The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: SB 290

INTRODUCER: Senator Galvano

SUBJECT: Taxes on Prepaid Calling Arrangements

DATE: February 13, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	**Favorable**
2.	Toman	Yeatman	CA	**Favorable**
3.			AFT	
4.			AP	
5.				
6.				

I. Summary:

Senate Bill 290 revises the definition of the term "prepaid calling arrangement" as provided for in Florida Statutes. Prepaid calling arrangements are excluded from the imposition of the communications services tax and gross receipts tax and are only subject to sales taxes. Under the definition proposed by the bill, certain sales of prepaid calling plans or services that are presently excluded from the definition would be considered "prepaid calling arrangements." Examples of presently excluded services include prepaid communications services featuring text messaging, multimedia messaging, and webmail. The amendments to Florida Statutes provided in the bill are intended to be remedial in nature and apply retroactively.

This bill substantially amends sections 202.11 and 212.05, Florida Statutes.

II. Present Situation:

Communications Services Tax Simplification Law

Overview and History

Chapter 202, F.S., is the Communications Services Tax Simplification Law. Effective October 1, 2001, the law simplified and restructured numerous state and local taxes and fees imposed on communications services into a single tax centrally administered by the Department of Revenue (DOR). The revenue collected under the Communications Services Tax (CST) is distributed three ways: a portion goes to the General Revenue Fund; a portion goes to the Public Education Capital Outlay (PECO) fund used for improvements for public education; and a portion goes to local governments based upon statutory distributions and established local rates.

Prepaid Calling Arrangement

The state CST of 6.65 percent is applied to the sales price of each communications service which originates and terminates in this state, or originates or terminates in this state and is charged to a service address in this state.[1] The tax is to be charged when the service is sold at retail, computed on each taxable sale for the purpose of remitting the tax due. However, the definition of the term "sales price" expressly excludes the "sale or recharge of a prepaid calling arrangement,"[2] so CST is not collected on the sale of a prepaid calling arrangement.

The term "prepaid calling arrangement" is defined to mean "the separately stated retail sale by advance payment of communications services that consist exclusively of telephone calls originated by using an access number, authorization code, or other means that may be manually, electronically, or otherwise entered and that are sold in predetermined units or dollars of which the number declines with use in a known amount."[3]

The governing authority of each county and municipality may, by ordinance, levy a discretionary communications services tax.[4] The local tax may be up to 7.12 percent, depending on the location of the customer.

Prepaid Calling Arrangement: Tax on Sales, Use and Other Transactions (SUT)

Chapter 212, F.S., provides for sales tax, including a requirement that a sales tax at the rate of 6 percent on charges for prepaid calling arrangements be collected at the time of sale and remitted by the selling dealer.[5] The definition of the term "prepaid calling arrangement" is almost identical to the definition in ch. 202, F.S.; it is defined to mean "the separately stated retail sale by advance payment of communications services that consist exclusively of telephone calls originated by using an access number, authorization code, or other means that may be manually, electronically, or otherwise entered and that are sold in predetermined units or dollars whose number declines with use in a known amount."[6]

Gross Receipts Tax on Communications Services

Section 203.01, F.S., provides for a gross receipts tax on communications services delivered to a retail consumer in this state. The tax on communications services is applied to the same services and transactions as are subject to the CST and to communications services sold to residential households. The tax is applied to the sales price of communications services when sold at retail, as the terms are defined in s. 202.11, F.S., and is due and payable at the same time as the CST. The rate applied to communications services is 2.37 percent. An additional rate of 0.15 percent is applied to communications services subject to the CST. With such sales, a communications services dealer may collect a combined rate of 6.8 percent comprised of the 6.65 percent for the CST and the 0.15 percent additional gross receipts tax.[7]

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[1] Section 202.12, F.S.
[2] Section 202.11(13)(b)4., F.S.
[3] Section 202.11(9), F.S.
[4] Section 202.19, F.S.
[5] Section 212.05(1)(e)1., F.S.
[6] *Id*.
[7] Section 202.12001, F.S.

