

DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
FAX NO: (808) 587-1560

MARIA E. ZIELINSKI
DIRECTOR OF TAXATION

DAMIEN A. ELEFANTE
DEPUTY DIRECTOR

To: The Honorable Angus L.K. McKelvey, Chair
and Members of the House Committee on Consumer Protection and Commerce

Date: Tuesday, February 7, 2017

Time: 2:00 P.M.

Place: Conference Room 329, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: H.B. 398, H.D. 1, Relating to Taxation

The Department of Taxation (Department) appreciates the intent of H.B. 398, H.D. 1, and provides the following comments for your consideration.

H.B. 398, H.D. 1, requires retailers not required to pay general excise tax (GET) to report the amounts of purchases made from them for use in the State of Hawaii both to their purchasers and to the Department. The bill has a defective effective date of July 1, 2038. The bill is similar to a Colorado law which was recently upheld in court.

First, the Department notes that this measure focuses on informational use tax reporting. The information is important to use tax collection; however, the information itself does not answer the question about how these taxes can be collected from the purchasers in the State of Hawaii. The use tax, codified at Chapter 238, Hawaii Revised Statutes, is imposed on a Hawaii purchaser when goods, services, etc. are purchased from a seller that does not have nexus with Hawaii. The use tax may be imposed on any taxpayer, whether an individual or an entity.

Since the use tax is imposed per purchaser, the efficient enforcement and collection of this use tax revenue remains difficult. For example, if an individual purchases \$2,000 of products from a retailer, and thus owes \$80 in use tax, the Department must bill and collect from an individual taxpayer to realize the \$80. This effort would be required for each potential taxpayer, which could be hundreds of thousands of individual taxpayers.

To address this, the Department recommends a provision to provide relief from the reporting requirements to retailers who voluntarily collect and pay use tax on their Hawaii sales. Voluntary collection would alleviate the heavy compliance burden on the Department and seems to be the most efficient method of collecting the use tax revenue.

Second, the Department notes that as written, the trigger for reporting is simply that the sale is made “for use in the State.” The Department suggests that this sourcing provision be clarified so that there is no confusion as to which transactions are subject to reporting under this measure. For example, the bill should specify how the sale of tangible personal property should be sourced.

Third, the Department suggests that a threshold for retailers subject to this measure be set at a specific dollar amount and allow the Department to mandate the electronic filing of the annual report.

Thank you for the opportunity to provide comments.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, USE, Reporting Requirement for Direct Sellers

BILL NUMBER: HB 398, HD-1

INTRODUCED BY: House Committee on Economic Development & Business

EXECUTIVE SUMMARY: This measure is based on a Colorado statute upheld in federal court. It is in line with other states' measures increasing pressure on remote sellers to collect and remit sales and use taxes owed on purchases by customers in the state. It has the potential to aid significantly in the enforcement and collection of GET and use taxes imposed under current law.

BRIEF SUMMARY: Adds a new section to HRS chapter 231 requiring that each retailer or vendor making sales of tangible personal property from a place of business outside the State for use in the State that is not required to pay or collect general excise or use tax shall send notifications to all purchasers in the State by January 31 of each year to the effect that the State requires a use tax return to be filed and use tax paid.

Provides that the notification shall be sent separately to all purchasers by first class mail and shall not be included with any other shipments. The notification is to include "Important Tax Document Enclosed" on the exterior of the mailing.

Requires each retailer or vendor subject to this requirement to file an annual statement showing the total amount paid for purchases during the preceding calendar year. The statement is to be filed with the department on or before March 1 of each year.

Provides that the penalty for failing to comply is \$10 for each purchaser not notified, or \$10 for each purchaser that should have been included in a non-filed annual report. A reasonable cause exception is provided.

EFFECTIVE DATE: July 1, 2038, and applies to taxable years beginning after December 31, 2016.

STAFF COMMENTS: The United States Constitution has been interpreted as providing two limits on the states' powers to tax. These limits come from at least two places: first, the Due Process Clause, requiring a person to have "minimum contacts" with a state before that state is allowed to exercise police powers, including the power to tax, against that person; and second, the Commerce Clause, where the Supreme Court held in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), that if the Congress does not otherwise define the threshold for taxability, state tax may not be imposed upon a person unless there is "substantial nexus" with that person. Substantial nexus is more than minimum contacts, and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), appears to stand for the proposition that some physical presence is needed to establish substantial nexus.

