

HOUSE COMMITTEE OF REFERENCE REPORT

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Chairman of Committee

April 2, 2014  
Date

Committee on Finance.

After consideration on the merits, the Committee recommends the following:

HB14-1269 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

1 Amend printed bill, strike everything below the enacting clause and  
2 substitute:

3           **"SECTION 1. Short title.** This act shall be known and may be  
4 cited as the "Marketplace Fairness and Small Business Protection Act".

5           **SECTION 2.** In Colorado Revised Statutes, 39-26-102, **amend**  
6 (3) as follows:

7           **39-26-102. Definitions.** As used in this article, unless the context  
8 otherwise requires:

9           (3) "Doing business in this state" means the selling, leasing, or  
10 delivering in this state, or any activity in this state in connection with the  
11 selling, leasing, or delivering in this state, of tangible personal property  
12 OR TAXABLE SERVICES by a retail sale as defined in this section, for use,  
13 storage, distribution, or consumption within this state. This ~~term~~  
14 SUBSECTION (3) AFFECTS THE IMPOSITION, APPLICATION, OR COLLECTION  
15 OF SALES AND USE TAXES ONLY. "DOING BUSINESS IN THIS STATE"  
16 includes, but shall not be limited to, the following acts or methods of  
17 transacting business:

18           (a) The maintaining within this state, directly or indirectly or by  
19 a subsidiary, of an office, ~~distributing house~~ DISTRIBUTION FACILITY,  
20 salesroom, ~~or house~~, warehouse, STORAGE PLACE, or other SIMILAR place  
21 of business, INCLUDING THE EMPLOYMENT OF A RESIDENT OF THIS STATE  
22 WHO WORKS FROM A HOME OFFICE IN THIS STATE.

23           (b) ~~(f)~~ The soliciting, either by direct representatives, indirect

1 representatives, manufacturers' agents, or by distribution of catalogues or  
2 other advertising, or by use of any communication media, or by use of the  
3 newspaper, radio, or television advertising media, or by any other means  
4 whatsoever, of business from persons residing in this state and by reason  
5 thereof receiving orders from, or selling or leasing tangible personal  
6 property to, such persons residing in this state for use, consumption,  
7 distribution, and storage for use or consumption in this state.

8 (c) A REMOTE SELLER DOING BUSINESS IN THIS STATE WITH  
9 RESPECT TO ANY REMOTE SALE SUBJECT TO TAX IN ACCORDANCE WITH  
10 SECTION 39-26-104 (2).

11 ~~(H)~~ (d) **Presumptive physical presence - component member**  
12 **with physical presence.** (I) ~~Commencing March 1, 2010, if a retailer~~  
13 ~~that does not collect Colorado sales tax~~ A PERSON IS PRESUMED TO BE  
14 DOING BUSINESS IN THIS STATE IF SUCH PERSON is part of a controlled  
15 group of corporations, and that controlled group has a component  
16 member, OTHER THAN A COMMON CARRIER ACTING IN ITS CAPACITY AS  
17 SUCH, ~~that is a retailer with~~ HAS physical presence in this state ~~the retailer~~  
18 ~~that does not collect Colorado sales tax is presumed to be doing business~~  
19 ~~in this state. For purposes of this subparagraph (H), "controlled group of~~  
20 ~~corporations" has the same meaning as set forth in section 1563 (a) of the~~  
21 ~~federal "Internal Revenue Code of 1986", as amended, and "component~~  
22 ~~member" has the same meaning as set forth in section 1563 (b) of the~~  
23 ~~federal "Internal Revenue Code of 1986", as amended. This presumption~~  
24 ~~may be rebutted by proof that during the calendar year in question, the~~  
25 ~~component member that is a retailer with physical presence in this state~~  
26 ~~did not engage in any constitutionally sufficient solicitation in this state~~  
27 ~~on behalf of the retailer that does not collect Colorado sales tax~~ AND SUCH  
28 COMPONENT MEMBER WITH PHYSICAL PRESENCE:

29 (A) SELLS UNDER THE SAME OR A SIMILAR BUSINESS NAME  
30 TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT  
31 SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

32 (B) MAINTAINS AN OFFICE, DISTRIBUTION FACILITY, SALESROOM,  
33 WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN  
34 THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL  
35 PROPERTY OR TAXABLE SERVICES SOLD BY THE PERSON AGAINST WHOM  
36 THE PRESUMPTION IS ASSERTED TO SUCH PERSON'S IN-STATE CUSTOMERS;

