

1 State of Arkansas As Engrossed: H1/29/19 H1/31/19

2 92nd General Assembly

# A Bill

3 Regular Session, 2019

HOUSE BILL 1002

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5 By: Representative D. Douglas

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## For An Act To Be Entitled

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AN ACT TO AMEND THE LAW CONCERNING SALES AND USE TAX;

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TO REQUIRE CERTAIN OUT-OF-STATE SELLERS TO COLLECT

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AND REMIT ARKANSAS SALES AND USE TAX; TO REPEAL THE

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SALES AND USE TAX LAW ON SELLERS AND AFFILIATED

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PERSONS; AND FOR OTHER PURPOSES.

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## Subtitle

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TO REQUIRE CERTAIN OUT-OF-STATE SELLERS

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TO COLLECT AND REMIT ARKANSAS SALES AND

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USE TAX.

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21 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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23 SECTION 1. DO NOT CODIFY. Legislative findings.

24 The General Assembly finds that:

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(1) The inability to effectively collect any Arkansas sales or use tax from remote sellers who deliver tangible personal property, other property subject to Arkansas sales and use tax, or services directly into the state is seriously eroding the sales and use tax base of this state, causing revenue losses and imminent harm to the state through the loss of critical funding for state and local services;

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(2) The harm from the loss of revenue is especially serious in Arkansas because sales and use tax revenues are essential in funding state and local services;

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(3) Despite the fact that a use tax is owed on tangible personal property, certain other property, or services delivered for use in this state, many remote sellers actively market sales as tax-free or as

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1 transactions not subject to sales and use tax;

2 (4) The structural advantages of remote sellers, including the  
3 absence of point-of-sale tax collection and the general growth of online  
4 retail, make clear that further erosion of this state's sales and use tax  
5 base is likely to occur in the near future;

6 (5) Remote sellers that make a substantial number of deliveries  
7 into Arkansas or collect large gross revenues from Arkansas benefit  
8 extensively from this state's market, economy, and infrastructure;

9 (6) In contrast with the increasing harm caused to the state by  
10 the exemption of remote sellers from sales and use tax collection duties, the  
11 costs of such collection have decreased because advanced computing and  
12 software options have made it neither difficult nor burdensome for remote  
13 sellers to collect and remit sales and use taxes associated with sales of  
14 goods and services to residents of this state; and

15 (7) The United States Supreme Court recently upheld the ability  
16 of states to compel out-of-state sellers with no physical presence in the  
17 state to collect state sales and use taxes.

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19 *SECTION 2. Arkansas Code § 26-52-103, concerning the definitions used*  
20 *under the Arkansas Gross Receipts Act of 1941, is amended to add additional*  
21 *subdivisions to read as follows:*

22 (35)(A) "Forum" means a physical place or electronic location  
23 where sales occur.

24 (B) "Forum" includes without limitation a:

25 (i) Store;

26 (ii) Booth;

27 (iii) Publicly accessible internet website;

28 (iv) Catalog; and

29 (v) Place or location similar to the places and  
30 locations listed in subdivisions (35)(B)(i)-(iv);

31 (36) "Marketplace facilitator" means a person that facilitates  
32 the sale of tangible personal property, taxable services, a digital code, or  
33 specified digital products by:

34 (A) Listing or advertising tangible personal property,  
35 taxable services, a digital code, or specified digital products for sale in a  
36 forum; and

1 (B) Either directly or indirectly through an agreement or  
2 arrangement with a third party, collecting payment from a purchaser and  
3 transmitting the payment to the person selling the tangible personal  
4 property, taxable services, a digital code, or specified digital products,  
5 regardless of whether the person receives compensation or other consideration  
6 in exchange for its services in collecting and transmitting the payment;

7 (37) "Marketplace seller" means a person that has an agreement  
8 with a marketplace facilitator under which the marketplace facilitator  
9 facilitates sales for the person;

