



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018**

ON THE FOLLOWING MEASURE:

S.B. NO. 2890, S.D. 2, RELATING TO TAXATION.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Tuesday, April 3, 2018

TIME: 10:30 a.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Kathryn-Jean T. Kanemori, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General has concerns about this bill because it may be challenged as violating the Commerce Clause of the United States Constitution.

The purpose of this bill is to amend the definitions in chapter 237, Hawaii Revised Statutes (HRS), relating to general excise tax by (1) adding the term "marketplace provider", (2) amending the definitions of "person", "representative", and "business", and (3) amending the definition of "import" relating to Use tax in chapter 238, HRS. "Marketplace provider" is defined as "any person who sells or assists in the sale of tangible personal property on behalf of another seller and who provides customer service, processes payments, and controls the fulfillment process." Under the proposed amendment to the term "business", a taxpayer would be engaging in "business" and subject to the general excise tax regardless of whether it has a physical presence in Hawaii. A person without physical presence in Hawaii is deemed to be engaging in "business" in the State if the person has gross receipts attributable to transactions in Hawaii totaling \$100,000 or more. Gross receipts attributable to sales in the State include sales by a person without physical presence in the State and that are facilitated by a marketplace provider. This bill is effective upon approval.

The amendments proposed in this bill may withstand a challenge in the State court under the current Hawaii Supreme Court jurisprudence; however, the amendments may still be subject to federal constitutional challenge.

The Commerce Clause of United States Constitution explicitly grants power to Congress to regulate interstate commerce and, in doing so, also implicitly restricts states from enacting laws that unduly burden interstate commerce. The United States Supreme Court stated that a state tax will survive a Commerce Clause challenge if the tax “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.” Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Furthermore, the United States Supreme Court in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), appeared to affirm the need for some type of physical presence, as originally established in National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), in order to meet the substantial nexus requirement.

Today’s proliferation of online commerce reveals that the physical presence requirement affirmed by Quill 25 years ago may be inadequate in today’s market. For example, New York’s highest court recently said that “[t]he world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated.” Overstock.com, Inc. v. New York Department of Taxation and Finance, 20 N.Y.3d 586, 595 (2013). Despite this statement, the New York court maintained that the taxpayer must have some type of physical presence in the state.

It may be important to note that many of the authoritative cases, including Quill, interpret the substantial nexus requirement to involve a state sales and use tax, not a general excise tax, which is at issue here in Hawaii. It is unknown whether the tests under Quill will be applied to a general excise tax and whether the imposition of such a tax without a requirement of a physical presence in the state would ultimately be sustained under a Commerce Clause challenge. Furthermore, it may be important to note that the United States Supreme Court will be reevaluating the physical presence requirement under Quill when it reviews the arguments from South Dakota v. Wayfair Inc., 901 N.W.2d 754 (S.D. 2017), cert. granted, 2018 WL 386568 (U.S. Jan. 12, 2018) (No. 17-494), later this year.

Because the main purpose of this bill is to apply the state general excise tax to the activity of certain taxpayers with no physical presence in Hawaii, if this bill becomes law, a taxpayer may cite to the United States Supreme Court decisions of Quill and Bellas Hess to challenge the State that the application of the general excise tax to a taxpayer with no physical presence in Hawaii violates the Commerce Clause of the United States Constitution.

Thank you for the opportunity to provide comments.

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

DAMIEN A. ELEFANTE
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF TAXATION**

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To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

Date: Tuesday, April 3, 2018
Time: 10:30 A.M.
Place: Conference Room 308, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 2890, S.D. 2, Relating to Taxation

The Department of Taxation (Department) supports the intent of S.B. 2890, S.D. 2, and offers the following comments for the Committee's consideration.

S.B. 2890, S.D. 2, which is effective upon approval, amends the definition of "business" in Hawaii Revised Statutes (HRS) section 237-2 by clarifying that a person with no physical presence in the State is engaged in business if the person has gross receipts attributable to transactions in this State totaling \$100,000 or more in the current or preceding calendar year. The bill further provides that gross receipts attributable to transactions in the State include gross receipts from sales that are facilitated by a marketplace provider that is engaged in business in the State. The term "marketplace provider" is defined as any person who sells or assists in the sale of tangible personal property (TPP) on behalf of another seller and who provides customer services, processes payments, and controls the fulfillment process.

The bill also deems a marketplace facilitator the seller of TPP for purposes of the general excise tax (GET) if the marketplace facilitator provides customer service, processes payments, and controls the fulfillment process for sales made by a marketplace seller. The bill also subjects marketplace facilitators to the use tax at the wholesale rate for TPP sold on behalf of a marketplace seller to a purchaser in the State. Specifically, the bill amends the definitions of "person" and "representative" in HRS section 237-1 and amends the definition of "import" in HRS section 238-1.

The Department suggests the following amendments, as detailed in the attached **Proposed H.D. 1**, to address the different business models within the context of the GET law:

First, the Department suggests replacing the term “marketplace provider” with “marketplace facilitator” and redefining the term as any person who sells or assists in the sale of TPP on behalf of another seller by (1) providing a forum, whether physical or electronic, in which sellers list or advertise TPP, and (2) collecting payment from the purchaser and transmitting the payment, in full or in part, to the person selling the property.

Second, the Department suggests creating a new section in HRS Chapter 237, which deems marketplace facilitators the sellers of TPP and deems the sellers on whose behalf the sales are made to be making sales at wholesale. The Department also suggests that the new section require persons other than marketplace facilitators who provide a forum to list or advertise TPP and who take or process sales orders (but do not collect payments) to comply with notice and reporting requirements or elect to be deemed the seller of TPP.

The notice and reporting requirements include: (1) Notification to purchasers that use tax must be paid if the sale is from an unlicensed seller and (2) Submission of a report to the Department each year for all sales in which TPP was delivered in the State that includes the purchaser’s name and contact information, the address of delivery, the aggregate dollar amount of the purchaser’s purchases, and the name and contact information of the seller. The Department further suggests a penalty of \$1,000 a month, up to \$12,000, for failing to comply with the notice and reporting requirements.

Third, the Department suggests moving the provision specifying that gross receipts include those from sales facilitated by a marketplace provider from the definition of “business” under HRS section 237-2, to the new section covering marketplace facilitators.

Fourth, the Department requests that the bill is made effective on January 1, 2019 to allow the Department sufficient time to make the necessary form and computer changes.

In sum, the attached Proposed H.D.1 would result in the following:

- (1) A “marketplace facilitator,” defined as a marketplace that collects payments from purchasers and remits them to sellers, will be doing business in the State (and therefore subject to GET) if a combination of its own sales and its marketplace sales (*i.e.*, sales for which it assisted or facilitated on behalf of another seller) for TPP delivered in the State total \$100,000 or more;
- (2) A marketplace facilitator doing business in the State will be subject to GET at the rate of four percent for its own sales as well as sales made on behalf of other sellers for TPP delivered in the State;
- (3) A seller who is doing business in the State will be subject to GET at the half-percent rate if it sells TPP through a marketplace facilitator for delivery in the State;
- (4) If a seller who is not doing business in the State makes a sale of TPP through a marketplace facilitator for delivery in the State, the marketplace facilitator will be subject to use tax at the rate of half a percent for the import of the TPP, in addition to being subject to GET at the rate of four percent for the sale of the TPP;

- and
- (5) A marketplace that does not collect payments from purchasers (and therefore is not a marketplace facilitator) will have the option of (a) being deemed the seller of the TPP or (b) complying with notice and reporting requirements.

This proposal is the most efficient method of imposing and collecting GET on third-party sales made through a marketplace facilitator because instead of having to collect the retail rate of GET from numerous individual marketplace sellers, the Department would only need to collect from one seller—the marketplace facilitator. This proposal also takes into account the different business models that marketplaces may operate under.

Thank you for the opportunity to provide comments.

____.B. NO.____

A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Chapter 237, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 "§237-__ Marketplace facilitators. (a) A marketplace
5 facilitator shall be deemed the seller of tangible personal
6 property and the seller on whose behalf the sale is made shall
7 be deemed to be making a sale at wholesale pursuant to section
8 237-4.

9 (b) For purposes of section 237-2, a marketplace
10 facilitator's gross income or gross proceeds of sale include
11 receipts from sales on behalf of other sellers under subsection
12 (a).

