

Second Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

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
13 SUBSECTION (3) AFFECTS THE IMPOSITION, APPLICATION, OR COLLECTION

1 OF SALES AND USE TAXES ONLY. "DOING BUSINESS IN THIS STATE"
2 includes, but shall not be limited to, the following acts or methods of
3 transacting business:

4 (a) The maintaining within this state, directly or indirectly or by
5 a subsidiary, of an office, ~~distributing house~~ DISTRIBUTION FACILITY,
6 salesroom, ~~or house~~, warehouse, STORAGE PLACE, or other SIMILAR place
7 of business, INCLUDING THE EMPLOYMENT OF A RESIDENT OF THIS STATE
8 WHO WORKS FROM A HOME OFFICE IN THIS STATE.

9 (b) ~~(H)~~ The soliciting, either by direct representatives, indirect
10 representatives, manufacturers' agents, or by distribution of catalogues or
11 other 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, of business from persons residing in this state and by reason
14 thereof receiving orders from, or selling or leasing tangible personal
15 property to, such persons residing in this state for use, consumption,
16 distribution, and storage for use or consumption in this state.

17 (c) A REMOTE SELLER DOING BUSINESS IN THIS STATE WITH
18 RESPECT TO ANY REMOTE SALE SUBJECT TO TAX IN ACCORDANCE WITH
19 SECTION 39-26-104 (2).

20 ~~(H)~~ (d) **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~~ A PERSON IS PRESUMED TO BE
23 DOING BUSINESS IN THIS STATE IF SUCH PERSON is part of a controlled
24 group of corporations, and that controlled group has a component
25 member, OTHER THAN A COMMON CARRIER ACTING IN ITS CAPACITY AS
26 SUCH, that is a retailer with HAS physical presence in this state ~~the retailer~~
27 ~~that does not collect Colorado sales tax is presumed to be doing business~~

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

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 PERSON AGAINST WHOM
18 THE PRESUMPTION IS ASSERTED TO SUCH PERSON'S IN-STATE 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 PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

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 IS SOLD TO IN-STATE CUSTOMERS BY THE
26 PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED; OR

27 (E) FACILITATES THE DELIVERY OF TANGIBLE PERSONAL PROPERTY

1 TO IN-STATE CUSTOMERS OF THE PERSON AGAINST WHOM THE
2 PRESUMPTION IS ASSERTED BY ALLOWING SUCH CUSTOMERS TO PICK UP
3 TANGIBLE PERSONAL PROPERTY SOLD BY SUCH PERSON AT AN OFFICE,
4 DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR
5 OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE.

6 (II) FOR PURPOSES OF THIS PARAGRAPH (d), "CONTROLLED GROUP
7 OF CORPORATIONS" HAS THE SAME MEANING AS SET FORTH IN SECTION
8 1563 (a) OF THE FEDERAL "INTERNAL REVENUE CODE OF 1986", AS
9 AMENDED, AND "COMPONENT MEMBER" HAS THE SAME MEANING AS SET
10 FORTH IN SECTION 1563 (b) OF THE FEDERAL "INTERNAL REVENUE CODE
11 OF 1986", AS AMENDED. "CONTROLLED GROUP OF CORPORATIONS" AND
12 "COMPONENT MEMBER" ALSO INCLUDE ANY ENTITY THAT,
13 NOTWITHSTANDING ITS FORM OF ORGANIZATION, BEARS THE SAME
14 OWNERSHIP RELATIONSHIP TO THE PERSON AGAINST WHOM THE
15 PRESUMPTION IS ASSERTED AS A CORPORATION THAT WOULD QUALIFY AS
16 A COMPONENT MEMBER OF THE SAME CONTROLLED GROUP OF
17 CORPORATIONS AS THE PERSON AGAINST WHOM THE PRESUMPTION IS
18 ASSERTED.

19 (III) THE PRESUMPTION SET FORTH IN SUBPARAGRAPH (I) OF THIS
20 PARAGRAPH (d) MAY BE REBUTTED BY PROOF THAT, DURING THE
21 CALENDAR YEAR IN QUESTION, THE COMPONENT MEMBER WITH PHYSICAL
22 PRESENCE DID NOT ENGAGE IN ANY ACTIVITIES IN THIS STATE THAT ARE
23 SUFFICIENT UNDER UNITED STATES CONSTITUTIONAL STANDARDS TO
24 ESTABLISH NEXUS IN THIS STATE ON BEHALF OF THE PERSON AGAINST
25 WHOM THE PRESUMPTION IS ASSERTED.

