

SST Member States must extend to SST CSPs the same liability protections afforded to sellers for use of automated systems certified by those Member States. [See FAQ XXX](#).

B. Non-Streamlined States

What is the difference between a “certified service provider” under the SSUTA (“SST CSP”) and a “certified software provider” under the MFA (“CSP-Non-SST”)? – Yet to be determined

These FAQs are drafted to provide information about the Marketplace Fairness Act (MFA) at a high level, with the intended audience being staff in departments of revenue and elected officials, such as legislators and governors, in states that are not part of the Streamlined Sales and Use Tax Agreement (SSUTA). It is intended that individual states will provide additional FAQs that explain in detail how each state intends to implement the MFA once the bill becomes law and each non-SST State makes decisions about whether to conform to the MFA’s requirements.

1. What is the Marketplace Fairness Act (MFA)?

Proposed Answer: The MFA is the name given to the federal legislation enacted by Congress on [XXXXX](#), which gives states the authority to require all sellers not qualifying for the small seller exception to collect their sales and use tax, but only if the state is either (a) an SST Member State or (b) adopts and implements certain other minimum simplifications.

2. What does passage of the MFA mean for non-SST States?

Proposed Answer: Passage of the MFA means that non-SST States can require sellers not qualifying for the small seller exception to collect sales and use tax on remote sales sourced to their state once the state adopts and implements certain minimum simplification requirements. However, the state cannot begin exercising this authority until the first day of the calendar quarter that is at least 6 months after the state enacts the minimum simplifications. [See FAQ XXX](#) for information on how the passage of the MFA affects SST Member States.

3. Which remote sellers can a state require to collect and remit its sales and use taxes under the MFA?

Proposed Answer: States that have complied with the requirements of the MFA can require every seller making remote sales into its state to collect and remit its state’s sales and use taxes, unless the seller qualifies for the small seller exception (i.e., the seller has gross annual receipts in total remote sales not exceeding \$1 million in the

preceding calendar year). If a seller sells over \$1 million in products in the prior calendar year with those sales sourced to customers located in states where the seller does not have sufficient contacts to be required to collect and remit the tax (*e.g.*, physical presence, see *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)), the seller may be required to collect taxes as a remote seller on those sales. In determining the \$1 million threshold, it does not matter if the sales are taxable. There are also attribution rules that apply to aggregate receipts from persons based on: (i) the person being a related person pursuant to I.R.C. §§ 267(b) & (c) and 707(b)(1) or (ii) a relationship with a person designed to avoid the \$1 million threshold. See FAQ XXX for the states asserting remote seller collection authority under the MFA.

Example: A seller has retail stores (*e.g.*, physical presence and a sales tax collection requirement) in Florida, Georgia and Alabama and only makes delivery sales using a common carrier to customers in Arkansas (an SST Member State) and Mississippi (a non-SST State). Absent the MFA, the seller has no requirement to collect tax in Arkansas or Mississippi. In determining whether the seller is over \$1 million in total remote sales, only the sales to Arkansas and Mississippi are taken into account. If the sales to customers in Arkansas and Mississippi are less than \$1 million in the preceding calendar year, the seller is still not required to collect the sales or use tax for Arkansas and Mississippi. If those sales are over a \$1 million in the preceding calendar year and Arkansas and Mississippi comply with the requirements of the MFA, the seller will be required to collect the tax for those states.

4. How is the \$1 million small seller exception computed?

Proposed Answer: The \$1 million small seller exception is based on the total remote sales a seller has in the prior calendar year. Any sale, including nontaxable sales, sourced to a location where the seller does not have a requirement to collect the tax, absent the MFA's authority, is a "remote sale." A seller starting a new business does not need to register and begin collecting and remitting a state's tax on remote sales until its remote sales (which must be aggregated with related members' remote sales in the prior calendar year) exceed \$1 million. Note: Rules apply to prevent a seller from creating multiple entities to fall below the small seller exception. See FAQ XXX for more information and an example of the remote seller calculation.

