

## MEMORANDUM

**TO:** Members of P.L 86-272 Work Group  
**FROM:** Brian Hamer  
**RE:** Summary of March 14, 2019 teleconference  
**DATE:** March 25, 2019

This is a high-level summary of the March 14 meeting 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 March 28.

Nikki Dobay, Senior Tax Counsel of the Council on State Taxation (COST), presented information she had collected from COST members that make sales over the internet. She related that some members utilize an order approval process that involves human decision makers while other members utilize a more automated process. She emphasized that the process varied widely among sellers. There also was discussion regarding the activities of both marketplace facilitators and credit card processors, and the use of “server farms” by sellers that used an automated process.

Ms. Dobay also addressed the use of “cookies” by COST members. She stated that information acquired by these COST members through the use of cookies was not sold by them to third parties. She referenced the use of third-party cookies by non-COST sellers. Members of the Work Group noted that some sellers do share information with other parties. One participant mentioned that the sharing of information by sellers with their corporate affiliates might defeat P.L. 86-272 protection.

The discussion then turned to the Scenarios posted on the Work Group’s MTC project page.

Scenario 1. Seller maintains a website offering various goods and services for sale. The provision of services does not require the seller, or a representative of the seller, to travel to the customer’s state.

State representatives voted 12-0 that P.L. 86-272 did not immunize the seller from paying income tax.

Scenario 2. Seller maintains a website offering for sale only items of tangible personal property. The products are complicated to use and purchasers often need post-sale assistance. Seller provides assistance in only one of the following ways:

2A. Seller identifies a toll-free number on its website, and purchasers may call the number to speak to a customer assistance representative (who is located out of state).

State representatives voted 12-0 that this activity was protected by PL. 86-272. One participant stated the assumption that the seller is not imposing a charge for customer service. Another participant noted that a grey area can easily be entered if the seller suggests through advertising that the purchase price is for both the purchase of tangible personal property and lifetime support. The chair agreed that an additional scenario be added to address this grey area.

2B. Purchasers may either email or engage in electronic chat sessions with a customer assistance representative through the seller's website.

One participant noted that this activity is arguably technical assistance, which under the current MTC Statement of Information is an unprotected activity. Discussion proceeded on whether the seller is engaged in a business activity in the customer's state, whether electronic chat is equivalent to a telephone call, and the relevance of the seller's website inserting software into the customer's computer (in which the seller may have a property interest). The Chair suggested that the Work Group may want to couch the vote on this scenario based on the assumption that the seller has placed software on the computer to facilitate the chat session.

Discussion on this scenario will be continued at the next meeting on March 28.