

By: Uresti

S.B. No. 1713

A BILL TO BE ENTITLED

1 AN ACT
2 relating to the administration and collection of the state use tax
3 as applied to certain persons engaged in business in this state;
4 requiring a permit; creating an offense.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section [151.008\(b\)](#), Tax Code, is amended to read
7 as follows:

8 (b) "Seller" and "retailer" include:

9 (1) a person in the business of making sales at auction
10 of tangible personal property owned by the person or by another;

11 (2) a person who makes more than two sales of taxable
12 items during a 12-month period, including sales made in the
13 capacity of an assignee for the benefit of creditors or receiver or
14 trustee in bankruptcy;

15 (3) a person regarded by the comptroller as a seller or
16 retailer under Section [151.024](#);

17 (4) a hotel, motel, or owner or lessor of an office or
18 residential building or development that contracts and pays for
19 telecommunications services for resale to guests or tenants;

20 (5) a person who engages in regular or systematic
21 solicitation of sales of taxable items in this state by the
22 distribution of catalogs, periodicals, advertising flyers, or
23 other advertising, by means of print, radio, or television media,
24 or by mail, telegraphy, telephone, computer data base, cable,

1 optic, microwave, or other communication system for the purpose of
2 effecting sales of taxable items; ~~and~~

3 (6) a person who, under an agreement with another
4 person, is:

5 (A) entrusted with possession of tangible
6 personal property with respect to which the other person has title
7 or another ownership interest; and

8 (B) authorized to sell, lease, or rent the
9 property without additional action by the person having title to or
10 another ownership interest in the property;

11 (7) a person who is a marketplace provider as defined
12 by Section 151.109; and

13 (8) a person who is a referrer as defined by Section
14 151.110.

15 SECTION 2. Subchapter D, Chapter 151, Tax Code, is amended
16 by adding Section 151.1065 to read as follows:

17 Sec. 151.1065. REFERRER'S PERMIT REQUIRED. (a) This
18 section applies only to a referrer as defined by Section 151.110 who
19 received:

20 (1) at least \$10,000 in fees, commissions, or other
21 consideration from other retailers for services described by
22 Section 151.110(a) performed by the referrer in this state in the
23 year preceding the year in which an application under this section
24 is due; or

25 (2) at least \$7,500 in fees, commissions, or other
26 consideration from other retailers for services described by
27 Section 151.110(a) performed by the referrer in this state in the

1 first three calendar quarters of the year in which an application
2 under this section is due.

3 (b) A referrer may not engage in activity described by
4 Section 151.110(a) in this state without a permit issued as
5 provided by this section.

6 (c) Not later than December 1 of each year, a referrer shall
7 apply to the comptroller for a referrer's permit.

8 (d) The comptroller shall issue a referrer's permit to an
9 applicant not later than the 15th day after the date the comptroller
10 receives the application for the permit. The permit is valid for
11 the 12-month period beginning on January 1 of the year following the
12 year in which the permit is issued.

13 (e) The comptroller may not charge, or require security
14 from, a referrer for a referrer's permit.

15 (f) A referrer's permit is valid only for the referrer to
16 which it is issued and may not be assigned.

17 (g) The comptroller shall revoke a referrer's permit if the
18 referrer fails to file the report or provide the notice required
19 under Section 151.111.

20 (h) The comptroller may adopt rules necessary to implement
21 and administer this section.

22 SECTION 3. Section 151.107, Tax Code, is amended by adding
23 Subsections (c-1), (c-2), (c-3), (c-4), and (c-5) to read as
24 follows:

25 (c-1) For purposes of this subchapter and in relation to the
26 use tax, a retailer is a retailer engaged in business in this state
27 if the retailer engages in any part of a sale, lease, or rental of a

1 taxable item to a purchaser in this state, regardless of whether the
2 retailer contracts with a third party to perform all or any part of
3 the transaction, or whether the retailer performs all or any part of
4 the transaction through an entity in which the retailer holds a
5 substantial ownership interest or that holds a substantial
6 ownership interest in the retailer. For purposes of this
7 subsection, the sale, lease, or rental of an item includes listing
8 the item for sale, lease, or rent, soliciting an order for the item,
9 branding the item, processing or fulfilling the order for the item,
10 providing customer service relating to the item, and accepting or
11 assisting with the return or exchange of the item. The act of
12 shipping an item by common carrier to a purchaser in this state is
13 not considered engaging in the sale, lease, or rental of a taxable
14 item for purposes of this subsection.

