



Report to the Uniformity Committee

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

**Boise, Idaho
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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 these ambiguities and promote uniform application of the law.

The Work Group consists of 18 volunteers from 14 states. It is chaired by Laurie McElhatton, Legal Counsel at the California Franchise Board. Eleven meetings of the Work Group have been held to date (via teleconference). Each of the meetings has been open to the public, and individuals from the private sector and additional state employees have participated.

The most recent 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. §§381-384. Other information, including summaries of Work Group meetings and reference materials, 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

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."

interpretation. The recommendations that will eventually 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. 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, 2002.²

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

Since the Uniformity Committee's last meeting in April, the Work Group has continued to assess how the provisions of P.L. 86-272 apply to various business activities conducted via the Internet. (The revised list of Scenarios being considered by the Work Group 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 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.³ This question is often addressed by the current version of the MTC Statement of Information. If the activity extends beyond solicitation of orders for tangible personal property, then the second step 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 a remote business's website (*i.e.*, does more than just view a presentation on the website), the business has engaged in activities in that 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.

²It 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.

³The 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.

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

In addition, the analysis in *South Dakota v. Wayfair, Inc.* has informed the thinking of at least some Work Group members. Although the Supreme Court in that case construed the Commerce Clause, not the language contained in P.L. 86-272, the decision speaks to the “continuous and pervasive virtual presence of retailers” in the states where their customers are located.

One member of the Work Group recently offered an alternative approach, which the Work Group has discussed. The member has advocated that *any* communication by a seller constitutes a business activity in the recipient’s state, including web page content and telephone calls. The member also has advocated that the Statement of Information’s definition of “de minimis activities” be expanded to include consideration of the extent to which the seller’s non-solicitation activities are purposefully directed to the customer’s state. Non-solicitation communications could be de minimis if they are not purposefully directed towards that state. This approach has not been adopted by the Work Group.

Members of the Work Group have taken straw votes on many scenarios.⁴ Scenarios where the votes have demonstrated a strong consensus include the following:

- A. Internet seller of tangible personal property offers customers post-sale assistance
 - via email accessed through a link on the seller’s website UNPROTECTED
 - via ordinary email not accessed through a link PROTECTED
 - via electronic chat accessed through the seller’s website UNPROTECTED
 - by posting on its website a list of static FAQs with answers PROTECTED
 - by placing on its website an interactive tool which allows customers to type in a question and which then provides answers UNPROTECTED
- B. Internet seller of tangible personal property offers warranty service to its customers. If a product ceases to function properly, the seller fixes the product remotely via the internet and wifi. UNPROTECTED
- C. Internet seller of tangible personal property invites customers to apply for its branded credit card via an online application. UNPROTECTED
- D. Seller maintains a website which customers access to immediately watch a movie through streaming. UNPROTECTED

⁴ The various tallies are set forth in the summary of each Task Force meeting. These summaries can be accessed from the Work Group’s project page. Note that straw votes are subject to revote.

Recently, the Work Group has turned to the subject of internet apps and cookies, specifically to consider whether these tools defeat the statute's protection when they transmit information about a purchaser or a potential purchaser's web activities to the seller or to a third party. Work Group members have expressed various points of view, and this discussion is ongoing.

The Work Group has spent substantial time considering whether non-solicitation activities conducted via telephone defeat a seller's immunity under the statute. At this point, it appears to be the consensus of the group not to recommend that this subject be addressed in any revision of the Statement.

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.

Going forward, the Work Group also will consider a number of other issues including: the application of P.L. 86-272 to cloud computing; solicitation and sale of gift cards; 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.

Work Group members will solicit input from the Uniformity Committee at the Boise meeting, including additional subjects that the group should consider. They also have expressed an interest in any thoughts that the Committee may have on the form that the revision to the Statement should take and on whether the MTC should ask individual states to adopt the Statement as signatories, which was the practice in the past.

Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272

Originally adopted by the Multistate Tax Commission on July 11, 1986
Revised version adopted by the MTC Executive Committee on January 22, 1993
Second revision adopted by the Multistate Tax Commission on July 29, 1994
Third revision adopted by the Multistate Tax Commission on July 27, 2001

Public Law 86-272, 15 U.S.C. 381-384, (hereafter P.L. 86-272) restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term "net income tax" includes a franchise tax measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

It is the policy of the state signatories hereto to impose their net income tax, subject to State and Federal legislative limitations, to the fullest extent constitutionally permissible. Interpretation of the solicitation of orders standard in P.L. 86-272 requires a determination of the fair meaning of that term in the first instance. The United States Supreme Court has recently established a standard for interpreting the term "solicitation" and this Statement has been revised to conform to such standard. *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992). 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". . See *Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, 510 U.S. 332, 114 S.Ct. 843, 127 L. Ed.2d 165 (1994), *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L. Ed.2d 407, 422 (1992); *Heublein, Inc. v. South Carolina Tax Com.*, 409 U.S. 275, 281-282 (1972).

