American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

September 10, 2013

The Honorable Max Baucus, Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dave Camp, Chairman
House Committee on Ways & Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Orrin G. Hatch
Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sander M. Levin
Ranking Member
House Committee on Ways & Means
1236 Longworth House Office Building
Washington, DC 20515

The Honorable Bob Goodlatte, Chairman
House Committee on Judiciary
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable Patrick J. Leahy, Chairman
Senate Committee on Judiciary
437 Russell Senate Office Building
Washington, DC 20510

The Honorable John Conyers, Jr.
Ranking Member
House Committee on Judiciary
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Chuck Grassley
Ranking Member
Senate Committee on Judiciary
135 Hart Senate Office Building
Washington, DC 20510

RE: Marketplace Fairness Act of 2013

Dear Chairmen Baucus, Camp, Goodlatte and Leahy, and Ranking Members Hatch, Levin, Conyers and Grassley:

The American Institute of Certified Public Accountants (AICPA) continues to encourage Congress to pass legislation that simplifies the tax system and the compliance burden of taxpayers. To further this mission, we provide comments below regarding suggestions to the proposed Marketplace Fairness Act of 2013 (MFA). The AICPA is not taking a position supporting or opposing the proposed MFA, but instead offers the following suggestions as a means to more easily attain the objectives of the legislation. The AICPA urges Congress to revise the legislation to provide greater simplification, uniformity, and consistency to make the most of this opportunity to create a fair environment for businesses that Congress will subject to new collection and remittance responsibilities for states in which they do not have physical presence. As Congress contemplates this proposed legislation, we hope Congress will consider these suggestions.

EXECUTIVE SUMMARY

In 1992, the U.S. Supreme Court in *Quill Corp. v. North Dakota*[1] held that physical presence within a state was required for collecting and remitting a state's use tax. Therefore, many remote/online businesses are not required to collect and remit sales and use tax for sales of merchandise in states in which they do not have physical presence.

On October 1, 2005, the Streamlined Sales and Use Tax Agreement (SSUTA) was created and has been implemented in a total of 24 states.[2] However, participation in the SSUTA is voluntary, as only Congress currently has the power to make it mandatory under its authority to regulate interstate commerce. The SSUTA requires state simplification in state-level administration (single state agency and single tax return for remitting sales taxes), uniform tax base (and exemptions) for all jurisdictions in the state, simplified/same tax rates for all jurisdictions in the state, and uniform sales sourcing rules (vendor location/origin for in-state sales, and destination sourcing for remote sales).[3]

With technological changes and the growth in e-commerce over the past decade, many states have enacted "click-through" or affiliate sales and use tax nexus legislation to require remote/online businesses to collect and remit tax on sales to residents located in states in which such businesses have no actual physical presence.[4]

The MFA was introduced in the prior 112th Congress, and reintroduced again in this 113th Congress with a few modifications. The MFA recently passed the Senate on May 6, 2013. As detailed below in the Legislation discussion, the MFA would authorize (both SSUTA member and non-member) states to require remote sellers to collect and remit sales and use taxes. This comprehensive legislation is intended to address the inherent challenges of developing a system under which states would have the power to require out-of-state businesses to act as tax collection and remittance agents.

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[1] See *Quill Corp. v. North Dakota* (91-0194), 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

[2] The SSUTA full member states are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Ohio and Tennessee are currently SSUTA associate member states.

[3] Destination sourcing for remote sales is the delivery address, if none, then customer address, if none, then billing address, if none, then seller address.

[4] Expanded sales and use tax nexus legislation has been enacted by Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Iowa, Kansas, Maine, Minnesota, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and West Virginia, and several other states may consider such legislation in the near future.

If Congress decides to pursue this proposed MFA legislation, the AICPA suggests that Congress revise the legislation to address many of the concerns raised by its opponents, reduce compliance burdens on businesses, and encourage more sales and use tax uniformity among all the states. The MFA is not just about collecting tax, as it requires remote businesses to comply with many different jurisdictions' rules. The state and local sales and use tax system is very complicated with many of the 9,600 different state and local taxing jurisdictions having their own exemptions and methodologies. The AICPA believes that the MFA should significantly simplify the tax reporting and determination process for remote sellers, and by extension, for all sellers required to collect and remit sales and use taxes. Congress can best achieve this result by making it easier for remote sellers to comply with the new collection and remittance requirements. The following revisions to the MFA would help achieve that aim.

