



**House  
Legislative  
Analysis  
Section**

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**EQUITABLE SALES AND USE TAX  
ADMINISTRATION ACT**

**House Bill 5080 (Substitute H-1)  
First Analysis (9-25-01)**

**Sponsor: Rep. Jason Allen  
Committee: Commerce**

***THE APPARENT PROBLEM:***

Many state governments are involved in the Streamlined Sales Tax Project, a project aimed at simplifying and modernizing sales and use tax collections and administration. (The project has a web site at [www.streamlinedsalestax.org](http://www.streamlinedsalestax.org).) The impetus for this effort is the increase in "remote sales" resulting from the use of the Internet. Most states levy a sales tax on purchases made within their borders. The use tax is, generally speaking, a companion tax levied on purchases made outside the state (remote sales). Catalogue sales, for example, have long been a source of remote sales. States traditionally have required retailers with a presence in the state to collect sales taxes and remit them to the state government. Use taxes have been more difficult to collect. The courts have limited the ability of states to collect use taxes from out-of-state businesses. (See Background Information.) In Michigan, for example, this tax has been considered a responsibility of the purchaser, who is supposed to report transactions and remit the tax. Compliance rates have, not surprisingly, been very low. Recently, the state has added a line to the state income tax form to encourage compliance with use tax reporting requirements.

While collection of taxes on remote sales has always been vexing, the widespread use of the Internet to make purchases has made the issue much more pressing. There are two obvious problems: one, the simple lack of fairness inherent in a system that makes Main Street brick-and-mortar retailers collect and remit taxes on products they sell while their Internet and catalogue competitors face no such requirement; and two, the loss of revenue to the states resulting from the impractical method of collection. By some estimates, some \$200 million in revenue is going uncollected annually at present, and that amount can only be expected to grow significantly year by year.

The Streamlined Sales Tax Project, which began in 2000, involves 32 participating states, including

Michigan, and six observer states, as well as input from business and local government. The mission of the project is to develop and implement a uniform simplified sales and use tax system that will encourage voluntary participation by remote sellers, and thus increase use tax compliance. This is no easy task. Revenue experts say there are 7,500 sales tax jurisdictions in the country. Of the 46 states with a sales tax (including the District of Columbia), 34 are said to have local option taxes and 30 have multiple rates. States treat the same products differently, have different kinds of exemptions, and different definitions in their tax laws. All of this makes creating a multistate system difficult.

By the end of the first year, project participants had developed a Uniform Sales and Use Tax Administration Act and a Streamlined Sales and Use Tax Agreement that project officials say "provides the basis for states to enact legislation to provide the benefits of simplification to vendors in their state." State revenue officials say that if Michigan wants to continue to be a key participant in the ongoing work of the project, it needs to adopt a version of the proposed act.

***THE CONTENT OF THE BILL:***

The bill would create the Equitable Sales and Use Tax Administration Act under which the Department of Treasury, with the approval of a specially created board of governance that includes the governor and legislative leaders, could enter into a streamlined sales and use tax agreement with one or more states "to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce". The department could not enter such a multistate agreement until legislation substantially complying with the agreement was enacted into law in Michigan, and the agreement itself would have to meet certain requirements specified in the new act (described later).

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The new act would state that it “shall at no time create or implement a new tax on interstate electronic commerce” and would specify that it was “not intended to generate revenue that is not currently due under the sales and use tax acts but is intended to provide for the simplification of the method of collecting the sales and use taxes . . . currently authorized to be collected under those acts”. The bill would also state that “nothing in this act should be construed to expand the tax base of the sales tax or use tax or to eliminate exemptions, but rather, this act simplifies and modernizes the sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce”.

