

2016 First Extraordinary Session

HOUSE BILL NO. 110

BY REPRESENTATIVE PUGH

TAX/SALES & USE: Requires registration, permitting, tax collection, and reporting by certain persons doing business, and facilitating and maintaining a market in Louisiana (Item #30)

1 AN ACT

2 To enact R.S. 47:302(V), relative to the collection of sales and use taxes; to provide for
3 definitions; to establish certain requirements for persons engaging in and facilitating
4 business in a taxing jurisdiction; to require reporting; to provide for the issuance of
5 permits; to provide for exceptions; to authorize fees and penalties; to provide for
6 appeals; to authorize rulemaking; to provide for severability; to provide for
7 effectiveness; and to provide for related matters.

8 Be it enacted by the Legislature of Louisiana:

9 Section 1. R.S. 47:302(V) is hereby enacted to read as follows:

10 §302. Imposition of tax

11 * * *

12 (V) The provisions of this Subsection establish requirements for persons who
13 engage in business, and facilitate and make retail sales in this state. The provisions
14 of this Subsection solely affect the imposition, application, and collection of sales
15 and use taxes, and in no instance shall they be interpreted as establishing nexus or
16 any other liability for purposes of any other tax.

17 (1) For purposes of this Subsection, the following words and phrases have
18 the following meanings unless the context indicates otherwise:

1 (a) "Customer" means a resident of Louisiana and includes persons who
2 purchase tangible personal property and taxable services.

3 (b) "Dealer" means a person who makes retail sales in Louisiana including
4 a marketplace dealer.

5 (c) "Direct response marketing" means and includes, but is not limited to the
6 sending, transmitting or broadcasting of flyers, newsletters, telephone calls, targeted
7 electronic mail, text messages, social media messages, targeted mailings, collecting,
8 analyzing, and utilizing individual data on customers or potential customers in the
9 state using information or software including cached files, cached software, or
10 'cookies' or other data tracking tools stored on property in or distributed within the
11 state, or conducting any other actions that use persons, tangible property, intangible
12 property, digital files or information, or software in the state in an effort to enhance
13 the probability that contact with a customer in the state will result in a sale to that
14 customer.

15 (d) "Marketplace dealer" means a dealer that has taxable sales in the state
16 facilitated by a marketplace provider.

17 (e) "Marketplace provider" means a person who facilitates a retail sale by a
18 marketplace dealer.

19 (f) "Referrer" means a person who contracts or otherwise agrees with a
20 dealer to list multiple items of tangible personal property and services for sale and
21 the sales price of those items in any forum, including a catalog or internet website;
22 receives a fee, commission, or other consideration from a dealer for the listing;
23 transfers, via telephone, internet link, or otherwise, a customer to the dealer or the
24 dealer's website to complete a purchase; and does not collect receipts from the
25 customer for the transaction.

26 (g) "Related person" means a person related to a remote dealer within the
27 meaning of Subsections (b) and (c) of Section 267 or Section 707(b)(1) of the
28 Internal Revenue Code of 1986, or having one or more ownership relationships and

1 the relationships were designed with a principal purpose of avoiding the application
2 of this Subsection.

3 (2) Engaging in business in Louisiana. In addition to the requirements of
4 R.S. 47:301(4), a person is considered to be "engaging in business in Louisiana", if
5 the person meets the qualifications set forth in this Paragraph. Doing business in the
6 state includes but shall not be limited to the following acts or methods of transacting
7 business on a regular or systematic basis:

8 (a) Selling, leasing, or delivery of tangible personal property or taxable
9 services for use, storage, distribution, or consumption in the state.

10 (b) Maintaining within the state, directly or indirectly, or by an affiliate,
11 office, distribution facility, salesroom, warehouse, storage place, or other similar
12 place of business including the employment of a resident of this state who works
13 from a home office in the state.

14 (c) Engaging in, either directly or indirectly through a marketplace provider,
15 referrer, or other third party, direct response marketing targeted at the residents of
16 the state.

17 (d) Entering into one or more agreements under which a person that has
18 nexus with the state under Article 1, Section 8, Clause 3 of the U.S. Constitution,
19 hereinafter the "Commerce Clause", directly or indirectly, refers potential customers
20 to the dealer for a commission or other consideration, whether by an internet-based
21 link or an internet website or otherwise. The activities described in this
22 Subparagraph constitute "doing business in the state" regardless of whether or not
23 the referral is related to the sale of tangible personal property or taxable services. An
24 agreement under which a dealer purchases advertisements from a person in the state,
25 to be delivered on television, radio, print, on the internet, or by any other medium
26 shall not be an agreement described in this Subparagraph unless the advertisement
27 revenue paid to the person in the state consists of commissions or other consideration
28 that is based in whole or in part upon the sale of products.

