

2013 Federal Legislation – Marketplace Fairness Act of 2013

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Senate Bill 336 and House Bill 684 (referred to as “bill” or bills” herein)

Streamlined States

Non-Streamlined States

Comments/Questions

Section 1: Short Title “Marketplace Fairness Act of 2013”

Section 2: Authorization to Require Collection of Sales/Use Taxes

<p>1. Who Gets Collection Authority? Sec. 2(a) & (b)</p>	<p>Yes, if...</p> <ul style="list-style-type: none"> • A SSUTA “Member state”; and • The SSUTA meets the federal minimum simplification requirements (“FMSRs”) in the bill. <p><i>See Item 4 directly below for more information on the FMSRs.</i></p>	<p>Yes, if the state...</p> <ul style="list-style-type: none"> • Implements the FMSRs in the bill; • Enacts legislation specifying the tax or taxes subject to the FMSRs; and • Specifies the products and services otherwise subject to the identified taxes and to which the bill will not apply. <p><i>See Item 4 directly below for more information on the FMSRs.</i></p>	<ul style="list-style-type: none"> • Does SSUTA currently meet the FMSRs/does it need to? • How does a SSUTA member’s compliance with the SSUTA impact collection authority? • Does the tax base exclusion provisions for non-SST states apply to SSUTA member states? See Sec. 2(b)(2)(B).
<p>2. Earliest Date to Exercise Authority Sec. 2(a) & (b)</p>	<p>90 days after state publishes notice of intent to exercise authority under this Act, but no earlier than first day of calendar quarter at least 90 days after Act is enacted.</p> <p><i>Example: if enacted April 1 with State notice on April 15, then Sept. 1 is the earliest that collection could commence.</i></p>	<p>First day of calendar quarter that is at least 6 months after state complies with the requirements in Item 1 directly above.</p>	<p>Streamlined member states must publish notice; what constitutes a notice? <i>See Marketplace Equity of 2011 for background on notice as previously contemplated.</i></p>

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<p>3. Small Seller Exception Sec. 2(c)</p>	<p>Up to \$1,000,000 in gross annual receipts in total remote sales in U.S. for preceding calendar year.</p> <p>For purposes of determining whether the retailer meets the threshold, the total remote sales include:</p> <p>(a) Sales of all related persons within the meaning of IRC Section 267(b) and (c) or IRC Section 707(b)(1)</p> <p>OR</p> <p>(b) Persons with 1 or more ownership relationships shall be aggregated if such relationships were designed with a principal purpose of avoiding the application of these rules.</p>	<p>Same</p>	<ul style="list-style-type: none"> • States could set higher thresholds. • If higher thresholds are set, the information should be reflected in the SSUTA resources for businesses.
<p>4. What are the Federal Minimum Simplification Requirements Sec. 2(b)(2)(A) – (H)</p>	<p style="background-color: #cccccc;"> </p>	<p style="background-color: #cccccc;"> </p>	<p style="background-color: #cccccc;"> </p>
<p>(2)(A)(i) Single entity within the State to administer tax, process returns and conduct audits of remote sales sourced to State</p>	<p>Obligation met, SSUTA Section 301</p>	<p>Defer to non-SST states</p>	<p> </p>

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(2)(A)(ii) Single audit of remote sellers for all State and Local taxing jurisdictions within State	Obligation met, SSUTA Section 301	Defer to non-SST states	
(2)(A)(iii) Single return to be used by remote sellers and filed with single entity responsible for administration	Obligation met, SSUTA Section 318	Defer to non-SST states	The single return is the Simplified Electronic Return - effectively required for all sellers January 1, 2013.
(2)(A)(iii) State may not require returns be filed more frequently for remote sellers than for nonremote sellers	<p>Obligation likely met, but not expressly addressed in the SSUTA</p> <p><i>Note: Individual states will need to review their laws for filing frequency requirements of nonremote sellers – SSUTA Section 318 to confirm this is happening in practice.</i></p>	Defer to non-SST states	<ul style="list-style-type: none"> • If this FMSR is made applicable to the SSUTA as it exists currently, the Governing Board (GB) may want to consider clarifying this issue. • Filing frequency for Model 1 Sellers (all file monthly) may be more frequent than for nonremote sellers due to individual state filing frequency requirements.
(2)(A)(iii) No Local jurisdiction may require remote seller to submit return or collect taxes except as described above	Obligation met, SSUTA Sections 301 and 318	Defer to non-SST states	
(2)(B) Uniform tax base among State and Local taxing jurisdictions within the State (<i>the bills do not make clear this applies only to remote sales</i>)	Discussion – SSUTA Section 302	Defer to non-SST states	<ul style="list-style-type: none"> • The SSUTA does permit deviation between the state/local tax bases. SSUTA Section 302. • If this FMSR is made applicable to the SSUTA as it exists

