

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 85TH LEGISLATIVE REGULAR SESSION

April 9, 2017

TO: Honorable Jane Nelson, Chair, Senate Committee on Finance

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: SB1713 by Uresti (Relating to the administration and collection of the state use tax as applied to certain persons engaged in business in this state; requiring a permit; creating an offense.), **As Introduced**

There would be an indeterminate amount of revenue gain to the General Revenue Fund depending on both the compliance with and the results of litigation over the sales and use tax provisions contained in the bill. Due to lack of data, the revenue gains cannot be determined at this time. In addition, there is an estimated cost of \$1.3 million to implement the provisions of the bill, as described below.

The bill would amend Chapter 151 of the Tax Code, regarding the administration and collection of the state use tax as applied to certain persons engaged in business in this state.

The bill would expand the set of businesses required to collect and remit Texas sales and use tax by: 1) expanding the set of activities that constitute doing business in this state; 2) requiring marketplace providers who facilitate sales on behalf of other retailers to collect and remit tax when those other sellers do not do so; and 3) requiring persons who make certain referrals of purchasers in this state to other retailers to collect and remit tax when those other sellers do not do so, unless the person holds a referrer's permit and makes annual reports regarding referrals to retailers.

Section 151.008(b) would be amended to add a person who is a marketplace provider or a referrer to the definition of "seller" and "retailer". "Marketplace provider" would be defined by new Section 151.109(a) as a person engaged in business in this state who facilitates sales, leases or rentals of tangible personal property on behalf of other retailers to purchasers in this state and collects payment and transmits those receipts to the other retailers less amounts retained as a fee for the facilitation. "Referrer" would be defined by new Section 151.110(a) to mean a person who facilitates sales on behalf of other retailers by listing items of tangible personal property and their prices in any media, receives a fee or commission, transfers a purchaser to another retailer by electronic link or any other means, and does not collect payment from the purchaser.

New Section 151.1065 would require annual permitting of any referrer with annual fees or commissions of at least \$10,000 from facilitation of sales to purchasers in this state.

Section 151.107 would be amended by adding new Subsection (c-1) to provide that a retailer is engaged in business in the state if the retailer engages, directly or through a third party or an affiliate, in any part of a sale, lease or rental of a taxable item. Sale, lease or rental would be defined to include: the listing of an item for sale, lease or rental; soliciting an order; branding the

item; processing or fulfilling an order; providing customer service relating to the item; or accepting or assisting with a return or exchange.

Section 151.107 would be amended by adding new Subsections (c-2), (c-3), (c-4) and (c-5) to provide that a retailer is engaged in business in this state if the retailer directly or through a third party uses direct response marketing, or a referrer or other person with significant economic presence in the state to facilitate the sale, lease or rental of a taxable item, subject to specified exceptions including annual certifications of lack of economic presence in the state. A person who provides false information in a certification of lack of economic presence commits an offense punishable as a misdemeanor.

Section 151.107(d) would be amended to define "direct response marketing" to mean, when for the purpose of facilitating sales to a purchaser in this state, any of: transmitting or broadcasting flyers, newsletters, telephone calls, targeted electronic mail, text messages, social media messages, or targeted mailings; collecting, analyzing and using individual data on purchasers or potential purchasers in this state; using information or software including data tracking tools that is stored on property in this state or distributed within the state; or conducting any other actions that use persons, tangible or intangible property, digital files or information, or software in this state to enhance the probability that contacts with purchaser in this state will result in sales to that purchaser.

The bill would add new Section 151.1075 to provide that a retailer is presumed to be engaged in business in this state if the retailer has receipts of more than \$1 million from taxable items delivered in this state, or at least 2,000 sales of taxable items delivered in this state, in a year. The presumption would be rebuttable by the retailer proving that it does not have substantial economic nexus with this state.

