



# Uniformity Developments

REPORT TO THE UNIFORMITY COMMITTEE  
LITTLE ROCK, ARKANSAS  
NOVEMBER 15, 2022

# REVISED STATEMENT ON P.L. 86-272

## CALIFORNIA GUIDANCE

- California FTB issued guidance in response to auditor's question about the application of P.L. 86-272 to certain facts and circumstances.
- The guidance looks to *Wayfair's* holding that Internet sellers "may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.."
- The guidance concludes that the statute's reference to "business activities within such state" should be interpreted consistently with *Wayfair*.
- The MTC's revised statement recommends the same conclusion.
- American Catalog Mailers Ass'n has challenged the guidance and the authority to issue it

**REVISED  
STATEMENT ON  
P.L. 86-272  
  
CALIFORNIA  
GUIDANCE**

**SAMPLING OF NEWS & COMMENTARY**

- **“Calif. Sued Over Conformity To Online Biz Tax Shield Guidance,”** Maria Koklanaris, Law 360 Tax Authority – State & Local, Aug. 24, 2022
- **“ACMA Challenges California's P.L. 86-272 Guidance for Online Retailers,”** Christopher Jardine, Tax Notes Today, Aug. 26, 2022
- **“P.L. 86-272 And Tax Cuts Here And There: SALT In Review,”** David Brunori, Law360 Tax Authority – State & Local, Sep 2, 2022

# MTC 2022 RESOLUTION ON FACTOR PRESENCE MODEL

- 2000 – Charles McLure advocated for a factor presence nexus standard (see “Implementing State Corporate Income Taxes in the Digital Age”)
- 2002 – the Commission adopted a Factor Presence Nexus Statute model
- 2002-2018 - COST and others opposed the model arguing Quill applied
- 2018 – U.S. Supreme Court ruled Quill was wrongly decided
- 2021 – the Commission approved the Revised Statement on P.L. 86-272
- 2022 – the Commission resolved continuing support for its Factor Presence Nexus Statute as a means to reduce compliance burdens on small sellers

# **MTC 2022 RESOLUTION ON FACTOR PRESENCE MODEL**

## **SAMPLING OF NEWS & COMMENTARY**

- **“MTC Urges States To Protect Small Online Sellers From Tax,”** Paul Williams, Law360 Tax Authority – State & Local, Aug. 3, 2022
- **“Multistate commission recommends new rules for taxing interstate commerce,”** Juliette Gaudemer, Accounting Today, Aug. 17, 2022
- **“Do Your Online Sales Trigger Multiple State Income Tax Filings?”** Barbara Weltman, eCommerce Bytes, Oct. 24, 2022

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## REVISED STATEMENT ON P.L. 86-272

### OTHER NEWS & COMMENTARY

- **“The MTC and P.L. 86-272 Protections in the Internet Age,”** Joe Garrett, Jr., Philip Trampe, Waltreese Carroll, Deepali Salin, Tax Notes – State, Aug. 8, 2022
- **“Practitioners Urge Oregon Not to Adopt MTC's P.L. 86-272 Guidance,”** Paul Jones, Tax Notes Today - State, Aug. 29, 2022
- **“Hot-Button Issues Included in Updated MTC Partnerships Project Outline,”** Amy Hamilton, Tax Notes – State, Sep. 5, 2022 – reporting that application of P.L. 86-272 was included in the issue outline in the project on state taxation of partnerships
- **“Out-of-State Businesses Tax Plan Indefinitely Halted in Oregon,”** Michael J. Bologna, Bloomberg Daily Tax Report, Sept. 22, 2022
- **“Oregon Holds Off on Following MTC’s P.L. 86-272 Revisions,”** Amy Hamilton, Tax Notes – State, Sep. 26, 2022
- **“Dragging P.L. 86-272 Into the Internet Age,”** Roxanne Bland, Tax Notes – State, Aug. 8, 2022

