



## E-commerce Transactions May Be at Risk for Increased Income Tax

Businesses that conduct extensive interactions with customers over the Internet beyond static sales transactions should be aware that the Multistate Tax Commission (MTC) unanimously adopted a revised version of Public Law 86-272, "[Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272](#)" in August 2021. The MTC is an intergovernmental state tax agency that promotes uniform and consistent tax policy and administration among the states and assists taxpayers in achieving compliance with existing tax laws.

Interstate commerce activities that involve only the solicitation of orders for tangible personal property which are approved and sent out-of-state for fulfillment generally are not liable for income tax under P.L. 86-272. States and courts have generally adopted the MTC's past guidance and it has provided a degree of certainty for companies engaged in interstate commerce.

The recent update to the revised guidance includes a new section that addresses e-commerce activities. The update notes that if a business interacts with a customer via the business's website or app, the business is deemed to be engaged in activity within the customer's state that goes beyond the protection afforded by P.L. 86-272. This may make the seller company liable for income tax in the customer's state. These activities include:

1. Providing post-sale assistance through electronic chat or email that is provided to customers through the company's website.
2. Placing internet "cookies" on customer computers to gather market or product research.
3. Transmitting code or electronic instructions via the internet to fix or upgrade products.
4. Soliciting or receiving online credit card applications.
5. Soliciting extended warranty services over the internet.
6. Contracting with a marketplace facilitator to store products or inventory, or to fulfill orders.
7. Contracting with in-state customers to stream videos and music to electronic devices.
8. Inviting and/or accepting employment applications through a web-based platform.

The revised guidance notes that the following online activities are still protected by P.L. 86-272:

1. Offering tangible personal property for sale on a searchable website.
2. Attaching "cookies" that are ancillary to the solicitation of orders, for purposes such as to remember items in a shopping cart.
3. Posting a static list of frequently asked questions (FAQs) to assist customers.

Although the guidance is not binding and states are not obligated to follow the revised guidance, some have already indicated they would adopt it either in part or in its entirety. Many states are

struggling to balance their budgets and seeking new sources of revenue. Because a narrow interpretation of P.L. 86-272 would enable a state to extend its ability to impose income tax on out-of-state business activity, it seems likely that many more states will adopt the revised MTC guidance or similar rules.

The websites and apps of many businesses have become increasingly sophisticated and do much more than simple accepting orders for the purchase of tangible personal property. Companies are advised to review the new MTC guidance in light of the functionality of their website and app to gauge if they are at risk of losing P.L. 86-272 protection and incurring unexpected income tax liability.

If you have any questions about the new MTC guidance, please contact Frankel Zacharia, LLC at 402.496.9100.