F I S C A L   I M P A C T   R E P O R T

ORIGINAL DATE 01/27/10
SPONSOR Chavez, El **LAST UPDATED** **HB** 50

SHORT TITLE Internet Sales Gross Receipts **SB**

ANALYST Gutierrez

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY10	FY11	FY12		
	*	*	Recurring	General Fund
	*	*	Recurring	Local Governments

(Parenthesis ( ) Indicate Revenue Decreases)
*Positive but unknown amount, probably less than $500,000 per year.

SOURCES OF INFORMATION
LFC Files

Responses Received From
Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of Bill

House Bill 50 repeals the gross receipts tax exclusion for operating a worldwide web site as a third party content provider on a computer physically located in New Mexico. This bill also would establish nexus for a seller who pays a New Mexico resident to refer potential customers when those referrals – by all such New Mexico residents -- result in sales in excess of $10,000 in a year.

Because no effective date is provided in the bill, its provisions will become effective ninety (90) days after the 2010 legislative session adjourns.

FISCAL IMPLICATIONS

The provision eliminating the GRT exclusion for website operators would have a positive fiscal impact but the number of entities affected is not currently known. The provision specifying nexus for remote sellers with in-state affiliates would not expand the current law definition of nexus according to the Tax Department and therefore would have no significant fiscal impact.

SIGNIFICANT ISSUES

House Bill 50 appears to be an attempt to match the "Amazon Law" recently imposed in New York and several other states. These laws establish nexus for remote sellers who pay a resident of the state who operates a website that includes links to the seller's website. In general, courts have ruled that a seller must have a physical presence in a state to be subject to tax. However, nexus can be established if the seller has commercial relationships with certain types of affiliates. The proposal would specifically include website operations that refer customers to the seller. This has been interpreted in some other states to mean that the website must contain a link to the seller's website, i.e. simply carrying advertising would not be enough.

Proponents argue that these statutes are required to bring remote sellers into their sales tax base. They also argue that operating a website with links to the seller's is a sufficient presence within the state to meet constitutional nexus requirements. Opponents argue that the imposition of tax will cause sellers to sever their connections with their affiliates, and to shift their business to states that do not impose tax. Opponents have challenged the laws as violating the interstate commerce protections of the U.S. Constitution.

ADMINISTRATIVE IMPLICATIONS

This bill would have a minimal impact on TRD.

TECHNICAL ISSUES

TRD:

> Nexus is a federal constitutional concept. Current United States Supreme Court case law indicates that for gross receipts tax purposes, physical presence in the state by the seller is required for nexus under the Commerce Clause. Physical presence can be employees, agents, independent contractors or property of the seller in the state.
>
> This bill in effect limits nexus. Under *Dell Catalog v NM Tax & Rev.,* 2009-NMCA-001, 145 N.M. 419, if a business contracts with someone physically present in New Mexico (does not need to be a New Mexico resident) who refers New Mexico customers to the business, there would be nexus. While referring only one customer may not create nexus, less than $10,000 in sales would probably constitute nexus.

BLG/svb

The Legislative Finance Committee has adopted the following principles to guide responsible and effective tax policy decisions:

1. ***Adequacy:*** *revenue should be adequate to fund government services.*
2. ***Efficiency:*** *tax base should be as broad as possible to minimize rates and the structure should minimize economic distortion and avoid excessive reliance on any single tax.*
3. ***Equity****: taxes should be fairly applied across similarly situated taxpayers and across taxpayers with different income levels.*
4. ***Simplicity****: taxes should be as simple as possible to encourage compliance and minimize administrative and audit costs.*
5. ***Accountability/Transparency:*** *Deductions, credits and exemptions should be easy to monitor and evaluate and be subject to periodic review.*

More information about the LFC tax policy principles will soon be available on the LFC website at www.nmlegis.gov/lcs/lfc