13 (c) Any person other than a marketplace facilitator who
14 provides a forum, whether physical or electronic, in which
15 sellers list or advertise tangible personal property for sale
16 and takes or processes sales orders shall:

17 (1) Post a conspicuous notice on its forum that informs
18 purchasers intending to purchase tangible personal

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1 property for delivery to a location in this State that
2 the purchaser is required to pay use tax if the sale
3 is made from an unlicensed seller;

4 (2) Provide a written notice to each purchaser at the time
5 of each sale of tangible personal property for
6 delivery to a location in this State that the
7 purchaser may be required to remit use tax directly to
8 the department and provide instructions for obtaining
9 additional information from the department on whether
10 and how to remit use tax to the department; and

11 (3) No later than the twentieth day of the fourth month
12 following the close of the taxable year, submit a
13 report to the department that includes, with respect
14 to each purchaser of tangible personal property
15 delivered to a location in this State, all of the
16 following:

17 (A) The purchaser's name, billing address, and
18 mailing address;

19 (B) The address in this State to which the property
20 was delivered to the purchaser;

21 (C) The aggregate dollar amount of the purchaser's
22 purchases from the seller; and

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1 (D) The name and address of the seller that made the
2 sale to the purchaser;
3 provided that the person, in lieu of complying with the notice
4 and reporting requirements in this subsection, may elect to be
5 deemed the seller of tangible personal property as provided in
6 subsection (a).

7 (d) Any person who fails to comply with subsection (b) and
8 has not elected to be deemed the seller of tangible personal
9 property, unless it is shown that the failure is due to
10 reasonable cause and not due to neglect, shall be assessed a
11 penalty of \$1,000 if the failure is for not more than one month,
12 with an additional \$1,000 for each additional month or fraction
13 thereof during which the failure continues, not exceeding
14 \$12,000 in the aggregate."

15 SECTION 2. Section 237-1, Hawaii Revised Statutes, is
16 amended as follows:

17 1. By adding a new definition to be appropriately inserted
18 and to read:

19 "Marketplace facilitator" means any person who sells or
20 assists in the sale of tangible personal property on behalf of
21 another seller by:

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1 (1) Providing a forum, whether physical or electronic, in
2 which sellers list or advertise tangible personal
3 property for sale; and

4
5 (2) Collecting payment from the purchaser and transmitting
6 the payment, in full or in part, to the person selling
7 the property."

8 2. By amending the definition of "representative" to read
9 as follows:

10 "Representative" means any salesperson, commission agent,
11 manufacturer's representative, broker or other person who is
12 authorized or employed by [~~an unlicensed~~] a seller to assist
13 such seller in selling property for use in the State, by
14 procuring orders for such sales or otherwise, and who carries on
15 such activities in the State, it being immaterial whether such
16 activities are regular or intermittent[~~; but the~~]. The term
17 "representative" does not include [~~a~~]:

18 (1) A manufacturer's representative whose functions are
19 wholly promotional and to act as liaison between an
20 unlicensed seller and a seller or sellers, and which
21 do not include the procuring, soliciting or accepting
22 of orders for property or the making of deliveries of

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1 property, or the collecting of payment for deliveries
2 of property, or the keeping of books of account
3 concerning property orders, deliveries or collections
4 transpiring between an unlicensed seller and a seller
5 or sellers[~~. Any unlicensed seller who in person~~
6 ~~carries on any such activity in the State shall also~~
7 ~~be classed as a representative.]; and~~

8 (2) A marketplace facilitator."

9 SECTION 3. Section 237-2, Hawaii Revised Statutes, is
10 amended to read as follows:

11 **"§237-2 "Business", "engaging" in business, defined.** As
12 used in this chapter:

13 "Business" includes all activities (personal, professional,
14 or corporate) engaged in or caused to be engaged in with the
15 object of gain or economic benefit either direct or indirect,
16 without regard to physical presence in the State, but does not
17 include casual sales. A person with no physical presence in the
18 State is engaged in business in this State if, in the current or
19 immediately preceding calendar year, the person has gross income
20 or gross proceeds of sale of \$100,000 or more attributable to
21 transactions in this State.

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1 "Engaging", with reference to engaging or continuing in
2 business, includes the exercise of corporate or franchise
3 powers."

4 SECTION 4. Section 238-1, Hawaii Revised Statutes, is
5 amended as follows:

6 1. By adding a new definition to be appropriately inserted
7 and to read:

8 "Marketplace facilitator" has the meaning defined by
9 chapter 237.

10 2. By amending the definition of "import" to read as
11 follows:

12 "Import" (or any nounal, verbal, adverbial, adjective, or
13 other equivalent of the term) includes:

14 (1) The importation into the State of tangible property,
15 services, or contracting owned, purchased from an
16 unlicensed seller, or however acquired, from any other
17 part of the United States or its possessions or from
18 any foreign country, whether in interstate or foreign
19 commerce, or both; [~~and~~]

20 (2) The sale and delivery of tangible personal property
21 owned, purchased from an unlicensed seller, or however
22 acquired, by a seller who is or should be licensed

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1 under the general excise tax law from an out-of-state
2 location to an in-state purchaser, regardless of the
3 free on board point or the place where title to the
4 property transfers to the purchaser[-]; and

5 (3) The sale of tangible personal property by a licensed
6 marketplace facilitator on behalf of an unlicensed
7 seller for delivery to a purchaser in the State."

8 SECTION 5. If any provision of this Act, or the
9 application thereof to any person or circumstance, is held
10 invalid, the invalidity does not affect other provisions or
11 applications of the Act that can be given effect without the
12 invalid provision or application, and to this end the provisions
13 of this Act are severable.

14 SECTION 6. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 7. This Act shall take effect on January 1, 2019.

17

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Report Title:

General Excise Tax; Use Tax; Tangible Personal Property;
Marketplace Facilitator

Description:

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

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, Define Doing Business Without Physical Presence; Attribution from Marketplace Provider

BILL NUMBER: SB 2890, SD-2

INTRODUCED BY: Senate Committee on Ways and Means

EXECUTIVE SUMMARY: This is an attempt to adopt a form of “economic nexus,” namely a statement that substantial sales in a state give rise to a sufficient connection between the state and the seller to enable that state to impose sales tax or use tax collection obligations. While the measure may be subject to constitutional challenge, 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.

Also states that a person who sells or assists in the sale of tangible personal property, provides customer service, processes payments, and controls the fulfillment process is a “seller” rather than a “representative,” and therefore has primary liability for the GET. We advise caution because some of the terms in this definition are not tightly defined, are not internally consistent, and could have ramifications beyond the intended targets.

SYNOPSIS: Adds a definition of “marketplace provider” in HRS section 237-1 as “any person who sells or assists in the sale of tangible personal property on behalf of another seller and who provides customer service, processes payments, and controls the fulfillment process.”

Also amends the definition of “person” or “company” in HRS section 237-1 to provide that any person who sells or assists in the sale of tangible personal property on behalf of another seller by providing customer service, processing payments, and controlling the fulfillment process shall be deemed the seller of the property, when sold, and the seller on whose behalf the sale is made shall be deemed to have made a sale at wholesale pursuant to section 237-4.

Also amends the definition of “representative” in HRS section 237-1 to exclude a person who sells or assists in the sale of tangible personal property on behalf of another seller by providing customer service, processing payments, and controlling the fulfillment process.

Amends the definition of “business” or “engaging” in business in HRS section 237-2 to provide that a person with no physical presence in the State is engaged in “business” in this State if, in the current or immediately preceding calendar year, the person has gross receipts attributable to this State of \$100,000 or more. Also provides that gross receipts attributable to this State include gross receipts from sales that would be taxable under chapter 237 but for the physical presence of the seller, and are facilitated by a marketplace provider that is engaged in business in this State.

Amends the definition of “import” in HRS section 238-1 to include the sale of tangible personal property by, or assisted by, a licensed seller who provides customer service, processes payments,

and controls the fulfillment process on behalf of an unlicensed seller for delivery to a purchaser in the State.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: This bill appears to be an effort to target “marketplace sellers,” namely those sellers who provide a framework for smaller sellers, most of whom are likely out of state, to sell into Hawaii (among other places). We understand that the marketplace sellers are presently taking the position that even if the marketplace seller has nexus with and must pay tax to Hawaii, it has no responsibility to collect and remit taxes when it is merely representing another seller that otherwise has no nexus with Hawaii.

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.

