

JAN 24 2018

A BILL FOR AN ACT

RELATING TO TAXATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that states fail to
2 collect more than \$23,000,000,000 annually in sales taxes from
3 remote sales over the Internet and through catalogs. Hawaii and
4 its local governments will lose out on an estimated \$60,000,000
5 in sales and use taxes from remote sales, reducing funds that
6 would otherwise be available for the public education system,
7 health care services, infrastructure, and other vital public
8 services.

9 The legislature further finds that Colorado adopted a law
10 requiring out-of-state retailers that do not collect Colorado's
11 state sales tax to report tax-related information to their
12 Colorado customers and the Colorado department of revenue. In
13 2016, the United States court of appeals for the tenth circuit
14 upheld that law.

15 The intent of this Act is to address the significant harm
16 and unfairness brought about by the physical presence nexus
17 rule. To achieve this objective, this Act adopts a new program



1 that requires remote sellers who meet a specified threshold of
2 gross receipts from sales into the State to have the option to
3 collect general excise or use tax on taxable sales into the
4 State or comply with certain general excise and use tax notice
5 and reporting provisions. This option is also available to
6 other persons, such as marketplace facilitators, for facilitated
7 sales on behalf of third-party remote sellers.

8 SECTION 2. Chapter 237, Hawaii Revised Statutes, is
9 amended by adding two new sections to be appropriately
10 designated and to read as follows:

11 "§237-A Election by remote sellers, referrers, and
12 marketplace facilitators. (a) Beginning on January 1, 2018,
13 and for any calendar year thereafter, remote sellers, referrers,
14 and marketplace facilitators shall elect to collect and remit
15 general excise tax on all taxable sales into the State pursuant
16 to this chapter or comply with section 237-B.

17 (b) For marketplace facilitators, the requirements of
18 subsection (a) shall apply only with respect to:

19 (1) Retail sales through the marketplace facilitator's
20 marketplace by or on behalf of marketplace sellers who
21 do not have a physical presence in the State; and



1 (2) A marketplace facilitator's own retail sales, if the
2 marketplace facilitator does not have a physical
3 presence in the State.

4 (c) For referrers, the requirements of subsection (a)
5 shall apply only with respect to:

6 (1) Retail sales directly resulting from a referral of the
7 purchaser to a marketplace seller who does not have a
8 physical presence in the State; and

9 (2) A referrer's own retail sales, if the referrer does
10 not have a physical presence in the State.

11 A referrer may make different elections pursuant to subsection
12 (a) with respect to retail sales described in paragraphs (1) and
13 (2).

14 **§237-B Information reporting.** (a) Except as otherwise
15 provided in subsection (e), a seller that does not collect the
16 tax imposed under this chapter on a taxable sale shall comply
17 with the applicable notice and reporting requirements of this
18 section. For taxable sales made through a marketplace
19 facilitator, or other agent, the marketplace facilitator, or
20 other agent, shall comply with the notice and reporting
21 requirements of this section, and the seller is not subject to



the notice and reporting requirements of this section with respect to those sales. If a referrer makes an election to comply with the applicable notice and reporting requirements of this section, a marketplace seller to whom a referral is made by the referrer shall remain subject to the applicable notice and reporting requirements pursuant to this section for their sales, unless the marketplace seller collects the tax imposed under this chapter on taxable retail sales sourced to the State.

(b) A seller, other than a referrer acting in its capacity as a referrer, subject to the notice and reporting requirements of this section shall:

(1) Post a conspicuous notice on its marketplace, platform, website, catalog, or any other similar medium that informs Hawaii purchasers that:

(A) General excise tax is due on certain purchases;

(B) The State of Hawaii requires the purchaser to file a general excise tax return; and

(C) The notice is provided under the requirements of this section; and

(2) Provide a notice to each consumer at the time of each sale that includes the following information:



1 (A) A statement that general excise tax is not being
2 collected or remitted upon the sale;

3 (B) A statement that the consumer may be required to
4 remit general excise tax directly to the
5 department of taxation; and

6 (C) Instructions for obtaining additional information
7 from the department regarding whether and how to
8 remit general excise tax to the department of
9 taxation;

10 provided that the notice pursuant to paragraph (2) shall be
11 prominently displayed on all invoices and order forms,
12 including, where applicable, electronic and catalog invoices and
13 order forms and upon each sales receipt or similar document
14 provided to the purchaser, whether in paper or electronic form.
15 No indication shall be made that general excise tax is not
16 imposed upon the transaction unless such indication is followed
17 immediately with the notice required pursuant to paragraph (2)
18 or the transaction with respect to which the indication is given
19 is exempt from general excise tax pursuant to law.



