

June 12, 2013

Re: Marketplace Fairness Act

Dear Representative:

We are writing on behalf of the remote sales retailers in our states to highlight a constitutional concern with S. 336/S.743/H.R.684, the "Marketplace Fairness Act." By authorizing the enforcement of state use tax laws that require remote sales retailers to collect and remit use tax proceeds to out-of-state taxing authorities that the retailer has not established "minimum contacts" with, the Act violates the Due Process Clause. In order to avoid years of costly, protracted, and unnecessary litigation, we urge you to oppose this Act.

Although Congress can authorize the enforcement of state legislation that burdens interstate commerce, Congress may not authorize the enforcement of state laws that violate the Due Process Clause. So, although this Act may clear the Commerce Clause hurdle, state taxing authorities wishing to collect use taxes from out-of-state businesses will still face a Due Process Clause hurdle. The Due Process Clause "demands that there be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with the taxing State." For purposes of evaluating whether this type of law violates the Due Process Clause, the relevant inquiry is not whether the remote sales business has a "physical presence" in the taxing state, but whether the business has adequate contacts with the taxing state "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."

Under this standard, an out-of-state retailer that purposefully avails itself of the benefits of an economic market in the forum state by engaging in continuous and widespread solicitation of business will have established minimum contacts with the forum state sufficient to satisfy Due Process. This Act, however, does not limit the enforcement of state use taxes to remote sales retailers that have purposefully availed itself of benefits in the taxing forum. Instead, it will authorize enforcement of state use tax laws that require any remote sales retailer located within our borders with a website and a single customer in a distant location to collect and remit use taxes from that transaction. Under the Act, it makes no difference whether or not the retailer targeted the taxing forum or had a physical presence there. As a result, any state's efforts to enforce the collection of use tax proceeds from remote sales retailers with little or no contact with the taxing authority will remain constitutionally suspect. This uncertainty will trigger years of costly litigation for state taxing authorities and remote sales retailers as the courts define the contours of what constitutes adequate contact to satisfy Due Process.

Aside from the costly Due Process litigation this Act will trigger, requiring small, brick-and-click remote sales retailers to collect and remit use taxes to upwards of 9,600 taxing jurisdictions will be a costly burden on our small businesses making it more difficult for them to compete in the market. Given the clear legal and economic pitfalls the Act presents, we strongly urge you to oppose it.



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