In Hawaii, section 237-22(a) HRS, states that there shall be excepted or deducted from the values, gross proceeds of sales, or gross income so much thereof as, under the Constitution and laws of the United States, the state is prohibited from taxing, but only so long as and only to the extent that the state is so prohibited. *In re Grayco Land Escrow, Ltd.*, 57 Haw. 436, 559 P.2d 264, *cert. denied*, 433 U.S. 910 (1977), established that Hawaii already extends its general excise and use taxes to reach the limit of the Constitution (“Thus, in plain and unmistakable language, the statute evidences the intention of the legislature to tax every form of business, subject to the taxing jurisdiction, not specifically exempted from its provisions.”).

This bill is 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.

Nothing the legislature enacts will change the U.S. Constitution, and the bill may face constitutional challenge if enacted. Even so, the Multistate Tax Commission has recommended, and many states have enacted, “factor presence nexus” standards saying that nexus should be found when a taxpayer has a significant dollar amount of sales activity in the state, and these standards have motivated some of the larger remote sellers to agree to collect and remit sales and use taxes on that activity.

Amazon, the online retailer, registered for a Hawaii general excise tax license and started collecting and remitting Hawaii tax on online purchases effective April 1, 2017. We understand,

however, that it is collecting and remitting tax on its own sales but is not doing so on “Amazon Marketplace” sales, where the company acts as a sales agent and a fulfillment agent for other, unrelated companies.

For marketplace sales, *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), hold that substantial nexus can be established through an independently contracted sales agent who acts in a state on behalf of another. Thus, whether or not “economic nexus” is ultimately found to be constitutional, nexus can be attributed from a marketplace provider under current law.

Obviously, it is easier from a revenue administration perspective to shift the responsibility for collecting and remitting tax to a marketplace provider with nexus in the State, as opposed to trying to chase down a myriad of small and large sellers scattered throughout the nation, and that is what this bill is trying to accomplish.

Technically, the bill could be tightened up.

“Providing customer service, processing payments, and controlling the fulfillment process” strike us as vague terminology. The Committee should consider tightening up the terms or allowing the Department of Taxation regulatory authority to do so.

The bill, as we understand it, is trying to deny “representative” status to a marketplace provider. A marketplace provider would be considered the retail seller to the ultimate customer in Hawaii and would be considered the importer of the sold goods for purposes of the 0.5% Use Tax. There seems to be no need to muck up the tax definitions to do this, because the courts already have adopted this interpretation. *In re Habilitat, Inc.*, 65 Haw. 199, 649 P.2d 1126 (1982).

Digested 3/30/2018



**Testimony of Bob Toyofuku, on behalf of
Uber Technologies Regarding SB 2890, SD 2
April 3, 2018**

To: Chairperson Sylvia Luke and Members of the House Committee on Finance:

My name is Bob Toyofuku and I am presenting this testimony on behalf of Uber Technologies regarding SB 2890, SD 2.

As you may be aware, Uber is a technology company with a simple vision: make safe and affordable transportation available everywhere, for everyone and everything at the push of a button. Uber's technology connects a network of riders with drivers in cities around the world, including Hawaii.

Uber also has a food delivery app, Uber Eats, which allows a network of customers to order meals from a network of locally owned and licensed restaurants in cities across the United States, including Honolulu. Uber provides technology services that connect independent delivery providers who have partnered with Uber with locally licensed restaurants for purposes of delivering the meals to customers from those locally licensed restaurants.

Today, I am here to request a very small amendment to SB 2890 SD 2 to ensure that the hundreds of locally licensed restaurants who do business on Uber Eats are not unintentionally swept into this bill.

While we don't have concerns with the intent of SB 2890 SD 2 to create a standard for GET licensing for online businesses which do not have an office, warehouse, employees, or inventory, in the State of Hawaii, Uber is concerned that the bill currently doesn't recognize online or digital platforms like Uber Eats that provide technology to facilitate sales by locally licensed businesses who are already subject to and paying their fair share of GET.

We ask that the committee amend SB 2890 SD 2 to add the word "unlicensed" before the word seller on page 2 line 7. This change will not impact the intent of the bill to require online sellers to register for GET and collect/remit GET on sales to unlicensed GET customers in Hawaii. By adding the word "unlicensed" it clarifies that GET-licensed restaurants on EATS app are already and will continue to be responsible for charging/remitting GET to the state on its sales of meals to customers.

Thank you and I am happy to answer any questions.



**TESTIMONY OF TINA YAMAKI
PRESIDENT
RETAIL MERCHANTS OF HAWAII
April 4, 2018**

SB 2890 SD2 Relating to Taxation

Good morning Chair Luke and members of the House Committee on Finance. 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 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 SB 2890 SD2 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. 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.

Currently under the existing state law, consumers are required to pay the General Excise Tax on the goods they purchase in the brick and mortar stores physically located in the state of Hawaii. However, if local consumers shop on line, sellers are not required to collect a tax in the same way our 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.

Although news last year that Amazon will begin charging tax on Hawaii purchases was a step in the right direction, they are only a 1% tax and NOT the 4% on neighbor islands and 4.5% for Oahu customers that our local brick and mortar stores have to charge. Furthermore, third party sellers on Amazon do not charge the tax. There are so many more online retailers like QVC, Wayfair, Overstock, Ebay, Vista Print, Etsy and Shoe Dazzle to name a few that are also not collecting taxes. Because of this, Hawaii is missing out on millions of dollars on uncollected use tax from remote sales. And every year online sales has been increasing substantially.

We urge you to support SB 2890 SD2.

Again mahalo for this opportunity to testify.



April 3, 2018

Honorable Sylvia Luke, Chair
House Finance Committee
Hawaii State Capitol
415 S Beretania St
Honolulu, HI 96813

RE: Opposition to SB 2890 – taxes on tangible personal property

Dear Chair Luke and members of the committee:

We ask that you do not pass SB 2890, a bill imposing new taxes on tangible personal property. Please avoid making the same mistakes South Dakota did.

SB 2890 will be seen by Hawaii consumers as a new tax and could erode your ability to protect Hawaii businesses from out-of-state tax collectors.

First, consider problems created by the bills anticipated legal challenges:

- Will not go into effect for several years, if ever
- Will cost Hawaii taxpayers in attorney's fees and court costs
- May be rendered irrelevant by other state lawsuits or Congressional action

Second, if the bill survives court challenges, they would:

- Reduce the ability of Hawaii to protect its businesses from burdens imposed by other states
- Rely on new revenue extracted from Hawaii residents – not from out-of-state businesses
- Would generate only minimal new tax revenue
- Establish a new tax regime that is anything but equal, consistent, or fair

Likely seen as a new tax by your constituents

Hawaii residents will likely see this as a new tax since any tax collected will come from the pockets of Hawaii citizens, not from out-of-state businesses.

NetChoice polled Tennessee residents on a similar tax in that state. (www.NetChoice.org/TNTaxPoll), and 56% said requiring them to pay tax on online purchases from out-of-state businesses would be a statewide tax increase so it is likely that similar results would occur if Hawaii citizens were polled.

SB 2890 is likely to bring burdens on Hawaii businesses from other states

Just by proposing this bill, Hawaii creates a dangerous precedent for other state revenue departments to follow. While this bill would apply only to remote sellers, it encourages other states to create similar laws that would impact Hawaii sellers.

No revenue would be generated from SB 2890 for several years, if ever. And the bill fritters away tax dollars on an unnecessary lawsuit

SB 2890 will generate no revenue for the state unless and until the US Supreme Court overturns a century of established federal doctrine.

Following enactment this bill, groups like NetChoice and ACMA intend to seek an injunction and challenge the law. Immediate injunction of SB 2890 is likely, since even the state of South Dakota¹ stipulated that its similar “Kill Quill” law was unconstitutional.

On March 6, 2017, the State Circuit Court in South Dakota granted a motion for Summary Judgment against the state’s 2016 law, finding:

“Because each of the Defendants lacks a physical presence in South Dakota... the State acknowledges that under *Quill Corp. v. North Dakota*, the State of South Dakota is prohibited from imposing sales tax collection and remittance obligations on the Defendants.”

“The State further admits that this Court is required to grant summary judgment in Defendants’ favor, because of the *Quill* ruling.”

“This Court is duty bound to follow applicable precedent of the United States Supreme Court.”

“This is true even when changing times and events clearly suggest a different outcome; it is simply not the role of a state circuit court to disregard a ruling from the United States Supreme Court.”

If a similar injunction is obtained in Hawaii, the state could not enforce SB 2890.

It is likely that the US Supreme Court will have already decided on the *Quill* question even before this new tax law would make their way through the courts. As noted above, courts already enjoined and are now reviewing the legality of a similar law in South Dakota² and Indiana³ and regulation in Alabama.⁴ SB 2890 acts as a pile-on with no material benefit to Hawaii -- while incurring litigation costs for the state.

