

Guidelines for Remote Sellers and Marketplace Facilitators

These guidelines are published by the Department of Taxation (“the Department”) to provide guidance to taxpayers regarding the new law applicable to remote sellers, marketplace sellers, and marketplace facilitators.

These guidelines are not rules or regulations subject to the provisions of the Administrative Process Act (*Va. Code* § 2.2-4000 *et seq.*) and are being published in accordance with the Tax Commissioner’s general authority to supervise the administration of the tax laws of the Commonwealth pursuant to *Va. Code* § 58.1-202. As necessary, additional information regarding the new law will be published and posted on the Department’s website, www.tax.virginia.gov.

These guidelines represent the Department’s interpretation of the relevant laws. They do not constitute formal rulemaking and hence do not have the force and effect of law or regulation. In the event that the final determination of any court holds that any provision of these guidelines is contrary to law, taxpayers who follow these guidelines will be treated as relying on erroneous written advice for purposes of waiving penalty and interest under *Va. Code* §§ 58.1-105, 58.1-1835, and 58.1-1845. To the extent there is a question regarding the application of these guidelines, taxpayers are encouraged to write to the Department and seek a written response to their question.

South Dakota v. Wayfair

The United States Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), held that the Constitutional principle of “substantial nexus” required a merchant to have a physical presence within a state before the merchant could be compelled to collect the state’s sales tax. The 2018 decision in *South Dakota v. Wayfair*, 585 U.S. ____ (2018), however, reversed the holding from *Quill* and held that physical presence is no longer a prerequisite for a state to require a merchant to collect its tax. The Court in *Wayfair* endorsed South Dakota’s economic nexus standard when coupled with administrative simplification measures aimed at easing the burden on remote sellers. To ensure that Virginia’s sales tax laws reflect the current Constitutional standard, Virginia has enacted economic nexus legislation.

During the 2019 Session, the General Assembly enacted House Bill 1722 (2019 *Acts of Assembly*, Chapter 815) and Senate Bill 1083 (2019 *Acts of Assembly*, Chapter 816), which require remote sellers and marketplace facilitators who sell or facilitate sales to Virginia customers to register for the collection of the Retail Sales and Use Tax (“the tax”) beginning July 1, 2019. This new law also contains provisions to simplify the administration of the tax for remote sellers and to repeal the exemption for out-of-state mail order sales of less than \$100.

Economic Nexus

The new law requires remote sellers and marketplace facilitators who sell or facilitate the sale of greater than \$100,000 in annual gross revenue from retail sales into the Commonwealth (“gross revenue”) or 200 annual transactions to Virginia customers to register for the collection of the tax beginning July 1, 2019. (See *Va. Code* § 58.1-612 (C)).

Remote Sellers

A remote seller is any dealer that, in the previous or current calendar year, either receives greater than \$100,000 in gross revenue from retail sales, or engages in 200 or more separate retail sale transactions, or other minimum gross revenue or transaction amounts as may be required by federal law, in the Commonwealth, or any software provider acting on behalf of such dealer. (See *Va. Code* § 58.1-602).

Marketplace Facilitators

A marketplace facilitator is any person that contracts with a marketplace seller to facilitate, for consideration and regardless of whether such consideration is deducted from transactions, the sale of such marketplace seller’s products through a physical or electronic marketplace operated by such person. (See *Va. Code* § 58.1-612.1 (A)).

The following are specifically excluded from the definition of “marketplace facilitator”:

- 1) A payment processor business appointed by a merchant to handle transactions from various channels, such as credit and debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties, and
- 2) A platform or forum that exclusively provides internet advertising services, including any advertisements that may list products for sale, so long as such platform or forum does not also engage directly or indirectly through one or more commonly controlled persons in the activities described in *Va. Code* § 58.1-612.1 (C).

In the case of a marketplace facilitator that also makes direct sales into the Commonwealth, both types of sales will be aggregated in order to determine whether or not that entity has established economic nexus. (See *Va. Code* § 58.1-612.1 (G)).

Marketplace Sellers

A marketplace seller is any person that is not a commonly controlled person to a marketplace facilitator and that makes sales through any physical or electronic marketplace operated by such marketplace facilitator, even if such seller would not have been required to collect and remit sales and use tax had the sale not been made through such marketplace. (See *Va. Code* § 58.1-612.1 (A)). In the case of a marketplace seller without physical presence in the Commonwealth that both sells on a facilitator’s marketplace and sells directly to Virginia customers, only the marketplace

seller's direct sales will be considered in determining whether the marketplace seller is required to register to collect the tax. (See *Va. Code* § 58.1-612.1 (H)).