The AICPA recommends that Congress modify the proposed legislation by:

- Substantially increase the existing small business exemption in the MFA and provide an additional state-level *de minimis* exemption;

- Allow remote sellers filing flexibility (i.e., temporary option of manual or electronic);

- Provide remote sellers stronger "hold harmless" penalty provisions and consider the appropriateness of amnesty for pre-MFA periods;

- Provide remote sellers a temporary special vendor compensation provision in addition to vendor compensation paid to all sellers required to collect and remit to the state; and

- Mandate more simplification (including the same filing option rules) in sales and use tax laws for all sales in, and shipped into, a state applicable to all businesses (both remote and in-state sellers) subject to collection and remittance obligations and provide greater clarity on taxable services and products.

BACKGROUND

In 1992, the U.S. Supreme Court in *Quill Corp. v. North Dakota*[5] held that physical presence within a state was required for collecting and remitting a state's use tax. Therefore, many remote/online businesses are not required to collect and remit sales and use tax for sales of merchandise in states in which they do not have physical presence.

However, the U.S. Supreme Court also held in that case that Congress had the ultimate power to subject remote sellers to those tax obligations based on its authority to regulate interstate commerce under the Commerce Clause of the U.S. Constitution.

On October 1, 2005, the Streamlined Sales and Use Tax Agreement (SSUTA) was created. It was amended most recently on May 24, 2012 and has been implemented in a total of 24 states.[6] However, participation in the SSUTA is voluntary, as only Congress currently has the power to make it mandatory under its authority to regulate interstate commerce. The SSUTA requires state simplification in state-level administration (single state agency and single tax return for remitting sales taxes), uniform tax base (and exemptions) for all jurisdictions in the state, simplified/same tax rates for all jurisdictions in the state, and uniform sales sourcing rules (vendor location/origin for in-state sales, and destination sourcing for remote sales.)[7]

With technological changes and the growth in e-commerce over the past decade, many states have enacted "click-through" or affiliate sales and use tax nexus legislation to require remote/online businesses to collect and remit tax on sales to residents located in states in which such businesses have no actual physical presence.[8]

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[5] See *Quill Corp. v. North Dakota* (91-0194), 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

[6] The SSUTA full member states are: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Ohio and Tennessee are currently SSUTA associate member states. The text of the SSUTA is available at http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf.

[7] Destination sourcing for remote sales is the delivery address, if none, then customer address, if none, then billing address, if none, then seller address.

[8] Expanded sales and use tax nexus legislation has been enacted by Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Iowa, Kansas, Maine, Minnesota, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and West Virginia, and several other states may consider such legislation in the near future.

The MFA was introduced in the prior 112th Congress and reintroduced again in this 113th Congress with a few modifications. The MFA recently passed the Senate on May 6, 2013. As detailed below in the Legislation discussion, the MFA would authorize (both SSUTA member and non-member) states to require remote sellers to collect and remit sales and use taxes. This comprehensive legislation is intended to address the inherent challenges of developing a system under which states would have the power to require out-of-state businesses to act as tax collection and remittance agents.

ISSUE

Local "main street" businesses are required to collect and remit sales and use tax to the states in which they operate; however, retailers without a physical presence in these states or businesses that do not have an affiliate or third party in the states engaged in activities that allow the retailer to establish and maintain a market in the states for sales are not required to collect and remit sales and use tax to such states.

Critics of the legislation have expressed the following concerns to the MFA:

- The $1 million threshold for the small business exception is too low.
- The MFA will have a negative impact on small internet businesses and purchasers.
- The MFA remains too complex and the compliance burdens too great.
- The MFA does not provide for a vendor discount as compensation for the compliance burdens involved.
- More uniformity is needed in the definitions and tax rates.

LEGISLATIVE PROPOSAL

On February 14, 2013, Senator Mike Enzi and Representative Steve Womack, along with 18 Senators and 35 House Members as cosponsors, introduced the bipartisan MFA, S. 336, and H.R. 684 (and S. 743, was introduced by Senator Mike Enzi on April 16, 2013, and went directly to the Senate floor). See the section by section summary. Currently, H.R. 684 has 66 cosponsors; S. 336 and S. 743 have 29 co-sponsors.

On May 6, 2013, the Senate passed the MFA (S. 743) by a vote of 69-27.

