

FISCAL NOTE
LEGISLATIVE FISCAL ANALYST ESTIMATE

ESTIMATE OF FISCAL IMPACT – STATE AGENCIES (See narrative for political subdivision estimates)				
	FY 2016-17		FY 2017-18	
	EXPENDITURES	REVENUE	EXPENDITURES	REVENUE
GENERAL FUNDS	\$55,285	See Below	\$51,492	See Below
CASH FUNDS		See Below		See Below
FEDERAL FUNDS				
OTHER FUNDS				
TOTAL FUNDS	\$55,285	See Below	\$51,492	See Below

Any Fiscal Notes received from state agencies and political subdivisions are attached following the Legislative Fiscal Analyst Estimate.

LB 1087 amends the Nebraska Revenue Act of 1967 regarding the sales and use tax.

The bill adds to the definition of “engaged in business in this state” by adding the following:

- The selling, leasing, or delivering in this state, or any activity connected to such, of tangible personal property or taxable services for use, storage, distribution, or consumption within Nebraska;
- Maintaining within Nebraska, directly or indirectly or by an affiliate, an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business, including the employment of a resident of Nebraska who works from a home office here;
- Engaging through a marketplace provider, referrer, or other third party, in direct response marketing;
 - Direct response marketing includes sending, transmitting, or broadcasting of flyers, newsletters, telephone calls, targeted electronic mail, text messages, social media messages, targeted mailings; collecting, analyzing and utilizing individual data on purchasers or potential purchasers in Nebraska; using information or software, including cached files, cached software, or other data tracing tools, that are stored on property in or distributed within this state, etc.;
- Entering into one or more agreements to refer potential purchasers to the seller for a commission;
- If any part of the sale process, including listing products for sale, solicitation, branding products, selling products, processing orders, fulfilling orders, providing customer service, or accepting or assisting with returns or exchanges, occurs in Nebraska;
- If the seller offers products for sale through one or more marketplace operated by a marketplace provider that has substantial nexus in Nebraska; or
- If the cumulative sales price of products sold to purchasers in Nebraska exceeds \$10,000 in the immediately preceding calendar year and the seller either has a physical presence in or is registered to collect and remit sales tax in a state that is a member of the Streamlined Sales and Use Tax Agreement.

The bill has an operative date of January 1, 2017 and contains the severability clause.

NOTE: The Department of Revenue has provided the following information regarding LB 1087: The bill seeks to adopt a recommendation for expanded nexus derived by the National Conference of State Legislatures (NCSL) and according to NCSL, this legislation is to provide a roadmap for overturning Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992) by asserting nexus over a seller without physical presence in a state to allow the resulting litigation to move to the U.S. Supreme Court.

Section 4 (11) of the bill provides that if the Tax Commissioner issues one or more assessments against a taxpayer due to the additional provisions of LB 1087, any appeal may be made directly to the Supreme Court within 60 days after the date the assessment is issued, if the primary issue is the constitutionality of the bill.

The Department of Revenue indicates that LB 1087 would positively impact General Fund revenue due to additional sales tax collection resulting from the additional nexus audits and assessments. However, they are unable to determine the increase due to lack of data and contingent upon the success of a test case to overturn Quill Corp. v. North Dakota.

We agree with the Department of Revenue’s projection regarding the impact of LB 1087 and should note that previous estimates of fiscal impact as result of capturing sales tax from remote sellers was in the range of \$45-\$60 million in additional tax revenue.

Collection of additional sales tax as a result of LB 1087 would positively impact the General Fund, the Highway Allocation Fund, the State Highway Capital Improvement Fund, and could impact the Game and Parks Commission Maintenance Fund, and the Highway Trust Fund.

The Department indicates an expenditure of \$55,285 for FY2016-17 and \$51,492 for FY2017-18 for 1.0 FTE Fiscal Compliance Examiner to monitor the anticipated activity. PSL would be \$37,808 and \$38,716 for the respective fiscal years. We have no basis to disagree with the Department's estimate of cost to implement the provisions of LB 1087.

State Agency Estimate

State Agency Name: Department of Revenue		Date Due LFA:				
Approved by: Tony Fulton		Date Prepared: 02/9/2016				
		Phone: 471-5896				
	FY 2016-2017		FY 2017-2018		FY 2018-2019	
	<u>Expenditures</u>	<u>Revenue</u>	<u>Expenditures</u>	<u>Revenue</u>	<u>Expenditures</u>	<u>Revenue</u>
General Funds	\$55,285	See below	\$51,492	See below	\$52,728	See below
Cash Funds						
Federal Funds						
Other Funds						
Total Funds	\$55,285	See below	\$51,492	See below	\$52,728	See below

LB 1087 would add to the sales and use tax definition of “engaged in business in this state” (Neb. Rev. Stat. § 77-2701.13) to adopt a recommendation for expanded nexus derived by the National Conference of State Legislatures (NCSL). According to the NCSL this legislation is to provide a roadmap for overturning Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct. 1904 (1992). The strategy would be to assert nexus over a seller without physical presence in a state to allow the resulting litigation to move to the U.S. Supreme Court.

LB 1087 does not amend or replace any of the existing definition, which already asserts nexus for a) maintaining directly or indirectly or through a subsidiary, an office, warehouse, or distribution center in Nebraska; b) having a representative, agent, salesperson, or solicitor in Nebraska; c) deriving rentals in Nebraska; d) soliciting orders for property by mail in Nebraska if the solicitations are regular, seasonal, or systematic; e) being owned by or in common ownership with any retailer that is engaged in business in the same or similar business in Nebraska; or f) having a franchisee or licensee operating under the retailer’s trade name.

The new section provides that any of the following activities cause the person to be engaged in business in Nebraska:

1. Selling, leasing, or delivering tangible personal property or taxable services in Nebraska;
2. Maintaining, directly or indirectly by an affiliate, an office, warehouse, or distribution center, or employing a resident who works from home in Nebraska;
3. Engaging in direct response marketing in this state, including by using a marketplace provider or referrer (Direct response marketing is defined as sending mail, fliers, social media messages, text messages, or other electronic messages. Marketplace providers are those who execute sales for retailers and collect the receipts, Marketplace referrers link up buyers and sellers in the marketplace on behalf of the retailer);
4. Entering into one or more agreements to refer potential purchasers to the seller for a commission;
5. Selling property or taxable services if any part of the sales process, including listing products for sale, soliciting, branding, processing orders, fulfilling orders, providing customer service, or accepting returns occurs in Nebraska; or
6. Offering products for sale through a marketplace provider that has nexus with Nebraska (click-through nexus).

A seller is presumed to have nexus if sales to Nebraska purchasers exceed \$10,000 in the previous calendar year and the seller also either has physical presence in, or is registered to collect sales tax in, a state that is a member of the Streamlined Sales and Use Tax Agreement.

LB 1087 further provides that, if the Tax Commissioner issues one or more assessments against a taxpayer due to these provisions, the appeal is directly to the Supreme Court within 60 days after the assessment is issued.

LB 1087 will positively impact General Fund revenues due to the additional sales tax collections resulting from more nexus audits and assessments. The increase is indeterminable due to the lack of data and contingent upon the success of the test case seeking to overturn Quill.

