

**A motion by Kansas, Kentucky, and Washington to amend the SSUTA
relating to vendor compensation: (referred to Executive Committee)**

The intent of this amendment is to define the Governing Board's standards for reasonable compensation, to become effective with the passage of and in accordance with the federal legislation (the Main Street Fairness Act). This proposed amendment, AM 09003 has been [revised as of 9/23/2009](#) to conform to the expected language of the federal act at the time of its introduction.

I. Vendor Compensation Requirement

A. Requirement for Collection Authority under federal legislation (Mainstreet Fairness Act).

1. In order for a Member State to require remote sellers to collect sales and use tax on remote sales, a Member State must provide vendor compensation to all sellers, instate and remote, which meets the requirements of the Governing Board and the Main Street Fairness Act as passed by Congress .
2. A state shall not be required to comply with the requirements for compensation in the Mainstreet Fairness Act in order to be considered a Member State under the Agreement, but such state shall not have remote seller collection authority authorized under Section 4 of the federal act .
3. Collection authority for all states will terminate if membership of the Governing Board falls below 10 states representing 20 percent of the population.

B. Petition for Collection Authority and Compensation Compliance Determination.

1. The Governing Board shall certify which Member States are in compliance with the minimum simplification and compensation requirements of Section 7 of the Mainstreet Fairness Act and shall reevaluate such certification on an annual basis.

(a) A Member State shall petition the Governing Board for certification that it meets all the compensation requirements of this section and the Mainstreet Fairness Act. The petition must include the most recent Certificate of Compliance issued by the Compliance and Interpretation Committee (CRIC) which shows it to be in full compliance with the minimum simplification standards, other than compensation.

(b) A petition for collection authority may be submitted to the Governing Board at any time but this state specific authorization shall not precede the 6-month general collection authority activation date provided within the Main Street Fairness Act.

(c) Upon certification by the Governing Board, the Member State will be authorized to require collection by remote sellers. This authority will commence for a specific state on the first day of the next calendar quarter sixty days after the date the Governing Board makes its compensation determination. Such collection authority will continue as

long as the Member State provides compensation to all sellers, both in-state and remote, and maintains its certification and compliance with the Agreement.

2. The Governing Board shall establish within its bylaws a Compensation Certification and Review committee comprised of no less than 11 members. Membership should be drawn from both advisory councils, and delegates to the Governing Board. The Chair of the Compliance and Interpretations Committee should be ex officio.

The purpose of this committee is to:

- (a) review each Member State's petition pursuant to B, 1;
- (b) perform annual reviews of state compensation plans; and
- (c) make recommendations to the Governing Board for action on any matter related to compensation.

3. At any time after the Governing Board has made the determinations required by the federal act in Section 4(c) to grant collection authority to a state, any person who may be affected by the Agreement may petition the Governing Board for a determination on a Member State's compliance with the federal Act or the Agreement. Such request shall be deemed a petition for matters of compliance under Section 1002 of the Agreement and shall comply with the rules and procedures for issue resolution in Section 1001 of the Agreement.¹

4. Upon a final determination by the Governing Board that a Member State's compensation is not in compliance with the compensation requirements of the federal act, [Section 7, 14(a) or 14(b),] then a Member State's authority to require collection by remote sellers shall automatically terminate 30 days following the date the Member State is finally determined to be out of compliance.

5. Upon a final determination by the Governing Board that a Member State is not in compliance with the minimum simplification parts of the Agreement, other than compensation [Section 7, 14(a) or 14(b),], that Member State shall lose its remote seller collection authority the earlier of

- (a) the date specified by the Governing Board, or
- (b) the later of the first day of January at least two years after the Governing Board finally determined the state was not compliant or the first day of a calendar quarter following the end of one full session of the state's legislature beginning after the Governing Board finally determined the state was not compliant.

6. Any Member State that loses its collection authority must petition again to have its remote seller collection authority restored. The new petition, which may be submitted at any time, should identify how the issues which caused loss of certification have been addressed and why certification should be restored.

C. Standards for Compensation

1. The Member State shall provide reasonable compensation to all sellers for expenses incurred in administering, collecting, and remitting sales and use taxes (other than taxes

paid on goods and services purchased for the consumption of the seller) to that Member State.

2. Compensation consists of two parts.

Part One Compensation:

Every State with collection authority must compensate every seller for the credit card and debit card fees paid to unrelated entities for the sales and use tax portion of a sale.

- (a) This compensation may be offered as a credit on the sales tax return (SER) for the actual amount paid, or paid according to a formula which will closely approximate the amount due. This formula should be developed in conjunction with the Business Advisory Council and adopted as a Governing Board Rule to promote ease of administration for both multistate sellers and states. Retailers must be able to document the amount claimed.
- (b) The Governing Board may, in response to changing technology, include other forms of electronic payment charges or fees on the sales and use tax portion of a sale if enacted by a Governing Board Rule.²
- (c) Part One of the compensation formula may not be capped.