In the House, the MFA has been referred to the House Judiciary Committee (HJC).

The MFA would allow SSUTA states and states that implement certain simplification requirements to require out-of-state businesses (including internet businesses) to collect and remit sales and use taxes to the states.

The MFA includes a small seller exception that exempts out-of-state vendors with $1,000,000 or less of national remote sales (gross annual receipts from remote sales in the U.S.) in the prior calendar year from the collection requirement.

The MFA requires states to provide to remote sellers software free of charge. The MFA requires that software from certified software providers must calculate sales and use taxes due on each transaction at the time the transaction is completed and allow for the filing of sales and use tax returns. The software also must work for all of the states qualified to require remote sellers to collect and remit tax under the MFA.

The MFA would allow a state that is a member of the SSUTA to impose a collection and remittance requirement upon remote sellers 180 days after it first publishes notice of its intent to exercise its authority under the MFA. The earliest date for the collection and remittance requirement is the first day of the calendar quarter that is at least 180 days after the date of the enactment of the MFA.

In addition, the MFA would allow non-SSUTA states that adopt and implement MFA mandatory sales tax simplification requirements to begin enforcing that state's collection authority under the MFA no earlier than the first day of the calendar quarter that is at least six months after the date that the state enacts such legislation.

AICPA POSITION AND RECOMMENDATIONS

The AICPA is not taking a position supporting or opposing the proposed MFA, but it encourages and supports efforts to simplify and streamline tax compliance and administration. If Congress decides to proceed with such legislation, the AICPA provides the following comments for Congress to consider regarding the proposed legislation.

The MFA is not just about collecting tax, as it requires remote businesses to comply with many different jurisdictions' rules. The state and local sales and use tax system is very complicated with many of the 9,600 different state and local taxing jurisdictions having their own exemptions and methodologies. The MFA asserts that a state has the right to require a seller that has no physical presence in that state, and by extension, no relationship with that state but for its customers, to act as a sales and use tax collector for the state. For the MFA

or a similar type of effort to work, states must take additional steps to support the collection process. The AICPA believes that ensuring a simple and fair collection and remittance process is very important.

While the MFA may appear to provide some level of uniformity and certainty in the area of multistate sales and use taxation, the AICPA believes that Congress can modify the MFA to significantly simplify the tax reporting and determination process for remote sellers, and by extension, for all sellers required to collect and remit sales and use taxes. Congress can best achieve this result by making it easier for remote sellers to comply with the new collection and remittance requirements. The following revisions to the MFA would help achieve that aim:

- Substantially increase the existing small business exemption in the MFA and provide an additional state-level *de minimis* exemption;

- Allow remote sellers filing flexibility (i.e., temporary option of manual or electronic);

- Provide remote sellers stronger "hold harmless" penalty provisions and consider the appropriateness of amnesty for pre-MFA periods;

- Provide remote sellers a temporary special vendor compensation provision in addition to vendor compensation paid to all sellers required to collect and remit to the state; and

- Mandate more simplification (including the same filing option rules) in sales and use tax laws for all sales in, and shipped into, a state applicable to all businesses (both remote and in-state sellers) subject to collection and remittance obligations and provide greater clarity on taxable services and products.

Substantially Increase the Small Business Exemption and Provide a State-Level *De Minimis* Threshold Exemption

Multistate sales and use tax collection, even under the SSUTA and the MFA, is complex and costly, will consume limited resources of small businesses, and could have a negative impact on those businesses' long-term viability. We recommend increasing the small business exemption in the MFA from $1 million to a substantially larger amount, as a means

to exempt small businesses that may not have the resources to comply with disparate collection and remittance processes in numerous states.

In addition to the increase in the overall small business exemption amount, we also recommend that in order for a state to have the power to require collection and remittance authority over a remote seller, the business should meet a state-specific dollar threshold as well. Providing a state-specific exemption amount for each state for remote sales into that state will provide simplification and relief to smaller businesses from filing in particular states in which the businesses have only a *de minimis* amount of internet sales in those particular states. To promote uniformity, every state should have a state-level threshold. The state-specific threshold may be structured as an amount that is either: (i) the same for all states; or (ii) a varying amount based upon the population of each state. Using either state-specific threshold will reduce the number of jurisdictions in which the seller would need to register. To require registration into all states regardless of how much market presence a seller has is burdensome and unfair.