15 (c-2) For purposes of this subchapter and in relation to the
16 use tax, a retailer is a retailer engaged in business in this state
17 if, to facilitate the sale, lease, or rental of a taxable item to a
18 purchaser in this state, the retailer directly or through a third
19 party uses:

20 (1) direct response marketing;
21 (2) a referrer with a significant economic presence in
22 this state; or

23 (3) another person who has a significant economic
24 presence in this state and with whom the retailer enters into an
25 agreement for the person to refer potential purchasers to the
26 retailer, regardless of whether the referral is not related to a
27 sale, lease, or rental of tangible personal property but

1 subsequently results in a sale, lease, or rental of that property.

2 (c-3) An agreement described by Subsection (c-2)(3) does
3 not include an agreement under which a retailer purchases
4 advertisements from a person in this state to be delivered by
5 television or radio, in print, on the Internet, or through another
6 means, unless the agreement includes the payment of advertising
7 revenue to the person based wholly or partly on the sales resulting
8 from the advertising.

9 (c-4) Subsection (c-2) does not apply to a retailer
10 described by that subsection if each person with whom the retailer
11 has entered into an agreement to refer potential purchasers to the
12 retailer:

13 (1) does not have a significant economic presence in
14 this state; and

15 (2) certifies to the retailer annually that the person
16 meets the requirement of Subdivision (1).

17 (c-5) The comptroller shall prescribe the form of the
18 certification described by Subsection (c-4). A person who
19 intentionally or negligently provides false information in the
20 certification commits an offense punishable in the same manner as
21 an offense under Section 151.708.

22 SECTION 4. Section 151.107(d), Tax Code, is amended by
23 amending Subdivision (1) and adding Subdivisions (1-a) and (1-b) to
24 read as follows:

25 (1) "Direct response marketing" means, for the purpose
26 of facilitating the sale, lease, or rental of tangible personal
27 property of a retailer to a purchaser in this state, any of the

1 following activities:

2 (A) transmitting or broadcasting flyers,
3 newsletters, telephone calls, targeted electronic mail, text
4 messages, social media messages, or targeted mailings;

5 (B) collecting, analyzing, and using individual
6 data on purchasers or potential purchasers in this state;

7 (C) using information or software, including
8 cached files, cached software, or cookies or other data tracking
9 tools, that is stored on property in this state or that is
10 distributed within this state; or

11 (D) conducting any other actions that use
12 persons, tangible or intangible property, digital files or
13 information, or software in this state in an effort to enhance the
14 probability that a person's contacts with a purchaser in this state
15 will result in a sale, lease, or rental to that purchaser.

16 (1-a) "Ownership" includes:

17 (A) direct ownership;

18 (B) common ownership; and

19 (C) indirect ownership through a parent entity,
20 subsidiary, or affiliate.

21 (1-b) "Referrer" has the meaning assigned by Section
22 151.110.

23 SECTION 5. Subchapter D, Chapter 151, Tax Code, is amended
24 by adding Sections 151.1075, 151.109, 151.110, and 151.111 to read
25 as follows:

26 Sec. 151.1075. RETAILER PRESUMED TO BE ENGAGED IN BUSINESS
27 IN THIS STATE. (a) For purposes of this subchapter and in relation

1 to the use tax, a retailer is presumed to be engaged in business in
2 this state if, in the previous calendar year or the current calendar
3 year, the retailer:

4 (1) has total receipts of more than \$1 million from
5 taxable items delivered in this state, including taxable items
6 delivered electronically to purchasers in this state; or

7 (2) has at least 2,000 sales of taxable items
8 delivered in this state, including taxable items delivered
9 electronically to purchasers in this state.

10 (b) A retailer described by Subsection (a) is required to
11 comply with the requirements of this chapter unless the retailer
12 rebutts the presumption under that subsection by proving that it
13 does not have substantial economic nexus with this state.