26 (e) **Presumptive physical presence - agreement or**
27 **arrangement with a person with physical presence. (I) EXCEPT AS**

1 PROVIDED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH (e), A PERSON IS
2 PRESUMED TO BE DOING BUSINESS IN THIS STATE IF SUCH PERSON AGAINST
3 WHOM THE PRESUMPTION IS ASSERTED ENTERS INTO AN AGREEMENT OR
4 ARRANGEMENT WITH A PERSON WHO HAS PHYSICAL PRESENCE IN THIS
5 STATE, OTHER THAN A COMMON CARRIER ACTING IN ITS CAPACITY AS
6 SUCH, FOR THAT PERSON WHO HAS PHYSICAL PRESENCE TO:

7 (A) SELL UNDER THE SAME OR A SIMILAR BUSINESS NAME
8 TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT
9 SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

10 (B) MAINTAIN AN OFFICE, DISTRIBUTION FACILITY, SALESROOM,
11 WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN
12 THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL
13 PROPERTY OR TAXABLE SERVICES SOLD BY THE PERSON AGAINST WHOM
14 THE PRESUMPTION IS ASSERTED TO SUCH PERSON'S IN-STATE CUSTOMERS;

15 (C) DELIVER, INSTALL, OR ASSEMBLE TANGIBLE PERSONAL
16 PROPERTY IN THIS STATE, OR PERFORM MAINTENANCE OR REPAIR SERVICES
17 ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH TANGIBLE
18 PERSONAL PROPERTY IS SOLD TO IN-STATE CUSTOMERS BY THE PERSON
19 AGAINST WHOM THE PRESUMPTION IS ASSERTED; OR

20 (D) FACILITATE THE DELIVERY OF TANGIBLE PERSONAL PROPERTY
21 TO IN-STATE CUSTOMERS OF THE PERSON AGAINST WHOM THE
22 PRESUMPTION IS ASSERTED BY ALLOWING SUCH CUSTOMERS TO PICK UP
23 TANGIBLE PERSONAL PROPERTY SOLD BY SUCH PERSON AT AN OFFICE,
24 DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR
25 OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE.

26 (II) THE PRESUMPTION SET FORTH IN SUBPARAGRAPH (I) OF THIS
27 PARAGRAPH (e) MAY BE REBUTTED BY PROOF THAT, DURING THE

1 CALENDAR YEAR IN QUESTION, THE PERSON WHO HAS PHYSICAL PRESENCE
2 IN THIS STATE DID NOT ENGAGE IN ANY ACTIVITIES IN THIS STATE THAT
3 ARE SUFFICIENT UNDER UNITED STATES CONSTITUTIONAL STANDARDS TO
4 ESTABLISH NEXUS IN THIS STATE ON BEHALF OF THE PERSON AGAINST
5 WHOM THE PRESUMPTION IS ASSERTED.

6 (III) **Activity to which presumption does not apply.** THE
7 PRESUMPTION ESTABLISHED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e)
8 DOES NOT APPLY TO THE FOLLOWING AGREEMENTS OR ARRANGEMENTS:

9 (A) **Advertising.** AN AGREEMENT OR ARRANGEMENT UNDER
10 WHICH A PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE
11 PURCHASES ADVERTISEMENTS FROM A PERSON TO BE DELIVERED IN THIS
12 STATE ON TELEVISION, RADIO, NEWSPAPERS, MAGAZINES, THE INTERNET,
13 OR ANY OTHER MASS-MARKET MEDIUM;

14 (B) **Affiliate marketing agreements.** AN AGREEMENT OR
15 ARRANGEMENT BETWEEN AN IN-STATE INDEPENDENT CONTRACTOR OR
16 OTHER REPRESENTATIVE AND A PERSON WITHOUT DIRECT IN-STATE
17 PHYSICAL PRESENCE UNDER WHICH SUCH INDEPENDENT CONTRACTOR OR
18 OTHER REPRESENTATIVE, FOR A COST PER ACTION, INCLUDING BUT NOT
19 LIMITED TO A COMMISSION OR OTHER CONSIDERATION BASED ON
20 COMPLETED SALES, DIRECTLY OR INDIRECTLY REFERS POTENTIAL
21 CUSTOMERS THROUGH INTERNET PROMOTIONAL METHODS TO THE PERSON
22 WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE; OR

23 (C) **Small businesses.** AN AGREEMENT OR ARRANGEMENT
24 BETWEEN AN IN-STATE PERSON AND A PERSON WITHOUT DIRECT IN-STATE
25 PHYSICAL PRESENCE IF THE CUMULATIVE GROSS RECEIPTS FROM SALES BY
26 THE PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE TO IN-STATE
27 CUSTOMERS IN THE PRIOR CALENDAR YEAR IS LESS THAN FIFTY THOUSAND

1 DOLLARS.

2 **SECTION 3. Severability.** If any provision of this act or the
3 application thereof to any person or circumstance is held invalid, such
4 invalidity does not affect other provisions or applications of the act that
5 can be given effect without the invalid provision or application, and to
6 this end the provisions of this act are declared to be severable.

7 **SECTION 4. Effective date.** This act takes effect July 1, 2014.

8 **SECTION 5. Safety clause.** The general assembly hereby finds,
9 determines, and declares that this act is necessary for the immediate
10 preservation of the public peace, health, and safety.