1 (e) If any part of the sale process, including listing products for sale,
2 soliciting, branding products, selling products, processing orders, fulfilling orders,
3 providing customer service, or accepting or assisting with returns or exchanges
4 occurs in the state, regardless of whether that part of the process has been
5 subcontracted to an affiliate or third party. The sale process does not include
6 shipping via a common carrier.

7 (f) If the dealer offers products for sale through one or more marketplaces
8 operated by a marketplace provider that has substantial nexus with the state.

9 (g) If the total cumulative sales price of products sold to customers in the
10 state exceeds fifty thousand dollars in the immediately preceding calendar year.

11 (h) If the person is related to a another person that has nexus under the
12 Commerce Clause with the state, and the related person does any of the following:

13 (i) Sells under the same or a similar business name tangible personal
14 property or taxable services similar to that sold by the person against whom the
15 presumption is asserted.

16 (ii) Maintains an office, distribution facility, salesroom, warehouse, storage
17 place, or other similar place of business in the state to facilitate the delivery of
18 tangible personal property or taxable services sold by the person against whom the
19 presumption is asserted to their in-state customers.

20 (i) Uses, with consent or knowledge of the person against whom the
21 presumption is asserted, trademarks, service marks, or trade names in the state that
22 are the same or substantially similar to those used by the person against whom the
23 presumption is asserted.

24 (j) Delivers, installs, or assembles tangible personal property or taxable
25 services in the state or performs maintenance or repair services on tangible personal
26 property in the state, which tangible personal property is sold to in-state customers
27 by the person against whom the presumption is asserted.

28 (k) Facilitates the delivery of tangible personal property to in-state customers
29 of the person against whom the presumption is asserted by allowing such customers

1 to pick up tangible personal property sold by such person at an office, distribution
2 facility, salesroom, warehouse, storage place, or other similar place of business
3 maintained in the state.

4 (l) Shares management, business systems, business practices, or employees
5 with the person against whom the presumption is asserted, or engages in
6 intercompany transactions with the person against whom the presumption is asserted
7 related to the activities that establish or maintain the market in the state of the person
8 against whom the presumption is asserted. The presumption may be rebutted by a
9 preponderance of the evidence that, during the taxable period in question, the related
10 person with nexus under the Commerce Clause did not engage in any activities in the
11 state that are sufficient under the Commerce Clause to establish nexus in the state on
12 behalf of the person against whom the presumption is asserted.

13 (3) Dealer. A dealer engaged in doing business in the state is required to
14 register with the Department of Revenue, hereinafter referred to as "department", and
15 to collect and remit sales and use tax unless they can prove that they do not have
16 nexus with the state. The provisions of this Paragraph do not apply if the dealer can
17 demonstrate that no person in the state with whom the dealer has an agreement
18 engaged in referral activity in the state on behalf of the dealer that would satisfy the
19 requirements of the establishing nexus with the state. In order to qualify for this
20 exception, the dealer shall certify that:

21 (a) Each person within the state with whom they have an agreement is
22 prohibited from engaging in any solicitation activities within the state that refer
23 potential customers to the dealer.

24 (b) Annually obtain a certification from each such in-state person that the
25 person has complied with the prohibition established in this Subparagraph. Any
26 person who intentionally or negligently provides an inaccurate certification may be
27 subject to penalties as may be established by rule promulgated by the secretary in
28 accordance with the Administrative Procedure Act.

1 (4) Marketplace Provider. A marketplace provider shall be subject to the
2 state's legal requirements for a dealer if the marketplace provider performs any of the
3 activities described in this Paragraph with respect to retail sales:

4 (a) Facilitates a retail sale, as evidenced by the marketplace provider doing
5 all of the following:

6 (i) Listing or advertising tangible personal property and services for sale in
7 any forum, including a catalog or internet website.

8 (ii) Either directly or indirectly through agreements or arrangements with
9 third parties, collecting receipts from the marketplace dealer, whether or not the
10 marketplace provider deducts any fees from the transmission of those receipts to the
11 marketplace dealer.