Allow Remote Sellers Temporary Filing Flexibility

Given the outdated nature of some states' filing systems (particularly the states that are not SSUTA members), the MFA should focus more on improving state sales and use tax collection and remittance procedures across the board. For example, the MFA should require states to adopt procedures that are substantially similar to the SSUTA procedures. Until procedures improve, remote sellers should have the temporary flexibility to file and make sales and use tax payments by electronic or manual means. In addition, the MFA should require non-SSUTA states, as a condition of participating under the MFA, to allow remote sellers to use the SSUTA simplified electronic tax form for filing returns (rather than requiring remote sellers to use that state's own sales and use tax return). States should permit, but not mandate, E-filing.

Hold Remote Sellers Harmless from Penalties and Consider the Appropriateness of Amnesty for Pre-MFA Periods

While the MFA requires states to provide free software for businesses to use for tax calculations and remittances, it is unlikely that every state will have the same software and that it will provide remote sellers accurate results. Therefore, we are pleased that the Senate-passed MFA included a provision holding the remote seller harmless in the case of inadvertent errors in the collection and remittance process (particularly when an error results

from relying upon state-provided software), and believe that the provision is a good first step. However, more protection is needed.

States should hold a remote seller harmless from the imposition of penalties in all cases where such seller reasonably tries to comply with its collection and remittance obligations, including situations where the remote seller has to determine the taxability of items under complex or unclear tax laws. If a seller relies on state-provided information, such as details on taxability, and misinterprets or misunderstands how a particular jurisdiction treats a taxable service or product, the state should hold the seller harmless from penalties that may result from such failure.

In addition, we point out that amnesty is a provision that is part of the SSUTA and is required to be provided by states joining the SSUTA.[1] Therefore, we suggest Congress consider, in the pursuit of fairness, simplification, and consistency between taxpayers in SSUTA states and non-SSUTA states, whether the MFA should require any participating state to grant amnesty to any remote seller that comes forward to collect and remit sales and use tax upon enactment of the MFA. In doing so, Congress should consider the potential consequences of not including an amnesty provision, most notably a continuing uncertain environment for businesses with the potential for significantly burdensome audits that reach back to pre-MFA tax periods.

Provide Temporary Special Vendor Compensation

Approximately one-half of the states that impose sales and use taxes currently pay vendor compensation to sellers who are subject to collection and remittance requirements. The sellers who will be subject to the collection and remittance responsibilities resulting from the enactment of the MFA will face significant burdens in preparing to use the "free" software provided by the states. These sellers will have to install such software and map their data for use via the software. Preparing data for use with software for tax calculations and remittance is typically complex and costly.

The MFA should require states to:

1. Temporarily (for two years) compensate remote sellers newly subject to the sales and use tax as a result of the MFA with a reasonable special vendor compensation allowance to offset the new costs associated with collecting the taxes on behalf of the states; and

[1] See SSUTA section 402: Amnesty for Registration and the SSUTA Frequently Asked Questions.

2. Require all states given collection and remittance authorization on remote vendors pursuant to the MFA that currently do not provide vendor compensation to sellers to provide all sellers (including those currently collecting and remitting sales and use tax) with a base level of vendor compensation.

A reasonable special vendor compensation allowance as a percentage of use tax collected for the first two years in which the remote seller is subject to new collection and remittance requirements would fairly compensate the remote seller for the numerous new tasks that it needs to perform. Following the initial two-year period, states could phase out the special vendor compensation, but remote sellers should still receive the same vendor compensation as other sellers. Further, the MFA is an ideal opportunity to recognize the significant effort required to participate as a collection and remittance agent for a state by providing all sellers a base level of vendor compensation as a condition of participating under the MFA.

Require More Sales and Use Tax Uniformity and Clarity Applicable to All Sales in, and Shipped into, a State

The MFA should require states to take significant action to make state and local sales and use taxes more uniform throughout the United States, and to create a collection and remittance system that is far less onerous on both in-state and remote sellers who will participate in this new expanded system, as well as other businesses already subject to these requirements. Along with uniformity, Congress should provide greater clarity in the law. For example, businesses frequently deal with issues of interpretation in areas such as the taxation of software as a service and digital products. The MFA should require each of the states to provide more clarity and uniformity among jurisdictions within a state as to what constitutes a taxable service or product.

