

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 85TH LEGISLATIVE REGULAR SESSION

April 27, 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 collection of, and notices and reports regarding, state sales and use taxes; providing an administrative penalty.), **Committee Report 1st House, Substituted**

Due to expected litigation over, and noncompliance with, provisions in the bill, the Comptroller will not certify additional revenue available for certification associated with the bill in 2018-19. In the event that the legal issues are resolved and marketplace providers begin to collect the use tax, General Revenue Related collections are expected to increase by \$250,000,000 per fiscal year. In addition, there is an estimated cost of \$570,000 to implement the provisions of the bill, as described below.

The bill would amend Chapter 151 of the Tax Code, regarding the collection of the state sales and use tax by certain persons.

Section 151.008(b) would be amended to add a person who is a marketplace provider to the definition of "seller" and "retailer".

The bill would add new Section 151.013 and define "Marketplace provider" as a person who has an agreement with a seller to facilitate the sale of taxable items by the seller, and "Marketplace seller" as a person under an agreement with a marketplace provider who will facilitate the sale of taxable items by the seller. A person would be considered the facilitator of a sale if that person provides the forum in which or by means of which the sale of taxable items takes place, and the person or an affiliate collects or contracts with another person to collect payment from the purchaser. A marketplace provider's facilitation of a sale would be considered the making of a sale if the marketplace provider holds a sales tax permit, or is registered with the Comptroller as a seller or retailer.

The new section would provide that a marketplace provider, not affiliated with a marketplace seller, is not liable for penalties resulting from failure to collect and remit the appropriate amount of sales and use tax due on the sale of a taxable item, if the marketplace provider can demonstrate that the amount is based entirely on information provided by the marketplace seller. A marketplace seller would not be required to collect and remit the sales and use tax due on the sale of taxable items, and would not be liable for penalties resulting from a failure to collect the tax if: the marketplace provider makes the sale, both parties agree that the marketplace provider is required to collect and remit the tax, and the marketplace seller can demonstrate that information provided to the marketplace provider did not cause failure by the marketplace provider to collect and remit the tax. A marketplace seller and a marketplace provider who are affiliated would be held jointly and severally liable for the marketplace provider's failure to collect and remit taxes

due on the sale of taxable items facilitated by the marketplace provider.

The bill would authorize the Comptroller to adopt rules necessary to implement Section 151.013.

The bill would add new Subchapter D-1 to require certain retailers, regardless of whether they have a physical presence in this state, to provide annual written notice to purchasers in this state regarding their purchases and potential use tax liability. Retailers subject to the requirement would be those that do not hold a sales tax permit, do not collect use tax from purchasers, and in the previous calendar year had total receipts from sales of taxable items of more than \$250,000 or had at least 500 sales of taxable items.

The Comptroller would be authorized to require, by rule, that retailers submit an annual statement to the Comptroller describing all sales of taxable items made to each purchaser in this state in a calendar year. The Comptroller would be authorized to impose administrative penalties on retailers who fail to provide the required written notices to customers and the annual statement required by the Comptroller. The bill would provide that the collected administrative penalties would only be appropriated to the Comptroller for the purpose of administering Subchapter D-1.

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 marketplace provider provisions of the bill would be met with noncompliance and potentially protracted litigation precludes a reasonable expectation of increased revenue collections in the foreseeable future. Were the major marketplace providers not to bring legal challenge and agree to collect use tax, up to \$250 million in annual state tax revenue and \$70 million in local tax revenue would be anticipated. Although the potential revenue associated with the marketplace provider provisions of the bill will not be included as revenue estimated to be available for certification at this time, if after enactment it is determined that the major marketplace providers have registered with the Comptroller and commenced collection and remittance of use tax on sales facilitated for marketplace sellers, estimates of the additional revenue will be included in subsequent statements of amounts of revenue available for certification.

The notice requirements imposed by the bill on certain remote sellers are not expected to result in litigation, in view of the decision by the Tenth Circuit U.S. Court of Appeals in *Direct Marketing Association v. Brohl*, affirming the right of a state to impose information reporting requirements on out-of-state sellers that do not have a physical presence in a state. It is possible the annual notices required to be mailed to purchasers could stimulate some additional remittance to the Comptroller of use tax by purchasers. However, no state as yet has any collections experience after implementation of such notice requirement provisions and any amounts of additional revenue collections cannot be determined.

This bill would take effect January 1, 2018.

Local Government Impact

In the event that the legal issues are resolved and marketplace providers begin to collect the use tax, use tax collections for units of local government are expected to increase by \$70,000,000 per fiscal year.

Source Agencies: 304 Comptroller of Public Accounts

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