

1 **SENATE FLOOR VERSION**

2 February 22, 2012

3 As Amended

4 SENATE BILL NO. 1561

5 By: Brinkley of the Senate

6 and

7 Ownbey of the House

8 **[ sales and use tax - criteria and definition -**  
9 **repealing intent - effective date ]**

10  
11 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

12 SECTION 1. AMENDATORY 68 O.S. 2011, Section 1354.2, is  
13 amended to read as follows:

14 Section 1354.2. (A) There is hereby levied upon all sales, not  
15 otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of  
16 four and one-half percent (4.5%) of the gross receipts or gross  
17 proceeds of each sale of tangible personal property to the consumer-  
18 user in this state by an out-of-state vendor who ~~engages in business~~  
19 ~~in this state through the continuous, regular or systematic~~  
20 ~~solicitation of retail sales by advertisement in the newspapers or~~  
21 ~~radio or television media operating within Oklahoma~~ maintains a  
22 place of business in this state. The tax shall be collected,  
23 reported, and remitted or paid in accordance with the Oklahoma Sales  
24 Tax Code.

1 (B) For purposes of administration of the sales tax laws, a  
2 sale occurs within this state if delivery or transfer of possession  
3 of the tangible personal property occurs within this state.

4 (C) Any advertisement soliciting sales to the Oklahoma  
5 consumer, subject to this section, to be published or broadcasted by  
6 newspapers or radio or television media operating in this state,  
7 shall contain a notice that the sale is subject to Oklahoma sales or  
8 use tax and shall include the sales tax permit number issued the  
9 advertising vendor by the Oklahoma Tax Commission. It shall be the  
10 duty of the vendor to provide such notice in advertisements referred  
11 to herein. No penalty as a result of this act shall lie against any  
12 newspaper, broadcaster or other Oklahoma advertising media.

13 (D) Any out-of-state vendor required to collect, report and  
14 remit or pay sales or use tax in accordance with ~~this act~~ the  
15 Oklahoma Sales Tax Code shall be entitled to the discount allowed  
16 other vendors pursuant to the Oklahoma Sales Tax Code.

17 (E) Any out-of-state vendor doing business in this state  
18 subject to this act shall be subject to all the civil and criminal  
19 penalties and liabilities imposed by the Oklahoma Sales Tax Code on  
20 vendors within the state.

21 (F) All sales or use tax revenues collected pursuant to this  
22 act shall be apportioned in the same manner as other sales or use  
23 tax revenues.

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1 SECTION 2. AMENDATORY 68 O.S. 2011, Section 1354.3, is  
2 amended to read as follows:

3 Section 1354.3. (A) There is hereby levied upon all sales, not  
4 otherwise exempted in the Oklahoma Sales Tax Code, ~~Sections 1350 et~~  
5 ~~seq. of Title 68 of the Oklahoma Statutes,~~ or the Oklahoma Use Tax  
6 Code, ~~Sections 1401 et seq. of Title 68 of the Oklahoma Statutes,~~ an  
7 excise tax of four and one-half percent (4.5%) of the gross receipts  
8 or gross proceeds of each sale or use of tangible personal property  
9 to or by a consumer-user in this state purchased from an out-of-  
10 state vendor who ~~engages in business in this state through the~~  
11 ~~continuous, regular or systematic solicitation of retail sales by~~  
12 ~~advertisement through mail order or catalog publications~~ maintains a  
13 place of business in this state. The tax shall be collected,  
14 reported and remitted or paid and apportioned in the same manner as  
15 any other sales or use tax levied by this state.

16 (B) Any out-of-state vendor required to collect, report or  
17 remit or pay sales or use tax in accordance with ~~this act~~ the  
18 Oklahoma Sales Tax Code shall be entitled to the discount allowed  
19 other vendors required to collect and report Oklahoma sales or use  
20 tax.

21 SECTION 3. AMENDATORY 68 O.S. 2011, Section 1401, is  
22 amended to read as follows:

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1 Section 1401. The following words, terms and phrases when used  
2 in this article shall have the meanings respectively given to them  
3 in this section:

4 1. The term "person" shall mean and include any individual,  
5 company, partnership, joint venture, joint agreement, association  
6 (mutual or otherwise), limited liability company, corporation,  
7 estate, trust, business trust, receiver, or trustee appointed by the  
8 state or federal court, syndicate, this state, any county, city,  
9 municipality, or other political subdivision or agency of the state,  
10 or group or combination acting as a unit in the plural or singular  
11 number;

12 2. The term "Tax Commission" means the Oklahoma Tax Commission;

