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SENATE BILL NO. 597

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator Wagner
on February 9, 2012)

(Patron Prior to Substitute—Senator Wagner)

A BILL to amend and reenact § 58.1-612 of the Code of Virginia, relating to establishing a presumption of sufficient activity within the Commonwealth to require a dealer to register for retail sales and use tax purposes; commonly controlled person facilitating the delivery of tangible personal property sold by the dealer to its customers.

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-612 of the Code of Virginia is amended and reenacted as follows:

§ 58.1-612. Tax collectible from dealers; "dealer" defined; jurisdiction.

A. The tax levied by §§ 58.1-603 and 58.1-604 shall be collectible from all persons who are dealers, as hereinafter defined, and who have sufficient contact with the Commonwealth to qualify under subsections (i) B and C or (ii) B and D hereof.

B. The term "dealer," as used in this chapter, shall include every person who:

1. Manufactures or produces tangible personal property for sale at retail, for use, consumption, or distribution, or for storage to be used or consumed in this Commonwealth;

2. Imports or causes to be imported into this Commonwealth tangible personal property from any state or foreign country, for sale at retail, for use, consumption, or distribution, or for storage to be used or consumed in this Commonwealth;

3. Sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, consumption, or distribution, or for storage to be used or consumed in this Commonwealth, tangible personal property;

4. Has sold at retail, used, consumed, distributed, or stored for use or consumption in this Commonwealth, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at retail, the use, consumption, distribution, or storage of such tangible personal property;

5. Leases or rents tangible personal property for a consideration, permitting the use or possession of such property without transferring title thereto;

6. Is the lessee or rentee of tangible personal property and who pays to the owner of such property a consideration for the use or possession of such property without acquiring title thereto;

7. As a representative, agent, or solicitor, of an out-of-state principal, solicits, receives and accepts orders from persons in this Commonwealth for future delivery and whose principal refuses to register as a dealer under § 58.1-613; or

8. Becomes liable to and owes this Commonwealth any amount of tax imposed by this chapter, whether he holds, or is required to hold, a certificate of registration under § 58.1-613.

C. A dealer shall be deemed to have sufficient activity within the Commonwealth to require registration under § 58.1-613 if he:

1. Maintains or has within this Commonwealth, directly or through an agent or subsidiary, an office, warehouse, or place of business of any nature;

2. Solicits business in this Commonwealth by employees, independent contractors, agents or other representatives;

3. Advertises in newspapers or other periodicals printed and published within this Commonwealth, on billboards or posters located in this Commonwealth, or through materials distributed in this Commonwealth by means other than the United States mail;

4. Makes regular deliveries of tangible personal property within this Commonwealth by means other than common carrier. A person shall be deemed to be making regular deliveries hereunder if vehicles other than those operated by a common carrier enter this Commonwealth more than twelve times during a calendar year to deliver goods sold by him;

5. Solicits business in this Commonwealth on a continuous, regular, seasonal, or systematic basis by means of advertising that is broadcast or relayed from a transmitter within this Commonwealth or distributed from a location within this Commonwealth;

6. Solicits business in this Commonwealth by mail, if the solicitations are continuous, regular, seasonal, or systematic and if the dealer benefits from any banking, financing, debt collection, or marketing activities occurring in this Commonwealth or benefits from the location in this Commonwealth of authorized installation, servicing, or repair facilities;

7. Is owned or controlled by the same interests which own or control a business located within this Commonwealth;

60 8. Has a franchisee or licensee operating under the same trade name in this Commonwealth if the
61 franchisee or licensee is required to obtain a certificate of registration under § 58.1-613; or

62 9. Owns tangible personal property that is rented or leased to a consumer in this Commonwealth, or
63 offers tangible personal property, on approval, to consumers in this Commonwealth.

64 *D. A dealer is presumed to have sufficient activity within the Commonwealth to require registration*
65 *under § 58.1-613 (unless the presumption is rebutted as provided herein) if any commonly controlled*
66 *person maintains a distribution center, warehouse, fulfillment center, office, or similar location within*
67 *the Commonwealth that facilitates the delivery of tangible personal property sold by the dealer to its*
68 *customers. The presumption in this subsection may be rebutted by demonstrating that the activities*
69 *conducted by the commonly controlled person in the Commonwealth are not significantly associated*
70 *with the dealer's ability to establish or maintain a market in the Commonwealth for the dealer's sales.*
71 *For purposes of this subsection, a "commonly controlled person" means any person that is a member of*
72 *the same "controlled group of corporations," as defined in § 1563(a) of the Internal Revenue Code of*
73 *1954, as amended or renumbered, as the dealer or any other entity that, notwithstanding its form of*
74 *organization, bears the same ownership relationship to the dealer as a corporation that is a member of*
75 *the same "controlled group of corporations," as defined in § 1563(a) of the Internal Revenue Code of*
76 *1954, as amended or renumbered.*

77 *E. Notwithstanding any other provision of this section, the following shall not be considered to*
78 *determine whether a person who has contracted with a commercial printer for printing in the*
79 *Commonwealth is a "dealer" and whether such person has sufficient contact with the Commonwealth to*
80 *be required to register under § 58.1-613:*

81 1. The ownership or leasing by that person of tangible or intangible property located at the Virginia
82 premises of the commercial printer which is used solely in connection with the printing contract with the
83 person;

84 2. The sale by that person of property of any kind printed at and shipped or distributed from the
85 Virginia premises of the commercial printer;

86 3. Activities in connection with the printing contract with the person performed by or on behalf of
87 that person at the Virginia premises of the commercial printer; and

88 4. Activities in connection with the printing contract with the person performed by the commercial
89 printer within Virginia for or on behalf of that person.