1 (c) A referrer subject to the notice and reporting
2 requirements of this section shall post a conspicuous notice on
3 its platform that informs Hawaii purchasers:

4 (1) That general excise tax is due on certain purchases;

5 (2) That the seller may or may not collect and remit
6 general excise tax on a purchase;

7 (3) That the State of Hawaii requires the purchaser to
8 file a general excise tax return if tax is not
9 assessed at the time of a taxable sale by the seller;

10 (4) That the notice is provided under the requirements of
11 this section;

12 (5) Of the instructions for obtaining additional
13 information from the department of taxation regarding
14 whether and how to remit the general excise tax to the
15 department; and

16 (6) That if the seller to whom the purchaser is referred
17 does not collect general excise tax on a subsequent
18 purchase by the purchaser, the seller may be required
19 to provide information to the purchaser and the
20 department of taxation about the purchaser's potential
21 general excise tax liability;



1 provided that the notice shall be prominently displayed on the
2 platform and may include pop-up boxes or notification by other
3 means that appear when the referrer transfers a purchaser to a
4 marketplace seller or an affiliated person to complete the sale.

5 (d) A seller, other than a referrer acting in its capacity
6 as a referrer, subject to the notice and reporting requirements
7 of subsection (b) shall, no later than February 28 of each year,
8 provide a report to each consumer for whom the seller was
9 required to provide a notice under subsection (b)(2). The
10 report under this subsection shall include:

11 (1) A statement that the seller did not collect general
12 excise tax on the consumer's transactions with the
13 seller and that the consumer may be required to remit
14 such tax directly to the department of taxation;

15 (2) A list, by date, generally indicating the type of
16 product purchased or leased during the immediately
17 preceding calendar year by the consumer from the
18 seller sourced to this State and the price of each
19 product;



1 (3) Instructions for obtaining additional information from
2 the department of taxation regarding whether and how
3 to remit the sales tax to the department;

4 (4) A statement that the seller is required to submit a
5 report to the department of taxation pursuant to
6 subsection (f) stating the total dollar amount of the
7 consumer's purchases from the seller; and

8 (5) Any information as the department of taxation may
9 reasonably require.

10 The report required under this subsection shall be sent to
11 the consumer's billing address or, if unknown, the consumer's
12 shipping address, by first-class mail, in an envelope marked
13 prominently with words indicating important tax information is
14 enclosed. If no billing or shipping address is known, the
15 report shall be sent electronically to the consumer's last known
16 electronic mail address with a subject heading indicating
17 important tax information is enclosed.

18 (e) A referrer subject to the notice requirements pursuant
19 to subsection (c) shall, no later than February 28 of each year,
20 provide notice to each marketplace seller to whom the referrer
21 transferred a potential purchaser located in Hawaii during the



1 previous calendar year. The notice under this subsection shall
2 include:

3 (1) A statement that Hawaii imposes a general excise tax
4 on gross receipts;

5 (2) A statement that a seller, meeting the threshold
6 pursuant to section 237-2, is required to either
7 collect and remit general excise tax on all taxable
8 gross receipts sourced to this State or to comply with
9 this section; and

10 (3) Instructions for obtaining additional information from
11 the department of taxation.

12 By February 28 of each year, a referrer required to provide
13 notice pursuant to this subsection shall provide the department
14 with a list of sellers who received the referrer's notice under
15 this section and an affidavit signed under penalty of perjury
16 from an officer of the referrer affirming that the referrer made
17 reasonable efforts to comply with the applicable general excise
18 tax notice and reporting requirements of this section; provided
19 that the list of sellers who received the referrer's notice
20 shall be provided electronically in a form and manner required
21 by the department of taxation.



