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**SENATE BILL NO. 813**

Offered January 14, 2009

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*A BILL to amend and reenact § 58.1-602 of the Code of Virginia, relating to sales and use tax.*

Patron—Cuccinelli

Referred to Committee on Finance

**Be it enacted by the General Assembly of Virginia:****1. That § 58.1-602 of the Code of Virginia is amended and reenacted as follows:****§ 58.1-602. Definitions.**

As used in this chapter, unless the context clearly shows otherwise, the term or phrase:

"Advertising" means the planning, creating, or placing of advertising in newspapers, magazines, billboards, broadcasting and other media, including, without limitation, the providing of concept, writing, graphic design, mechanical art, photography and production supervision. Any person providing advertising as defined herein shall be deemed to be the user or consumer of all tangible personal property purchased for use in such advertising.

"Amplification, transmission and distribution equipment" means, but is not limited to, production, distribution, and other equipment used to provide Internet-access services, such as computer and communications equipment and software used for storing, processing and retrieving end-user subscribers' requests.

"Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either directly or indirectly.

"Cost price" means the actual cost of an item or article of tangible personal property computed in the same manner as the sales price as defined in this section without any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever.

"Custom program" means a computer program which is specifically designed and developed only for one customer. The combining of two or more prewritten programs does not constitute a custom computer program. A prewritten program that is modified to any degree remains a prewritten program and does not become custom.

"Distribution" means the transfer or delivery of tangible personal property for use, consumption, or storage by the distributee, and the use, consumption, or storage of tangible personal property by a person who has processed, manufactured, refined, or converted such property, but does not include the transfer or delivery of tangible personal property for resale or any use, consumption, or storage otherwise exempt under this chapter.

"Gross proceeds" means the charges made or voluntary contributions received for the lease or rental of tangible personal property or for furnishing services, computed with the same deductions, where applicable, as for sales price as defined in this section over the term of the lease, rental, service, or use, but not less frequently than monthly.

"Gross sales" means the sum total of all retail sales of tangible personal property or services as defined in this chapter, without any deduction, except as provided in this chapter. "Gross sales" shall not include the federal retailers' excise tax or the federal diesel fuel excise tax imposed in § 4091 of the Internal Revenue Code if the excise tax is billed to the purchaser separately from the selling price of the article, or the Virginia retail sales or use tax, or any sales or use tax imposed by any county or city under § 58.1-605 or 58.1-606.

"Import" and "imported" are words applicable to tangible personal property imported into the Commonwealth from other states as well as from foreign countries, and "export" and "exported" are words applicable to tangible personal property exported from the Commonwealth to other states as well as to foreign countries.

"In this Commonwealth" or "in the Commonwealth" means within the limits of the Commonwealth of Virginia and includes all territory within these limits owned by or ceded to the United States of America.

"Integrated process," when used in relation to semiconductor manufacturing, means a process that begins with the research or development of semiconductor products, equipment, or processes, includes the handling and storage of raw materials at a plant site, and continues to the point that the product is packaged for final sale and either shipped or conveyed to a warehouse. Without limiting the foregoing, any semiconductor equipment, fuel, power, energy, supplies, or other tangible personal property shall be deemed used as part of the integrated process if its use contributes, before, during, or after production,

59 to higher product quality, production yields, or process efficiencies. Except as otherwise provided by  
60 law, such term shall not mean general maintenance or administration.

61 "Internet" means collectively, the myriad of computer and telecommunications facilities, which  
62 comprise the interconnected world-wide network of computer networks.

63 "Internet service" means a service that enables users to access proprietary and other content,  
64 information electronic mail, and the Internet as part of a package of services sold to end-user  
65 subscribers.

66 "Lease or rental" means the leasing or renting of tangible personal property and the possession or use  
67 thereof by the lessee or renter for a consideration, without transfer of the title to such property.

68 "Manufacturing, processing, refining, or conversion" includes the production line of the plant starting  
69 with the handling and storage of raw materials at the plant site and continuing through the last step of  
70 production where the product is finished or completed for sale and conveyed to a warehouse at the  
71 production site, and also includes equipment and supplies used for production line testing and quality  
72 control. The term "manufacturing" shall also include the necessary ancillary activities of newspaper and  
73 magazine printing when such activities are performed by the publisher of any newspaper or magazine  
74 for sale daily or regularly at average intervals not exceeding three months.

75 The determination whether any manufacturing, mining, processing, refining or conversion activity is  
76 industrial in nature shall be made without regard to plant size, existence or size of finished product  
77 inventory, degree of mechanization, amount of capital investment, number of employees or other factors  
78 relating principally to the size of the business. Further, "industrial in nature" shall include, but not be  
79 limited to, those businesses classified in codes 10 through 14 and 20 through 39 published in the  
80 Standard Industrial Classification Manual for 1972 and any supplements issued thereafter.