The following information reflects the signatory states' current practices with regard to: (1) whether a particular factual circumstance is considered under P.L. 86-272 or permitted under this Statement as either protected or not protected from taxation by reason of P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another state for purposes of applying a throwback rule (if applicable) with respect to such sales. It is the intent of the signatory states to apply this Statement uniformly to factual circumstances, irrespective of whether such application involves an analysis for jurisdictional purposes in the state into which such tangible personal property has been shipped or delivered or for throwback purposes in the state from which such property has been shipped or delivered.

I NATURE OF PROPERTY BEING SOLD

Only the solicitation to sell personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trade marks, service marks and the like, or any other type of property are not protected activities under P.L. 86-272.

The sale or delivery and the solicitation for the sale or delivery of any type of service that is not either (1) ancillary to solicitation or (2) otherwise set forth as a protected activity under the Section IV.B. hereof is also not protected under Public Law 86-272 or this Statement.

II SOLICITATION OF ORDERS AND ACTIVITIES ANCILLARY TO SOLICITATION

For the in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to *solicitation* (except for *de minimis* activities described in Article III. and those activities conducted by independent contractors described in Article V. below). Solicitation means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.

Ancillary activities are those activities that serve no independent business function for the seller apart from their connection to the solicitation of orders. Activities that a seller would engage in apart from soliciting orders shall not be considered as ancillary to the solicitation of orders. The mere assignment of activities to sales personnel does not, merely by such assignment, make such activities ancillary to solicitation of orders. Additionally, activities that seek to promote *sales* are not ancillary, because P.L. 86-272 does not protect activity that facilitates sales; it only protects ancillary activities that facilitate the request for an order. The conducting of activities not falling within the foregoing definition of solicitation will cause the company to lose its protection from a net income tax afforded by P.L. 86-272, unless the disqualifying activities, taken together, are either *de minimis* or are otherwise permitted under this Statement.

III DE MINIMIS ACTIVITIES

De minimis activities are those that, when taken together, establish only a trivial connection with the taxing State. An activity conducted within a taxing State on a regular

or systematic basis or pursuant to a company policy (whether such policy is in writing or not) shall normally not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with the State is to be measured on both a qualitative and quantitative basis. If such activity either qualitatively or quantitatively creates a non-trivial connection with the taxing State, then such activity exceeds the protection of P.L. 86-272. Establishing that the disqualifying activities only account for a relatively small part of the business conducted within the taxing State is not determinative of whether a *de minimis* level of activity exists. The relative economic importance of the disqualifying in-state activities, as compared to the protected activities, does not determine whether the conduct of the disqualifying activities within the taxing State is inconsistent with the limited protection afforded by P.L. 86-272.

IV SPECIFIC LISTING OF UNPROTECTED AND PROTECTED ACTIVITIES

The following two listings - IV.A. and IV.B. - set forth the in-state activities that are presently treated by the signatory state as "Unprotected Activities" or "Protected Activities". Such listings may be subject to an amendment by addition or deletion that appears on the individual signatory state's Signature Page attached to this Statement. [*Note: a list of states that have adopted this Statement, together with a compilation of such additions and deletions, is available from the MTC*].

The signatory state has included on the list of "Protected Activities" those in-state activities that are either required protection under P.L. 86-272; or, if not so required, that the signatory state, in its discretion, has permitted protection. The mere inclusion of an activity on the listing of "Protected Activities", therefore, is not a statement or admission by the signatory state that said activity is required any protection under the Public Law.

A. UNPROTECTED ACTIVITIES :

The following in-state activities (assuming they are not of a *de minimis* level) are not considered as either solicitation of orders or ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under the Public Law:

1. Making repairs or providing maintenance or service to the property sold or to be sold.
2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
3. Investigating credit worthiness.
4. Installation or supervision of installation at or after shipment or delivery.

5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
6. Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders.
7. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
13. Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel.
14. Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the state during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, using or maintaining any of the following facilities or property in-state:
 - a. Repair shop.
 - b. Parts department.
 - c. Any kind of office other than an in-home office as described as permitted under IV.A.18 and IV.B.2.
 - d. Warehouse.
 - e. Meeting place for directors, officers, or employees.
 - f. Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
 - g. Telephone answering service that is publicly attributed to the company or to employees or agent(s) of the company in their representative status.

