

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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Opinion No. 06-053

Regulation of Internet Drop-off Stores by the Tennessee Auctioneer Commission

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**QUESTION**

Are Internet drop-off stores under the regulatory authority of the Tennessee Auctioneer Commission?

**OPINION**

No. Internet drop-off stores, which assist individuals in selling items through Internet sites such as eBay, do not fit the statutory definition of “auction” or “auctioneer.”

**ANALYSIS**

You have asked whether Internet drop-off stores are under the regulatory authority of the Tennessee Auctioneer Commission. You state that one such store offers to assist individuals in selling items on eBay, an Internet auction site. You have also provided the following details on the operation of such stores:

Consigner brings merchandise into the Internet Drop Off Store and it is evaluated. Some Stores do not consider certain types of items appropriate for Internet sale. Some stores will not accept items anticipated to bring less than a specific amount.

Consignor and the company discuss listing fees and commissions. The listing fee is often paid in advance. The commission is deducted from the sale price after the item is sold. Most companies do charge a variable commission based on the final sale price, ranging from 20% to 40%. Generally items selling for less than \$50.00 are charged an higher commission rate. Items that sell for more are charged a lower commission rate.

A contractual agreement is entered into covering:

1. Merchandise to be consigned.
2. Payment of fees.
3. Terms of listing--3 day, 7 day, 10 day.
4. Commission rate.

5. Liability for items. This should cover who is responsible for items consigned to an Internet sale and stored at the Drop Off Store. Many companies do not address this issue in writing. If an item is maintained by the seller until a buyer is found, there should be a written procedure for having the item delivered to the drop off store once the successful bid has been received.

6. Reserve prices and opening bid prices.

7. Re-listing terms in the event the item doesn't sell or the successful bidder does not pay.

8. When the seller should expect disbursement of funds.

9. Return of the merchandise to the seller if an item does not sell.

10. Reconciliation Reporting/Closing Statement. The Internet Drop Off Store should disclose to the seller how it is going to account when each sale is concluded.

Each item should be cataloged. Some companies use a bar-code system; most use some sort of internal inventory system to identify each consigner's merchandise.

Each item should be photographed and researched for listing.

Each item is listed on the Internet with an opening bid price ranging from 99 cents to whatever the consignor may designate.

The company answers all questions on behalf of the consignor regarding listed items during the duration of the listing. In most cases, the Internet Drop Off Store writes the description of the item. All communications regarding a listing are handled by the store. The consignor is not identified to the bidding public.

When the item sells, the Internet Drop Off Store sends an electronically site-generated invoice to the buyer for the sale price plus shipping and handling charges. Insurance, if requested or required, is an additional charge.

The buyer pays by any number of acceptable means: cash, personal check, money order, Paypal, etc.

The Internet Drop Off Store packs and ships the item to the buyer.

The company and the buyer can leave feedback messages for each other on the Internet. NOTE: eBay does not regulate feedback, so anyone with buyer's remorse can leave negative feedback. Feedback cannot be changed or removed. Feedback options are *Positive*, *Neutral* or *Negative* and there is a place for a comment by the party leaving feedback.

The sale is recorded in Internet Drop Off Store's books, charges are deducted, and funds are disbursed to the consignor.

1. An invoice is generated reflecting the sale that has taken place, identifying the buyer, the sale price, sales tax (where applicable), and shipping and handling charges assessed to the seller.

2. A payment against that invoice is generated showing the payment method (cash, check, money order, Paypal, etc.)
3. A sale ticket/closing statement is generated for the consignor that reflects:
  - a. the item description
  - b. the final sale price
  - c. itemized listing/final value fees
  - d. itemized Paypal fees (if applicable)
  - e. commission rate per item
  - f. final proceeds due
4. Funds from checks, cash, money order are deposited directly into escrow.
5. Funds from Paypal (less the Paypal transaction fees) are transferred to the Internet Drop Off Store's "ghost" account (this is a 3-4 business day process). As soon as these funds can be assessed by the Internet Drop Off Store they must be transferred from the "ghost" account to the store's escrow account.
6. The Consignor is paid from funds deposited into escrow.
7. The Internet Drop Off store is reimbursed for any fees assessed on the transaction and paid its commission. This is done by a transfer from the escrow account to the store's general operating account.
8. The Internet Drop Off Store pays the hosting site such as eBay for fees and pays the shipper for shipping expenses incurred.

Every action taken by an agency must be grounded in an express statutory grant of authority or must arise by necessary implication from an express statutory grant of authority. *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *accord, Methodist Healthcare-Jackson Hosp. v. Jackson-Madison County General Hosp. Dist.*, 129 S.W.3d 57, 69 (Tenn. Ct. App. 2003); *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988).

Tenn. Code Ann. § 62-19-101 contains the following relevant definitions:

- (2) "Auction" means a sales transaction conducted by means of oral or written exchange between an auctioneer and members of the audience, which exchange consists of a series of invitations for offers for purchase of goods or real estate made by the auctioneer and offers to purchase made by members of the audience culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience;
- (3) "Auctioneer" means any individual who, for a fee, commission, or any other valuable consideration, or with the intention or expectation of receiving the same, by the means or process of auction

or sale at auction, offers, negotiates, or attempts to negotiate a listing contract, sale, purchase, or exchange of goods;

...

