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SENATE BILL NO. 1601

Offered January 9, 2019

Prefiled January 9, 2019

A BILL to amend the Code of Virginia by adding sections numbered 58.1-612.1, 58.1-612.2, and 58.1-612.3, relating to remote sales and use tax collection.

Patron—Norment

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding sections numbered 58.1-612.1, 58.1-612.2, and 58.1-612.3 as follows:

§ 58.1-612.1. "Marketplace facilitator" and "marketplace seller" defined.

As used in this chapter, unless the context requires a different meaning:

"Marketplace facilitator" means a person that contracts with sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a physical or electronic marketplace operated by the person and that engages in at least one activity from subdivision 1 and at least one activity from subdivision 2.

1. The person directly or indirectly, through one or more affiliated persons, engages in any of the following:

a. Transmitting or otherwise communicating the offer or acceptance between the buyer and the seller.

b. Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together.

c. Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller.

d. Software development or research and development related to any of the activities described in subdivision 2, if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person.

2. The person engages in any of the following activities with respect to the seller's products:

a. Payment processing services.

b. Fulfillment or storage services.

c. Listing products for sale.

d. Setting prices.

e. Branding sales as those of the marketplace facilitator.

f. Order taking.

g. Advertising or promotion.

h. Providing customer service or accepting or assisting with returns or exchanges.

"Marketplace seller" means a seller that makes retail sales through any physical or electronic marketplace operated by a marketplace facilitator.

§ 58.1-612.2. Economic nexus standard for sales and use tax collection by remote sellers and marketplace facilitators.

Notwithstanding any other provision of law, any remote seller or marketplace facilitator selling or facilitating the sale of tangible personal property or services taxable under this chapter for delivery into the Commonwealth shall be subject to the taxes imposed pursuant to this chapter. Such remote seller or marketplace facilitator shall collect and remit applicable sales and use tax pursuant to this chapter and shall follow all applicable procedures and requirements established by the Department, provided that the remote seller or marketplace facilitator meets any of the following criteria in the previous calendar year or the current calendar year:

1. If a remote seller, the remote seller makes sales of tangible personal property or services taxable under this chapter for delivery in the Commonwealth exceeding \$100,000 or in 200 or more separate transactions.

2. If a marketplace facilitator, the marketplace facilitator makes or facilitates the sale of tangible personal property or services taxable under this chapter, on its own behalf or on behalf of one or more marketplace sellers, for delivery into Commonwealth exceeding \$100,000 or in 200 or more separate transactions.

§ 58.1-612.3. Requirements applicable to remote sellers and marketplace facilitators.

A. Any marketplace facilitator subject to taxation under this chapter pursuant to the provisions of §

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59 58.1-612.2 shall collect and remit the sales and use tax on all sales taxable under this chapter to
60 customers in the Commonwealth. However, such marketplace facilitator is not required to collect and
61 remit sales and use tax on a sale from a marketplace seller to a customer in the Commonwealth if the
62 marketplace facilitator elects to request and maintain a copy of the marketplace seller's registration to
63 collect sales and use tax in the Commonwealth. Nothing in this section shall be construed to interfere
64 with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each
65 other regarding the fulfillment of the requirements of this chapter.

66 B. A marketplace facilitator is relieved of liability under this section for failure to collect and remit
67 sales and use tax to the extent that the marketplace seller or customer has remitted the sales or use tax
68 at issue.

69 C. A marketplace facilitator is relieved of liability under this section for failure to collect and remit
70 the correct amount of tax to the extent that the error was due to incorrect information given to the
71 marketplace facilitator by the marketplace seller. However, this subsection shall not apply if the
72 marketplace seller is a commonly controlled person, as defined in subsection D of § 58.1-612, of the
73 marketplace facilitator.

74 D. Marketplace facilitators shall report the sales and use tax from marketplace sellers separately
75 from any sales and use tax collected on taxable retail sales made directly by the marketplace facilitator,
76 or an affiliate of the marketplace facilitator, to customers in the Commonwealth using a separate
77 marketplace facilitator return to be published by the Department.

78 E. No class action shall be brought against a marketplace facilitator in any court of the
79 Commonwealth on behalf of customers arising from or in any way related to an overpayment of sales
80 and use tax collected on sales facilitated by the marketplace facilitator, regardless of whether such
81 claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to
82 seek a refund on an individual basis.

83 F. Nothing in this section shall affect the obligation of any consumer to remit sales and use tax on
84 any taxable transaction for which a marketplace facilitator or a marketplace seller does not collect and
85 remit sales and use tax.

86 G. Nothing in this section shall prohibit the Department from auditing marketplace facilitators or
87 marketplace sellers, except the Department is prohibited from auditing:

88 1. Marketplace facilitators to the extent that the marketplace seller collected and remitted sales tax
89 and was audited for such sales; and

90 2. Marketplace sellers to the extent that the marketplace facilitator collected and remitted sales tax
91 and was audited for such sales unless the marketplace facilitator is seeking relief of liability under
92 subsection B.

93 H. If a marketplace facilitator pays sales or use tax on a retail sale transaction facilitated for a
94 marketplace seller as a result of an audit or otherwise, the marketplace facilitator shall have the right
95 to recover such tax and any associated interest and penalties from the marketplace seller within the
96 applicable statutory period following the date of payment by the marketplace facilitator.

97 1. The Department shall waive penalties and interest if a marketplace facilitator seeks liability relief
98 and the Department rules that a reasonable cause exists.

99 2. That the provisions of this act requiring sales and use tax collection shall not apply to any retail
100 sales transactions occurring before July 1, 2019.

101 3. That should any portion of this act be held unconstitutional by a court of competent
102 jurisdiction, the remaining portions of this act shall remain in effect.