# DEPARTMENT OF TAXATION
# 2019 Fiscal Impact Statement

**1. Patron** Frank M. Ruff, Jr.

**2. Bill Number** SB 1083
**House of Origin:**
_____ **Introduced**
_____ **Substitute**
_____ **Engrossed**

**3. Committee** Passed House and Senate

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

**Second House:**
_____ **In Committee**
_____ **Substitute**
_X_ **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 either $100,000 in gross revenue or 200 transactions, or whatever other minimum amounts 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 rate.

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

**6. Budget amendment necessary:** No.

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

**8. Fiscal implications:**

Administrative Costs

The Department of Taxation ("the Department") considers implementation of this bill to be routine and does not require additional funding.

Revenue Impact

This bill would result in an estimated positive revenue impact of up to $155 million in Fiscal Year 2020, $175 million per year for Fiscal Years 2021 through 2023, and $180 million for Fiscal Years 2024 and 2025. This potential impact is based on the estimated amount of sales by out-of-state dealers to Virginia consumers currently going untaxed, which was recently updated to reflect voluntary registration by out-of-state dealers as a result of the Wayfair decision, as well as the imposition of a $100,000/200 transaction threshold. This impact is expected to grow over time due to an increase in internet sales. The positive revenue impact of this bill is included in the Introduced Executive Budget.

However, the provision of this bill that would allow a 90-day suspension or delay in collection by marketplace facilitators could have a negative revenue impact of up to $42 million in Fiscal Year 2019, depending on the number and size of marketplace facilitators that apply for and are granted such waivers.

**Estimated Revenue Impact - Distribution by Fund**
Effective July 1, 2019
(all figures in millions of dollars, except rate)

| Fund | Rate | FY 2020 | FY 2021 | FY 2022 | FY 2023 | FY 2024 | FY 2025 |
|---|---|---|---|---|---|---|---|
| State Sales and Use Tax (5.3%) | 5.280% | 144.9 | 163.6 | 163.6 | 163.6 | 168.3 | 168.3 |
| GF - Unrestricted [1] | 2.015% | 55.3 | 62.4 | 62.4 | 62.4 | 64.2 | 64.2 |
| GF - Restricted [2] | 0.990% | 27.2 | 30.7 | 30.7 | 30.7 | 31.6 | 31.6 |
| Education School Age 1/8% - (GF transfer from Restricted) | 0.125% | 3.4 | 3.9 | 3.9 | 3.9 | 4.0 | 4.0 |
| Education SOQ- 1/4% - (GF transfer from Unrestricted) | 0.250% | 6.9 | 7.7 | 7.7 | 7.7 | 8.0 | 8.0 |
| Transportation [3] | 0.800% | 22.0 | 24.8 | 24.8 | 24.8 | 25.5 | 25.5 |
| Local Option | 1.000% | 27.4 | 31.0 | 31.0 | 31.0 | 31.9 | 31.9 |
| HMOF (GF transfer) | 0.100% | 2.7 | 3.1 | 3.1 | 3.1 | 3.2 | 3.2 |
| Regional Trans. Funds (0.7%) [4] | 0.367% | 10.1 | 11.4 | 11.4 | 11.4 | 11.7 | 11.7 |
| Hampton Roads (TPO) | 0.127% | 3.5 | 3.9 | 3.9 | 3.9 | 4.1 | 4.1 |
| Northern Virginia (NVTA) | 0.240% | 6.6 | 7.4 | 7.4 | 7.4 | 7.7 | 7.7 |
| Total Sales and Use Tax [4] | 5.647% | 155.0 | 175.0 | 175.0 | 175.0 | 180.0 | 180.0 |

Notes:
1) Includes: 2.025% General Fund Unrestricted, -0.01% Dealer Discount.
2) Includes: 1% Education 1% based on school age population, -0.01% Dealer Discount.
3) Includes 0.5% TTF, 0.175% HMOF, 0.050% IPROCF, and 0.075% Mass Transit Fund.
4) The assumed state, local and regional sales and use blended tax rate is 5.65%, after dealer discount.

## 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 $100,000 in gross revenue or 200 transaction 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 same $100,000 in gross revenue or 200 transaction per year standard that applies to sellers would also apply to the facilitators. Therefore, facilitators who engage in certain activities which would identify them as facilitators, such as listing items for sale, handling the money involved in the transaction, or providing a forum upon which buyers and sellers can connect, would create the obligation for those facilitators to collect 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 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. Enactment Clause 15 contained a provision which would cause the wholesale tax on gasoline to revert to 3.5 percent if Congress were to enact legislation granting remote collection authority on or after January 1, 2015. 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. In light of the possibility that the federal government may pass legislation relating to remote sales tax collection authority, this bill would remove the contingencies in 2013 House Bill 2313 that would cause the Motor Fuels Tax rate to revert to 3.5 percent

and revenues generated by federal legislation to be dedicated to transportation and local governments.

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 Q*uill* 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 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 $100,000 in gross revenue or 200 transactions, 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 to ease compliance as well as setting notice requirements for rate changes.

This bill would exclude from the definition of "marketplace facilitator" payment processor businesses appointed by a merchant to handle payment transactions and whose sole activity with respect to marketplace sales is to handle transactions between two parties. This bill would also clarify that internet advertising alone is not sufficient to make a business a marketplace facilitator.

This bill places the liability for any deficiency resulting from incorrect information provided by the seller onto the seller. This bill would prohibit class action suits against marketplace facilitators arising from overpayment of tax.

This bill would require the Department to allow for a waiver from the collection requirements if a marketplace facilitator demonstrates, to the satisfaction of the Commissioner, that either all of its marketplace sellers are already registered dealers or its marketplace seller has sufficient nexus to require registration and that the collection of the tax by the marketplace facilitator would create an undue burden or hardship for either party.

This bill would also require the Department to allow marketplace facilitators to, upon written application and for good cause shown, request up to a 90-day suspension or delay of the requirements to collect, report, or both.

This bill would 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 rate.

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

Similar Legislation

**House Bill 1722** is identical to this bill.

cc : Secretary of Finance

Date: 2/20/2019 VB
DLAS File Name: SB1083FER1161