

HOUSE BILL REPORT

HB 1904

As Reported by House Committee On:
Technology & Economic Development
Finance

Title: An act relating to the sale and taxation of Washingtonians' personal information and related data.

Brief Description: Concerning the sale and taxation of Washingtonians' personal information and related data.

Sponsors: Representative Smith.

Brief History:

Committee Activity:

Technology & Economic Development: 2/9/17, 2/14/17, 3/1/17 [DPS];
Finance: 3/10/17, 3/14/17 [DP2S(w/o sub TED)].

Brief Summary of Second Substitute Bill

- Imposes a business and occupation tax on the sale of Washingtonians' personal information.

HOUSE COMMITTEE ON TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 14 members: Representatives Morris, Chair; Kloba, Vice Chair; Tarleton, Vice Chair; Smith, Ranking Minority Member; DeBolt, Assistant Ranking Minority Member; Doglio, Fey, Harmsworth, Hudgins, Manweller, McDonald, Santos, Slatter and Wylie.

Minority Report: Do not pass. Signed by 1 member: Representative Steele.

Minority Report: Without recommendation. Signed by 1 member: Representative Nealey.

Staff: Lily Smith (786-7175).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

According to the Federal Trade Commission, companies known as "data brokers" collect personal information from consumers and sell or share it with others. Data brokers collect this information from a wide variety of publicly available sources, and use both raw and inferred data about individuals to develop and market products, verify identities, and detect fraud. Consumers are often unaware of these practices.

Washington's major business tax is the business and occupation (B&O) tax. The B&O tax is imposed on the gross receipts of business activities conducted within the state, without any deduction for the costs of doing business. Business and occupation taxes are collected by the Department of Revenue, and revenues are deposited in the State General Fund.

Persons with a substantial nexus to the state are subject to B&O taxes for engaging in business activities. For purposes of applying B&O taxes, "apportionable income" is the gross income of a business engaging in activities that can be allocated to the state. This income can come from activities performed outside the state if it would be taxable if received from activities in the state. This income is allocated to Washington by multiplying the apportionable amount by a receipts factor, expressed as a fraction.

For defined apportionable activities, a person is considered to be engaging in activities within the state when that person generates gross income of a business from sources, such as customers or intangible property, within the state. The person does not need to be physically present in the state.

Summary of Substitute Bill:

Beginning on January 1, 2018, a business and occupation (B&O) tax is imposed on the sale of personal information in Washington. The tax applies to each person engaging in the sale of personal information in the state, in the amount of 3.3 percent of the gross income of such business.

In applying the B&O tax, an individual is considered located in the state if the physical, mailing, Internet protocol, or similar address used by the individual is located in the state.

"Personal information" is information that identifies, relates to, describes, or is capable of being associated with a particular individual, including but not limited to:

- a name;
- a physical, mailing, or electronic mail address;
- physical characteristics or description;
- driver license and other identification numbers; and
- financial, medical, employment, or education information.

Personal information includes browser habits and any other data that can be attributed to an individual and used for marketing, or determining access and costs related to insurance, credit, or health care. It does not include photographs.

The sale of personal information is an apportionable activity for computing tax liability. The receipts factor for calculating the apportionment is the ratio that the number of Washington addresses in the personal information bears to all addresses in the personal information. If the taxpayer is not able to calculate this ratio, an alternate method is based on the ratio of the state's population to that of all the states in the taxpayer's market. Any other reasonable methods allowed by the Department of Revenue may also be used.

The sale of personal information is excluded from the definitions of "digital goods," "digital automated service," and "gross income on royalties" for the purposes of applying the B&O tax.

The sales or charges made for services received by persons engaging in "credit bureau services" is removed from the definition of the term "sale at retail" or "retail sale."

"Addresses," for the purpose of calculating the apportionment of income, means physical, mailing, or internet protocol addresses, or similar addresses.

Substitute Bill Compared to Original Bill:

In addition to physical and Internet protocol addresses, similar addresses and mailing addresses are added:

- to the types of addresses used to calculate the receipts factor for determining the amount of gross income attributable to the state; and
- to the types of addresses used to determine if an individual is considered located within the state.

"Mailing address" is added to the definition of personal information.

