

Federal Implementation Workgroup Call

March 18, 2013

Workgroup participant

Russ Brubaker, FedTax
Christie Comanita (AZ)
Mark Haskins (VA)
Tim Jennrich (WA)
Bruce Johnson (UT)
Craig Johnson, SSTGB
Ellen Thompson (NB)
David Thompson, SSTGB
Joan Wagon, FedTax
Scott Peterson, Avalara
Diane Yetter, Yetter Tax Consulting
Nancy Prosser (TX)

Other Participants

Beth Freeman for Steve Kranz, McDermott
Will & Emery
Sandra Hoffman (KY)
Gina Dougherty (AK)
Donna Thomas (NJ)
Bob Mueller (IN)
Larry Paxton (IA)
Kristin Shogren (MN)
Gary Centlivre (KS)
Pat Calore (MI)
Harry Fox (NJ)
Rob Carter (KY)
Tim Bennett (KY)
Jonathon Barsade, Exactor
David Campbell, FedTax
Chris Nielson (NV)
John Doyle
Lindsey McAfee (KPMG)
Sherry Hathaway (TN)

Richard Dobson, Chair reported that Tim Jennrich and Craig Johnson would discuss the Marketplace Fairness Act (MFA) of 2013 analysis during the call. Also Pat Calore would discuss follow-up issues that the states should think about either collectively or individually.

MFA of 2013 Analysis

Tim Jennrich said he made two updates based on feedback received, which was reflected in the Webinar materials.

MFA Section 2(c) – Updates

Small Seller Exception Threshold

There were questions received after the last implementation meeting regarding whether non-taxable sales are included in determining the threshold. Mr. Jennrich said generally it appears that it would include both taxable and non-taxable sales based on the language, a reading consistent with discussions at the prior Implementation Workgroup meeting. Another question

was asked in regard to voluntary sellers and whether they are legally required to collect or tax as contemplated under the MFA and so are or are not making remote sales. Because in these cases there is no legal requirement to collect, pay, or remit tax, it appears these sales could likely be treated as remote sales. There were no objections and the related call material updates were retained subject to future revision.

Mr. Jennrich said that Christie Comanita of Arizona had asked about non-Streamlined states resources. He and Craig Johnson are working on developing resources and will report on this at the State and Local Advisory Council (SLAC) meeting in Dallas next week.

MFA Section 2

2(B) - Uniform Tax Base among State and Local Taxing Jurisdictions within the State

Mr. Jennrich walked through the enumerated federal minimum simplifications in the MFA as addressed in the call materials, picking up where the prior Implementation Workgroup call left off on the issue of tax base uniformity.

Scott Peterson asked if there are Streamlined states that have a uniform tax base between the state and local governments. He said assuming the MFA passes the way it is written today, some Streamlined states might need to determine if they have a uniform tax base. Discussion ensued regarding Mr. Peterson's question and whether the requirements are met.

It was then discussed that currently the MFA base requirements were contemplated as being met by the SSUTA and that this may be clarified as the MFA moves forward. In reference to this, Mr. Dobson referred to comments from Mr. Johnson last week, the way the MFA is written, and his understanding of the feedback received from the staff sponsors.

A workgroup participant asked if base uniformity would be applied on a state-by-state basis or applied uniformly across all states. In response, Mr. Johnson suggested that the language supported the idea that within a state, the state and local tax base should be uniform. Nancy Prosser said that Texas would agree with Mr. Johnson's assessment that an item within the state at a local level would have to be taxed the same.

2(C) Uniform Sourcing of Intrastate Sales

Mr. Jennrich said there are federal sourcing rules for interstate sales under the non-Streamlined option in the MFA. Streamlined states under their option would be sourcing sales consistent with the SSUTA. Because of the two options, there may be post implementation work to consider.

Diane Yetter said she was in a meeting last summer with Senator Durbin's staff and an issue came up as to what tax type they would be collecting, i.e., sales and/or use tax. There was some discussion of this issue on the call, but it was decided the question was not well enough developed to address at the time or to conclude there was an issue. Ms. Yetter agreed to provide Mr. Johnson, Ms. Calore, and Mr. Jennrich with more information outside of the workgroup before proceeding further.