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			<p>currently, the Governing Board may want to consider clarifying this issue.</p> <ul style="list-style-type: none"> Does Section 2(b)(1)(B) allow a state to carve out specific products/services from being subject to the bill?
<p>(2)(C)Uniform sourcing <u>interstate</u> sales: (a) Where item is received by purchaser based on instructions furnished by purchaser; (b) If (a) does not apply, then based on customer’s address known by seller; (c) If address not known by seller in advance, address obtained during consummation of the transaction, including address on payment instrument if no other address available; or (d) If (a), (b) and (c) do not apply, then based on address of the seller from which the remote sale was made.</p>	<ul style="list-style-type: none"> Obligation met, SSUTA Sections 309, 310, 310.1, 311, 313, and 314, This FMSR is not required for SSUTA states as follows: “A State granted authority under section 2(a) shall comply with the sourcing provisions of the [SSUTA].” 	<p>Defer to non-SST states</p>	<ul style="list-style-type: none"> How will the FMSR for sourcing in non-SST states be interpreted going forward and what are the implications for tax administrators? This provision does not appear to be limited to remote sales/sellers.

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<p>(2)(D)(i) Provide information indicating the taxability of products and services along with product and service exemptions</p>	<p>Discussion – SSUTA Section 328</p>	<p>Defer to non-SST states</p>	<ul style="list-style-type: none"> • Is this all taxable products and exemptions? • If this FMSR is made applicable to the SSUTA as it exists currently, should the GB consider clarifying this issue if the current “taxability matrix” is found insufficient under the bill?
<p>(2)(D)(i) Provide rates and boundary database</p>	<p>Discussion – SSUTA Section 305</p>	<p>Defer to non-SST states</p>	<p>SSUTA 305 requires rate and boundary databases only for states with local jurisdictions. Some “member states” have no local jurisdictions - is this acceptable under the bill?</p>
<p>(2)(D)(ii) Provide software free of charge for remote sellers that: (a) Calculates tax dues on each transaction at time the transaction is completed (b) Files sales and use tax returns (c) Updated to provide rate changes</p>	<p>Discussion, input is needed from SST CSPs. See SSUTA Sections 203, 205, 328, 501, 502 and 601</p>	<p>Defer to non-SST states</p>	<ul style="list-style-type: none"> • Possibly covered by CSPs under contract – rate change notifications different than SSUTA currently requires • Would CSPs be free to all remote sellers? • The bills require “software” be provided free of charge. What if a remote seller just wants “software” and no CSP interaction/involvement? Are any SSUTA states prepared to provide this and is this even required by the bill separate from CSP service?

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(2)(D)(iii) Provide certification procedures for certified software providers. The software must be able to calculate and files sales and use taxes in all the States qualified under the Act	Discussion, input is needed from SST CSPs. See SSUTA Sections 203, 205, 328, 501, 502 and 601	Defer to non-SST states	Who determines which states are qualified under this Act"? It appears the bill gives states flexibility in this regard.
(2)(E) Relieve remote sellers from liability to state (tax, interest and penalties) if error is result of error or omission made by certified software provider	Discussion, input is needed from SST CSPs.	Defer to non-SST states	Some SST states provide that sellers using a CSP are not liable to the state for sales or use tax due on transactions processed by the CSP unless the seller <u>misrepresented</u> the type of items it sells or committed <u>fraud</u> or if using a CAS and the seller/CSP misclassified a transaction. See CSP Contract for basis.
(2)(F) Relieve certified software providers from liability (tax, interest and penalty) if error is result of misleading or inaccurate	Discussion, input is needed from SST CSPs.	Defer to non-SST states	

