

C. ACTIVITIES CONDUCTED VIA THE INTERNET:

To determine whether a person that sells tangible personal property via the Internet is shielded from taxation by P.L. 86-272 requires the same analysis as with respect to persons that sell tangible personal property by other means. Thus, such a seller is shielded from taxation in the customer's state if the only business activity in which it engages in that state is the solicitation of orders for sales of tangible personal property, which orders are sent outside that state for approval or rejection, and if approved, are shipped from a point outside of that state.

If such a seller engages in an activity via the Internet that: (i) extends beyond solicitation of orders for sales of tangible personal property, (ii) is neither ancillary to solicitation nor de minimis, and (iii) takes place in the customer's state, then P.L. 86-272 does not shield the seller from taxation by the customer's state.

As a general rule, when a company interacts with a customer via the company's website or app, the company engages in an activity in the customer's state. Presenting static text or photos on a website does not in itself constitute an activity in those states where customers are located.

Following are examples of activities conducted by a company that operates a website offering for sale only items of tangible personal property. In each case, customer orders are approved or rejected, and the products are shipped from a location, outside of the customer's state. The company has no contacts with the customer's state other than what is indicated.

These examples should not be interpreted to mean that other scenarios either are protected or not protected, since every scenario requires a separate assessment of all relevant facts.

1. The company provides post-sale assistance to in-state customers by posting a list of static FAQs with answers on the company's website. This business activity does not defeat the company's P.L. 86-272 immunity because it does not take place in the state.
2. The company regularly provides post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the company's website. This activity defeats the company's P.L. 86-272 immunity in states where the customers are located because this activity does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.
3. The company solicits on-line applications for its branded credit cards via the company's website. Issued cards will generate interest income and fees for the company. This in-state business activity defeats the company's P.L. 86-272 immunity in states where the applications for cards are available to customers because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.

4. The company's website invites viewers in a customer's state to apply for sales positions and other positions with the company. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and resume. This in-state business activity defeats the company's P.L. 86-272 immunity in the customer's state because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.
5. The company places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information which will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. This in-state business activity defeats the company's P.L. 86-272 immunity because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.
6. The company places Internet "cookies" onto the computers or other devices of in-state customers. These cookies gather customer information only for purposes that are entirely ancillary to the solicitation of orders for tangible personal property, such as: to remember items that customers have placed in their shopping cart during a current web session, to store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller's website, and to remind customers what products they have considered during previous sessions. This in-state business activity does not defeat the company's 86-272 immunity because it is entirely ancillary to the in-state solicitation of orders for tangible personal property.
7. The company remotely fixes products previously purchased by in-state customers from the company by transmitting code or other electronic instructions to those products via the Internet. This in-state business activity defeats the company's P.L. 86-272 immunity because it does not constitute, and is not ancillary to, the in-state solicitation of orders for tangible personal property.
8. The company contracts with a marketplace facilitator that facilitates the sale of the company's products on an on-line marketplace. The marketplace facilitator maintains inventory, including some of the company's products, at fulfillment centers in various states where the company's customers are located. This maintenance of the company's products defeats the company's P.L. 86-272 immunity in those states where the fulfillment centers are located—see Article V.
9. The company contracts with in-state customers to stream videos and music to electronic devices for a charge. This in-state business activity is unprotected because the products sold do not constitute the sale of tangible personal property for purposes of P.L. 86-272. [Delete? Does Article I, as revised, adequately address this scenario?] [Alternatively, individual states can elect to delete this example if necessary.]

