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State & Local Taxes

## ¶ 11,820. Doing Business or Nexus.—

**“Doing business” or nexus—effect.** A corporation is taxable in California if it is doing business in the state. Foreign corporations that actively engage in a transaction for the purpose of financial or pecuniary gain or profit are “doing business” in-state. A foreign corporation that engages in a transaction for the purpose of financial or pecuniary gain or profit in California is considered “doing business” in-state whether or not the transaction is considered exclusively engaged in interstate commerce, and is therefore subject to the franchise tax. However, if the only activities of their employees in-state are the solicitation of orders for goods to be shipped to customers in-state from out-of-state points, the foreign corporations are probably within the protection of P.L. 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)). Accordingly, such foreign corporations would not be subject to the franchise tax or the income tax. However, the corporations may be subject to the minimum tax imposed by [Cal. Rev. & Tax. Cd. §23153](#). The mere receipt of dividends and interest by a corporation and the distribution of such income to its shareholders does not constitute “doing business.” [[Cal. Code Regs.18 §23101\(a\)](#); [Cal. Code Regs.18 §23101\(b\)](#).]

**CHIEF COUNSEL RULINGS—“DOING BUSINESS” QUESTIONS .** The FTB has clarified the situations when it will issue Chief Counsel Rulings in the light of the 2010 amendment of [Cal. Rev. & Tax. Cd. §23101](#) that added specific conditions for “doing business” in California for taxable years beginning on or after January 1, 2011. These threshold tests, when met by an entity, provide that the entity is “doing business” in the state. However, when the entity does not meet one or more of those conditions, it still must determine whether it was “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit” under the general rule for “doing business” found within [Cal. Rev. & Tax. Cd. §23101\(a\)](#). The FTB will accept requests for written advice on those unique circumstances where a putative California corporation franchise or income taxpayer is unsure whether its activities constitute “doing business” in California under the general rule of [Cal. Rev. & Tax. Cd. §23101\(a\)](#) but the FTB will continue to decline to rule on whether the specific factual threshold tests of [Cal. Rev. & Tax. Cd. §23101\(b\)](#) have been met. As explained in [California Franchise Tax Board Notice No. 2009-08, 10/12/2009](#)—which sets guidelines for FTB rulings—the FTB may issue Chief Counsel Rulings that interpret and apply California law to a specific set of facts. However, the FTB will not provide written advice, including among others, where the answer to a question depends principally upon factual issues. (See [California Franchise Tax Board Notice No. 2011-06, 10/12/2011](#).)

**Activities constituting “doing business.”** *Post-2010—“economic nexus” applied:* A corporation is taxable in California if it is doing business in the state (see [¶ 10,205](#); [¶ 10,210](#)). A taxpayer will be considered to be “doing business” in the state if any of the following conditions has been satisfied:

- the taxpayer is actively engaging in any transaction in California for the purpose of financial or pecuniary gain or profit [[Cal. Rev. & Tax. Cd. §23101\(a\)](#); [Cal. Code Regs.18 §23101\(a\)](#)]; or
- it is organized or commercially domiciled in California [[Cal. Rev. & Tax. Cd. §23101\(b\)\(1\)](#)]; or
- its sales (including sales by an agent or independent contractor) in California exceed the lesser of \$509,500 (effective for tax years beginning on or after January 1, 2012; was \$500,000) or 25% of the taxpayer’s total sales (California sales are determined using the rules for assigning sales under [Cal. Rev. & Tax. Cd. §25135](#) (sales of tangible personal property) and, effective for taxable years beginning on or after January 1, 2011, and before January 1, 2013, [Cal. Rev. & Tax. Cd. §25136](#) (sales other than sales of tangible personal property), see [¶ 11,860](#)) [[Cal. Rev. & Tax. Cd. §23101\(b\)\(2\)](#); [California FTB Tax News No. 01/01/2013](#),