5. What are the minimum simplification requirements that a state must meet if it does not belong to the SSUTA but wants collection authority over remote sellers?

Proposed Answer: In order to obtain remote collection authority, the MFA requires that a non-SST State must meet the following minimum simplification requirements:

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- a. Enact legislation which specifically identifies the taxes to which the authority applies and the products, otherwise subject to these taxes, that will not be subject to this authority.
 - b. Have only one entity within the state that administers the state and local sales and use tax, processes returns, and performs audits.
 - c. Have only one audit for remote sellers for all state and local taxing jurisdictions within the state.
 - d. Have a single sales and use tax return to be used by remote sellers to be filed with the single entity in the state that is responsible for tax administration.
 - e. Not require remote sellers to file sales and use tax returns any more frequently than returns are required for nonremote sellers, not impose requirements on remote sellers that the state does not impose on nonremote sellers with respect to the collection of sales and use taxes, and not allow any local jurisdiction to require a remote seller to submit a sales and use tax return or to collect sales and use taxes.
 - f. Provide a uniform sales and use tax base within state and local taxing jurisdictions, unless the state does not seek remote collection authority on any specifically identified products when the items are not both taxable or exempt at both the state and local level.
 - g. Follow uniform procedures for sourcing remote sales.
 - h. Relieve remote sellers from liability, penalty, and interest for the incorrect collection, remittance, or noncollection of sales and use taxes if caused by an error or omission made by the certified software provider (non-SST CSP), and non-SST CSP from liability for such mistakes if the error results from misleading or inaccurate information provided by the remote seller.
 - i. Relieve remote sellers and non-SST CSPs from liability for incorrectly collecting, remitting, or failing to collect sales and use taxes if the liability is the result of incorrect information or software provided by the state.
 - j. Provide 90 days' notice of a state or local rate change to remote sellers and non-SST CSPs and provide relief to any remote seller or non-SST CSP for collecting the tax at the immediately preceding rate if the 90-day notice period is not followed.
 - k. Provide remote sellers with information as to the taxability of products, exemptions available for products, and a rates and boundary database.
 - l. Provide remote sellers with free software that calculates sales and use taxes due on each transaction when the transaction is completed, files sales and use tax returns, and is updated to reflect rate changes.
 - m. Create certification procedures for non-SST CSPs.
6. When can a non-SST State begin exercising remote seller collection authority once it complies with the simplification requirements?

Proposed Answer: Non-SST States can exercise remote seller collection authority no earlier than the first day of the calendar quarter that is at least 6 months after the date that the state enacts legislation to exercise the authority that meets the simplification requirements. The plain language of the MFA appears to allow a non-SST State to pass legislation prior to the MFA becoming law with the result that when the MFA becomes law the required 6-month waiting period for some non-SST States may already be completed.

7. What types of taxes can a non-SST State require remote sellers to pay or collect and remit once the state implements the simplification requirements?

Proposed Answer: According to the express language of the MFA, non-SST States can only ask remote sellers “to collect and remit sales and use taxes with respect to remote sales sourced to that State.” The MFA does not provide a definition for the term “sales and use taxes.” Each State will identify the specific taxes that are covered by the provisions of the MFA which remote sellers would be required to collect.

The MFA also contains provisions that apply to all states seeking remote collection authority that provides nothing in the MFA “shall be construed as . . . subjecting a seller or any other person to franchise, income, occupation, or any other type of taxes, other than sales and use taxes; . . . affecting the application of such taxes; or . . . enlarging or reducing State authority to impose such taxes.” The MFA further provides that, as applied to all states seeking remote collection authority, nothing in the Act “shall be construed as permitting or prohibiting a State from . . . subjecting any person to State or local taxes not related to the sale of products or services.”

8. What does it mean when the MFA says that a non-SST State has to specify the taxes the state intends to require remote sellers to collect?

