

SALES TAX PROPOSAL #B
for consideration by the
ARKANSAS TAX REFORM AND RELIEF LEGISLATIVE TASK FORCE

TOPIC: Collection by Remote Sellers

Summary of Proposal for Consideration

This proposal would require out-of-state sellers that do not have a physical presence in the state and that have more than one hundred thousand dollars (\$100,000) in sales or at least two hundred (200) separate sales transactions in Arkansas to collect and remit Arkansas sales and use taxes. This requirement would not be retroactive, and any revenues collected as a result of this proposal would be dedicated to reducing taxes. This proposal would also repeal § 26-51-201(e), which provides for the reduction of the four and five-tenths percent (4.5%) income tax rate for middle-income earners to be reduced based on collections by out-of-state sellers that do not have a physical presence in the state.

Fiscal Analysis

Based on information the Department of Finance and Administration presented to the Arkansas Tax Reform and Relief Legislative Task Force on July 27, 2018, the estimated impact of enacting the proposed requirement for certain out-of-state sellers to collect and remit Arkansas sales and use taxes would be thirty-five million three hundred seventy-four thousand dollars (\$35,374,000), with twenty-four million four hundred ninety-one thousand dollars (\$24,491,000) representing the estimated increase in general revenue.

Potential Legal Issues

Until recently, requiring an out-of-state seller that has no physical presence in the state to collect and remit sales and use taxes was considered to be a violation of the Commerce Clause of the United State Constitution. However, based on the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018), a seller no longer has to have a physical presence in a state in order to be compelled to collect sales and use taxes on sales that seller makes into the state if the state takes steps to mitigate the burden such collection would place on interstate commerce. Although the Supreme Court did not decide the validity of South Dakota's law requiring certain sellers to collect and remit sales and use taxes, the Court noted that many of the features of South Dakota's law would mitigate the burden such a requirement would place on interstate commerce, including a safe harbor that protected small sellers, a non-retroactivity clause, and the inherent protections afforded to sellers by South Dakota being a party to the Streamlined Sales and Use Tax Agreement (SSUTA) (*i.e.*, simplified tax structure, centralized administration, uniformity of rules, and immunity for collectors).

This proposal is intended to conform to the *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018), decision by proposing that the state enact a law substantially similar to South Dakota's law. As Arkansas is also a party to the SSUTA, this proposal would place Arkansas in the same position

as South Dakota in the *Wayfair* case. Although the Supreme Court did not determine the validity of South Dakota's law, based on the comments of the Court in the majority opinion, it is probable that this law would be upheld by the Court if it were challenged.

With respect to the repeal of § 26-51-201(e), because an income tax reduction has not yet occurred under § 26-51-201(e), no income tax rates would be raised under this proposal. Accordingly, no legal issues are anticipated with respect to this portion of the proposal.