01/01/2013]; or

- its real property and tangible personal property in California exceed the lesser of \$50,950 (effective for tax years beginning on or after January 1, 2012; was \$50,000) or 25% of the taxpayer's total real property and tangible personal property (the value of real and tangible personal property and the determination of whether property is in California is determined by the rules used to calculate the property factor, see ¶ 11,865) [Cal. Rev. & Tax. Cd. §23101(b)(3); California FTB Tax News No. 01/01/2013, 01/01/2013]; or
- its California payroll (compensation paid) exceeds the lesser of \$50,950 (effective for tax years beginning on or after January 1, 2012; was \$50,000) or 25% of the total compensation paid by taxpayer (compensation in California is determined using the rules for assigning payroll in calculating the payroll factor, see ¶ 11,870). These figures are annually adjusted by the Franchise Tax Board for inflation. [Cal. Rev. & Tax. Cd. §23101(b)(4); Cal. Rev. & Tax. Cd. §23101(c); California FTB Tax News No. 01/01/2013, 01/01/2013.]

*Indexed threshold amounts:* The Franchise Tax Board (FTB) has released the indexed threshold requirements of Cal. Rev. & Tax. Cd. §23101, which defines doing business in California. For taxable years beginning on or after January 1, 2012, the conditions for determined "doing business" (nexus) also have been "indexed" by California's CPI. For 2012 year, the inflation factor increased 1.9%. The indexed amounts for tax years beginning on or after January 1, 2012, are: taxpayer's threshold—property, \$50,950 (formerly, \$50,000); payroll, \$50,950 (formerly, \$50,000); sales, \$509,500 (formerly, \$500,000). Cal. Rev. & Tax. Cd. §23101 as modified now provides that if a taxpayer satisfies any of the following conditions, they are doing business in California: (1) the taxpayer actively engages in any transaction in California for the purpose of financial or pecuniary gain or profit' (2) the taxpayer is organized or commercially domiciled in California; (3) if the taxpayer's sales, as defined in Cal. Rev. & Tax. Cd. §25120(f), including sales by the taxpayer's agents and independent contractors, exceeds the lesser of \$509,500 or 25% of the taxpayer's total sales; (4) the taxpayer's real and tangible personal property in California exceeds the lesser of \$50,950 or 25% of the taxpayer's total real and tangible personal property; (5) the amount paid in California by the taxpayer for compensation, as defined in Cal. Rev. & Tax. Cd. §25120(c), exceeds the lesser of \$50,950 or 25% of the total compensation paid by the taxpayer. Furthermore, when FTB determines the amount of the taxpayer's sales, property, and payroll for doing business purposes, it will include the taxpayer's pro rata share of sales, property, and payroll from partnerships, LLCs treated as partnerships, and S corporations. [Cal. Rev. & Tax. Cd. §23101(b)(4); Cal. Rev. & Tax. Cd. §23101(c); California FTB Tax News No. 01/01/2013, 01/01/2013.]

*Example 1:* Corporation A, an out-of-state seller of tangible goods, has no property or payroll in California. During tax year 2011, Corporation A has \$1,000,000 of sales in California. Corporation A will have a filing requirement for tax year 2011 and will be subject to the \$800 minimum tax, assuming its activities in the state do not exceed P.L. 86-272 ( 15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)). [California FTB Tax News No. 03/01/2011, 03/01/2011.]

*Example 2:* Corporation B has a 30% limited partnership interest in Limited Partnership X which is doing business in this state. For tax year 2011, Partnership X has \$50,000, \$80,000, and \$2,000,000 in property, payroll, and sales in California, respectively.

For the purpose of determining whether Corporation B is doing business in this state, it will compute its pro rata shares of Partnership X's California property, payroll, and sales as follows: Pro rata partnership property = \$15,000 (\$50,000 x 30%) Pro rata partnership payroll = \$24,000 (\$80,000 x 30%) Pro rata partnership sales = \$600,000 (\$2,000,000 x 30%)

Corporation B is doing business in-state because it has over \$500,000 in 2011 California sales through its pro rata share from Partnership X. [California FTB Tax News No. 03/01/2011, 03/01/2011.]

