Multistate: MTC is Moving Forward with Revisions to its Statement of Information on Public Law 86-272

The Multistate Tax Commission’s “Statement of Information Concerning Practices of Multistate Commission and Signatory States under Public Law 86-272” was first adopted in 1986 and last revised in 2001. In 2018, a Commission Workgroup began drafting additional revisions; these were approved for public hearing last week. The proposed revisions – if adopted by a state – would provide state guidance on “how the [federal] statute applies to modern business activities,” including selling goods over the Internet. The date of the public hearing has not yet been established.

Under the proposed revisions, as a general rule, if a business interacts with a customer via the business’s website or app, the business would be considered to be engaged in an activity within the customer’s state. If the activity performed through the website or app exceeds P.L. 86-272 thresholds, then the business would not be eligible for P.L. 86-272 protections. However, if a business presents only static text or photos on its website, that presentation would not by itself be considered an activity within the customer state. The draft includes eleven Internet-related examples, each indicating whether that specific internet activity would or would not fall within P.L. 86-272 thresholds.

The proposed revisions also include new language stating that “activities performed by an employee who telecommutes on a regular basis” are unprotected unless the activities are limited to solicitation of orders for tangible personal property. The Committee noted that many states have put similar provisions on hold during the COVID-19 situation, and that this provision is not intended to disturb those announcements in any way.

Other changes included in the proposed regulation include: (a) stating that an independent contractor’s performance of unprotected activities on behalf of a seller – such as warranty work and accepting returns – removes the seller’s protection; (b) providing that if a State applies P.L. 86-272 to foreign commerce, it would 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; and (c) removing language that had implied P.L. 86-272 thresholds should be considered on an entity-by-entity basis, as opposed to a “Finnigan” approach that could consider thresholds on a unitary group basis.

The Commission recognized these interpretations could affect P.L. 86-272 protections for many businesses, including small businesses, and pointed to its 2002 model factor presence nexus statute to address those concerns. Please reach out to Shirley Sicilian at 202-533-3466 with questions or if you would like more information.