- h. Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.
 - i. Real property or fixtures to real property of any kind.
- 17. Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.
- 18. Maintaining, by any employee or other representative, an office or place of business of any kind (other than an in-home office located within the residence of the employee or representative that (i) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity , and (ii) so long as the use of such office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the company; or for such other activities that are protected under Public Law 86-272 or under paragraph IV.B. of this Statement).

A telephone listing or other public listing within the state for the company or for an employee or representative of the company in such capacity or other indications through advertising or business literature that the company or its employee or representative can be contacted at a specific address within the state shall normally be determined as the company maintaining within this state an office or place of business attributable to the company or to its employee or representative in a representative capacity . However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the company shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the company or its employee or representative.

The maintenance of any office or other place of business in this state that does not strictly qualify as an "in-home" office as described above shall, by itself, cause the loss of protection under this Statement.

For the purpose of this subsection it is not relevant whether the company pays directly, indirectly, or not at all for the cost of maintaining such in-home office.

- 19. Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state.
- 20. [RESERVED.]

21. Conducting any activity not listed in paragraph IV.B. below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

B. PROTECTED ACTIVITIES :

The following in-state activities will not cause the loss of protection for otherwise protected sales:

1. Soliciting orders for sales by any type of advertising.
2. Soliciting of orders by an in-state resident employee or representative of the company, so long as such person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in IV.A.18. above.
3. Carrying samples and promotional materials only for display or distribution without charge or other consideration.
4. Furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration.
5. Providing automobiles to sales personnel for their use in conducting protected activities.
6. Passing orders, inquiries and complaints on to the home office.
7. Missionary sales activities; i.e., the solicitation of indirect customers for the company's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if such solicitation activities are otherwise immune.
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.
9. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control).
10. Maintaining a sample or display room for two weeks (14 days) or less at any one location within the state during the tax year.
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.

12. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.
13. Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by this Statement under paragraph IV.B. shall not, by itself, remove the protection under this Statement.

V INDEPENDENT CONTRACTORS

P.L. 86-272 provides protection to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the company or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the company's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining an office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as those provided under P.L. 86-272 and this Statement .

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the company, except for purposes of display and solicitation, shall remove the protection.

VI APPLICATION OF DESTINATION STATE LAW IN CASE OF CONFLICT

When it appears that two or more signatory states have included or will include the same receipts from a sale in their respective sales factor numerators, at the written request of the company, said states will in good faith confer with one another to determine which state should be assigned said receipts. Such conference shall identify

what law, regulation or written guideline, if any, has been adopted in the state of destination with respect to the issue. The state of destination shall be that location at which the purchaser or its designee actually receives the property, regardless of f.o.b. point or other conditions of sale.

In determining which state is to receive the assignment of the receipts at issue, preference shall be given to any clearly applicable law, regulation or written guideline that has been adopted in state of destination. However, except in the case of the definition of what constitutes "tangible personal property", this state is not required by this Statement to follow any other state's law, regulation or written guideline should this state determine that to do so (i) would conflict with its own laws, regulations, or written guidelines and (ii) would not clearly reflect the income-producing activity of the company within this state.

Notwithstanding any provision set forth in this Statement to the contrary, as between this state and any other signatory state, this state agrees to apply the definition of "tangible personal property" that exists in the state of destination to determine the application of P.L. 86-272 and issues of throwback, if any. Should the state of destination not have any applicable definition of such term so that it could be reasonably determined whether the property at issue constitutes "tangible personal property", then each signatory state may treat such property in any manner that would clearly reflect the income-producing activity of the company within said state.

VII MISCELLANEOUS PRACTICES

A. APPLICATION OF STATEMENT TO FOREIGN COMMERCE

Public Law 86-272 specifically applies, by its terms, to "interstate commerce" and does not directly apply to foreign commerce. The states are free, however, to apply the same standards set forth in the Public Law and in this Statement to business activities in foreign commerce to ensure that foreign and interstate commerce are treated on the same basis. Such an application also avoids the necessity of expensive and difficult efforts in the identification and application of the varied jurisdictional laws and rules existing in foreign countries.

This state will apply the provisions of Public Law 86-272 and of this Statement to business activities conducted in foreign commerce. Therefore, whether business activities are conducted by (i) a foreign or domestic company selling tangible personal property into a country outside of the United States from a point within this state or by (ii) either company selling such property into this state from a point outside of the United States, the principles under this Statement apply equally to determine whether the sales transactions are protected and the company immune from taxation in either this state or in the foreign country, as the case might be, and whether, if applicable, this state will apply its throwback provisions.

