



AMERICANS *for* TAX REFORM

Grover G. Norquist
President

May 2, 2013

Senator Mike Enzi
379A Senate Russell Office Building
Washington, DC 20510

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?

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?

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?

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?

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?

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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?

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?

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?

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?

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?

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.

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?

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?

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?

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?

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?

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, or phone, 202-785-0266.

Onward,



Grover G. Norquist