(6) "Firm" means any person who, as part of such person's business, arranges, manages, sponsors, advertises or carries out auctions;

...

(8) "Person" includes an individual, association, partnership, corporation, and the officers, directors and employees of a corporation.

An Internet drop-off store, as described above, primarily assists in a transaction on eBay or some similar Internet site. The drop-off store provides several services, but these are mainly in the areas of storage, cataloguing, and shipping. As to the actual sale, however, the store does not appear to do anything more than is done by the individual seller who interacts directly with eBay. The drop-off store does not operate "by the means or process of auction or sale at auction." Tenn. Code Ann. § 62-19-101(3). Further, the drop-off store does not make a "series of invitations for offers" as required in Tenn. Code Ann. § 62-19-101(2), but only an opening price that is partly set by the customer. Therefore, it is the opinion of this Office that the Internet drop-off store, as you have described it, is not under the regulatory authority of the Tennessee Auctioneer Commission.

This conclusion is buttressed by the manner in which eBay and similar Internet sites work. While such services perform some of the functions of an auctioneer, they do not fall within a literal reading of that term as defined in Tenn. Code Ann. § 62-19-101(3). Accordingly, an Internet drop-off store, being one step removed from the process, is even less likely to be considered an auctioneer.

First, a corporation can be a firm for purposes of Tenn. Code Ann. § 62-19-102, which provides for the licensing of individual auctioneers and auction firms. Tenn. Code Ann. § 62-19-102(2)(b), however, indicates that a licensed auction firm will include at least one licensed individual auctioneer. In other words, the statute contemplates, not a corporation that auctions, but rather a corporation that includes auctioneers, who are by definition individuals. Computers, not individuals, conduct Internet "auctions."

More significantly, eBay's transactions do not fit the definition of "auction," although they often accomplish many of the same goals as a traditional auction. "Audience" and "participating audience" evoke the limited, definable, physically present group of people one associates with a traditional auction. The eBay "auction" is unlimited and not similarly identifiable. eBay does not so much make invitations for offers as notify purchasers as to the status of their bids. An eBay

“auction” does not culminate in the acceptance of the highest or most favorable bid in the traditional sense, but rather in the highest bid that has been registered within a specified period.<sup>1</sup>

This conclusion is consistent with the opinion of the Attorney General of California on the question of whether eBay must be licensed as a yacht broker. The Attorney General of California stated:

We have little doubt that eBay does not sell or offer to sell or buy or offer to buy, on behalf of another or others, any of the items, including pre-owned yachts, listed on its website. Rather, sellers and buyers, not eBay, initiate and directly control the selling and buying process. eBay does not select or describe any of the items offered for sale on its website and does not determine any of the payment, shipping or delivery terms that may be required by the seller. (*Cf. Gentry v. eBay* (2002) 99 Cal.App.4th 816, 827 [“eBay is not in the business of selling or offering to sell the collectibles at issue; rather, it is the individual defendants who sold the items to plaintiff, using eBay as a venue”]. Nor does eBay decide the price a buyer may be willing to pay for an item or see, inspect, examine, possess, place into inventory, purchase or take title to any listed item at any time.

Op. Cal. Att’y Gen. 86-48, 2003 WL 1866402, \*2 (2003).

This conclusion is also consistent with that part of the opinion of the Attorney General of North Dakota that considered whether eBay qualified as an “auction” under North Dakota’s statute, which otherwise does not illuminate Tennessee’s statute because it is differently worded. The Attorney General of North Dakota stated that “eBay’s User Agreement and the court’s summary [in *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084 (C.D.Cal. 2001)] clearly show that eBay itself is not offering to ‘sell’ anything; the offer for sale is made by the member who places the goods for sale.” Op. N.D. Att’y Gen. No. L-40, 2005 WL 3015979, \*4 (2005).

One can make a credible argument that while our statute was not written with Internet sales in mind, the manner in which those sales are conducted by eBay and similar sites comes close

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<sup>1</sup> *Cf.* Op. N.D. Att’y Gen. No. L-40, 2005 WL 3015979, \*5 (2005), describes an eBay sale as follows:

In the eBay case, the sale does not always go to the highest bidder. If an item is offered for sale in a fixed price format, then the first member willing to pay that price will acquire that item, even if another member is willing to pay a higher price. If an item is offered in an auction format, the item still may not go to the member willing to pay the highest price, but rather to the member who offers the highest price within the time limit set by the seller. Once the time limit has expired, the item is sold even if other members are willing to pay a higher price.

enough to both the statutory description and the overarching purpose of an auction to be covered by that law. Such a conclusion, however, requires a liberal reading of the statute that may not coincide with the intent of the legislators who enacted it. It is the view of this Office that the more appropriate course is to read the statute carefully as it was drafted, and leave the decision of whether or not to regulate Internet auction-type sites to the considered judgment of the General Assembly. Moreover, the instant question is an easier one, since it focuses on Internet drop-off stores that are one step removed from the Internet site itself. Therefore, it is the opinion of this Office that the Tennessee Auctioneer Commission does not possess regulatory authority over Internet drop-off sites.

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