



MULTISTATE TAX COMMISSION

Rosen Centre Hotel
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Report to the Uniformity Committee on Developments November 7, 2018

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In addition to the state tax developments that will be discussed in other parts of the committee's agenda, following are some notable developments concerning uniformity projects:

- Partnership/RAR Model – Status: The commission conducted a hearing on the proposed Model Uniform Statute for Reporting Adjustments to Federal Taxable Income and Federal Partnership Audit Adjustments. The executive committee will consider the hearing officer's report at its meeting on Thursday, November 8.
- Wayfair and the commission's model Sales and Use Tax Nexus (Engaging in Business) statute, adopted in 2016 - The commission adopted this model prior to *Wayfair* and it would, therefore, no longer represent the commission's recommendation to the states. The committee may wish to recommend to the commission that it withdraw its recommendation of this model effective July 1, 2018 (to avoid any implication that the commission endorses the retroactive application of *Wayfair*).
- Wayfair and the commission's Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272 – There has been substantial discussion among state and local tax practitioners about the effect *Wayfair* might have on income tax nexus and, especially, the application of P.L. 86-272. Some have argued that P.L. 86-272 protects sellers of digital goods. Others have argued that the federal statute also protects activities in a state other than the solicitation activities explicitly covered by the statute. This “reassessment” of P.L. 86-272 may be a reaction to the failure by some businesses to file and pay income taxes, either under the mistaken impression that *Quill* applied to income taxes, or, to avoid scrutiny as to potential sales tax

liabilities.¹ These businesses may now be seeking the protection of the federal statute. Those arguing for that protection appear to argue that P.L. 86-272 implicitly covers activities such as having software or other intangible property in a state. Richard Cram, MTC Nexus Director, has written on this subject and that article is posted with this report on the agenda for this meeting.

The commission adopted a policy on P.L. 86-272 in 1986, last amended 17 years ago. The policy makes clear that the signatories agreed “to impose their net income tax, subject to State and Federal legislative limitations, to the fullest extent constitutionally permissible.” Also, the policy notes that: “In those cases where there may be reasonable differences of opinion as to whether the disputed activity exceeds what is protected by P.L. 86-272, the signatory States will apply the principle that the preemption of state taxation that is required by P.L. 86-272 will be limited to those activities that fall within the clear and manifest purpose of Congress.” (Internal citations omitted.)

The policy does not specifically address activities that have, in recent years, become more common, such as the use of the Internet to provide all manner of services that may be related to sales of tangible property, or the sale of digital goods. The work group that is considering a model combined statute using the *Finnigan* approach is expected to reconsider this policy on P.L. 86-272 for the purpose of addressing a provision in that policy endorsing the “*Joyce* rule.”

The committee may also want to consider whether any of the provisions of the policy should be updated.

- Market-Based Sourcing –
 - Louisiana recently proposed rules for market-based sourcing of services that are based on the delivery of the service.
 - Some practitioners are suggesting that when audits begin for market-based sourcing years, we will begin to see issues that have still not be addressed in terms of rules and regulations. To date, however, we’ve received no requests from practitioners or taxpayers to clarify or add rules to the uniform regulations adopted last year.

¹ See “Wells Fargo’s \$481 Million Tax Surprise—Bank cites impact from recent Supreme Court ruling in Way-fair case, which dealt with online retailers,” Wall Street Journal, July 13, 2018.