests for orders, even if the activity helps to increase purchases.

B. PROTECTED ACTIVITIES:

The following in-state activities are protected:

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 business, so long as 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.

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 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 business's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers is protected if 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 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 will not, by itself, remove the protection.

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 extend beyond solicitation of orders for sales of tangible personal property and are 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 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 via either electronic chat

or email that customers initiate by clicking on an icon on the business's website. For example, the business regularly advises customers on how to use products after they have been delivered. 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 business or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the 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.

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the business, except for purposes of display and solicitation, removes the protection.

Appendix D

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 Supporting States have included or will include the same receipts from a sale in their respective receipts factor numerators, at the written request of the business, these states will confer with one another in good faith to determine which state should be assigned the receipts. Such conference will identify what law, regulation or written guideline, if any, has been adopted in the destination state with respect to the issue. The destination 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 is given to any clearly applicable law, regulation or written guideline that has been adopted by the destination state. However, except in the case of the definition of what constitutes "tangible personal property," 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 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 business within its borders.

Notwithstanding any provision set forth in this Statement to the contrary, each Supporting State will apply the destination state's definition of "tangible personal property" to determine the application of P.L. 86-272 as it relates to the origin state's throwback rule, if any. If the destination state lacks a definition that would enable a determination of whether the sale in question is a sale of "tangible personal property," then each state may treat the sale in any manner that would clearly reflect the income-producing activity of the business within its borders.

VII. MISCELLANEOUS PRACTICES

A. Application of Statement to Foreign Commerce.

Congress explicitly applied P.L. 86-272 only to "interstate commerce." Therefore, by its terms, the statute does not apply to foreign commerce. *See Border Pipe Line Co. v. Fed. Power Comm'n*, 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 P.L. 86-272 in the context of foreign commerce. If a Supporting State applies P.L. 86-272 in the context of foreign commerce, it will do so consistently whether it is determining if activities of a foreign seller are protected 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 does not apply to a corporation incorporated under the laws of the taxing state or to a person who is a resident of or domiciled in the taxing state.

C. Registration or Qualification to do Business.

Merely registering or qualifying to do business within a state, without more, will not forfeit the protection that may otherwise apply under P.L. 86-272 in that state. Seeking to use or protect any additional benefit under state law through engaging in other activity not protected under P.L. 86-272 (such as protecting a trade secret or corporate name) will forfeit the protection.

D. Loss of Protection for Conducting Unprotected Activity During Part of Tax Year.

The protection afforded by P.L. 86-272 is determined on a tax year by tax year basis. Therefore, if at any time during a tax year a business conducts activities that are not protected under P.L 86-272, the business will not be considered protected under P.L. 86-272 for the entirety of that year.

Appendix D

Addendum I - 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 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).

(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 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 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 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 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

Approved by the Multistate Tax Commission
October 17, 2002

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.