14 (c) For purposes of this subchapter and in relation to the
15 use tax, a retailer is presumed to be engaged in business in this
16 state if the retailer is related, as provided by Subsection (d), to
17 a person engaged in business in this state who:

18 (1) sells under the same or a similar business name
19 taxable items similar to those sold by the retailer;

20 (2) maintains an office, distribution facility,
21 salesroom, warehouse, storage place, or other similar place of
22 business in this state to facilitate the delivery of taxable items
23 sold by the retailer to purchasers in this state;

24 (3) uses in this state, with the retailer's knowledge
25 or consent, trademarks, service marks, or trade names that are the
26 same or substantially similar to those used by the retailer;

27 (4) delivers, installs, assembles, or performs

1 maintenance or repair services in this state on tangible personal
2 property sold by the retailer to purchasers in this state;

3 (5) facilitates the delivery of tangible personal
4 property to the retailer's customers in this state by allowing the
5 customers to pick up tangible personal property sold by the
6 retailer at an office, distribution facility, salesroom,
7 warehouse, storage place, or other similar place of business
8 maintained by the person in this state; or

9 (6) shares management, business systems, business
10 practices, or employees with the retailer or engages in
11 intercompany transactions with the retailer related to the
12 activities that establish or maintain the retailer's market in this
13 state.

14 (d) For purposes of Subsection (c), a retailer is related to
15 a person engaged in business in this state if the retailer and the
16 person:

17 (1) have a relationship described by Section 267(b) or
18 707(b)(1), Internal Revenue Code of 1986; or

19 (2) have an ownership relationship designed with a
20 principal purpose of avoiding the application of Subsection (c).

21 (e) A retailer may rebut the presumption under Subsection
22 (c) for a reporting period by proving by a preponderance of evidence
23 that the person engaged in business in this state did not engage in
24 any activities on the retailer's behalf during the reporting period
25 sufficient to establish the retailer's substantial economic nexus
26 with this state.

27 Sec. 151.109. MARKETPLACE PROVIDERS. (a) In this section,

1 "marketplace provider" means a person who:

2 (1) facilitates the sale, lease, or rental of the
3 tangible personal property of a retailer that is not the person to a
4 purchaser in this state in any manner, including by the use of a
5 catalog or an Internet website;

6 (2) directly or indirectly collects from a purchaser
7 in this state receipts derived from the sale, lease, or rental of
8 the retailer's tangible personal property to the purchaser and
9 transmits those receipts to the retailer, other than any amount the
10 person is authorized to retain as a fee for facilitating the sale,
11 lease, or rental; and

12 (3) is engaged in business in this state by means of
13 any of the activities listed in Section 151.107(a), (c-1), or (c-2)
14 or because of an un rebutted presumption under Section 151.1075(a).

15 (b) A marketplace provider's facilitation of a sale, lease,
16 or rental described by Subsection (a)(1) that results in a sale,
17 lease, or rental by the other retailer is considered the making of a
18 sale by the marketplace provider for purposes of Sections
19 151.008(a) and 151.103. Notwithstanding Section 151.103, the
20 marketplace provider is not required to collect a use tax imposed
21 under this subchapter that is due from a purchaser if the retailer
22 for whom the marketplace provider facilitates the sale, lease, or
23 rental collects the tax from the purchaser.

24 (c) For purposes of Subsection (b), a marketplace provider
25 may presume that a retailer registered with the comptroller under
26 Section 151.106 collects the use tax from a purchaser.

27 (d) Subject to Subsection (e), a marketplace provider is not

1 subject to liability under Subchapter L for failing to collect or
2 remit the appropriate amount of use tax if, in determining the
3 amount, the marketplace provider relies exclusively on information
4 provided by the retailer for whom the marketplace provider
5 facilitates the sale, lease, or rental of the tangible personal
6 property on which the tax is due.

7 (e) Subsection (d) does not apply if:

8 (1) the marketplace provider and the retailer for whom
9 the marketplace provider facilitated the sale, lease, or rental of
10 tangible personal property have an ownership relationship designed
11 with a principal purpose of relieving the marketplace provider of
12 liability as authorized by Subsection (d); or

13 (2) the marketplace provider and the other retailer
14 have a relationship described by Section 267(b) or 707(b)(1),
15 Internal Revenue Code of 1986.

16 (f) Nothing in this section may be construed as affecting
17 the ability of a marketplace provider and another retailer to enter
18 into an agreement regarding the requirements of this chapter.

