

Internet Sales Tax Amendment Act of 2018, Bill 22-914

Before the Committee on Finance and Revenue

The Honorable Jack Evans, Chairman

**October 10, 2018, 10:00 AM
Room 120, John A. Wilson Building**



**Testimony of
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Office of Tax and Revenue**

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Chief Financial Officer
Government of the District of Columbia**

Good morning Chairman Evans and members of the Committee on Finance and Revenue. My name is Jessica Brown, Assistant General Counsel in the Office of Tax and Revenue. I am pleased to present testimony today on Bill 22-914, the “Internet Sales Tax Amendment Act of 2018” (the “Bill”).

As introduced, the Bill proposes to modernize the District’s sales and use tax laws as a result of the U.S. Supreme Court decision in *South Dakota v. Wayfair*. Prior to *Wayfair*, the Supreme Court had limited the ability of states and the District of Columbia (“District”) to impose sales tax collection and reporting requirements to retailers with a physical presence in the jurisdiction. Current District tax law reflects this “physical presence” requirement. The *Wayfair* decision overturned those prior Supreme Court decisions and upheld a South Dakota law that imposed sales tax collection and reporting requirements on out-of-state retailers. Under the *Wayfair* decision, the physical presence requirement for collecting and remitting sales tax was removed.

The Bill expands the District’s sales tax collection requirements to retailers who do not have physical presence in the District. The Bill adopts what is referred to a “small seller exemption” to this sales tax collection requirement, exempting out-of-state retailers whose gross receipts from sales to the District are \$100,000 or less or who make 200 or fewer sales in the District in a 12-month period. The Bill

also expands the sales tax to apply to sales of “products transferred electronically” in the District.

The Bill also seeks to designate the revenue from the sales tax amendments for the purpose of reducing the commercial property tax rate on properties whose assessed value is greater than \$10 million from \$1.89 for each \$100 of assessed value, to \$1.85 for each \$100 of assessed value. The Office of Revenue Analysis estimates that such property tax reduction would cost approximately \$32.9 million in fiscal year 2019.

The Office of Tax and Revenue has identified certain administrability and legal concerns with some of the provisions of the Bill, and has drafted recommended changes for consideration of the Committee that are attached to this testimony. Generally, we recommend the Bill be drafted to accord with the guidance provided in the *Wayfair* decision to avoid potential legal challenges. We offer the following specific suggestions to align the Bill with the procedures outlined in *Wayfair*:

First, the Bill creates a new standalone section for the imposition of collection and reporting requirements. The Bill should incorporate the new requirements into the existing sales tax framework to remain in compliance with the *Wayfair* decision.

Second, the Bill does not define which “products delivered electronically” are subject to the sales tax or provide taxpayers clarity regarding the taxability of such digital products.

Third, the Bill does not address the compliance requirements of online marketplace sellers who connect sellers and buyers and handle sales transactions on behalf of buyers.

Fourth, the Bill lacks a certain prospective effective date for application of the sales tax changes, as required by the *Wayfair* decision.

And fifth, the Bill contemplates a direct dedication of revenues from the sales tax changes to the commercial property tax rate reduction. The increased revenues from these sales tax changes cannot be directly separated or tracked by the Office of Tax and Revenue. Retailers affected by the Bill will register and pay sales tax in the same manner and on the same form as all other retailers, and it is not possible to directly identify or track those taxpayers without physical presence in the District. Accordingly, a direct dedication of revenues to reduce property tax rates cannot be administered.

The Office of Tax and Revenue’s proposed amendment to the Bill would expand the sales tax definition of “vendor” to include retailers without a physical presence in the District and maintains the same small seller exemptions included in the Bill. The amendment would expand the definition of “retailer” to include

“marketplace facilitators” (i.e., third party sales sites) and “marketplace sellers” (third parties who sell on third party sales sites) to make clear that such marketplace facilitators and sellers are required to collect and remit District sales tax.