DOR Tax Information Publication on Prepaid Communications Services

In March of 2012, DOR issued Tax Information Publication (TIP) No. 12ADM-02 to provide department clarification regarding the application of Florida taxes to sales of certain prepaid communications plans and services.[8] The document stated that certain prepaid communications plans or services are not "prepaid calling arrangements."

Examples of such plans that do not fall under this definition include, but are not limited to:
- service that includes text messaging, multimedia messaging, web, e-mail, etc.;
- unlimited calling plans that do *not* decline with usage;
- services or plans that are *not* sold in predetermined units or dollars; or
- services or plans that are *not* originated using an access number or authorization code.[9]

The TIP went on to affirm that a "sale of a prepaid card or prepaid arrangement that does not fall under the definition of a "prepaid calling arrangement" is not subject to SUT. Instead, sales of such plans are subject to CST, because Florida's CST law generally applies to services that allow the transmission, conveyance, or routing of voice, data, audio, or video."[10]

III. Effect of Proposed Changes:

Section 1 amends ss. 202.11(9), F.S., to define the term "prepaid calling arrangement" to mean "access to communications services which must be paid for in advance of using such services and which is sold in predetermined units or dollars that expire on a predetermined schedule or that are decremented on a predetermined basis in exchange for such access."

This amended definition deletes language that refers to "communications services that consist exclusively of telephone calls" and use of "an access number, authorization code, or other means." Additionally, by substituting "access to communications services" for "communications services that consist exclusively of telephone calls," the new language appears to include text messaging and other communications services.

Section 2 amends ss. 212.05(1), F.S., to define the term prepaid calling arrangement to have the same meaning as provided in s. 202.11, F.S.

Section 3 provides that these amendments are intended to be remedial in nature and apply retroactively, but do not provide a basis for an assessment of any tax not paid or create a right to a refund or credit of any tax paid before the effective date of this act.

Section 4 provides that except as otherwise expressly provided in section 3, the bill takes effect July 1, 2013.

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[8] Florida Department of Revenue, *Prepaid Communications Services,* TIP No. 12ADM-02 (March 27,2012) *available at* http://dor.myflorida.com/dor/tips/tip12adm-02.html.
[9] *Id*. Emphasis in the original.
[10] *Id.*

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18 (b) of the Florida Constitution, prohibits the Legislature from "enacting, amending, or repealing any general law if the anticipated effect" is to reduce county or municipal aggregate revenue generating authority as it existed on February 1, 1989.

Subsection (d) provides an exemption from this prohibition. Laws determined to have an "insignificant fiscal impact," which means an amount not greater than the average statewide population for the applicable fiscal year times $0.10 (which is $1.9 million for FY 2012-13[11]) are exempt.

As is discussed below in the Tax/Fee Issues section, the bill's effect on revenues is uncertain. The Revenue Estimating Conference (REC) has not met to review the fiscal impact of SB 290, but it is scheduled to discuss the Communications Service and Sales Tax in the future. An REC statement would likely help to clarify the mandate question. If the bill is not exempt as having an insufficient fiscal impact, it may require a two-thirds vote of the membership of each chamber to become law.

B. Public Records/Open Meetings Issues:

Not applicable; this bill does not appear to have any effect on public records or open meetings.

C. Trust Funds Restrictions:

Not applicable; this bill does not appear to have any effect on trust funds.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill's effect on tax revenues is uncertain. Under current law, for a plan to qualify as a legitimate prepaid calling arrangement, it must have the following characteristics:

- It must require prepayment for services.
- The services or plans must be "sold in predetermined units or dollars whose number declines with use in a known amount," and thus cannot include unlimited plans, which do not decline with usage, or plans that are otherwise not sold in terms of a predetermined amount of dollars or units, such as minutes.
- The services must "consist exclusively of telephone calls," and thus cannot include any service other than voice communications, no text messaging, multimedia messaging, webmail, or similar services.

[11] Based on the Demographic Estimating Conference's final population estimate for April 1, 2012, which was adopted on November 7, 2012. The Executive Summary can be found at: http://edr.state.fl.us/Content/conferences/population/demographicsummary.pdf.

- The telephone calls must be "originated by using an access number, authorization code, or other means."