Dual Roles

A taxpayer may qualify as a remote seller, a marketplace seller, or a marketplace facilitator or any mix of the three classifications depending on its retail sales activities within the Commonwealth.

Both marketplace facilitators that engage in retail sales and remote sellers have a duty to collect the tax on their sales transactions. Marketplace sellers, however, are not permitted to collect tax on sales conducted through a marketplace facilitator's marketplace but they are required to track any retail sales that are conducted outside of a marketplace facilitator's marketplace and collect tax on transactions conducted during any time where they qualify as a "remote seller." (See *Va. Code* § 58.1-612.1 (A)).

Dealers that qualify for designation and register as marketplace facilitators but also sell at retail are required to collect sales tax on both facilitated and direct sales transactions. Additionally, marketplace facilitators are required to keep and maintain separate records for their facilitated and direct sales transactions for audit purposes.

Examples

1. Facilitate Co. operates a website where sellers can list their items for sale either through auctions or in a marketplace-type platform. The goods sold on this marketplace are owned by the sellers and not Facilitate Co. Facilitate Co. also sells its own goods directly to Virginia consumers. Seller Co. is a dealer that lists items for sale on Facilitate Co.'s marketplace but also sells its goods directly to the consumer via its own website.
 - a. If Facilitate Co. qualifies as a "marketplace facilitator" because it has facilitated sales resulting in greater than \$100,000 in gross revenue or 200 transactions, but Seller Co. only made direct sales of \$50,000 through 20 transactions, which dealer(s) have a responsibility to collect and remit sales tax in light of the new law?

Answer: Facilitate Co. has established economic nexus with the Commonwealth and therefore has the obligation to register for the collection of sales tax as a "marketplace facilitator" on the sales that it facilitates as well as its direct sales. Accordingly, Facilitate Co. is required to collect and remit the tax on all of Seller Co.'s transactions that are facilitated on Facilitate Co.'s marketplace. Seller Co. is a "marketplace seller" with respect to its sales facilitated by Facilitate Co. and is prohibited from collecting the tax on its sales that are facilitated by Facilitate Co.'s marketplace. In addition, Seller Co.'s direct sales have not exceeded either of the economic nexus thresholds and consequently Seller Co. has not established economic nexus with the

Commonwealth and does not have to register for collection of the tax as a “remote seller” for its direct sales, although it may voluntarily do so.

- b. If Facilitate Co. qualifies as a “marketplace facilitator” because it has facilitated sales resulting in greater than \$100,000 in gross revenue or 200 transactions, but Seller Co. also completed direct sales of \$100,000 or greater than 200 transactions, which dealer(s) have a responsibility to collect and remit sales tax in light of the new law?

Answer: Facilitate Co. has established economic nexus with the Commonwealth and therefore has the obligation to register for the collection of sales tax as a “marketplace facilitator” on the sales that it facilitates, including those facilitated for Seller Co., as well as its direct sales. Seller Co. has also exceeded the economic nexus thresholds with its direct sales and therefore must register as a “remote seller” for collection of the tax on its direct sales. Seller Co. is prohibited from collecting the tax on its sales that are facilitated by Facilitate Co.

Attribution of Sales Activities

For purposes of determining whether a dealer meets the \$100,000 gross revenue or 200 transaction thresholds, the sales made by all commonly controlled persons will be aggregated and the sales transactions of commonly controlled persons will be attributed to all members of its corporate group that are dealers. A “commonly controlled person” is any person that is a member of the same “controlled group of corporations,” as defined in Internal Revenue Code § 1563 (a), as the dealer or any other entity that bears the same relationship to the dealer as a corporation that is a member of the same “controlled group of corporations.” (See *Va. Code* § 58.1-612 (D)).

For purposes of determining whether a dealer operating a marketplace meets the \$100,000 gross revenue or 200 transaction threshold, both facilitated and direct sales of the dealer will be aggregated and attributed to that dealer. (See *Va. Code* § 58.1-612.1 (G)).

