

MEMORANDUM

TO: Members of P.L 86-272 Work Group
FROM: Brian Hamer
RE: Summary of May 17, 2019 teleconference
DATE: June 4, 2019

This is a high-level summary of the May 17 meeting (via teleconference) of the P.L. 86-272 Work Group. It is not intended to serve as minutes of the meeting but rather to highlight key matters that were addressed, in order to facilitate discussion at the next meeting to be held on June 6.

The meeting began with Chair Laurie McElhatton proposing that the Work Group discuss the alternative analysis of P.L. 86-272 described in Ray Langenberg's memo (which is posted on the Work Group's project page on the MTC website).

At the Chair's request, I summarized the approach that the Work Group has used to date to determine if P.L. 86-272 provides a business immunity from income taxation. The first step is to determine whether a business activity constitutes the solicitation of orders for tangible personal property. (This question is generally addressed by the current version of the MTC Statement of Information.) If the activity extends beyond solicitation, then the second step is to determine where the activity takes place. A business will not lose its immunity if it engages in non-solicitation activities entirely outside of the taxing state.

As to this second step, I related that a consensus had developed among Work Group members with respect to Internet sellers: if an in-state customer interacts with the remote business's website (*i.e.*, does more than just view a presentation on the website), the business has engaged in activities in the state. This thinking is based in key part on the following considerations:

(1) When a customer engages a seller's website, the website transmits software or code to the user's computer, which is stored in the user's computer for some period of time. The code serves to facilitate the interaction between the customer and seller.

(2) The interaction between the customer and the seller's website is substantial in nature.

(3) The analysis in *South Dakota v. Wayfair, Inc.* speaks to the "continuous and pervasive virtual presence of retailers" in the states where their customers are located.

The Work Group also had concluded that a remote seller does not engage in business activities in the customer's state when it provides post-sale assistance to the customer via a telephone.

Mr. Langenberg summarized his alternative approach. He explained that whether P.L. 86-272 protects a particular business activity turns on whether the activity is limited to

solicitation, not on the means by which the activity occurs (such as via telephone or the internet or in-person). He also stated that physical presence should have no bearing on the analysis. He further expressed that the current MTC Statement of Information's definition of "de minimis activities" should be revised to include consideration of the extent to which the seller's non-solicitation activities are purposefully directed to the customer's state. [Please review Mr. Langenberg's memo for a more in-depth description of his approach.]

One participant stated that he did not believe that the Work Group had been considering physical presence in its analysis to date and noted that telephone calls historically have been considered protected by P.L. 86-272. He expressed: there must be some actual activity in the customer's state that is attributable to the seller. He also drew a distinction between physical presence and business activity.

Another participant stated that he agreed that business activity did not require physical presence in the state. A third participant stated that it would be difficult to defend the position that any interaction between a customer and an out-of-state seller constitutes in-state business activity with the only issue being whether the activity is solicitation or de minimis.

Mr Landenberg stated that his intent is to avoid drawing lines, and that it is important to evaluate the qualitative and quantitative contacts to determine whether activity is di minimis.

There was a suggestion that the Work Group reexamine some of the scenarios that have been discussed to date in light of Mr. Langenberg's memo. I suggested that the Group might focus on those scenarios that the Group has found to be protected.