



# This Week in State Tax (TWIST)

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## California: Motion for Summary Judgment Denied in Case Challenging P.L. 86-272 Guidance

Recently, a California superior court denied a motion for summary judgment in a case filed by the American Catalog Mailer's Association (ACMA) challenging the Franchise Tax Board's revised guidance on the application of P.L. 86-272 to Internet sellers. The ACMA is not an Internet seller itself but is a non-profit that advocates for the interests of catalog, online, direct mail and other remote sellers. Recall, California was the first state to publicly adopt aspects of the Multistate Tax Commission's (MTC) revised "Model Statement of Information Concerning Practices of Multistate Commission and Supporting States Under P.L. 86-272. In TAM 2022-01, the FTB addressed whether the protections of PL 86-272 apply to fact patterns that are common in the current economy due to "technological advancements."

The general rule stated in the TAM and the MTC's revised statement is that when a business interacts with a person or entity in the state via the business's website or app, the business engages in an activity within the state. If that activity goes beyond solicitation of sales, then the business is not protected under P.L. 86-272. Examples of activities conducted by a seller of tangible personal property over the Internet that would appear to cause the loss of P.L. 86-272 protection include, but are not limited to, providing post-sales assistance over the Internet and leaving cookies on customer devices that gather marketing information. The guidance in the TAM 2022-01 was later incorporated into FTB Publication 1050.

In the instant matter, the ACMA moved for summary judgment that the TAM and FTB Publication 1050 were invalid because they contradicted P.L. 86-272 and the U.S. Constitution. The FTB raised a host of objections to ACMA's claims, including that the ACMA lacked standing and was not an interested person who might seek a declaratory declaration as to the validity of a regulation, the TAM and Publication 1050 were not regulations to which ACMA could seek declaratory relief, and there was no controversy ripe for consideration by the court. The court found that none of these objections were persuasive. In the court's view, ACMA had associational standing through its members. Further, in light of the dilemma in which ACMA's members found themselves due to the uncertainty as to whether they would be protected under P.L. 86-272, the court determined that the facial challenge was ripe for adjudication. The court also agreed that the TAM and Publication 1050 were "regulations," despite not being adopted in accordance with the state's Administrative Procedure Act, and therefore they could be the subject of a declaratory action. Although the court agreed with the ACMA regarding the procedural challenges, the court nevertheless concluded that the ACMA had not provided adequate support for its position that the FTB's examples of non-protected activities involving post-sale assistance or internet cookies contradicted P.L. 86-272 on its face such that the TAM and Publication 1050 should be invalidated. As such, the case will presumably continue to trial. Please contact Shirley Sicilian with questions on *American Catalog Mailers Association v. Franchise Tax Board*.

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