

**SALES AND USE TAX - SELLER NOTICE
REQUIREMENTS**

2012 GENERAL SESSION
STATE OF UTAH

Chief Sponsor: Wayne A. Harper

Senate Sponsor: _____

LONG TITLE

General Description:

This bill enacts certain notice requirements for specified sellers that sell to customers in the state.

Highlighted Provisions:

This bill:

- ▶ requires specified sellers that sell to customers in the state to provide certain notice related to sales and use taxes; and
- ▶ prohibits the specified sellers from making certain representations about taxes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill takes effect on July 1, 2012.

Utah Code Sections Affected:

ENACTS:

59-12-107.6, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **59-12-107.6** is enacted to read:

59-12-107.6. Notice requirements for certain sellers -- Prohibition on certain



28 **representations by a seller.**

29 (1) As used in this section:

30 (a) "De minimis online auction website" means an online auction website that
31 facilitated total gross sales in the state in the prior year of less than \$100,000.

32 (b) "De minimis seller" means a noncollecting seller that made total gross sales in the
33 state in the prior year of less than \$100,000.

34 (c) "Noncollecting seller" means a seller that:

35 (i) is not required to collect and remit a tax under this chapter;

36 (ii) does not voluntarily collect and remit a tax under this chapter;

37 (iii) sells tangible personal property, a service, or a product transferred electronically
38 from a place of business outside the state; and

39 (iv) ships the tangible personal property, service, or product transferred electronically
40 into the state for storage, use, or consumption.

41 (d) "Online auction website" means one or more web pages on the Internet:

42 (i) that allow a person to display tangible personal property, a service, or a product
43 transferred electronically for sale; and

44 (ii) through which a purchase is made through a competitive process that allows:

45 (A) a participant to place a bid; and

46 (B) the highest bidder to purchase the tangible personal property, service, or product
47 transferred electronically upon completion of the bidding period.

48 (e) "Purchaser in the state" means a purchaser that purchases tangible personal
49 property, a service, or a product transferred electronically that is shipped or transferred into the
50 state.

51 (2) (a) Except as provided in Subsection (2)(b), and subject to the other provisions of
52 this section, a noncollecting seller that sells tangible personal property, a service, or a product
53 transferred electronically to a purchaser in the state shall provide notice that meets the
54 requirements of this section to that purchaser.

55 (b) The following are exempt from the requirements of this section:

56 (i) a de minimis seller; or

57 (ii) a de minimis online auction website.

58 (3) The notice required by this section shall state that the:

- 59 (a) noncollecting seller did not collect a sales or use tax on the sale;
60 (b) sale may be subject to sales or use taxation;
61 (c) sale is not exempt from sales or use taxation because it is made over the Internet or
62 by other remote means; and
63 (d) purchaser should consult the tax laws of the state in which the sale is made to
64 determine whether the sale is subject to sales or use taxation.
65 (4) (a) Except as provided in Subsection (4)(b), for a sale over the Internet, a
66 noncollecting seller shall place the notice required by this section on:
67 (i) a web page that is necessary to complete the transaction; and
68 (ii) an:
69 (A) electronic order confirmation if the noncollecting seller issues an electronic order
70 confirmation; or
71 (B) invoice, bill of sale, or similar document that the noncollecting seller provides to
72 the purchaser if the noncollecting seller does not issue an electronic order confirmation.
73 (b) An online auction website is not required to place the notice required by this
74 section on an electronic order confirmation.
75 (5) For a catalogue sale, a noncollecting seller shall place the notice required by this
76 section on the order form.
77 (6) For a sale that is made by telephone, a noncollecting seller shall place the notice
78 required by this section on an invoice, bill of sale, or similar document the noncollecting seller
79 provides to the purchaser.
80 (7) A noncollecting seller may not:
81 (a) state or display that sales or use tax is not due on a sale unless:
82 (i) the statement or display is accompanied by the notice required by this section each
83 time the statement or display appears; or
84 (ii) the noncollecting seller knows that the sale is not subject to sales or use taxation;
85 and
86 (b) unless the noncollecting seller knows that a sale is not subject to sales or use
87 taxation, show an amount of zero on a line designated as:
88 (i) sales tax;
89 (ii) sales and use tax;

- 90 (iii) use tax;
91 (iv) tax; or
92 (v) a term similar to Subsections (7)(b)(i) through (iv).
93 Section 2. **Effective date.**
94 This bill takes effect on July 1, 2012.

