

May 2nd, 2013

Dear Senator Enzi,

We believe that there are a number of unanswered questions concerning the Marketplace Fairness Act that remain troubling to taxpayers. We would appreciate your leadership in answering the following questions regarding the legislation as it stands and the recent manager's amendment that you filed to S. 743, the Marketplace Fairness Act.

1) What measures protect businesses from tax audits, court proceedings and penalties like tax liens imposed on a business by state departments of revenue where the business has no physical presence? How will businessmen and women be protected over time from politicians in a different state that they cannot vote for or against? Is there a danger of establishing taxation without representation?

The MFA includes many significant benefits for remote sellers, such as critical liability protection. It is important to keep in mind that the tax is imposed on the consumer, who lives in the state and is the ultimate check against excessive taxation. Again, because the tax is imposed on the consumer, there is no danger of taxation without representation (see one pager)

2) Does the bill prevent double taxation by removing the Use Tax? If states still have a Use Tax law on the books what provisions of MFA prevent states from charging Use Tax in addition to sales tax?

This question demonstrates a lack of understanding of sales and use tax. Sales tax is imposed on all applicable transactions in the state. The use tax only applies if the sales tax is not collected. The MFA allows sales tax to be collected, and thus there would be no use tax imposed in any state.

3) Can states audit remote sellers for customer data and then retroactively (i.e., prior to the enactment) audit citizens for "unpaid" Use Taxes? Some states, such as California, can perform audits reaching back six years. Can states ask remote sellers for historical customer purchasing data and then audit citizens based on this data?

No. The authority provided by the MFA is clearly prospective only (and, in fact, builds in considerable "waiting periods" before states can exercise the authority provided by the MFA). As a point of clarification, states rarely if ever seek purchaser data from retailers in consumer transactions.

4) While the legislation says that it does not break physical nexus requirements for other types of taxation, some states have "privilege" taxes already in law. Some of these privilege taxes require enactment of MFA as written to enforce "privilege" tax collections. For example Michigan law states:

"there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable ..."

Is there anything in MFA that prevents this type of application of MFA collection standards?

This question also demonstrates a lack of understanding regarding sales and use tax laws. The taxes that we generally refer to as sales and use tax are often called by different names, such as the retailer's occupation tax in Illinois, the general excise tax in Hawaii, the gross receipts tax in New Mexico or the transaction privilege tax in Arizona. All of these taxes are sales and use taxes, where the retailer is authorized (and in most cases required) to pass the tax directly on to the consumer and to separately state the tax on the consumer's invoice or receipt.

5) If states do not conform with MFA requirements or basic simplification requirements, does Section 6 of the MFA permit them to continue to expand "nexus definition" laws? Can California collect tax based on economic nexus laws? Can New York collect based on affiliate nexus laws? Could Oklahoma expand its reporting requirement laws across its borders?

Section 6 leaves the existing nexus standards, as interpreted by the Supreme Court, unchanged. The Supreme Court has declined to extend the "physical presence" standard beyond sales taxes, and it has not taken any cases to clarify the constitutionality of so-called "economic nexus" laws. Other Supreme Court decisions, such as *Scripto* and *Tyler Pipe* have made clear that regard to sales tax, affiliates and independent contractors can create physical presence for sales tax collection purposes. The MFA clears up any confusion regarding collection of sales taxes by setting standards for states who wish to require remote sellers to collect.

6) Why are tribal lands now included as "states" in the manager's amendment? Why were tribal lands not included in the original bill? Have any of the tribes agreed to the same rules the states have, or asked to be included?

? I still don't know anything beyond what was reported in BNA.

7) During the floor debate, there were many questions on how the MFA would apply to sellers based in other countries. What is the enforcement process for overseas sellers with no presence in the United States? Are they required to comply with state tax collection duties? Under MFA, do states have the ability to bring enforcement actions against overseas businesses that are selling remotely into the state?

States currently enforce their taxes against foreign businesses with no physical presence in the United States. States are not bound by US tax treaties requiring permanent establishment. States have myriad methods to compel collection by foreign sellers (see one pager).

8) Does the MFA protect the small sellers, who would be eligible for the small seller exemption, from states that exercise their Section 6 discretion to expand their tax collection authority through nexus definitions?

As noted above, the MFA does not alter existing nexus standards. If a remote seller below the exemption level establishes a physical presence in a state, as articulated by the Supreme Court, then presumably it would have a duty to collect just as all other sellers would.

9) While the minimum simplification requirements preclude the Streamlined Sales Tax

Agreement (SSUTA), if states make changes to the SSUTA after the enactment of MFA do those changes become law?

This question is nonsensical. The MFA does not “preclude” the SSUTA. Rather, it recognizes that the SSUTA already incorporates the simplifications and protections embodied within the MFA. Thus, states that have enacted laws in compliance with the SSUTA are granted authority by the MFA to require remote sellers to collect tax. Future changes to the SSUTA would not be in conflict with the MFA so long as those changes do not implicate the simplifications and protections provided in the MFA. Of course, changes to the SSUTA itself have no force of law; any such changes must be enacted by individual states.

10) Included in the manager’s amendment is language that clarifies that a state may not impose requirements on remote sellers that they do not impose on non-remote sellers. Currently, many states give special state sales tax deals for businesses with in-state presence, while offering remote sellers no such deal. Since this practice is giving preferential treatment to in-state sellers in relation to the collection and remittance of sales taxes, will this be prohibited under MFA. Will there be any limitation on states giving special sales tax breaks to large in-state businesses while forcing strictly out-of-state businesses with no presence to comply?

The MFA does not dictate to the states how they should design their tax systems; to do so would be a fundamental violation of state sovereignty. Rather, the MFA simply levels the playing field for all sellers by allowing states to enforce their sales tax laws.