Examples

2. Facilitator Co., Affiliate Co., and Marketplace Seller Co. make retail sales of tangible personal property to Virginia customers. Facilitator Co. also operates a marketplace used by other sellers to sell goods to Virginia customers. Marketplace Seller Co. is one of the sellers that utilizes Facilitator Co.’s marketplace to sell its goods to Virginia customers. Affiliate Co. is a wholly owned subsidiary of Facilitator Co. None of these entities have a physical presence in the Commonwealth.
 - a. Facilitator Co. realized \$90,000 of gross revenue last year from 199 direct sales transactions to Virginia customers via its website and electronic

application. Affiliate Co. realized \$40,000 of gross revenue last year from 50 direct sales transactions to Virginia customers via its website. Marketplace Seller Co. did not make any sales to Virginia customers. Which of these dealers have the obligation to register for the collection of sales tax on their sales to Virginia customers?

Answer: Facilitator Co. and Affiliate Co. both have the obligation to register for the collection of sales tax because, although their gross revenue from their respective direct sales to Virginia customers do not individually exceed the \$100,000 or 200 transaction thresholds, as affiliated entities their sales are aggregated and attributed to each other. When their combined sales of \$130,000 in gross revenues and 249 sales transactions are considered, they have exceeded the economic nexus thresholds and must register and begin collecting sales tax on their sales. Facilitator Co. and Affiliate Co. are each required to collect the tax on only their own sales transactions (Facilitator Co. on its \$90,000 and Affiliate Co. on its \$40,000) because Affiliate Co. is not selling through Facilitator Co.'s marketplace. If Affiliate Co. is selling through Facilitator Co.'s marketplace then Facilitator Co. would be required to collect the tax on Affiliate Co.'s sales as well as its own.

- b. Facilitator Co. realized \$80,000 of gross revenues last year from 100 direct sales transactions to Virginia customers via its website and electronic application. Affiliate Co. realized \$10,000 in sales from 10 sales to Virginia customers last year. Marketplace Seller Co. realized \$25,000 in gross revenues from 25 sales transactions that were facilitated by Facilitator Co.'s marketplace. Do any of these dealers have the obligation to register for the collection of sales tax?

Answer: Facilitator Co. has the obligation to register for the collection of sales tax. Although Facilitator Co.'s gross revenues from direct sales to Virginia customers does not exceed the \$100,000 or 200 transaction thresholds, *Va. Code* § 58.1-612.1(G) requires that the sales that Facilitator Co. facilitated for Marketplace Seller Co., as well as any sales made by Affiliate Co. be aggregated with Facilitator Co.'s direct sales, which would cause Facilitator Co. to have a combined gross revenues of \$115,000. Marketplace Seller Co. would not be required to register as a remote seller because it has not exceeded either of the economic nexus thresholds. Affiliate Co. would not be required to register because the aggregation and attribution rules that apply to a remote seller pursuant to *Va. Code* § 58.1-612 (D) apply only to the direct sales of affiliated dealers and do not require aggregation with sales facilitated by related entities. Accordingly, aggregating the sales of Affiliate Co. and Facilitator Co. would result in \$90,000 of sales from 110 transactions, which is below the statutory threshold.

Registration

If a previously unregistered dealer establishes economic nexus and therefore qualifies as a remote seller or a marketplace facilitator, that dealer is required to register with the Department for the collection of sales and use tax no later than 30 days from the day that the dealer establishes economic nexus with the Commonwealth. Dealers who establish economic nexus as of July 1, 2019 must register to begin collecting the tax for transactions occurring on or after July 1, 2019.

Dealers must register for collection using Form R-1. Dealers registering based on economic nexus must identify themselves as “remote sellers” or “marketplace facilitators” on Form R-1 during registration. Dealers who engage in both activities will be required to register as both remote sellers and marketplace facilitators. A dealer that is already registered but that also qualifies as a marketplace facilitator must update its registration by July 1, 2019 to indicate that it is also a marketplace facilitator.

A dealer who is registered as a remote seller or a marketplace facilitator may cease collection of the tax on January 1 of the year following any year in which the dealer fails to meet the \$100,000 gross revenue or 200 transaction thresholds. However, if and for so long as the dealer is still engaging in or facilitating retail sales to Virginia customers, the dealer maintains the obligation to begin collecting sales tax within 30 days of re-establishing economic nexus with the Commonwealth.

