



**TO:** Tommy Hoyt (Texas)  
Chairman, MTC Uniformity Committee

**FROM:** Laurie McElhatton (California), Chair, P.L. 86-272 Statement of Information Work Group  
Brian Hamer, Counsel, MTC

**RE:** Transmittal of proposed revision to the P.L. 86-272 Statement of Information

**DATE:** March 23, 2020

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On behalf of the P.L. 86-272 Statement of Information Work Group (“Work Group”), we are pleased to transmit to you the attached proposed revision to the P.L. 86-272 MTC Statement of Information (“Statement of Information”) for consideration by the Uniformity Committee, together with a copy which is marked to show changes from the version of the Statement that is currently in place.

### **Background**

On November 7, 2018, the Uniformity Committee initiated a project to update the Statement of Information to address the significant changes to the way that business is conducted since the Statement was last revised in 2001.<sup>1</sup> Between February 2019 and February 2020, the Work Group, which consists of 14 volunteers from 12 states, met regularly by telephone to analyze P.L. 86-272 and to consider how to apply the statute to modern business activities.

All Work Group meetings were open to the public and the Work Group encouraged interested parties to provide input. State government employees who were not Work Group members, business representatives, and private sector tax professionals attended Work Group meetings, provided information, and offered their opinions. The Work Group carefully examined and discussed proposed changes to the Statement; they frequently returned to matters that had been previously discussed to refine language, address concerns, and confirm decisions.

### **Limited Scope of the Project**

Since first convening, the Work Group has been cognizant that its role was a limited one: to consider how P.L. 86-272 applies to modern business activities. In other words, the Work Group has

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<sup>1</sup> The official name of the Statement of Information is “Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272.” The Statement was initially adopted by the Commission on July 11, 1986, and has been revised on three occasions, most recently in 2001.

engaged in statutory interpretation rather than policy making. States of course may adopt limitations on business income taxation that extend beyond the limitations contained in P.L. 86-272, such as legislation shielding from taxation those businesses with activity or property that falls below certain designated thresholds. The Commission has previously adopted such a model for recommendation to the states. *See* MTC Factor Presence Nexus Standard for Business Activity Taxes, approved October 17, 2002.

### **Proposed revision to the Statement of Information**

P.L. 86-272 was adopted in 1959. At that time, Congressional proponents described the legislation as “a temporary solution” pending a deeper review of state taxation.<sup>2</sup> Yet during the following six decades, the statute has never been revised or updated.

During the course of its deliberations, the Work Group focused primarily on how P.L. 86-272 applies to business activities conducted via the Internet, although it also considered how the statute applies to other business activities that have arisen or evolved since 1959. This review resulted in the following proposed substantive changes to the Statement (as well as various non-substantive changes that are intended to promote clarity or modernize text):

#### **A. Business activities conducted via the Internet.**

After substantial discussion, the Work Group adopted a framework to determine whether business activities conducted via the Internet are or are not protected by P.L. 86-272. Language reflecting this framework has been inserted into new Section IV.C of the proposed revision to the Statement of Information and reads:

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 customer’s state. However, for purposes of this Statement, when a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business’s customers are located.

To provide further guidance, the Work Group added to new Section IV.C eleven factual scenarios and indicated in each case whether the described business activity was or was not protected by P.L. 86-272, together with a brief explanation.

The individual members of the Work Group did not always apply the same analysis to determine whether a particular business activity is protected or unprotected. But with respect to every scenario, all or the vast majority of members reached the same conclusion.

#### **B. Other proposed substantive changes to the Statement.**

The Work Group also proposes the following changes to the Statement:

- (1) Delete Section VII.E which endorsed the *Joyce* rule. The Work Group concluded that this section should be deleted at least in part because more than half of the states that have enacted mandatory combined reporting have now adopted the *Finnigan* rule. *Compare Appeal of Joyce, Inc.*, Cal. State Bd. of Equal. (1966) with *In re the Appeal of Finnigan Corp.*, Cal. State Bd. of Equal (1990).

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<sup>2</sup> Senate Report No. 658 (Aug. 11, 1959).

- (2) Add certain activities performed by an employee who telecommutes on a regular basis to the Statement's list of unprotected activities. *See* Article IV.A (20).
- (3) Address the performance of warranty work and accepting returns by independent contractors. *See* Article V (fourth paragraph).
- (4) Revise Article VII.C which addresses foreign commerce, emphasizing that if a Supporting State applies P.L. 86-272 to foreign commerce, it will do so consistently whether it is determining if (i) activities of a foreign seller are protected or (ii) sales into the foreign jurisdiction will be thrown back. The Article's proposed text recognizes the fact that states have adopted different positions on whether the statute should be applied to foreign commerce.

Finally, the proposed revision of the Statement of Information adopts the concept of a "Supporting State." Unlike prior versions of the Statement, the proposed revision contemplates that states will not need to affix a signature to the document to indicate their approval. Instead, adopting the Statement by legislation, regulation or other administrative action (or by some other express means) will indicate approval. States may indicate support for individual sections of the Statement rather than the entire Statement.