13 3. The term "purchase price" applies to the measure subject to  
14 the tax levied under Section 1402 of this title and has the same  
15 meaning as "gross receipts" or "gross proceeds" or "sales price" as  
16 defined in Section 1352 of this title;

17 4. The term "taxpayer" means any person liable to pay a tax  
18 hereunder, or charged with the collection and remission thereof, or  
19 to make a report for the purpose of claiming any exemptions in  
20 payment of any tax levied by this article;

21 5. The term "purchase at retail" means and includes all  
22 purchases except purchases made for the purpose of resale;

23 6. The term "sale" means and includes the transfer of either  
24 the title or possession for a valuable consideration of tangible

1 personal property, regardless of the manner, method, instrumentality  
2 or device by which such transfer is accomplished. The term "sale"  
3 also includes the exchange, barter, lease, or rental of tangible  
4 personal property where such exchange, barter, lease or rental  
5 results in either the transfer of the title or the possession;

6 7. The term "purchase" means and includes any method whereby a  
7 transferee receives from a transferor either the title or  
8 possession, for a valuable consideration, of tangible personal  
9 property, regardless of the manner, method, instrumentality or  
10 device by which such transfer is accomplished. The term "purchase"  
11 also includes the exchange, barter, lease or rental of tangible  
12 personal property where such exchange, barter, lease or rental  
13 results in either the transfer of the title or the possession to the  
14 transferee;

15 8. The term "use" means and includes the exercise of any right  
16 or power over tangible personal property incident to the ownership  
17 or possession of that property, except that it shall not include the  
18 sale of that property in the regular course of business;

19 9. a. The term "retailer" means every person engaged in the  
20 business of selling tangible personal property for use  
21 within the meaning of the article; provided, however,  
22 that when in the opinion of the Tax Commission it is  
23 necessary for the efficient administration of this  
24 article to regard any salesmen, representatives,

1 truckers, peddlers, or canvassers as the agents of the  
2 dealers, distributors, supervisors, employers, or  
3 persons under whom they operate or from whom they  
4 obtain the tangible personal property sold by them,  
5 irrespective of whether they are making sales on their  
6 own behalf or on behalf of such dealers, distributors,  
7 supervisors, employers, or persons, the Tax Commission  
8 may so regard them and may regard the dealers,  
9 distributors, supervisors, employers or persons as  
10 retailers for purposes of this article.

11 b. A retailer shall be deemed to be engaged in the  
12 business of selling tangible personal property for use  
13 in this state if:

14 (1) both of the following conditions exist:

15 (a) the retailer holds a substantial ownership  
16 interest in, or is owned in whole or in  
17 substantial part by, a retailer maintaining  
18 a place of business within this state, and

19 (b) the retailer sells the same or a  
20 substantially similar line of products as  
21 the related Oklahoma retailer and does so  
22 under the same or a substantially similar  
23 business name, or the Oklahoma facilities or  
24 Oklahoma employees of the related Oklahoma

1 retailer are used to advertise, promote or  
2 facilitate sales by the retailer to  
3 consumers, ~~or~~

4 (2) the retailer holds a substantial ownership  
5 interest in, or is owned in whole or in  
6 substantial part by, a business that maintains a  
7 distribution house, sales house, warehouse or  
8 similar place of business in Oklahoma that  
9 delivers property sold by the retailer to  
10 consumers,

11 (3) the retailer utilizes or maintains in this state  
12 an office, distribution house, sales house,  
13 warehouse, or other physical place of business,  
14 whether owned or operated by the vendor or any  
15 other person, other than a common carrier acting  
16 in its capacity as such, or having agents  
17 operating in this state, whether the place of  
18 business or agent is within this state  
19 temporarily or permanently or whether the person  
20 or agent is authorized to do business within this  
21 state, or

22 (4) the presence of any person, other than a common  
23 carrier acting in its capacity as such, that has  
24 substantial nexus in this state and that:

- 1                   (a) sells a similar line of products as the  
2                   vendor and does so under the same or a  
3                   similar business name,
- 4                   (b) uses trademarks, service marks, or trade  
5                   names in this state that are the same or  
6                   substantially similar to those used by the  
7                   vendor,
- 8                   (c) delivers, installs, assembles, or performs  
9                   maintenance services for the vendor,
- 10                  (d) facilitates the vendor's delivery of  
11                  property to customers in the state by  
12                  allowing the vendor's customers to pick up  
13                  property sold by the vendor at an office,  
14                  distribution facility, warehouse, storage  
15                  place, or similar place of business  
16                  maintained by the person in this state, or
- 17                  (e) conducts any other activities in this state  
18                  that are significantly associated with the  
19                  vendor's ability to establish and maintain a  
20                  market in this state for the vendor's sales.