## **RESPONSE TO CRITICISM OF “POLICY MAKING”**

- “These objections, however, reflect a misunderstanding of what the MTC did. . . . the members of the MTC work group charged with developing the updates engaged in a process of statutory interpretation. Specifically, they considered (in addition to other subjects) how P.L. 86-272 applies to activities conducted via the internet. And they reached a result that is supported by the statute’s language and history. Under these circumstances, policy objections directed at the revised statement are misplaced.”
- “In the Wake of the MTC’s P.L. 86-272 Project,” Brian Hamer, Tax Notes – State Aug. 8, 2022

## PARTNERSHIP ISSUES

- The IRS is ramping up partnership audit activity and states need to act to ensure that they can properly assess and collect state tax on federal adjustments from centralized partnership audits.

“3 Things State Tax Pros Should Know About The Inflation Act,” Maria Koklanaris, Law360 Tax Authority – State & Local, Aug. 12, 2022

- Noting that the MTC is seeking public comments on the draft model for the treatment of income of investment partnerships.

“Legislation: AICPA Seeks Modifications to Multistate Tax Commission Draft Model Act on Investment Partnership Income,” Bloomberg Daily Tax Report, Sept. 13, 2022



## PARTNERSHIP ISSUES

- Noting that a draft of the model for the treatment of investment partnership income included a proposed modification to the anti-abuse rule.

“Anti-Abuse Rule Revised in Model Tax Law on Partnerships,” Michael J. Bologna, Bloomberg Daily Tax Report, Aug. 23, 2022

- New Jersey is in the process of adopting the MTC model for assessing state tax on federal partnership adjustments.

“NJ Senate Panel OKs Ending Tax Audit Deadline Extension,” Paul Williams, Law360 Tax Authority – State & Local, Oct. 31, 2022

## **PARTNERSHIP ISSUES**

At a recent ABA tax section event, PTE taxes and the need for consistent guidance was discussed, and a state tax attorney was reported to have said:

“I honestly feel bad for accountants who have to deal with the returns in all states and trying to get the elections in on time.”

“Consistent Guidance on SALT Cap Workarounds Needed, Panel Says,” Emily Hollingsworth, Tax Notes State, Oct. 24, 2022

The number one complaint about PTE taxes is there is not enough guidance and the rules vary from state to state. And it’s not just accountants or tax preparers that are struggling.

# TAXATION OF DIGITAL PRODUCTS

- Reminder –
  - April 2021 - Washington state proposed the Uniformity Committee study approaches to taxing digital products and whether a broad-based approach offered solutions.
  - July 2021 - Uniformity Committee agreed to begin working on a white paper on the subject and directed MTC staff to conduct background research and stakeholder interviews and to draft a detailed outline.
  - August 2022 - Uniformity Committee reviewed the draft outline and set up a work group to provide ongoing input and review of the white paper as it is developed.

# TAXATION OF DIGITAL PRODUCTS

- The topic has been the subject of almost every state and local tax seminar or conference in 2022.
- Press has been following the work as well as how other developments, including digital advertising, NFTs, digital currency, etc., may impact the project.
- Some groups have expressed concern that the MTC and Streamlined work together.
- There is growing recognition that the Internet Tax Freedom Act will be important.

SAMPLING OF NEWS & COMMENTARY

## TAXATION OF DIGITAL PRODUCTS

- **“How States Are Avoiding Square-Peg Tax Policies for Technology,”** Gary C. Bingel, Bloomberg Tax Insights & Commentary, Aug. 10, 2022
- **“ITFA Will Set Boundaries For Digital Tax Project,”** MTC Atty Says, Paul Williams, Law360 Tax Authority – State & Local, Sep. 27, 2022
- **“MTC Digital Products and Sales Tax Project: Thoughts From Industry Leaders,”** Roxanne Bland, Tax Notes – State, Oct. 17, 2022
- **“MTC Digital Products Work Group Members Include SSUTA Leaders,”** Amy Hamilton, Tax Notes – State, Oct. 17, 2022
- **“Taxing Income In the Digital World,”** Roxanne Bland, Tax Notes – State, Oct. 24, 2022
- **“Defining ‘Digital Products’ Is First Focus of MTC Project,”** Amy Hamilton, Tax Notes – State, Oct. 28, 2022
- **“To Tax Digital Goods, Let’s Define What We’re Talking About,”** Perry Cooper, Bloomberg Daily Tax Report, Oct. 28, 2022
- **“Multistate Tax Commission Digital Products Project: The Practitioners Speak,”** Roxanne Bland, Tax Notes – State, Oct. 31, 2022