Proposed Answer: While the MFA is silent on the degree of specificity a non-SST State must use in its conforming legislation to comply with this provision of the Act, each non-SST State must identify the taxes to be conformed.

States refer to sales and use type taxes in various ways and in various statutory provisions. Therefore, in order to exercise remote collection authority under the MFA, each non-SST State has to identify the exact taxes that the state intends to conform. For example, assume a state imposes a limited sales and use tax under Chapter A of its Tax Code on most products, such as clothing and data processing services, and also imposes a motor vehicle sales and use tax under Chapter B of its Tax Code. If the state’s legislature seeks remote collection authority under the MFA, it needs to state clearly which chapters of the Tax Code will be conformed.

The MFA provides non-SST States with flexibility to exclude from remote collection authority expressly identified products in the state’s legislation. Therefore, the state cannot impose collection responsibilities on remote sellers of these products. For example, assume a state provides a partial exemption on sales of gasoline such that sales and use tax applies at the local level while it is exempt from sales and use tax at the state level. The MFA allows the state to specifically identify and exclude from remote collection authority gasoline so that the difference in taxation at the state and local level can continue, but remote sellers of gasoline cannot be required to collect tax on the sale of gasoline.

9. What does it mean when the MFA says that a non-SST State has to specify the products subject to the tax by remote sellers?

Proposed Answer: The MFA provides non-SST States with flexibility to seek remote collection authority for products only if expressly identified in the state’s conforming legislation. Congress recognized that to improve simplification for remote sellers, non-SST States needed the authority to exclude some products from remote collection authority. For example, assume a state provides a partial exemption on sales of gasoline such that sales and use tax applies at the local level while it is exempt from sales and use tax at the state level. The MFA allows the state to specifically identify and exclude from remote collection authority gasoline so that the difference in taxation at the state and local level can continue, but remote sellers of gasoline cannot be required to collect tax on the sale of gasoline.

10. The MFA says a non-SST State has to provide information about the taxability of products, along with information about exemptions. What qualifies as appropriate information under the MFA?

Proposed Answer: The MFA does not require non-SST States to provide taxability information in any particular format. Each non-SST State that seeks to conform to the MFA’s simplification requirements has flexibility to provide the information it deems is appropriate to help remote sellers and purchasers comply with its laws regarding items that are taxable and exempt. Some of the ways non-SST States can comply with this simplification requirement include issuing rules and publications and working with certified software providers (non-SST CSPs) to provide information about taxability in a matrix or other format.

11. The MFA says a non-SST State seeking remote collection authority has to provide a rates and boundary database. What qualifies as an appropriate rates and boundary database?

Proposed Answer: The MFA does not prescribe any particular format for the rates and boundary database. Some non-SST States currently provide the public with a database for free that allows a person to look up an address and determine the applicable state and local sales and use tax rates that apply at the location of the address. Other states may offer their rates and boundary database in a downloadable format.

12. Does a non-SST State have to “publish notice” of its intention to exercise remote seller collection authority like the SST Member States?

Proposed Answer: No notice is required in addition to enacting legislation that conforms to the MFA’s simplification requirements. However, it will likely be in each non-SST State’s best interest to provide some type of notification to inform remote sellers of the collection requirements for its state. See FAQ XXX for additional information.

13. Can a non-SST State use the central registration system that was developed by the SST Member States to register remote sellers? If yes, what does a non-SST State have to do to use the system and how much does it cost? Are there any benefits to using the system? Will non-SST States be able to obtain lists of remote sellers that have registered through the SST central registration system? If a non-SST State chooses to use the SST central registration system, does that mean the non-SST State has to use that system for all sellers, not just remote sellers?

Proposed Answer: To date the SSTGB has not taken formal action on this issue, but the SSTGB is in the process of issuing an RFP to enhance its registration system, and plans to consult with non-SST States on proposed enhancements to meet their needs. Requirements for non-SST States to use the system, cost, and functionality are yet to be determined. Non-SST States can contact [fill in appropriate contact name and info] for more information about the current features of the central registration system and possible features that may be added.