1 (f) A seller, other than a referrer acting in its capacity
2 as a referrer, subject to the notice and reporting requirements
3 of this section shall, no later than February 28 of each year,
4 file a report with the department of taxation. The report shall
5 include, with respect to each consumer to whom the seller is
6 required to provide a report pursuant to subsection (d) by
7 February 28 of the current calendar year:

8 (1) The consumer's name;

9 (2) The billing address and, if different, the last known
10 mailing address;

11 (3) The shipping address for each product sold or leased
12 to the consumer for delivery to a location in the
13 State during the immediately preceding calendar year;
14 and

15 (4) The total dollar amount of all such purchases by the
16 consumer.

17 The report pursuant to this subsection shall include an
18 affidavit signed under penalty of perjury from an officer of the
19 seller affirming that the seller made reasonable efforts to
20 comply with the applicable general excise tax notice and
21 reporting requirements pursuant to this section. Except for the



1 affidavit, the report pursuant to this subsection shall be filed
2 electronically in a form and manner required by the department
3 of taxation.

4 (g) A seller who is registered with the department of
5 taxation to collect and remit general excise tax, and who makes
6 a reasonable effort to comply with the requirements of this
7 chapter, is not required to provide notice or file reports under
8 this section.

9 (h) Every seller subject to this section and section 237-A
10 shall keep and preserve, for a period of five years, suitable
11 records as may be necessary for the department of taxation to
12 verify the seller's compliance with this section and section
13 237-A. All of the seller's books, records, and invoices shall
14 be open for examination at any reasonable time by the department
15 of taxation. The department of taxation may require the
16 attendance of any officer of the seller or any employee of the
17 seller having knowledge pertinent to the department's
18 investigation of the seller's compliance with this section and
19 section 237-A, at a time and place fixed in a subpoena, and may
20 take the person's testimony under oath.



1 (i) In exercising discretion in enforcing this section and
2 section 237-A, the department of taxation may take into
3 consideration available resources, whether the anticipated
4 benefits from any potential enforcement activities are likely to
5 exceed the department's expected enforcement costs, and any
6 other factors the department deems appropriate."

7 SECTION 3. Chapter 238, Hawaii Revised Statutes, is
8 amended by adding two new sections to be appropriately
9 designated and to read as follows:

10 "§238-A Election by remote sellers, referrers, and
11 marketplace facilitators. (a) Beginning on January 1, 2018,
12 and for any calendar year thereafter, remote sellers, referrers,
13 and marketplace facilitators shall elect to collect and remit
14 use tax on all taxable sales into the State pursuant to this
15 chapter or comply with section 238-B.

16 (b) For marketplace facilitators, the requirements of
17 subsection (a) shall apply only with respect to:

18 (1) Retail sales through the marketplace facilitator's
19 marketplace by or on behalf of marketplace sellers who
20 do not have a physical presence in this State; and



1 (2) A marketplace facilitator's own retail sales, if the
2 marketplace facilitator does not have a physical
3 presence in this State.

4 (c) For referrers, the requirements of subsection (a)
5 shall apply only with respect to:

6 (1) Retail sales directly resulting from a referral of the
7 purchaser to a marketplace seller who does not have a
8 physical presence in this State; and

9 (2) A referrer's own retail sales, if the referrer does
10 not have a physical presence in this State.

11 A referrer may make different elections pursuant to subsection
12 (a) with respect to retail sales described in paragraphs (1) and
13 (2).

14 **§238-B Information reporting.** (a) Except as otherwise
15 provided in subsection (e), a seller that does not collect the
16 tax imposed under this chapter on a taxable sale shall comply
17 with the applicable notice and reporting requirements of this
18 section. For taxable sales made through a marketplace
19 facilitator, or other agent, the marketplace facilitator, or
20 other agent, shall comply with the notice and reporting
21 requirements of this section, and the seller is not subject to



the notice and reporting requirements of this section with respect to those sales. If a referrer makes an election to comply with the applicable notice and reporting requirements of this section, a marketplace seller to whom a referral is made by the referrer shall remain subject to the applicable notice and reporting requirements pursuant to this section for their sales, unless the marketplace seller collects the tax imposed under this chapter on taxable retail sales sourced to this State.

