

The NetChoice Coalition

Promoting Convenience, Choice, and Commerce on The Net

Steve DelBianco, Executive Director
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7482
www.netchoice.org



March 23, 2011

Senator Carol Fukunaga, Chair
Senate Economic Development and Technology Committee
Hawaii State Capitol, Room 216
415 South Beretania Street
Honolulu, HI 96813

RE: **Opposition to HB 1183, Relating To The General Excise Tax**

Dear Senator Fukunaga:

We fully understand the need for states to seek out additional tax revenue. However, we worry that HB 1183 presents a *new pain with no gain* burden that would cause job loss across Hawaii.

Also, the reporting requirements of HB 1183 require the state to collect highly private and sensitive information about Hawaii citizens and could face the same constitutional problems as a similar Colorado law.¹

Loss of State Revenue and Harm to Hawaiian Schools

HB 1183 is designed to increase collection of sales taxes when Hawaii residents purchase from out-of-state businesses. It would apply to any retailer that uses an extended network of websites for displaying advertisements. The law re-defines what it means to be a “business” in the state and creates a presumption of nexus when an out-of-state company advertises through Hawaii’s websites.

Today, both online and traditional companies are experimenting with ways to deliver products, services, and content, while businesses of all kinds are using online advertising to find distant customers. State laws that declare Internet advertising a proxy for in-state sales agents will stunt the growth of new business models and distort the evolution of Internet marketing.

Hawaii should avoid the procedural pitfalls and fundamental unfairness of making online advertising a nexus determinant. But a far more important consideration for Hawaii legislators is the likely unintended impact on in-state businesses and charities that rely on this very same advertising to fund their operations.

For example, consider the bill’s impact on a growing source of fundraising dollars for Hawaii’s charities—*Box Tops for Education*.

¹ *The Direct Marketing Ass’n v. Roxy Huber*, No. IO-CV-01546-REB-CBS (June 30, 2010).

For years, kids around the country have been collecting box tops from cereal boxes to raise money for field trips and new equipment. *Box Tops for Education* has raised over a hundred million dollars -- by collecting just a few cents on every box top. Today, this fundraising has gone online via *Box Tops Marketplace*, generating commissions when parents shop at affiliated e-commerce websites. Here's the Box Tops Marketplace webpage:

BOX TOPS EDUCATION

All About Box Tops **Marketplace** Reading Room Bonus Offers Recipes Family Matters Parent Community

Sign up now
Already signed up? Log in

Marketplace

Shop online at your favorite stores through the Box Tops Marketplace™ and your school earns cash on every qualifying purchase, up to \$20,000 each year, at no additional cost to you.

How the Marketplace Works Hide

- 1 Start your online shopping at the **Box Tops Marketplace**. Click "shop now" next to the store you'd like to shop at.
- 2 Select items you'd like to purchase, as you normally would, and follow their standard checkout process.
- 3 A percentage of qualifying purchases will be automatically credited to your school. [Learn more »](#)