Part Two Compensation:

Every State must compensate all sellers for other costs, not related to credit card or debit card fees, which may be reasonably related to actual costs incurred in collecting and remitting sales and use taxes. A compensation formula in the form of a rule (see C. 2.) must be approved by the Governing Board prior to any state exercising its collection authority. The rule must set out the different variables to be considered in determining Part Two compensation. It should determine the extent to which compensation may

- (d) vary from state to state,
- (e) vary according to collection costs of sellers of different sizes,
- (f) vary according to the complexity of a state's laws, such as having a single state rate versus many local jurisdictions, clothing caps or thresholds, origin sourcing, etc.
- (g) deviate from the minimum standard,
- (h) be reasonably capped,
- (i) be adjusted in relationship to adjustments in the size of the small business exemption adopted by the Governing Board,

3. Rules setting forth minimum compensation amounts, must be approved by the Governing Board prior to any state exercising its collection authority. Procedural rules to facilitate calculation and payment of compensation within the Simplified Electronic Return must be in place prior to any state exercising its collection authority. All rules relating to compensation must be reviewed biannually by the Governing Board in time for states to incorporate any changes into their next legislative session.³

4. States shall begin paying compensation for all remote sellers with submission of the seller's first simplified electronic return (SER). Each state will track its collections from these remote retailers who have registered and are collecting as a result of the federal grant of authority. When the total of their monthly collections meets or exceeds the amount that

would be required to pay the approved level of vendor compensation for all other sellers, then vendor compensation will be due and owing beginning the following month forward for all sellers. In a state that is already compensating its vendors, only the difference above the currently paid amount will be required to accumulate before implementing the approved compensation.⁴

5. Twenty-four months after obtaining remote collection authority, if a state is not receiving sufficient revenues from remote collectors to pay the Governing Board-approved compensation rate to all vendors, then the state may notify the Governing Board that its remote collection authority should expire and terminate its obligation to pay vendor compensation at the Governing Board-approved rate.⁵

6 Compensation will be paid in any month that a return is timely filed and paid. No compensation will be paid for a late-filed return.

7. A remote seller can elect either to (a) have the state pay for the use of a Certified Service Provider or (b) receive vendor compensation, but not both.

II. Small Seller Exemption

A. The Governing Board shall determine which remote sellers without nexus in a state may be exempted from the requirement to collect sales taxes. In making such a determination the Governing Board should consider whether:

1. the sales are occasional and isolated;
2. the sales are of such low volume that the administrative expense of collection imposes too great a burden on both seller and state;
3. the collection burden on small sellers is offset by compensation;
4. the seller has a monthly filing requirement in a state;
5. CSP's for sellers in that industry group are readily available;
6. technology solutions are available to mitigate the filing burden.

In making the determination, the Governing Board should identify the total annual dollar volume of remote sales nationwide above which would trigger a collection responsibility for sellers without nexus under the federal act. "Remote Sales" are sales into a state in which the seller would not be required to collect tax but for the requirement imposed by Congress. The exemption threshold should be set at a relatively low level and over time should gravitate in the direction of being a threshold that excludes only occasional sales and sellers from the collection requirement. The threshold should be a single national threshold and not have a state-level component.

B. For the first year after collection authority is authorized by Congress, any remote seller and its affiliates with less than \$____,____⁶ in gross remote sales nation-wide in the preceding 12 months is exempt from the collection requirement. That exemption is valid until the following year, when the seller would again have to determine if the small seller exemption applies based on sales volume of the seller and the annual policy determination of the board.⁷

C. In determining whether a retailer qualifies for the Small Seller Exemption, the total remote sales for the period of October 1 to September 30 must be computed. If the sales exceed the exemption amount, then the retailer would have to begin collection on January 1 of the following year. Once it is determined that a seller has exceeded the exemption threshold, the seller must be allowed one quarter to prepare before the collection obligation becomes effective. If a seller that is collecting currently falls below the threshold amount, that seller should be required to collect until the end of the following calendar quarter

D. In determining whether a seller has exceeded the specified exemption threshold, the sales of the seller should be grouped with its affiliates in the same line of business to avoid an incentive for a seller to split its operations among multiple entities in order to stay below the threshold. In addition, there should be no exemption for individual sellers below a specified threshold if the affiliated group of which it is a part exceeds the overall threshold.

E. The Governing Board shall post information about the Small Seller Exemption on its website at least 90 days prior to the date on which it becomes effective on the first day of a calendar quarter.

