



TaxNewsFlash

United States



No. 2022-048
February 16, 2022

California: "Unprotected" activities resulting in internet sellers losing P.L. 86-272 protection clarified

The California Franchise Tax Board (FTB) issued a Technical Advice Memorandum—[TAM 2022-01](#) [PDF 97 KB] (February 14, 2022)—addressing whether the protections of Public Law (P.L.) 86-272 apply to fact patterns that are common in the current economy due to "technological advancements."

Summary

The TAM notes that in the decades since P.L. 86-272 was enacted, the way in which interstate business is conducted has changed significantly. Congress, however, has neither created a federal mechanism to provide administrative guidance to taxpayers nor has it updated the statute to address the application to new business activities. As the FTB noted, the U.S. Supreme Court In the *Wayfair* decision concluded that an internet seller "may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." Per the TAM:

California considers the Court's analysis regarding virtual contacts to be relevant to the question of whether a seller is engaged in business activities in states where its customers are located for purposes of P.L. 86-272.

The TAM sets forth several factual scenarios and then concludes as to whether the taxpayer's activities, as set forth in the facts, would cause the loss of P.L. 86-272 protection. The internet-related activities that, in the FTB's view, would result in the loss of P.L. 86-272 protection include the following:

- A business that regularly provides post-sale assistance to California customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website.
- A business that solicits and receives online applications for its branded credit card via the business's website from California customers.
- A business with a website that invites viewers in California to apply for non-sales positions with the company.
- A business that remotely fixes or upgrades products previously purchased by California customers by transmitting code or other electronic instructions to those products via the internet.

- A business that places internet "cookies" onto the computers or other electronic devices of California customers. These "cookies" gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale. In contrast, a business that uses cookies to gather customer information that is only used for purposes entirely ancillary to the solicitation of orders for tangible personal property would not lose P.L. 86-272 protection. Activities falling into this category would include using cookies to: (1) remember items that customers have placed in their shopping cart during a current web session; (2) store personal information customers have provided to avoid the need for the customers to re-input the information when they return to the seller's website; and (3) remind customers what products they have considered during previous sessions.

In addition, the FTB also addressed whether having a telecommuting employee in the state who performs business management and accounting tasks would cause the loss of P.L. 86-272 protection. The TAM notes that unless the activities of the employee telecommuting from California on a regular basis constitute solicitation of orders for sales of tangible personal property, or are entirely ancillary to solicitation, this situation would cause the business to lose P.L. 86-272 protection. In the FTB's view, the management and accounting tasks would be considered non-sales activities, and therefore P.L. 86-272 protection would be lost.

KPMG observation

With the TAM, California became the first state to publicly adopt aspects of the Multistate Tax Commission's (MTC's) revised "Model Statement of Information Concerning Practices of Multistate Commission and Supporting States Under Public Law 86-272."

The revised statement—approved by the MTC in August 2021—addresses the application of P.L. 86-272 to business activity conducted by an internet seller. Importantly, under the revised MTC statement, if a business **interacts** with a customer via the business's website or app (as opposed to providing static text and photos to the customer), the business is generally considered to be engaged in a business activity within the customer's state. The statement includes a list of protected and unprotected internet-related activities, most of which are incorporated into California TAM 2022-01.

For more information, contact a tax professional with KPMG's State and Local Tax practice:

Shirley Sicilian | ssicilian@kpmg.com

Oksana Jaffe | ojaffe@kpmg.com

Gina Rodriquez | grodriguez@kpmg.com

kpmg.com/socialmedia



The information contained in TaxNewsFlash is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 1037(a)(2) of Treasury Department Circular 230, as the content of this document is issued for general informational purposes only, is intended to enhance the reader's knowledge on the matters addressed therein, and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

KPMG International Limited is a private English company limited by guarantee and does not provide services to clients. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm.

Direct comments, including requests for subscriptions, to [Washington National Tax](https://www.kpmg.com/US/issuesandnews/pressroom/Pages/default.aspx). For more information, contact KPMG's Federal Tax Legislative and Regulatory Services Group at +1 202.533.4366, 1801 K Street NW, Washington, DC 20006-1301.

To unsubscribe from TaxNewsFlash-United States, reply to [Washington National Tax](https://www.kpmg.com/US/issuesandnews/pressroom/Pages/default.aspx).

[Privacy](#) | [Legal](#)