10 (38) "Referral" means the transfer by a referrer of a potential  
11 purchaser to a person that advertises or lists tangible personal property,  
12 taxable services, a digital code, or specified digital products for sale on  
13 the referrer's platform;

14 (39)(A) "Referrer" means a person, other than a person engaging  
15 in the business of printing or publishing a newspaper, that, under an  
16 agreement or arrangement with a marketplace seller or remote seller, does the  
17 following:

18 (i) Agrees to list or advertise for sale tangible  
19 personal property, taxable services, a digital code, or specified digital  
20 products of the marketplace seller or remote seller via a physical or  
21 electronic medium;

22 (ii) Receives consideration from the marketplace  
23 seller or remote seller from the sale offered in the listing or  
24 advertisement;

25 (iii) Transfers by telecommunications, internet  
26 link, or other means, a purchaser to a marketplace seller or remote seller to  
27 complete a sale; and

28 (iv) Does not collect a receipt from the purchaser  
29 for the sale.

30 (B) "Referrer" does not include a person that:

31 (i) Provides internet advertising services; and

32 (ii) Does not:

33 (a) Provide the marketplace seller's or the  
34 remote seller's shipping terms; or

35 (b) Advertise whether a marketplace seller or  
36 remote seller collects sales or use tax; and

1           (40) "Remote seller" means a person, other than a marketplace  
2 facilitator, that does not maintain a place of business in this state and  
3 that through a forum sells tangible personal property, taxable services, a  
4 digital code, or specified digital products, the sale or use of which is  
5 subject to the tax imposed by this chapter or the Arkansas Compensating Tax  
6 Act of 1949, § 26-53-101 et seq.

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8           SECTION 3. Arkansas Code § 26-52-110 is repealed.

9           ~~26-52-110. Sellers and affiliated persons—Referral agreements—~~  
10 ~~Notice required—Definitions.~~

11           ~~(a) As used in this section:~~

12                 ~~(1) "Affiliated person" means:~~

13                         ~~(A) A person that is a member of the same controlled group~~  
14 ~~of corporations as the seller; or~~

15                         ~~(B) Another entity that, notwithstanding its form of~~  
16 ~~organization, bears the same ownership relationship to the seller as a~~  
17 ~~corporation that is a member of the same controlled group of corporations;~~  
18 ~~and~~

19                 ~~(2) "Controlled group of corporations" means the same as in 26~~  
20 ~~U.S.C. § 1563(a), as it existed on January 1, 2011.~~

21           ~~(b) A seller is presumed to be engaged in the business of selling~~  
22 ~~tangible personal property, specified digital products, a digital code, or~~  
23 ~~taxable services for use in the state if an affiliated person is subject to~~  
24 ~~the sales and use tax jurisdiction of the state and the:~~

25                         ~~(1) Seller sells a similar line of products as the affiliated~~  
26 ~~person and sells the products under the same business name or a similar~~  
27 ~~business name;~~

28                         ~~(2) Affiliated person uses his, her, or its in-state employees~~  
29 ~~or in-state facilities to advertise, promote, or facilitate sales by the~~  
30 ~~seller to consumers;~~

31                         ~~(3) Affiliated person maintains an office, distribution~~  
32 ~~facility, warehouse or storage place, or similar place of business to~~  
33 ~~facilitate the delivery of property, specified digital products, a digital~~  
34 ~~code, or services sold by the seller to the seller's business;~~

35                         ~~(4) Affiliated person uses trademarks, service marks, or trade~~  
36 ~~names in the state that are the same or substantially similar to those used~~

1 ~~by the seller; or~~

2 ~~(5) Affiliated person delivers, installs, assembles, or performs~~  
3 ~~maintenance services for the seller's purchasers within the state.~~

4 ~~(c) The presumption in subsection (b) of this section may be rebutted~~  
5 ~~by demonstrating that the affiliated person's activities in the state are not~~  
6 ~~significantly associated with the seller's ability to establish or maintain a~~  
7 ~~market in the state for the seller's sales.~~