The new act would be repealed effective December 31, 2002. Among other things, it would do the following:

- Allow the Department of Treasury, with the approval of a specially created board of governance, to enter into the streamlined sales and use tax agreement, and, accordingly, allow the department to act jointly with other signatory states of the agreement to establish standards for certification of a certified service provider and certified automated system and to establish performance standards for multistate sellers.
- Create a board of governance to represent the state in meetings with the other states authorized to enter into the agreement, made up of the Speaker of the House of Representatives or a designee who is a member or former member of the House or an employee of the House or the House Fiscal Agency; the Majority Leader of the Senate or a designee who is a member or former member of the Senate or an employee of the Senate or Senate Fiscal Agency; the Minority Leader of the House or an appropriate designee; the Minority Leader of the Senate or an appropriate designee; the state treasurer or a designee; one member appointed by the state treasurer; the governor or a designee; and one member appointed by the governor.
- Permit the board of governance to vote on behalf of the state and represent the position of the state in all matters relating to the adoption of the agreement or amendment of the agreement, and require the board to report quarterly to the tax committees in the House and Senate on its progress in negotiating the agreement and recommend what statutes were required to be amended to be substantially in compliance with the agreement.

- Create a six-member business advisory council to advise and make recommendations to the board of governance. The board would initially consist of two members appointed by the governor who are retailers domiciled in the state and two members appointed by the governor who are large national retailers domiciled outside the state but who are licensed to do business in the state. Those four members would then elect one retail seller domiciled in the state and one manufacturer domiciled in the state.

- Specify that any provision of the agreement or any application of the agreement to any person or circumstance that was inconsistent with any Michigan law would not have effect and that nothing in the act could be construed to amend or modify any state law or limit the authority of the Michigan legislature or of the state’s courts. The act contains a number of other provisions designed, generally speaking, to safeguard state sovereignty. Implementation of any condition of the agreement would require action by the state.

- Provide for the registration of “sellers” through a central registration system (that allows online registration as an option) in which a seller registered in any one signatory state would be considered registered in Michigan and vice versa. A seller (a person who sells, leases, or rents tangible personal property or services to another person) would have to choose among three models, described in the bill, for the purposes of collecting and remitting sales and use taxes under the agreement.

- Allow a seller, under one model, to contract with a certified service provider; that is, with an agent certified jointly by the states that are signatories to the agreement to perform all of the seller’s sales and use tax functions, other than the obligation to remit the tax. Under a second model, a seller could use a certified automated system; that is, computer software certified by the participating states to calculate the tax, determine the amount to remit, and to maintain a record of transactions. A third model would allow a seller with sales in at least five signatory states and with total sales of \$500 million or more to use a proprietary tax calculation system, provided the seller entered a performance standard agreement with states. (A seller in this third model could include an affiliated group of sellers using the same proprietary system.)

- Specify that a registered seller would not be liable for any uncollected taxes or nonremitted sales or use tax on transactions with purchasers in the state before the date of registration, if the seller had not been

registered under the sales or use tax acts in the 12 months prior to Michigan's entering the multistate agreement.

- Provide for consumer privacy by requiring that a certified service provider's system be designed and tested to protect the anonymity of consumers and prohibit, with some exceptions, a provider from retaining and disclosing the personally identifiable information of consumers, that is, information that identifies a specific person. (The retention and disclosure of information would be limited to exemption claims because of a consumer's status or intended use of the goods or services purchased, to investigations of fraud, and to the extent necessary to ensure the reliability of the provider's technology. A person would have to be provided reasonable notification of the retention and afforded reasonable access to their own data, with a right to correct inaccurately recorded data.)

The following is a more detailed description of the bill's provisions.

The Streamlined Sales and Use Tax Agreement. The Department of Treasury could not enter into the agreement unless the agreement required each signatory state to abide by the following requirements. The agreement would have to:

- Set restrictions to achieve more uniform state rates through limiting the number of state rates; eliminating caps on the amount of state tax due on a transaction; and eliminating thresholds on the application of state tax.

- Establish uniform standards for the sourcing of transactions to taxing jurisdictions; the administration of exempt sales; the allowances a seller could take for bad debts; and sales and use tax returns and remittances.

- Require signatory states to develop and adopt uniform definitions of sales and use tax terms. The definitions would have to enable a signatory state to preserve its ability to make policy choices that were substantially consistent with the uniform definitions.

- Provide a central electronic registration system that allowed a seller to register to collect and remit sales and use taxes for all signatory states.

- Provide that registration with the central registration system and the collection of sales and use taxes in the signatory states would not be used as a factor in determining whether the seller had nexus with a state for any tax.