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information provided by remote seller			
(2)(G) Relieve remote sellers and certified software providers from liability (tax, interest and penalty) if error is result of incorrect information or software provided by the State	Obligation likely met, SSUTA Sections 306, 328, and 502	Defer to non-SST states	SST member states must confirm CSPs meet the requirement of free software provided by the state.
(2)(H) Provide remote sellers and certified software providers with 90 days notice of rate changes by State or Local government and relieve remote sellers and certified software providers from liability for collecting the tax at the immediately preceding effective rate during a 90-day notice period if 90 days notice is not provided	Discussion	Defer to non-SST states	<ul style="list-style-type: none"> • Currently 30 days for State and 60/120 for Local changes • If this FMSR is made applicable to the SSUTA as it exists currently, the GB may want to clarify this issue.
Section 3: Limitations Sec. 3(a)			
Nothing in the Act shall be construed as: (a) subjecting sellers to any other	No change needed	No change needed	May be important information to be disseminated as implementation proceeds.

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type of tax other than sales and use taxes (b) affecting the application of such other taxes (b) enlarging or reducing State authority to impose taxes			
Nexus Sec. 3(b)			
No effect on nexus – the bill does not create nexus	?	?	<ul style="list-style-type: none"> What does this mean? Prior bill only indicated that the bill did not create nexus for other taxes. Query impact on current state statutes, case law and/or administrative practices.
Licensing and Regulatory Requirements Sec. 3(c)			

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<p>Nothing permits or prohibits a State from:</p> <p>(a) licensing or regulating any person</p> <p>(b) requiring a person to qualify to transact intrastate business</p> <p>(c) subjecting a person to State or Local taxes not related to the sale of goods or services</p> <p>(d) exercising authority over matters of interstate commerce</p>	<p>No change needed</p>	<p>No change needed</p>	<p>May be important information to be disseminated as implementation proceeds.</p>
No New Taxes Sec. 3(d)			
<p>Nothing should be construed to encourage a State to impose taxes on goods or services not subject to taxation prior to this Act</p>	<p>No change needed</p>	<p>No change needed</p>	

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Effect on INTRASTATE sales Sec. 3(e)			
Act does not apply to INTRASTATE sales or INTRASTATE sourcing rules, but Streamlined Member States shall comply with all INTRASTATE sourcing rules of SSUTA	No change needed “State granted authority under section 2(a) shall comply with all interstate provisions of the [SSUTA].	Defer to non-SST states	
Effect on Mobile Telecommunications Sourcing Act Sec. 3(f)			
Nothing shall be construed as altering or preempting the Mobile Telecommunications Sourcing Act	No change needed	No change needed	
Section 4: Definitions			
Certified Software Provider	No change needed to SSUTA	Defer to non-SST states	<ul style="list-style-type: none"> • While no change is needed, the related FMSRs may apply and would need to be complied with. • We call them Certified Service Providers
Locality/Local	No change needed to SSUTA	Defer to non-SST states	

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Member State	No change needed to SSUTA	Defer to non-SST states	<ul style="list-style-type: none"> We have interpreted “member state” to mean “full member state”. It appears the bill applies the SSUTA definition of “member state” as it exists on the date the bill is enacted, i.e., the definition cannot be amended going forward.
Person	No change needed to SSUTA	Defer to non-SST states	The bill’s definition of “person” includes “State or local government”.
Remote Sale	No change needed to SSUTA <i>States should confirm that their existing law allows for imposition on “remote sales” as defined.</i>	Defer to non-SST states	<ul style="list-style-type: none"> Not identical to the term as defined in the SSUTA, but it is substantially similar. Consider amending the SSUTA if the GB limits provisions to remote sellers consistent with the FMSRs
Remote Seller	No change needed to SSUTA <i>States should confirm that their existing law allows for imposition on “remote seller” as defined.</i>	Defer to non-SST states	
Sourced	No change needed to SSUTA	Defer to non-SST states	
State	No change needed to SSUTA	Defer to non-SST states	Changes needed if the SSUTA admits “Guam, American Samoa, the United States Virgin Islands, the

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			Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States”
Streamlined Sales and Use Tax Agreement	No change needed to SSUTA	Defer to non-SST states	
Section 5: Severability			
If any provision is held to be unconstitutional, the remainder of this Act shall not be affected.	No change needed	No change needed	
Section 6: Preemption			
This Act shall not be construed to preempt or limit any power exercised by a State or local jurisdiction.	No change needed	No change needed	

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