

1 State of Arkansas *As Engrossed: S2/2/17 H3/31/17*

2 91st General Assembly

# A Bill

3 Regular Session, 2017

SENATE BILL 140

4

5 By: Senators Files, J. Dismang, Teague, B. Sample, Rapert

6 By: Representative D. Douglas

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## For An Act To Be Entitled

9 AN ACT TO PROVIDE FOR THE COLLECTION OF *SALES AND USE*  
10 TAX RATHER THAN USE TAX ON SALES BY CERTAIN REMOTE  
11 SELLERS; AND FOR OTHER PURPOSES.

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## Subtitle

15

*TO PROVIDE FOR THE COLLECTION OF SALES*

16

*AND USE TAX RATHER THAN USE TAX ON SALES*

17

*BY CERTAIN REMOTE SELLERS.*

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19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

21

22 SECTION 1. DO NOT CODIFY. Legislative findings.

23 (a) The General Assembly finds that:

24 (1) The inability to effectively collect any Arkansas sales or  
25 use tax from remote sellers who deliver tangible personal property, any other  
26 property subject to Arkansas sales and use tax, or services directly into the  
27 state is seriously eroding the sales tax base of this state, causing revenue  
28 losses and imminent harm to the state through the loss of critical funding  
29 for state and local services;

30 (2) The harm from the loss of revenue is especially serious in  
31 Arkansas because sales and use tax revenues are essential in funding state  
32 and local services;

33 (3) Despite the fact that a use tax is owed on tangible personal  
34 property, certain other property, or services delivered for use in this  
35 state, many remote sellers actively market sales as tax-free or transactions  
36 not subject to sales tax;



1           (4) The structural advantages of remote sellers, including the  
2 absence of point-of-sale tax collection and the general growth of online  
3 retail, make clear that further erosion of this state's sales and use tax  
4 base is likely to occur in the near future;

5           (5) Remote sellers that make a substantial number of deliveries  
6 into Arkansas or collect large gross revenues from Arkansas benefit  
7 extensively from this state's market, economy, and infrastructure;

8           (6) In contrast with the expanding harms caused to the state  
9 from the exemption of sales and use tax collection duties for remote sellers,  
10 the costs of such a collection have decreased because advanced computing and  
11 software options have made it neither difficult nor burdensome for remote  
12 sellers to collect and remit sales and use taxes associated with sales into  
13 this state;

14           (7) As United States Supreme Court Justice Anthony Kennedy  
15 recently recognized in his concurrence in Direct Marketing Association v.  
16 Brohl, 575 U.S. \_\_\_, 135 S. Ct. 1124 (2015) (Kennedy, J., concurring), the  
17 United States Supreme Court should reconsider its doctrine that prevents  
18 states from requiring remote sellers to collect use tax, and based on the  
19 foregoing findings, this argument has grown stronger and the cause more  
20 urgent with time;

21           (8) Given the urgent need for the United States Supreme Court to  
22 reconsider the doctrine, it is necessary for this state to pass a law  
23 clarifying its immediate intent to require collection of sales and use taxes  
24 by remote sellers and permitting the most expeditious possible review of the  
25 constitutionality of this law;

26           (9) Expeditious review is necessary and appropriate because,  
27 although it may be reasonable notwithstanding this act for remote sellers to  
28 continue to refuse to collect the sales and use tax in light of existing  
29 federal constitutional doctrine, this refusal causes imminent harm to this  
30 state; and

31           (10) At the same time, the General Assembly recognizes that the  
32 enactment of this law places remote sellers in a complicated position,  
33 precisely because existing constitutional doctrine calls this act into  
34 question.

35           (b) The General Assembly intends to:

36           (1) Clarify that the obligations created by this act would be

1 appropriately stayed by the courts until the constitutionality of this law  
 2 has been clearly established by a binding judgment, including without  
 3 limitation a decision from the United States Supreme Court abrogating its  
 4 existing doctrine or a final judgment applicable to a particular taxpayer;

5 (2) Apply Arkansas's sales and use tax obligations to the  
 6 greatest extent possible under federal and state constitutional doctrines;  
 7 and

8 (3) Clarify that Arkansas law permits the state to immediately  
 9 argue in any litigation that the constitutional doctrine should be changed to  
 10 permit the collection obligations of this act.