This bill is, of course, trying to solve the problem, faced by all states that have enacted sales and use taxes, about collecting sales and use taxes on remote sellers. A seller with no physical presence in a customer's state might see no obligation to collect and remit tax in the customer's state. The customer would be liable for use tax, but tax departments throughout the country have met with little success in motivating such customers, especially those with small purchases, to pay use tax. With the explosive growth of e-commerce, the states' inability to compel out-of-state retailers to collect sales tax has cost state and local governments significant revenue and disadvantaged in-state retailers, who must pay GET at the point of sale.

Colorado came up with an interesting solution to its problem. They figured they couldn't make all retailers collect and pay the tax over. However, they did pass a law saying that if a retailer selling to a Colorado consumer doesn't pay the tax, it must do three things. First, the retailer must advise the consumer that Colorado use tax is due on the purchase. Second, the retailer must send a summary of all purchases made during the year to the consumer if those purchases total \$500 or more. Third, the retailer must send a summary to the Colorado Department of Revenue similar to IRS Form 1099 reporting requirements. Penalties are imposed against noncompliant retailers. The penalty amount is \$10 per purchaser for failing to send the purchaser statement, and \$10 per purchaser that should have been included in a report for failure to file the statement.

The Direct Marketing Association, or the DMA, whose members include many online retailers, sued in federal court asking for an injunction against enforcing these requirements, which they contended were discriminatory and unconstitutional. The U.S. District Court found them to be an undue burden on interstate commerce and granted a permanent injunction. The Department of Revenue appealed to the Tenth Circuit. After a trip to the U.S. Supreme Court, the Tenth Circuit reached the merits and upheld the statute. *Direct Marketing Association v. Brohl*, No. 12-1175 (10th Cir. Feb. 22, 2016). The Supreme Court denied review on December 12, 2016.

Nothing the legislature enacts will change the U.S. Constitution, and the bill may face constitutional challenge if enacted. However, this statute appears to be patterned after the Colorado statute upheld by the Tenth Circuit.

As technical matters:

1. The Committee may wish to consider a de minimis threshold, for example, not requiring the retailer to send notices or report to the department unless its total sales into Hawaii for the year is at least a certain dollar amount. Thresholds adopted in other states range from about \$100,000 to \$250,000.
2. The penalty provided for failure to file the annual statement should also be imposed for omitting purchasers that should have been included in the statement but were not.
3. The Committee may wish to make clear that a remote seller that registers for voluntary collection of use tax is exempt from the requirements of this new section.



Chamber of Commerce HAWAII
The Voice of Business

LATE

**Testimony to the House Committee on Consumer Protection & Commerce
Tuesday, February 7, 2017 at 2:00 P.M.
Conference Room 329, State Capitol**

RE: HOUSE BILL 398 HD1 RELATING TO TAXATION

Chair McKelvey, Vice Chair Ichiyama, and Members of the Committees:

The Chamber of Commerce Hawaii ("The Chamber") **supports** HB 398 HD1, which requires retailers or vendors that are not located in the State and not required to pay or collect general excise or use tax for sales to send certain information to purchasers in the State; requires retailers or vendors to submit an annual report to the department of taxation.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,600+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

Currently, many internet-based retailers and vendors unfairly benefit from the State's inability to enforce the Use Tax against individual purchasers. The result is often lost revenue by the State and lost sales by conventional and "brick and mortar" retailers, many of which provide employment opportunities for our residents. This bill could help eliminate this tax gap. We believe that measures such as these provide fairness and equity for all businesses.

Thank you for the opportunity to testify.