Any arrangement that does not have all these characteristics is not a prepaid calling arrangement as defined by these statutes. It is, therefore, subject to the communications services and gross receipts tax statutes.[12]

The application of these statutes in these circumstances is a matter of disagreement. The DOR concludes that the sale is subject to the CST; providers argue that such a sale may not fit within the remainder of the CST statutes and requirements either and, as such, it would not be subject to the CST. Under the bill, a plan *can* offer texting and still qualify as a prepaid calling arrangement such that the sales tax would be applicable, not the CST.

The disagreement appears to be important, however, in attempting to determine the bill's impact on state and local CST revenues and state gross receipts tax. Sales tax on a prepaid calling arrangement is 6 percent plus any local discretionary sales surtaxes. The total CST can be as much as 16.29 percent, consisting of the state CST of 6.65 percent, state gross receipts tax of 2.52 percent, and a local CST of up to 7.12 percent. In simply comparing the two rates, it appears that the bill will result in a reduction of tax revenues. However, this assumes that tax payments have been made in the past based on the DOR interpretation. If, in fact, all or most sellers have used the conflicting interpretation and paid sales tax, not the CST, the actual difference in past revenue and projected revenue under the bill will be little to nothing as there would be no change in payments under such circumstances. The fact that at least some sellers have paid sales tax, not CST, is acknowledged in DOR's TIP No. 12ADM-02, which encourages such sellers to contact DOR.[13]

B. Private Sector Impact:

Communications service providers can continue to offer a prepaid plan consisting of a flat-rate charge for a predetermined number of minutes of access to communications services, including services such as texting, without being subject to the increased complexity and slightly higher rate of the CST. Customers will continue to have this choice.

C. Government Sector Impact:

The Revenue Estimating Conference has not met to review the fiscal impact of SB 290 but it is scheduled to discuss the Communications Service and Sales Tax in the future.

The DOR estimates a $45,721 non-recurring expenditure to create and mail a TIP to sales tax dealers and communications services providers outlining the provisions of the bill.[14]

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[12] For the Department of Revenue's discussion of these characteristics, and for a history of the communications services tax and prepaid calling arrangements, see http://dor.myflorida.com/dor/tips/tip12adm-02.html.
[13] *Id*.
[14] Florida Department of Revenue, *Senate Bill 290 Analysis: Taxes on Prepaid Calling Arrangements* (Feb. 8, 2013) *available at* http://abar.laspbs.state.fl.us/ABAR/Attachment.aspx?ID=507.

VI. Technical Deficiencies:

A DOR analysis of SB 290 recommended the following possible technical changes for the bill:

- on page 1, line 25, replace "access to" with "the retail sale of";
- on page 2, line 33, strike "are decremental" and replace with "decline"; and
- on page 2, line 34, replace "such access" with "use of such service."[15]

VII. Related Issues:

The DOR analysis also outlined potential department difficulties in the implementation, administration or enforcement of SB 290. [16] Given the provisions of the bill, "any communication service that is paid for in advance, is sold in predetermined units or dollars, and expires on predetermined schedule could fall under the proposed (prepaid calling arrangement) definition. For example, Video on Demand (VOD), cable television, and direct-to-home satellite service, while not 'calling services,' could fall within the definition, because they are communications services that are paid for in advance of use, are sold in predetermined dollars, and expire on a predetermined schedule (i.e., within 24 hours or monthly)." The department opined that consideration might be given "to exclude communications services, such as VOD, that are not primarily calling services from the definition of the term 'prepaid calling arrangement.'"

In addition the DOR analysis highlights potential issues with the "advance payment" provision of the bill. Although advance payment is required, current language "does not specify whether the communications service must be discontinued at the expiration of the predetermined schedule or at a point where the decrement at a predetermined basis is exhausted or complete to meet the requirements of a 'prepaid calling arrangement.'"[17]

Finally, the DOR analysis draws attention to the bill's replacement of the phrase "retail sale" with the term "access." According to the department, "this creates an ambiguity and leaves room for different interpretations of the meaning. As currently proposed, a prepaid calling arrangement is access to the transmission, routing or conveyance of voice, data, audio, video . . ."[18]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*