

**SUBJECT:** Prohibiting sale of certain items at flea markets

**COMMITTEE:** Business and Industry — favorable, without amendment

**VOTE:** 9 ayes — Brimer, Dukes, Corte, George, Giddings, Ritter, Siebert, Solomons, Woolley  
0 nays

**WITNESSES:** For — Chuck Courtney, Texas Retailers Association; John P. Smith, Walmart Stores, Inc.  
Against — None  
On — Dennis Baker, Texas Department of Health Bureau of Food and Drug Safety

**DIGEST:** HB 749 would amend the Business and Commerce Code to outlaw selling or attempting to sell at a flea market packaged baby food or formula, over-the-counter drugs and medical devices, cosmetics, or any item with an expiration date. A person who sold such items or a flea market operator who knowingly allowed such items to be sold would commit a misdemeanor, punishable by a fine up to \$100. The bill would exempt sample products or items purchased by catalogue as long as they were not delivered at the flea market.

If the manufacturer or distributor expressly authorized a person by name to sell such items and the person presented the authorization to anyone requesting it, then the seller would have an affirmative defense from prosecution. If the authorization were forged or obtained by fraud, or found to contain a false statement, the seller would be subject to misdemeanor charges carrying a fine of \$100.

HB 749 defines flea market as a location at which booths or spaces are rented or temporarily made available to two or more people who offer tangible personal property for sale.

A law enforcement agency investigating a violation of HB 749 would have to maintain a public record of the investigation.

HB 749 would take effect September 1, 1999.

**SUPPORTERS  
SAY:**

HB 749 would help protect the public's health and safety without adversely affecting responsible vendors. Currently, some flea market vendors sell baby formula, drugs, and other perishable items that can be damaged by exposure to heat and sun at outdoor markets, as well as items with expired dates. While many vendors are legitimate, some of the items sold at flea markets may have been stolen, brought in from foreign countries, or even dug out of the trash after being discarded by retailers. Many flea-market customers are persons with low incomes who are especially vulnerable to sales of inexpensive merchandise regardless of quality.

The Food and Drug Administration has established guidelines for retailers selling over-the-counter drugs and medical supplies. Flea markets are not subject to the guidelines. For example, retailers, but not flea markets, are required to pull expired items, such as glucose strips, from the shelf. Also, liability problems could be involved in flea-market sales of items from stores with house-brand goods. If a house-brand good with an expired date is purchased at a flea market, and a problem arises with the product, the consumer later might claim recourse against the store.

Pharmaceutical companies have established procedures for issuing recall notices to established retail outlets or distributors, but flea market vendors have no way of knowing when such recalls occur.

The intent of HB 749 is to stop certain perishable items listed in the bill from being sold without over-regulating the flea-market industry. The Texas Department of Health does not have sufficient staff to inspect the thousands of flea markets throughout the state. The Comptroller's Office occasionally spot-checks such items during sales-tax compliance checks. However, if the Legislature eliminates the sales tax on non-prescription medicine and other health-related items this session, the comptroller's authority over these items would end.

A ban on sale of perishable items at flea markets would authorize any law enforcement official to take action, helping curb the flow of stolen goods in Texas. Other states are beginning to increase regulation of flea markets. Because some states with stricter regulations are near Texas, our state is becoming a dumping ground for goods that cannot be sold in those states.

**OPPONENTS  
SAY:**

Flea markets represent an important, one-stop, low-price shopping center for many low-income families. HB 749 would deprive them of an important

outlet for purchasing products normally found in retail drug stores.

Under HB 749's vague definition, any place where two or more people temporarily offered goods for sale at a booth or space would be considered a flea market. For example, a yard sale involving several neighbors temporarily sharing space technically could be construed as a flea market. The bill also includes no clear definition of an expiration date. Under HB 749, products with voluntary expiration dates or "sell by" dates possibly could be outlawed at flea markets. As a result, the bill could prohibit the sale of soft drinks, candy, or other dated goods by two or more people selling temporarily anywhere. HB 749 also needs clarification to determine whether each item sold constitutes a separate offense.

OTHER  
OPPONENTS  
SAY:

Existing provisions of the Health and Safety Code already authorize regulation of unsafe food, drugs, and cosmetics. HB 749 may conflict with general regulatory authority regarding the specific items sold at flea markets covered by the bill. For example, if the Texas Department of Health officials found over-the-counter medicine that had expired, HB 749 might supersede their authority to seize the product or file class A misdemeanor charges. Instead, they only may be able to impose fines up to \$100.

The maximum \$100 fine may be too low to deter larger dealers who travel from one flea market to another. Also, many law enforcement agencies and prosecuting attorneys would place a low priority on enforcing a fine-only misdemeanor.

NOTES:

The companion bill, SB 1633 by Nelson, has been referred to the Senate Economic Development Committee.