37 (C) USES TRADEMARKS, SERVICE MARKS, OR TRADE NAMES IN THIS  
38 STATE THAT ARE THE SAME OR SUBSTANTIALLY SIMILAR TO THOSE USED  
39 BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

40 (D) DELIVERS, INSTALLS, OR ASSEMBLES TANGIBLE PERSONAL  
41 PROPERTY IN THIS STATE, OR PERFORMS MAINTENANCE OR REPAIR

1 SERVICES ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH  
2 TANGIBLE PERSONAL PROPERTY IS SOLD TO IN-STATE CUSTOMERS BY THE  
3 PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED; OR

4 (E) FACILITATES THE DELIVERY OF TANGIBLE PERSONAL PROPERTY  
5 TO IN-STATE CUSTOMERS OF THE PERSON AGAINST WHOM THE  
6 PRESUMPTION IS ASSERTED BY ALLOWING SUCH CUSTOMERS TO PICK UP  
7 TANGIBLE PERSONAL PROPERTY SOLD BY SUCH PERSON AT AN OFFICE,  
8 DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR  
9 OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE.

10 (II) FOR PURPOSES OF THIS PARAGRAPH (d), "CONTROLLED GROUP  
11 OF CORPORATIONS" HAS THE SAME MEANING AS SET FORTH IN SECTION  
12 1563 (a) OF THE FEDERAL "INTERNAL REVENUE CODE OF 1986", AS  
13 AMENDED, AND "COMPONENT MEMBER" HAS THE SAME MEANING AS SET  
14 FORTH IN SECTION 1563 (b) OF THE FEDERAL "INTERNAL REVENUE CODE  
15 OF 1986", AS AMENDED. "CONTROLLED GROUP OF CORPORATIONS" AND  
16 "COMPONENT MEMBER" ALSO INCLUDE ANY ENTITY THAT,  
17 NOTWITHSTANDING ITS FORM OF ORGANIZATION, BEARS THE SAME  
18 OWNERSHIP RELATIONSHIP TO THE PERSON AGAINST WHOM THE  
19 PRESUMPTION IS ASSERTED AS A CORPORATION THAT WOULD QUALIFY AS  
20 A COMPONENT MEMBER OF THE SAME CONTROLLED GROUP OF  
21 CORPORATIONS AS THE PERSON AGAINST WHOM THE PRESUMPTION IS  
22 ASSERTED.

23 (III) THE PRESUMPTION SET FORTH IN SUBPARAGRAPH (I) OF THIS  
24 PARAGRAPH (d) MAY BE REBUTTED BY PROOF THAT, DURING THE  
25 CALENDAR YEAR IN QUESTION, THE COMPONENT MEMBER WITH PHYSICAL  
26 PRESENCE DID NOT ENGAGE IN ANY ACTIVITIES IN THIS STATE THAT ARE  
27 SUFFICIENT UNDER UNITED STATES CONSTITUTIONAL STANDARDS TO  
28 ESTABLISH NEXUS IN THIS STATE ON BEHALF OF THE PERSON AGAINST  
29 WHOM THE PRESUMPTION IS ASSERTED.

30 (e) **Presumptive physical presence - agreement or**  
31 **arrangement with a person with physical presence.** (I) EXCEPT AS  
32 PROVIDED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH (e), A PERSON IS  
33 PRESUMED TO BE DOING BUSINESS IN THIS STATE IF SUCH PERSON AGAINST  
34 WHOM THE PRESUMPTION IS ASSERTED ENTERS INTO AN AGREEMENT OR  
35 ARRANGEMENT WITH A PERSON WHO HAS PHYSICAL PRESENCE IN THIS  
36 STATE, OTHER THAN A COMMON CARRIER ACTING IN ITS CAPACITY AS  
37 SUCH, FOR THAT PERSON WHO HAS PHYSICAL PRESENCE TO:

38 (A) SELL UNDER THE SAME OR A SIMILAR BUSINESS NAME  
39 TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT  
40 SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

41 (B) MAINTAIN AN OFFICE, DISTRIBUTION FACILITY, SALESROOM,

1 WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN  
2 THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL  
3 PROPERTY OR TAXABLE SERVICES SOLD BY THE PERSON AGAINST WHOM  
4 THE PRESUMPTION IS ASSERTED TO SUCH PERSON'S IN-STATE CUSTOMERS;