- Outline any monetary allowances to be provided by the signatory states to sellers or certified service providers (described below).

- Require each signatory state to certify compliance with the terms of the agreement before joining, and to maintain compliance under the laws of the member state with all provisions of the agreement while a member.

- Require each signatory state to adopt a uniform policy for certified service providers that protected the privacy of consumers and maintained the confidentiality of tax information.

- Provide for the appointment of an advisory council of private sector representatives and an advisory council of nonmember state representatives to consult with the signatory states in the administration of the agreement.

Further, the agreement would have to provide for reduction of the burdens of complying with local sales and use taxes through the following:

- Restricting and eliminating variances between each signatory state's tax base and the local tax bases within that state.

- Requiring signatory states to administer any sales and use taxes levied by local jurisdictions within those states so that sellers collecting and remitting the taxes would not have to register or file returns with, remit funds to, or be subject to independent audits from local taxing jurisdictions.

- Restricting the frequency of changes in local sales and use tax rates, and setting effective dates for the application of local jurisdictional boundary changes to local sales and use taxes.

- Providing notice of changes in local sales and use tax rates, and of changes in the boundaries of local taxing jurisdictions.

Certified Service Providers. The bill specifies that a certified service provider would be the agent of a seller, with which the provider had contracted for the collection and remittance of sales and use taxes. As the seller's agent, the provider would be liable for sales and use tax due each signatory state on all sales transactions it processed for the seller, except as provided in the bill. A seller that contracted with a provider would not be liable to this state for sales or use tax due on transactions processed by the provider, unless the seller made a material misrepresentation of the type of items it sold, or committed fraud. In the

absence of probable cause to believe that the seller had committed fraud or made a material misrepresentation, the seller would not be subject to audit on the transactions processed by the provider. A seller would be subject to audit for transactions not processed by the provider. The signatory states acting jointly could perform a system check of the seller and review the seller's procedures to determine if the provider's system was functioning properly, and the extent to which the seller's transactions were being processed by the provider.

The department, acting jointly with the signatory states, could certify a person as a certified service provider if the person met all of the following requirements:

- Used a certified automated system.
- Integrated its certified automated system with the system of a seller for which the person collected tax, so that the tax due on a sale was determined at the time of the sale.
- Agreed to remit the taxes it collected at the time and in the manner specified by the signatory states.
- Agreed to file returns on behalf of the sellers for which it collected tax.
- Agreed to protect the privacy of tax information it obtained.
- Entered into a contract with the signatory states and agreed to comply with the terms of the contract.

Certified Automated Systems. The department, acting jointly with the signatory states, could certify a software program as a certified automated system if the signatory states determined that the program met all of the following requirements:

- It identified the applicable state and local sales and use tax rate for a transaction based on the uniform sourcing provision established under the agreement.
- It identified whether an item was exempt from tax.
- It identified the amount of tax to be remitted for each taxpayer for a reporting period.
- It could generate reports and returns as required by the signatory states.
- It could meet any other requirement set by the signatory states.

The department, acting jointly with the signatory states, could establish one or more sales tax performance standards for multistate sellers that met the eligibility criteria set by the signatory states and that had developed a proprietary system, to determine the amount of sales and use tax due on transactions.

A person that provided a certified automated system would be responsible for the proper functioning of that system, and would be liable to this state for underpayments of tax attributable to errors in the functioning of the system. A seller that used a system would remain responsible and liable to the state for reporting and remitting tax.

A seller that had a proprietary system for determining the amount of tax due on transactions and had signed an agreement establishing a performance standard for that system would be liable for the failure of the system to meet the performance standard.

Collection Allowances. In computing the amount of tax to be remitted to the state, a certified service provider under model one and a seller under model two could deduct a base rate that applied to transactions in accordance with a contract entered into with the participating states. This deduction would be in lieu of the collection allowance allowed in the General Sales Tax Act. A model three seller, however, could only take the collection allowance. In addition to the deduction, a voluntary seller could, for up to 24 months after registering, deduct a percentage of tax it generated in Michigan in accordance with a contract entered into by the signatory states.