11  
 12 *SECTION 2. Arkansas Code § 26-52-110 is repealed.*

13 ~~26-52-110. Sellers and affiliated persons — Referral agreements —~~  
 14 ~~Notice required.~~

15 ~~(a) As used in this section:~~

16 ~~(1) "Affiliated person" means:~~

17 ~~(A) A person that is a member of the same controlled group~~  
 18 ~~of corporations as the seller; or~~

19 ~~(B) Another entity that, notwithstanding its form of~~  
 20 ~~organization, bears the same ownership relationship to the seller as a~~  
 21 ~~corporation that is a member of the same controlled group of corporations;~~

22 ~~(2) "Controlled group of corporations" means the same as in 26~~  
 23 ~~U.S.C. § 1563(a), as it existed on January 1, 2011; and~~

24 ~~(3) "Facilitator" means a person that directly aids or assists~~  
 25 ~~sellers in making remote sales, including without limitation a person that~~  
 26 ~~operates a website marketplace through which the seller makes sales.~~

27 ~~(b) A seller is presumed to be engaged in the business of selling~~  
 28 ~~tangible personal property or taxable services for use in the state if an~~  
 29 ~~affiliated person is subject to the sales and use tax jurisdiction of the~~  
 30 ~~state and the:~~

31 ~~(1) Seller sells a similar line of products as the affiliated~~  
 32 ~~person and sells the products under the same business name or a similar~~  
 33 ~~business name;~~

34 ~~(2) Affiliated person uses its in-state employees or in-state~~  
 35 ~~facilities to advertise, promote, or facilitate sales by the seller to~~  
 36 ~~consumers;~~

1 ~~(3) Affiliated person maintains an office, distribution~~  
2 ~~facility, warehouse or storage place, or similar place of business to~~  
3 ~~facilitate the delivery of property or services sold by the seller to the~~  
4 ~~seller's business;~~

5 ~~(4) Affiliated person uses trademarks, service marks, or trade~~  
6 ~~names in the state that are the same or substantially similar to those used~~  
7 ~~by the seller; or~~

8 ~~(5) Affiliated person delivers, installs, assembles, or performs~~  
9 ~~maintenance services for the seller's purchasers within the state.~~

10 ~~(e) The presumption in subsection (b) of this section may be rebutted~~  
11 ~~by demonstrating that the affiliated person's activities in the state are not~~  
12 ~~significantly associated with the seller's ability to establish or maintain a~~  
13 ~~market in the state for the seller's sales.~~

14 ~~(d)(1) If there is not an affiliated person with respect to a seller~~  
15 ~~in the state, the seller is presumed to be engaged in the business of selling~~  
16 ~~tangible personal property or taxable services for use in the state if the~~  
17 ~~seller enters into an agreement with one (1) or more residents of the state~~  
18 ~~under which the residents, for a commission or other consideration, directly~~  
19 ~~or indirectly refer potential purchasers, whether by a link on an Internet~~  
20 ~~website or otherwise, to the seller.~~

21 ~~(2) However, subdivision (d)(1) of this section applies only if~~  
22 ~~the cumulative gross receipts from sales by the seller to purchasers in the~~  
23 ~~state who are referred to the seller by all residents according to the type~~  
24 ~~of agreement described in subdivision (d)(1) of this section exceed ten~~  
25 ~~thousand dollars (\$10,000) during the preceding twelve (12) months.~~

26 ~~(e)(1) The presumption in subsection (d) of this section may be~~  
27 ~~rebutted by submitting proof that the residents with whom the seller has an~~  
28 ~~agreement did not engage in any activity within the state that was~~  
29 ~~significantly associated with the seller's ability to establish or maintain~~  
30 ~~the seller's market in the state during the preceding twelve (12) months.~~

31 ~~(2) Proof provided under subdivision (e)(1) of this section may~~  
32 ~~consist of written statements from all of the residents with whom the seller~~  
33 ~~has an agreement stating that they did not engage in any solicitation in the~~  
34 ~~state on behalf of the seller during the preceding twelve (12) months if the~~  
35 ~~statements were provided and obtained in good faith.~~

36 ~~(f) The Director of the Department of Finance and Administration shall~~

1 ~~promulgate rules to implement this section.~~

2  
3 SECTION 3. Arkansas Code Title 26, Chapter 52, Subchapter 1, is  
4 amended to add an additional section to read as follows:

5 26-52-111. Collection by remote sellers.