B. APPLICATION TO CORPORATION INCORPORATED IN STATE OR TO PERSON RESIDENT OR DOMICILED IN STATE

The protection afforded by P.L. 86-272 and the provisions of this Statement do not apply to any corporation incorporated within this state or to any person who is a resident of or domiciled in this state.

C. REGISTRATION OR QUALIFICATION TO DO BUSINESS.

A company that registers or otherwise formally qualifies to do business within this state does not, by that fact alone, lose its protection under P.L. 86-272. Where, separate from or ancillary to such registration or qualification, the company receives and seeks to use or protect any additional benefit or protection from this state through activity not otherwise protected under P.L. 86-272 or this Statement, such protection shall be removed.

D. LOSS OF PROTECTION FOR CONDUCTING UNPROTECTED ACTIVITY DURING PART OF TAX YEAR.

The protection afforded under P.L. 86-272 and the provisions of this Statement shall be determined on a tax year by tax year basis. Therefore, if at any time during a tax year the company conducts activities that are not protected under P.L. 86-272 or this Statement, no sales in this state or income earned by the company attributed to this state during any part of said tax year shall be protected from taxation under said Public Law or this Statement.

E. APPLICATION OF THE *JOYCE RULE*.

In determining whether the activities of any company have been conducted within this state beyond the protection of P.L. 86-272 or paragraph IV.B. of this Statement, the principle established in *Appeal of Joyce, Inc.*, Cal. St. Bd. of Equal. (11/23/66), commonly known as the "Joyce Rule", shall apply. Therefore, only those in-state activities that are conducted by or on behalf of said company shall be considered for this purpose. Activities that are conducted by any other person or business entity, whether or not said person or business entity is affiliated with said company, shall not be considered attributable to said company, unless such other person or business entity was acting in a representative capacity on behalf of said company.

**Addendum:
Public Law 86-272**

••• §381. Imposition of net income tax.

(a) Minimum Standards.

No state or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which 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; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) Domestic corporations ; persons domiciled in or residents of a State.

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to ----

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident, of such State.

(c) Sales or solicitation of orders for sales by independent contractors.

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) Definitions.

For purposes of this section ----

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principle and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

••• §382. Assessment of net income taxes; limitations; collection.

(a) No State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title.

(b) the provisions of subsection (a) of this section shall not be construed ----

(1) to invalidate the collection, on or before September 14, 1959, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after September 14, 1959, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

••• .§383. Definition.

For purpose of this chapter, the term "net income tax" means any tax imposed on, or measured by net income.

••• §384. Separability of provisions.

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Scenarios

(updated 7/8/19 to add four additional scenarios)

(further updated 7/11/19)

In each scenario, does P.L. 86-272 provide immunity to the seller against the imposition of a net income tax in the purchaser's state?

Assume for each scenario the following:

- (a) Seller has no state contacts other than those referenced below and is subject to tax under state law and the U.S. Constitution. (States in fact may have a factor presence statute or other rule that provides immunity to the seller, but this should not be considered for the purpose of analyzing the impact of P.L. 86-272.)
- (b) When a customer visits seller's website, the website transmits software to the customer's computer. This software is stored on the computer's hard drive and enables the customer to interact with seller's website with respect to the website's various activities. [This description is subject to discussion and receipt of additional information.]
- (c) For scenarios 1-10, the order is approved or rejected, and the products are shipped from a point, outside of the purchaser's state. Where orders are approved or rejected is the subject of scenario 11.

* * * *

- 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.
- 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).
 - 2B. Purchasers may either email or engage in electronic chat sessions with a customer assistance representative through the seller's website.
 - 2C. Seller posts on its website a list of frequently asked questions together with answers.
 - 2D. Seller's website includes an interactive tool which allows customers to type in a question. In response, the system (without human intervention) either asks follow-up questions or provides an answer.