Further, the amendment would update the existing definition of “retail sale” to include “digital products” to clarify the Bill’s imposition of sales tax on “products delivered electronically”. Conforming changes would also be made to the gross receipts tax. The amendment also includes an effective date of January 1, 2019 for all sales tax changes in order to provide adequate notice to taxpayers, as required by the *Wayfair* decision.

The amendment also includes a provision that would reduce the commercial property tax rates on properties whose assessed value is greater than \$10 million for the tax year beginning October 1, 2019 and again for the tax year beginning October 1, 2020 to the extent possible given the 2019 and 2020 quarterly fiscal estimates of revenue generated by this Bill. The Office of Revenue Analysis estimates the bill would generate approximately \$20.3 million of revenue annually, which would be sufficient to reduce the commercial property tax rate on properties valued at greater than \$10 million to \$1.87 for the property tax year beginning October 1, 2019.

OTR’s amendment also includes minor administrative changes to conform existing tax provisions to the changes implemented by the Bill.

Thank you, Chairman Evans, for the opportunity to comment on this Bill. I would be happy to answer any questions at this time.

1
2 Chairman Phil Mendelson

Councilmember Jack Evans

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6 A BILL
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9 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
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12 To amend Chapter 8 of Title 47 of the District of Columbia Official Code to provide for triggers to
13 lower the commercial property tax rates for real property with an assessed value of greater
14 than \$10 million; to amend Chapter 20 of Title 47 of the District of Columbia Official
15 Code to clarify that persons and retailers without a physical presence in the District are
16 vendors required to collect and pay sales tax on retail sales; to limit the ability of the
17 District to collect sales taxes from vendors without a physical presence in the District; to
18 expand the definition of retailer to include marketplace facilitators and marketplace sellers;
19 to clarify that the sale of electronically delivered products is a retail sale subject to sales
20 tax; to amend Chapter 22 of Title 47 of the District of Columbia Official Code to make
21 conforming changes to the use tax regarding electronically delivered products; to amend
22 Chapter 25 of Title 47 of the District of Columbia Official Code to clarify that
23 electronically delivered products subject to sales or use tax are not also subject to the gross
24 receipts tax; and to repeal the Internet Sales Tax, Homelessness Prevention, and WMATA
25 Momentum Fund Establishment Act of 2013.
26

27 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
28 act may be cited as the “Property Tax Relief and Remote Vendor Sales Tax Clarification
29 Amendment Act of 2018”.

30 Sec. 2. D.C. Code § 47-812(b-9)(2) is amended by adding new subparagraphs (D) and
31 (E) to read as follows:

32 “(D)(i) Notwithstanding subparagraph (C)(iii) of this paragraph, for the tax year
33 beginning October 1, 2019 and each tax year thereafter, the recurring annual revenue attributable
34 to the Property Tax Relief and Remote Vendor Sales Tax Clarification Amendment Act of 2018
35 (Bill 22-0XXX) as certified by the Chief Financial Officer in the quarterly estimate issued in

36 February 2019 shall, to the extent total recurring annual revenue is in excess of that required for
37 the financial plan for fiscal year 2019 as required by D.C. Code § 1-204.24d, reduce the property
38 tax rate under subparagraph (C)(iii) of this paragraph, as determined at the time of such quarterly
39 revenue estimate, to the lowest tax rate rounded up to the nearest penny per \$100 of assessed
40 value that is no less than \$1.85 per \$100 of assessed value.

41 (ii) If the tax rate calculated under subparagraph (D)(i) of this paragraph
42 remains greater than \$1.85 per \$100 of assessed value, the rate shall be further reduced as
43 provided under subparagraph (E) of this paragraph.

