

The Marketplace Fairness Act of 2013

An effort is underway in Congress to pass a bill that would allow taxes to be collected for online purchases

Under longstanding Supreme Court precedents, state and local governments cannot require remote sellers—retailers with no employees or physical property in the state—to collect their sales and use taxes. As consumers make more purchases online, the inability to collect the taxes on these sales has resulted in growing state revenue losses. Purchasers are obligated to pay the tax (technically “use” tax), but it is impractical for states to collect it from them when the seller does not do so. Since the 1990s, states have sought federal legislation authorizing them to compel remote sellers to collect these taxes (a power that the Supreme Court has stated Congress has under the Commerce Clause).

The U.S. Senate responded by passing the Marketplace Fairness Act (S. 743) on May 6, 2013, which provides states with authority to require remote sellers to collect and remit tax on sales. After passage by the Senate, the bill was referred to the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law on June 14, 2013.

States can qualify to collect taxes in two ways

A state can qualify under the act to require remote sellers to collect its taxes in either of two ways:

- By being a member of the Streamlined Sales and Use Tax Agreement (SSUTA), which is a voluntary agreement entered into by roughly 28 states that provides uniform tax policies and collection procedures in an effort to simplify tax administration for remote sellers; or
- By meeting a few key requirements in the act. First, the state must establish a single entity responsible for tax administration (e.g., the state department of revenue). Second, the state must also provide uniform tax rules for remote sellers. Third, the state must provide remote sellers with software (at no charge) that calculates the tax and files the returns. Finally, the state must relieve both the remote seller and the software provider from liability for incorrect calculation, remittance, or noncollection of sales and use taxes if the liability is an error by the software provider.

Small sellers are excluded

As passed by the Senate, the act excludes any remote seller who had less than \$1 million in gross receipts in the previous calendar year from any collection requirements. However, in certain circumstances, the act requires remote sellers to aggregate their gross receipts in applying the \$1 million test. For instance, if two or more remote sellers are related entities under the Internal Revenue Code (e.g., they are controlled subsidiaries or affiliates or close relatives are controlling owners), they must aggregate their annual gross receipts. Therefore, a seller could not create multiple businesses, each with less than \$1 million in gross receipts, to avoid collecting taxes under the act.

There is a 180-day notice requirement The act imposes a 180-day mandatory notice period. This requirement, in combination with the act's effective date, means that a state cannot use its authority until the first day of a calendar quarter that occurs at least 180 days after the later of the state's published notice or enactment of the act.

Minnesota intends to collect the tax Minnesota published its intent to collect tax under the act by the legislature's enactment of the 2013 omnibus tax bill into law on May 24, 2013. [Laws 2013, ch. 143](#), art. 8, § 18. If Congress enacts the Marketplace Fairness Act in 2013, the earliest that Minnesota could begin collecting sales tax would be January 1, 2014. Because Minnesota is a member of SSUTA and has published notice, the state could begin requiring collection after the mandatory notice period.

The act is limited to sales and use taxes The act limits its authority to sales and use taxes. Specifically, enactment of the Marketplace Fairness Act will not subject a remote seller to any other type of taxation (e.g., franchise, income, or occupation taxes).

The act also does not create any nexus or alter the standards used to determine nexus between a state and an individual. The act also allows sellers to choose a third-party certified software provider if they prefer not to use the software provided by the state.

States retain licensing and regulatory powers Under the act, states retain the authority to require licenses and to regulate business of any person. States can require remote sellers to qualify to conduct business in the state, and to pay any necessary licensing fees associated with doing business.

The act adopts SSUTA sourcing rules The act borrows many sourcing rules from the SSUTA. The location to which a remote sale is sourced is the location where that product or service is received by the purchaser, based on the instructions provided by the purchaser as part of the sale. If no delivery location is specified, the seller must make reasonable effort to determine the purchaser's location. If the seller cannot obtain that information, the sale is sourced to the address of the remote seller.

The future of the bill is uncertain The bill was referred to the House Committee on Judiciary, and later referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, where it awaits further action. Whether the House will act on the bill or if it does, what form that will take, is unclear at this point.

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