

Second Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 14-0655.01 Esther van Mourik x4215

HOUSE BILL 14-1269

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A BILL FOR AN ACT

101 **CONCERNING THE CIRCUMSTANCES UNDER WHICH A PERSON WHO**
102 **SELLS ITEMS SUBJECT TO SALES TAX MUST COLLECT SUCH SALES**
103 **TAX ON BEHALF OF THE STATE.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

The state imposes a sales tax collection obligation on every retailer or vendor, and the terms "retailer" and "vendor" are defined to include every person doing business in this state and selling to the user or consumer, and not for resale. The state also imposes a use tax collection

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

obligation on every person in this state for the privilege of storing, using, or consuming in the state any tangible personal property purchased at retail. By operation of law, the definition of the term "doing business in this state" establishes which retailers must collect sales and use tax on behalf of the state from its customers. What qualifies as "doing business in this state" is what is understood as "nexus" among sales tax experts.

The bill modifies and expands the state's sales and use tax nexus provisions by:

- ! Expanding the types of activities that will create nexus with the state if conducted by any person that already has a physical presence in this state, other than a common carrier acting in its capacity as such, pursuant to an agreement or arrangement with an out-of-state retailer;
- ! Clarifying that the expanded nexus provisions create a rebuttable presumption that the specified activities create substantial nexus for the out-of-state retailer;
- ! Requiring an out-of-state retailer to collect and remit sales and use taxes if that retailer contracts with the state for the sale of tangible personal property or taxable services; and
- ! Limiting the effect of the expanded nexus provisions to sales and use tax by specifying that the nexus does not apply to franchise, income, or other taxes.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Short title.** This act shall be known and may be
3 cited as the "Marketplace Fairness and Small Business Protection Act".

4 **SECTION 2.** In Colorado Revised Statutes, 39-26-102, **amend**
5 (3) as follows:

6 **39-26-102. Definitions.** As used in this article, unless the context
7 otherwise requires:

8 (3) "Doing business in this state" means the selling, leasing, or
9 delivering in this state, or any activity in this state in connection with the
10 selling, leasing, or delivering in this state, of tangible personal property
11 OR TAXABLE SERVICES by a retail sale as defined in this section, for use,
12 storage, distribution, or consumption within this state. This term includes,
13 but shall not be limited to, the following acts or methods of transacting

1 business:

2 (a) **Physical presence.** The maintaining within this state, directly
3 or indirectly or by a subsidiary, of an office, ~~distributing house~~
4 DISTRIBUTION FACILITY, salesroom, ~~or house,~~ warehouse, STORAGE
5 PLACE, or other SIMILAR place of business. FOR PURPOSES OF THIS
6 PARAGRAPH (a), "MAINTAINING" INCLUDES THE PERMANENT PRESENCE IN
7 THIS STATE OF AN EMPLOYEE WHO IS A RESIDENT OF THIS STATE.

8 (b) ~~(H)~~ **Transitory physical presence with solicitation.** The
9 ~~soliciting, either by direct representatives, indirect representatives,~~
10 ~~manufacturers' agents, or by distribution of catalogues or other~~
11 ~~advertising, or by use of any communication media, or by use of the~~
12 ~~newspaper, radio, or television advertising media, or by any other means~~
13 ~~whatsoever,~~ REGULAR OR SYSTEMATIC SOLICITATION, PROMOTION, OR
14 FACILITATION, WHETHER DIRECT OR INDIRECT, WITHIN THE STATE OF
15 ~~business from~~ SALES AND PURCHASES OF TANGIBLE PERSONAL PROPERTY
16 OR TAXABLE SERVICES TO persons residing in this state ~~and by reason~~
17 ~~thereof receiving orders from, or selling or leasing tangible personal~~
18 ~~property to, such persons residing in this state~~ for use, consumption,
19 distribution, and storage for use or consumption in this state.