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 6, 2017 11:47 AM
To: CPCtestimony
Cc: blawaiianlvr@icloud.com
Subject: Submitted testimony for HB398 on Feb 7, 2017 14:00PM

HB398

Submitted on: 2/6/2017

Testimony for CPC on Feb 7, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
De MONT R. D. CONNER	Ho'omana Pono, LLC.	Oppose	Yes

Comments: We WHOLLY OPPOSE this bill. This bill violates the United States Interstate Commerce Clause, see United States v. Lopez, 514 U.S. 549 (1995), as well as the Foreign Commerce Clause that are both embedded with in the United States Constitution, Article I, Section 8, Clause 1. While traditional "brick & mortar" stores are crying foul, that internet companies have an unfair advantage. It must be remembered that these same "brick & mortar" stores have regularly passed on the cost of doing business in Hawaii to the consumers, as well as effectively pricing average and low income people out of the market. Ala Moana Shopping Center is a classic example of gluttony & greed. It has become the Tourist Only Mall! Lastly, while there are claims that this State is losing out on over \$122 million dollars each year to on-line shopping. It must be remembered that this State has no right to claim money from beyond its shores. This bill clearly violates the United States Constitution, is wholly unenforceable & a total waste of time, money & efforts that are better spent on what this State can control.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov



LATE

**TESTIMONY OF TINA YAMAKI
PRESIDENT
RETAIL MERCHANTS OF HAWAII
February 7, 2017**

Re: HB 398 HD1 Relating to Taxation.

Good afternoon Chairman McKelvey and members of the House Committee on Consumer Protection and Commerce. I am Tina Yamaki, President of the Retail Merchants of Hawaii and I appreciate this opportunity to testify.

The Retail Merchants of Hawaii (RMH) is a statewide not-for-profit trade organization representing 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii. The retail industry is one of the largest employers in the state, employing 25% of the labor force.

The Retail Merchants of Hawaii strongly supports HB 398 Relating to Taxation. Our local brick and mortar stores are the economic backbones of our communities that provide employment and tax revenue to fund vital services throughout the State.

Currently under the existing state law, consumers are required to pay the General Excise Tax on the goods they purchase in stores physically located in the state of Hawaii. However, if they shop on line, sellers are not required to collect a tax in the same way these local businesses do. This puts our local retailers at a disadvantage as this effectively makes products purchased at brick-and-mortar stores more expensive than products purchased online.

Many of our retailers statewide are already operating on a thin margin, especially mom and pop stores. This measure would provide e-fairness by leveling the playing field for businesses in our community.

We urge you to support HB 398 HD1 and have the state of Hawaii join the 39 other states that have enacted similar e-fairness legislation including most recently Louisiana, Michigan, Nevada, Ohio, Oklahoma, South Dakota, Tennessee and Vermont.

Again mahalo for this opportunity to testify.

February 3, 2017

David Wong
jkfujita@hawaii.rr.com

Subject: Testimony to oppose HB 398, HD1

Dear Sir/Ma'am,

I am respectfully submitting the following testimony to oppose HB 398, HD1. This bill is proposing to place the tax burden on the consumer for out-of-state purchases, thereby unfairly creating a sales tax on the consumer. This newly created sales tax will contradict existing law such as, Hawaii Revised Statutes (HRS) Section 431:10-218, which prohibits insurers or their agents from charging additional fees, including GET, for insurance premiums. If this bill becomes law, insurance premiums purchased from an out-of-state business will be subject to this new sales tax.

In addition, this bill will implement a tax on purchases currently exempted from the General Excise Tax (GET). It seems the intent of this bill is to create another source of revenue for the State. Instead of creating another tax, I think the State should focus its efforts in collecting all taxes currently allowed by law.

Finally, this bill would potentially create a financial hardship on person's that are affected by this new tax. Currently, the GET is applied at the time of purchase. In contrast, this tax is proposed to be accumulated on a yearly basis. So, instead of incremental payments throughout the year, a one time total would be due each year.

To conclude, for the reasons stated above, I oppose HB 398, HD1. I feel that the residents of Hawaii are sufficiently taxed and the creation of a new sales tax is unfair and not needed. Thank you for considering my testimony.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Wong', written in a cursive style.

David Wong

PETER L. FRITZ

TELEPHONE (SPRINT RELAY): (808) 568-0077
E-MAIL: PLFLEGIS@FRITZHQ.COM

HOUSE OF REPRESENTATIVES
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017

COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Testimony on H.B. 398 HD1
Hearing: February 7, 2017
Relating To Taxation

Chair McKelvey, Vice Chair Ichiyama and members of the Committee. My name is Peter Fritz. I am an attorney with a tax practice. I am testifying in **strong support** of H.B. 398 HD1.

