Regular Session, 2011

HOUSE BILL NO. 641 (Substitute for House Bill No. 544 by Representative Rosalind Jones)

BY REPRESENTATIVES ROSALIND JONES, ANDERS, ARMES, AUSTIN BADON, BISHOP, BROSSETT, BURRELL, CARTER, CHANDLER, DIXON, DOERGE, FANNIN, GISCLAIR, HOWARD, GIROD JACKSON, SAM JONES, LEBAS, LEGER, MONTOUCET, MORENO, NOWLIN, AND PATRICIA SMITH

TAX/SALES & USE: Provides with respect to the definition of "dealer" for state and local sales and use tax

AN ACT

To amend and reenact R.S. 47:301(4)(h) and 302(K)(5) and to enact R.S. 47:301(4)(m), relative to sales and use tax; to provide with respect to dealers; to provide for certain definitions; to provide a method for reporting and remitting taxes by certain dealers; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 47:301(4)(h) and 302(K)(5) are hereby amended and reenacted and R.S. 47:301(4)(m) is hereby enacted to read as follows:

§301. Definitions

As used in this Chapter the following words, terms, and phrases have the meaning ascribed to them in this Section, unless the context clearly indicates a different meaning:

* * *

(4) "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in a taxing jurisdiction. "Dealer" is further defined to mean:

* * *

(h) Any person engaging in business in the taxing jurisdiction. "Engaging in business in the taxing jurisdiction" means and includes any of the following

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methods of transacting business: maintaining directly, indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse, or other place or location of business, or by having an agent, salesman, independent contractor, or solicitor operating within the taxing jurisdiction under the authority of or through an agreement with the seller or its subsidiary irrespective of whether such place of business, agent, salesman, or solicitor is located in such taxing jurisdiction permanently or temporarily or whether such seller or subsidiary is qualified to do business in such taxing jurisdiction, or any person who makes deliveries of tangible personal property into the taxing jurisdiction other than by a common or contract carrier. "Engaging in business in the taxing jurisdiction" also means and includes the solicitation of business through an independent contractor or any other representative pursuant to an agreement with a Louisiana resident or business under which the resident or business, for a commission, referral fee, or other consideration of any kind, directly or indirectly refers potential customers, whether by link on an Internet website or otherwise, to the seller.

* * *

(m)(i) Any person selling tangible property or services, the use of which is taxed pursuant to this Chapter, who:

(aa) Sells the same or substantially similar line of products as a Louisiana retailer under the same or substantially similar business name, using the same trademarks, service marks, or trade names that are the same or substantially similar to those used by the Louisiana retailer.

(bb) Uses the facilities or employees of a Louisiana retailer to advertise or promote sales by the person to Louisiana purchasers, or to facilitate returns, issuance of refunds or credits, or adjustments on property sold by the person.

(cc) Solicits business and develops and maintains a market in Louisiana through an agent, salesman, independent contractor, solicitor, or other representative pursuant to an agreement with a Louisiana resident or business, hereinafter referred to collectively as "affiliated agent" under which the affiliated agent, for a

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commission, referral fee, or other consideration of any kind engages in activities in this state that inure to the benefit of the person in the person's development or maintenance of a market for its goods or services in the state, to the extent that those activities of the affiliated agent are sufficient to satisfy the nexus requirement of the United States Constitution. For purposes of this Subparagraph, such activities of the affiliated agent shall include referral of potential customers to the person, either directly or indirectly, whether by link on an Internet website or otherwise.

(ii)(aa) In addition to those persons established as dealers according to Item (i) of this Subparagraph, the provisions of this Subparagraph shall be presumed by the taxing authority to apply to any person who holds a substantial ownership interest, directly or through a subsidiary, in a retailer maintaining sales locations in Louisiana; or to any person who is owned in whole or in substantial part by a retailer maintaining sales locations in Louisiana, or by a parent or subsidiary thereof.

(bb) For the purposes of this Subparagraph, "substantial ownership interest" means affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

(iii) A dealer, as defined in and for purposes of this Subparagraph, shall file all applicable sales and use tax returns and remittances through the electronic filing options available for such purposes. Further, such dealer shall not be authorized to collect the tax authorized by R.S. 47:302(K)(5).

(iv) The provisions of this Subparagraph holding that certain business activities conducted by certain persons establishes the person as a dealer for purposes of sales and use tax levied by the state and its political subdivisions, shall not be used in the determination of whether such persons are liable for the payment of income and franchise taxes levied by the state.

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§302. Imposition of tax

* * *

K. An additional tax shall be levied as follows:

* * *

(5) The tax levied under this Subsection shall be levied and collected only from vendors who qualify as a "dealer" in this state solely by virtue of engaging in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio, or television media, including but not limited to television shopping channels, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system. <u>The provisions of this Subparagraph shall not apply to any dealer defined in R.S. 47:301(4)(m).</u>

* * *

Section 2. The provisions of this Act shall apply prospectively.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Rosalind Jones HB No. 641

Abstract: Expands the definition of "dealer" to include persons who have certain substantial relationships and similarities with La. retailers or who engage in business in La. through the use of certain affiliated agents.

<u>Present law</u> provides various definitions of "dealer" with respect to sales and use tax law and defines "engaging in business in a taxing jurisdiction".

<u>Proposed law</u> retains <u>present law</u> but expands the definition of "engaging in business in the taxing jurisdiction" to include the solicitation of business through an independent contractor or any other representative pursuant to an agreement with a La. resident or business under which the resident or business, for a commission, referral fee, or other consideration of any

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kind, directly or indirectly refers potential customers, whether by link on an Internet website or otherwise, to the seller.

Proposed law retains present law but expands the definition of "dealer" to include a person who (1) sells the same or substantially similar line of products as a La. retailer under the same or substantially similar business name; (2) the facilities or employees of the La. retailer are used to advertise or promote sales by the person to La. purchasers and to support the maintenance of a market in La.; (3) solicits business and develops a market in La. through an agent or other representative through an agreement for a commission, referral fee, or other consideration who engages in activities in La. that inure to the benefit of the person in the person's development or maintenance of a market for its goods or services in La., to the extent that those activities of the agent are sufficient to satisfy the nexus requirement of the U.S. Constitution; or (4) holds a substantial ownership interest, directly or through a subsidiary, in a retailer maintaining sales locations in La. or who is owned in whole or in substantial part by a retailer maintaining sales locations in La.

Proposed law requires persons who meet the definition of a dealer under proposed law to electronically file tax returns and remittances to the state and local taxing authorities.

Present law levies an additional 4% sales and use tax to be collected only by dealers who qualify as a dealer in this state solely by virtue of engaging in regular or systematic solicitation of a consumer market in La. by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio, or telephone media, including but not limited to television shopping channels, by mail, telegraphy, telephone, computer database, cable optic, microwave, or other communication system.

Proposed law specifies that present law regarding the levy and collection of the additional 4% sales tax shall not apply to persons who are defined as dealers pursuant to proposed law.

Provisions of proposed law apply prospectively.

Effective upon signature of governor or lapse of time for gubernatorial action.

(Amends R.S. 47:301(4)(h) and 302(K)(5); Adds R.S. 47:301(m))

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