

MEMORANDUM

TO: Members of P.L. 86-272 Work Group
FROM: Brian Hamer
RE: Summary of June 6, 2019 teleconference
DATE: June 17, 2019

This is a high-level summary of the June 6 meeting (via teleconference) of the P.L. 86-272 Work Group. It is not intended to serve as minutes of the meeting but rather to highlight key matters that were addressed, in order to facilitate discussion at the next meeting to be held on June 20.

The meeting began with Chair Laurie McElhatton proposing that, in light of the alternative approach to applying P.L. 86-272 tendered by Ray Langenberg, the Work Group reexamine three scenarios that it had previously considered. This would give members a means to assess whether they wanted to alter the analytical approach they had been using. These scenarios involve post-sale customer service provided by a remote seller via telephone, email, or static FAQs posted on a website. She reminded participants that the core issue in each of these scenarios is whether the activity takes place in the customer's state (since none of the activities constitute solicitation of orders for tangible personal property). No one objected to the Chair's proposal.

Mr. Langenberg thereupon summarized his approach (which he has described in both a memorandum and his mark-up to the MTC Statement of Information; both documents can be accessed via the P.L. 86-272 Working Group project page on the MTC website). He stated in part that a remote seller engages in business activities in the customer's state whether those activities are conducted via the Internet, telephone or other means of transmission. Whether an activity other than solicitation is protected by P.L. 86-272 therefore turns on whether it is *de minimis*. He further explained that in his view whether an activity is *de minimis* is not a binary determination but rather requires consideration and weighing of many factors including whether an activity is purposefully directed to the taxing state. For example, such factors as who initiated the call, the extent of the interaction between the parties, and whether the location of the customer is known to the seller must be considered.

A lengthy conversation followed in which various participants expressed numerous ideas and points of view. Much of the discussion addressed whether an interstate telephone call between a remote seller and its customer constitutes a business activity in the customer's state. Although some participants supported that point of view (at least one referring to the Supreme Court's language in the *Wayfair* decision about virtual presence), others stated that applying *Wayfair* to activities conducted via telephone would be taking the language too far. Michael Fatale reiterated his view that the question is not whether a seller is present in the customer's state but rather whether there are business activities in the state. He and others noted that a telephone call has not in the past been considered a business activity in the customer's state for purposes of the statute and that, unlike the internet, phone calls are not a new or modern activity and therefore should not be a focus of the Work Group's efforts.

Mr. Langenberg stated that in 1959, when P.L. 86-272 was enacted, it was assumed that the Constitution required some physical presence for a state to impose tax. This may explain why no one at that time addressed whether interstate telephone calls could defeat the statute's protection. Since then,

our understanding of the Constitution has changed. He also stated that the statute protects solicitation, not telephone calls.

Phil Horwitz questioned whether communications are substantial enough to constitute a business activity for purposes of P.L. 86-272. He drew a distinction between a conversation between a seller and its customer about a problem involving a product (perhaps protected) and a situation where a vendor takes control of the customer's computer to effectuate a repair (perhaps unprotected). He also questioned whether there is a meaningful distinction between different means of communication under the statute, such as telephone calls and electronic chat.

Mr. Fatale noted that the state's brief in *Wrigley* asserted that telephone calls would not defeat a seller's immunity, and expressed again that taxability turns in part on whether the vendor has a property interest in the state such as software or cookies transmitted to the customer's computer. One participant expressed that no state has made the argument that a telephone call is in the customer's state; another participant stated that transmission of software to the customer's computer is not sufficient to defeat the seller's immunity.

A suggestion was made that the Work Group address new technologies rather than telephone calls. The discussion briefly returned to emails. Mr. Langenberg stated that not all emails are protected or unprotected; it depends on the facts and circumstances.

The meeting concluded without any votes being taken. The Chair stated that the Work Group would keep with its current schedule, which contains three additional meetings before the Uniformity Committee meets in August.