20 ~~(H)~~ (c) **Presumptive physical presence - component member**
21 **with physical presence.** (I) ~~Commencing March 1, 2010,~~ if A retailer
22 that does not collect Colorado sales tax IS PRESUMED TO BE DOING
23 BUSINESS IN THIS STATE IF SUCH RETAILER is part of a controlled group of
24 corporations, and that controlled group has a component member, OTHER
25 THAN A COMMON CARRIER, that ~~is a retailer with~~ HAS physical presence in
26 this state ~~the retailer that does not collect Colorado sales tax is presumed~~
27 ~~to be doing business in this state.~~ For purposes of this subparagraph (H),

1 ~~"controlled group of corporations" has the same meaning as set forth in~~
2 ~~section 1563 (a) of the federal "Internal Revenue Code of 1986", as~~
3 ~~amended, and "component member" has the same meaning as set forth in~~
4 ~~section 1563 (b) of the federal "Internal Revenue Code of 1986", as~~
5 ~~amended. This presumption may be rebutted by proof that during the~~
6 ~~calendar year in question, the component member that is a retailer with~~
7 ~~physical presence in this state did not engage in any constitutionally~~
8 ~~sufficient solicitation in this state on behalf of the retailer that does not~~
9 ~~collect Colorado sales tax AND SUCH COMPONENT MEMBER WITH~~
10 ~~PHYSICAL PRESENCE:~~

11 (A) SELLS UNDER THE SAME OR A SIMILAR BUSINESS NAME
12 TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT
13 SOLD BY THE RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX;

14 (B) MAINTAINS AN OFFICE, DISTRIBUTION FACILITY, SALESROOM,
15 WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN
16 THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL
17 PROPERTY OR TAXABLE SERVICES SOLD BY THE RETAILER THAT DOES NOT
18 COLLECT COLORADO SALES TAX SUCH RETAILER'S CUSTOMERS;

19 (C) USES TRADEMARKS, SERVICE MARKS, OR TRADE NAMES IN THIS
20 STATE THAT ARE THE SAME OR SUBSTANTIALLY SIMILAR TO THOSE USED
21 BY THE RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX;

22 (D) DELIVERS, INSTALLS, OR ASSEMBLES TANGIBLE PERSONAL
23 PROPERTY IN THIS STATE, OR PERFORMS MAINTENANCE OR REPAIR
24 SERVICES ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH
25 TANGIBLE PERSONAL PROPERTY WAS SOLD TO CUSTOMERS RESIDING IN
26 THIS STATE BY THE RETAILER THAT DOES NOT COLLECT COLORADO SALES
27 TAX;

1 (E) FACILITATES THE DELIVERY OF TANGIBLE PERSONAL PROPERTY
2 TO IN-STATE CUSTOMERS OF THE RETAILER THAT DOES NOT COLLECT
3 COLORADO SALES TAX BY ALLOWING SUCH CUSTOMERS TO PICK UP
4 TANGIBLE PERSONAL PROPERTY SOLD BY SUCH RETAILER AT AN OFFICE,
5 DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR
6 OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE; OR

7 (F) CONDUCTS ANY OTHER ACTIVITIES IN THIS STATE THAT ARE
8 SIGNIFICANTLY ASSOCIATED WITH THE ABILITY OF THE RETAILER THAT
9 DOES NOT COLLECT COLORADO SALES TAX TO ESTABLISH AND MAINTAIN
10 A MARKET IN THIS STATE FOR SALES OF TANGIBLE PERSONAL PROPERTY OR
11 TAXABLE SERVICES.

12 (II) FOR PURPOSES OF THIS PARAGRAPH (c), "CONTROLLED GROUP
13 OF CORPORATIONS" HAS THE SAME MEANING AS SET FORTH IN SECTION
14 1563 (a) OF THE FEDERAL "INTERNAL REVENUE CODE OF 1986", AS
15 AMENDED, AND "COMPONENT MEMBER" HAS THE SAME MEANING AS SET
16 FORTH IN SECTION 1563 (b) OF THE FEDERAL "INTERNAL REVENUE CODE
17 OF 1986", AS AMENDED. "CONTROLLED GROUP OF CORPORATIONS" AND
18 "COMPONENT MEMBER" ALSO INCLUDE ANY ENTITY THAT,
19 NOTWITHSTANDING ITS FORM OF ORGANIZATION, BEARS THE SAME
20 OWNERSHIP RELATIONSHIP TO THE RETAILER AS A CORPORATION THAT
21 WOULD QUALIFY AS A "COMPONENT MEMBER" OF THE SAME "CONTROLLED
22 GROUP OF CORPORATIONS" AS THE RETAILER.