*Example 3:* Corporation C, an out-of-state corporation, has \$100,000 in total property, \$200,000 in total payroll, \$1,000,000 in total sales, of which \$400,000 was sales to California customers. Corporation C has no property or payroll in California. Although Corporation C's California sales are less than the \$500,000 threshold, Corporation C's California sales are 40% of its total sales which exceeds 25% of the corporation's total sales ( $\$400,000 \div 1,000,000 = 40$  percent.) Therefore, for tax year 2011, Corporation C is considered doing business in this state, and will be subject to either the franchise tax (assuming Corporation C is not protected by P.L. 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#))) or to the \$800 minimum tax, whichever is greater. [California FTB Tax News No. 03/01/2011, 03/01/2011.]

*Example 4:* Partnership A, an out-of-state partnership, has employees who work out of their homes in California. The employees sell and provide warranty work to California customers. Partnership A's property, payroll and sales in California fall below the threshold

amounts. Partnership A is considered doing business in California even if the property, payroll and sales in California fall below the threshold amounts. Partnership A is considered doing business in California through its employees because those employees are "actively engaging" in transactions for profit on behalf of Partnership A. [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Example 5:* Corporation B, an out-of-state corporation, has \$100,000 in total property, \$200,000 in total payroll, \$1,000,000 in total sales, of which \$400,000 was sales to California customers. Corporation B has no property or payroll in California. Corporation B is considered doing business in California—although Corporation B's 2011 California sales is less than the \$500,000 threshold, Corporation B's California sales is 40% of its total sales which exceeds 25% of the corporation's total sales ( $\$400,000 \div 1,000,000 = 40\%$ ). [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Partnerships, LLCs (treated as partnerships) and S-Corporations:* In determining their property, payroll and sales in-state, the taxpayer must also include their pro rata share of amounts from partnerships, LLCs (treated as partnership) and S corporations. [\[Cal. Rev. & Tax. Cd. §23101\(d\).\]](#) Partnerships and LLCs are considered doing business in-state if it has general partners or members in-state. Likewise, partners and members are considered doing business in-state if the partnership or LLC is doing business in-state. [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Example 6:* Corporation E, an out-of-state corporation, has no property or payroll but has \$450,000 of sales to customers located in this state. Corporation E also has a 30% limited partnership interest in Limited Partnership X which is doing business in-state. For tax year 2011, Partnership X has \$30,000, \$50,000 and \$200,000 in property, payroll and sales in California, respectively. Corporation E is considered to have the following distributive shares of property, payroll and sales from Partnership X: Flow-through Partnership Property = \$9,000 ( $\$30,000 \times 30\%$ ); Flow-through Partnership Payroll = \$15,000 ( $\$50,000 \times 30\%$ ); Flow-through Partnership Sales = \$60,000 ( $\$200,000 \times 30\%$ ). Corporation E is doing business in-state because it has a total of \$510,000 sales in-state ( $\$450,000$  of its own sales + \$60,000 of Partnership X's sales.) [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Example 7:* Corporation F is a 50% general partner in a California Partnership. The Partnership has \$800,000 of sales, \$10,000 of property and \$10,000 of payroll in California. Corporation F, through its distributive share from the California Partnership, has \$400,000 of sales, \$5,000 of property and \$5,000 of payroll in California which are below the 2011 threshold amounts. However, because Corporation F is a general partner, it is considered doing business in-state on behalf of the California Partnership that is doing business in-state. [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Example 8:* Corporation G, an out-of-state corporation, owns multiple interests in several pass-through entities in this state. How should it compute the amounts of property, payroll and sales in this state? Corporation G computes its property, payroll and sales in-state by aggregating the property, payroll and sales from all sources, including all distributive shares of property, payroll and sales from each pass-through entity. If the combined property, payroll or sales exceed the threshold amounts, Corporation G is considered doing business in-state. [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Investment partnerships and qualifying investment securities:* In applying the factor presence "doing business" test set forth in [Cal. Rev. & Tax. Cd. §23101\(b\)](#), corporations that are entitled to exclude from their income distributive share amounts of gain or loss from the sale or exchange of qualifying investment securities pursuant to [Cal. Rev. & Tax. Cd. §23040.1\(a\)\(1\)](#) are not to take into account their pro rata shares of the sales, property and payroll attributable to such sales or exchanges in determining whether they are doing business under [Cal. Rev. & Tax. Cd. §23101\(b\)](#). Furthermore, the exemption from doing business applicable to alien corporations that meet the requirements of [Cal. Rev. & Tax. Cd. §23040.1\(c\)](#) remains in effect. [\[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.\]](#)

