

Application of P.L. 86-272 to internet sellers

Decision tree/discussion document

2/21/19

Relevant text of P.L. 86-272, 15 U.S.C. §381:

(a) **MINIMUM STANDARDS** No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

....

(c) SALES OR SOLICITATION OF ORDERS FOR SALES BY INDEPENDENT CONTRACTORS

For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or tangible personal property.

Assume an internet seller with constitutional nexus, but no sales staff working in or products stored in the state and no other traditional physical presence.

1. Does the seller sell any services into the state?

If YES, seller is not immune. [current Statement of Information]

If NO, go to question 2.

2. Does the seller lease or license any property or sell intangibles in the state?

If YES, seller is not immune. [current Statement of Information]

If NO, go to question 3.

3. Are the seller's in-state business activities conducted through the Internet limited to solicitation of orders?

--consider whether non-solicitation activities, if any, occur *within* the state where the customer is located.

What is the relevance, if any, of the Supreme Court's factual observations in *Wayfair* (e.g.: ". . . a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers")?

What is the effect of the principle that federal preemptions of state taxing power should be narrowly construed?

A. Unprotected activities listed in the current Statement of Information conducted via their website) [Does the current Statement assume that these activities are conducted by in-state personnel?]:

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.

11. Picking up or replacing damaged or returned property.

12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.

B. Other activities conducted by internet sellers via their website:

1. Seller inserts or stores software or cookies in the customer's computer. What if the software collects data to be sold by the seller to third parties?

2. Post-sale activities—customer support (e.g., help desk relating to software sold to the customer), process refunds, accept complaints and resolve disputes, arrange for repairs, handling warranty claims.

3. Loyalty card solicitations, branded credit card ads

4. Other examples?

If NO, seller is not immune.

Exceptions:

If the seller's non-solicitation activities are ancillary to solicitation, go to question 4.

If the seller's non-solicitation activities are de minimis, go to question 4.

If YES, go to question 4.

4. Are all orders approved outside of the state?

Does one look to the location of the seller, the computer that approves credit card transactions, the location of the customer's computer, everywhere (on the worldwide web), or somewhere else?

Is it relevant that sellers sometimes later decline to fill orders because of lack of inventory? Are there also other reasons they later decline to fill orders?

Would internet sellers simply change their process if the MTC adopted the view that internet orders are approved in the taxing state?

If NO, seller is not immune.

If YES, go to question 5.

5. Are all orders filled by shipment or delivery from outside the state?

If NO, seller is not immune.

Note: if orders are fulfilled by a marketplace, it is likely that the seller's inventory is stored in the taxing state, eliminating P.L. 86-272 protection.

If YES, go to question 6.

6. Are the sales exclusively of tangible personal property?

What is tangible personal property?/Whose law applies? Should current Section VI of the MTC Statement of Information be retained?

To be considered: if it is determined that applicable state law defines digital goods as intangible property, is the sale of digital products nevertheless protected activity due to Congressional intent (recognizing that digital goods did not exist in 1959)?

Should the Statement of Information expressly mention the following: digital downloads, digital goods, streaming, software, on-line gaming? Do any of these things require analysis other than addressing (1) whether they are considered tangible personal property, intangible personal property, or a service and (2) whether their transfer to the customer is a sale or a license or a lease?

If NO, seller is not immune.

If YES, go to question 7.

7. Are there third parties that engage in non-protected "business activities" in the taxing state "on behalf of" the seller?

Who are those parties and what are their activities? Marketplace facilitators? Related parties or corporate affiliates? Content distribution networks (see MA "cookie nexus" regulation)?

What does "on behalf of" mean?

If YES, seller is not immune.

IF NO, seller is immune.