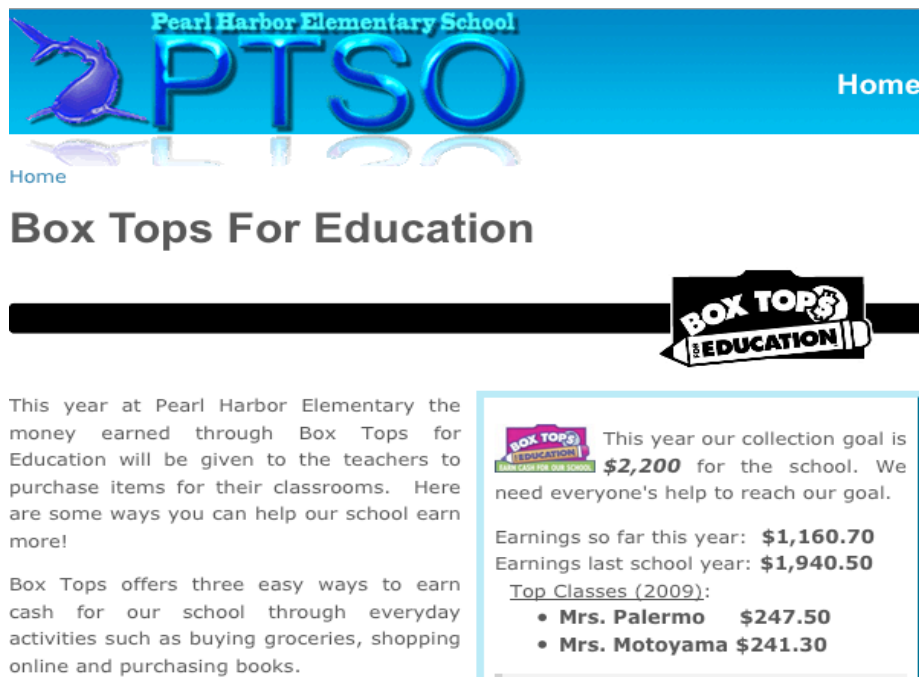
Store Categories

- Apparel & Accessories
- Books, Music & Movies
- Electronics & Office

The Box Tops Marketplace has grown to over a hundred participating websites, offering parenting essentials such as pet supplies, shoes, books, clothing, and household goods. Each of the online stores in the *Box Tops Marketplace* gives a percentage of sales to support good causes in Hawaii:

1-800-PetMeds 6% donation Description Shop Now	The Land of Nod 4% donation Description Shop Now	blue nile 2.5% donation FREE FedEx Shipping on every order!
1-800-flowers.com 8% donation Description Shop Now	LANDS' END Guaranteed. Period.® 3.5% donation Description Shop Now	Kodak EasyShare Gallery 3.5% donation Free Shipping on orders of \$15+ for Mother's Day with code: ILOVEMOM
AÉROPOSTALE 3% donation Description Shop Now	LANDS' END OVERSTOCKS 3.5% donation Description Shop Now	HSN shop now 2% donation Save \$15 off your first single item purchase of \$45 or more. Use coupon C73687
Apple Store 1% donation Description Shop Now	LeapFrog 3% donation Description Shop Now	SHOES.COM 7.5% donation Save 15% off at shoes.com with code: SPRING15
AVON 4% donation Description Shop Now	Leaps and Bounds 3% donation Description Shop Now	
babygap.com 2% donation Description Shop Now	Lillian Vernon 3% donation Description Shop Now	
BANANA REPUBLIC 2% donation Description Shop Now	magazines.com 20% donation Description Shop Now	
BARNES & NOBLE www.bn.com 6% donation Description Shop Now	Martha Stewart for 1-800-Flowers 5% donation Description Shop Now	
BEST BUY 0.5% donation Description Shop Now	naturalizer 5% donation Description Shop Now	

Also in Hawaii, schools like the Pearl Harbor Elementary School encourage parents to do their online shopping at *Box Tops Marketplace* to generate commissions for their school. The school is even encouraging competition among classes:



Home

Box Tops For Education

This year at Pearl Harbor Elementary the money earned through Box Tops for Education will be given to the teachers to purchase items for their classrooms. Here are some ways you can help our school earn more!

Box Tops offers three easy ways to earn cash for our school through everyday activities such as buying groceries, shopping online and purchasing books.

This year our collection goal is **\$2,200** for the school. We need everyone's help to reach our goal.

Earnings so far this year: **\$1,160.70**
Earnings last school year: **\$1,940.50**

Top Classes (2009):

- Mrs. Palermo **\$247.50**
- Mrs. Motoyama **\$241.30**

Thing is, few of the online stores participating in *Box Tops Marketplace* have any physical presence in Hawaii, and are therefore not required to lists of purchases made by Hawaiian residents. Would the out-of-state retailers in Box Tops Marketplace continue to work with Hawaii's schools and PTAs if the state enacts HB 1183? More likely, these advertisers will simply cancel their online affiliate programs as they did in Rhode Island, North Carolina, and Illinois after those states enacted a similar law.

State's Collection of Sensitive and Private Information About Hawaiians

For companies without the necessary infrastructure to collect the taxes required by HB 1183, the bill provides companies the option of reporting to the Hawaii Department of Taxation the resident's name, date of sale, and dollar amount of each sale.

This option would tell the Department from whom a Hawaiian buys their products and services, revealing potentially highly personal activities of its citizens.