14. The MFA requires non-SST States to provide free software to remote sellers. What must that software do and are there any options for how a non-SST State provides that software?

Proposed Answer: The free software must calculate sales and use taxes due on each transaction at the time the transaction is completed, allow remote sellers to file sales and use tax returns, and be updated to reflect rate changes with 90 days’ notice for any state or locality. If the required notice is not provided, then remote sellers cannot be liable for taxes not properly collected at the immediately preceding effective rate during

the 90-day notice period. Exactly how the non-SST States are to provide the 90-day notice is not specified.

The bill language is silent on how non-SST States must provide the free software to the remote sellers.

15. The MFA requires non-SST States to have certification procedures for certified software providers (non-SST CSP). What does that mean and how do states certify such providers?

Proposed Answer: A non-SST CSP is defined by the MFA as a person that provides software to facilitate state and local sales and use tax compliance in conjunction with the requirement that non-SST States provide free software to remote sellers. The MFA also provides that once the state has a program for non-SST CSPs, remote sellers must be allowed to use the software provider of their choice.

The MFA is silent on the certification procedures non-SST States must adopt, leaving the non-SST States flexibility to determine what certification procedures are appropriate and to develop programs that meet each state’s needs. For example, states could consider adopting or adapting the certification process followed by the SST Member States for their SST CSPs or adopting their own unique certification procedures.

16. The MFA requires a non-SST State to have a uniform base between state and local taxing jurisdictions. What does that mean?

Proposed Answer: The MFA does not expressly explain how a non-SST State achieves a uniform base to meet this simplification requirement. However, a product that is subject to sales and use tax by the state must also be taxable in any local jurisdiction within the state that also imposes a sales and use tax. For example, assume a state currently provides under its laws a partial exemption for canned software, meaning it is subject to state sales and use tax but exempt from local sales and use tax, and also assume the state legislature determines what is taxable at both the state and local levels. It is also true that some states allow “home rule,” meaning that the local jurisdictions determine without state oversight whether to impose any type of sales and use tax and what products are subject to tax. In order for a state and its local jurisdictions to achieve remote seller collection authority on any given product, that product must be taxable or exempt by both the state and local taxing jurisdictions. A state may not require remote sellers to collect state or local sales or use taxes on products that are taxed differently at the state and local levels.

Under the above set of facts, the options available to obtain remote collection authority are as follows, assuming the state legislature has control over what is taxable at both the state and local level: (1) exclude the sale of canned software from remote collection authority altogether so the state does not require remote sellers to collect tax on the software, (2) make the sale of canned software taxable or exempt at both the state and local level, or (3) exclude all local jurisdictions from having any remote collection authority altogether and only seek remote collection authority for the state portion of the tax.

If a state allows cities to make their own taxability determinations via “home rule,” then it may be an option for a state to pass conforming legislation that allows local jurisdiction to have remote collection authority if their tax base is the same as the state’s tax base so both are uniform.

17. Which transactions are covered by the sourcing rules for non-SST States who receive remote collection authority?

Proposed Answer: Only remote sales are covered by the MFA. Remote sales are defined as any sale into a state in which the seller would not legally be required to pay, collect, or remit state or local sales and use taxes other than under the MFA. In other words, if a seller does not have any physical presence in a state which, under that state’s law and applicable federal law, means the seller does not have to pay or collect and remit sales and use tax, and the only reason the seller is required to pay or collect and remit sales and use tax in a particular state is because that state has conformed its laws to the MFA, then that is a remote sale.

18. What does the sourcing rule require for non-SST States, under the MFA?

Proposed Answer: A remote seller must pay or collect and remit any applicable state and local sales and use taxes in effect at that time of the sale according to the following hierarchy, which starts with tax due based on the location of delivery of the item (i.e., destination sourcing) and ends with tax due based on the seller’s location (i.e., origin sourcing). Remote sellers are required to maintain normal books and records. The failure to keep such records does not allow a remote seller to default to origin sourcing.