Passage of SB 2890 would erode state sovereignty

Advocates for this bill claim that the purpose is to overturn the current *Quill* standard⁵ of physical presence. Today, the *Quill* standard stops tax collectors in California, New York, or Illinois from harassing Hawaii businesses that have no physical presence in those states.

But passage of this bill would remove the protections of *Quill* and reduce the ability of Hawaii to protect its businesses from tax collectors across the country, forcing Hawaii businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true “winners” if SB 2890 succeed in overturning the *Quill* standard. Hawaii citizens and Hawaii businesses would be the losers.

No new money would come into Hawaii

Even if SB 2890 survives a Supreme Court challenge, *no new money would flow into Hawaii*. Any sales taxes collected as the result of these bills would come from the pockets of Hawaii residents -- not from out-of- state businesses.

¹ See *South Dakota v. Wayfair Inc. et al*, Case No. 3:2016cv03019 (S.D. Dist. Ct. May 15, 2016).

² See Sandra Guy, *South Dakota sues four big online retailers over sales taxes*, Internet Retailer (April 29, 2016).

³ Ind. Code § 34-14-1-1

⁴ See Chris Morran, *Newegg Challenges Alabama Over Collection Of Online Sales Tax*, Consumerist (June 14, 2016)

⁵ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) further confirmed the physical presence standard for sales tax collection. It protected Quill, a Delaware corporation with offices and warehouses in Illinois, California, and Georgia, from North Dakota tax collectors and North Dakota tax rules – a state where Quill had no physical presence.

Minimal tax revenue would be generated from SB 2890

Today, most of the top e-retailers already collect for Hawaii. That includes Amazon, who accounted for 41% of online sales in Q1 2016.⁶

Some advocates cite a 2009 University of Tennessee⁷ study to suggest a large windfall of uncollected sales taxes. However, the UT study is far out-of-date and fails to account for existing tax collection by Amazon and several other large e-retailers.

Even the US General Accounting Office predict collections are, at best, less than half of what the outdated University of Tennessee study promises.

The question, assuming SB 2890 survives in court, is whether the minimal tax revenue extracted from Hawaii citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

SB 2890 creates a new tax that is not equal, consistent, or fair

Tax advocates justify these bills by saying they “create a level playing field for all sellers.” However, SB 2890 foists disproportionate collection burdens on catalog and online retailers. When a customer enters a gift shop in Annapolis, the store does not ask for that customer’s home address to look up the tax rate and later remit the tax to the customer’s home state.

But SB 2890 would impose the burden of look-up, tax filing, and audit – on marketplace sellers. We fail to see how that would be equal, consistent, or fair so we ask that you reject SB 2890 to protect Hawaii businesses from out-of-state tax auditors, shield Hawaii citizens from a new tax and avoid costly litigation the state is likely to lose.

Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

CompTIA
NetChoice
Internet Coalition
TechNet

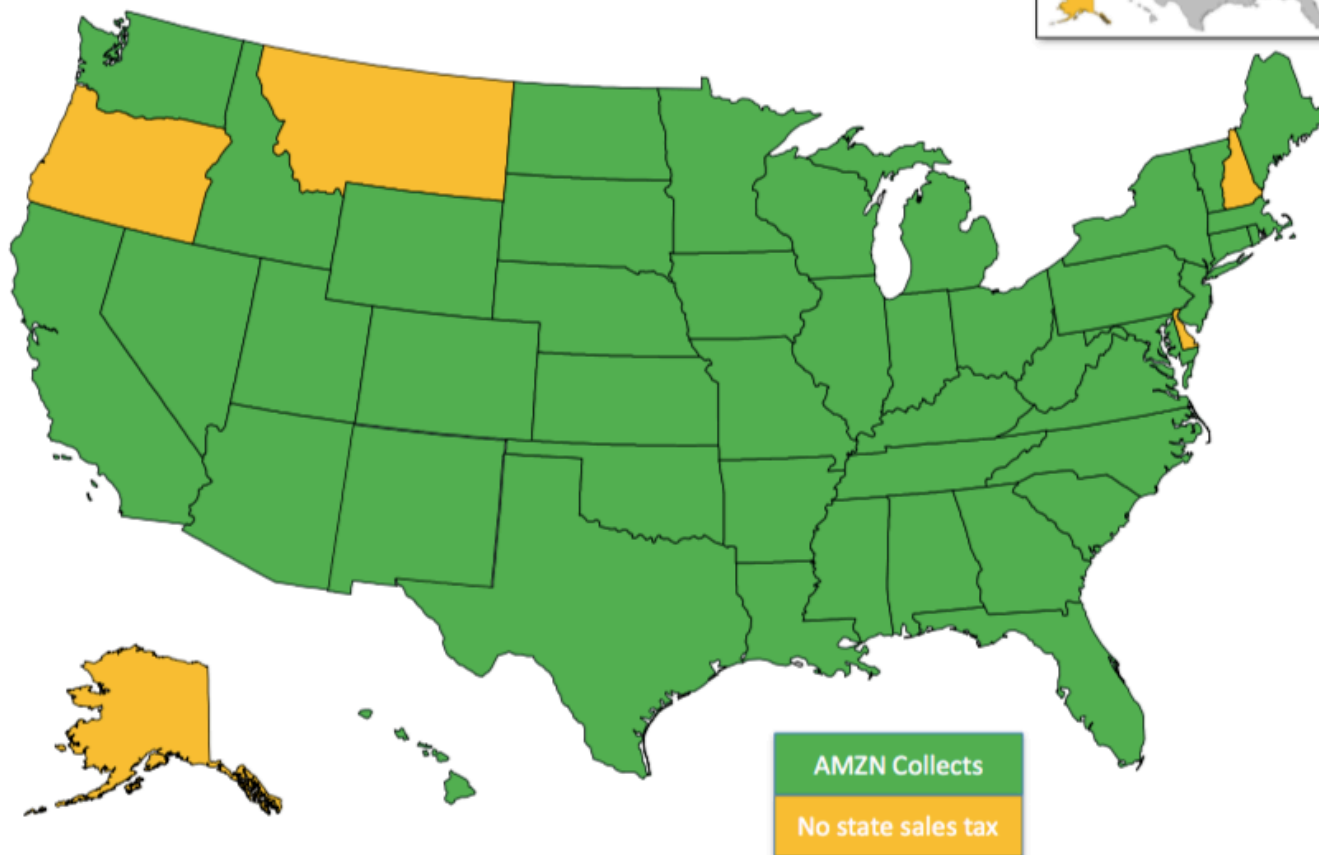
⁶ Ken Kam, *The Market Is Underestimating Amazon*, Forbes (May 27, 2016).

⁷ Bruce, Fox, and Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee (2009).

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org

Amazon is collecting for the entire country

Now 100% of the US population



PETER L. FRITZ

PLFLEGIS@FRITZHQ.COM

HOUSE OF REPRESENTATIVES THE TWENTY-NINTH LEGISLATURE REGULAR SESSION OF 2018

COMMITTEE ON FINANCE

Testimony on S.B. 2890 S.D. 2
Hearing: April 3, 2018

Relating To Taxation

Chair Luke, Vice Chair Cullen and members of the Committee. My name is Peter Fritz. I am a tax attorney and was a Rules Specialist with the Department of Taxation. I am testifying today **in support** of S.B. 2890 S.D. 2 and offering comments.

Approximately 50% of Amazon sales are from marketplace sellers. While Amazon does collect tax on sales by Amazon, in most states, Amazon does not collect any tax on sales that it facilitates on behalf of its marketplace sellers.

However, a number of states, including Washington and Pennsylvania have passed laws that require online marketplaces like Amazon's to collect or report tax on behalf of sellers. After passage of a Washington law, Amazon began collecting tax on sales by marketplace sellers. Esty has also begun collecting sales tax on sales to Washington residents.

In response to a Pennsylvania law for marketplace providers Amazon notified marketplace sellers that Amazon would begin collecting and remitting sales tax on behalf of 3rd party sellers beginning April 1, 2018.

Hawaii should enact a similar marketplace facilitator law that would require collection of taxes on sales to Hawaii residents by 3rd party sellers.

Amazon's involvement in marketplace sales is substantial. Amazon Marketplace rents space on Amazon's website to independent merchants. The program has more than 2 million sellers.

