HOUSE BILL NO. 933

AN ACT TO AMEND SECTION 27-65-9, MISSISSIPPI CODE OF 1972, TO REVISE THE DEFINITION OF THE TERM "DOING BUSINESS" FOR PURPOSES OF THE STATE SALES TAX LAW; TO AMEND SECTION 27-67-3, MISSISSIPPI CODE OF 1972, TO REVISE THE DEFINITION OF THE TERMS "PERSONS DOING BUSINESS IN THIS STATE" AND "PERSONS MAINTAINING A PLACE OF BUSINESS WITHIN THIS STATE" FOR PURPOSES OF THE STATE USE TAX LAW; TO AMEND SECTION 27-67-4, MISSISSIPPI CODE OF 1972, IN CONFORMITY THERETO; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 27-65-9, Mississippi Code of 1972, is amended as follows:

27-65-9. (1) "Business" shall mean and include all activities or acts engaged in (personal or corporate), for benefit or advantage, either direct or indirect, and not exempting subactivities in connection therewith. Each of such subactivities shall be considered business engaged in, taxable in the class in which it falls.

(2) "Business" shall include activities engaged in by exempt organizations or political entities in competition with privately owned business subject to the provisions of this chapter; however, the term "business" shall not include the following activities:

To: Ways and Means

By: Representative Smith (39th)
(a) Sales of prepaid student meal plans by public or private universities, colleges and community or junior colleges;

(b) Sales of prepared meals by any public or private school to students in kindergarten through Grade 12; and

(c) Retail sales of prepared meals when:
   
   (i) Sold on the campus of a public or private university, college or community or junior college in this state to a student enrolled at such university, college or community or junior college; and
   
   (ii) Payment for the sale is made through the use of a prepaid declining balance account or similar instrument or account issued to such student by the university, college or community or junior college that may be used only to purchase prepared meals.

(3) "Business" shall include the activity or activities of a person in this state performing a service under contract or agreement with another person when the service performed is taxable under the provisions of this chapter.

(4) "Doing business" shall include any person owning personal property located in this state under lease or rental agreement or any person installing personal property within this state.

(5) "Doing business" shall include any person represented in this state by salesmen taking or soliciting orders.

(6) "Doing business" shall include:
(a) A person shall be presumed to be doing business in this state if:

(i) An affiliated person has substantial nexus with this state; or

(ii) Any person, other than a person acting in its capacity as a common carrier, that has substantial nexus with this state:

1. Sells a similar line of products as the person and does so under the same or a similar business name;

2. Maintains an office, distribution facility, warehouse or storage place, or similar place of business in the state to facilitate the delivery of property or services sold by the person to the person's customers;

3. Uses trademarks, service marks, or trade names in the state that are the same or substantially similar to those used by the person;

4. Delivers, installs, assembles, or performs maintenance services for the person's customers within the state;

5. Facilitates the person's delivery of property to customers in the state by allowing the person's customers to pick up property sold by the person at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the entity in the state; or

6. Conducts any other activities in the state that are significantly associated with the person's ability to
establish and maintain a market in the state for the person's sales.

(iii) The presumptions in this paragraph (a) may be rebutted by demonstrating that the activities of the other person or affiliated person in the state are not significantly associated with the person's ability to establish or maintain a market in this state for the person's sales.

(b) (i) A person shall also be presumed to be doing business in this state if the person enters into an agreement with one or more residents of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet website, by telemarketing, by an in-person oral presentation, or otherwise, to the person, if the cumulative gross receipts from sales by the person to customers in the state who are referred to the person by all residents with this type of an agreement with the person is in excess of Ten Thousand Dollars ($10,000.00) during the preceding twelve (12) months.

(ii) The presumption in this paragraph (b) may be rebutted by submitting proof that the residents with whom the person has an agreement did not engage in any activity within the state that was significantly associated with the person's ability to establish or maintain the person's market in the state during the preceding twelve (12) months. Such proof may consist of sworn written statements from all of the residents with whom the person
has an agreement stating that they did not engage in any solicitation in the state on behalf of the person during the preceding year provided that such statements were provided and obtained in good faith.

(iii) The presumption in this paragraph (b) shall take effect ninety (90) days after the effective date of this act and shall apply to sales made, uses occurring, and services rendered on or after the date this section shall have become a law in accordance with the applicable transition provisions and without regard as to the date the person and the resident entered into the agreement described in this paragraph (b). However, the term "the preceding twelve (12) months" as used in this paragraph (b) may include the twelve (12) months commencing before the effective date of this section.