- a. If the seller knows the location where the product is received by the purchaser based on instructions for delivery as provided by the purchaser, tax is due based on that location.
- b. If the purchaser does not specify a location for the product to be delivered, the seller must collect tax based on the purchaser’s address that is known to the seller as provided by the purchaser or based on information known to the seller as

collected to complete the sale, such as address information from a purchaser’s credit card or other payment instrument.

- c. If the delivery location or the purchaser’s address cannot be determined, then the seller must collect tax based on the address of the seller from which the remote sale was made.

19. Does the MFA make any changes to sourcing rules for persons who are not remote sellers?

Proposed Answer: No. The MFA only applies to remote sellers making sales into a state in which they are not currently required to pay, collect, or remit the tax. Existing state sourcing rules continue to apply when a seller is otherwise legally required to pay, collect or remit the tax in the state. The MFA also states expressly that intrastate sales are not affected.

20. What are the liability protections for remote sellers under the MFA when selling taxable products into non-SST States?

Proposed Answer: Non-SST States cannot hold a remote seller liable for the incorrect collection, remittance, or noncollection of sales and use taxes, including penalties and interest, if the remote seller’s action was the result of an error or omission made by a certified software provider or if the seller’s action was the result of incorrect information or software provided by the state. Remote sellers can be held liable if they provide misleading or inaccurate information to the certified software provider. See **FAQ XXX**.

21. What are the liability protections for software providers that are certified by a non-SST State under the MFA?

Proposed Answer: States cannot hold a certified software provider liable for the incorrect collection, remittance or noncollection of sales and use taxes, including penalties and interest, if the certified software provider’s action was the result of (1) “misleading” or “inaccurate” information provided by the remote seller or (2) incorrect information or software provided by the state.

22. Does the MFA affect existing nexus laws?

Proposed Answer: The MFA does not alter the existing standards for determining nexus between a person and any state or locality. The MFA provides that it shall not be construed to preempt or limit any power exercised or to be exercised by a State or local

jurisdiction under the law of such State or local jurisdiction or under any other Federal law.

23. What happens if a remote seller that does not meet the small seller exemption refuses to collect the taxes in a state that has remote seller collection authority? What authority does a non-SST State have over these businesses?

Proposed Answer: The MFA expressly states that a non-SST State “may not require a remote seller to file sales and use tax returns any more frequently than returns are required for nonremote sellers or impose requirements on remote sellers that the State does not impose on nonremote sellers with respect to the collection of sales and use taxes.” Accordingly, a state may pursue collection of any unpaid tax and take steps to encourage compliance as it would with any other business obligated to be registered with the state and to collect and remit sales and use tax.

24. What happens to remote sellers if a state is not an SST Member State and also does not seek remote collection authority under the MFA?

Answer: Remote sellers would not have any collection responsibilities in non-MFA or non-SST States.

III. Business Questions and Answers

1. Am I required to collect taxes as a “remote seller”?

- o Consider flowchart, decision tree, checklist to answer this question

Proposed Answer: Every seller must collect the states’ sales/use taxes that have complied with the MFA requirements unless the seller qualifies for the small seller exception, remote sales not exceeding \$1 million. If a seller sells over \$1 million in products in the prior calendar year with those sales sourced to customers located in states where the seller does not have sufficient contacts to be required to collect and remit the tax (*e.g.*, physical presence, see *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)), the seller may be required to collect taxes as a remote seller on those sales. In determining the \$1 million threshold, it does not matter if the sales are taxable. There are also attribution rules that apply to aggregate receipts from persons based on: (i) the person being a related person pursuant to I.R.C. §§ 267(b) & (c) and 707(b)(1) or (ii) a relationship with a person designed to avoid the \$1 million threshold. See question X for the states asserting remote seller collection authority under the MFA.