(b) A seller, other than a referrer acting in its capacity as a referrer, subject to the notice and reporting requirements of this section shall:

(1) Post a conspicuous notice on its marketplace, platform, website, catalog, or any other similar medium that informs Hawaii purchasers that:

(A) Use tax is due on certain purchases;

(B) The State of Hawaii requires the purchaser to file a use tax return; and

(C) The notice is provided under the requirements of this section; and

(2) Provide a notice to each consumer at the time of each sale that includes the following information:



1 (A) A statement that use tax is not being collected
2 or remitted upon the sale;

3 (B) A statement that the consumer may be required to
4 remit use tax directly to the department of
5 taxation; and

6 (C) Instructions for obtaining additional information
7 from the department regarding whether and how to
8 remit use tax to the department of taxation;

9 provided that the notice pursuant to paragraph (2) shall be
10 prominently displayed on all invoices and order forms,

11 including, where applicable, electronic and catalog invoices and
12 order forms and upon each sales receipt or similar document
13 provided to the purchaser, whether in paper or electronic form.

14 No indication shall be made that use tax is not imposed upon the
15 transaction unless such indication is followed immediately with
16 the notice required pursuant to paragraph (2) or the transaction
17 with respect to which the indication is given is exempt from use
18 tax pursuant to law.

19 (c) A referrer subject to the notice and reporting
20 requirements of this section shall post a conspicuous notice on
21 its platform that informs Hawaii purchasers:



- 1 (1) That use tax is due on certain purchases;
- 2 (2) That the seller may or may not collect and remit use
3 tax on a purchase;
- 4 (3) That the State of Hawaii requires the purchaser to
5 file a use tax return if tax is not assessed at the
6 time of a taxable sales by the seller;
- 7 (4) That the notice is provided under the requirements of
8 this section;
- 9 (5) Of the instructions for obtaining additional
10 information from the department of taxation regarding
11 whether and how to remit the use tax to the
12 department; and
- 13 (6) That if the seller to whom the purchaser is referred
14 does not collect use tax on a subsequent purchase by
15 the purchaser, the seller may be required to provide
16 information to the purchaser and the department of
17 taxation about the purchaser's potential use tax
18 liability;
- 19 provided that the notice shall be prominently displayed on the
20 platform and may include pop-up boxes or notification by other



1 means that appear when the referrer transfers a purchaser to a
2 marketplace seller or an affiliated person to complete the sale.

3 (d) A seller, other than a referrer acting in its capacity
4 as a referrer, subject to the notice and reporting requirements
5 of subsection (b) shall, no later than February 28 of each year,
6 provide a report to each consumer for whom the seller was
7 required to provide a notice under subsection (b) (2). The
8 report under this subsection shall include:

9 (1) A statement that the seller did not collect use tax on
10 the consumer's transactions with the seller and that
11 the consumer may be required to remit such tax
12 directly to the department of taxation;

13 (2) A list, by date, generally indicating the type of
14 product purchased or leased during the immediately
15 preceding calendar year by the consumer from the
16 seller sourced to this State and the price of each
17 product;

18 (3) Instructions for obtaining additional information from
19 the department of taxation regarding whether and how
20 to remit the use tax to the department;



1 (4) A statement that the seller is required to submit a
2 report to the department of taxation pursuant to
3 subsection (f) stating the total dollar amount of the
4 consumer's purchases from the seller; and

5 (5) Any information as the department of taxation may
6 reasonably require.

7 The report required under this subsection shall be sent to
8 the consumer's billing address or, if unknown, the consumer's
9 shipping address, by first-class mail, in an envelope marked
10 prominently with words indicating important tax information is
11 enclosed. If no billing or shipping address is known, the
12 report shall be sent electronically to the consumer's last known
13 electronic mail address with a subject heading indicating
14 important tax information is enclosed.