19 (g) The comptroller may adopt rules necessary to implement
20 and administer this section, including rules establishing the
21 requirements for an entity to be considered a marketplace provider.

22 Sec. 151.110. REFERRERS. (a) In this section, "referrer"
23 means a person who:

24 (1) for the purpose of facilitating the sale, lease,
25 or rental of tangible personal property of a retailer that is not
26 the person to a purchaser in this state, agrees to list items of
27 tangible personal property and the prices of the items in any forum,

1 including in a catalogue or on an Internet website;

2 (2) receives a fee, commission, or other consideration
3 as part of the agreement with the retailer;

4 (3) transfers the purchaser to the retailer or the
5 retailer's Internet website by telephone, electronic link, or any
6 other means to complete a sale, lease, or rental of a listed item;
7 and

8 (4) does not collect from the purchaser receipts
9 derived from the sale of the item to the purchaser.

10 (b) For purposes of this subchapter and in relation to the
11 use tax, a referrer who makes a referral to another retailer that
12 results in a sale, lease, or rental of the other retailer's tangible
13 personal property to a purchaser in this state is a retailer engaged
14 in business in this state.

15 (c) A referrer's facilitation of a sale, lease, or rental
16 described by Subsection (a)(1) that results in a sale, lease, or
17 rental by the other retailer is considered the making of a sale by
18 the referrer for purposes of Sections 151.008(a) and 151.103, and
19 the listed price of the item for sale, lease, or rent is presumed to
20 be the sales price for purposes of Sections 151.101 and 151.103.
21 Notwithstanding Section 151.103, the referrer is not required to
22 collect a use tax imposed under this subchapter that is due from a
23 purchaser if:

24 (1) the retailer for whom the referrer facilitates the
25 sale, lease, or rental collects the tax from the purchaser; or

26 (2) the referrer:

27 (A) holds a referrer's permit issued under

1 Section 151.1065; and

2 (B) is in compliance with Section 151.111.

3 (d) For purposes of Subsection (c), a referrer may presume
4 that a retailer registered with the comptroller under Section
5 151.106 collects the use tax from a purchaser.

6 (e) Subject to Subsection (f), a referrer is not subject to
7 liability under Subchapter L for failing to collect or remit the
8 appropriate amount of use tax if, in determining the amount, the
9 referrer relies exclusively on information provided by the retailer
10 for whom the referrer facilitates the sale, lease, or rental of the
11 tangible personal property on which the tax is due.

12 (f) Subsection (e) does not apply if:

13 (1) the referrer and the retailer for whom the
14 referrer facilitated the sale, lease, or rental of tangible
15 personal property have an ownership relationship designed with a
16 principal purpose of relieving the referrer of liability as
17 authorized by Subsection (e); or

18 (2) the referrer and the other retailer have a
19 relationship described by Section 267(b) or 707(b)(1), Internal
20 Revenue Code of 1986.

21 (g) The comptroller may adopt rules necessary to implement
22 and administer this section, including rules establishing the
23 requirements for an entity to be considered a referrer.

24 Sec. 151.111. REFERRER'S ANNUAL REPORT; NOTICE TO
25 RETAILERS. (a) This section applies only to a referrer who is
26 required to hold a referrer's permit under Section 151.1065.

27 (b) On January 1 of each year, a referrer shall:

1 (1) file with the comptroller a report that contains,
2 for the preceding 12-month period:

3 (A) the name and address of each retailer with
4 whom the referrer entered into an agreement described by Section
5 151.110(a)(1); and

6 (B) to the extent practicable, for each retailer
7 required to be included in the report under Paragraph (A):

8 (i) the estimated total amount of sales
9 attributable to referrals made by the referrer to that retailer;

10 (ii) the estimated total number of
11 referrals made by the referrer to that retailer and the estimated
12 number of those referrals that resulted in a purchase by a purchaser
13 in this state; and

14 (iii) details about each referral made to
15 the retailer, including the type and price of each item that was the
16 subject of the referral; and

17 (2) provide notice to each retailer with whom the
18 referrer entered into an agreement described by Section
19 151.110(a)(1) during the preceding 12-month period that:

20 (A) the retailer's sales in this state may be
21 subject to a use tax under the laws of this state; and

22 (B) the referrer is required to annually report
23 the information described by Subdivision (1) to this state.