Examples

3. Dealer Co. makes direct sales to Virginia customers via its website. Dealer Co. did not exceed \$100,000 in gross revenues or 200 transactions for the 2018 calendar year. Dealer Co. exceeds the \$100,000 gross revenues threshold for the 2019 calendar year on March 1, 2019. Dealer Co. would therefore be required to register for collection as a “remote seller” by July 1, 2019 and begin collecting the tax on July 1, 2019.
4. Dealer Inc. makes direct sales to Virginia customers via its website. Dealer Inc. exceeded the \$100,000 gross revenues threshold during the 2018 calendar year. Dealer Inc. would therefore be required to register for collection as a “remote seller” by July 1, 2019 and begin collecting the tax on July 1, 2019.
5. Dealer LLC makes direct sales to Virginia customers via its website. Dealer LLC exceeded the \$100,000 gross revenues threshold during the 2018 calendar year and therefore registers as a “remote seller” and begins collecting on July 1, 2019. Dealer LLC only receives gross revenues of \$99,000 from 100 transactions during the 2019 calendar year and continues selling during all of 2020. Dealer LLC may cease collection of the tax on January 1, 2020. However, since Dealer LLC is still engaging in retail sales, it must restart collection of the tax within 30 days of reestablishing economic nexus with Virginia in the future.
6. Dealer Ltd. makes direct retail sales to Virginia customers via its website. Dealer Ltd. exceeds the 200 transactions threshold on October 1, 2019. Dealer Ltd. is

required to register as a “remote seller” and begin collecting the tax no later than 30 calendar days from that date. Therefore Dealer Ltd. must register and begin collecting the tax by October 31, 2019.

Sourcing Rules

Sales by dealers located in Virginia are generally sourced to the city or county in which the dealer’s place of business is located, even if the goods are ultimately delivered to the purchaser at another location. A remote sale by telephone, Internet, or mail order of goods from an in-state dealer with a place of business in Virginia is sourced to the location in which the order was first taken. (See 23 Virginia Administrative Code (“VAC”) § 10-210-2070). Under existing policy, sales by out-of-state dealers are generally sourced to the city or county where the goods are used or consumed by the purchaser, or stored for use or consumption. (See 23 VAC § 10-210-2070).

A marketplace facilitator accepting and processing orders to Virginia customers through a website or electronic application may use destination-based sourcing if unable to associate the order with a physical place of business in Virginia.

Examples

7. Seller Co. does not have a physical presence within the Commonwealth but is registered for the collection of the tax as a remote seller. Seller Co. sells taxable goods to Virginia customers. How should these transactions be sourced?

Answer: Seller Co., as an out-of-state-dealer, should use destination-based sourcing. Accordingly, Seller Co. should source each transaction to the locality in which the buyer is located. In order to accurately determine the correct tax rate, Seller Co. should consult the Department’s online lookup tool.

8. Facilitator Co. is an out-of-state retailer that sells goods to customers nationwide. Each order is placed on its website, the payment processed, and the item to be shipped identified in any one of its many warehouses located nationwide based on purchaser’s location and the availability of the items in the Dealer’s warehouses. Historically, Facilitator Co. has had no obligation to register as a dealer for the collection of Virginia sales tax. Facilitator Co., however, opens a fulfillment center located in Virginia on July 1, 2019 to handle sales placed by customers located both within and without the Commonwealth. Facilitator Co. has registered for sales tax collection in Virginia based on the physical presence associated with its new Virginia fulfillment center. Facilitator Co. continues to sell taxable goods to Virginia customers. How should these transactions be sourced?

Answer: Facilitator Co. is now an in-state dealer. Sales by dealers located in Virginia are generally sourced to the city or county in which the dealer’s place of business is located, even if the goods are ultimately delivered to the purchaser at another location. A remote sale by telephone, Internet, or mail order of goods from

an in-state dealer with a place of business in Virginia is sourced to the location in which the order was first taken. However, if Facilitator Co. is unable to associate an order with a physical place of business in Virginia, it may use destination-based sourcing.

Marketplace Facilitator Liability Protection Language

The new law affords liability protection to remote sellers and marketplace facilitators. A marketplace facilitator is relieved of liability for the incorrect collection or remittance of tax on transactions for which it acts as facilitator or seller if the error is due to reasonable reliance on:

- 1) An invalid exemption certificate provided by the marketplace seller or purchaser,
- 2) Incorrect or insufficient information provided by the Commonwealth, or
- 3) Incorrect or insufficient information provided by the marketplace seller or purchaser regarding the tax classification or proper sourcing of an item or transaction, provided the facilitator made a reasonable effort to obtain accurate information from the seller or purchaser.