Liability Limitations. The bill provides that a person who registered as a seller would not be liable for any uncollected or nonremitted sales or use tax on transactions with purchasers in Michigan before the date of registration, if the seller were not licensed under the General Sales Tax Act or the Use Tax Act in the 12-month period preceding the date the state entered into the agreement. The seller also would not be responsible for any penalty or interest that could be due on those transactions. These provisions would not apply to the following:

- Any tax liability of the registered seller for transactions that were subject to sales or use tax in Michigan in which the registered seller was the purchaser.
- Any sales or use taxes already paid or remitted to the state.

-- Any transactions for which the seller received notice of the commencement of an audit that was not finally resolved, including related administrative or judicial processes.

The liability limitations would apply to a seller absent the seller's fraud or intentional misrepresentation of a material fact if the seller continued to be registered and continued collection and remittance of applicable sales and use taxes in Michigan for at least 36 months. The statute of limitations applicable to assessing a tax liability would be tolled during that time.

Consumer Privacy. A certified service provider would be prohibited from retaining or disclosing a consumer's "personally identifiable information", that is, information that identified a specific person. A provider's system would have to be designed and tested to assure the privacy of consumers by protecting their anonymity.

A provider would have to give clear and conspicuous notice of its information practices to consumers, including what information it collected, how it collected the information, how it used the information, and whether it disclosed the information to signatory states. A provider also would have to provide the necessary technical, physical, and administrative safeguards to protect personally identifiable information from unauthorized access and disclosure.

A provider's retention or disclosure to signatory states of personally identifiable information would be limited to exemption claims because of a consumer's status or intended use of the goods or services purchased, to investigations of fraud, and to the extent necessary to ensure the reliability of the provider's technology. If personally identifiable information were retained for these purposes in the absence of exigent circumstances, persons would have to be given reasonable notification of that retention and afforded reasonable access to their own data, with a right to correct inaccurately recorded data.

The bill specifies that this privacy policy would be subject to enforcement by signatory states' attorneys general or other appropriate authorities.

The agreement would not enlarge or limit the signatory states' authority to do any of the following:

-- Conduct audits or other review as provided under the agreement and state law.

-- Provide records pursuant to a signatory state's freedom of information act, disclosure laws with governmental agencies, or other regulations.

-- Prevent, consistent with state law, disclosures of confidential taxpayer information.

-- Prevent, consistent with federal law, disclosures or misuse of federal return information obtained under a disclosure agreement with the Internal Revenue Service.

-- Collect, disclose, disseminate, or otherwise use anonymous data for governmental purposes.

State Sovereignty. The bill contains several other statements limiting the effect of the new act. It would specify the following: 1) Any provision of the agreement or any application of a provision of the agreement to any person or circumstance that was inconsistent with state law would not have effect. 2) Nothing in the act could be construed to amend or modify any state law or to limit the authority of the state legislature. The agreement authorized by the act could bind and inure only to the benefit of Michigan and the other signatory states. No person, other than a signatory state, could be an intended beneficiary of the agreement. Any benefit to a person other than a signatory state would have to be established by state law (and the laws of the other participating states) and not by the agreement. 3) Nothing in the act could be construed to limit the authority of the courts of the state. A person would have all the rights and remedies provided for in the revenue act. A person would not have any cause of action or defense under the agreement because of the state's approval of the agreement or on the grounds that the department's action or inaction was inconsistent with the agreement. 4) A state law, or the application of a law, could not be declared invalid on the ground it was inconsistent with the agreement. 5) No provision of the agreement in whole or in part would invalidate or amend any provision of state law. Adoption of the agreement by the state would not amend or modify any state law.

Enhanced Revenues. The committees responsible for reviewing tax issues in the House and Senate would be required to review the revenue reports produced by the fiscal agencies and consider methods to return to the taxpayers revenues from enhanced use tax compliance resulting from the new act. The bill also contains a statement of intent specifying that "all revenues collected as a result of the implementation of this act will be distributed in the same manner as provided for revenues collected under the General Sales Tax Act".

