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SENATE BILL NO. 1349

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on February 23, 2023)

(Patron Prior to Substitute—Senator Barker)

A BILL to amend and reenact § 58.1-416 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 58.1-422.5, relating to taxation of corporations; Internet root infrastructure providers.

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-416 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 58.1-422.5 as follows:

§ 58.1-416. When certain other sales deemed in the Commonwealth.

A. Sales, other than sales of tangible personal property, are in the Commonwealth if:

1. The income-producing activity is performed in the Commonwealth; or

2. The income-producing activity is performed both in and outside the Commonwealth and a greater proportion of the income-producing activity is performed in the Commonwealth than in any other state, based on costs of performance.

B. 1. For debt buyers, as defined in § 58.1-422.3, sales, other than sales of tangible personal property, are in the Commonwealth if they consist of money recovered on debt that a debt buyer collected from a person who is a resident of the Commonwealth or an entity that has its commercial domicile in the Commonwealth. Such rule shall apply regardless of the location of a debt buyer's business.

2. For property information and analytics firms, as defined in § 58.1-422.4, that meet the requirements set forth in § 58.1-422.4, sales of services are in the Commonwealth if they are derived from transactions with a customer or client who receives the benefit of the services in the Commonwealth. Such rule shall apply regardless of the location of a property information and analytics firm's business operations.

3. For Internet root infrastructure providers, as defined in § 58.1-422.5, sales of services are in the Commonwealth if they are derived from sales transactions with a customer or client who receives the benefit of the services in the Commonwealth. Such rule shall apply regardless of the location of an Internet root infrastructure provider's operations.

C. The taxes under this article on the sales described under subsection B are imposed to the maximum extent permitted under the Constitutions of Virginia and the United States and federal law. For the collection of such taxes on such sales, it is the intent of the General Assembly that the Tax Commissioner and the Department assert the taxpayer's nexus with the Commonwealth to the maximum extent permitted under the Constitutions of Virginia and the United States and federal law.

D. If necessary information is not available to the taxpayer to determine whether a sale other than a sale of tangible personal property is in the Commonwealth pursuant to the provisions of subsections B and C, the taxpayer may estimate the dollar value or portion of such sale in the Commonwealth, provided that the taxpayer can demonstrate to the satisfaction of the Tax Commissioner that (i) the estimate has been undertaken in good faith, (ii) the estimate is a reasonable approximation of the dollar value or portion of such sale in the Commonwealth, and (iii) in using an estimate the taxpayer did not have as a principal purpose the avoidance of any tax due under this article. The Department may implement procedures for obtaining its approval to use an estimate. The Department shall adopt remedies and corrective procedures for cases in which the Department has determined that the sourcing rules for sales other than sales of tangible personal property have been abused by the taxpayer, which may include reliance on the location of income-producing activity and direct costs of performance as described in subsection A.

§ 58.1-422.5. Internet root infrastructure providers.

A. As used in this section:

"Authority" means the Virginia Economic Development Partnership Authority.

"Eligible planning district" means Planning District 8.

"Internet root infrastructure provider" means an entity and its affiliated entities that is designated to operate one or more of the 13 Internet root servers of the Internet Assigned Names Authority (IANA) root and functions as the authoritative directory for one or more Top-Level Domains. This term does not include an Internet service provider, cable service provider, or similar company.

"Internet root server of the IANA root" means a Domain Name System server for one of the 13 root identities (A. - M.) that answers requests for the Domain Name System root zone of the Internet, redirecting requests for each Top-Level Domain to its respective nameservers.

60 "Memorandum of understanding" means a performance agreement or related document entered into
61 by an Internet root infrastructure provider and the Authority on or after January 1, 2023, but before
62 December 1, 2023, that sets forth the requirements for commitments to the Commonwealth.

63 B. 1. For taxable years beginning on or after January 1, 2023, but before January 1, 2030, an
64 Internet root infrastructure provider shall be subject to the provisions of subdivision B 3 of § 58.1-416
65 only if the Authority certifies to the Department that the taxpayer has at least 550 full-time employees
66 with an average annual salary of \$175,000 in an eligible planning district, has entered into a
67 memorandum of understanding with the Authority, and has met the terms of such agreement.