This relief may not exceed the total amount of tax due from the facilitator on the incorrect transaction independent of penalties or interest that would have applied. (See *Va. Code* § 58.1-612.1 (E)). In addition, any remote seller that has collected an incorrect amount of sales and use tax is relieved from liability for such amount, including penalty or interest, if the error is a result of the remote seller's reasonable reliance on information provided by the Commonwealth. (See *Va. Code* § 58.1-625 (D)(2)).

Waivers for Marketplace Facilitators

A marketplace facilitator may apply to the Department for a waiver of the obligation to collect and remit taxes on its facilitated transactions if either (i) all of its marketplace sellers are registered dealers or (ii) if the marketplace seller for whom the marketplace facilitator does not wish to collect tax has sufficient nexus to register as a dealer and collection of the tax by the facilitator would create an undue burden for either party. (See *Va. Code* § 58.1-612 (D)(3)). Marketplace facilitators should check the Department's website for more information starting May 15, 2019.

Waiver Based on All Sellers Being Registered Dealers

Marketplace facilitators may make an application to the Department for a waiver of the obligation to collect and remit taxes on its facilitated transactions if all of the facilitator's marketplace sellers are registered dealers. To apply for this type of waiver, the marketplace facilitator must register as a dealer and designate itself as a "marketplace facilitator" during such registration. Additionally, the marketplace facilitator must also supply the Department with a complete list of all marketplace sellers that the facilitator would be required to collect tax on behalf of absent granting of the waiver. Once such a waiver is granted, the marketplace facilitator has an ongoing obligation to notify the Department of any changes to its current list of marketplace sellers. Only changes to

the previous certification because of marketplace sellers joining or leaving the marketplace facilitator's platform need to be documented to the Department.

Waiver Based on Undue Burden

Marketplace facilitators may also apply to the Department for a waiver of the obligation to collect and remit taxes on transactions facilitated for a specific marketplace seller if such seller has sufficient nexus to require registration as a dealer and if collecting tax on behalf of such marketplace seller would create an undue burden for either the marketplace facilitator or the marketplace seller. Only a marketplace facilitator may apply for a waiver. A marketplace facilitator applying for this type of waiver must certify to the Department that:

- 1) The marketplace seller at issue either qualifies as a "remote seller" or has sufficient physical presence within the Commonwealth to require registration as a dealer, and
- 2) Having the marketplace facilitator collect the tax on the seller's behalf would place an undue burden on either the facilitator or the marketplace seller.

Waiver Period

Any waiver granted to a marketplace facilitator will remain in effect so long as the basis for the waiver exists. A marketplace facilitator that has been granted a waiver based on all of its marketplace sellers being registered dealers must recertify that it meets the waiver requirements on a quarterly basis.

A marketplace facilitator granted a waiver based on the marketplace seller being eligible for registration and the existence of an undue burden to the parties has 30 days to notify the Department and begin collecting and remitting taxes on behalf of such marketplace seller if either the marketplace seller no longer has sufficient nexus to require registration as a dealer or the undue hardship ceases to exist.

Administrative Simplification Measures

The new law requires the Department to adopt several measures designed to simplify the collection, remittance, and record-keeping requirements for remote sellers and marketplace facilitators.

Rate and Exemptions Lookup

The Department will enhance its existing online lookup tool to provide taxpayers with the ability to determine the locality to which a transaction should be sourced. The Department will also post a matrix of sales tax exemptions.

Single-Audit

The Department will continue its current practice of limiting its audits of dealers to a single audit that will encompass all state and local sales and use taxes.

Single Return

The Department will not require more than one sales tax return per month from remote sellers.

30 Days' Notice for Rate Changes

The Department will provide any rate changes at least 30 days before the rate change is to take effect.

Additional Information

These guidelines are available online under the Guidance Documents section of the Department's website, located at <http://tax.virginia.gov/guidance-documents>. The Department will issue additional guidance regarding this law change if necessary. For additional information, please contact the Department at 804.367.8037.

Approved:

A handwritten signature in black ink, reading "Craig M. Burns", is written over a horizontal line.

Craig M. Burns
Tax Commissioner