When a neighborhood bookstore in Hawaii sells a book, it collects for Hawaii's General Excise Tax ("GET") and pays taxes to the Department of Taxation ("Department"). When Barnes & Noble sells a book over the Internet to a Hawaii buyer, it collects for GET and pays taxes to the Department. But when Amazon sells a book over the Internet to a Hawaii buyer, Amazon might not to collect for the GET.

Hawaii consumers have a preexisting obligation to pay use tax on the purchase from Amazon; but most are seemingly unaware of their tax responsibility. When Hawaii buyers do not pay use tax on their purchases, it increases the burden on all Hawaii taxpayers because it forces government to seek needed revenue from other sources or to cut appropriations to programs needed by citizens.

The purpose of this bill is to assist the state in collecting and educating Hawaii taxpayers about the use tax for in-state purchasers by imposing three obligations on non-collecting retailers: (1) to send a transactional notice to purchasers informing them that they may be subject to Hawaii's use tax, (2) to send Hawaii purchasers who buy goods from the retailer totaling more than \$500 an annual purchase summary with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes on those purchases, and (3) to send the Department an annual customer information report listing their customers' names, addresses, and total amounts spent. These reporting requirements apply only to retailers that are not otherwise required to comply with the GET.

Rules can address the Department's comments about de minimis purchasers, deminimis non-collecting retailers and sourcing. Regulations issued by Colorado exclude reports for purchaser whose total purchases do not exceed a certain dollar amount, exclude non-collecting retailers who have gross sales less than a specified amount and provide sourcing rules.

With respect to the concern expressed by the Department regarding the cost to collect the use tax, the Department could start by contacting taxpayers with the greatest amount of purchases and who did not pay any use tax. Alternatively, the Tax System Modernization could be adapted to process this information and send notices to taxpayers.

Thank you for the opportunity to testify.

Respectfully submitted,


Peter L. Fritz

LATE

To: The Committee on Consumer Protection and Commerce
The Honorable Angus McKelvey, Chair

Re: HB 398

Date: February 6, 2017

Aloha Members of the Committee,

HB 398 is a poor first attempt to regulate on-line shopping out-of-existence for the consumers of Hawai`i.

There are fatal flaws in the legislation as written.

(1) The requirement imposed on on-line sellers to report individuals' purchases to the state Department of Taxation or face a fine for failing to so do imposes an added cost on out-of-state on-line sellers not faced by in-state sellers (whether or not they have 'brick-and-mortar establishments). Thus, the so-called 'level playing field' nature of this bill is vitiated.

(2) For consumers, protection of anonymity of purchases is lost. Does the state of Hawai`i enjoy the legal authority to compel sellers (or buyers) to specify the quantity of legal goods bought and sold? Rather, isn't the state's interest satisfied by knowing the total dollar value of sales? Compelling revelation of items is an invasion of citizen's privacy not a "protection" of consumers (see your Committee title). Individual's specific purchases become known to state Department officials and are subject to the safety and security of electronic systems. This is not true of purchases made within the state. Merchants in a store DO NOT, except in very limited cases, report to government the items a consumer purchases.

(3) If this bill passes, as a citizen of the state, do I now face an implicit violation of the search-and-seizure clause of the 4th Amendment to the U.S. Constitution? If a company is compelled—by cost or other penalty—to report my purchases to the state, the state, *ipso facto* potentially knows the entire contents of my home without having a court involved (e.g. for warrant purposes). Is this an illegal search?

(4) What recourse exists for purchasers if the reporting company is in error in their reporting? How many receipts and bills—at what cost of time and effort—are you willing to require me, as an aging consumer, to keep throughout the year? Will the state provide me with bookkeeping and storage services?

(5) Time prevents me from going further, but any one of these points should be enough to cause a pause in the haste for this bill and re-think the issue more carefully.