(c) Any ruling, agreement or contract, whether written or oral, express or implied, between a person doing business in this state and this state's executive branch, or any other state agency or department, stating, agreeing, or ruling that the person is not required to collect sales tax in this state despite the presence of a warehouse, distribution center, or fulfillment center in the state that is owned or operated by the person or an affiliated person of the person shall be null and void unless it is specifically approved by a majority vote of each of the houses of this Legislature.
(d) If any person sells or leases tangible personal property or services to the state, a state department, a state agency, or an agent thereof, that person and any affiliated person shall, as a prerequisite for any such sale or lease, register with the Department of Revenue as a person engaging in business in this state as provided in Section 27-65-27 and comply with all legal requirements imposed on a person engaging in business in this state, including the requirement to collect and remit sales tax on all taxable sales of tangible personal property and services to customers in the state.

(e) For the purposes of this subsection (6), the term "affiliated person" means any person that is a member of the same "controlled group of corporations" as defined in Section 1563(a) of the Internal Revenue Code as the person or any other entity that, notwithstanding its form of organization, bears the same ownership relationship to the person as a corporation that is a member of the same "controlled group of corporations" as defined in Section 1563(a) of the Internal Revenue Code.

SECTION 2. Section 27-67-3, Mississippi Code of 1972, is amended as follows:

27-67-3. Whenever used in this article, the words, phrases and terms shall have the meaning ascribed to them as follows:

(a) "Tax Commission" or "department" means the Department of Revenue of the State of Mississippi.
(b) "Commissioner" means the Commissioner of Revenue of the Department of Revenue.

(c) "Person" means any individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate or any other group or combination acting as a unit and includes the plural as well as the singular in number. "Person" shall also include husband or wife, or both, where joint benefits are derived from the operation of a business taxed hereunder or where joint benefits are derived from the use of property taxed hereunder.

(d) "Taxpayer" means any person liable for the payment of any tax hereunder, or liable for the collection and payment of the tax.

(e) "Sale" or "purchase" means the exchange of properties for money or other consideration, and the barter of properties or products. Every closed transaction by which title to, or possession of, tangible personal property or specified digital products passes shall constitute a taxable event. A transaction whereby the possession of property or products is transferred but the seller retains title as security for payment of the selling price shall be deemed a sale.

(f) "Purchase price" or "sales price" means the total amount for which tangible personal property or specified digital product is purchased or sold, valued in money, including any additional charges for deferred payment, installation and service
charges, and freight charges to the point of use within this
state, without any deduction for cost of property or products
sold, expenses or losses, or taxes of any kind except those exempt
by the sales tax law. "Purchase price" or "sales price" shall not
include cash discounts allowed and taken or merchandise returned
by customers when the total sales price is refunded either in cash
or by credit, and shall not include amounts allowed for a trade-in
of similar property or products.

(g) "Lease" or "rent" means any agreement entered into
for a consideration that transfers possession or control of
tangible personal property or specified digital products to a
person for use within this state.

(h) "Value" means the estimated or assessed monetary
worth of a thing or property. The value of property or products
transferred into this state for sales promotion or advertising
shall be an amount not less than the cost paid by the transferor
or donor. The value of property or products which have been used
in another state shall be determined by its cost less straight
line depreciation provided that value shall never be less than
twenty percent (20%) of the cost or other method acceptable to the
commissioner. On property or products imported by the
manufacturer thereof for rental or lease within this state, value
shall be the manufactured cost of the property and freight to the
place of use in Mississippi.
(i) "Tangible personal property" means personal property perceptible to the human senses or by chemical analysis, as opposed to real property or intangibles. "Tangible personal property" shall include printed, mimeographed, multigraphed matter, or material reproduced in any other manner, and books, catalogs, manuals, publications or similar documents covering the services of collecting, compiling or analyzing information of any kind or nature. However, reports representing the work of persons such as lawyers, accountants, engineers and similar professionals shall not be included. "Tangible personal property" shall also include tangible advertising or sales promotion materials such as, but not limited to, displays, brochures, signs, catalogs, price lists, point of sale advertising materials and technical manuals. Tangible personal property shall also include computer software programs.

(j) (i) "Person doing business in this state," "person maintaining a place of business within this state," or any similar term means any person having within this state an office, a distribution house, a salesroom or house, a warehouse, or any other place of business, or owning personal property located in this state used by another person, or installing personal property in this state. This definition also includes any person selling or taking orders for any tangible personal property, either personally, by mail or through an employee representative,
salesman, commission agent, canvasser, solicitor or independent contractor or by any other means from within the state.

