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Robert Desiderio
Hearing Officer

Via E-Mail

Re: COST Comments on Proposed Revisions to the MTC Model Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272

Dear Hearing Officer Desiderio,

On behalf of the Council On State Taxation (COST), we write in opposition to the proposed revisions to the MTC Model Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272 (Proposed Revised Statement of Information). Essentially, if the additions to the list of unprotected activities in the Proposed Revised Statement of Information are adopted by the MTC and the individual states, P.L. 86-272's protections will be effectively eviscerated. COST has made similar comments during the MTC's P.L. 86-272 Work Group's deliberations as well as, most recently, at the Uniformity Committee and Executive Committee meetings in April 2020.

The MTC's Revised Rules Render P.L. 86-272 a Nullity

The MTC's stated goal for this project is to update the Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272 (Statement of Information), last revised in 2001, "to consider how P.L. 86-272 applies to modern business activities."¹ Perhaps a more appropriate description of the project is "to consider how P.L. 86-272 **no longer** applies to modern business activities" as the revisions included in the Proposed Revised Statement of Information fully dismantle the protections previously provided to multistate businesses by the sixty-year old federal statute.

If the proposed MTC revisions take effect, most businesses with functional websites, but no physical presence in the customer's state, will lose the protections currently afforded by P.L. 86-272. In the introduction to the new section in the Proposed Revised Statement of Information on "Activities Conducted Via The Internet," the MTC states, "As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the

¹ Brian Hamer, Submission of Proposed Revisions to the MTC Model Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272, June 17, 2020, at 2.

customer's state.”² With that statement, the MTC has effectively conflated the in-state activities of the customer (or a prospective employee) who accesses the seller's website on his or her own computer, tablet or phone, with the out-of-state activities of the seller.

According to the MTC's Proposed Revised Statement of Information, the newly “unprotected activities” include the following:

- the business regularly provides post-sales assistance to in-state customers via either electronic chat or email;
- the business solicits and receives on-line applications for its branded credit card via the business's website;
- the business's website invites viewers in a customer's state to apply for non-sales positions with the business;
- the business places Internet “cookies” onto the computers or other devices of in-state customers and the cookies gather customer search information that will identify new items to offer for sale; and,
- the business offers and sells extended warranty plans via its website to in-state customers.

These are common activities for most, if not all, businesses engaged in remote Internet commerce with their customers or prospective employees. Thus, under the guise of modernizing the list of “unprotected activities,” the MTC and any state that adopt these new guidelines will be, in effect, interpreting the “protected activities” out of existence.

A Seller's Physical Presence in a Customer's State Is a Pre-Condition to Losing P.L. 86-272 Protection

The U.S. Congress enacted P.L. 86-272 in 1959, following closely on the heels of the U.S. Supreme Court decision in *Northwestern States Portland Cement Co. v. Minnesota*,³ to provide a safe harbor from corporate income taxes for an out-of-state company selling tangible personal property into a state so long as the company limited its physical presence in the customer's state to the solicitation of orders or ancillary activities. We do not believe that the language or legislative history of P.L. 86-272 indicate a Congressional intent to protect a company making sales with limited physical presence in a customer's state, but not a company making sales without any physical presence in a customer's state.

Until now, it has generally been assumed that an “unprotected activity” under P.L. 86-272 occurred only with “in person” activity of a seller in the customer's state. The words “[t]he following in-state activities” appear before the list of “unprotected activities” in Article IV of the Statement of Information. Further, the “unprotected activities” list includes making repairs, hiring or training personnel other than those involved only in solicitation, collecting on delinquent accounts, and owning property in-state.⁴ The list makes no sense unless one assumes the “unprotected activity” takes place in the customer's state. Otherwise virtually any customer-related or employee-related activity by the seller, with or without physical presence in the customer's state, would exceed the protection of P.L. 86-272, making the statute a nullity.

² P.L. 86-272 Work Group proposed revision (2/20/2020), **Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272**, at 8.

³ 358 U.S. 450 (1959)

⁴ P.L. 86-272 Work Group proposed revision (2/20/2020), *supra* at 4-7.

To illustrate this point, imagine if any of the above activities are conducted by the seller remotely (out of state) by telephone. If physical presence of the remote seller in the customer's state is not required, why wouldn't performing these activities remotely by telephone constitute an "unprotected activity"? In 1959, almost 80 percent of U.S. households had telephones—something Congress certainly would have been aware of at the time it enacted P.L. 86-272.⁵ Clearly, a seller's electronic communications via telephone was a "protected activity"; otherwise, the enactment of P.L. 86-272 would have been meaningless in the first instance.