5 (C) DELIVER, INSTALL, OR ASSEMBLE TANGIBLE PERSONAL  
6 PROPERTY IN THIS STATE, OR PERFORM MAINTENANCE OR REPAIR SERVICES  
7 ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH TANGIBLE  
8 PERSONAL PROPERTY IS SOLD TO IN-STATE CUSTOMERS BY THE PERSON  
9 AGAINST WHOM THE PRESUMPTION IS ASSERTED; OR

10 (D) FACILITATE THE DELIVERY OF TANGIBLE PERSONAL PROPERTY  
11 TO IN-STATE CUSTOMERS OF THE PERSON AGAINST WHOM THE  
12 PRESUMPTION IS ASSERTED BY ALLOWING SUCH CUSTOMERS TO PICK UP  
13 TANGIBLE PERSONAL PROPERTY SOLD BY SUCH PERSON AT AN OFFICE,  
14 DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR  
15 OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE.

16 (II) THE PRESUMPTION SET FORTH IN SUBPARAGRAPH (I) OF THIS  
17 PARAGRAPH (e) MAY BE REBUTTED BY PROOF THAT, DURING THE  
18 CALENDAR YEAR IN QUESTION, THE PERSON WHO HAS PHYSICAL PRESENCE  
19 IN THIS STATE DID NOT ENGAGE IN ANY ACTIVITIES IN THIS STATE THAT  
20 ARE SUFFICIENT UNDER UNITED STATES CONSTITUTIONAL STANDARDS TO  
21 ESTABLISH NEXUS IN THIS STATE ON BEHALF OF THE PERSON AGAINST  
22 WHOM THE PRESUMPTION IS ASSERTED.

23 (III) **Activity to which presumption does not apply.** THE  
24 PRESUMPTION ESTABLISHED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e)  
25 DOES NOT APPLY TO THE FOLLOWING AGREEMENTS OR ARRANGEMENTS:

26 (A) **Advertising.** AN AGREEMENT OR ARRANGEMENT UNDER  
27 WHICH A PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE  
28 PURCHASES ADVERTISEMENTS FROM A PERSON TO BE DELIVERED IN THIS  
29 STATE ON TELEVISION, RADIO, NEWSPAPERS, MAGAZINES, THE INTERNET,  
30 OR ANY OTHER MASS-MARKET MEDIUM;

31 (B) **Affiliate marketing agreements.** AN AGREEMENT OR  
32 ARRANGEMENT BETWEEN AN IN-STATE INDEPENDENT CONTRACTOR OR  
33 OTHER REPRESENTATIVE AND A PERSON WITHOUT DIRECT IN-STATE  
34 PHYSICAL PRESENCE UNDER WHICH SUCH INDEPENDENT CONTRACTOR OR  
35 OTHER REPRESENTATIVE, FOR A COST PER ACTION, INCLUDING BUT NOT  
36 LIMITED TO A COMMISSION OR OTHER CONSIDERATION BASED ON  
37 COMPLETED SALES, DIRECTLY OR INDIRECTLY REFERS POTENTIAL  
38 CUSTOMERS THROUGH INTERNET PROMOTIONAL METHODS TO THE PERSON  
39 WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE; OR

40 (C) **Small businesses.** AN AGREEMENT OR ARRANGEMENT  
41 BETWEEN AN IN-STATE PERSON AND A PERSON WITHOUT DIRECT IN-STATE

1 PHYSICAL PRESENCE IF THE CUMULATIVE GROSS RECEIPTS FROM SALES BY  
2 THE PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE TO IN-STATE  
3 CUSTOMERS IN THE PRIOR CALENDAR YEAR IS LESS THAN FIFTY THOUSAND  
4 DOLLARS.

5 **SECTION 3. Severability.** If any provision of this act or the  
6 application thereof to any person or circumstance is held invalid, such  
7 invalidity does not affect other provisions or applications of the act that  
8 can be given effect without the invalid provision or application, and to  
9 this end the provisions of this act are declared to be severable.

10 **SECTION 4. Effective date.** This act takes effect July 1, 2014.

11 **SECTION 5. Safety clause.** The general assembly hereby finds,  
12 determines, and declares that this act is necessary for the immediate  
13 preservation of the public peace, health, and safety.".

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