Amazon reaps substantial benefits when its sellers do well. On top of fees to join the marketplace and use Amazon's warehousing and delivery program, third-party sellers pay Amazon an 8 to 15 service charge on their sales on most items. Does Amazon, which has a nexus with Hawaii because of Whole Foods, pay GET on these commissions on sales to Hawaii?

To address against concerns that a marketplace facilitator law might violate the physical presence requirement of Quill Corp. v. North Dakota, 504 U.S. 298 (1992), states have passed notice and reporting laws. Notice and reporting laws require marketplace sellers and facilitators to provide notice to purchasers that the purchaser may owe use tax on their purchases and report information about such purchases to the state. The validity of notice and reporting laws were upheld when the United States Supreme Court declined to review the decision of the United States Court of Appeals for the 10th Circuit as reported in Direct Mktg. Ass'n v. Brohl, 135 S.Ct. 1124, 1135 (2015).

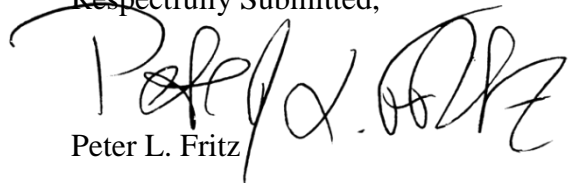
Testimony of Peter L. Fritz
S.B. 2890
April 3, 2018
Page 2

Arguments about the holding in Quill were raised in the Online Travel Company litigation in which the state prevailed and Hawaii now has an additional source of General Excise Tax revenue. Such concerns should not keep Hawaii from enacting a marketplace facilitator law especially considering that the holding of Quill applies to a sales tax and Hawaii has a gross receipts tax. A seller is not required to pass on the General Excise Tax.

I am also proposing some language for adding some definitions to this bill and language allowing an election to notify purchasers of merchandise and report sales to the Department of Taxation for the Committee's consideration.

Thank you for the opportunity to testify.

Respectfully Submitted,



Peter L. Fritz

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

- (a) Directly or indirectly, through one or more affiliated persons in any of the following:
 - (i) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;
 - (ii) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
 - (iii) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; and
- (b) In any of the following activities with respect to the seller's products:
 - (i) Payment processing services;
 - (ii) Fulfillment or storage services;
 - (iii) Listing products for sale;
 - (iv) Setting prices;
 - (v) Branding sales as those of the marketplace facilitator;
 - (vi) Order taking;
 - (vii) Advertising or promotion; or
 - (viii) Providing customer service or accepting or assisting with returns or exchanges.

"Marketplace seller" means a seller that makes retail through any physical or electronic marketplaces operated by a marketplace facilitator or directly resulting from a referral by a referrer.

"Platform" means an electronic or physical medium, including a web site or catalog, operated by a referrer.

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

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

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

- (b) "Referrer" does not include a person that:
 - (i) Provides internet advertising services; and
 - (ii) Does not ever provide either the marketplace seller's shipping terms or advertise whether a marketplace seller charges tax.

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

"§237-2 "Business", "engaging" in business, defined.

"Business" as used in this chapter, 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 this state

- (1) A remote seller if, during the current or immediately preceding calendar year, its gross receipts from sales sourced to this State are at least ten thousand dollars.
- (2) A marketplace facilitator if, during the current or immediately preceding calendar year, the gross receipts from sales sourced to this State by the marketplace facilitator, whether in its own name or as an agent of a marketplace seller, total at least ten thousand dollars.
- (3) A referrer, if during the current or immediately preceding calendar year, the gross income of the business received from the referrer's referral services apportioned to this State, whether or not subject to tax and from sales sourced to this State, if any, is at least two hundred sixty-seven thousand dollars.

The term "engaging" as used in this chapter with reference to engaging or continuing in business also includes the exercise of corporate or franchise powers."

"§237- Election By Remote Sellers, Referrers, And Marketplace Facilitators. (1)(a) Beginning January 1, 2018, and for any calendar year thereafter, remote sellers, referrers, and marketplace facilitators must elect to either collect and remit general excise or use tax on all taxable sales into this state pursuant to this chapter and chapters 237 or 237 HRS or comply with 237- HRS.

(b) For marketplace facilitators, the election provided in (a) of this subsection (1) applies only with respect to:

(i) Retail sales through the marketplace facilitator's marketplace by or on behalf of marketplace sellers who do not have a physical presence in this state; and

(ii) A marketplace facilitator's own retail sales, if the marketplace facilitator does not have a physical presence in this state.

(c)(i) For referrers, the election provided in (a) of this subsection (1) applies only with respect to:

(A) Retail sales directly resulting from a referral of the purchaser to a marketplace seller who does not have a physical presence in this state; and

(B) A referrer's own retail sales, if the referrer does not have a physical presence in this state.

(ii) A referrer may make different elections with respect to retail sales described in (c)(i)(A) and (B) of this subsection.

"§237- Information Reporting. (1) Except as otherwise provided in subsection (5) of this section, a seller that does not collect the tax imposed under chapter 237 or 238 HRS on a taxable sale must comply with the applicable notice and reporting requirements of this section. For

taxable sales made through a marketplace facilitator, or other agent, the marketplace facilitator, or other agent must comply with the notice and reporting requirements of this section, and the principal is not subject to the notice and reporting requirements of this section with respect to those sales. If the referrer makes an election to comply with the applicable notice and reporting requirements of this section, marketplace sellers to whom a referral is made by the referrer remain subject to the applicable notice and reporting requirements under this section for their sales unless the marketplace sellers collect the tax imposed under chapter 237 or 238 HRS on taxable retail sales sourced to this state.

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

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

(A) Use tax is due on certain purchases;

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

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

(ii) Provide a notice to each consumer at the time of each sale. The notice under this subsection (2)(a)(ii) must include the following information:

(A) A statement that neither general excise tax is being paid nor use tax is being collected or remitted upon the sale;

(B) A statement that the consumer may be required to remit use tax directly to the department; and

(C) Instructions for obtaining additional information from the department regarding whether and how to remit use tax to the department.

(b) The notice under (a)(ii) of this subsection (2) must be prominently displayed on all invoices and order forms including, where applicable, electronic and catalog invoices and order forms, and upon each sales receipt or similar document provided to the purchaser, whether in paper or electronic form. No indication may be made that tax or use tax is not imposed upon the transaction, unless:

(i) Such indication is followed immediately with the notice required by (a)(ii) of this subsection (2); or

(ii) The transaction with respect to which the indication is given is exempt from general excise tax and use tax pursuant to law.

(3) A referrer subject to the notice and reporting requirements of this section must:

(a) Post a conspicuous notice on its platform that informs Hawaii purchasers:

(i) That use tax is due on certain purchases;

(ii) That the seller may or may not collect and remit general excise tax or use tax on a purchase;

(iii) That Hawaii requires the purchaser to file a use tax return if tax is not assessed at the time of a taxable sale by the seller;

(iv) That the notice is provided under the requirements of this section;

(v) Of the instructions for obtaining additional information from the department regarding whether and how to remit the use tax to the department; and

(vi) That if the seller to whom the purchaser is referred does not collect retail sales tax on a subsequent purchase by the purchaser, the seller may be required to provide information to the purchaser and the department about the purchaser's potential general excise or use tax liability.

(b) The notice under (a) of this subsection (3) must be prominently displayed on the platform and may include pop-up boxes or notification by other means that appear when the referrer transfers a purchaser to a marketplace seller or an affiliated person to complete the sale.

(4)(a) A seller, other than a referrer acting in its capacity as a referrer, subject to the notice and reporting requirements of subsection (2) of this section must, no later than February 28th of each year, provide a report to each consumer for whom the seller was required to provide a notice under subsection (2)(a)(ii) of this section.

(b) The report under this subsection (4) must include:

(i) A statement that the seller did not collect general excise or use tax on the consumer's transactions with the seller and that the consumer may be required to remit such tax directly to the department;

(ii) A list, by date, generally indicating the type of product purchased or leased during the immediately preceding calendar year by the consumer from the seller, sourced to this state and the price of each product;

(iii) Instructions for obtaining additional information from the department regarding whether and how to remit the sales or use tax to the department;

(iv) A statement that the seller is required to submit a report to the department pursuant to subsection (6) of this section stating the total dollar amount of the consumer's purchases from the seller; and

(v) Any information as the department may reasonably require.

(c)(i) The report required under this subsection (4) must be sent to the consumer's billing address or, if unknown, the consumer's shipping address, by first-class mail, in an envelope marked prominently with words indicating important tax information is enclosed.

(ii) If no billing or shipping address is known, the report must be sent electronically to the consumer's last known email address with a subject heading indicating important tax information is enclosed.