12 (b) A marketplace provider doing business in the state is required to collect
13 and remit the sales and use tax on any sales facilitated by the marketplace provider
14 to customers in the state. However, no marketplace provider shall be required to
15 collect, remit, or pay sales or use tax on a sale from a marketplace dealer to a
16 customer in the state if the marketplace dealer either provides a copy of the
17 marketplace dealer's registration to collect sales and use tax in the state to the
18 marketplace provider before the marketplace provider facilitates on that sale, or the
19 marketplace dealer appears on a list published by the department of the entities
20 registered to collect sales and use tax in the state. The secretary of the department,
21 hereinafter referred to as "secretary", shall establish provisions for the content and
22 publication of the list and clarify when a marketplace provider facilitates a retail sale
23 by administrative rule promulgated in accordance with the Administrative Procedure
24 Act.

25 (c) A marketplace provider is relieved of liability under this Subsection for
26 failure to collect and remit the correct amount of tax to the extent that the
27 marketplace provider can demonstrate that the error was due to incorrect information
28 given to the marketplace provider by the marketplace dealer unless the marketplace
29 provider and the marketplace dealer are related.

1 (d) Nothing in this Subsection shall be construed to interfere with the ability
2 of a marketplace provider and a marketplace dealer to enter into agreements with
3 each other regarding fulfillment of the requirements of this Chapter.

4 (5) Referrer Permit. The provisions of this Paragraph establish procedures
5 for the permitting of referrers, requirements for reporting by a referrer, and the
6 potential liability for the payment of sales and use tax by a referrer under certain
7 circumstances.

8 (a) A referrer that received more than ten thousand dollars in fees paid by
9 dealers for services in the previous calendar year or that received more than seven
10 thousand five hundred dollars for such services in the first three quarters of the
11 current calendar year shall be required to annually file a notification form with the
12 Department of Revenue stating the referrer's intent to provide services to a dealer in
13 the following calendar year. The form shall be filed by the first day of the last month
14 of a calendar year, and the content of the form shall be determined by the secretary.
15 The Department of Revenue shall, within fifteen days of receipt of the notice, issue
16 a permit to the referrer, without charge, to provide services to dealers to refer
17 customers in the state to dealers.

18 (b) A referrer required to file the notice as provided in Subparagraph (a) of
19 this Paragraph that fails to obtain a permit shall be prohibited from referring
20 customers in the state to dealers. A referrer that does so without a permit shall be
21 assessed a penalty and required to pay a fee as may be established by administrative
22 rule promulgated in accordance with the Administrative Procedure Act.

23 (c) In addition to any other return or report required to be filed, a referrer that
24 receives more than ten thousand dollars in fees paid by dealers in the previous
25 calendar year shall be required to annually report all of the following to the
26 Department of Revenue:

27 (i) The name and address of each dealer who has contracted with the referrer
28 to refer customers within the state to the dealer.

1 (ii) If available, the cumulative sales price and any available transactional-
2 level detail for referrals made by the referrer of customers in the state to each
3 retailer, including listed price of items and the number of times referrals were made
4 to dealers for those items. The referrer shall not be required to provide any
5 information that could identify a customer.

6 (iii) If available, the number of potential customers located in the state that
7 were referred to the dealer and the number of customers who made purchases after
8 a referral.

9 (d) A referrer that receives more than ten thousand dollars from fees paid by
10 dealers during the previous calendar year shall also be required to provide notice to
11 dealers that the dealer's sales may be subject to sales and use tax and that the dealer's
12 contact information and sales volume into the state is being provided to the
13 Department of Revenue. The secretary may establish by regulation what constitutes
14 notice to a dealer. The secretary shall revoke the permit of any dealer who fails to
15 provide the notice required by this Subparagraph. However, a referrer shall not be
16 required to provide the information for a dealer if the dealer is a marketplace
17 provider that collects and remits sales and use tax, and provides a copy of the dealer's
18 registration to collect sales and use tax in the state to the referrer, or the dealer
19 appears on a list published by the Department of Revenue. The department shall
20 promulgate regulations regarding the content and publication of the list.

21 (e) When a referrer refers a customer to a dealer and the dealer makes a retail
22 sale to that customer in the state, liability for the sales and use tax on the transaction
23 due from the customer or dealer shall be imposed on the referrer in the amount of the
24 sales and use tax that would have been due on the transaction, based on the sales
25 price listed by the referrer or dealer, unless the dealer either provides a copy of the
26 dealer's registration to collect sales and use tax in the state to the referrer or the
27 dealer appears on a list published by the department of entities registered to collect
28 sales and use tax in the state.

1 (f) The provisions of this Subparagraph shall not apply to any referrer that
2 has properly complied with the provisions regarding annual permitting and the
3 reporting of information.