11) Under SSUTA states agreed that sales price was the cost that a consumer actually paid for an item. However, Nebraska wants to claim that “sales price” is the gross price before discounts and coupons, thereby charging the business tax on retail value rather than amount paid (Think discounts from Groupon or Living Social. If the retail cost is \$75, but the discount makes it \$25, Nebraska would want to collect sales tax on the \$75 rather than the amount actually paid, which was \$25). Is there anything in the MFA that prevents this type of excessive taxation from occurring in Nebraska or other states? From what we understand the minimum requirements of MFA do not prevent this type of theoretical taxing from occurring.

Again, the MFA does not dictate to the states how they should design their tax systems. It is unclear why any organization, let alone one committed to small government, would encourage the Congress to debate the appropriate nature and extent of state tax structures. The Congress’ role is to set groundrules for the applicability of state tax systems to interstate commerce, balancing the interests of taxpayers, states and the economy as a whole. That is exactly what the MFA does.

12) How could MFA requirements affect the financial services sector? Will financial products that are sold over the Internet, like portfolio management services, credit reporting service apps, or insurance service fall under MFA taxation authority?

The MFA does not affect the financial service sector. At the risk of sounding like a broken record, the MFA does not address in any way whether states impose a sales tax, what they impose sales tax on, or at what rate a sales tax is imposed. Rather, it simply authorizes states to require remote sellers to collect legally due taxes.

No state has ever imposed a sales tax on financial transactions, and no state is proposing to do so. The MFA does not alter a states' ability to tax transactions, and thus it does not have any unique effect on the financial services industry.

13) Home-schooling parents meet at state, regional, and national gatherings in part to sell used textbooks and related products that their children have completed. If these transactions are conducted online through an aggregation site, would the transactions be subject to the MFA small-seller exemption in states that exercise their Section 6 discretion to expand their tax collection authority through nexus definitions?

Section 6 does not provide any "discretion" to states. Section 6 simply makes clear that the MFA does not alter current nexus standards. Transactions that are taxable today remain taxable under the MFA, and transactions that are exempt today remain exempt under the MFA. If the seller in these transactions happens to be a remote seller, then they would not be required to collect taxes unless they exceed \$1 million in remote sales annually.

14) How will the MFA affect digital goods and services? Without a clear structure for digital goods taxation, these types of goods could fall under multiple taxation schemes. Does the MFA protect digital goods from multiple taxation?

Again, the MFA does not affect the taxability of goods, digital or otherwise. Whether digital goods are taxable or exempt remains the province of state law.

15) In terms of digital goods, like apps and music, who is responsible for remitting the sales tax: the vendor, an app store or sales platform, or the creator of the digital good?

The person responsible for remitting sales tax is exactly the same under the MFA as it is under current state law. The MFA does not affect the substantive provisions of state law, except to provide significant simplifications and protections to remote sellers. Turning this question around, who is responsible for remitting tax on the sale of a physical book: the vendor, the shopping center in which the vendor resides, or the creator (author) of the book? Some of these supposedly complicated issues associated with new forms of goods and services are really not very complicated at all. The question under state law remains as it always has: who is making the "sale" as defined in state law? That is the party which first collects and then remits the tax.

16) Some states, like Maryland have different sales tax rules for goods that are priced under one dollar. For example:

Effective January 3, 2008, the Maryland sales and use tax rate is 6 percent, as follows:

- 1 cent on each sale where the taxable price is 20 cents.
- 2 cents if the taxable price is at least 21 cents but less than 34 cents.
- 3 cents if the taxable price is at least 34 cents but less than 51 cents.
- 4 cents if the taxable price is at least 51 cents but less than 67 cents.
- 5 cents if the taxable price is at least 67 cents but less than 84 cents.
- 6 cents if the taxable price is at least 84 cents.

On each sale where the taxable price exceeds \$1.00, the tax is 6 cents on each exact dollar plus:

- 1 cent if the excess over an exact dollar is at least 1 cent but less than 17 cents.
- 2 cents if the excess over an exact dollar is at least 17 cents but less than 34 cents.

- 3 cents if the excess over an exact dollar is at least 34 cents but less than 51 cents.
- 4 cents if the excess over an exact dollar is at least 51 cents but less than 67 cents.
- 5 cents if the excess over an exact dollar is at least 67 cents but less than 84 cents.
- 6 cents if the excess over an exact dollar is at least 84 cents.

If Maryland, or states wishing to follow suit, do not comply with SSTP or the minimum simplification requirements included in MFA, can they tax low-cost goods in this way? This applies in particular to digital goods like apps and songs. Does the MFA require simple, flat taxes for low cost and digital goods?

The MFA does not require states to adopt the SSUTA. In fact, it does not require states to do anything. However, states that wish to require remote sellers to collect must adhere to the simplifications and protections provided in the MFA.

Again, importantly, the MFA does not eviscerate state sovereignty by specifying tax rules for different types of goods or services or for goods or services priced at different levels.

Interestingly, the table reproduced above is essentially an if/then statement of the kind that computers have been able to process for decades. In other words, this apparently complicated rounding method isn't complicated at all for computers to process. Presumably, digital goods are generally sold via computers.

It's also worth noting that the sales tax is the ultimate flat tax. The Maryland chart simply is an alternative form of rounding.

Thank you in advance for your consideration and response to our concerns. I look forward to working with you to address these issues and ensure no legislation is passed that harms taxpayers nationwide. If you have any questions or concerns while responding to this letter, please have your staff contact Katie McAuliffe by email, [kmcauliffe@atr.org](mailto:kmcauliffe@atr.org), or phone, [202-785-0266](tel:202-785-0266).

Onward,

Grover Norquist