F. This exemption must be reviewed annually, but may be adjusted no more frequently than once a year. Sellers claiming the exemption must file an exemption certificate with the online registration system, indicating they meet the exemption criteria.

G. Any seller utilizing a third party for hosting its sales and processing payments shall not be entitled to the small seller exception if the dollar volume of sales for all sellers using the host exceeds the threshold.

These sections are repealed:

Section 603: MONETARY ALLOWANCE FOR MODEL 3 SELLERS AND ALL OTHER SELLERS THAT ARE NOT UNDER MODELS 1 OR 2

Section 604: ADDITIONAL MONETARY ALLOWANCE REQUIRED FOR MEMBERS MAKING CERTAIN ELECTION (Effective January 1, 2010)

ENDNOTES

¹ What is the process when someone challenges the certification for collection authority?

Response: This would appear to be a matter of a State's compliance, and Section 6 of the Mainstreet Fairness Act allows "any person affected by the Agreement" to file such a petition with the Governing Board "for a determination on any issue relating to implementation of the Agreement" "at any time." Section 1002 of the Agreement provides for the "petition for resolution" that "any member state" or "person" can file to resolve "matters of compliance under Section 805." Thus, the "petition for resolution" in Section 1002 of the Agreement appears to apply to the type of petition contemplated under Section 6 of the Mainstreet Fairness Act. Such a petition must be acted upon by the Governing Board "within 6 months after the date on which the petition is submitted."

Section 1001 of Agreement provides for promulgation of rules governing the issue resolution process. It would seem logical for these rules to apply to the petition contemplated under Section 6 of the Mainstreet Fairness Act. Rule 904 provides for "compliance" petitions: "A member state or person may petition the Governing Board to determine matters of a member state's compliance with the Agreement." The rule then provides a process for making that determination. Initially, the Compliance Review Committee makes a recommendation to the Governing Board as to whether the petition should be considered or not. If the Governing Board determines not to consider the petition, then the petitioner is notified, and the petitioner may then file a "petition for reconsideration" with the Governing Board, which is governed by Rule 1001, which provides: "Any party dissatisfied with a decision of the Governing Board may file a petition with the Governing Board to request reconsideration of the decision." Such a petition must be filed within 60 days after the Governing Board decision.

One concern: if the petitioner must go through this two-step process (first file a petition for compliance determination, and then follow that up with a petition for reconsideration), is there enough time for the Governing Board to act on all this within 6 months, as required under Section 6 of the Mainstreet Fairness Act (which provides for Federal Court of Claims review if the Governing Board does not act on the petition within 6 months)? It may make sense to structure this compensation amendment to the Agreement so that the petition under Section 6 of the Mainstreet Fairness Act is treated as a "petition for reconsideration" under Rule 1001, so as to streamline the process for getting the petition addressed by the Governing Board within the 6 month time frame. Rules 904 and 1001 may need to be amended to be consistent with such a change.

Could challenges come from a state that was denied, or from a seller that has to collect, or the business community, or another state?

Response: Section 6 of the Mainstreet Fairness Act gives "any person who may be affected by the Agreement" the right to file a petition. The Act defines "person" to also include a state. Section 1002 of the Agreement allows "any member state or person" to petition the Governing Board to invoke the issue resolution process regarding a state's compliance.

What is the timeline?

Response: Rule 1001 of the Agreement requires that a petition for reconsideration must be filed within 60 days of the Governing Board decision being requested to be reconsidered. Section 6 of the Mainstreet Fairness Act requires that the petition be addressed by the Governing Board within 6 months, or the petitioner may then seek judicial review before the Federal Court of Claims. The petitioner must see judicial review within 60 days after that 6 month time period expires. If the Governing Board does timely act on the petition within the 6-month time frame, then the petitioner has 60 days after the Governing Board denial of the petition to seek judicial review.

What are the appeal rights?

Response: Under Section 6 of the Mainstreet Fairness Act, if the Governing Board denies or partially denies the petition, then the petitioner may seek judicial review before the Federal Court of Claims within 60 days of the denial.

When does the judicial review by the Federal Court of Claims begin? Does the new language change any of this?

Response: Section 6 of the Act covers this: The petitioner may seek judicial review within 60 days after the Governing Board has either denied/partially denied the petition or has failed to act on it within 6 months. The latest proposed change to Section 6 gives the Federal Court of Claims jurisdiction to remand the matter back to the Governing Board and grant “any relief that the court considers proper, including declaratory and injunctive relief, except that the court shall not award monetary relief.”

Final determination shall mean that all appeals processes provided for in the Agreement have been exhausted or the time for pursuing such appeals has expired.

Does this include actions at the federal court of claims as well?