The definition of engaging in activities within the state, for the purpose of applying the B&O tax, is included in the new tax application section.

The alternate method for calculating income attributable to the state is specified to be based on the ratio of the population of the state to that of all the states.

The intent section is modified to address personal data generated from increased interactions with new technologies.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect on January 1, 2018.

Staff Summary of Public Testimony:

(In support) This is a twenty-first century tax for a twenty-first century economy based on the sale and trade of information. Washingtonians' personal data is part of this big data economy. The bill would provide a nexus to the state for those profiting from the sale of personal data. It is fair and simple, and would allow for transparency regarding profits from the sale of personal information. It would also provide revenue for the state. This industry is a logical place to look for a revenue stream to accomplish shared goals, such as addressing increased burdens for cybersecurity, consumer education and data protection, and meeting industry demands for an educated workforce.

(Opposed) The definition of "personal information" in the bill is very broad and would apply the tax to 20,000 existing and 5,000 new taxpayers. This would be the highest gross receipts tax in the state, and affected businesses would see a large increase in their tax rates. The tax would be difficult for the Department of Revenue to administer, resulting in increased audits. Shifting the nexus standard from physical presence to an economic nexus is a new concept that other states are not doing, and it would mean that a business fully outside the state could trigger the tax.

(Other) Companies believe they are already paying tax in this state. The consumer data industry prepares various reports that are subject to the state sales tax and should already be paying the corresponding retail business and occupation tax. The tax rate imposed in the bill would be significantly higher than what is applied to similar service providers.

Persons Testifying: (In support) Representative Smith, prime sponsor.

(Opposed) Eric Lohnes, Association of Washington Business.

(Other) Cliff Webster, Consumer Data Industry Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON FINANCE

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Technology & Economic Development. Signed by 6 members: Representatives Lytton, Chair; Frame, Vice Chair; Dolan, Pollet, Springer and Wylie.

Minority Report: Do not pass. Signed by 4 members: Representatives Orcutt, Assistant Ranking Minority Member; Condotta, Stokesbary and Wilcox.

Minority Report: Without recommendation. Signed by 1 member: Representative Nealey, Ranking Minority Member.

Staff: Tracey O'Brien (786-7152).

Summary of Recommendation of Committee On Finance Compared to Recommendation of Committee On Technology & Economic Development:

The definition of "personal information" is clarified to exclude Internet access. The business and occupation (B&O) tax imposed is not a tax on Internet access.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect on January 1, 2018.

Staff Summary of Public Testimony:

(In support) This is a normal adjustment of tax policy to modernize the way we treat digital goods. This economy has changed rapidly in the past few years. The average Washingtonian now has their data turned into many different components and then bought and sold. Research shows that people feel it is important to be in control of what information is collected about them and who can get that information. The big data economy has a high monetary value, but the cost to government in providing these expected services in this economy, such as cybersecurity, is ever growing. The workforce services of the next generation necessary for this economy are also ever growing. The proposed rate is set in order to offset the loss in retail sales taxes, and provide revenue to address the work made necessary by governing in a big data economy. Addressing these issues is timely, and this bill is transparent, fair, simple, and the right thing to do.

(Opposed) The sale of personal information is defined very broadly, relies on undefined terms, and could include routine information. Many of these businesses are already paying B&O taxes and compensating the state. The tax rate proposed would be the highest in the state, and would significantly increase businesses' tax liability which will be passed on to consumers. It will be difficult to determine when the tax applies and will result in a number of audits and audit disputes. It is not reasonable to increase tax rates applied to services that are required by law. Online companies already have privacy policies; this tax will not give consumers additional control over their data nor the specific revenue benefits of the bill. A similar tax does not exist in other states. Overregulation will stifle creative uses of this data, deprive consumers of helpful tools, and disadvantage Washington innovators. Washington will be at risk of losing great talent and its status as an innovation hub.

Persons Testifying: (In support) Representative Smith, prime sponsor.

(Opposed) Eric Lohnes, Association of Washington Business; Joanie Deautsch, TechNet; Denny Eliason, Washington Bankers Association; Cliff Webster, Consumer Data Industry Association; and Tom McBride, Computer Technology and Information Association.

Persons Signed In To Testify But Not Testifying: None.