

MEMORANDUM

TO: Members of P.L. 86-272 Work Group
FROM: Brian Hamer
RE: Summary of August 20, 2019 teleconference
DATE: August 30, 2019

This is a high-level summary of the August 20 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 me briefly describing the presentation made by Chair Laurie McElhatton and myself to the Uniformity Committee on August 6 in Boise and comments expressed by others. The presentation described the deliberations of the Work Group to date. We also tendered a written status report to the Committee, which is posted on the Working Group's project page on the MTC website.

Ms. McElhatton then noted that I had circulated a preliminary draft of possible revisions to the MTC P.L. 86-272 Statement of Information based on the Work Group's discussions to date. This draft would add a third section to Part IV of the Statement, addressing business activities conducted via the Internet. She emphasized that the draft reflects just one possible format and is intended to initiate a conversation among Work Group members. She proposed that the Working Group discuss this format either later in the meeting or at the next meeting, but that participants immediately discuss paragraph 5 which addresses Internet "cookies" (rather than returning to a discussion of Scenario 8 which possibly provides more detail than is necessary for purposes of revising the Statement). [Note that at the request of participants during the July 25 Work Group meeting this scenario has been revised.] No one raised an objection to the Chair's suggestions.

One Work Group member noted that section B(6) of the current Statement provides that passing orders, inquires and complaints to the home office is a protected activity. Therefore, if the Work Group concludes that using information gathered by cookies for purposes other than solicitation is unprotected, there could be a potential conflict. Another member stated that if information gathered by cookies is used by a seller for its own purposes that activity is protected, but if the seller passes on the information to third parties then the activity is unprotected.

Jeffrey Friedman of Eversheds Sutherland questioned whether the use of cookies by a remote seller is in-state activity and also suggested that use of cookies might be ancillary to solicitation or de minimis. A Work Group member expressed disagreement with his comments, stating that the use of cookies is an in-state activity because cookies reside on users' in-state computers and also noted that customers may download a seller's app to their phone. She pointed to the Supreme Court's analysis in *Wayfair* and stated that the use of cookies is not de minimis given all the functions they perform. Responding to Mr. Friedman, another participant stated that when a cookie is downloaded onto a phone, the resulting activity occurs where the user's device is located.

A member suggested that draft paragraph 5 be broken up into two parts, one addressing the use of information by sellers that transmit cookies to users' computers and the other addressing cases where the seller shares the information with third parties.

One member stated that if the information gathered by cookies is used to promote its own sales or to conduct market research for its own benefit, then the activity is possibly protected. If the information is used by other persons, it is not protected. Dennis Jansen of Eversheds Sutherland expressed that an out-of-state seller does not engage in in-state activity if it transfers a cookie to the user's computer via the internet and, with respect to the information gathered by a cookie and transmitted to the seller, it is no different than a person receiving traditional mail from a location outside of its state.

At this point, I requested general feedback about the format of the draft revision of the Statement of Information. A number of Work Group members commented favorably. One member questioned whether the streaming video example should be combined with the other examples. There was a brief discussion regarding the basis for treating streaming as an unprotected activity; the question also was posed whether the Statement should identify the reasons why specified Internet activities are or are not protected.

Participants elected to postpone any further discussion about Scenario 8 and turn to Scenario 9. This scenario reads as follows:

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.

Various participants noted that a CDN enhances a seller's website, regardless of the activities that occur via the site. References were made to both item 16 of unprotected activities and item 13 of protected activities in the current Statement of Information. A number of participants then expressed the opinion that whether the in-state use of a CDN defeats the statute's protection may turn on whether the activities it enhances is protected or not. No vote was taken. The Work Group then turned to Scenario 10, which reads as follows:

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.

A very brief discussion ensued. One participant pointed to item 16 of the Statement's list of unprotected activities: owning, leasing, using or maintaining . . . a stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation. At the request of one Work Group member, the Work Group postponed conducting a vote on this scenario. The Work Group then turned to scenario 11, which reads as follows:

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.

After a very brief discussion, members of the Work Group elected to put off the discussion of this scenario to a future meeting. They then turned to scenario 12, which reads as follows:

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.

The Work Group discussed this scenario for a short time. One participant stated that a webinar is not protected because it is a service that is received in the taxing state. A second participant noted that the current Statement of Information states that training courses, seminars and lectures for personal other than personal involved only in solicitation is unprotected. Another participant referenced the Massachusetts case *Kennametal v. Commissioner of Massachusetts*. Jeff Friedman stated that he disagreed with the statement that this was an in-state activity. Further discussion of the scenario was postponed.