2(D) Taxability Information, Free Software, Certified Software Providers, and Liability Relief

It was discussed that currently the MFA requirements were contemplated as being met by the SSUTA and this may be clarified as the MFA moves forward. Joan Wagon indicated that related to software and certified software providers she thought the current Streamlined certified service provider (CSP) model may meet the MFA requirements. Mr. Jennrich asked the CSPs if they would be willing to work on this if needed at some date in the future. Russ Brubaker and Joan Wagon of FedTax, Jonathan Barsade of Exactor, and Scott Peterson of Avalara said they would be happy to help.

There was significant discussion on these requirements generally. Mr. Peterson asked whether participants were reading "free software" as equivalent to a certified software provider under the MFA. Harry Fox also raised the question about whether a Streamlined certified automated system (CAS) might qualify as "free software". Mr. Peterson raised a question about what certification requires under the MFA. While the issues were discussed, no definitive conclusions were articulated. Given the time constraints, Mr. Jennrich suggested the discussion move on and that time permitting the group could return to these issues. Mr. Dobson said we still bleed into the same issue when you get to the next point in the liability relief provisions. The MFA Relief of Liability Provisions was briefly discussed and the suggestion was to approach these provisions in a similar manner to the "free software" and certified software provider provisions.

2(A) Rates and Boundary Database

Under Section 305 of the Streamlined Agreement, member states must provide a rates and boundary database. This is also required by the MFA. It was discussed that currently the MFA requirements were contemplated as being met by the SSUTA and this may be clarified as the MFA moves forward. There was discussion on how this might apply to Streamlined states that have only a single taxing jurisdiction, which the SSUTA Section 305 does not have a requirement for. David Thompson said if required, a rates and boundary database would likely be a one line rate and some of the states already have it out there.

Rate changes

Mr. Jennrich said the requirements indicate that states need to provide remote sellers and certified software providers with at least 90-days notification along with certain liability relief. It was discussed that currently the MFA requirements were contemplated as being met by the SSUTA and this may be clarified as the MFA moves forward. This is one relatively clear instance in which SSUTA might need to be amended if the requirement was made applicable under the Streamlined option at a future date.

Section 3

3(a) – Franchise, Income Tax and Application Tax

The actual language of the MFA indicates that the MFA does not apply to franchise taxes, income taxes and occupation taxes. While raising no implementation issues, Mr. Jennrich said this may need to be reflected in our communications so that businesses understand the limits of the MFA.

Ms. Yetter said when you look at the section regarding uniform taxes her concern was what about specified taxes on telecom, food, etc. or anything else that doesn't meet the simplification requirement. She asked if remote sellers would not be subject to those taxes. Mr. Jennrich suggested she start by looking at the grant of collection authority in seeking to address the question. The Streamlined option appears to apply to taxes covered by the Agreement. Thus, the tax would likely need to be covered by the SSUTA to be included in the grant, and so presumably subject to the SSUTA's provisions. If Diane is referring to taxes under the non-Streamlined option, the state exercising the non-Streamlined option, whether a Streamlined state or otherwise that state would appear to need to legislatively identify the tax under Section 2 and then meet applicable federal minimum simplifications for the tax. Mr. Jennrich noted that it appears states could not; however add one of excluded tax types such as income taxes.

3(b)

It was discussed that the bill does not confer nexus. Mr. Jennrich indicated that this provision itself did not appear to impact the Implementation Workgroup, but it might have impacts for states individually. He also indicated that this was a change from prior bills and it was unclear what the reason for the change was. Ms. Wagnon suggested the language may have been chosen because there has been a continued concern about whether it creates nexus for sales taxes or for other reasons. Mr. Jennrich raised the possibility that the language may also clarify that due process nexus is not conferred. Mark Haskins of Virginia said today's state taxes had an article that talks about this provision and its relation to nexus. Sherry Hathaway (TN) asked if there's a difference between sales and/or use tax on retail sells versus sales tax imported into

a particular state and used there. Ms. Calore said if you look at the language it uses the word “person” which is defined quite broadly to include other entities and she asked if there may be concern about the application of nexus in control group setting that was also being addressed. Further discussion ensued and it was suggested this is one of those sections that states should look at to see what that means in terms of the application of their individual laws.