Legislative Review Note
as of 2-6-12 9:22 AM

As required by legislative rules and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill enacts requirements that certain sellers who are not required to, and do not voluntarily, collect sales and use taxes in the state provide notice to purchasers. The notice states that: the seller did not collect a tax on the sale; the sale may be subject to sales or use taxation; the sale is not exempt from sales or use taxation because it is made over the Internet or by other remote means; and the purchaser should consult the state's tax laws as to the taxability of the purchase. In addition, the bill enacts prohibitions on a seller showing a zero tax liability for a purchase unless the seller provides the notice described above or knows that the sale is not subject to tax.

Because this bill imposes obligations on out-of-state sellers, the bill raises issues under the Commerce Clause of the Constitution of the United States. The Constitution of the United States grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States." *U.S. Const.* art. I, § 8. Case law has interpreted the Commerce Clause as having a dormant aspect, which "prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) (quoting *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 (1938)).

In evaluating a state statute under a dormant Commerce Clause challenge, the Supreme Court of the United States has evaluated whether the statute "discriminates against interstate commerce either on its face or in practical effect." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Further, if discrimination is found, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 336-37.

In 2010, Colorado enacted a law that establishes the following obligations on a seller selling to customers in Colorado: (1) a requirement to notify Colorado purchasers that sales or use tax is due on certain purchases made from the seller and that the state of Colorado requires the purchaser to file a sales or use tax return ("notice requirements"); and (2) a requirement for a seller to annually notify the purchaser of Colorado purchases made from the seller, informing the purchaser of the obligation to report and pay use tax on the purchases, and informing the purchaser of the seller's duty to report the purchaser's name and purchases from the retailer to the Colorado Department of Revenue ("reporting requirements"). The Direct Marketing Association ("DMA") challenged this Colorado law.

On January 26, 2011, the United States District Court for the District of Colorado issued a preliminary injunction in this case, which enjoins the State of Colorado from enforcing these notice and reporting requirements. This preliminary injunction is currently in effect. In granting the injunction, the district court found that DMA "demonstrated a substantial likelihood of success on both its discrimination claim and its undue burden claim under the dormant Commerce Clause." *DMA v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo., Jan. 26, 2011) (Order Granting Motion for Preliminary Injunction). With respect to the discrimination claim, the court found that the notice and reporting requirements impose a burden on out-of-state retailers that is not generally imposed on in-state retailers. Further, the court ruled that it is unlikely that Colorado will be able to justify a lack of "nondiscriminatory alternatives" to its local interest of collecting tax revenues because other states permit the collection of use tax through the state income tax return. *Id.* at 8. The court also found that the notice and reporting requirements placed an undue burden on interstate commerce. *Id.* at 10.

The Colorado statute challenged in the *Huber* case contains reporting requirements that are not included in this bill. However, the notice requirements in this bill are similar to those in Colorado. Because the federal district court in Colorado included the notice requirements as part of the injunction in *Huber*, finding a "substantial likelihood of success" in prevailing on a dormant Commerce Clause claim, there is a high probability that, if challenged, a court would also find this bill to violate the dormant Commerce Clause. Although the *Huber* case is a Colorado federal district court case, Colorado, like Utah, is within the United States Court of Appeals for the Tenth Circuit. Depending on the outcome of the *Huber* case and the extent to which it is appealed, the *Huber* case could have binding precedent in Utah.

Office of Legislative Research and General Counsel