**BACKGROUND INFORMATION:**

In 1967, the U.S. Supreme Court ruled that an Illinois statute that required an out-of-state mail-order business to collect and pay use tax on goods purchased for use in Illinois violated the Due Process Clause of the U.S. Constitution and created an unconstitutional burden on interstate commerce (*National Bellas Hess, Inc. v Department of Revenue of Ill.*, 386 U.S. 753).

In a subsequent use tax collection case, North Dakota filed an action in state court to require an out-of-state mail-order house to collect and pay use tax on goods purchased from it for use in North Dakota. The case eventually went to the U.S. Supreme Court, which affirmed its earlier ruling in *Bellas Hess*; held that to collect sales or use tax a business must have a physical presence (nexus) in the state; and found that Congress could legislate a solution because it had the constitutional authority to regulate commerce among the states (*Quill Corp. v Heitkamp*, 504 U.S. 298 (1992)). [Background Information from the Senate Fiscal Agency's analysis of Senate Bill 433 as passed the Senate, which also deals with the streamlined sales tax agreement.]

**FISCAL IMPLICATIONS:**

The House Fiscal Agency reports that the bill would move the state towards the collection of sales and use tax revenue that is currently owed to the state but is not being collected. The agency estimates that for fiscal year 2000-2001, the state is not collecting about \$200 million in revenue on remote sales. Remote sales include mail order sales and electronic commerce (the Internet). HFA points out that 33 percent of state use tax revenue is earmarked to the School Aid Fund, while the remainder is General Fund/General Purpose revenue. About 73 percent of sales tax revenue is earmarked to the SAF, 24 percent to revenue sharing, and the remainder is GF/GP revenue.

The HFA says there are administrative costs associated with this legislation for the Department of Treasury. A projected \$2 million would be required to acquire capacity for the electronic collection of sales and use taxes. The initial \$1 million is included in the FY 2000-2001 appropriation to the department. The remaining \$1 million is proposed in the FY 2001-2002 department budget. On-going costs, says the agency, for maintenance of the electronic filing system and database modifications are estimated at \$500,000 annually. (HFA fiscal note dated 9-24-01)

**ARGUMENTS:****For:**

State tax officials say that if Michigan wants to continue to be a key participant in the ongoing work of the multistate Streamlined Sales Tax Project, the state needs to adopt a version of the legislation produced by the project. The enactment of House Bill 5080, they say, gives the state "a place at the table" as the efforts continue to develop a voluntary, multistate sales and use tax collection system. This legislation does not bind the state to change its tax laws; that will be up to future legislatures. The details of any agreement reached by the states participating in the project will have to come back to the legislature, say state revenue officials. Michigan has been an important participant in this project, but at this point needs to enact this legislation to continue its level of participation.

The project has grown out of the concern among many of the 45 states (and the District of Columbia) that levy sales and use tax that the ever-increasing volume of purchases over the Internet and by mail order is seriously eroding sales and use tax revenue, and that this erosion will grow dramatically over time. Documents from the National Conference of State Legislatures indicate that business-to-consumer electronic-commerce sales amounted to \$3 billion in 1997 and \$45 billion in 2000, and are projected to total \$140 billion by 2003. A widely reported study by the National Tax Association and the University of Tennessee projects that the 45 states with sales tax will forgo over \$10 billion in uncollected tax on "e-commerce" transactions in 2003. In states that rely heavily on sales and use tax revenue, the combination of increased remote sales and a continuing inability to tax those sales presents a threat to those states' budgets. In Michigan, approximately 35 percent of total state tax revenue is from sales and use taxes, and 73 percent of sales tax revenue is dedicated to the State School Aid Fund.

**For:**

It is a matter of simple fairness to Main Street, brick-and-mortar retailers that the state (in collaboration with other states) devise a method of collecting taxes on remote sales; that is, find a way to collect the use taxes that are supposed to be collected now. Retailers collecting the six percent tax in Michigan are at a competitive disadvantage compared with out-of-state business who do not have to collect such a tax, such as Internet businesses and catalogue companies. U.S. Supreme court decisions have, generally speaking, prohibited states from collecting

use taxes from remote sellers. This has left the reporting and remitting of taxes to those making purchases out of state. So, the development of a cooperative multistate system has become a priority for state revenue officials. This is not a scheme to impose a new tax on consumers. It is not an Internet tax. This is a tax of long standing. Indeed, one could argue that the failure to collect the use tax already owed requires (and will increasingly require) a higher level of taxation from other sources.