Respectfully yours,
David L. Hammes
155 Alohala Drive
Hilo, HI 96720

808-959-2426

dlhammes@gmail.com



LATE

Hawaii Association of Public Accountants

P.O. Box 61043
Honolulu, HI 96839

Before the House Committee on Consumer Protection & Commerce

**Tuesday, February 7, 2017 at 2:00 p.m.
Conference Room 329**

Re: Support for HB398, HD1 Relating to Taxation

Chair McKelvey, Vice Chair Ichiyama, and Committee Members:

Hawaii Association of Public Accountants (HAPA) is a statewide organization of over 550 tax and public accounting practitioners who are primarily small to mid-sized Hawaii CPA firm owners, managers, and staff located throughout the State of Hawaii.

HAPA is in strong support of HB398, HD1 since it will encourage compliance with Hawaii General Excise/Use taxes by those retailers who do not have taxable “nexus” (or physical presence) in the State of Hawaii. Where a retailer has no nexus, the state cannot directly impose the Hawaii General Excise tax on the retailer even though the retailer sells products to purchasers in Hawaii. Instead, the obligation to pay tax falls on the purchaser of goods, who is supposed to pay a corresponding “use” tax. Unfortunately, except for some businesses, the use tax is not paid by most purchasers of goods from out-of-state vendors because the purchasers are not informed or aware of their Hawaii use tax obligations, and for other reasons.

Hawaii General Excise/Use tax receipts currently constitute over 50% of Hawaii’s General Fund tax revenues and are the largest single category of tax collections for the State of Hawaii. Nationwide, consumers have been resorting more and more to purchasing goods online, and the growth rate for online shopping recently has been in the double digits, while the growth rate of sales from brick and mortar stores has been in the low single digits. This means that without action taken to shore up tax compliance for purchases made from online retailers, Hawaii will lose more and more of its retail tax revenues.

HB398, HD1 is crafted similar to a Colorado statute with notice provisions, and HB398, HD1 provides that online vendors not already paying or collecting Hawaii General Excise or Use tax shall provide notice to purchasers and the Hawaii Department of Taxation of amounts subject to Hawaii’s use tax. After Colorado's

statute withstood legal challenges, giant retailer Amazon agreed to collect sales taxes for Colorado and for states with similar statutes rather deal with the paperwork of providing notices to purchasers or the various states. As of February 1, 2017, Hawaii will be only one of six states remaining where Amazon has not agreed to collect sales/use taxes for a state imposing such taxes.

Unfair playing field for Hawaii Brick and Mortar Stores compared to Online Retailers with no Hawaii physical presence

With the increased growth rate of online sales and the offer of free shipping by out-of-state retailers, much of the retail sales to Hawaii purchasers have not been taxed. Where online sales have not been taxed, it creates an unfair playing field for Hawaii brick and mortar stores, who have to pay not only Hawaii General Excise taxes, but also payroll taxes for Hawaii employees and either taxes related to Hawaii lease rent or Hawaii property taxes.

HB398, HD1 retains Hawaii's effective tax structure by allowing Hawaii to preserve its broad tax base without the need to increase tax rates

It is not fair or equitable to raise taxes to provide for Hawaii's needs when reasonable efforts have not been made to collect taxes that are already required to be paid under existing Hawaii tax laws. It is important that Hawaii retains its underlying tax base established by law for years, and does not shift its tax burden unfairly to Hawaii retailers and all taxpayers by increasing tax rates for those taxpayers who have been complying with the tax laws.

Comment: The committee may wish to consider exempting certain online retailers who send, in the aggregate, small amounts to Hawaii purchasers in order to avoid this notice requirement from being overly cumbersome to certain retailers.

This bill is only about tax enforcement and compliance, and does not raise Hawaii tax rates. This bill is long overdue because other states have had similar bills to assist with online retail tax collections, and Hawaii cannot afford to ignore tax compliance efforts or wait for federal legislation which has been discussed for years with no results.

Please support HB398, HD1. Thank you for considering the above.

Respectfully submitted,

Brian M. Iwata, CPA

State President, Hawaii Association of Public Accountants

and

Marilyn M. Niwao, J.D., CPA, ATA, CGMA

Legislative Committee Chairperson, Hawaii Association of Public Accountants