

MEMORANDUM

TO: Members of P.L. 86-272 Work Group
FROM: Brian Hamer
RE: Summary of July 11, 2019 teleconference
DATE: July 23, 2019

This is a high-level summary of the July 11 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 future meetings of the Work Group.

The meeting began with Chair Laurie McElhatton describing those factual scenarios discussed by the Work Group where straw votes have indicated a consensus or near-consensus among Work Group members. The Work Group then turned to Scenario 5:

5. Seller maintains a website offering for sale only items of tangible personal property. Seller invites customers to apply for its branded credit card via an online application. Whether the application is accepted or rejected typically is noticed to the customer within minutes electronically.

Participants engaged in a brief discussion. Some participants described various benefits that sellers receive from offering branded credit cards. [My subsequent research has indicated that retailers that offer branded credit cards receive substantial interest income from card holders.]

Participants then voted on this scenario as follows:

Protected: 1 vote
Unprotected: 12 votes

After a brief discussion, participants decided to delete part (a) from Scenario 6 and then to vote on the remainder of Scenario 6, which now reads as follows:

6. Seller maintains a website which customers access to immediately watch a movie through streaming.

It was pointed out that Section VI of the Statement of Information provides that signatory states agree to apply the definition of tangible personal property that exists in the state of destination to determine application of P.L. 86-272.

11 participants voted that streaming was unprotected; one participant expressed the view that P.L. 86-272 does not apply to this situation.

Participants then turned to Scenario 7. After some discussion, this scenario was revised in two ways, by modifying 7A and adding 7C: The scenario now reads as follows:

- 7. Purchasers download to their smartphone an app offered by seller. The app enables purchasers to order and pay for items of tangible personal property sold by the seller. Seller does not sell services or license any intangible property.
- 7A. Seller uses the information about the purchaser received via the app only to facilitate the sale.
- 7B. Seller sells the information about the purchaser received via the app to third parties.
- 7C. Seller uses the information to engage in market research to facilitate future sales, develop new products, and engage in targeted marketing.

A number of participants drew a comparison to pre-internet sales personnel who would gather information when on sales calls and then share that information with out-of-state home office staff. The home office might use that information for a variety of purposes. One participant expressed the view that this collection of information could be in the nature of “market research” rather than solicitation. This discussion resulted in the revisions to the scenario that I referenced above.

Participants voted as follows:

7A.	Protected:	12 votes	Unprotected:	0 votes
7B.	Protected:	1 vote	Unprotected:	11 votes
7C.	Protected:	1 vote	Unprotected;	11 votes

Participants then turned to Scenario 8, which addresses the subject of cookies and reads as follows:

- 8. Seller maintains a website offering for sale only items of tangible personal property. When a purchaser interacts with the seller’s website, the seller utilizes one or both of the following technologies [descriptions are subject to discussion and receipt of additional information]:

8A. Cookies. These are small text files installed on the hard drive of a customer’s computer or customer’s smartphone when he or she visits the seller’s website. These cookies allow the seller’s webserver to store information about the customer, including search histories and location information. Cookies also enable a seller to track its customers’ behavior over time and to deliver ads that are specific to each customer.

8B. Third party cookies. These are cookies that a seller allows other entities, such as advertisers or data brokers, to place on customers’ computers and devices through the seller’s website. Third party cookies may be persistent cookies that track the customer across multiple sites. Utilizing these cookies, advertisers and data brokers collect information and compile it for sellers so that sellers may promote their products to customers more effectively.

Since the time for the teleconference soon expired, discussion was tabled and no votes were taken.