

House Committee on Taxation

Verbal Testimony House Bill 2756- Sales Tax Nexus

Presented by Eric Stafford, Vice President of Government Affairs

Thursday, March 1, 2018

Mister Chairman and members of the committee, my name is Eric Stafford, Vice President of Government Affairs for the Kansas Chamber. The Kansas Chamber appreciates the opportunity to testify in support of the intent of taxing online sales. Our legislative agenda approved by our board of directors states that we “Encourage Federal and state resolution regarding collection of sales taxes by out-of-state, online-only retailers.”

While we do support resolution to closing the loophole from online-only retailers in the current sales tax system, we have received mixed feedback on whether to move forward today with legislation, or wait for the U.S. Supreme Court to decide on the *South Dakota v. Wayfair* case which will be argued on April 17. If South Dakota is successful, Kansas would have authority to collect sales tax from out-of-state retailers who lack a physical presence in the state. It is worth noting that HB 2756 creates a new tax on digital goods and subscription services such as Netflix. This in the eyes of our members goes above and beyond the *South Dakota v. Wayfair* case and is viewed as a tax increase.

HB 2756 somewhat conflicts with existing law in Kansas. The Kansas Chamber led efforts to address this problem back in 2013 with the ultimate passage of legislation (H Sub for SB 83) dealing with online-only retailers. That bill amended K.S.A. 79-3702 to establish a threshold of \$10,000 over the previous 12 months for out-of-state retailers to collect and remit sales tax to the state. HB 2756 however has a threshold of \$50,000. Existing law reads:

(C) The retailer enters into an agreement with one or more residents of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link or an internet website, by telemarketing, by an in-person oral presentation, or otherwise, to the retailer, if the cumulative gross receipts from sales by the retailer to customers in the state who are referred to the retailer by all residents with this type of an agreement with the retailer is in excess of \$10,000 during the preceding 12 months. This presumption may be rebutted by submitting proof that the residents with whom the retailer has an agreement did not engage in any activity within the state that was significantly associated with the retailer's ability to establish or maintain the retailer's market in the state during the preceding 12 months. Such proof may consist of sworn written statements from all of the residents with whom the retailer has an agreement stating that they did not engage in any solicitation in the state on behalf of the retailer during the preceding year, provided that such statements were provided and obtained in good faith. This subparagraph shall take effect 90 days after the enactment of this statute and shall apply to sales made and uses occurring on or after the effective date of this subparagraph and without regard to the date the retailer and the resident entered into the agreement described in this subparagraph. The term "preceding 12 months" as used in this subparagraph includes the 12 months commencing prior to the effective date of this subparagraph.

We would ask this committee to diligently work through the intricacies of this policy decision to ensure it is compatible with existing law, and to verify the laws on the books today are sufficient, or not, before passing new legislation. We also urge this committee to thoroughly research the background on the South Dakota case, how South Dakota taxes online sales, and how other states have tackled this issue. For example, Massachusetts passed what's been called the "cookie" tax as a way to work around *Quill*. Their threshold is more than 100 sales and sales in excess of \$500,000 over the previous 12 months. Colorado and six other states have adopted a reporting requirement which this committee heard testimony on last year, and three states have passed economic nexus legislation (*Source: Tax Foundation Amicus Brief, South Dakota v. Wayfair*).

Kansas falls under the category of 18 states to have passed "click-through-nexus" legislation. In an amicus brief filed by the Tax Foundation urging the Supreme Court to take the case outlining click-through-nexus, they state:

"These statutes create physical presence when a retailer uses an independent contractor even if those contractors do not engage in maintaining an in-state market or a substantial flow of goods. While these statutes provide for an ability to rebut the presumption that solicitation occurred, rebutting such presumption would inherently be futile, as it is hard to prove what has been done by individuals on the internet. As a result, due to the global nature of the internet, these click-through laws apply more broadly and encompass not only retailers who target sales within a given state, but also retailers who may not actually produce a sale in the given state."

We would urge you to read this brief as it is extremely informative. The link is: <https://files.taxfoundation.org/20180116173936/Amicus-Brief-South-Dakota-v.-Wayfair-Online-Sales-Tax-Case.pdf>

An article written by Joe Henchman on the Tax Foundation website regarding the South Dakota case reads: "However, other states seeking similar authority could expose online retail to a flurry of problematic state tax laws." Tax Foundation, as you'll read in the brief, viewed the South Dakota sales tax structure as simplified and the right approach to look at taxing online sales.

HB 2756 appears to be more prescriptive than what passed in 2013. It is much more prescriptive than the language passed by South Dakota (included at the end of our testimony). But we reiterate, we would like to ensure we are not passing conflicting or unnecessary legislation with what is already in statute today.

In closing, we support leveling the playing field for online sales which currently places Kansas-based brick and mortar locations at a disadvantage to those without a physical presence in the state. However, we urge caution on how our state moves forward with the South Dakota case pending before the U.S. Supreme Court. We must make sure that Kansas' click-through-nexus statutes are insufficient before passing additional legislation. We must also make sure that new legislation is good legislation and not burdensome to Kansas businesses. Thank you for the opportunity to provide testimony on House Bill 2756, and I am happy to answer questions at the appropriate time.

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis. The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:
Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:
No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:
If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:
A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes, penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.
No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.
Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

- (1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;
- (2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;
- (3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers actively market sales as tax free or no sales tax transactions;
- (4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;
- (5) Remote sellers who make a substantial number of deliveries into or have large gross

revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

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

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.