(5)(a) A referrer subject to the notice requirements under subsection (3) of this section must, no later than February 28th of each year, provide notice to each marketplace seller to whom the referrer transferred a potential purchaser located in Hawaii during the previous calendar year.

(b) The notice under this subsection (5) must include:

(i) A statement that Washington imposes a tax or use tax on sales;

(ii) A statement that a seller, meeting the threshold in section 237-3 HRS, is required to either collect and remit general excise or use tax on all taxable sales sourced to this state or to comply with this section; and

(iii) Instructions for obtaining additional information from the department.

(c) By February 28th of each year, a referrer required to provide the notice under this subsection must provide the department with:

(i) A list of sellers who received the referrer's notice under this subsection. The information must be provided electronically in a form and manner required by the department.

(ii) An affidavit signed under penalty of perjury from an officer of the referrer affirming that the referrer made reasonable efforts to comply with the applicable sales and use tax notice and reporting requirements of this section.

(6)(a) A seller, other than a referrer acting in its capacity as a referrer, subject to the notice and reporting requirements of this section must, no later than February 28th of each year, file a report with the department.

(b) The report under this subsection (6) must include, with respect to each consumer to whom the seller is required to provide a report under subsection (4) of this section by February 28th of the current calendar year:

(i) The consumer's name;

(ii) The billing address and, if different, the last known mailing address;

(iii) The shipping address for each product sold or leased to such consumer for delivery to a location in this state during the immediately preceding calendar year; and

(iv) The total dollar amount of all such purchases by such consumer.

(c) The report under this subsection (6) must also include an affidavit signed under penalty of perjury from an officer of the seller affirming that the seller made reasonable efforts to comply with the applicable sales and use tax notice and reporting requirements in this section.

(d) Except for the affidavit, the report under this subsection (6) must be filed electronically in a form and manner required by the department.

(7) A seller who is registered with the department to collect and remit retail sales and use tax, and who makes a reasonable effort to comply with the requirements of chapter 237 and 288, is not required to provide notice or file reports under this section.

(8) Every seller subject to this chapter must keep and preserve, for a period of five years, suitable records as may be necessary for the department to verify the seller's compliance with this chapter. All of the seller's books, records, and invoices must be open for examination at any reasonable time by the department. The department may require the attendance of any officer of the seller or any employee of the seller having knowledge pertinent to the department's investigation of the seller's compliance with this chapter, at a time and place fixed in a subpoena and may take the person's testimony under oath.

(9) In exercising discretion in enforcing the provisions of this chapter, the department may take into consideration available resources, whether the anticipated benefits from any potential enforcement activities are likely to exceed the department's expected enforcement costs, and any other factors the department deems appropriate.



LATE

To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

Date: Tuesday, April 3, 2018
Time: 10:30 A.M.
Place: Conference Room 308, State Capitol

From: Braden Cox, Director, US State & Local Public Policy
Amazon
Written Testimony Only

Re: SB 2890, SD 2, Relating to Taxation

Chair Luke and Members of the Committee:

We write regarding SB 2890, SD 2, which would impose the state's general excise tax ("GET") on marketplaces that provide certain services to sellers. We oppose this legislation, at least as it is currently written, and offer the following on potential alternatives that would create a more level playing field and increase revenue compliance.

Many of you know Amazon as the online retailer we've become since first opening our virtual doors in 1995. You may not know, however, that there are more than 7,000 authors, sellers, and developers in Hawaii growing their businesses and reaching new customers on Amazon products and services.

We care about how small sellers can use our marketplace to reach customers nationwide. That's why we're concerned about SB 2890, SD 2, which targets marketplaces that enhance the seller experience with customer service, payment processing, and order fulfillment services. As drafted, SB 2890, SD 2, applies only to online marketplaces that offer these services, and would not uniformly apply to all the various online marketplace business models. We believe there is no reasonable basis on which to differentiate between marketplaces for purposes of applying the GET and there are better legislative options to achieve fairness and increase revenue.

Transferring the GET liability to marketplaces does not level the playing field, discriminates against and unfairly burdens certain marketplaces, and will not be a large revenue source for the state.

SB 2890, SD 2, applies to a very narrow type of business – marketplaces that provide customer service, process payments, and control the fulfillment process – thus it will not serve to level the playing field for retailers. In large part, this is because many remote sellers do not make sales through a marketplace that provides these services.

Additionally, it will be easy to avoid the obligations that SB 2890, SD 2, creates. Those remote sellers that make sales through a marketplace can simply change their selling habits to avoid having GET remitted on their sales. Sellers will shift their sales to other sales channels that are not impacted by SB

2890, SD 2. As a result of SB 2890, SD 2's very narrow application, SB 2890, SD 2, will not serve to level the playing field between brick-and-mortar stores and remote sellers. All marketplaces regardless of the services they provide should be treated similarly for purposes of applying the GET.

Because of the very narrow application of SB 2890, SD 2, and the ability of sellers and marketplaces to change their behavior to eliminate the bill's impact on them, the bill will not serve to raise any revenue for the state of Hawaii. To the extent the state is attempting to raise revenue by collecting GET on some portion of remote sales made into Hawaii, the state's actions are premature because the U.S. Supreme Court is set to review the physical presence standard in *Quill Corp v. North Dakota*.

SB 2890, SD 2, is premature given that the U.S. Supreme Court will review the physical presences standard set forth in *Quill Corp v. North Dakota* this year.

The U.S. Supreme Court granted the state of South Dakota's petition for certiorari in *South Dakota v. Wayfair, Inc.*, No. 17-494 on January 12, 2018 and oral arguments are scheduled for April 17, 2018 in which the U.S. Supreme Court will be reviewing the validity of the physical presence standard set forth in *Quill Corp v. North Dakota*. The U.S. Supreme Court will issue its decision this year, possibly as early as June, at which time Hawaii and the other states will have an answer on their authority to impose tax on remote sellers. If the U.S. Supreme Court overturns the physical presence standard, this will level the playing field between remote sellers and local brick-and-mortar stores.

If the Hawaii legislature wants to take action, there are better alternatives. The legislature should consider passing an economic nexus law similar to the law South Dakota passed last year. SB 2890, SD 2, contains such economic nexus language at page 4, lines 1-13. Should this committee want to enact marketplace tax collection, the legislature should look at the marketplace tax collection models implemented in both Washington and Pennsylvania.

For these reasons, Amazon opposes SB 2890, SD 2, as written and urges Committee members to consider economic nexus language and amendments that are more inclusive of all sales into Hawaii and provide a clearer standard for compliance. Should you have any questions regarding our position, please feel free to contact me at bradenc@amazon.com or 202-442-2900.

Thank you for the opportunity to provide comments.

Sincerely,



Braden Cox



Chamber of Commerce HAWAII

The Voice of Business

**Testimony to the Senate Committee on Finance
Tuesday, April 3, 2018 at 10:30 A.M.
Conference Room 308, State Capitol**

LATE

RE: SENATE BILL 2890 SD2 RELATING TO TAXATION

Chair Luke, Vice Chair Cullen, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **supports the intent of SB 2890 SD2**, which amends the general excise tax law by adding a definition for "marketplace provider." Provides that a person with no physical presence in the State shall be considered to be engaged in business in the State if, in the current or immediately preceding calendar year, the person has gross receipts attributable to transactions in the State totaling \$100,000 or more. Clarifies that a person who sells or assists in the sale of tangible personal property and who provides customer service, processes payments and controls fulfillment is the seller of the property for general excise tax and use tax purposes.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ 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.

We support the intent of this bill to help ensure that local stores with bricks-and-mortar locations in Hawaii will be on a level playing field with internet sellers as internet sellers would be subject to the same taxes as the in-state businesses.

From a legal standpoint, it is our understanding that this bill may be premature as technically, this statute would violate existing US Supreme Court precedent, which continues to state that a physical presence is necessary in a state before you can be taxed. The case that makes this statement, the "Quill" decision, is currently being challenged at the US Supreme Court. If enacted before the Supreme Court decision is announced, it could potentially be contrary to existing law.

Thank you for the opportunity to testify.

Hawaii State Senate
415 S Beretania St
Honolulu, HI 96813
Re: SB NO 2890 Marketplace Taxation



To whom it may concern:

We support the concept of S.B. No. 2890, but we feel that the bill as currently worded does not go far enough to protect local small businesses (3rd party sellers) like me who supply products to the marketplaces like Amazon. Even though Amazon acts as the retailer and has complete control over the retail experience, over 20 states like California and Washington are trying to place the tax burden on small businesses nationwide.