*Registration; authority to do business in-state:* The FTB has indicated that these activities will create nexus: (1) an out-of-state business registers to do business in the state; and (2) out-of-state business obtains authority to do business in the state. [\[FTB Reply to RIA Nexus Questionnaire, 11/10/2009.\]](#)

**Pre-2011 "doing business" definition.** For taxable years beginning before January 1, 2011, "doing business" means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit. [\[Cal. Rev. & Tax. Cd. §23101\(a\); Cal. Code Regs.18 §23101\(a\) .\]](#)

The term "doing business" includes:

- the purchase and sale of stocks or bonds;

- endorsement by the parent of a subsidiary's notes;
- leasing of real property by the parent to the subsidiary and other tenants; and
- liquidating activities such as sales, rentals, and collection on notes. [Cal. Code Regs.18 §23101(a).]

**Activities not constituting “doing business.”** The following activities are not considered “doing business” in-state:

- *Federal law (PL 86-272) protected activities*— See explanation below for more details.

**CAUTION.** PL 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)) still applies to sellers of tangible personal property despite the economic nexus rule. As a result, if a taxpayer's activities in California stay within the protections of PL 86-272, a taxpayer also remains protected from the imposition of those taxes that are computed based on net income, namely, the California franchise and income tax. Nevertheless, if a taxpayer is considered doing business in California either under [Cal. Rev. & Tax. Cd. §23101\(a\)](#) or [Cal. Rev. & Tax. Cd. §23101\(b\)](#), it still has a filing requirement and will be subject to the minimum tax, because that tax is not computed based on net income and therefore is not subject to the protections of PL 86-272.

- *Alien corporations trading in stock for own account*—An alien corporation (other than a dealer in stock or securities) whose sole activities in-state involve trading in stock or securities for its own account, is not considered to be “doing business” in-state for purposes of the franchise tax. [Cal. Rev. & Tax. Cd. §23040.1(c).]
- *Conventions and trade show activities:* For taxable beginning after 1995, an out-of-state corporation will not be considered doing business in California if its sole activity in the state is engaging in convention and trade show activities for not over seven calendar days during the taxable year and it does not derive more than \$10,000 of gross income reportable to the state. [Cal. Rev. & Tax. Cd. §23104(a).]

**IMPACT.** A corporation that is deemed not doing business in California for engaging in convention and trade show activities, will be subject to the income tax rather than the franchise tax, and it will not have to pay the minimum franchise tax. Gross income reportable to California includes gross income reportable to the state by members of the “commonly controlled group” of which the taxpayer is a member. [Cal. Rev. & Tax. Cd. §23104(b).]

- *Holding stock or bonds of other corporations*—A corporation that merely holds stocks or bonds of other corporations and not trading in such stocks or bonds is not doing business in California. The mere receipt of dividends and interest by a corporation and the distribution of such income to the corporation's shareholders is not doing business. [Cal. Rev. & Tax. Cd. §23102; Cal. Code Regs.18 §23101(b).]
- *Purchasing activities and/or employees studying in-state*—The FTB may determine that a corporation is not doing business in-state (for purposes of the franchise tax) or deriving income from sources in-state (for purposes of corporation income tax) if its only activities in-state are either or both of the following: (1) purchasing tangible personal property or services in-state and company meets the 100/200 employee test; (2) having employees studying in-state. (See explanation below.) [Cal. Rev. & Tax. Cd. §23101.5.]

