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Facts on the Marketplace Fairness Act (S. 743, formerly S. 336)

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As the Marketplace Fairness Act winds its way through Congress, lawmakers should, at the very least, take into consideration concerns raised by opponents. That is only prudent, especially since Congress has never held a hearing on the bill or markup of its previous incarnations. Some of these concerns are outlined below.

MFA Undermines State Sovereignty. Every state’s authority ends at its borders. This bill would undermine that federalist principle by allowing one state to reach into the borders of another and tax businesses that have no political voice in the taxing state. This is *not* a restoration of state sovereignty, but *taxation without representation* and an unprecedented expansion of state taxing authority.

MFA Threatens Privacy. Retailer groups have dismissed privacy concerns, claiming that they do not send customer information to state revenue departments. In fact, it has already happened—twice. In the last couple of years, North Carolina and Colorado asked out-of-state retailers for transaction histories for their own residents. Courts blocked those state’s anti-privacy efforts, but MFA would destroy those safeguards.

MFA Decimates Healthy Tax Competition. MFA would deal a serious blow to healthy tax competition between states. For example, drivers’ ability to drive to Virginia to fill up exerts downward pressure on Washington, D.C.’s gasoline taxes—benefiting consumers on both sides of the Potomac. This legislation is the equivalent of gas stations charging taxes based on customers’ license plates, forcing them to wear their home state’s tax regime like an albatross while shopping online.

MFA Guts Due Process. This plan will very likely face Constitutional challenges, as it is not clear it will pass Due Process muster. The Supreme Court has yet to weigh in on whether having a website accessible from a state is synonymous with a business availing itself of another state’s taxing regime.

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