These states are not only requiring 3rd party sellers to register to collect or pay sales tax, but also are finding 3rd party marketplace sellers liable for years of back sales tax that can potentially amount to hundreds of thousands of dollars owed by the average small business.

The cost of being compliant in more than twenty states for sales tax and paying back taxes that should be owed by Amazon will put many 3rd party sellers in Hawaii (which numbers in the thousands) out of business. Not only would it kill a lot of current jobs, but it would dissuade others from starting 3rd party seller businesses due to the high multi-state tax burden and cost to do business online.

We would like language included in the bill that encourages the state of Hawaii to intervene to protect local marketplace participants from this unfair tax burden and protect the local economy and jobs if states try to come after local businesses. This isn't a hypothetical situation, as states like California and Washington are coming after local businesses already and will put a lot of local 3rd party sellers out of business (see Hawaii News Now article on a local businessman's struggle with CA and WA). Any gains in collecting excise tax from marketplace sales, would be more than offset in lost tax revenues from lost jobs and local 3rd party sellers closing due to unfair out-of-state tax burdens.

This bill with some changes to the wording, can be a big win for small businesses in Hawaii and nationwide. I urge you to protect the local Hawaii economy and local small businesses.

Regards,

V. Sananikone
President, Hanalei Company



Hawaii business could lose everything over Amazon taxes dispute

Thursday, December 14th 2017, 6:02 am HST

By Ashley Nagaoka, Reporter

<http://www.hawaiinewsnow.com/story/37063915/local-businessman-hounded-for-back-taxes-on-goods-sold-through-amazon>



HONOLULU (HawaiiNewsNow) -

Some states have started going after small businesses that sell their products through the Amazon, saying they owe years of back taxes.

And some Hawaii sellers have found themselves targeted.

Ren Wu, the founder of the Remi Collection in Kalihi, says he has been a third-party seller for Amazon since 2009. That means he sends different products to Amazon warehouses where they're stored until they're purchased online.

Wu says earlier this year, he started receiving letters from Washington state's Department of Revenue.

He says they're trying to collect six years of back taxes on products he supplied to Amazon.

"Of course, they want to get money and, of course, I don't want to pay something that I don't feel I'm responsible for," Wu said.

Wu says paying the back taxes could be detrimental to his company. Plus, he says he already gives Amazon a 15-percent cut on each sale, plus an additional 15-percent commission for storage, packing, and shipping.

"Washington says it should collect from small businesses like us. They had all the chances in the past to deal with it, but after all these years, they're trying to revisit a topic that should have been taken care of a long time ago," said Wu.

Even though, Amazon will begin collecting sales tax on behalf of its third-party merchants in Washington starting next month, Wu's attorney says small business owners are still being told to pay up for previous years.

He says for Wu, that could mean hundreds of thousands of dollars and, potentially, his business.

"If that's all you do is put something in a box and ship it UPS you're not supposed to have that tax burden. That's too big a tax burden to put on you. For Mr. Wu to assert his constitutional rights -- for him to say its a problem -- he can't afford to do that," said attorney and state tax professor Paul Rafelson.

Other states are offering to waive back taxes if third-party sellers begin collecting sales tax on their own, but Rafelson says that would be too costly and time consuming for many.

"This all could be solved if the states simply asked Amazon to collect. What can be done in Hawaii to prevent states like Washington, like California, like Massachusetts, from taking these positions against small businesses," said Rafelson.

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April 3, 2018

LATE

Members, Senate Committee on Ways and Means
Hawaii State Capitol
415 South Beretania St.
Honolulu, HI 96813

Members, House Committee on Finance
Hawaii State Capitol
415 South Beretania St.
Honolulu, HI 96813

**RE: HB 1655 and SB 2890
OPPOSE**

Dear Committee Members,

On behalf of the Internet Association (IA), I submit this letter expressing our **OPPOSITION to HB 1655 and SB 2890**, which would impose the state's general excise tax ("GET") on marketplaces for sellers' sales facilitated by the marketplace.

IA represents more than 40 of the world's leading internet companies, and advances public policy solutions that foster innovation, promote economic growth, and empower people through the free and open internet.

The marketplace bills being considered by the Hawaii legislature are flawed in numerous ways. These bills transfer the GET liability for sales being made through marketplaces to the marketplace provider. This will not raise revenue for the state nor will it operate to level the playing field between local brick and mortar stores and online retailers. Hawaii does not need to take any legislative action to address the remote seller issue because in *South Dakota v. Wayfair* the U.S. Supreme Court will be reviewing the validity of the physical presence standard set forth in *Quill Corp v. North Dakota*. The U.S. Supreme Court will issue its decision this year, possibly as early as June, at which time Hawaii and other states will have an answer on their authority to impose tax on remote sellers. Any state action is premature with respect to imposing GET liability on marketplaces before the U.S. Supreme Court issues its decision in *Wayfair*.

Additionally, these marketplace bills are constitutionally suspect and may violate other federal laws. By requiring marketplaces to pay GET for sellers' sales regardless of whether those sellers have a physical presence in the state, these marketplace proposals may violate the Commerce Clause of the U.S. Constitution. As a result, these bills may be subject to protracted litigation for years and will not raise any revenue during the litigation.



For these reasons, we urge your **OPPOSITION to HB 1655 and SB 2890**. Should you have any questions regarding our position, please feel free to contact me at callahan@internetassociation.org or (916) 836-8983. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Robert Callahan'.

Robert Callahan
Vice President, State Government Affairs

Online Merchants Guild

Paul Rafelson

Support

LATE

THE SENATE
TWENTY-NINTH LEGISLATURE, 2018
STATE OF HAWAII

S.B. NO. 2890
S.D. 2

A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Section 237-1, Hawaii Revised Statutes, is
2 amended as follows:

3 1. By adding a new definition to be appropriately inserted
4 and to read:

5 "Marketplace provider" means any person who sells or
6 assists in the sale of tangible personal property on behalf of
7 another seller and who provides customer service, processes
8 payments, ~~and whose logo is prominently displayed on the website~~
where sellers products are purchased, regardless of whether such
person controls the fulfillment process."

9 2. By amending the definition of "person" or "company" to
10 read as follows:

11 "Person" or "company" includes every individual,
12 partnership, society, unincorporated association, joint
13 adventure, group, hui, joint stock company, corporation,
14 trustee, personal representative, trust estate, decedent's
15 estate, trust, trustee in bankruptcy, or other entity, whether
16 such persons are doing business for themselves or in a fiduciary
17 capacity, and whether the individuals are residents or

Commented [PR1]: I'm confused why it would only apply to those who provide fulfillment services. I would think that you'd want this law to apply evenly to Amazon Walmart Ebay, etc. Only Amazon has the fulfillment services so you'd be losing a lot of potential revenue by limiting to Amazon.

Still not sure I follow the \$100,000 limit. If its for non-marketplace sellers who have their own website, I get it. However for Amazon eBay and company \$100,000 even in Hawaii is probably surpassed in an Hour, so why do we care if the marketplace has \$100,000 in sales or not?

1 nonresidents of the State, and whether the corporation or other
 2 association is created or organized under the laws of the State
 3 or of another jurisdiction. Any person who has in the person's
 4 possession, for sale in the State, the property of a nonresident
 5 owner, other than as an employee of such owner, sells or
 6 assists in the sale of tangible personal property on behalf of
 7 another seller by providing customer service, processing
 8 payments, and controlling the fulfillment process is a Marketplace
 Provider shall be
 9 deemed the seller of the property, when sold, and the seller
 10 on whose behalf the sale is made shall be deemed to have made a
 3 sale at wholesale pursuant to section 237-4." However, to the
extent required sellers whose products are sold via a Marketplace
Provider shall be exempt from obtaining a resale certificate from
the Marketplace Provider.

114 To minimize undue burdens on interstate commerce with respect to
small business sellers worldwide, and on this Department by
reducing the need to any tax owed by a seller, remote or in-
state, whose sale of tangible personal property was facilitated
via a Marketplace provider shall be subject to General Excise Tax
as a wholesaler, pursuant to 237-4. However, it shall be the
responsibility of the Marketplace Provider, not the individual
seller, to collect such taxes from the seller and the marketplace
provider must remit a separate tax return indicating cumulative
tax due from such transactions. Documents supporting the
calculation of the cumulative tax remitted will not be required
to be filed with the Department but must be made available for
inspection, if requested by the Department.