Response: Section 4(c) of the latest proposed version of Act provides: “An action before the Federal Court of Claims pursuant to Section 6 of this act shall not operate to stay a state’s loss of collection authority.”

² Wording suggested by Amazon to cover Pay Pal, ACH transactions, etc.

³ Ultimately, this must agree with the compensation formula that is being developed.

⁴ **This is the trigger for providing instate compensation when new money reaches a certain level.** Would it be better to say that only remittances from remote sellers registering after remote collection authority begins would be considered as “new revenue” for purposes of this provision?

⁵ Should “new revenue” be defined as coming from remote retailers registering after remote collection authority commences?

⁶ Since the amount is measured in “gross remote sales nation-wide” this is still going to be a fairly generous exemption (as opposed to basing it on gross sales nation-wide), but a big improvement over using sales in a particular state, or something even more restrictive.

⁷ **Excerpts from the Small Seller/Compensation Task Force Report.**

√ At this point, the primary determinant of the threshold would be the “break-even” point for the state in terms of the vendor compensation being at such a level it would not warrant pursuing the tax. Likewise, a higher threshold could be considered to reduce the level of vendor compensation required for certain classes of sellers.

√ The Task Force believes the federal remote sales legislation should contain a small seller threshold below which a seller would not be required to collect tax in states where it does not have nexus under current law. A threshold is necessary to rationalize the costs and benefits of collection to both sellers and states and to recognize a reality that the smallest sellers cannot practically collect in all states at a reasonable cost relative to the amount of tax they would collect. At the same time, the Task Force believes that sales tax collection is an obligation of doing business and that fundamental fairness requires that, to the extent practical, all sellers should have a collection obligation.

√ The Task Force believes that the threshold should be set at a relatively low level and over time should gravitate in the direction of being a threshold that excludes only occasional sales and sellers from the collection requirement. The level at which the threshold can be set will be dependent on the degree to which tax compliance technology is made readily available to sellers at little or no cost, the simplifications incorporated in the Agreement, and the level of vendor compensation provided. The Task Force believes that the availability of technology must be improved and that additional simplifications must be adopted in order for the threshold to reach what it considers to be a desirable level. Specific suggestions are made below.

√ The Task Force believes that any threshold should be plain, simple and straightforward so that a seller can know his/her situation and plan accordingly. As a result, the Task Force recommends that any small seller threshold should be based simply on a seller’s gross remote sales “Remote Sales” is used here in the same manner as it is in H.R. 3396 and S. 34 as being a sale into a state in which the seller would not be required to collect tax but for the requirement imposed by the legislation. for a specified twelve month period, e.g., the twelve months ending Sept. 30 each year. In addition, once it is determined that a seller has exceeded the threshold, the seller must be allowed a period of time (at least one quarter) to prepare before the collection obligation becomes effective. Likewise, if a seller that is collecting currently falls below the threshold, that seller should be required to collect until the end of the following calendar quarter (presuming that is the time allowed for a seller to prepare for the collection requirement.) The Task Force recommendation differs from the current federal legislation which based the threshold on “gross remote taxable

sales.” The Task Force believes that the “taxable sale” requirement adds complexity to the threshold and increases the burden of any state audits to determine compliance with the threshold.

√ In determining whether a seller has exceeded the specified threshold, the sales of the seller should be grouped with affiliates in the same line of business (as in the current legislation) to avoid an incentive for a seller to split its operations among multiple entities in order to stay below the threshold. In addition, the Task Force does not recommend an exclusion for individual sellers below a specified threshold even though the affiliated group of which it is a part exceeds the overall threshold. In a similar vein, the Task Force believes the threshold should be a single national threshold and not have a state-level component, i.e., not contain a requirement that would say a seller with over X amount of sales in a particular state (where it has no physical presence) would be responsible for collection in that state even though it did not exceed the national threshold.

√ The Task Force expects that any small seller threshold would be implemented on a phased basis, i.e., the threshold would be reduced over time. Phasing is necessary for two reasons: (a) to allow the Streamlined organization to adjust to and work with the influx of registrants; and (b) achieving a threshold at the level envisioned by the Task Force is contingent on the adoption and implementation of additional simplifications and increases in the availability of technological solutions to a broad range of sellers.

√ The Governing Board should also give consideration to whether sellers making remotes sales should be required to certify in some fashion (e.g., via a report filed with the Streamlined Board) that they are below the threshold or whether enforcement of the threshold would be on an “after the fact” audit basis. Requiring some annual certification could be seen as intrusive, but it would allow a seller to think about its position and begin necessary planning as well as putting them in contact with the Streamlined organization so that assistance can be provided.

√ The Governing Board should review the small seller threshold regularly (at least annually) to determine its effect and operation as well as other adjustments are necessary or warranted in light of changing technology and simplifications.