90 ~~EF.~~ In addition to the jurisdictional standards contained in ~~subsection C~~ of this section *subsections C*
91 *and D*, nothing contained herein (other than subsection ~~D~~ *E*) shall limit any authority which this
92 Commonwealth may enjoy under the provisions of federal law or an opinion of the United States
93 Supreme Court to require the collection of sales and use taxes by any dealer who regularly or
94 systematically solicits sales within this Commonwealth. Furthermore, nothing contained in subsection C
95 shall require any broadcaster, printer, outdoor advertising firm, advertising distributor, or publisher which
96 broadcasts, publishes, or displays or distributes paid commercial advertising in this Commonwealth
97 which is intended to be disseminated primarily to consumers located in this Commonwealth to report or
98 impose any liability to pay any tax imposed under this chapter solely because such broadcaster, printer,
99 outdoor advertising firm, advertising distributor, or publisher accepted such advertising contracts from
100 out-of-state advertisers or sellers.

101 **2. That any dealer described in subsection D of § 58.1-613 of the Code of Virginia that rebuts the**
102 **presumption of sufficient activity as described in that section, and does not collect the tax imposed**
103 **by § 58.1-604 of the Code of Virginia or the tax imposed by § 58.1-606 of the Code of Virginia on**
104 **taxable sales of tangible personal property it makes, and causes to be delivered, to purchasers with**
105 **an address in the Commonwealth shall notify such purchaser that Virginia state and local use**
106 **taxes are due on certain purchases made from the dealer and that the laws of the Commonwealth**
107 **require the purchaser to file a use tax return for purchases made from the dealer. Each dealer**
108 **failing to provide the notice under this subdivision is hereby assessed with a penalty of \$5 for each**
109 **such failure unless the dealer shows reasonable cause for the failure. The penalty shall be collected**
110 **by the Department of Taxation.**

111 The dealer shall also provide a written notice to all such purchasers by January 31 of each
112 year that reports the total amount paid by the purchaser for purchases made from the dealer in
113 the immediately preceding calendar year. The report shall only include purchases for which the
114 dealer's records show a billing address that is the address of such purchaser in the
115 Commonwealth. The notice shall include, if available, the dates of the purchases, the amount of
116 each purchase, and the category of the purchase, including, if known by the dealer, whether the
117 purchase is exempt from Virginia state and local use taxes. The notice shall also state that the
118 laws of the Commonwealth require a use tax return to be filed by the purchaser for such
119 purchases and for the use tax to be paid by the purchaser for certain purchases made from the
120 dealer. The notice shall be sent separately to all such Virginia purchasers by first-class mail and
121 shall not be included with any other shipments. The notice shall include the words "IMPORTANT

TAX DOCUMENT ENCLOSED" on the exterior of the mailing. The notice shall include the name of the dealer. Each dealer failing to send the notice under this subdivision is hereby assessed with a penalty of \$10 for each such failure unless the dealer shows reasonable cause for the failure. The penalty shall be collected by the Department of Taxation.

The dealer shall file an annual statement with the Department for each purchaser with an address in the Commonwealth who made purchases from the dealer during the preceding calendar year or any portion thereof. The statement shall report the total amount paid during the preceding calendar year or any portion thereof by the purchaser on purchases made from the dealer. The annual statement shall be filed by March 1 of each year on such forms as are provided or approved by the Department of Taxation.

If the dealer made more than an aggregate of \$100,000 in sales of tangible personal property during the preceding calendar year, or any portion thereof, to all purchasers with a billing address in the Commonwealth, then the Tax Commissioner may require the dealer to file the annual statement for the year by magnetic media or another machine-readable form.

A penalty of \$10 is hereby assessed upon the dealer for each such purchaser for which the dealer did not file the annual statement with the Department by March 1, unless the dealer shows reasonable cause for the failure. The penalty shall be collected by the Department of Taxation.

3. That if any clause, sentence, paragraph, subsection, or subdivision of this act, including but not limited to any or all of the provisions of the second enactment of this act, shall be adjudged in any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remaining provisions of this act, but shall be confined in its operation to the clause, sentence, paragraph, subsection, or subdivision thereof directly involved in the controversy in which the judgment shall have been rendered, and to this end the provisions of this act are declared severable.