**Federal law (PL 86-272) protected activities.** PL 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)), passed in 1959, provides that a state may not impose a tax on income earned by a foreign taxpayer in interstate commerce if the only business activities of the taxpayer within the state are solicitation of orders, by its own salesmen or by an independent contractor, for tangible personal property, which orders are sent outside the state for approval or rejection, and on approval, are filled by shipments or delivery from a point outside the state. PL 86-272 immunizes only corporations of other states. Accordingly, such foreign corporations would not be subject to the franchise tax or the income tax. However, the corporations may be subject to the minimum tax imposed by [Cal. Rev. & Tax. Cd. §23153](#). [Cal. Code Regs.18 §23101(a).] California corporations and foreign corporations are subject to tax without regard to this federal legislation. PL 86-272 applies only when the activities of the foreign corporation in California are wholly interstate. The presence of any intrastate activities makes PL 86-272 inapplicable to both the interstate and intrastate activities. [See *Complete Auto Transit, Inc v Brady (1977) 430 US 274, 97 Sct 1076, California FTB Legal Ruling No. 372, 01/15/1974*, and [Cal. Code Regs.18 §23101\(a\)](#); [Cal. Code Regs.18 §23501](#) .]

*Example 1:* Corporation C, an out-of-state corporation, is a seller of tangible goods over the Internet and qualifies for protection under PL 86-272. For taxable year 2011, Corporation C has \$1,000,000 of sales but no property or payroll in California. Corporation C is considered doing business in California because it has sales of \$1,000,000 in California. Therefore, Corporation C must file a California

return to pay the minimum tax. However, since Corporation C is protected under PL 86-272, it will not be subject to California franchise tax.

*Example 2:* Corporation D, an out-of-state corporation with no property or payroll in California, is a service provider that has sales of \$2,000,000 to purchasers who receive the benefit of Corporation D's services in California. Those services are from income-producing activity that is performed outside of California and Corporation D uses the four-factor formula (property, payroll and double-weighted sales) to apportion its income to California. As a result, none of Corporation D's income is apportioned to California. Corporation D is considered doing business in California. Sales of services and intangibles are sourced under Cal. Rev. & Tax. Cd. §23136(b) for purposes of applying the doing business test of [Cal. Rev. & Tax. Cd. §23101\(b\)](#) regardless of whether those sales are sourced under Cal. Rev. & Tax. Cd. §23136(a) for income apportionment purposes (that is, regardless of whether taxpayer elects single sales factor apportionment). Accordingly, Corporation D is considered doing business in California because it has sales of services here of \$2,000,000. Although Corporation D has no California source income, it is still liable for the minimum tax because it is doing business in-state. PL 86-272 does not protect the taxpayer, because it does not apply to service providers, nor does it protect against the minimum tax (because that tax is not income-based). [[FTB Announcement—New Rules for Doing Business in California, 03/04/2011.](#)]

**MTC statement of information under P.L. 86-272.** On June 21, 1985, the Multistate Tax Commission (MTC) adopted a resolution that authorized the drafting of a document containing the practices of each MTC member state regarding P.L. 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)). However, the document is merely informational and cannot be relied on as to a nexus conclusion. Taxpayers are directed to ask the particular state for its position on a specific set of factual circumstances. The MTC document clarifies some of the uncertainties in P.L. 86-272, by limiting the federal law protection to the sale of tangible personal property. It emphasizes that the selling or providing of (including renting) of, services, real property, or intangibles is not immune from state taxing. Immunity is limited solely to solicitation except in those few instances when the activities are related to or incidental to solicitation like advertising, carrying display samples, maintaining sample or display room for two weeks or less, owning or furnishing cars to sales persons, missionary sales activities, passing inquiries and complaints on to home office, checking customers' inventories without charge for re-order (but not for other purposes), recruitment or training or evaluation of salespeople (including occasional use of homes, hotels, or similar places for meetings with salespeople), mediating direct customer complaints (only to ingratiate the salesperson with the customer) and facilitating requests for orders. Soliciting sales by an in-state resident employee is a protected activity so long as the employee does not have an in-state sales office or place of business (in-home or otherwise) that is attributable to the company or to the company's agents in their agency capacity. The document contains an extensive list of non-immune activities (see below). [[Miscellaneous Multistate Materials ¶ 301; California FTB Informational Publication No. 1050, 06/01/2011.](#)]

