

DEPARTMENT OF TAXATION

2019 Fiscal Impact Statement

1. **Patron** Emily M. Brewer

3. **Committee** House Rules

4. **Title** Retail Sales and Use Tax; Collection by
Remote Sellers and Marketplace Facilitators

2. **Bill Number** HB 2801

House of Origin:

 X **Introduced**

 Substitute

 Engrossed

Second House:

 In Committee

 Substitute

 Enrolled

5. **Summary/Purpose:**

This bill would require marketplace facilitators and out-of-state dealers to register for the collection of the Retail Sales and Use Tax if annual sales to Virginia customers made or facilitated by them exceed \$250,000 in gross revenue, or whatever other minimum amount may be required by federal law. This bill would also remove the contingencies in 2013 House Bill 2313 (2013 *Acts of Assembly*, Chapter 766) as they pertain to the effects of federal remote collection authority on sales tax revenue distribution and the Motor Fuels Tax. This bill would also allow facilitators and remote sellers to make a written request to the Department of Taxation ("the Department") for a delay in the obligation to begin collecting for up to 184 days based upon a showing of good cause.

If enacted during the 2019 Regular Session of the General Assembly, this bill would become effective July 1, 2019.

6. **Budget amendment necessary:** Yes.

Item(s): Page 1: Revenue Estimates

7. **Fiscal Impact Estimates are:** Preliminary. (See Line 8.)

8. **Fiscal implications:**

Administrative Costs

The Department considers implementation of this bill to be routine and does not require additional funding.

Revenue Impact

This bill would have an unknown negative revenue impact in Fiscal Year 2020, and a negative revenue impact of approximately \$5 million annually in Fiscal Year 2021 and thereafter. The annual \$5 million reduction in revenues in Fiscal Years 2020 through 2025 is due to the difference between the estimated revenue impact of the \$100,000 threshold that is assumed in the Introduced Budget and the smaller estimated revenue impact of

this bill's \$250,000 threshold. However, this bill could result in an up to additional \$80 million decrease in collections depending on the extent to which facilitators request and are granted extensions of time to begin collecting sales tax.

9. Specific agency or political subdivisions affected:

Department of Taxation

10. Technical amendment necessary: No.

11. Other comments:

Constitutional Nexus

The Commerce Clause of the U.S. Constitution reserves to Congress the power to regulate commerce among the states and with foreign nations. The U.S. Supreme Court has established a four-prong test to be used in determining whether a state tax on an out-of-state corporation's activities in interstate commerce violates the Commerce Clause. A state may require an entity engaged in interstate commerce to collect taxes on its behalf provided the tax is 1) applied to an activity with a substantial nexus with the taxing State; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The U.S. Supreme Court had determined, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), that the Commerce Clause barred a state from requiring an out-of-state mail-order company to collect use tax on goods sold to customers located within the state when the company had no outlets, sales representatives, or significant property in the state. In this case, the Court determined that only Congress has the authority to require out-of-state vendors without a physical presence in a state to register and collect that state's tax.

On June 21, 2018, the U.S. Supreme Court in *South Dakota v. Wayfair*, overturned its ruling in *Quill* and held that physical presence is no longer a prerequisite for a state to require a merchant to collect its tax. The Court looked favorably upon South Dakota's \$100,000/200 transaction threshold when bolstered by the simplification measures that come with membership in the Streamlined Sales and Use Tax Agreement (SSUTA). Membership in the SSUTA is not a prerequisite for embracing the new nexus standard but rather the Court's opinion suggests that a reasonable dollar amount and transaction threshold should be coupled with administrative simplification measures designed to protect out-of-state small businesses and encourage administrative efficiency.

Current Virginia law specifically sets out the standards for requiring out-of-state dealers to collect the Virginia Retail Sales and Use Tax on sales into the Commonwealth. The law provides that a dealer is deemed to have sufficient activity within the Commonwealth to require that dealer to register to collect the Virginia Retail Sales and Use Tax if the dealer:

- Maintains an office, warehouse, inventory, or place of business in the Commonwealth;

- Solicits business in the Commonwealth, by employees, independent contractors, agents or other representatives;
- Advertises in Commonwealth publications, on billboards or posters located in the Commonwealth, or through materials distributed in the Commonwealth;
- Regularly makes deliveries into the Commonwealth by means other than common carrier;
- Continuously, regularly, seasonally, or systematically solicits business in the Commonwealth through broadcast advertising;
- Solicits business in the Commonwealth by mail, provided the solicitations are continuous, regular, seasonal, or systematic and the dealer benefits from any banking, financing, debt collection, or marketing activities occurring in the Commonwealth;
- Is owned or controlled by the same interests which own or control a business located within this Commonwealth;
- Has a franchisee or licensee operating under the same trade name in the Commonwealth, if the franchisee or licensee is required to obtain a certificate of registration; or
- Owns tangible personal property that is rented or leased to a consumer in the Commonwealth, or offers tangible personal property, on approval, to consumers in the Commonwealth.

Actions by Other States

In the wake of the *Wayfair* decision, 34 states have abandoned the physical presence standard in favor of some form of economic nexus. Additionally, 11 states have pursued the application of economic nexus standards to marketplace facilitators. Since marketplace facilitators tend to be large, sophisticated players in the commerce arena, requiring them to collect sales tax on behalf of the often small sellers who utilize their marketplaces comports with the U.S. Supreme Court's favorable view of administrative efficiency and small seller protections. This bill would add Virginia to the long and growing list of states that are pursuing the current nexus standard in the fairest and most efficient manner available.