- 2E. Seller's website includes seller-sponsored "how to" videos and in some cases similar videos posted by its customers.
3. Seller maintains a website offering for sale only items of tangible personal property. The products are covered by a warranty. If a product ceases to function properly during the warranty period:
- 3A. [Added] Seller is able to fix the product remotely via the internet and WIFI (e.g., fixing a remote-control device that controls a bed's position).
- 3B. Purchaser may mail the product to the seller for repair after downloading a return slip from the website.
- 3C. Seller will repair the product at the purchaser's location, which is performed by an independent contractor pursuant to a contract with the seller.
4. Seller maintains a website offering for sale only items of tangible personal property. The website invites viewers to apply for employment at the seller.
- 4A. The website allows applicants to upload a copy of their cover letter and resume, which is then reviewed by seller's HR team (which is not located in state). The HR team then sends an email to applicants either informing them that they will not be hired or inviting them to participate in a telephone interview.
- 4B. The website directs applicants to complete an online form which is evaluated and scored by an automated system based on the appearance of certain words or phrases. Applicants who receive a high score are invited to participate in a telephone interview.
5. Seller maintains a website offering for sale only items of tangible personal property. Seller invites customers to apply for its branded credit card via an online application. Whether the application is accepted or rejected typically is noticed to the customer within minutes electronically.
6. Seller maintains a website which customers access to immediately watch a movie through streaming.
7. Purchasers download to their smartphone an app offered by seller. The app enables purchasers to order and pay for items of tangible personal property sold by the seller. Seller does not sell services or license any intangible property.
- 7A. Seller uses the information about the purchaser received via the app only to facilitate the sale.
- 7B. Seller sells the information about the purchaser received via the app to third parties.

7C. Seller uses the information to engage in market research to facilitate future sales, develop new products, and engage in targeted marketing.

8. Seller maintains a website offering for sale only items of tangible personal property. When a purchaser interacts with the seller's website, the seller utilizes one or both of the following technologies [descriptions are subject to discussion and receipt of additional information]:

8A. Cookies. These are small text files installed on the hard drive of a customer's computer or customer's smartphone when he or she visits the seller's website. These cookies allow the seller's webserver to store information about the customer, including search histories and location information. Cookies also enable a seller to track its customers' behavior over time and to deliver ads that are specific to each customer.

8B. Third party cookies. These are cookies that a seller allows other entities, such as advertisers or data brokers, to place on customers' computers and devices through the seller's website. Third party cookies may be persistent cookies that track the customer across multiple sites. Utilizing these cookies, advertisers and data brokers collect information and compile it for sellers so that sellers may promote their products to customers more effectively.

9. Seller maintains a website offering for sale only items of tangible personal property. Seller contracts with a provider of a content distribution network ("CDN") to use in-state servers to accelerate the delivery of the seller's web pages to customers. Because the CDN allows the seller to deliver web pages to customers more quickly and efficiently, the CDN helps ensure that the seller's customers are less likely to exit the seller's website.
10. Seller, which sells only tangible personal property, contracts with a marketplace facilitator. The marketplace offers for sale the seller's products via the marketplace's website, receives orders, processes payments from purchasers, transmits payments to the seller, and handles returns. The marketplace maintains inventory, including seller's products, at fulfillment centers in the purchaser's state.
11. Seller maintains a website offering for sale only items of tangible personal property. The seller does not sell on a marketplace. Additional facts to be considered: After purchasers select items for purchase, input their credit card information and press the submit button on the website, purchase information is automatically transmitted to seller's merchant service provider. The merchant service provider in turn sends a notification to the purchaser's credit card company (bank) to see if sufficient credit is available to purchase the product. If sufficient credit is available, seller still may decline to make the sale anytime before shipping the item to the purchaser. Seller, however, rarely declines orders.

12. Seller maintains a website offering for sale only items of tangible personal property. It periodically hosts and moderates user group webinars for the users of its products. During these webinars, the seller teaches users how to use its products and answers questions about its products.
13. Seller is a provider of the following cloud computing “services.” It maintains no equipment in the states where its customers are located. Assume that the customers’ states do not treat the transactions as a sale of tangible personal property.
 - (a) Software as a Service (SaaS). Customers obtain access to software or applications hosted on remote servers maintained by the provider.
 - (b) Infrastructure as a Service (IaaS). Customers obtain access to the provider’s remote IT infrastructure, such as servers and network equipment, in order to utilize the equipment’s computing power and storage.
 - (c) Remote monitoring. Seller remotely monitors the performance of the customer’s network and computer systems and addresses software issues when necessary.
14. Seller maintains a website offering for sale only items of tangible personal property and gift cards that can be used to purchase its products.
15. Seller, which sells only tangible personal property in its ordinary course of business, sells one of the divisions of its business. Some of the proceeds from the sale are attributed to brand and good will, which are assigned to certain states according to a market sourcing regime based on the destination of the division’s sales of tangible personal property. Does P.L. 86-272 provide immunity to the seller against the imposition of income tax in those states (assuming that its other activities in those states are protected)?