**FINNIGAN AND JOYCE.** California has signed its conformity to the "Phase II" revision of the "Statement of Information of Multistate Tax Commission and Signatory States Under Public Law 86-272" adopted by the MTC on July 29, 1994, with qualification (see [Miscellaneous Multistate Materials ¶ 301](#)). In determining whether a company's activities in a state have exceeded the protection of P.L. 86-272, the principle established in the *Appeal of Joyce, Inc.* ([SBE 66-SBE-070, 11-23-66](#)), commonly known as the "Joyce Rule" applied for tax years before 2011. Therefore, through tax year 2010, California considers only those in-state activities that are conducted by or on behalf of a company. Activities that are conducted by any other person or business entity, whether or not said person or business entity is affiliated with the said company, are not considered attributable to the company, unless such other person or business entity was acting in a representative capacity on behalf of said company. The "Joyce Rule" applies effective for taxable years beginning on or after April 22, 1999; that is, the date of the SBE opinion in *Appeal of Huffly Corp.* ([99-SBE-005, 4-22-99](#)), where the SBE rejected its *Finnigan decision* ([88-SBE-022, SBE 8-25-88](#)) and concluded that its pre-Finnigan decision in *Joyce* is the better law, based on the need to promote uniformity of the UDITPA law, and to more fairly reflect the fundamental principles of combined reporting. **WARNING.** [California FTB Informational Publication No. 1050, 06/01/2011](#) —Application and Interpretation of Public Law 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)), is obsolete insofar as it states that *Finnigan* is controlling.

For taxable years beginning on or after January 1, 2011, the state has enacted legislation adopting the "Finnigan Rule." For purposes of determining whether sales are in California and included in the numerator of the sales factor, all sales of the combined reporting group properly assigned to California are included in the sales factor numerator for California, regardless of whether the member of the combined reporting group making the sale is subject to corporate franchise or income tax. All sales not assigned to California are not included in the sales factor numerator for the state if a member of the taxpayer's combined reporting group is taxable in the state of the

purchaser. [Cal. Rev. & Tax. Cd. §25135(b).]

**MULTISTATE TAX COMPACT REPEALED.** 2012 legislation (S105, ch. 37) repealed California's Multistate Tax Compact provisions (Cal. Rev. & Tax. Cd. §38001 et seq.) effective June 27, 2012. However, the repeal is not to be construed to create any inference that a change in the compact's interpretation prior to its repeal is implied by the repealer legislation. [L. 2011Chapter 37 §3; L. 2011Chapter 37 §5.]

*Unprotected activities:* Pursuant to the MTC Statement of Information Under P.L. 86-272 (15 USC 381 through 384, **Miscellaneous Multistate Materials ¶ 381** through **Miscellaneous Multistate Materials ¶ 384**), the following in-state activities (assuming they are not of a de minimis level) are not considered as either solicitation of orders or ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under the Public Law:

- (1) Making repairs or providing maintenance or service to the property sold or to be sold.
- (2) Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
- (3) Investigating credit worthiness.
- (4) Installation or supervision of installation at or after shipment or delivery.
- (5) Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
- (6) Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders.
- (7) Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
- (8) Approving or accepting orders.
- (9) Repossessing property.
- (10) Securing deposits on sales.
- (11) Picking up or replacing damaged or returned property.
- (12) Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
- (13) Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel.
- (14) Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the state during the tax year.
- (15) Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
- (16) Owning, leasing, using or maintaining any of the following facilities or property in-state: (a) repair shop; (b) parts department; (c) any kind of office other than an in-home office; (d) warehouse; (e) meeting place for directors, officers, or employees; (f) stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation; (g) telephone answering service that is publicly attributed to the company or to employees or agent(s) of the company in their representative status; (h) mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles; (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 any employee or other representative, an office or place of business of any kind (other than an in-home office located within the residence of the employee or representative that (i) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity, and (ii) so long as the use of such office is limited to soliciting and receiving orders from customers: for transmitting such orders outside the state for acceptance or rejection by the company; or for such other activities that are protected under P.L. 86-272 or under the MTC Statement). A telephone listing or other public listing within the state for the company or for an employee or representative of the company in such capacity or other indications through advertising or business literature that the company or its employee or representative can be contacted at a specific address within the state shall normally be determined as the company maintaining within this state an office or place of business attributable to the company or to its employee or representative in a representative capacity. However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the company does not, by itself, be considered as advertising or otherwise publicly attributing an office to the company or its employee or representative. (The maintenance of any office or other place of business in this state that does not strictly qualify as an "in-home" office as described above shall, by itself, cause the loss of protection under this

Statement.)

