



MULTISTATE TAX COMMISSION

Interim Report of the P.L. 86-272 Working Group

Uniformity Committee
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MULTISTATE TAX COMMISSION

Background

1959. The U.S. Supreme Court decides *Northwestern States Portland Cement Co. v. Iowa* and declines to hear the appeals of two Louisiana tax cases.

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

The act is described by proponents as “a temporary measure 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.”



MULTISTATE TAX COMMISSION

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.

1959-2018. Technology changes the way business is conducted. Congress does not revise the statute.

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



MULTISTATE TAX COMMISSION

Limited Scope of the Project

The Work Group’s role is a limited one: to consider the application of P.L. 86-272 to modern business activities. The recommendations that will be submitted to the Uniformity Committee will not address when persons *should* be subject to income tax filing and payment obligations.

There are limitations other than P.L. 86-272 on the power of states to tax remote businesses.

States that have not adopted thresholds to shield small businesses from tax may wish to consider doing so if either the Commission or individual states conclude that P.L. 86-272 does not provide immunity to small sellers that utilize modern business tools.



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

To date, the Work Group has primarily considered how the provisions of P.L. 86-272 apply to various business activities conducted via the Internet.

The Work Group has applied a two-step analysis to determine if the statute provides a business immunity from taxation:

1. Do business activities constitute the solicitation of orders for tangible personal property?
2. If the activities extend beyond solicitation, do the activities take place entirely outside of the taxing state?

Consensus has developed regarding step 2: if an in-state customer interacts with the remote business's website (*i.e.*, does more than just view a presentation), the business has engaged in activities in the taxing state.

Key considerations

(1) When a customer engages a seller's website, the website transmits software or code to the user's computer, which is stored in the user's computer for some period of time. The code serves to facilitate the interaction between the customer and the business.

(2) The interaction between the customer and the website is substantial in nature.

In addition, the analysis in *South Dakota v. Wayfair, Inc.* has informed the thinking of at least some Work Group members. Although the Supreme Court construed the Commerce Clause, not the language contained in P.L. 86-272, the decision speaks to the "continuous and pervasive virtual presence of retailers" in the states where their customers are located.

Examples of Work Group straw votes with a strong majority

A. Internet seller of tangible personal property offers customers post-sale assistance:

--via email accessed through a link on the seller's website UNPROTECTED

--via ordinary email not accessed through a link PROTECTED

--via electronic chat accessed through the seller's website UNPROTECTED

--by posting on its website a list of static FAQs with answers PROTECTED

--by placing on its website an interactive tool which allows customers to type in a question and which then provides answers UNPROTECTED

B. Internet seller of tangible personal property offers warranty service to its customers. If a product ceases to function properly, the seller fixes the product remotely via the internet and wifi. UNPROTECTED

C. Internet seller of tangible personal property invites customers to apply for its branded credit card via an online application. UNPROTECTED

D. Seller maintains a website which customers access to immediately watch a movie through streaming. UNPROTECTED

Telephone calls

The Work Group has spent substantial time considering whether non-solicitation activities conducted via telephone defeat a seller's immunity under the statute. At this point, it appears to be the majority view not to recommend that this subject be addressed in any revision of the Statement.

Minority approach

Any communication by a seller constitutes a business activity in the recipient's state, including web page content and telephone calls.

The Statement of Information's definition of "de minimis activities" should be expanded to include consideration of the extent to which the seller's non-solicitation activities are purposefully directed to the customer's state.

Non-solicitation communications could be de minimis if they are not purposefully directed towards that state.

This approach has not been adopted by the Work Group.

A current issue: impact of internet apps and cookies

Apps and cookies are used by internet retailers to effectuate orders and sales, but they also can be used by retailers to gather information about persons who visit their website.

This information in turn can be utilized by retailers to adjust manufacturing plans, alter their product lines or develop new products, and engage in targeted marketing.

Does using this information in these ways defeat P.L. 86-272 protection?



MULTISTATE TAX COMMISSION

Future Steps

Analysis is still a work in progress: Other matters relating to the conduct of business over the Internet remain to be discussed, such as where order approval takes place.

Additional issues to be addressed including: Application of P.L. 86-272 to cloud computing; solicitation and sale of gift cards; conducting webinars to assist product users; and whether to propose revising or deleting § VII (E) which adopts the *Joyce* rule.

MTC staff continues to encourage the taxpayer community to provide input to ensure that the Work Group hears all points of view and that decisions are based on an accurate understanding of actual business practices.



MULTISTATE TAX COMMISSION

Should the format or structure of the Statement of Information be changed?

1. Should the proliferation of remote commerce cause the Commission to abandon the current structure that sets forth a list of unprotected and protected activities and instead adopt a format that focuses more on how activities are conducted?
2. Should the Statement continue past practice and ask individual states to adopt the Statement as signatories?*

*The Statement currently points to signatory states' practices with respect to (i) whether an activity is or is not protected and (ii) the jurisdictional standards that will apply to sales made in another state for purposes of applying throwback.