



Report to the Uniformity Committee

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

**Denver, Colorado
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**Prepared by Brian Hamer, Counsel, MTC on behalf of
Holly Coon, outgoing Work Group Chair and
Laurie McElhatton, incoming Work Group Chair**

Background

On November 7, 2018, 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 those ambiguities and promote uniform application of the law.

The Uniformity Committee appointed Holly Coon of Alabama to chair a Work Group to undertake this project. The Work Group currently consists of 14 volunteers from 12 states, in addition to the Chair.² Five meetings have been held to date (via teleconference). Each of the meetings has been open to the public, and various individuals from the private sector and additional state employees have participated. Laurie McElhatton, Legal Counsel at the California Franchise Board, will be chairing the Work Group going forward.

The 2001 version of the Statement of Information is attached to this Report. The addendum to the Statement contains a copy of P.L. 86-272, which is codified at 15 U.S.C.

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."

²The Work Group includes (in their unofficial capacities) Krystal Bolton (Louisiana), Michael Fatale (Massachusetts), Steven Alvarez (Georgia), Phil Skinner (Idaho), Ashley McGhee (North Carolina), Ellen Golden (West Virginia), Preeti Gratz (Alabama), Michael Hale (Kansas), Jennifer Hays (Kentucky), Kevin Branson (Kentucky), Ben Clough (Iowa), Hristo Chaprazov (Iowa), Stephen Ferraro (Tennessee), and Rob Plattner (New York).

§§381-384. Other information is available on the Work Group's project page which is posted on the MTC website at www.mtc.gov.

Limited Scope of the Project

The Work Group is cognizant 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 recommendations that will eventually be submitted to the Uniformity Committee will not address when persons *should* be subject to income tax filing and payment obligations. There are, of course, other limitations on taxation. So, 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. *Cf. South Dakota v. Wayfair, Inc.* (finding that the South Dakota statute imposing tax collection responsibilities on sellers did not violate the Commerce Clause in part because the statute exempted small sellers from the law). 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, 2002.³

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.

Discussion

At the outset, the Work Group reviewed the background that gave rise to enactment of P.L. 86-272 and key case law interpreting the statute. Subsequently, the Work Group has primarily considered how the provisions of P.L. 86-272 apply to various business activities conducted with customers via the Internet. (The list of Scenarios is set forth on the Work Group's project page. This list also is attached to this Report.) These discussions have served to identify key issues and to develop a framework for analyzing the application of the statute to various contemporary fact patterns.

The language of P.L. 86-272 protects certain specific activities provided they are "the only business activities within such State by or on behalf of such person during such taxable year." The Work Group has applied the following two-step analysis to determine if P.L. 86-272 provides a business immunity from income taxation. The first step is to determine whether a business activity constitutes the solicitation of orders for tangible personal property, since such activity is protected by the statute.⁴ This question is often addressed by the current version of the MTC Statement of Information. If the activity extends beyond solicitation, then the second step

³It should be noted that in many cases immunity from income tax in one state does not reduce a business's overall tax liability since its income may as a result be subject to tax in its state of residence.

⁴The U.S. Supreme Court has held that activities that are ancillary to solicitation or are *de minimis* also are protected by P.L. 86-272.

is to determine where the activity takes place. A business will not lose its immunity if it engages in non-solicitation activities entirely outside of the taxing state.

As to this second step, a consensus has developed among Work Group members--if an in-state customer interacts with the remote business's website (*i.e.*, does more than just view a presentation on the website⁵), the business has engaged in activities in the state. This thinking is based in key part on the following considerations:

(1) When a customer engages a seller's website, the website transmits software or code to the user's computer. which is stored in the user's computer for some period of time. The code serves to facilitate the interaction between the customer and seller.

(2) The interaction between the customer and the seller's website is substantial in nature.

(3) The analysis in *South Dakota v. Wayfair, Inc.* speaks to the "continuous and pervasive virtual presence of retailers" in the states where their customers are located.

Applying these considerations, a majority of Work Group members draw a distinction between business activities conducted by remote sellers via the telephone and business activities conducted via the seller's website.⁶ In the case of the former, the seller does not engage in activities within the customer's state; in the case of the latter, the seller does.⁷

It is important to note that the Work Group's analysis is still a work in progress. In addition, MTC staff continues to encourage the taxpayer community to provide input to ensure that the members of the Work Group can hear all points of view and that decisions are based on facts and an accurate understanding of actual business practices.

Other matters relating to the conduct of business over the Internet remain to be discussed or to be discussed in greater depth. For example, P.L. 86-272 provides that the solicitation of orders for tangible personal property is a protected activity only if the 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). The Work Group must still consider where order approval takes place in the case of Internet transactions. It appears that this approval process involves very different practices than in 1959 when in-state sales staff would transmit orders to personnel located in their company's home office for approval.

⁵ For example, the Work Group has concluded that a seller does not engage in business activities within the customer's state if its only non-solicitation activity is providing customer assistance by posting a list of frequently asked questions together with answers on its website.

⁶ A large part of the Work Group's discussions to date has addressed the provision of post-sale customer support or assistance by remote sellers. *See* Scenario 2 on the attached list of Scenarios.

⁷ It is important to keep in mind that the analysis required here relates to construing the meaning of terms contained in P.L. 86-272, such as "business activities," and not for example concepts relating to constitutional nexus.

Going forward, the Work Group also will consider a number of other issues including: the application of P.L. 86-272 to cloud computing and streaming; whether to propose revising or deleting VII(E) of the current Statement of Information which adopts the *Joyce* rule; and possible issues relating to how interpretations of the statute effect the determination of tax liabilities for prior tax periods.

The issues being addressed by the Work Group are complex. Work Group members look forward to receiving input from the Uniformity Committee at the Denver meeting and also receiving additional questions or subjects that they should consider.