

MEMORANDUM

TO: Members of P.L 86-272 Work Group
FROM: Brian Hamer
RE: Summary of March 28, 2019 teleconference
DATE: April 9, 2019

This is a high-level summary of the March 28 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 April 11.

The Work Group continued its discussion of Scenario 2B, which reads as follows:

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:

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

Participants returned to whether there is a relevant distinction between communications or activities conducted via telephone and via the internet. Holly Coon also presented an additional scenario: she had purchased a bed whose remote control stopped working. She contacted the company which then fixed the control remotely via the internet and wifi. Ms. Coon proposed that the Work Group consider this scenario at some point in the future.

Participants expressed the following points: Analysis of whether an activity is protected by P.L. 86-272 requires consideration of whether the activity extends beyond solicitation of orders for tangible personal property and if so whether that activity occurs within the customer's state. Consideration must also be given to whether a non-solicitation activity is ancillary to solicitation and whether it is de minimis. Activities conducted via the internet are different from a telephone call because (1) the seller's website transmits software or code to the user's computer in order to facilitate the interaction between the seller and the customer, and the user's computer retains that code for some period of time, and (2) the nature of interaction is different.

Separate votes were taken on scenario 2B; one addressing email and the other addressing electronic chat. State representatives divided evenly on whether the use of email to provide post-sale customer support was a protected activity. One participant who voted that email was protected expressed that this was a close call. One participant who did not cast a vote stated that the question turned in his mind on whether the seller's website transmits software to the user's computer. Another participant stated that emailing "might" be protected, but that the result is fact sensitive.

State representatives then voted by a large margin that chat was not a protected activity. Three participants who voted that chat was not protected mentioned that it was based on their understanding that the seller's software was present in the user's computer.

The Work Group then turned to Scenario 2C, which reads as follows: Seller posts on its website a list of frequently asked questions together with answers.

State representatives voted unanimously that this activity is protected by P.L. 86-272.