Economic Nexus and Marketplace Facilitators

Economic nexus refers to the utilization of a monetary or transaction amount threshold to identify sellers who may lack physical presence but who are of suitably large size and who are availing themselves of the Commonwealth to a sufficiently significant degree that imposing a sales tax collection requirement on them would not be unduly burdensome. This bill contains a \$250,000 gross revenue per year standard to identify those sellers.

Marketplace facilitators are entities which operate online marketplaces on which sellers can list items for sale. Facilitators do not own the goods being sold on the marketplaces but often handle the exchange of money and provide a forum upon which sellers can list their goods and buyers can utilize a centralized search process. Most marketplace facilitators do not currently collect Virginia tax on the sales they facilitate because they either do not meet the physical presence standard or they do not satisfy the current

definition of “dealer” because they do not actually own the goods being sold. The bill would apply the same \$250,000 in gross revenue per year standard that applies to sellers to facilitators. This bill would require facilitators who list items for sale on their marketplace and handle the exchange of money in the sale transaction to register for the collection of sales tax on all of the sales that they facilitate to Virginia consumers. The bill would prevent the sellers who utilize these marketplaces from having the option to collect the sales tax themselves for the sales they conduct on the marketplace.

2013 House Bill 2313

2013 House Bill 2313 eliminated the 17.5 cents per gallon motor fuels tax and replaced it with 3.5 percent tax on the wholesale price of gasoline and a 6.0 percent tax on the wholesale price of diesel beginning July 1, 2013. Enactment Clause 14 provided that the tax law changes imposed under House Bill 2313 would be repealed if the revenues earmarked for transportation were redirected for non-transportation purposes at any point in the future. Enactment Clause 14 also provided that if federal legislation authorizing remote sales tax collection authority had not been enacted by January 1, 2015, the wholesale tax on gasoline was to increase from 3.5 percent to 5.1 percent. As federal legislation authorizing remote sales tax collection had not been enacted by January 1, 2015, the wholesale tax on gasoline increased to 5.1 percent.

Virginia’s Sales Tax Nexus

Under current law, the Retail Sales and Use Tax generally applies to sales of tangible personal property to customers within Virginia. However, because the U.S. Supreme Court held in the now overturned *Quill* decision that the Commerce Clause requires physical presence as a prerequisite for nexus, many out-of-state sellers avoid collecting sales tax on their sales to Virginia customers by choosing not to have a physical presence within Virginia’s borders. In 2017, Virginia enacted House Bill 2058 and Senate Bill 962 (2017 *Acts of Assembly*, Chapters 51 and 808, respectively) which required dealers who store inventory in the Commonwealth to register for the collection of the Retail Sales and Use Tax.

Additionally, marketplace facilitators have evolved to represent a significant portion of all retail sales transacted on the internet and therefore a significant portion of all retail sales. Currently, marketplace facilitators are not required to collect Virginia sales tax on the sales facilitated by their marketplaces because they either lack physical presence or do not have ownership of the goods being sold.

Simplification Measures

Embracing the *Wayfair* Court’s favorable view of simplification measures, this bill would simplify Virginia’s sales tax system by limiting the number of sales tax returns that may be required to no more than one per month, limiting audits to just the Department of Taxation, and requiring 30 days’ notice for rate changes. The bill would also require the Department of Taxation to provide sufficient information to allow out-of-state software developers and retailers to accurately determine the rate applicable to all sales to Virginia consumers. These simplification measures would protect marketplace facilitators as well

as smaller, less sophisticated sellers while also making Virginia's sales tax system more administratively efficient.

Proposal

This bill would require marketplace facilitators and out-of-state dealers to register for the collection of the Retail Sales and Use Tax if annual sales to Virginia customers made or facilitated by them exceed either \$250,000 in gross revenue or whatever other minimum amounts may be required by federal law. This bill would also remove the exemption for out-of-state mail order sales of \$100 or less. This bill would simplify the Virginia's sales tax system for the benefit of smaller retailers by requiring the Department to provide information to remote sellers and marketplace facilitators to ease compliance as well as setting notice requirements for rate changes. This bill would allow facilitators and remote sellers to make a written request to the Department of Taxation for a delay in the obligation to begin collecting for up to 184 days based upon a showing of good cause. Lastly, this bill would also remove the contingencies in 2013 House Bill 2313 (2013 *Acts of Assembly*, Chapter 766) as they pertain to the effects of federal remote collection authority on sales tax revenue distribution and the Motor Fuels Tax.

If enacted during the 2019 Regular Session of the General Assembly, this bill would become effective July 1, 2019.

Similar Legislation

Senate Bill 1767 is identical to this bill.

House Bills 1722 and 2090 and Senate Bills 1083, 1294, and 1500 would simplify some of the administrative provisions of the sales tax and would require marketplace facilitators and out-of-state dealers to register for sales tax collection above a \$100,000/200 transaction threshold.

Senate Bill 1267 would simplify the sales tax administrative rules and also require marketplace facilitators and out-of-state dealers to register for sales tax collection above the \$100,000/200 transaction threshold. The bill would also distribute the state portion of the sales tax revenue from newly registered dealers for the benefit of transportation.

Senate Bill 1337 would distribute revenue from remote sellers into an Online Revenue Collection Fund to be used to supplement the local distribution of sales tax.

Senate Bill 1390 would remove the contingencies regarding federal remote seller legislation and domestic fuels set forth in 2013 House Bill 2313 (2013 *Acts of Assembly*, Chapter 766).

Senate Bill 1601 would require marketplace facilitators and out-of-state dealers to register for sales tax collection above the \$100,000/200 transaction threshold on sales taking place after July 1, 2019.

cc : Secretary of Finance