For example, if a citizen bought products from adult websites, the Department would learn that citizen bought pornography. For citizens who work within state government, this information could be embarrassing or potentially cost them their job.

Another Unintended Consequence Of HB 1183 Is The Loss Of A Growing Source Of Revenue For Hawaii's Online Publishers.

One such publisher is the Honolulu *Star Advertiser*, a one hundred and fifty-year-old newspaper that employs hundreds of Hawaii's citizens and is read across the state. To pay the costs of creating and hosting online content, the Honolulu Star Advertiser relies on advertising by

retailers seeking to reach its website visitors. The screen below shows what a consumer would see if they turned to the Honolulu *Star Advertiser's* website for the latest news:



Scene+Heard: Sampling the sounds of Seattle



When my friend Brian told me he would be driving to Seattle to play a show with the band Grand Hallway, I jumped at the opportunity to tag along.

[View More](#)

MAR 21, 2011

Music: New Eddie Vedder single out today

MAR 21, 2011

VIDEO: Narcissus Festival Fashion Show

Dave & Buster's
power cards

BEFORE AFTER
Get clearer skin starting now!
With deep penetrating VersaFoam® technology.
Get One Month of MaxClarity™ FREE
ORDER NOW
Data on file Stiefel Laboratories. Individual results will vary. MaxClarity generally clears skin of acne in approximately 8-12 weeks. **Terms and conditions apply. Why am I seeing this ad?
MaxClarity
foam acne medication

Stiefel Labs, the retailer who purchased ads on this page, sells the popular “Max Clarity” acne cream. Stiefel has no presence in Hawaii and presently has no obligation to collect and remit sales tax for Hawaii purchasers. A critical question before your committee is whether out-of-state retailers would continue to advertise with the Honolulu Star Advertiser if Hawaii enacted HB 1183 as a way to force advertisers to collect and remit state sales taxes.

Would some advertisers begin remitting Hawaii’s citizen’s information, possibly under protest?

Would they sue the state over questions of constitutionality?

Or would they follow the example of hundreds of retailers who simply stopped their online advertising in New York, Rhode Island, and North Carolina after those states enacted a similar law?

It's essential to remember that out-of-state businesses can avoid the burden of either collecting taxes or reporting purchases by cutting-off their ad spending with Hawaii's websites. Of course, Hawaiian consumers could still buy from out-of-state businesses who stop advertising on Hawaii's websites. That means HB 1183 could have the unintended consequence of reducing ad revenue for Hawaii's publishers *without* increasing sales tax collections.

The net effect of HB 1183 could therefore be new pain with no gain. In no event would new money flow into Hawaii; any incremental sales tax collected just moves from the Hawaii's purchaser to the state treasury at a time when households are being squeezed by a struggling economy. To the contrary, fewer advertising dollars would flow to Hawaii's websites who employ and serve Hawaii's residents.

Likely Unconstitutionality of HB 1183

HB 1183 requires out-of-state businesses to report purchases made by Hawaiians. We fear that HB 1183 leads Hawaii into the same unconstitutional area as Colorado's HB 10-1193. A Colorado judge recently enjoined such legislation.² In making his decision, the Colorado judge stated, "looking to the practical effect of the Act and the Regulations, I conclude that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned [by the US Supreme Court] in Quill."

If passed, Hawaii, like Colorado, would likely be in court arguing the constitutionality of HB 1183. And when a state loses these court battles, the state must pay the opposing party's attorney's fees as well as any legal fees the state incurs. Hawaii should defer consideration of HB 1183 until it is certain to not result in high court and attorney's costs to the Hawaii treasury and citizens.

We therefore urge you to oppose HB 1183 and to refrain from imposing additional burdens on retailers who spend advertising dollars with Hawaii's publishers, businesses, and charities.

Thank you for considering our views. Please let me know if I can provide further information.

Sincerely,



Steve DelBianco
Executive Director, NetChoice

cc: Members of the Committee

NetChoice is a coalition of trade associations and e-Commerce businesses who share the goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org

² *The Direct Marketing Ass'n v. Roxy Huber*, No. IO-CV-01546-REB-CBS (June 30, 2010).