68 2. For taxable years beginning on or after January 1, 2030, if the Authority certifies to the
69 Department that all requirements of the memorandum of understanding have been satisfied, no
70 additional certifications shall be required, and the Internet root infrastructure provider shall continue to
71 be subject to the provisions of subdivision B 3 of § 58.1-416 in future taxable years.

72 C. The General Assembly finds that the presence of the Internet root infrastructure provider industry
73 is essential to the continued fiscal health of the Commonwealth. If any provision of this section is for
74 any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction,
75 that provision shall not be deemed severable.

76 2. That the Department of Taxation shall develop and make publicly available guidelines
77 implementing the provisions of this act. In developing such guidelines, the Department of Taxation
78 shall not be subject to the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the
79 Code of Virginia) for guidelines promulgated on or before December 31, 2023, but shall cooperate
80 with and seek the counsel of interested groups and shall not promulgate any guidelines,
81 preliminary or final, without first seeking such counsel and conducting a public hearing.
82 Preliminary guidelines shall be promulgated and made publicly available no later than December
83 31, 2023, and final guidelines shall be promulgated and made publicly available no later than
84 December 31, 2024. After December 31, 2024, the guidelines shall be subject to the Administrative
85 Process Act and accorded the weight of regulations under § 58.1-205 of the Code of Virginia.

86 3. That the memorandum of understanding, as defined in § 58.1-422.5 of the Code of Virginia, as
87 created by this act, shall include provisions that require, during the term of the memorandum of
88 understanding, an Internet root infrastructure provider (the provider) to report annually to the
89 Virginia Economic Development Partnership Authority and the Secretaries of Commerce and
90 Trade and Finance beginning January 1, 2024, such information as is necessary to demonstrate
91 that the provider is in compliance with the performance criteria set forth in the memorandum of
92 understanding. The annual report shall contain information regarding the new investments made
93 by the provider to satisfy the performance criteria, the anticipated liability of the provider
94 notwithstanding the provisions of this act related to the apportionment of its income, the
95 anticipated liability of the provider pursuant to the apportionment formula under this act, and
96 other such financial information as the Secretaries of Commerce and Trade and Finance deem
97 necessary to demonstrate that the provider will be able to fulfill the obligations of the
98 memorandum of understanding.

99 4. That the memorandum of understanding, as defined in § 58.1-422.5 of the Code of Virginia, as
100 created by this act, shall contain a provision that, should the Internet root infrastructure provider
101 be out of substantial compliance with the performance criteria set forth in the memorandum of
102 understanding for three consecutive years, then the memorandum of understanding shall
103 terminate. If the memorandum of understanding is terminated pursuant to this enactment and
104 such provision, (i) the Secretary of Finance shall notify the Department of Taxation; (ii) the
105 Internet root infrastructure provider shall thereafter no longer be eligible to utilize the
106 apportionment formula set forth in subdivision B 3 of § 58.1-416 of the Code of Virginia, as
107 amended by this act; and (iii) the Internet root infrastructure provider shall be required to amend
108 its income tax returns for any taxable year in which it utilized the apportionment formula set
109 forth in subdivision B 3 of § 58.1-416, as amended by this act, and was in substantial
110 noncompliance. The amended tax returns shall instead compute its tax liability for such years
111 using the apportionment formula required if it were not eligible for the apportionment formula set
112 forth in subdivision B 3 of § 58.1-416 of the Code of Virginia, as amended by this act.

113 5. That any person to whom tax information is divulged pursuant to this act shall be subject to
114 the prohibitions and penalties set forth in § 58.1-3 of the Code of Virginia as though he were a tax
115 official.

116 6. That the provisions of this act shall not become effective until a memorandum of understanding,
117 as defined in § 58.1-422.5 of the Code of Virginia, as created by this act, is signed. If such
118 memorandum of understanding is not signed by December 1, 2023, the provisions of subdivision B
119 3 of § 58.1-416 of the Code of Virginia, as amended by this act, shall not be applicable in any
120 taxable year beginning on or after January 1, 2023.

121 7. That the Virginia Economic Development Partnership Authority shall provide, upon signature, a

122 copy of any memorandum of understanding, as defined in § 58.1-422.5 of the Code of Virginia, as
123 created by this act, to the Chairmen of the House Committee on Finance, the House Committee on
124 Appropriations, and the Senate Committee on Finance and Appropriations. The provisions of this
125 act shall expire if copies of such memorandum of understanding are not delivered by December
126 31, 2023.