

## Undefined Terms Cloud P.L. 86-272's Role in Modern Economy, Panel Says

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The lack of definitions for key terms in P.L. 86-272 continues to fuel disagreements on when the protections against state income taxation should apply to modern businesses, according to panelists.

During a March 17 panel of the American Bar Association/Institute for Professionals in Taxation virtual seminar on income tax, Jennifer Karpchuk of Chamberlain, Hrdlicka, White, Williams & Aughtry said that one of the major issues with P.L. 86-272 is that there are no definitions of key terms such as "solicitation" and "tangible personal property."

"This is a particular issue with the evolving landscape of digital goods," Karpchuk added. "If we think back to 1959, we were a largely manufacturing-based economy, and now we have shifted to very much a service-based economy."

Karpchuk said many modern businesses are selling intangibles and services instead of tangible personal property and are falling outside the parameters of P.L. 86-272.

Brian Hamer, counsel of the Multistate Tax Commission, agreed with Karpchuk and said the MTC had issued a statement of information concerning P.L. 86-272 in 1986, which was last updated in 2001. He added that a work group was created to develop and propose revisions to the statement in order to address modern business activities.

Hamer said the work group's efforts were not about policymaking but a matter of statutory interpretation, calling it "the states' effort to apply the statute to modern business activities, in some cases activities that were not contemplated 60 years ago." He added that by doing so, the work group hoped to give "some notice to taxpayers about how the states might react to their activities and generally to promote some uniformity among the states."

Hamer said the work group's [proposed revisions](#) to the MTC's statement of information on the application of P.L. 86-272 will not become official until the statement is considered by the full commission, which will likely happen later this year.

Christopher Lutz of HMB Legal Counsel wondered about the timing of the work group starting a few months after the 2018 *South Dakota v. Wayfair Inc.* [decision](#).

Lutz acknowledged there is some language in the majority opinion of *Wayfair* regarding the idea that having a market and virtual contact in a state are business activities and noted that "business activity" is not defined in P.L. 86-272, but he said what makes him uncomfortable is that P.L. 86-272 presupposes nexus.

Lutz said *Wayfair* is a dormant commerce clause case about what states may do so as not to burden interstate commerce when Congress has failed to say something and that he isn't sure that dormant commerce clause jurisprudence should even play a factor once Congress has stepped in and created limits, like in the case of P.L. 86-272.

Lutz said he thinks some language by Justice Anthony M. Kennedy in the *Wayfair* opinion colors what the MTC considers "business activities," and he isn't sure this was appropriate given the differences in the two issues.

Hamer responded by saying that while he thinks the *Wayfair* decision played a significant role in the thinking and analysis of the work group members once discussions began, he believes that had to do with the observations the Court made about the modern world and the way business is conducted with the internet, rather than the analysis contained in the decision.

Noting that the *Wayfair* decision contained the quote that "a company with a website accessible in South Dakota may be said to have a physical presence in the state via the customer's computers," Hamer said he thinks "the members of the work group thought it was not much of a leap to go from this notion of physical presence in the customer's state to the fact that the internet seller was engaging in business activities" in the customer's state.

Regarding one of the examples addressed by the proposed revisions setting out that a business contracting with in-state customers to stream videos and music is not a protected activity because it's not the sale of tangible personal property, Lutz wondered if the state sales tax characterization of the product as tangible personal property matters from the MTC's perspective.

Calling it a challenging question, Hamer said this goes back to the point that tangible personal property is not defined in P.L. 86-272. He continued that it seems odd "to go to state statutes to understand a federal statute, but it's hard to know where else to go," adding that it wouldn't surprise him if many states or courts at least looked to state sales tax statutes to provide some guidance.

Hamer said the way the statement addresses the issue, as a general matter, is to look at how the state where the customer is located defines the term. Beyond that, he added, there seemed to be some hesitancy among work group members to address issues about which there was a good deal of disagreement by states over whether something was tangible personal property.

But Lutz said that without federal authority defining "business activity" for purposes of P.L. 86-272, it seems fundamentally unfair for a state to characterize digital goods as tangible personal property for purposes of sales tax, and then have its interpretation of P.L. 86-272 be that digital goods are not tangible for purposes of the protection.