15 (e) A referrer subject to the notice requirements pursuant
16 to subsection (c) shall, no later than February 28 of each year,
17 provide notice to each marketplace seller to whom the referrer
18 transferred a potential purchaser located in Hawaii during the
19 previous calendar year. The notice under this subsection shall
20 include:



- 1 (1) A statement that Hawaii imposes a use tax on the
2 landed value of purchases;
- 3 (2) A statement that a seller, meeting the threshold
4 pursuant to section 237-2, is required to either
5 collect and remit use tax on the landed value of
6 purchases sourced to this State or to comply with this
7 section; and
- 8 (3) Instructions for obtaining additional information from
9 the department of taxation.

10 By February 28 of each year, a referrer required to provide
11 notice pursuant to this subsection shall provide the department
12 with a list of sellers who received the referrer's notice under
13 this section and an affidavit signed under penalty of perjury
14 from an officer of the referrer affirming that the referrer made
15 reasonable efforts to comply with the applicable use tax notice
16 and reporting requirements of this section; provided that the
17 list of sellers who received the referrer's notice shall be
18 provided electronically in a form and manner required by the
19 department of taxation.

20 (f) A seller, other than a referrer acting in its capacity
21 as a referrer, subject to the notice and reporting requirements



1 of this section shall, no later than February 28 of each year,
2 file a report with the department of taxation. The report shall
3 include, with respect to each consumer to whom the seller is
4 required to provide a report pursuant to subsection (d) by
5 February 28 of the current calendar year:

6 (1) The consumer's name;

7 (2) The billing address and, if different, the last known
8 mailing address;

9 (3) The shipping address for each product sold or leased
10 to the consumer for delivery to a location in this
11 State during the immediately preceding calendar year;
12 and

13 (4) The total dollar amount of all such purchases by the
14 consumer.

15 The report pursuant to this subsection shall include an
16 affidavit signed under penalty of perjury from an officer of the
17 seller affirming that the seller made reasonable efforts to
18 comply with the applicable use tax notice and reporting
19 requirements pursuant to this section. Except for the
20 affidavit, the report pursuant to this subsection shall be filed



1 electronically in a form and manner required by the department
2 of taxation.

3 (g) A seller who is registered with the department of
4 taxation to collect and remit use tax, and who makes a
5 reasonable effort to comply with the requirements of this
6 chapter, is not required to provide notice or file reports under
7 this section.

8 (h) Every seller subject to this section and section 238-A
9 shall keep and preserve, for a period of five years, suitable
10 records as may be necessary for the department of taxation to
11 verify the seller's compliance with this section and section
12 238-A. All of the seller's books, records, and invoices shall
13 be open for examination at any reasonable time by the department
14 of taxation. The department of taxation may require the
15 attendance of any officer of the seller or any employee of the
16 seller having knowledge pertinent to the department's
17 investigation of the seller's compliance with this section and
18 section 238-A, at a time and place fixed in a subpoena, and may
19 take the person's testimony under oath.

20 (i) In exercising discretion in enforcing this section and
21 section 238-A, the department of taxation may take into



1 consideration available resources, whether the anticipated
2 benefits from any potential enforcement activities are likely to
3 exceed the department's expected enforcement costs, and any
4 other factors the department deems appropriate."

5 SECTION 4. Section 237-1, Hawaii Revised Statutes, is
6 amended by adding six new definitions to be appropriately
7 inserted and to read as follows:

8 "Marketplace facilitator" means a person that contracts
9 with sellers to facilitate for consideration, regardless of
10 whether deducted as fees from the transaction, the sale of the
11 seller's products through a physical or electronic marketplace
12 operated by the person, and engages:

13 (1) Directly or indirectly through one or more affiliated
14 persons in any of the following:

15 (A) Transmitting or otherwise communicating the offer
16 or acceptance between the buyer and seller;

17 (B) Owning or operating the infrastructure,
18 electronic or physical, or technology that brings
19 buyers and sellers together; or



1 (C) Providing a virtual currency that buyers are
2 allowed or required to use to purchase products
3 from the seller; and

4 (2) In any of the following activities with respect to the
5 seller's products:

6 (A) Payment processing services;

7 (B) Fulfillment or storage services;

8 (C) Listing products for sale;

9 (D) Setting prices;

10 (E) Branding sales as those of the marketplace
11 facilitator;

12 (F) Order taking;

13 (G) Advertising or promotion; or

14 (H) Providing customer service or accepting or
15 assisting with returns or exchanges.