44 “(E)(i) Notwithstanding subparagraphs (C)(iii) and (D) of this paragraph, for the
45 tax year beginning October 1, 2020 and each tax year thereafter, the recurring annual revenue
46 attributable to the Property Tax Relief and Remote Vendor Sales Tax Clarification Amendment
47 Act of 2018 (Bill 22-0XXX) as certified by the Chief Financial Officer in the quarterly estimate
48 issued in February 2020 shall, to the extent total recurring annual revenue is in excess of that
49 required for the financial plan for fiscal year 2020 as required by D.C. Code § 1-204.24d, reduce
50 the property tax rate under subparagraph (D) of this paragraph, as determined at the time of such
51 quarterly revenue estimate, to the lowest tax rate rounded up to the nearest penny per \$100 of
52 assessed value that is no less than \$1.85 per \$100 of assessed value.

53 “(ii) This subparagraph shall not be effective unless its provisions
54 reduce the tax rate below that amount set pursuant to subparagraph (D) of this paragraph.”.

55 Sec. 3. Chapter 20 of Title 47 of the District of Columbia Official Code is amended as
56 follows:

57 (a) Section 47-2001 is amended as follows:

58 (1) A new subsection (d-1) is added to read as follows:

59 “(d-1) (1) “Digital goods” means “digital audiovisual works,” “digital audio works,”
60 “digital books,” “digital codes,” “digital applications and games,” and any other otherwise
61 taxable tangible personal property electronically or digitally delivered, whether electronically or
62 digitally delivered, streamed or accessed and whether purchased singly, by subscription or in any
63 other manner, including maintenance, updates and support and further defined as follows:

64 “(A) “Digital audiovisual works” means a series of related images that,
65 when shown in succession, impart an impression of motion, together with accompanying sounds.
66 “Digital audiovisual works” includes motion pictures, musical, videos, news and entertainment
67 programs, and live events.

68 “(B) “Digital audio works” means works that result from the fixation of
69 a series of musical, spoken, or other sounds, that are transferred electronically, including
70 prerecorded or live songs, music, readings of books or other written materials, speeches,
71 ringtones, or other sound recording.

72 “(C) “Digital books” means works that are generally recognized in the
73 ordinary and usual sense as “books” that are transferred electronically, including works of
74 fiction, nonfiction, and short stories.

75 “(D) “Digital code” means a code that provides the person who holds
76 the code a right to obtain an additional digital good, a “digital audiovisual work,” “digital audio
77 work”, or “digital book” and that may be obtained by any means, including tangible forms and
78 electronic mail, regardless of whether the code is designated as song code, video code, or book
79 code. “Digital code” includes codes used to access or obtain any specified digital goods, or any
80 additional digital goods that have been previously purchased, and promotion cards or codes that
81 are purchased by a retailer or other business entity or use by the retailer’s or entity’s customers.

82 “(E) “Digital applications and games” mean any application or game,
83 including add-ons or additional content that can be used by a computer, mobile device, or tablet
84 notwithstanding the function performed.”.

85 “(2) Digital goods shall not include cable television service, satellite relay
86 television service, or any and all other distribution of television, video, or radio service
87 subject to tax under § 47–2501.01, unless expressly included in the definition of digital
88 goods under paragraph (1) of this subsection.

89 (2) New subsections (h-1a), (h-1b) and (h-1c) are added to read as follows:

90 “(h-1a) “Marketplace” means a physical or electronic place, including, but not limited to,
91 a store, a booth, an internet web site, a catalogue or a dedicated sales software application, where
92 retail sales, as defined in subsection (n) of this section, occur.

93 “(h-1b) “Marketplace facilitator” means any person who provides a marketplace that lists,
94 advertises, stores or processes orders for retail sales subject to tax under this chapter for sale by
95 such marketplace sellers, and directly or indirectly collects payment from a purchaser and remits
96 payment to a marketplace seller.

97 “(h-1c) “Marketplace seller” means any person that makes retail sales through a
98 marketplace operated by a marketplace facilitator.”.

99 (3) Subsection (h-2) is repealed.

100 (4) Subsection (l) is amended as follows:

101 (A) Paragraph (2) is amended by striking the phrase “; and” and inserting
102 “;” in its place.