8 ~~(d)(1) If there is not an affiliated person with respect to a seller~~  
9 ~~in the state, the seller is presumed to be engaged in the business of selling~~  
10 ~~tangible personal property, specified digital products, a digital code, or~~  
11 ~~taxable services for use in the state if the seller enters into an agreement~~  
12 ~~with one (1) or more residents of the state under which the residents, for a~~  
13 ~~commission or other consideration, directly or indirectly refer potential~~  
14 ~~purchasers, whether by a link on an Internet website or otherwise, to the~~  
15 ~~seller.~~

16 ~~(2) However, subdivision (d)(1) of this section applies only if~~  
17 ~~the cumulative gross receipts from sales by the seller to purchasers in the~~  
18 ~~state who are referred to the seller by all residents according to the type~~  
19 ~~of agreement described in subdivision (d)(1) of this section exceed ten~~  
20 ~~thousand dollars (\$10,000) during the preceding twelve (12) months.~~

21 ~~(e)(1) The presumption in subsection (d) of this section may be~~  
22 ~~rebutted by submitting proof that the residents with whom the seller has an~~  
23 ~~agreement did not engage in any activity within the state that was~~  
24 ~~significantly associated with the seller's ability to establish or maintain~~  
25 ~~the seller's market in the state during the preceding twelve (12) months.~~

26 ~~(2) Proof provided under subdivision (e)(1) of this section may~~  
27 ~~consist of written statements from all of the residents with whom the seller~~  
28 ~~has an agreement stating that they did not engage in any solicitation in the~~  
29 ~~state on behalf of the seller during the preceding twelve (12) months if the~~  
30 ~~statements were provided and obtained in good faith.~~

31 ~~(f) The Director of the Department of Finance and Administration shall~~  
32 ~~promulgate rules to implement this section.~~

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34 *SECTION 4. Arkansas Code Title 26, Chapter 52, Subchapter 1, is*  
35 *amended to add an additional section to read as follows:*

36 *26-52-111. Remote sellers and marketplace facilitators.*

1 (a) A remote seller or a marketplace facilitator that sells or  
2 facilitates the sale of tangible personal property, taxable services, digital  
3 codes, or specified digital products for delivery into Arkansas shall collect  
4 and remit the applicable sales tax levied under this chapter or the  
5 applicable compensating use tax levied under the Arkansas Compensating Tax  
6 Act of 1949, § 26-53-101 et seq., if in the previous calendar year or in the  
7 current calendar year, the remote seller or the marketplace facilitator had  
8 aggregate sales of tangible personal property, taxable services, digital  
9 codes, or specified digital products subject to Arkansas sales or use tax  
10 within this state or delivered to locations within this state exceeding:

11 (1) One hundred thousand dollars (\$100,000); or

12 (2) Two hundred (200) transactions.

13 (b) A sale made through a marketplace facilitator:

14 (1) Is a sale of the marketplace facilitator for purposes of  
15 determining whether a person satisfies the criteria stated in subsection (a)  
16 of this section; and

17 (2) Is not a sale of the marketplace seller for purposes of  
18 determining whether a person satisfies the criteria stated in subsection (a)  
19 of this section.

20 (c) The requirement to collect and remit sales or use tax under this  
21 section shall not be applied retroactively.

22 (d) This section does not affect or impair the:

23 (1) Obligation of a purchaser in this state to remit use tax on  
24 any applicable transaction in which the seller does not collect and remit  
25 sales or use tax;

26 (2) Obligation of a seller, when the seller is transacting  
27 business in the state and a point-of-sale tax is collected on the  
28 transaction, to remit all state and local taxes on any applicable transaction  
29 in which the seller provides goods or furnishes services within the state; or

30 (3) Ability of a state entity to immediately collect the taxes  
31 described in subdivision (d)(2) of this section.

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33 SECTION 5. EFFECTIVE DATE. Sections 1-4 of this act are effective on  
34 the first day of the calendar quarter following the effective date of this  
35 act.

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*/s/D. Douglas*

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