23 (III) THIS PRESUMPTION MAY BE REBUTTED BY PROOF THAT,
24 DURING THE CALENDAR YEAR IN QUESTION, THE COMPONENT MEMBER
25 WITH PHYSICAL PRESENCE DID NOT ENGAGE IN ANY CONSTITUTIONALLY
26 SUFFICIENT SOLICITATION, PROMOTION, OR FACILITATION IN THIS STATE TO
27 ESTABLISH OR MAINTAIN A MARKET IN THIS STATE ON BEHALF OF THE

1 RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX.

2 (d) **Presumptive physical presence - agreement or**
3 **arrangement with a person with physical presence.** (I) A RETAILER
4 THAT DOES NOT COLLECT COLORADO SALES TAX IS PRESUMED TO BE
5 DOING BUSINESS IN THIS STATE IF SUCH RETAILER ENTERS INTO AN
6 AGREEMENT OR ARRANGEMENT WITH A PERSON WHO HAS PHYSICAL
7 PRESENCE IN THIS STATE, OTHER THAN A COMMON CARRIER, FOR THAT
8 PERSON WHO HAS PHYSICAL PRESENCE TO:

9 (A) SELL UNDER THE SAME OR A SIMILAR BUSINESS NAME
10 TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT
11 SOLD BY THE RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX;

12 (B) MAINTAIN AN OFFICE, DISTRIBUTION FACILITY, SALESROOM,
13 WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN
14 THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL
15 PROPERTY OR TAXABLE SERVICES SOLD BY THE RETAILER THAT DOES NOT
16 COLLECT COLORADO SALES TAX TO SUCH RETAILER'S CUSTOMERS;

17 (C) DELIVER, INSTALL, OR ASSEMBLE TANGIBLE PERSONAL
18 PROPERTY IN THIS STATE, OR PERFORM MAINTENANCE OR REPAIR SERVICES
19 ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH TANGIBLE
20 PERSONAL PROPERTY WAS SOLD TO CUSTOMERS RESIDING IN THIS STATE
21 BY THE RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX;

22 (D) FACILITATE THE DELIVERY OF TANGIBLE PERSONAL PROPERTY
23 TO IN-STATE CUSTOMERS OF THE RETAILER THAT DOES NOT COLLECT
24 COLORADO SALES TAX BY ALLOWING SUCH CUSTOMERS TO PICK UP
25 TANGIBLE PERSONAL PROPERTY SOLD BY SUCH RETAILER AT AN OFFICE,
26 DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR
27 OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE; OR

1 (E) CONDUCT ANY OTHER ACTIVITIES IN THIS STATE THAT ARE
2 SIGNIFICANTLY ASSOCIATED WITH THE ABILITY OF THE RETAILER THAT
3 DOES NOT COLLECT COLORADO SALES TAX TO ESTABLISH AND MAINTAIN
4 A MARKET IN THIS STATE FOR SALES OF TANGIBLE PERSONAL PROPERTY OR
5 TAXABLE SERVICES.

6 (II) THIS PRESUMPTION MAY BE REBUTTED BY PROOF THAT,
7 DURING THE CALENDAR YEAR IN QUESTION, THE PERSON WHO HAS
8 PHYSICAL PRESENCE IN THIS STATE DID NOT ENGAGE IN ANY
9 CONSTITUTIONALLY SUFFICIENT SOLICITATION, PROMOTION, OR
10 FACILITATION IN THIS STATE TO ESTABLISH OR MAINTAIN A MARKET IN
11 THIS STATE ON BEHALF OF THE RETAILER THAT DOES NOT COLLECT
12 COLORADO SALES TAX.

13 (e) **Presumptive physical presence - resident of the state refers**
14 **customers to retailer.** (I) EXCEPT AS PROVIDED IN SUBPARAGRAPH (III)
15 OF THIS PARAGRAPH (e), A RETAILER THAT DOES NOT COLLECT COLORADO
16 SALES TAX IS PRESUMED TO BE DOING BUSINESS IN THIS STATE THROUGH
17 AN INDEPENDENT CONTRACTOR OR OTHER REPRESENTATIVE IF SUCH
18 RETAILER ENTERS INTO AN AGREEMENT WITH A RESIDENT OF THIS STATE
19 UNDER WHICH THE RESIDENT, FOR A COMMISSION OR OTHER
20 CONSIDERATION BASED ON COMPLETED SALES, DIRECTLY OR INDIRECTLY
21 REFERS POTENTIAL CUSTOMERS, WHETHER BY A LINK ON AN INTERNET
22 WEB SITE OR OTHERWISE, TO THE RETAILER THAT DOES NOT COLLECT
23 COLORADO SALES TAX, AND IF THE CUMULATIVE GROSS RECEIPTS FROM
24 SALES BY THE RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX
25 TO CUSTOMERS IN THE STATE WHO ARE REFERRED TO SUCH RETAILER BY
26 ALL RESIDENTS WITH THIS TYPE OF AGREEMENT WITH THE RETAILER THAT
27 DOES NOT COLLECT COLORADO SALES TAX IS IN EXCESS OF TEN THOUSAND

