

MEMORANDUM

TO: Members of P.L. 86-272 Work Group
FROM: Brian Hamer
RE: Summary of September 6, 2019 teleconference
DATE: September 13, 2019

This is a high-level summary of the September 6 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 summarizing the Work Group's prior meeting on August 20. She then turned to Scenario 9, which reads as follows:

9. Seller maintains a website offering for sale only items of tangible personal property. Seller contracts with a provider of a content distribution network ("CDN") to use in-state servers to accelerate the delivery of the seller's web pages to customers. Because the CDN allows the seller to deliver web pages to customers more quickly and efficiently, the CDN helps ensure that the seller's customers are less likely to exit the seller's website.

Ms. McElhatton proposed that the Work Group drop this scenario because the taxability of sellers likely turns on whether the website activities enhanced by a CDN are themselves protected or unprotected activities. There was no objection to her proposal. The Work Group then turned to Scenario 10, which reads as follows:

10. Seller, which sells only tangible personal property, contracts with a marketplace facilitator. The marketplace offers for sale the seller's products via the marketplace's website, receives orders, processes payments from purchasers, transmits payments to the seller, and handles returns. The marketplace maintains inventory, including seller's products, at fulfillment centers in the purchaser's state.

Ms. McElhatton referenced two items on the current Statement of Information's list of unprotected activities: item 16 ("Owning, leasing, using or maintaining . . . [a] stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation") and item 17 ("Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale."). One Work Group member stated that P.L. 86-272 does not immunize the seller in this scenario because the seller has inventory in the taxing state. After a brief discussion, the Chair stated that there appeared to be a consensus that the seller was not shielded from tax. No one objected. The Work Group then turned to scenario 11, which reads as follows:

11. Seller maintains a website offering for sale only items of tangible personal property. The seller does not sell on a marketplace. Additional facts to be considered: After purchasers select items for purchase, input their credit card information and press the submit button on the website, purchase information is automatically transmitted to seller's merchant service provider. The merchant service provider in turn sends a notification to the purchaser's credit card company (bank) to see if sufficient credit is available to purchase the product. If sufficient credit is

available, seller still may decline to make the sale anytime before shipping the item to the purchaser. Seller, however, rarely declines orders.

One participant stated that making a credit card purchases exceeds solicitation and therefore is not protected by the statute. Another participant expressed that the credit card approval may occur outside of the taxing state and also that approval by the credit card bank does not necessarily mean that a purchase is accepted, the seller can still deny the sale.

Work Group members then voted on this scenario as follows:

Protected: 7 votes (including the vote of one member who was unable to participate on the call)
Unprotected: 0 votes

One member questioned whether this scenario should be addressed by the Statement (given that facts will vary among transactions) and elected not to cast a vote on whether the activity described in this scenario is protected or unprotected.

The Work Group then turned to scenario 12, which reads as follows:

12. Seller maintains a website offering for sale only items of tangible personal property. It periodically hosts and moderates user group webinars for the users of its products. During these webinars, the seller teaches users how to use its products and answers questions about its products.

In response to questions, I stated that users were not charged for participating in webinars and they did not receive any kind of professional credit. I also stated that the intent was that there was interaction among webinar participants and that this was not a static presentation. One participant asserted that it was not relevant whether the webinar was static or interactive. Another participant stated that this scenario was similar to facts that were addressed when the Work Group considered Scenario #2.

The Chair observed an apparent consensus among Work Group members that P.L. 86-272 did not shield the seller from taxation. There was no objection.

The Work Group then turned to Scenario 13, which reads as follows:

13. Seller is a provider of the following cloud computing “services.” It maintains no equipment in the states where its customers are located. Assume that the customers’ states do not treat the transactions as a sale of tangible personal property.
 - (a) Software as a Service (SaaS). Customers obtain access to software or applications hosted on remote servers maintained by the provider.
 - (b) Infrastructure as a Service (IaaS). Customers obtain access to the provider’s remote IT infrastructure, such as servers and network equipment, in order to utilize the equipment’s computing power and storage.
 - (c) Remote monitoring. Seller remotely monitors the performance of the customer’s network and computer systems and addresses software issues when necessary.

A participant stated that P.L. 86-272 does not apply to cloud computing because there is no sale of tangible personal property. Another participant drew a distinction between cases where a business only performs services and cases where a business performs services and also sells tangible personal property. All speakers agreed that when a business only performs services, P.L. 86-272 does not apply. Some participants expressed that if a seller solicits tangible personal property in a state, then also performing services will defeat P.L. 86-272 immunity only if those services are performed in that state. A participant stated that cloud computing providers conduct business activities in the states where their customers are located.

One participant noted the assumption set forth in this scenario that customers' states do not treat cloud computing transactions as a sale of tangible personal property. Some participants thereupon mentioned that some states impose sales tax on SaaS. Others noted that sales tax treatment varied among states, and that sales tax laws may not be relevant to the application of P.L. 86-272 to cloud computing.

There was discussion on whether the scenario should be modified to state that the provider also sells tangible personal property in the taxing state.