6 (a) A seller selling tangible personal property, any other property  
7 subject to Arkansas sales and use tax, or services for delivery into  
8 Arkansas, that does not have a physical presence in this state:

9 (1) Is subject to the provisions of this chapter and the  
10 Arkansas Compensating Tax Act of 1949, § 26-53-101 et seq.; and

11 (2) Shall either:

12 (A) Remit the sales and use tax and follow all applicable  
13 procedures and requirements of law as if the seller had a physical presence  
14 in the state, if the seller meets either of the following criteria in the  
15 previous calendar year or the current calendar year:

16 (i) The seller's gross revenue from the sale of  
17 tangible personal property, any other property subject to Arkansas sales and  
18 use tax, and services delivered into Arkansas exceeds one hundred thousand  
19 dollars (\$100,000); or

20 (ii) The seller sold tangible personal property, any  
21 other property subject to Arkansas sales and use tax, and services for  
22 delivery into Arkansas in at least two hundred (200) separate transactions;  
23 or

24 (B) If the seller does not collect and remit sales and use  
25 taxes under this section:

26 (i) Report annually to the Department of Finance and  
27 Administration the name of each Arkansas purchaser, the address of each  
28 Arkansas purchaser, and the total amount paid to the seller for the year by  
29 each Arkansas purchaser; and

30 (ii) Provide notice to each Arkansas purchaser  
31 identified under subdivision (a)(2)(B)(i) of this section that the  
32 purchaser's information has been provided to the department.

33 (b)(1) The state may bring a declaratory judgment action against any  
34 person the state believes meets the criteria of subsection (a) of this  
35 section to establish that the obligation to remit sales and use tax is  
36 applicable and valid under state and federal law.

1           (2) The state is not required to initiate an audit or other tax  
2 collection procedure before bringing a declaratory judgment action under this  
3 section.

4           (3) The circuit court shall act on a declaratory judgment action  
5 filed under this section as expeditiously as possible, and this action shall  
6 proceed with priority over any other action presenting the same question in  
7 any other venue.

8           (4) The award of attorney's fees is not allowed in a declaratory  
9 judgment action brought under this section or any appeal from a declaratory  
10 judgment action brought under this section.

11           (c)(1) The filing of a declaratory judgment action by the state under  
12 this section operates as an administrative injunction during the pendency of  
13 the action, prohibiting any state entity from enforcing the obligation in  
14 subsection (a) of this section against any taxpayer that does not  
15 affirmatively consent or otherwise remit the *sales and use* tax on a voluntary  
16 basis.

17           (2) An administrative injunction under this subsection does not  
18 apply if there is a previous judgment from a court establishing the validity  
19 of the obligation in subsection (a) of this section with respect to the  
20 particular taxpayer, and it does not operate to enjoin an existing lawsuit  
21 that seeks to establish the validity of the obligation in subsection (a) of  
22 this section.

23           (3) If the declaratory judgment action is resolved in favor of  
24 the state, in general or with respect to a specific taxpayer, the state shall  
25 assess and apply the obligation established in subsection (a) of this section  
26 from that date forward with respect to any taxpayer covered by the  
27 administrative injunction.

28           (d) The obligation to remit the *sales and use* tax required under this  
29 section shall not be applied retroactively.

30           (e)(1) A taxpayer complying with this section may seek a recovery of  
31 taxes, penalties, or interest only by following the procedures established in  
32 Arkansas Code Title 26, Chapter 18.

33           (2) However, a claim shall not be granted on the basis that the  
34 taxpayer lacked a physical presence in the state and complied with this  
35 section voluntarily while covered by an injunction under this section.

36           (f) This section does not limit the ability of a taxpayer to obtain a

1 refund for any other reason, including without limitation a mistake of fact  
2 or mathematical miscalculation of the applicable tax.

3 (g) A seller that remits sales and use tax under this section is not  
4 liable to a purchaser if the seller was not required to collect sales and use  
5 tax because a provision of this section is later deemed unlawful.

6 (h) This section does not affect the obligation of a purchaser from  
7 this state to remit use tax on any applicable transaction in which the seller  
8 does not collect and remit sales and use tax.

9 (i) This section does not affect or impair the:

10 (1) Obligation of a seller, when the seller is transacting  
11 business in the state and a point-of-sale tax is collected on the  
12 transaction, to remit all state and local taxes on any applicable transaction  
13 in which the seller provides goods or furnishes services within the state; or

14 (2) Ability of a state entity to immediately collect the taxes  
15 described in subdivision (i)(1) of this section.

16  
17 SECTION 4. DO NOT CODIFY. The Arkansas Tax Reform and Relief  
18 Legislative Task Force shall review the amount of revenue attributable to the  
19 collection of sales and use taxes under § 26-52-111 and make recommendations  
20 concerning the use of these revenues, including without limitation the use of  
21 the revenues to reduce income tax rates or fund other programs that the task  
22 force deems relevant or necessary.

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24 SECTION 5. EFFECTIVE DATE. Sections 1 through 4 of this act are  
25 effective on the first day of the second calendar month following the  
26 effective date of this act.

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28 /s/Files  
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