

MEMORANDUM

TO: Members of P.L. 86-272 Work Group
FROM: Brian Hamer
RE: Summary of September 17, 2019 teleconference
DATE: September 23, 2019

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

The meeting began with Chair Laurie McElhatton briefly describing decisions that were made by the Work Group at its meeting on September 6. She also noted that the Work Group had discussed Scenario 13 (which addresses cloud computing) during the latter part of that meeting, mentioned that some participants later expressed that the Work Group should not address the application of P.L. 86-272 to cloud computing when revising the Statement of Information, and asked whether anyone wanted to explain the basis for reaching this conclusion.

One participant expressed that at least two of the three fact patterns addressed by the scenario are clearly services, and there is no need to addresses services again. If some iteration of cloud computing were seen as a tangible personal property transaction, it would likely be a license of tangible personal property and also not covered by P.L. 86-272. This participant also noted that this is a complex area and difficult for the Work Group to address. Another participant stated that this subject is too complicated to address and that the jurisprudence is not developed yet.

Ms. McElhatton ask if any member of the Work Group was opposed to removing cloud computing from consideration. No one objected, and she declared that there was a consensus.

The Work Group then turned to Scenario 14, which reads as follows:

14. Seller maintains a website offering for sale only items of tangible personal property and gift cards that can be used to purchase its products.

I noted that for sales tax purposes states typically treat the sale of a gift card as a sale of an intangible right. In response to questions, I also expressed that the gift cards in this scenario could only be used to purchase products from the seller and that the seller only sold items of tangible personal property.

One participant argued that if the gift cards could only be used to purchase tangible personal property, then their purchase was simply a step in purchasing such property and therefore P.L. 86-272 protects the seller in this scenario. Another participant noted that Internet sellers have been selling gift cards for some time and that there appears to be no reported court or administrative decisions addressing P.L. 86-272 protection, suggesting that there is no compelling issue to address. He also asked if there is a case to be made that this transaction is just the means to achieve the final sale of tangible personal property.

A participant described possible complexities and stated that additional facts should be added to the scenario; for example, if an electronic gift card is purchased via the Internet by a person in California but has the card transmitted to a recipient in New Jersey. Another participant expressed the benefit of not making the scenario too specific.

Work Group members then voted on this scenario as follows:

Protected: 4 votes

Unprotected: 2 votes

Two members stated that the immunity turned on how gift cards were characterized under applicable law. Other members stated that they were not ready to cast a vote.

There then followed a brief discussion about potential due process nexus issues relating to the sale of gift cards via the Internet. There was consensus, however, that this subject exceeded the scope of the project.

The Work Group then returned to Scenario 8, which 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:

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 later deliver ads that are specific to each customer.

8A.1. Seller [only*] utilizes cookies for the following purposes: to remember items that a customer has placed in his or her shopping cart during a current web session; to store personal information the customer has provided to avoid the need for the customer to re-input the information when he or she returns to the seller's website; and to remind sellers what products they have considered during previous sessions.

8A.2. Seller uses customer search information collected by cookies to adjust its production schedules or inventory, to develop new products, and to identify new items to offer for sale.

8A.3. Seller sells the information gathered by cookies to third parties.

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.

*At the suggestion of a participant, the Chair inserted "only" into the text of 8A.1 in order to clarify the fact pattern.

After a brief discussion of 8A.1, the Chair noted that no one was asserting that the seller would lose P.L. 86-272 protection and stated that there was a consensus that the activity described in this scenario was protected. There was no objection.

The discussion then addressed 8A.2. One participant stated that the seller probably lost its immunity, analogizing to sales staff that engaged in market research. Another participant noted that the definition of ancillary activities contained in the current Statement of Information indicated that the activities described in 8A.2 are not ancillary to solicitation.

The Chair stated that there was a consensus that the activities described in 8A.2 were not protected. There was no objection.

The Chair then stated that if 8A.2 activities are not protected, then 8B activities are not protected. There was no objection and she stated there was a consensus.

The Work Group then turned to Scenario 15, which states as follows:

15. Seller, which sells only tangible personal property in its ordinary course of business, sells one of the divisions of its business. Some of the proceeds from the sale are attributed to brand and good will, which are assigned to certain states according to a market sourcing regime based on the destination of the division's sales of tangible personal property. Does P.L. 86-272 provide immunity to the seller against the imposition of income tax in those states (assuming that its other activities in those states are protected)?

One participant stated that these activities are not protected because brand and goodwill are not tangible personal property. Another participant questioned whether P.L. 86-272 protection could turn on the question of how a state sources income. Another participant stated that the issue turns on whether there is a business activity in the taxing state. Two speakers expressed that this was a complicated issue and required more thought. The scenario was informally tabled.