1 DOLLARS DURING THE PRECEDING TWELVE MONTH PERIOD.

2 (II) (A) THIS PRESUMPTION MAY BE REBUTTED BY PROOF THAT THE
3 RESIDENT WITH WHOM THE RETAILER THAT DOES NOT COLLECT COLORADO
4 SALES TAX HAS AN AGREEMENT DID NOT ENGAGE IN ANY SOLICITATION IN
5 THE STATE ON BEHALF OF SUCH RETAILER THAT WOULD SATISFY THE
6 NEXUS REQUIREMENT OF THE UNITED STATES CONSTITUTION DURING THE
7 TWELVE MONTH PERIOD IN QUESTION.

8 (B) EVIDENCE TO REBUT THE PRESUMPTION MAY CONSIST OF
9 VERIFIED WRITTEN STATEMENTS FROM ALL RESIDENTS WITH WHOM THE
10 RETAILER THAT DOES NOT COLLECT COLORADO SALES TAX HAS AN
11 AGREEMENT STATING THAT SUCH RESIDENTS DID NOT ENGAGE IN ANY
12 SOLICITATION OR OTHER ACTIVITIES IN THIS STATE ON BEHALF OF SUCH
13 RETAILER DURING THE TWELVE MONTH PERIOD IN QUESTION IF THE
14 STATEMENTS ARE PROVIDED AND OBTAINED IN GOOD FAITH.

15 (III) AN AGREEMENT UNDER WHICH A RETAILER THAT DOES NOT
16 COLLECT COLORADO SALES TAX PURCHASES ADVERTISEMENTS FROM A
17 RESIDENT OF THIS STATE TO BE DELIVERED ON TELEVISION, RADIO, IN
18 PRINT, ON THE INTERNET, OR BY ANY OTHER MEDIUM, IS NOT AN
19 AGREEMENT DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e),
20 UNLESS THE ADVERTISEMENT REVENUE PAID TO THE RESIDENT OF THIS
21 STATE CONSISTS OF COMMISSIONS OR OTHER CONSIDERATION THAT IS
22 BASED UPON COMPLETED SALES.

23 (f) THIS SUBSECTION (3) AFFECTS THE IMPOSITION, APPLICATION,
24 OR COLLECTION OF SALES TAXES ONLY.

25 (g) FOR PURPOSES OF THIS SUBSECTION (3), THE TERM "SALES TAX"
26 INCLUDES THE TERM "USE TAX".

27 **SECTION 3.** In Colorado Revised Statutes, 39-26-103, **add** (3.5)

1 as follows:

2 **39-26-103. Licenses - fee - revocation.** (3.5) A PERSON MAY
3 ONLY SELL, LEASE, OR DELIVER TANGIBLE PERSONAL PROPERTY OR
4 TAXABLE SERVICES TO THE STATE, EITHER THROUGH THE "PROCUREMENT
5 CODE", ARTICLES 101 TO 112 OF TITLE 24, C.R.S., OR OTHERWISE, IF SUCH
6 PERSON, OR ANY COMPONENT MEMBER OF A CONTROLLED GROUP OF
7 CORPORATIONS AS DEFINED IN SECTION 39-26-102 (3) (c) (II) THAT
8 INCLUDES THAT PERSON, OBTAINS A RETAIL SALES TAX LICENSE AS
9 SPECIFIED IN THIS SECTION, AND SUCH PERSON IS RESPONSIBLE FOR THE
10 COLLECTION OF SALES TAXES ON ALL ITS SALES, LEASES, OR DELIVERIES OF
11 TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES IN THIS STATE AS
12 SPECIFIED IN SECTION 39-26-105.

13 **SECTION 4. Severability.** If any provision of this act or the
14 application thereof to any person or circumstance is held invalid, such
15 invalidity does not affect other provisions or applications of the act that
16 can be given effect without the invalid provision or application, and to
17 this end the provisions of this act are declared to be severable.

18 **SECTION 5. Effective date.** This act takes effect July 1, 2014.

19 **SECTION 6. Safety clause.** The general assembly hereby finds,
20 determines, and declares that this act is necessary for the immediate
21 preservation of the public peace, health, and safety.