125 3. By amending the definition of "representative" to read
 136 as follows:

147 ""Representative" means any salesperson, commission agent,

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~~158~~ manufacturer's representative, broker or other person who is
| ~~169~~ authorized or employed by ~~an unlicensed~~ seller to assist
~~1710~~ such seller in selling property for use in the State, by
~~1811~~ procuring orders for such sales or otherwise, and who carries on
~~1912~~ such activities in the State, it being immaterial whether such
| ~~2013~~ activities are regular or intermittent ~~but the~~. The term
~~2114~~ "representative" does not include [a]:



1 (1) manufacturer's representative whose functions are
 2 wholly promotional and to act as liaison between an
 3 unlicensed seller and a seller or sellers, and which
 4 do not include the procuring, soliciting or accepting
 5 of orders for property or the making of deliveries of
 6 property, or the collecting of payment for deliveries
 7 of property, or the keeping of books of account
 8 concerning property orders, deliveries or collections
 9 transpiring between an unlicensed seller and a seller

10 or ~~sellers~~ f. Any unlicensed seller who in person
 11 carries on any such activity in the State shall also
 12 be classed as a representative.]; and

13 (2) ~~A person who sells or assists in the sale of tangible~~
 14 ~~personal property on behalf of another seller and who~~
 15 ~~provides customer service, processes payments, and~~
 16 ~~controls the fulfillment process.~~ "Marketplace Providers as
 17 defined in this section.

18 SECTION 2. Section 237-2, Hawaii Revised Statutes, is

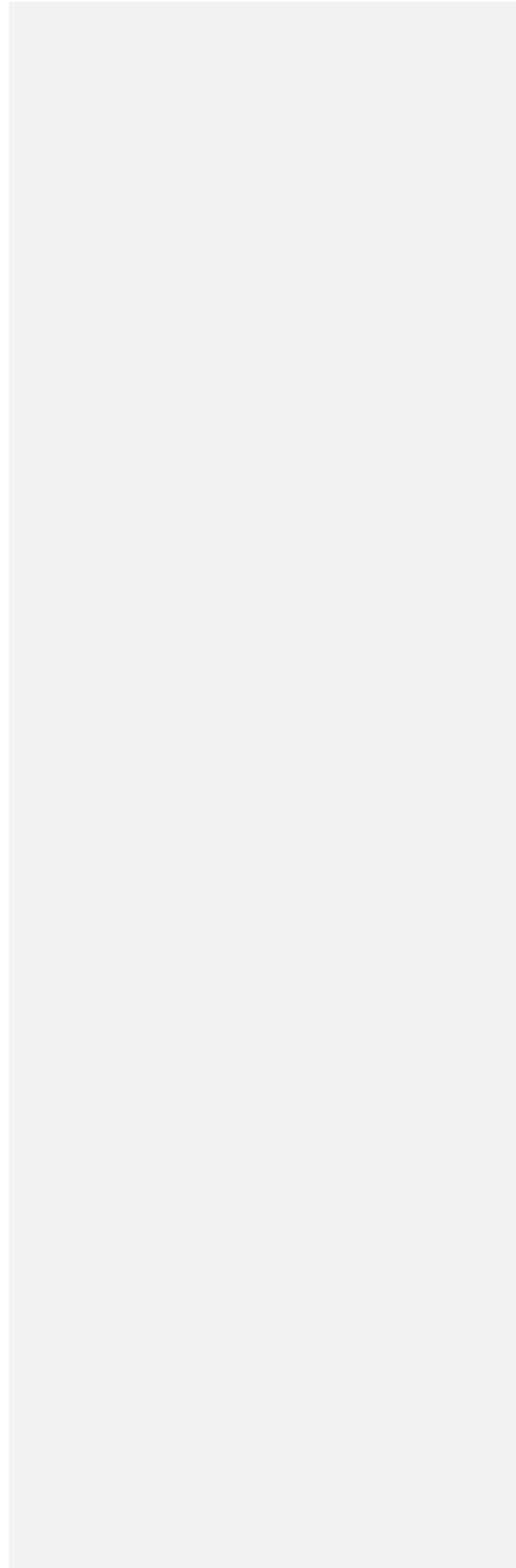
19 amended to read as follows:

20 "§237-2 "Business", "engaging" in business, defined. As

21 used in this chapter:

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1 "Business" includes all activities (personal, professional,
 2 or corporate) engaged in or caused to be engaged in with the
 3 object of gain or economic benefit either direct or indirect,
 4 without regard to physical presence in the State, but does not
 5 include casual sales. A person with no physical presence in the
 6 State is engaged in business in this State if, in the current or
 7 immediately preceding calendar year, the person has gross
 8 receipts attributable to transactions in this State totaling

9 \$100,000 or more. However, such limits will not apply
marketplace facilitators, and any sales made by a seller via a
marketplace facilitator will not be considered a sale for
purposes of this rule. Only sales independent of marketplace
facilitators, such as sales made via a website, offering products
for sale without the need for a marketplace facilitator shall be
counted for purposes of determining whether this nexus threshold
has been met. ~~_____~~

10 So that this rule does not place undue burdens on interstate
commerce:

9 If a person's only connection to this state is Gross receipts
attributable to transactions

10 in this State include gross receipts from sales that, but for

11 the seller's lack of physical presence, would be taxable under

11 this chapter and are to facilitated by a marketplace provider
than all taxes owed whether at retail, wholesale or otherwise
shall be collected and remitted to the Department by the
marketplace provider, in a manner so determined by the
Department.

No seller whose only connection to this State is via economic or
non-physical, presence and whose sales only marketplace
facilitator shall not be required to register with the Secretary
of State or any other agency of this State. ~~that~~

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~~12~~

~~1513~~ business, includes the exercise of corporate or franchise
~~1614~~ powers."

~~1715~~ SECTION 3. Section 238-1, Hawaii Revised Statutes, is
~~1816~~ amended by amending the definition of "import" to read as
~~1917~~ follows:

~~2018~~ "Import" (or any nounal, verbal, adverbial, adjective, or
~~2119~~ other equivalent of the term) includes:



- 1 (1) The importation into the State of tangible property,
2 services, or contracting owned, purchased from an
3 unlicensed seller, or however acquired, from any other
4 part of the United States or its possessions or from
5 any foreign country, whether in interstate or foreign
6 commerce, or both; [and]
- 7 (2) The sale and delivery of tangible personal property
8 owned, purchased from an unlicensed seller, or however
9 acquired, by a seller who is or should be licensed
10 under the general excise tax law from an out-of-state
11 location to an in-state purchaser, regardless of the
12 free on board point or the place where title to the
13 property transfers to the purchaser[7]; and
- 14 (3) The sale of tangible personal property by, or assisted
15 by, a licensed seller who provides customer service,
16 processes payments, ~~and whether or not it controls the~~
17 process on behalf of an unlicensed seller for delivery
18 to a purchaser in the State."

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SECTION 4. No provision of this bill shall prevent or be considered evidence of ambiguity if the state, upon further review of a person's business activities prior to the enactment of this law determines that such activity was such that the person is accountable for prior unpaid taxes, to the extent allowed in accordance within the statutory time frame to assess a tax. If any person can provide evidence to the Department or to the Attorney General that such taxes should have been paid by such person, the Department and the Attorney General must take

steps to protect the financial interests of the State.

Further, if any person who is a resident of this state whose only connection outside of this state to any other state is via a marketplace facilitator, is pursued by another state for back taxes owed, or tax compliance obligations in the future, it is the responsibility of the Attorney General of this state to take action to protect the interests, local economy, and its residents from harm caused by undue burdens, that are unconstitutionally being placed on such resident by another state.

19 SECTION 54. If any provision of this Act, or the
20 application thereof to any person or circumstance, is held
21 invalid, the invalidity does not affect other provisions or

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1 applications of the Act that can be given effect without the
2 invalid provision or application, and to this end the provisions
3 of this Act are severable.

4 SECTION 5. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 6. This Act shall take effect upon its approval.



S.B. NO. 2890
S.D. 2

Report Title:

General Excise Tax; Use Tax; Tangible Personal Property;
Marketplace Provider

Description:

Amends the general excise tax law by adding a definition for "marketplace provider". Provides that a person with no physical presence in the State shall be considered to be engaged in business in the State if, in the current or immediately preceding calendar year, the person has gross receipts attributable to transactions in the State totaling \$100,000 or more. Clarifies that a person who sells or assists in the sale of tangible personal property and who provides customer service, processes payments, and controls fulfillment is the seller of the property for general excise tax and use tax purposes. (SD2)

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

