



Report to the Uniformity Committee

Status of P.L. 86-272 Statement of Information Project

**San Antonio, Texas
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Background

Last fall, the Uniformity Committee initiated a project to update the MTC's Statement of Information regarding P.L. 86-272. This decision recognized the significant changes to both the economy and the way that business is conducted since the Statement was last revised in 2001.¹ The fact that P.L. 86-272 was enacted in 1959, long before the development of numerous technological advances that have become integral parts of modern business practices, means that the application of the statute is often unclear. Reexamination of the statute by the Commission, therefore, can both address these ambiguities and promote uniform application of the law.

The P.L. 86-272 Work Group consists of 18 volunteers from 14 states. It is chaired by Laurie McElhatton, Legal Counsel at the California Franchise Board. Each meeting of the Work Group has been open to the public; individuals from the private sector and additional state employees have participated.

A draft of a revised Statement of Information, marked to show possible edits, is posted on the Work Group's project page at www.mtc.gov. It is important to note that this draft remains a work in progress, some edits in fact were recently modified, and other edits still need to be discussed and finalized. We also anticipate that some additional language will be inserted before the Work Group tenders a final product to the Uniformity Committee for its consideration. Nevertheless, substantial progress has been made and a strong majority of Work Group members have reached consensus on many issues.

Attached to this Report is the most recent draft of the opening paragraphs in new Section 3 of Article IV (Specific Listing of Unprotected and Protected Activities). This (proposed) section addresses business activities conducted via the Internet. A portion of this language was

¹ The official name of the Statement is "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272."

developed by the Work Group at its most recent meeting and differs from language contained in the draft Statement posted on the project page. Because these paragraphs describe the analytical approach adopted by a majority of Work Group members with respect to Internet activities, we wanted to take this opportunity to bring this language to the Uniformity Committee's attention and to solicit preliminary reaction at the upcoming meeting. (Note that no formal vote has yet been taken on this language.)

Limited Scope of the Project

The Work Group understands that its role is a limited one: to consider the application of P.L. 86-272 to modern business activities. This project is fundamentally a matter of statutory interpretation. The final recommendations that eventually will be submitted to the Uniformity Committee will not address when persons *should* be subject to income tax obligations.

There are, of course, other limitations on taxation. For example, the U.S. Constitution may shield remote sellers from a state's income tax if they sell relatively small amounts of goods or services into that state. Alternatively, a state may have in place a statutory provision containing thresholds to shield small businesses from tax. *See* MTC Factor Presence Nexus Standard for Business Activity Taxes, approved October 17, 2002.

States that have not adopted such thresholds may wish to consider doing so if either the Commission or individual states conclude that P.L. 86-272 does not provide immunity to small remote sellers that utilize modern business tools.

Conclusion

Although some work remains to be done before a final product is submitted to the Uniformity Committee, the volunteer members of the Work Group have devoted substantial time and effort to this project and a final product is in sight. We look forward to providing a more substantial update to the Uniformity Committee in San Antonio.

Attachment

10/24/19 Draft Article IV, section C language

IV

SPECIFIC LISTING OF UNPROTECTED AND PROTECTED ACTIVITIES

...

C. ACTIVITIES CONDUCTED VIA THE INTERNET:

To determine whether a person that sells tangible personal property via the Internet is shielded from taxation by P.L. 86-272 requires the same analysis as with respect to persons that sell tangible personal property by other means. Thus, such a seller is shielded from taxation in the customer's state if the only business activity in which it engages in that state is the solicitation of orders for sales of tangible personal property, which orders are sent outside that state for approval or rejection, and if approved, are shipped from a point outside of that state.

If such a seller engages in an activity via the Internet that: (i) extends beyond solicitation of orders for sales of tangible personal property, (ii) is neither ancillary to solicitation nor de minimis, and (iii) takes place in the customer's state, then P.L. 86-272 does not shield the seller from taxation by the customer's state.

As a general rule, when a company interacts with a customer via the company's website or app, the company engages in an activity in the customer's state. Presenting static text or photos on a website does not in itself constitute an activity in those states where customers are located.

Following are examples of activities conducted by a company that operates a website offering for sale only items of tangible personal property. . . .