## **TAXATION OF DIGITAL PRODUCTS**

Major streaming companies like Netflix and Disney+ clearly are hoping to make up for any eroding growth in consumer receipts with ad revenue. Perhaps the litigation and controversy in Maryland would ordinarily scare legislators in other states away from the concept entirely. But can they really afford to ignore advertising receipts? Not only does a tax on advertising revenue match the direction the industry appears to be headed; it also offers the political benefit of being largely invisible to the consumer. Look for more news about more states tinkering with taxes aimed at advertising revenue in the future.

“Changes to Streaming Media Monetization Could Affect State Taxes,” Toby Bargar, Bloomberg Daily Tax Report, Oct. 13, 2022

# TAXATION OF DIGITAL PRODUCTS

Many of the articles and commentary, as well the stakeholder interviews done by the MTC staff, focus on the need for uniformity and clarity when it comes to state taxation of digital products.

But one commentator was quoted as saying this:

“there is no solution to [the complexity]. Our federal system of government precludes it, and short of a federal mandate, which we’re never going to see, it’s a fool’s errand to try, as history has shown.”

MTC Digital Products and Sales Tax Project: Thoughts From Industry Leaders, Roxanne Bland, Tax Notes – State, Oct. 17, 2022



# SOURCING REGULATION REVIEW PROJECT

- **“Keep It Close and Approximate: New Rules for Market Sourcing,”** Eric S. Tresh, Elizabeth S. Cha, Tax Notes – State, Sep. 26, 2022
- **“Airline, Shipper Sourcing Rules Tackled by Tax Harmony Project,”** Michael J. Bologna, Bloomberg Daily Tax Report, Oct. 13, 2022
- **“Litigation Drives MTC Review of Market-Sourcing Industry Rules,”** Amy Hamilton, Tax Notes – State, Oct. 24, 2022
- **“Concerns Seen With States' Market-Sourcing Rulemaking,” Panel Says,”** Andrea Muse, Tax Notes – State, Oct. 31, 2022 – reporting on a panel that discussed whether having rules that are too detailed is a problem.
- **The Curious First Meeting of the MTC’s Model Receipts Sourcing Regulations Work Group,** Pillsbury Winthrop Shaw Pittman LLP, <https://www.pillsburylaw.com/en/news-and-insights/model-receipts-sourcing-regulations-first-meeting.html>





## **UNIVERSAL POWER OF ATTORNEY DISCUSSIONS**

Efforts to develop a universal POA form, spearheaded by Eversheds Sutherland and hosted by the MTC, are well underway.

“The Universal Power of Attorney: An Idea Whose Time Has Come,” Roxanne Bland, Tax Notes – State, Nov. 7, 2022

## **OTHER DEVELOPMENTS**

- The federal Inflation Reduction Act included a corporate alternative minimum tax based on financial statement income for corporate groups over a certain size. One question this raises is how to determine the amount of income or loss to include when the amounts flow through partnership and pass-through entity structures in which the corporate group may be a direct or indirect interest holder.

## OTHER DEVELOPMENTS

- IRS continues to issue guidance as to how transferors, partnerships, and intermediaries may comply with withholding requirements when foreign partners sell an interest in a partnership with domestic operations. See IRC Sec.s 864(c)(8) and 1446(f)(4) as well as <https://www.irs.gov/pub/irs-drop/td-9919.pdf>.