(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) Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.

(21) Conducting any activity not listed in "Protected Activities" below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases. [\[Miscellaneous Multistate Materials ¶ 301; California FTB Informational Publication No. 1050, 06/01/2011.\]](#)

*Protected activities:* Pursuant to the MTC Statement of Information Under P.L. 86-272 (15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)), the following in-state activities will not cause the loss of P.L. 86-272 protection for otherwise protected sales:

**CAUTION.** The MTC Statement points out that signatory states have included on the list of "Protected Activities" those in-state activities that are either required protection under P.L. 86-272; or, if not so required, that the signatory state, in its discretion, has permitted protection. The mere inclusion of an activity on the listing of "Protected Activities," therefore, is not a statement or admission by the signatory state that said activity is required any protection under the P.L. 86-272. [\[Miscellaneous Multistate Materials ¶ 301; California FTB Informational Publication No. 1050, 06/01/2011.\]](#)

(1) Soliciting orders for sales by any type of advertising.

(2) Soliciting of orders by an in-state resident employee or representative of the company, so long as such person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in "Unprotected Activities" above.

(3) Carrying samples and promotional materials only for display or distribution without charge or other consideration.

(4) Furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration.

(5) Providing automobiles to sales personnel for their use in conducting protected activities.

(6) Passing orders, inquiries and complaints on to the home office.

(7) Missionary sales activities; i.e., the solicitation of indirect customers for the company's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if such solicitation activities are otherwise immune.

(8) Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.

(9) Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control).

(10) Maintaining a sample or display room for two weeks (14 days) or less at any one location within the state during the tax year.

(11) Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.

(12) Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.

(13) Owning, leasing, using maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by the MTC Statement under "Protected Activities" shall not, by itself, remove the protection under the MTC Statement. [\[Miscellaneous Multistate Materials ¶ 301; California FTB Informational Publication No. 1050, 06/01/2011.\]](#)

**MTC BULLETIN ON COMPUTER NEXUS.** On March 14, 1996, the California State Board of Equalization voted to rescind the state's endorsement of the Multistate Tax Commission's National Nexus Program Bulletin 95-1. The Franchise Tax Board followed suit on September 9, 1996. The MTC Bulletin, issued on December 20, 1995 and endorsed by 26 states, advises direct marketers of computers and other related items that states have nexus to tax them if they also provide in-state warranty repair services through

independent third parties. For the full text of the MTC Bulletin, see [Miscellaneous Multistate Materials ¶ 351](#).

**FTB determinations—corporations making purchases in-state.** The FTB may determine that a corporation is not doing business in-state (for purposes of the franchise tax) or deriving income from sources in-state (for purposes of corporation income tax) if its only activities in-state are either or both of the following:

- (1) the purchase of personal property or services solely for its own use or use by its affiliate outside California if: (a) the corporation does not have more than 100 employees in-state, and their duties are limited to solicitation, negotiation, liaison, monitoring, auditing and inspecting property or services acquired, or providing technical advice with respect to its requirements or, (b) effective for taxable years beginning on or after January 1, 1993, if the personal property or services acquired are used for the construction or modification of a physical plant or facility located out-of-state, the corporation does not have more than 200 employees performing the same functions as in (a) above (but the combined number of the corporation's employees in-state under both (a) and (b) cannot exceed 200); and/or
- (2) the presence of employees in-state is only for the purpose of attending a private or public school, college or university. [[Cal. Rev. & Tax. Cd. §23101.5](#).]

If the corporation applying for a determination is engaged in a unitary business, the 100/200 employees limitation applies to the aggregation of all corporations within the unitary group. [[Cal. Rev. & Tax. Cd. §23101.5\(e\)](#) .]