4 (6) Notwithstanding any provision of law to the contrary, if the secretary
5 issues one or more final determinations as to the collection and remittance of sales
6 and use taxes, any appeal based on a constitutional issue shall be heard by preference
7 within sixty days of the lodging of the record in the court of appeal. The appeal shall
8 be taken thirty days from the date the determination is issued. If such appeal is
9 timely filed, any amount of taxes paid under protest pursuant to R.S. 47:1856(E)
10 shall remain segregated and no bond or other security shall be necessary to perfect
11 such appeal. In the event the supreme court grants a writ of certiorari, the court shall
12 hear the appeal on the next regular docket of the court.

13 Section 2. If any provision of this Act or the application thereof is held invalid, such
14 invalidity shall not affect other provisions or applications of this Act which can be given
15 effect without the invalid provisions or applications, and to this end the provisions of this
16 Act are hereby declared severable.

17 Section 3. This Act shall become effective upon signature by the governor or, if not
18 signed by the governor, upon expiration of the time for bills to become law without signature
19 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
20 vetoed by the governor and subsequently approved by the legislature, this Act shall become
21 effective on the day following such approval.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB 110 Original

2016 First Extraordinary Session

Pugh

Abstract: Establishes a variety of requirements and procedures affecting persons who make or facilitate retail sales of taxable tangible personal property and services in La.

Proposed law provides requirements for persons who engage in business, and facilitate and maintain a market in La. concerning the collection and remittance of sales and use tax.

Proposed law defines the following terms: "dealer", "direct response marketing", "marketplace dealer", "marketplace provider", and "referrer".

Proposed law establishes activity that constitutes doing business within a jurisdiction, which includes the selling, leasing, or delivery of taxable tangible personal property or services, maintaining an office or other facility, having an employee work from his home located within a jurisdiction, engaging in marketing targeted at the residents of a jurisdiction, and maintaining agreements with certain persons who refer potential purchasers of products.

Proposed law establishes a rebuttable presumption that a person is presumed to be conducting business within a jurisdiction, and thus a dealer, if their cumulative sales exceed \$50,000 per calendar year, and authorizes rebuttal of the presumption under certain circumstances.

Present law requires a dealer to register with the Dept. of Revenue (department) for purposes of collection and remittance of sales and use tax.

Proposed law establishes guidelines for the types of relationships between persons which indicate nexus with a jurisdiction, and authorizes rebuttal of a presumption of nexus under certain circumstances.

Proposed law establishes conditions under which a marketplace provider may be subject to the obligations of a dealer with respect to collection and remittance of sales and use tax, and provides for the specific conditions under which they may be relieved of that duty.

Proposed law requires a referrer to annually register with the department and provides for a permitting process for referrers.

Proposed law requires referrers who are paid more than \$10,000 by dealers for referral services in the previous calendar year, or more than \$7,500 in the first three quarters of the current calendar year, to file a notification form with the department concerning their activities in the promotion, facilitating, and maintenance of a market in a jurisdiction. Upon the filing of the notification, the department shall issue a permit to the referrer for activity in the prospective year. A referrer is prohibited from referring customers in the jurisdiction of a seller without a permit. A fee may be imposed on a referrer who refers customers without a permit, as may be determined by administrative rule.

Proposed law requires the department to maintain a list of dealers and referrers.

Proposed law establishes specific requirements for reports to the department by a referrer who receives more than \$10,000 per year from dealers, including information on the identity of the dealers, the cumulative sales from referrals, and numbers of referrals. Further, such a referrer is required to provide notice to dealers that the dealer's sales may be subject to sales and use tax and that other information concerning the dealer and their sales is being provided to the department. A referrer who fails to perform the required reporting shall have their permit revoked.

Proposed law establishes conditions under which a referrer may be subject to the obligations of a dealer with respect to collection and remittance of sales and use tax, and provides for the specific conditions under which they may be relieved of that duty.

Proposed law provides that an appeal of a determination by the secretary concerning the collection and remittance of sales and use taxes under proposed law on an issue of constitutionality shall be heard by preference within 60 days of the lodging of the record in the court of appeal. The appeal shall be taken 30 days from the date the determination was issued. Further, amounts paid under protest shall remain segregated, and there shall be no bond or other security necessary to perfect the appeal. In the event the supreme court grants a writ of certiorari, the court shall hear the appeal on the next regular docket of the court.

If any provision of this Act or the application thereof is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be effective without the invalid provisions or applications, and to this end the provisions of this Act are hereby declared severable.

Effective upon signature of governor or lapse of time for gubernatorial action.

(Adds R.S. 47:302(V))