***Against:***

Regardless of whether this bill is a step towards instituting a "new" tax on Michigan consumers (and some people would argue that it is a new tax on the Internet), there can be little doubt that the aim of the participants in the multistate project is to transfer more money out of the pockets of taxpayers and into government budgets. Some have estimated it will mean \$3.9 billion in new tax revenue from Michigan taxpayers over the next ten years. No corresponding tax cut has been offered to offset the promised new revenues. In the long run, approving this legislation could lead to a national model tax law that could raise taxes in the state in a number of ways. It could lead to the elimination of existing exemptions (in the name of simplification). It could lead to the taxing of services (in the name of standardization across states). It could make the imposition of local sales taxes easier to administer. The point is, this is a proposal fraught with danger to taxpayers. A better approach to dealing with declining revenue is to tighten budgets, not to seek out novel sources of tax revenue. It should also be noted that the out-of-state retailers who are the target of this project do not benefit from government services in Michigan to the extent the brick-and-mortar retailers do, and that many Michigan brick-and-mortar retailers are themselves getting into e-commerce and selling in other states by that method. Further, Internet retailers may well begin to congregate in those states that choose not to participate in the new collection system.

Moreover, the kind of agreement envisioned in the bill is a blow to state sovereignty. Article IX of the State Constitution says that, "The legislature shall impose taxes . . . sufficient to pay the expenses of state government", and that "The power of taxation shall never be surrendered, suspended, or contracted away". This legislation envisions sending a small group to vote on behalf of the state's interest at multistate conferences aimed at "streamlining" (that is, rewriting) state sales tax laws, and further envisions contracting out tax collection functions to a

third party. The state could lose control over its tax laws and tax system.

***Response:***

House Bill 5080 contains language specifying that it "shall at no time create a new tax on interstate electronic commerce", and that "nothing in this act should be construed to expand the tax base of the sales tax or use tax or to eliminate exemptions". Also, the very constitutional language cited above from Article 9 is what protects the state from having its tax laws altered without approval of the state's elected representatives. Those representing the state at the meetings of the Streamlined Sales Tax Project can make recommendations to the legislature, but changes in the state's tax system can only be made by the legislature. The bill contains numerous provisions safeguarding state sovereignty, including all of Section 8, which states in part, "Nothing in this act shall be construed to amend or modify any law of this state or to limit the authority of the Michigan legislature".

***Against:***

Critics of the proposal say that a new multistate tax collection system using third parties raises privacy issues. With the creation of new large repositories of information about consumers and consumer transactions, the opportunities for the increased invasion of personal privacy expand. Some people are concerned about the growth in electronic surveillance associated with the use of personal computers to shop.

***Response:***

The bill, in Section 13, does contain provisions to safeguard the privacy of individuals. The system is supposed to be designed to protect the anonymity of consumers. One of the work groups of the ongoing multistate project is devoted to privacy issues.

***POSITIONS:***

Among those testifying in support of the bill before the House Commerce Committee were: the State Treasurer; the Michigan Federation of Teachers; the Detroit Regional Chamber of Commerce; the Michigan Education Association; the Small Business Association of Michigan; the Michigan Retailers Association. (9-25-01)

Among other groups that have indicated support for the bill are: the Michigan Manufacturers Association; the International Council of Shopping Centers; AT & T; Ameritech; the Michigan Association of School Administrators; the Michigan Municipal League; the Michigan Association of School Boards; the

Michigan Association of Counties; the Michigan Grocers; K-Mart; the Michigan Townships Association; the Michigan Chamber of Commerce; and the Macomb Schools. (9-25-01).

Taxpayers United testified in opposition to the bill. (9-25-01)

The American Civil Liberties Union of Michigan is concerned about the impact the legislation could have on consumer privacy. (9-25-01)

Analyst: C. Couch

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.