81 "Modular building" means, but shall not be limited to, single and multifamily houses, apartment  
82 units, commercial buildings, and permanent additions thereof, comprised of one or more sections that are  
83 intended to become real property, primarily constructed at a location other than the permanent site, built  
84 to comply with the Virginia Industrialized Building Safety Law (§ 36-70 et seq.) as regulated by the  
85 Virginia Department of Housing and Community Development, and shipped with most permanent  
86 components in place to the site of final assembly. For purposes of this chapter, a modular building shall  
87 not include a mobile office as defined in § 58.1-2401 or any manufactured building subject to and  
88 certified under the provisions of the National Manufactured Housing Construction and Safety Standards  
89 Act of 1974 (42 U.S.C. § 5401 et seq.).

90 "Modular building manufacturer" means a person or corporation who owns or operates a  
91 manufacturing facility and is engaged in the fabrication, construction and assembling of building  
92 supplies and materials into modular buildings, as defined in this section, at a location other than at the  
93 site where the modular building will be assembled on the permanent foundation and may or may not be  
94 engaged in the process of affixing the modules to the foundation at the permanent site.

95 "Modular building retailer" means any person who purchases or acquires a modular building from a  
96 modular building manufacturer, or from another person, for subsequent sale to a customer residing  
97 within or outside of the Commonwealth, with or without installation of the modular building to the  
98 foundation at the permanent site.

99 "Motor vehicle" means a "motor vehicle" as defined in § 58.1-2401, taxable under the provisions of  
100 the Virginia Motor Vehicles Sales and Use Tax Act (§ 58.1-2400 et seq.) and upon the sale of which all  
101 applicable motor vehicle sales and use taxes have been paid.

102 "Occasional sale" means a sale of tangible personal property not held or used by a seller in the  
103 course of an activity for which he is required to hold a certificate of registration, including the sale or  
104 exchange of all or substantially all the assets of any business and the reorganization or liquidation of  
105 any business, provided such sale or exchange is not one of a series of sales and exchanges sufficient in  
106 number, scope and character to constitute an activity requiring the holding of a certificate of registration.

107 "Open video system" means an open video system authorized pursuant to 47 U.S.C. § 573 and, for  
108 purposes of this chapter only, shall also include Internet service regardless of whether the provider of  
109 such service is also a telephone common carrier.

110 "Person" includes any individual, firm, copartnership, cooperative, nonprofit membership corporation,  
111 joint venture, association, corporation, estate, trust, business trust, trustee in bankruptcy, receiver,  
112 auctioneer, syndicate, assignee, club, society, or other group or combination acting as a unit, body  
113 politic or political subdivision, whether public or private, or quasi-public, and the plural of such term  
114 shall mean the same as the singular.

115 "Prewritten program" means a computer program that is prepared, held or existing for general or  
116 repeated sale or lease, including a computer program developed for in-house use and subsequently sold  
117 or leased to unrelated third parties.

118 "Railroad rolling stock" means locomotives, of whatever motive power, autocars, railroad cars of  
119 every kind and description, and all other equipment determined by the Tax Commissioner to constitute  
120 railroad rolling stock.

"Retail sale" or a "sale at retail" means a sale to any person for any purpose other than for resale in the form of tangible personal property or services taxable under this chapter, and shall include any such transaction as the Tax Commissioner upon investigation finds to be in lieu of a sale. All sales for resale must be made in strict compliance with regulations applicable to this chapter. Any dealer making a sale for resale which is not in strict compliance with such regulations shall be personally liable for payment of the tax.

The terms "retail sale" and a "sale at retail" shall specifically include the following: (i) the sale or charges for any room or rooms, lodgings, or accommodations furnished to transients for less than 90 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration; (ii) sales of tangible personal property to persons for resale when because of the operation of the business, or its very nature, or the lack of a place of business in which to display a certificate of registration, or the lack of a place of business in which to keep records, or the lack of adequate records, or because such persons are minors or transients, or because such persons are engaged in essentially service businesses, or for any other reason there is likelihood that the Commonwealth will lose tax funds due to the difficulty of policing such business operations; and (iii) the separately stated charge made for automotive refinish repair materials that are permanently applied to or affixed to a motor vehicle during its repair. The Tax Commissioner is authorized to promulgate regulations requiring vendors of or sellers to such persons to collect the tax imposed by this chapter on the cost price of such tangible personal property to such persons and may refuse to issue certificates of registration to such persons.

The term "transient" shall not include a purchaser of camping memberships, time-shares, condominiums, or other similar contracts or interests that permit the use of, or constitute an interest in, real estate, however created or sold and whether registered with the Commonwealth or not. Further, a purchaser of a right or license which entitles the purchaser to use the amenities and facilities of a specific real estate project on an ongoing basis throughout its term shall not be deemed a transient; provided, however, that the term or time period involved is for seven years or more.

