

MEMORANDUM

TO: Members of P.L. 86-272 Work Group
FROM: Brian Hamer
RE: Summary of July 25, 2019 teleconference
DATE: August 16, 2019

This is a high-level summary of the July 11 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 future meetings of the Work Group.

The meeting began with Chair Laurie McElhatton describing recent Work Group discussions, votes taken by the Work Group, and areas of consensus. She also shared information that she had gathered about Internet cookies.

The Work Group then turned to Scenario 8, which the Chair edited to add the bracketed language. The scenario reads as follows:

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 [later] 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.

Participants discussed how cookies are used by businesses and referenced the discussion of apps which had occurred at the Work Group's prior meeting.

One participant argued that first-party cookies (i.e., cookies that are used by sellers and not sold to third parties) are analogous to salespersons who in 1959 would gather a variety of information when visiting customers, and share that information with the home office. Home office staff might then use that information for such purposes as product development, increasing future sales, etc. The participant suggested that in the same way that states may not have considered that such information-gathering activity defeated P.L. 86-272 protection, the use of first party cookies might not defeat the statute's protections.

Others disagreed with this point of view. One participant stated that when cookies are used by a seller only for solicitation they are protected, but when they are used for other purposes they are not. Once a seller uses information transmitted by cookies to make additional sales to that customer or to additional customers protection is lost.

The point was made that Scenario 8's language did not indicate what the seller was doing with the cookies. A participant stated that the scale of information obtained by cookies can be far greater than what traditional salesmen gathered when visiting customers in 1959, and that the collection of data via cookies is systemic. He also stated that the use of information gathered by traditional sales staff may at times have defeated the statute's protections.

Another participant stated that activities in the nature of market research extend beyond solicitation; the relevant question is whether activities fall within the definition of solicitation, whether they are conducted by a traditional sales staff or through the use of cookies. He stated that the Work Group perhaps should address the meaning of solicitation in this context. One participant noted that it might be difficult to know when the use of first party cookies crosses the line and extends beyond solicitation.

Another participant argued that what is relevant is if customer information is collected during solicitation (in which case the activity is protected); not how the information might ultimately be used by the business.

Finally, members briefly discussed the upcoming presentation on the Work Group's efforts to the Uniformity Committee.