The MTC's Work Group on the Proposed Revisions to the Statement of Information disagrees. According to the Counsel's Report to the Hearing Officer, the physical presence of the seller in the customer's state is unnecessary for a seller's activity to constitute an "unprotected activity." As the Counsel's Report states in response to negative feedback to the MTC's approach: "Perhaps most significant is the argument that activities which are conducted via the Internet cannot constitute business activities 'within' customers' states because Internet sellers are not physically present in those states. P.L. 86-272, however makes no express mention of physical presence ..."⁶

For the MTC Work Group's analysis to be valid, the absence of a physical presence requirement would apply to telephonic communication going back to 1959. For instance, when considering the proposed revisions to the list of "unprotected activities," the list should also read:

- the business regularly provides post-sales assistance to in-state customers via **telephonic means** [last two words added];
- the business solicits and receives on-line applications for its branded credit card via **telephonic means** [last two words added];

The work group did consider this issue but decided to "punt." According to the Counsel's Report, the MTC work group decided that "it was unnecessary to address the issue of telephone calls, which had not previously been addressed in the Statement of Information."⁷ If the MTC is unwilling to go on record with its analysis of whether the listed activities if performed by telephonic communications constitute "unprotected activities", then it should refrain from its sweeping conclusion that physical presence in the customer's state is not a pre-condition to losing P.L. 86-272 protection.

Although there are some differences between telephonic and Internet communications, the Counsel's Report asserts in a conclusory manner that an in-state customer who accesses a seller's website creates a physical presence for the seller in the customer's state.⁸ This argument is half-hearted, at best, and should not be the basis for an "interpretative" repeal of a federal pre-emption statute that has been a prominent feature in the state tax landscape for 60 years.

The U.S. Congress, Not the MTC, Has the Authority to Amend or Repeal Federal Statutes

The U.S. Congress has not revisited P.L. 86-272 since 1959. Congress has, however, repeatedly stated its opposition in another context to states impeding the use and growth of the Internet with its enactment and extension of the Internet Tax Freedom Act.

⁵ Statista, "Percentage of Housing Units with Telephones in the United States from 1920 - 2008", <https://www.statista.com/statistics/189959/housing-units-with-telephones-in-the-united-states-since-1920/>.

⁶ Brian Hamer, *supra* at 12-13.

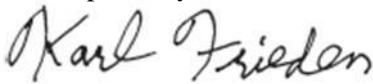
⁷ *Ibid*, at 7.

⁸ *Ibid*, at 13; P.L. 86-272 Work Group proposed revision (2/20/2020), *supra* at 8.

We fully recognize that many believe that the jurisdictional rule for corporate income taxes should mirror the new “economic nexus” standard for sales taxes set forth in the U.S. Supreme Court’s 2018 decision in *South Dakota v. Wayfair Inc.*⁹ Given the long-standing federal pre-emption of P.L. 86-272, however, that is a decision for the U.S. Congress to make and not the MTC or the individual states. The *Wayfair* decision is not dispositive here as it was based on the dormant Commerce Clause, which applies only in the absence of a specific exercise of Congressional authority under the Commerce Clause. In the case of P.L. 86-272, one of the few times Congress has passed pre-emption legislation in the state and local tax area that applies more broadly than to a specific industry (*i.e.*, such as to railroads or airlines), the U.S. Congress has spoken. The federal statute provides a multistate business a safe harbor from corporate income tax jurisdiction if the business limits its physical presence and activities in the customer’s state. If the political winds coalesce in favor of change, it is the U.S. Congress and not the MTC or the states that needs to amend or repeal that federal statute. This is especially true given the weak foundation of the MTC’s actions based on either the proposition that the physical presence of the seller in the customer’s state is not required, or that a seller’s website constitutes such physical presence.

In conclusion, we urge the Hearing Officer to recommend that the MTC withdraw its proposed revisions and leave the Statement of Information as is.

Respectfully,



Karl A. Frieden



Nikki E. Dobay

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

⁹ 138 S.Ct. 2080 (2018). If this change does occur, clearly it should include a “factor presence” minimum filing threshold.