3(c) Licensing and regulatory requirements

The status quo remains for state authority related to certain licensing and regulatory issues. While raising no implementation issues appear implicated, Mr. Jennrich said we may want to disseminate this information in our stakeholder information as we move forward in Mr. Johnson’s FAQ subgroup. Ms. Yetter asked if there might be a conflict between Sections 3(a) and (c) of the MFA? Discussion ensued but no conflict was identified.

3(d) No new taxes

This section indicates the MFA is not encouraging the imposition of new taxes.

3(e) - Intrastate sales

This section clarifies that the Act does not apply to intrastate sales and sourcing rules and indicates that the Streamlined option states must comply with the intrastate sourcing provisions in the SSUTA. Mr. Jennrich indicated from the Streamlined perspective there is no specific rule or provision that is referred to as an intrastate sourcing provision. However section 310.1 deals with origin sourcing and functionally applies to intrastate sales and may be what was contemplated. Mr. Jennrich indicated that while not an Implementation Workgroup issue, the Streamlined states adopting origin sourcing will want to be aware of this provision when determining whether they have met the requirements of the MFA.

3(f) - Mobile Telecommunications Sourcing Act

This provision recognizes that the federal Mobile Telecommunications Sourcing Act remains the law of the land for the sourcing of commercial mobile radio services for all states even after passage of the MFA.

Section 4 - Definitions

It was said from a Streamlined perspective it does not appear that changes to the SSUTA are needed with respect to the definitions. However individual states are encouraged to review the definitions when reviewing the MFA in order to determine if they may need to consider state statutory changes in regard to any of the definitions.

Steve DelBianco raised a question about whether the language “into the state” in the definition of “remote sales” may be unclear or have unintended implications. There was general consensus the language created no significant issues.

Sections 5 & 6: Severability and Preemption

Mr. DelBianco asked whether states would continue to have authority for asserting nexus claims outside of the MFA on account of the preemption provisions and whether this was good policy. Mr. Jennrich responded that he read the preemption provisions to preserve the status quo for nexus under existing state and federal law. The question raised was really a policy question beyond the Workgroup scope.

MFA 2013 – List of Follow up Issues

Ms. Calore reported a list of follow-up items for which will be discussed at the SLAC meeting to be held in Dallas on March 26-27.

1. Our understanding is that full member SSUTA states are authorized to require remote sellers not qualifying for the small seller exception to collect and remit sales and use taxes beginning 90-days after the State publishes a notice. In no event, however, will authority commence earlier than the first day of the calendar quarter that is at least 90 days after the federal bill is enacted.
2. States must publish a notice of intent to exercise authority under the Act. Should the Governing Board develop and recommend a uniform best practices Notice for state usage?
3. Draft examples describing how the small seller exception will be administered.
4. Prepare a Checklist of issues states need to look at in their own statutes and rules.

Some items to consider include:

- a. Voluntary Seller Definition – this definition appears in the CSP contract (section D3). Some states may also have the term “voluntary seller” in their statutes. SSTP states may want to review their statutes to determine whether they need

to amend their statutes to update this definition should the federal legislation pass.

- b. States need to review their statutes to confirm they meet all of the federal constitutional requirements for asserting collection authority.
5. The SST organization is reviewing the SSUTA registration system for use by both member and non-member states to determine what modifications may need to be made to deal with registration and deregistration of remote sellers (e.g., year to year fluctuations and discontinuance of businesses).
 6. FAQs – Various FAQs will need to be prepared to address questions as to administration under the SSUTA in light of the federal legislation.

Mr. Dobson said Ms. Calore's list of continuing issues was very thorough of continuing issues. He also indicated that from the state and government perspective, all of us have had to implement legislation, but not on this scale before. He said the questions are all good and you have to look at all these things from a practical standpoint. Russ said that federal legislation is written broadly.

Collection of Information – Contacts List Subgroup

Ellen Thompson said they had heard from 6-states in response to the survey and will resend the request.