

THOUGHT LEADERSHIP

LEGAL UPDATES

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New Jersey Proposes Rules Incorporating Parts of MTC's Public Law 86-272 Guidelines

Public Law 86-272 (P.L. 86-272) was first adopted by the U.S. Congress in 1959 to address the business concerns of tax implications from traveling salesmen working in multiple states.

To address these concerns, Congress used its Commerce Clause power to enact P.L. 86-272, which prohibited imposition of a tax based on income on a business whose sole connection with the state was solicitation of tangible personal property, where the order was accepted and shipped from outside that state. The law was meant to be temporary.

Over the 60+ years of the existence of P.L. 86-272, courts have addressed to what extent these protections apply. Over this time, the U.S. economy has shifted from manufacturing and tangible products to technology and services, creating challenges on how the protections of P.L. 86-272 apply to new ways of doing business.

The Multistate Tax Commission (MTC), an intergovernmental state tax agency, has proposed controversial guidance on how these nexus protections provided under P.L. 86-272 should apply to modern forms of doing business and customer interactions. New Jersey has proposed rules that incorporate certain parts of these guidelines and are intended to apply prospectively upon adoption. [57 N.J.R. 305(a), Vol. 57, Iss. 4 (Feb. 2025)]

Specifically, New Jersey's proposed rules would provide that certain internet activities conducted by a business do not fall within the protections of P.L. 86-272, such that the business would have to file corporation business tax returns. These activities include, but are not limited to, (1) transmitting code or electronic instructions through the internet to fix or upgrade products as part

of a service subscription; (2) placing “internet cookies” on computers of in-state customers that gather market or product research whereby such data is sold to a third party; (3) providing and offering a targeted internet advertising service for a fee to in-state business customers; (4) providing post-sales assistance through an electronic chat, email, or application that the customers access; (5) contracting with in-state customers to stream (but not download) videos and music to electronic devices; (6) contracting with in-state customers for subscription services; (7) contracting with in-state customers to provide business services through internet-connected devices, whereby the application is installed on the customer’s devices; and (8) inviting and/or accepting applications for employment through a web-based platform that are specifically targeted to in-state residents or for in-state job positions other than for sales positions.

To assist taxpayers, New Jersey’s proposed rules provide several examples which we encourage readers to review.

Even the most traditional multi-state seller of tangible personal property is likely to have one of these website features or internet activities. Given that a website is generally accessible, even a business’s passive website presence, which does not actively direct solicitation of New Jersey customers, can lead to purported nexus creation.

What this means to you

Should these rules be finalized, taxpayers that arguably become subject to New Jersey law should consider their options to challenge the tax and/or preserve their rights.

Contact us

Please reach out to Smitha Chintamaneni, Bill Schenkelberg, or a member of Husch Blackwell’s State & Local Taxation (SaLT) team for assistance in evaluating and understanding the options available.