The terms "retail sale" and "sale at retail" shall not include a transfer of title to tangible personal property after its use as tools, tooling, machinery or equipment, including dies, molds, and patterns, if (i) at the time of purchase, the purchaser is obligated, under the terms of a written contract, to make the transfer and (ii) the transfer is made for the same or a greater consideration to the person for whom the purchaser manufactures goods.

"Retailer" means every person engaged in the business of making sales at retail, or for distribution, use, consumption, or storage to be used or consumed in the Commonwealth.

"Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property and any rendition of a taxable service for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication, and the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. *A sale does not include fabrication of animal meat to be consumed by the purchaser of the animal meat or his family, when the purchaser supplies the animal or meat that is fabricated.* A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

"Sales price" means the total amount for which tangible personal property or services are sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser, consumer, or lessee by the dealer, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, losses or any other expenses whatsoever. "Sales price" shall not include (i) any cash discount allowed and taken; (ii) finance charges, carrying charges, service charges or interest from credit extended on sales of tangible personal property under conditional sale contracts or other conditional contracts providing for deferred payments of the purchase price; (iii) separately stated local property taxes collected; (iv) that portion of the amount paid by the purchaser as a discretionary gratuity added to the price of a meal; or (v) that portion of the amount paid by the purchaser as a mandatory gratuity or service charge added by a restaurant to the price of a meal, but only to the extent that such mandatory gratuity or service charge does not exceed 20% of the price of the meal. Where used articles are taken in trade, or in a series of trades as a credit or part payment on the sale of new or used articles, the tax levied by this chapter shall be paid on the net difference between the sales price of the new or used articles and the credit for the used articles.

"Semiconductor cleanrooms" means the integrated systems, fixtures, piping, partitions, flooring, lighting, equipment, and all other property used to reduce contamination or to control airflow,

182 temperature, humidity, vibration, or other environmental conditions required for the integrated process of  
183 semiconductor manufacturing.

184 "Semiconductor equipment" means (i) machinery or tools or repair parts or replacements thereof; (ii)  
185 the related accessories, components, pedestals, bases, or foundations used in connection with the  
186 operation of the equipment, without regard to the proximity to the equipment, the method of attachment,  
187 or whether the equipment or accessories are affixed to the realty; (iii) semiconductor wafers and other  
188 property or supplies used to install, test, calibrate or recalibrate, characterize, condition, measure, or  
189 maintain the equipment and settings thereof; and (iv) equipment and supplies used for quality control  
190 testing of product, materials, equipment, or processes; or the measurement of equipment performance or  
191 production parameters regardless of where or when the quality control, testing, or measuring activity  
192 takes place, how the activity affects the operation of equipment, or whether the equipment and supplies  
193 come into contact with the product.

194 "Storage" means any keeping or retention of tangible personal property for use, consumption or  
195 distribution in the Commonwealth, or for any purpose other than sale at retail in the regular course of  
196 business.

197 "Tangible personal property" means personal property which may be seen, weighed, measured, felt,  
198 or touched, or is in any other manner perceptible to the senses. The term "tangible personal property"  
199 shall not include stocks, bonds, notes, insurance or other obligations or securities. The term "tangible  
200 personal property" shall include (i) telephone calling cards upon their initial sale, which shall be exempt  
201 from all other state and local utility taxes, and (ii) manufactured signs.

202 "Use" means the exercise of any right or power over tangible personal property incident to the  
203 ownership thereof, except that it does not include the sale at retail of that property in the regular course  
204 of business. The term does not include the exercise of any right or power, including use, distribution, or  
205 storage, over any tangible personal property sold to a nonresident donor for delivery outside of the  
206 Commonwealth to a nonresident recipient pursuant to an order placed by the donor from outside the  
207 Commonwealth via mail or telephone. The term does not include any sale determined to be a gift  
208 transaction, subject to tax under § 58.1-604.6.

209 "Use tax" refers to the tax imposed upon the use, consumption, distribution, and storage as herein  
210 defined.

211 "Used directly," when used in relation to manufacturing, processing, refining, or conversion, refers to  
212 those activities which are an integral part of the production of a product, including all steps of an  
213 integrated manufacturing or mining process, but not including ancillary activities such as general  
214 maintenance or administration. When used in relation to mining, it shall refer to the activities specified  
215 above, and in addition, any reclamation activity of the land previously mined by the mining company  
216 required by state or federal law.

217 "Video programmer" means a person or entity that provides video programming to end-user  
218 subscribers.

219 "Video programming" means video and/or information programming provided by or generally  
220 considered comparable to programming provided by a cable operator including, but not limited to,  
221 Internet service.