(ii) A person shall be presumed to be doing business in this state if:

1. An affiliated person has substantial nexus with this state; or

2. Any person, other than a person acting in its capacity as a common carrier, that has substantial nexus with this state:
   a. Sells a similar line of products as the person and does so under the same or a similar business name;
   b. Maintains an office, distribution facility, warehouse or storage place, or similar place of business in the state to facilitate the delivery of property or services sold by the person to the person's customers;
   c. Uses trademarks, service marks, or trade names in the state that are the same or substantially similar to those used by the person;
   d. Delivers, installs, assembles, or performs maintenance services for the person's customers within the state;
   e. Facilitates the person's delivery of property to customers in the state by allowing the person's customers to pick up property sold by the person at an office,
distribution facility, warehouse, storage place, or similar place
of business maintained by the entity in the state; or

f. Conducts any other activities in the
state that are significantly associated with the person's ability
to establish and maintain a market in the state for the person's
sales.

3. The presumptions in this subparagraph (ii)
may be rebutted by demonstrating that the activities conducted by
the other person or affiliated person in the state are not
significantly associated with the person's ability to establish or
maintain a market in this state for the person's sales.

(iii) 1. A person shall also be presumed to be
doing business in this state if the person enters into an
agreement with one or more residents of this state under which the
resident, for a commission or other consideration, directly or
indirectly refers potential customers, whether by a link on an
Internet website, by telemarketing, by an in-person oral
presentation, or otherwise, to the person, if the cumulative gross
receipts from sales by the person to customers in the state who
are referred to the person by all residents with this type of an
agreement with the person is in excess of Ten Thousand Dollars
($10,000.00) during the preceding twelve (12) months.

2. The presumption in this subparagraph (iii)
may be rebutted by submitting proof that the residents with whom
the person has an agreement did not engage in any activity within
the state that was significantly associated with the person's
ability to establish or maintain the person's market in the state
during the preceding twelve (12) months. Such proof may consist
of sworn written statements from all of the residents with whom
the person has an agreement stating that they did not engage in
any solicitation in the state on behalf of the person during the
preceding year provided that such statements were provided and
obtained in good faith.

3. The presumption in this subparagraph (iii) shall take effect ninety (90) days after the effective date of
this act and shall apply to sales made, uses occurring, and
services rendered on or after the date this section shall have
become a law in accordance with the applicable transition
provisions and without regard as to the date the person and the
resident entered into the agreement described in this subparagraph
(iii). However, the term "the preceding twelve (12) months" as
used in this subparagraph (iii) may include the twelve (12) months
commencing before the effective date of this section.

4. Any ruling, agreement or contract, whether
written or oral, express or implied, between a person and this
state's executive branch, or any other state agency or department,
stating, agreeing, or ruling that the person is not required to
collect use tax in this state despite the presence of a warehouse,
distribution center, or fulfillment center in the state that is
owned or operated by the person or an affiliated person shall be
null and void unless it is specifically approved by a majority vote of each of the houses of this Legislature.

5. If any person sells or leases tangible personal property or services to the state, a state department, a state agency, or an agent thereof, that person and any affiliated person shall, as a prerequisite for any such sale or lease, register with the Department of Revenue as provided in Section 27-67-9 and comply with all legal requirements imposed on a person maintaining a place of business or doing business in this state, including the requirement to collect and remit use tax on all taxable sales of tangible personal property and services to customers in the state.

(h) For the purposes of this subparagraph (iii), the term "affiliated person" means any person that is a member of the same "controlled group of corporations" as defined in Section 1563(a) of the Internal Revenue Code as the person or any other entity that, notwithstanding its form of organization, bears the same ownership relationship to the person as a corporation that is a member of the same "controlled group of corporations" as defined in Section 1563(a) of the Internal Revenue Code.

Any person doing business under the terms of this article by reason of coming under any one or more of the qualifying provisions listed above shall be considered as doing business on all transactions involving sales to persons within this state.
(k) "Use" or "consumption" means the first use or intended use within this state of tangible personal property or specified digital product and shall include rental or loan by owners or use by lessees or other persons receiving benefits from use of the property or product. "Use" or "consumption" shall include the benefit realized or to be realized by persons importing or causing to be imported into this state tangible advertising or sales promotion materials.

(l) "Storage" means keeping tangible personal property or specified digital product in this state for subsequent use or consumption in this state.

(m) "Specified digital products" shall have the meaning ascribed to such term in Section 27-65-26.

SECTION 3. Section 27-67-4, Mississippi Code of 1972, is amended as follows:

27-67-4. * * *

The tax required under this * * * chapter to be collected, and any amount unreturned to a purchaser that is not tax but was collected from the purchaser under the representation that it was tax, constitute funds of the State of Mississippi from the moment of collection.

SECTION 4. This act shall take effect and be in force from and after July 1, 2013.