Section 151.1075 would also provide that a retailer is presumed to be engaged in business in this state if the retailer is related, by means of certain familial, ownership, or fiduciary relationships, to a person engaged in business in this state who: sells similar taxable items under the same or similar business name; maintains an office or other facility in this state to facilitate delivery of items sold by the retailer to purchasers in this state; uses in this state trademarks, service marks, or trade names that are the same or similar to those used by the retailer; delivers, installs, assembles or performs maintenance or repairs on tangible personal property sold by the retailer to purchasers in this state; allows customers of the retailer to pick up items purchased from the retailer at facilities of the person in this state; shares business management, systems, practices or employees with the retailer or engages in intercompany transactions related to the retailer's market in this state. The presumption would be rebuttable for a reporting period if the retailer proves by a preponderance of evidence that the person engaged in business in this state did not engage in any activities on the retailer's behalf sufficient to establish the retailer's substantial economic nexus with this state.

Subsection (b) of new Section 151.109 would provide that a marketplace provider's facilitation of a sale is considered the making of a sale by the marketplace provider, but that the marketplace provider is not required to collect tax due from a purchaser if the retailer for whom the sale is facilitated collects the tax. Subsections (c) - (f) of the section provide for circumstances under which a marketplace provider's responsibility to collect and remit the appropriate amount of tax is relieved or limited.

Subsection (c) of new Section 151.110 would provide that a referrer's facilitation of a sale is considered the making of a sale by the referrer and that the listed price of the item is presumed to be the sales price for purposes of tax, but that the referrer is not required to collect tax due from a

purchaser if the retailer for whom the sale is facilitated collects the tax or if the referrer holds a referrer's permit and is in compliance with the reporting requirements provided by Section 151.111.

New Section 151.111 would provide reporting and retailer notice requirements for referrer's permit holders. Reports would include name and address of each retailer for whom referrals were made, the estimated total amount of sales attributable to referrals made to each retailer, the estimated total number of referrals and number of referrals that resulted in sales for each retailer, and details about each referral made including the type and price of each item. Referrers would be required to provide notice to each retailer for whom they make referrals that the retailer's sales in this state may be subject to tax and that the referrer is required to make detailed reports to this state regarding its referrals.

This bill would provide that the constitutionality and other validity under the state or federal constitution of all or any part of the amendments made to Chapter 151, Tax Code, by this bill may be determined in an action for declaratory judgment in a district court in Travis County under Chapter 37, Civil Practice and Remedies Code, and provides for accelerated appeal.

While the Comptroller does not rule on the constitutionality of proposed laws, and indeed presumes the validity of enacted laws unless and until a court of competent jurisdiction indicates otherwise, the likelihood that the provisions of the bill would be met with noncompliance and protracted litigation precludes a reasonable expectation of increased revenue collections in the foreseeable future. Lack of information regarding the identities of referrers, the nature of and volume of transactions facilitated by referrers, and the extent to which retailers that contract with referrers may have nexus with the state under current law and already collect and remit tax, prevents meaningful estimation of potential revenue gains, even in the absence of litigation.

The Comptroller indicates there would be a one-time technology cost of \$1,269,000 in fiscal 2018 for an estimated 8460 hours to design and develop an electronic system to support the proposed referrers permit program. The Comptroller's Office would be required to create a separate use tax permit, different from the sales tax permit that every retailer gets, in that it is renewable on an annual basis. The annual reporting requirements would include amounts of sales and text fields to collect names, addresses, and product descriptions. The assumption is that this will be an electronic or web filing process only, due to the large amount of information that may be reported. A new structure would be required to allow for storage and retrieval of text as well as numbers per line item of sales.

The bill would authorize the Comptroller to adopt rules necessary to implement Sections 151.109, 151.1065, and 151.110. The bill would take effect September 1, 2017.

Local Government Impact

There would be an indeterminate amount of revenue gain to units of local government depending on both the compliance with and the results of litigation over the sales and use tax provisions contained in the bill. Due to lack of data, the revenue gains cannot be determined at this time.

Source Agencies: 304 Comptroller of Public Accounts

LBB Staff: UP, KK, SD