A taxpayer that sells property or services to a corporation with more than 100 employees in-state with respect to which an FTB determination has been made, must file annually with the FTB, a report identifying the number of its employees in-state directly attributable to the construction or modification of a physical plant or facility out-of-state. [[Cal. Rev. & Tax. Cd. §23101.5\(f\)](#); [Cal. Code Regs.18 §23101.5\(d\)](#).]

**HOW TO GET A DETERMINATION.** A corporation may petition the FTB for a determination under its procedures. The filing of the petition is deemed a waiver of the confidentiality provisions with respect to the facts alleged in the petition, and any additional evidence produced with respect to such facts. [[Cal. Rev. & Tax. Cd. §23101.5\(b\)](#).] If the determination is made, it remains in force for five years as long as the corporation continues to meet the above criteria; with respect to corporations meeting the above criteria on or before January 1, 1978, the determination remains in force indefinitely so long as the corporation continues to meet the above criteria. [[Cal. Rev. & Tax. Cd. §23101.5\(c\)](#); [Cal. Code Regs.18 §23101](#); [Cal. Code Regs.18 §23101.5](#).]

*Illustrative court decisions:* The Supreme Court recognized a “de minimis” exception to the rule that engaging in non-ancillary activities causes the forfeiture of an out-of-state seller's sec. 381(a) (P.L. 86-272, 15 USC 381 through 384, [Miscellaneous Multistate Materials ¶ 381](#) through [Miscellaneous Multistate Materials ¶ 384](#)) immunity. But it refused to apply the exception simply because the manufacturer's gum sales through “agency stock check” were only several hundred dollars a year or 0.00007% of the manufacturer's annual sales. Although the relative magnitude of such activity, in conjunction with the manufacturer's other non-ancillary activities, was not large compared to the manufacturer's other operations in-state, “they constituted a nontrivial additional connection with the State.” (See *Wisconsin Dept. Rev. v. William Wrigley, Jr., Co.*, U.S. Sct. (1992) [505 US 214](#).) Presence of personal property of foreign corporation in another state defeats P.L. 86-272 immunity. Inventory maintained by consignees to fill orders is an activity that exceeds mere solicitation of sales orders. (See *Consolidated Accessories Corp. v. FTB*, *Calif Ct.Appl. 2nd Dist.* (1984) [161 CalApp3d 1036](#), [208 CalRptr 74](#).) Solicitation for orders of print advertising sales constituted solicitation of order for sales of a service—the placement of advertising in a magazine—rather than sales of tangible personal property and the solicitation activities were not, therefore, protected by P.L. 86-272 . (See *Appeal of Personal Selling Power, Inc., SBE*, *Dkt. No. 380557, 03/16/2009 (not to be cited as precedent)*.) Use of technical representatives as instructors was not solicitation activity. (See *Appeal of Schwinn Sales West, Inc., 88-SBE-014, 05/03/1988*.) Helping develop new business opportunities for independent retailers of its products and aiding such retailers expand their businesses, were not protected “solicitation of orders.” As held in *Wrigley*, ([505 US 214](#), ) it is not enough that an activity is designed to facilitate sales. To qualify for immunity, the activity must facilitate the requesting of sales. (See *Brown Group Retail, Inc. v. FTB*, *California Ct. Appl.* (1996) [52 CalRptr2d 202](#).)

The corporation must annually confirm with the FTB within two months and 15 days after the close of its fiscal year that the facts relevant to the granting of the determination remain unchanged or state and explain any changes that have occurred since the preceding report was filed. [[Cal. Rev. & Tax. Cd. §23101.5\(d\)](#).]

**Legal Rulings.** The Franchise Tax Board has issued a Legal Ruling to the effect that owners of disregarded entities (e.g. QSubs and SMLLCs) are doing business and have substantial nexus in California and, therefore, subject to corporate franchise (income) tax

because the disregarded entities are doing business in-state—even though the owners have no separate activity in-state. QSubs and check-the-box entities (such as SMLLCs) are legally recognized entities with one owner that may be disregarded as separate from their owners for federal income tax purposes. (See [California FTB Legal Ruling No. 2011-01, 01/11/2011](#).)

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