



Proposed Revision to the P.L. 86-272 Statement of Information

**Submitted to the Uniformity Committee
on behalf of the P.L. 86-272 Work Group
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On behalf of the P.L. 86-272 Work Group, we are pleased to submit for the Uniformity Committee's consideration the proposed revision to the current MTC Statement of Information.

- The Work Group met on 23 occasions between February 2019 and February 2020.
- All Work Group meetings were open to the public and the Work Group encouraged all interested parties to provide input.
- State government employees who were not Work Group members and members of the private sector also provided information and ideas.



Background

1959. The U.S. Supreme Court decides *Northwestern States Portland Cement Co. v. Minnesota* and declines to hear appeals of two Louisiana tax cases addressing the taxation of businesses engaged in interstate commerce.

Seven months later, Congress passes and President Eisenhower signs P.L. 86-272.

The Senate Report describes the legislation as a “temporary solution” pending a deeper review of state taxation.”

One of the sponsors states on the floor of the House of Representatives that the legislation “is very narrow, indeed. It covers only the single and simple area where a corporation does nothing more within a State than solicit orders.”



1986. The MTC adopts its “Statement of Information Concerning Practices of Multistate Commission and Signatory States Under Public Law 86-272.”

2001. The MTC issues its most recent update of the Statement of Information.

2018. The Uniformity Committee initiates a project to update the Statement to address the significant changes to the way that business is conducted since the Statement was last revised.



Limited Scope of the Project

The Work Group's role was a limited one: to consider the application of P.L. 86-272 to modern business activities. Its recommendations to the Uniformity Committee do not address when businesses *should* be subject to state income tax.



MULTISTATE TAX COMMISSION

P.L. 86-272

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 . . . :

(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



MULTISTATE TAX COMMISSION

The Work Group focused primarily on how P.L. 86-272 applies to business activities conducted via the Internet.

It applied a two-part analysis to determine if the statute provides a business immunity from taxation:

1. Do business activities conducted by the business constitute the solicitation of orders for tangible personal property?
2. If the business's activities extend beyond solicitation, do they take place within the taxing state?

The Work Group agreed to utilize the following principle to address the second part (in-state activities), which was inserted into the proposed revision:

“As a general rule, when a business interacts with a customer via the business’s website or app, the business engages in an activity within the customer’s state. However, when a business presents static text or photos on its website, that presentation does not in itself constitute an activity within those states where the business’s customers are located.”



In order to provide further guidance, the Work Group also added to the proposed revision eleven **factual scenarios** involving Internet sellers and indicated in each case whether the described business activity was or was not protected by P.L. 86-272, together with a brief explanation.

Considerations

Individual members of the Work Group did not always apply the same analysis; they did rely on the following considerations:

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

South Dakota v. Wayfair, Inc. The Work Group included in the Introduction to the proposed revision the Supreme Court's observation that an Internet seller "may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term" (while recognizing that the decision did not address P.L. 86-272).



Other proposed substantive changes

- Telecommuting. Added to the Statement’s list of in-state unprotected activities “activities performed by an employee who telecommutes on a regular basis” (unless the activities constitute solicitation of orders for tangible personal property).
- Added to Article V (Independent Contractors) an affirmative statement that an independent contractor’s performance of unprotected activities on behalf of a seller removes the seller’s statutory protection. It provided two examples of such activities: performing warranty work and accepting returns of the seller’s products.

Other proposed substantive changes

- Revised Article VII.A (Foreign Commerce). The proposed language retains the Statement’s observation that P.L. 86-272 applies explicitly only to “interstate commerce,” not to “foreign commerce.” Unlike the current Article, the proposal does not state that states “will apply” the statute’s protections to activities conducted in foreign commerce—although that appears to be the general practice of states.
- Deleted Article VII.E (Joyce rule). The current version of the Statement endorses the *Joyce* rule rather than the *Finnigan* rule. The Work Group concluded that it was no longer appropriate to recommend *Joyce* since many states have adopted *Finnigan*. The proposed revision of the Statement takes no position.



MULTISTATE TAX COMMISSION

Concept of “Supporting States”

To indicate their state’s endorsement, state representatives signed prior iterations of the Statement of Information (occasionally with exceptions).

The proposed revision does not provide for signatures but instead adopts the concept of “Supporting States.”



MULTISTATE TAX COMMISSION

Other changes

The proposed revision of the Statement also adds a table of contents, updates the Introduction, and makes numerous non-substantive changes to clarify and modernize language.



A final note

In the Introduction to the proposed revision, the Work Group inserted a reference to the MTC's model factor presence nexus statute. Also, the model is attached as an Addendum

The MTC has recommended that states adopt this model to shield from taxation small businesses and other businesses that have minimal contacts with the state.