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What's Next for the Evolution of Public Law 86-272?

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For over 65 years, Public Law 86-272 has dictated a state's ability to assert income tax on an out-of-state business. While the 1959 federal law predated the emergence of e-commerce and digital services and could not have anticipated the way businesses would operate today, P.L. 86-272 has nonetheless remained the law of the land.

P.L. 86-272 was enacted to protect out-of-state businesses from state overreach. The law prevents states from imposing income tax on income derived within the state from interstate commerce if the only activity performed in the state is the solicitation of orders of tangible personal property. While this statute was relatively easy to apply to commercial transactions in the 20th century, the explosion of e-commerce and the internet has changed the calculus, making it difficult to navigate for businesses soliciting over the internet.

The 2021 MTC Statement

In 2021, the Multistate Tax Commission (MTC) acknowledged this problem and developed a model statement to provide guidance specifically for internet businesses interpreting P.L. 86-272. The statement asserts that, generally, "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." The MTC statement

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provides examples of internet activities (such as certain cookies or chat and email assistance) that self-servingly are deemed unprotected activities under P.L. 86-272.

Several states have since adopted rules that are consistent with the MTC's position, and almost instantly have been hit with legal challenges. For instance, a New York court recently issued a decision upholding a New York regulation adopting the MTC's interpretation.^[1] The court did strike down the retroactive application of the regulations, but held that P.L. 86-272 did not restrict the state from determining and regulating which internet activities exceed mere solicitation in the state. Which begs the question of whether such regulations can exceed the scope of a law, especially a federal law designed to limit a state's overreach.

While the court upheld New York's narrow interpretation of P.L. 86-272 with respect to internet activities, it remains unclear whether such a position will prevail in all states (or if the New York decision will be upheld if appealed). There is significant uncertainty whether and to what extent e-commerce businesses can avail themselves of P.L. 86-272 protections.

Ultimately, a federal amendment may be necessary to clarify how to interpret the law in the internet age.

A Federal Proposal

Slipped into the reconciliation bill recently passed by the House is a proposal to do just that. The proposed language would amend P.L. 86-272 to expand the definition of "solicitation." The House Judiciary Committee's text would define the term to include "business activity that facilitates the solicitation of orders even if that activity may also serve some independently valuable business function apart from solicitation."

The federal amendment would appear to significantly broaden the protection afforded to businesses under P.L. 86-272, further curtailing the ability of states to tax out-of-state businesses.

What Lies Ahead for P.L. 86-272?

At this time, it is not entirely clear from the language in the bill what would or would not be covered. The proposed revisions do not specifically address internet activities. Further, the bill is now before the Senate, where it may undergo further changes — or be stricken altogether — before the reconciliation process is complete.

A federal amendment to P.L. 86-272 is long overdue, and bringing the statute into the 21st century would be a positive development for taxpayers and states alike. However, reconciliation may not be the best vehicle for such an amendment, especially since the amendment is revenue neutral from a federal perspective. Modernizing the law would be most effective after soliciting and incorporating comments from interest groups, and any revisions should also provide guidance for internet businesses. Thoughtful revisions to P.L. 86-272 would go a long way to providing clarity for businesses, and, if nothing else, the proposal in the reconciliation bill could bring renewed attention to an issue that has often been overlooked by Congress.

[1] Am. Catalog Mailers Ass'n v. Dept. of Taxation Finance, N.Y. Sup. Ct., No. 903320-24 (4/28/25).

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