16 "Marketplace seller" means a seller that makes retail sales
17 through any physical or electronic marketplace operated by a
18 marketplace facilitator or directly resulting from a referral by
19 a referrer.

20 "Platform" means an electronic or physical medium,
21 including a website or catalog, operated by a referrer.



1 "Referral" means the transfer by a referrer of a potential
2 customer to a marketplace seller who advertises or lists
3 products for sale on the referrer's platform.

4 "Referrer" means a person, other than a person engaging in
5 the business of printing a newspaper or publishing a newspaper,
6 who contracts or otherwise agrees with a seller to list or
7 advertise for sale one or more items in any medium, including a
8 website or catalog; receives a commission, fee, or other
9 consideration from the seller for the listing or advertisement;
10 transfers, via telephone, internet link, or other means, a
11 purchaser to a seller or an affiliated person to complete the
12 sale; and does not collect receipts from the purchasers for the
13 transaction.

14 "Referrer" shall not include a person that:

15 (1) Provides important advertising services; and

16 (2) Does not provide the marketplace seller's shipping
17 terms or advertise whether a marketplace seller
18 charges tax.

19 "Remote seller" means any seller, other than a marketplace
20 facilitator or referrer, who does not have a physical presence
21 in this State and makes retail sales to purchasers."



SECTION 5. Section 237-2, Hawaii Revised Statutes, is amended to read as follows:

"§237-2 "Business", "engaging" in business, defined. As used in this chapter:

"Business" includes all activities (personal, professional, or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, without regard to physical presence in the State, but does not include casual sales[-]; provided that the following businesses are engaged in "business" in the State:

(1) A remote seller if, during the current or immediately preceding calendar year, its gross receipts from sales sourced to the State are at least \$10,000;

(2) A marketplace facilitator if, during the current or immediately preceding calendar year, the gross receipts from sales sourced to the State by the marketplace facilitator, whether in its own name or as an agent of a marketplace seller, total at least \$10,000; and

(3) A referrer if, during the current or immediately preceding calendar year, the gross income of the



1 business received from the referrer's referral
2 services apportioned in the State, whether or not
3 subject to tax and from sales sourced to the State, if
4 any, is at least \$267,000.

5 "Engaging", with reference to engaging or continuing in
6 business, includes the exercise of corporate or franchise
7 powers."

8 SECTION 6. Section 238-1, Hawaii Revised Statutes, is
9 amended by adding six new definitions to be appropriately
10 inserted and to read as follows:

11 "Marketplace facilitator" shall have the same meaning as
12 in section 237-1.

13 "Marketplace seller" shall have the same meaning as in
14 section 237-1.

15 "Platform" shall have the same meaning as in section 237-1.

16 "Referral" shall have the same meaning as in section 237-1.

17 "Referrer" shall have the same meaning as in section 237-1.

18 "Remote seller" shall have the same meaning as in section
19 237-1."

20 SECTION 7. If any provision of this Act, or the
21 application thereof to any person or circumstance, is held



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1 invalid, the invalidity does not affect other provisions or
2 applications of the Act that can be given effect without the
3 invalid provision or application, and to this end the provisions
4 of this Act are severable.

5 SECTION 8. In codifying the new sections added by
6 sections 2 and 3 of this Act, the revisor of statutes shall
7 substitute appropriate section numbers for the letters used in
8 designating the new sections in this Act.

9 SECTION 9. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 10. This Act, upon its approval, shall apply to
12 taxable years beginning after December 31, 2019.

13

INTRODUCED BY:

Tom D. Kinkaid
Director



S.B. NO. 2871

Report Title:

Marketplace Facilitators; Referrers; Remote Sellers; General Excise Tax; Use Tax

Description:

Requires marketplace facilitators, referrers, and remote sellers that meet certain requirements to remit general excise or use taxes or report sales information. Applies to taxable years beginning after December 31, 2019.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