The SSUTA, to its credit, has tried to create a system by which full membership results in a fair amount of simplification of the sales and use tax code through a set of model rules, including a uniform set of sales tax definitions. Though the current version of the MFA leverages the SSUTA, it does not include enough to make the sales and use tax rules more uniform from state to state, and does not require states to become SSUTA members in order to obtain the right to claim jurisdiction over remote sellers.

While a requirement for non-SSUTA states to join SSUTA in its entirety is probably not feasible, Congress should require some level of uniformity in the sales and use tax laws. Without a push for more uniformity, remote sellers newly subject to sales and use tax

collection obligations in numerous states will find the compliance burden unsustainable. Further, there is a high risk of interpretive errors made by remote sellers. These issues are being faced not only by remote sellers, but by all sellers subject to collection and remittance requirements. Therefore, to promote uniformity in this area, the MFA should require adoption by non-SSUTA states of at least some of the more substantive aspects of the SSUTA such as state-level administration, uniform tax base (and exemptions) for all jurisdictions in the state, simplified/same tax rates for all jurisdictions in the state, and uniform sales sourcing rules (vendor location/origin for in-state sales, and destination sourcing for remote sales) in order for such states to enforce collection and remittance responsibilities on remote sellers and encourage continued simplification following enactment of the MFA.

Moreover, Congress may want to consider a more uniform treatment of all sales in, and shipped into, each state. As currently drafted, the MFA only addresses remote sales arising from out-of-state sellers that do not have nexus with the state. For example, the MFA allows for single returns for all jurisdictions for remote sellers, while in-state sellers would still have to file returns in all the local jurisdictions.

The currently drafted narrow definition of "remote seller" means that the MFA simplification provisions and requirements would only apply to out-of-state sellers that lack an in-state physical presence. Many states that currently do not conform to the SSUTA are likely to adopt the minimum changes necessary to comply with MFA, particularly states with a bifurcated state and local sales tax system. These states likely will create a simplified system available to remote sellers only, resulting in two separate sales tax regimes for out-of-state sellers shipping into the state. Out-of-state sellers may need to follow one regime one year and another regime the next year depending on whether they have an employee or some other physical presence in the state for that filing period. An out-of-state business would lose the simplification benefits of the MFA if it builds a distribution center in the state.

This two-tiered system runs counter to the overall aim of the MFA to simplify state and local sales and use tax systems. The rules should treat all out-of-state sellers the same following adoption of the MFA. As one benefit of the MFA, states and out-of-state sellers should no longer need to consider physical presence of the seller and its bearing on a nexus determination, resulting in more certainty on the issue of which businesses are required to comply with sales and use tax collection and remittance requirements. Congress should consider extending all of the simplification and uniformity provisions to both in-state and remote sellers so that two different systems do not result from enactment of the MFA.

CONCLUSION

The MFA will place a significant burden on affected businesses in exchange for the states receiving benefits through the collection and compliance efforts of remote sellers. The MFA will dramatically expand the reach of the states in the administration of the sales and use tax. As such, the AICPA urges Congress, if it is going to pursue such MFA legislation, to make the most of this opportunity to create a fair environment for businesses subject to new collection and remittance responsibilities for states in which they do not have physical presence, in an effort to provide greater simplification, uniformity, and consistency in the sales and use tax system.

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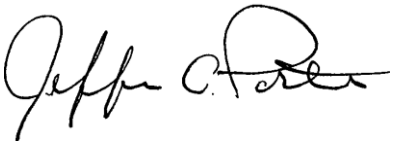
The AICPA is the world's largest member association representing the accounting profession, with more than 394,000 members in 128 countries and a 125 year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We encourage Congress to consider these comments and suggestions as you consider this proposed legislation. We look forward to working with you on this issue to achieve greater simplification, uniformity, and consistency in the sales and use tax system.

If you have any questions or if we can further assist with this legislation, please contact me at jporter@portercpa.com, or (304) 522-2553; or Eileen Sherr, AICPA Senior Technical Manager, at esherr@aicpa.org, or (202) 434-9256.

Sincerely,



Jeffrey A. Porter, CPA
Chair, AICPA Tax Executive Committee

cc: Members of the Senate Finance Committee, Senate Judiciary Committee, House Ways and Means Committee, and House Judiciary Committee
Representative Steve Womack