21                  The presumptions in divisions (3) and (4) of this  
22                  subparagraph may be rebutted by demonstrating that the  
23                  person's activities in this state are not  
24                  significantly associated with the vendor's ability to

1 establish and maintain a market in this state for the  
2 vendor's sales.

3 Any ruling, agreement or contract, whether written or  
4 oral, express or implied, between a person and this  
5 state's executive branch, or any other state agency or  
6 department, stating, agreeing, or ruling that the  
7 person is not engaged in selling tangible personal  
8 property for use in this state or is not required to  
9 collect sales and use tax in this state despite the  
10 presence of a warehouse, distribution center, or  
11 fulfillment center in this state that is owned or  
12 operated by the vendor or an affiliated person, as  
13 defined in this subparagraph, of the vendor shall be  
14 null and void unless it is specifically approved by a  
15 majority vote of each of the houses of this  
16 legislature.

17 If any person sells or leases tangible personal  
18 property or services to the state, a state department,  
19 a state agency, or an agent thereof, that person and  
20 any affiliated person shall, as a prerequisite for any  
21 such sale or lease, register with the department as a  
22 vendor and comply with all legal requirements imposed  
23 on a dealer, including the requirement to collect and  
24 remit sales or use tax on all taxable sales of

1 tangible personal property and services to customers  
2 in the state. For purposes of this subparagraph,  
3 "affiliated person" means any person that is a member  
4 of the same controlled group of corporations as  
5 defined in Section 1563(a) of the Internal Revenue  
6 Code as the vendor or any other entity that,  
7 notwithstanding its form of organization, bears the  
8 same ownership relationship to the vendor as a  
9 corporation that is a member of the same controlled  
10 group of corporations as defined in Section 1563(a) of  
11 the Internal Revenue Code.

12 c. For purposes of subparagraph b of this paragraph:

13 (1) "substantial ownership interest" means an  
14 interest in an entity that is not less than the  
15 degree of ownership of equity interest in an  
16 entity that is specified by Section 78p of Title  
17 15 of the United States Code, or any successor to  
18 that statute, with respect to a person other than  
19 a director or officer,

20 (2) "ownership" means and includes both direct  
21 ownership and indirect ownership through a  
22 parent, subsidiary or affiliate, and

23 (3) the processing of orders electronically,  
24 including facsimile, telephone, the Internet or

1 other electronic ordering process, does not  
2 relieve a retailer of responsibility for  
3 collection of the tax from the purchaser if the  
4 retailer is doing business in this state pursuant  
5 to this paragraph.

6 d. Any retailer that is part of a controlled group of  
7 corporations, and that controlled group of  
8 corporations has a component member that is a retailer  
9 engaged in business in this state as described in  
10 subparagraph b of this paragraph, shall be presumed to  
11 be a retailer engaged in business in this state. This  
12 presumption may be rebutted by evidence that during  
13 the calendar year at issue the component member that  
14 is a retailer engaged in business in this state did  
15 not engage in any of the activities described in this  
16 subparagraph on behalf of the retailer. For purposes  
17 of this subparagraph, "controlled group of  
18 corporations" means "controlled group of corporations"  
19 as defined in Section 1563(a) of the Internal Revenue  
20 Code, and "component member" means "component member"  
21 as defined in Section 1563(b) of the Internal Revenue  
22 Code.

23 e. Any retailer making sales of tangible personal  
24 property to purchasers in this state by mail,

1 telephone, the Internet or other media which has a  
2 contractual relationship with an entity to provide and  
3 perform installation or maintenance services for the  
4 retailer's purchasers within this state shall be  
5 included within the definition of "retailer" under the  
6 provisions of subparagraph a of this paragraph; and

7 10. The phrase "maintaining a place of business within the  
8 state" includes any person having or maintaining in the state,  
9 directly or by subsidiary, an office, distribution house, sales  
10 house, warehouse, or other place of business. It also includes any  
11 person having agents operating in the state under authority of the  
12 retailer or subsidiary, whether the place of business or agent is  
13 within the state permanently or temporarily, or whether the person  
14 or subsidiary is authorized to do business within the state is  
15 immaterial.

16 SECTION 4. REPEALER 68 O.S. 2011, Section 1354.1, is  
17 hereby repealed.

18 SECTION 5. This act shall become effective November 1, 2012.

19 COMMITTEE REPORT BY: COMMITTEE ON FINANCE, dated 2-14-12 - DO PASS,  
20 As Amended and Coauthored.  
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