103 (B) Paragraph (3) is amended by striking the phrase “consumption.” and
104 inserting the phrase “consumption; and” in its place; and

105 (C) New paragraphs (4) and (5) are added to read as follows:
106 “(4) Every marketplace facilitator; and
107 “(5) Every marketplace seller.”
108 (5) Subsection (n) is amended as follows:
109 (A) The lead in language to paragraph (1) is amended by striking the phrase
110 “by a nexus-vendor”.
111 (B) A new subparagraph(1)(AB) is added to read as follows:
112 “(AB) The sale of or charges for digital goods.
113 (C) Subparagraph(2)(C) is amended by striking the phrase “and is not sold
114 by a nexus-vendor”.
115 (D) Subparagraph(2)(F) is amended by adding an additional sub-
116 subparagraph (iv) to read as follows:
117 “(2)(F)(iv) “Internet access service” shall not include digital goods as defined in §
118 47-2001(d-1)(1).”
119 (6) Subsection (w) is amended as follows:
120 (A) The existing text is designated as paragraph (1).
121 (B) The new paragraph (1) is amended by striking the phrase “, including a
122 nexus vendor,”.
123 (C) A new paragraph (2) is added to read as follows:
124 “(2) The term vendor shall include any person or retailer who does not have a
125 physical presence in the District, provided the person or retailer meets either of the
126 following criteria in the previous calendar year or the current calendar year:

127 “(A) The person or retailer’s gross receipts from all retail sales delivered
128 into the District exceeds one hundred thousand dollars; or

129 “(B) The person or retailer made two hundred or more separate retail sales
130 delivered in the District.”.

131 Sec. 4. Chapter 22 of Title 47 of the District of Columbia Official Code is amended as
132 follows:

133 (a) Section 47-2201(a)(1) is amended by adding a new subparagraph (R) to read as follows:

134 “(R) The sale of or charges for digital goods as defined in
135 § 47-2001(d-1).”.

136 Sec. 5. Chapter 25 of Title 47 of the District of Columbia Official Code is amended as
137 follows:

138 (a) Section 47-2501.01(a) is amended to read as follows:

139 “(a) “Before the 21st day of each calendar month, each company that sells or charges for
140 cable television service, satellite relay television service, and any and all other distribution of
141 television, video, or radio service (other than sales of digital goods as defined in § 47-2001(d-1)
142 and subject to tax pursuant to § 47-2001(n)(1)(AB) and/or § 47-2201(a)(1)(R)) with or without
143 the use of wires provided to subscribers or paying customers, whether for basic service, ancillary
144 service, or other special service, and any other charges related to providing the services within
145 the District of Columbia, including, but not limited to, rental of signal receiving equipment,
146 shall:

147 “(1) File an affidavit with the Mayor indicating the amount of its gross receipts
148 for the preceding calendar month from the sale of or charges for the services within the District;

149 “(2) Until May 31, 1994, pay to the Mayor 9.7% of these gross receipts; and

150 “(3) After May 31, 1994, pay to the Mayor 10.0% of its gross receipts from sales
151 included in bills rendered after May 31, 1994.”

152 Sec. 6. The Internet Sales Tax, Homelessness Prevention, and WMATA Momentum Fund
153 Establishment Act of 2013, effective December 24, 2013 (D.C. Law 20-61; D.C. Official Code §
154 47-3931 *et seq.*) is repealed.

155 Sec. 7. Fiscal impact statement.

156 The Council adopts the fiscal impact statement in the committee report as the fiscal impact
157 statement required by section 4a of the General Legislative Procedures Act of 1975, approved
158 October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

159 Sec. 8. Applicability Date

160 Sections 3, 4, 5 and 6 of this act shall be applicable on January 1, 2019.

161 Sec. 9. Effective date.

162 This act shall take effect following approval by the Mayor (or in the event of veto by the
163 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
164 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
165 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
166 Columbia Register.