24 (c) The report required under Subsection (b) may not contain
25 personally identifiable information of any purchaser.

26 (d) Notwithstanding Subsection (b), a referrer may exclude
27 from the report required under that subsection the name of, and any

1 information relating to referrals to, a retailer for whom the
2 referrer makes referrals if the retailer collects the use tax
3 imposed under this subchapter from purchasers in this state. For
4 purposes of this subsection, a referrer may presume that a retailer
5 registered with the comptroller under Section 151.106 collects the
6 tax.

7 (e) The comptroller may adopt rules necessary to implement
8 and administer this section and may prescribe the form of the report
9 and the notice required under this section.

10 SECTION 6. Section 151.403(b), Tax Code, is amended to read
11 as follows:

12 (b) A retailer engaged in business in this state as provided
13 by Section 151.107, 151.1075, 151.109, or 151.110 [~~of this code~~]
14 shall file a tax report with respect to the use tax.

15 SECTION 7. The first report and notice required under
16 Section 151.111, Tax Code, as added by this Act, are due January 1,
17 2018.

18 SECTION 8. The change in law made by this Act does not
19 affect tax liability accruing before the effective date of this
20 Act. That liability continues in effect as if this Act had not been
21 enacted, and the former law is continued in effect for the
22 collection of taxes due and for civil and criminal enforcement of
23 the liability for those taxes.

24 SECTION 9. (a) The constitutionality and other validity
25 under the state or federal constitution of all or any part of the
26 amendments made to Chapter 151, Tax Code, by this Act may be
27 determined in an action for declaratory judgment in a district

1 court in Travis County under Chapter 37, Civil Practice and
2 Remedies Code, except that this section does not authorize an award
3 of attorney's fees against this state and Section 37.009, Civil
4 Practice and Remedies Code, does not apply to an action filed under
5 this section.

6 (b) An appeal of a declaratory judgment or order, however
7 characterized, of a district court, including an appeal of the
8 judgment of an appellate court, holding or otherwise determining
9 that all or any part of the amendments made to Chapter 151, Tax
10 Code, by this Act is constitutional or unconstitutional, or
11 otherwise valid or invalid, under the state or federal constitution
12 is an accelerated appeal.

13 (c) If the judgment or order is interlocutory, an
14 interlocutory appeal may be taken from the judgment or order and is
15 an accelerated appeal.

16 (d) A district court in Travis County may grant or deny a
17 temporary or otherwise interlocutory injunction or a permanent
18 injunction on the grounds of the constitutionality or
19 unconstitutionality, or other validity or invalidity, under the
20 state or federal constitution of all or any part of the amendments
21 made to Chapter 151, Tax Code, by this Act.

22 (e) There is a direct appeal to the Texas Supreme Court from
23 an order, however characterized, of a trial court granting or
24 denying a temporary or otherwise interlocutory injunction or a
25 permanent injunction on the grounds of the constitutionality or
26 unconstitutionality, or other validity or invalidity, under the
27 state or federal constitution of all or any part of the amendments

1 made to Chapter 151, Tax Code, by this Act.

2 (f) The direct appeal is an accelerated appeal.

3 (g) This section exercises the authority granted by Section
4 3-b, Article V, Texas Constitution.

5 (h) The filing of a direct appeal under this section will
6 automatically stay any temporary or otherwise interlocutory
7 injunction or permanent injunction granted in accordance with this
8 section pending final determination by the Texas Supreme Court,
9 unless the supreme court makes specific findings that the applicant
10 seeking such injunctive relief has pleaded and proved that:

11 (1) the applicant has a probable right to the relief it
12 seeks on final hearing; and

13 (2) the applicant will suffer a probable injury that
14 is imminent and irreparable, and that the applicant has no other
15 adequate legal remedy.

16 (i) An appeal under this section, including an
17 interlocutory, accelerated, or direct appeal, is governed, as
18 applicable, by the Texas Rules of Appellate Procedure, including
19 Rules 25.1(d)(6), 26.1(b), 28.1, 28.3, 32.1(g), 37.3(a)(1),
20 38.6(a) and (b), 40.1(b), and 49.4.

21 SECTION 10. This Act takes effect September 1, 2017.