

126th MAINE LEGISLATURE

FIRST REGULAR SESSION-2013

Legislative Document

No. 319

H.P. 228

House of Representatives, February 7, 2013

An Act To Provide Tax Fairness to Small Businesses in the State

(EMERGENCY)

Reference to the Committee on Taxation suggested and ordered printed.

Millicent M. Mac Jailand

MILLICENT M. MacFARLAND Clerk

Presented by Representative BERRY of Bowdoinham. Cosponsored by President ALFOND of Cumberland and Representatives: BECK of Waterville, Speaker EVES of North Berwick, KNIGHT of Livermore Falls, McCABE of Skowhegan.

1 2	Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and
3 4	Whereas, Maine law requires a retailer of goods or services to collect sales and use tax on the purchase of those goods or services; and
5 6 7	Whereas, a retailer located in another state who makes sales to persons in this State does not collect and remit Maine sales and use tax even when that retailer has a nexus with the State; and
8 9	Whereas, the loss of revenue to the State from this failure to collect and remit sales and use tax has been estimated at over \$60,000,000 annually; and
10 11 12	Whereas, aside from the loss of revenue, businesses located in the State that comply with the requirement to collect and remit Maine sales and use tax are put at a competitive disadvantage with businesses that fail to collect and remit Maine sales and use tax; and
13 14 15 16	Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,
17	Be it enacted by the People of the State of Maine as follows:
18	PART A
18 19 20	PART A Sec. A-1. 36 MRSA §1752, sub-§10, as repealed and replaced by PL 1997, c. 393, Pt. A, §41, is amended to read:
19	Sec. A-1. 36 MRSA §1752, sub-§10, as repealed and replaced by PL 1997, c.
19 20 21 22	 Sec. A-1. 36 MRSA §1752, sub-§10, as repealed and replaced by PL 1997, c. 393, Pt. A, §41, is amended to read: 10. Retailer. "Retailer" means a person who makes retail sales or and who is required to register by section 1754 A or 1754 B or who is registered under section
19 20 21 22 23	 Sec. A-1. 36 MRSA §1752, sub-§10, as repealed and replaced by PL 1997, c. 393, Pt. A, §41, is amended to read: 10. Retailer. "Retailer" means a person who makes retail sales or and who is required to register by section 1754 A or 1754 B or who is registered under section 1756.:
19 20 21 22 23 24	 Sec. A-1. 36 MRSA §1752, sub-§10, as repealed and replaced by PL 1997, c. 393, Pt. A, §41, is amended to read: 10. Retailer. "Retailer" means a person who makes retail sales or and who is required to register by section 1754 A or 1754 B or who is registered under section 1756.: <u>A. Required to register by section 1754-A or 1754-B; or</u>

1 2 3	(1) Solicitation of business in this State through catalogs, flyers, telephone or electronic media when delivery of ordered goods is effected by the United States mail or by an interstate 3rd-party common carrier;
4	(2) Attending trade shows, seminars or conventions in this State;
5 6	(3) Holding a meeting of a corporate board of directors or shareholders or holding a company retreat or recreational event in this State;
7	(4) Maintaining a bank account or banking relationship in this State; or
8	(5) Using a vendor in this State for printing;
9 10	Sec. A-3. 36 MRSA §1754-B, sub-§1, ¶E, as enacted by PL 1995, c. 640, §3, is amended to read:
11 12 13 14 15 16	E. Every agent, representative, salesperson, solicitor or distributor <u>that has a</u> <u>substantial physical presence in this State sufficient to satisfy the requirements of the</u> <u>due process and commerce clauses of the United States Constitution and</u> that receives compensation by reason of sales of tangible personal property or taxable services made outside this State by a principal for use, storage or other consumption in this State;
17 18	Sec. A-4. 36 MRSA §1754-B, sub-§1, ¶G, as amended by PL 2007, c. 328, §5, is further amended to read:
19 20 21 22	G. Every seller of tangible personal property or taxable services that has a substantial physical presence in this State sufficient to satisfy the requirements of the due process and commerce clauses of the United States Constitution. The following activities do not constitute a substantial physical presence for the purpose of this paragraph:
23 24 25	(1) Solicitation of business in this State through catalogs, flyers, telephone or electronic media when delivery of ordered goods is effected by the United States mail or by an interstate 3rd-party common carrier;
26	(2) Attending trade shows, seminars or conventions in this State;
27 28	(3) Holding a meeting of a corporate board of directors or shareholders or holding a company retreat or recreational event in this State;
29	(4) Maintaining a bank account or banking relationship in this State; or
30 31	(5) Using a vendor in this State for printing, drop shipping or telemarketing services;
32 33	Sec. A-5. 36 MRSA §1754-B, sub-§1, ¶H, as amended by PL 2009, c. 373, §5, is repealed.
34	Sec. A-6. 36 MRSA §1754-B, sub-§1-A is enacted to read:
35	1-A. Persons presumptively required to register. This subsection creates a
36 37	rebuttable presumption that a seller not subject to subsection 1 is engaged in the business of selling taxable personal property or services for use in this State and is required to
38	register as a retailer with the assessor.

1 2	A. As used in this subsection, unless the context otherwise indicates, the following terms have the following meanings.
3 4 5 6 7 8	(1) "Affiliated person" means a person that is a member of the same controlled group of corporations as the seller or any other entity that, notwithstanding its form of organization, bears the same ownership relationship to the seller as a corporation that is a member of the same controlled group of corporations. For purposes of this subparagraph, "controlled group of corporations" has the same meaning as in the Code, Section 1563(a).
9 10	(2) "Person" means an individual or entity that qualifies as a person under the Code, Section 7701(a)(1).
11 12	(3) "Seller" means a person that sells, other than in a casual sale, tangible personal property or taxable services.
13 14 15 16	B. A seller is presumed to be engaged in the business of selling taxable personal property or services for use in this State if an affiliated person has a substantial physical presence in this State or if any person, other than a person acting in its capacity as a common carrier, that has a substantial physical presence in this State:
17 18	(1) Sells a similar line of products as the seller and does so under a business name that is the same or similar to that of the seller;
19 20 21	(2) Maintains an office, distribution facility, warehouse or storage place or similar place of business in the State to facilitate the delivery of property or services sold by the seller to the seller's customers;
22 23	(3) Uses trademarks, service marks or trade names in the State that are the same or substantially similar to those used by the seller;
24 25	(4) Delivers, installs, assembles or performs maintenance services for the seller's customers within the State;
26 27 28 29	(5) Facilitates the seller's delivery of property to customers in the State by allowing the seller's customers to pick up property sold by the seller at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in the State; or
30 31	(6) Conducts any activities in the State that are significantly associated with the seller's ability to establish and maintain a market in the State for the seller's sales.
32 33 34 35 36	<u>A seller who meets the requirements of this paragraph shall register with the assessor</u> and collect and remit taxes in accordance with the provisions of this Part. A seller may rebut the presumption created in this paragraph by demonstrating that the person's activities in the State are not significantly associated with the seller's ability to establish or maintain a market in this State for the seller's sales.
37 38 39 40 41	C. A seller that does not otherwise meet the requirements of paragraph B is presumed to be engaged in the business of selling tangible personal property or taxable services for use in this State if the seller enters into an agreement with a person under which the person, for a commission or other consideration, while within this State:

- 1(1) Directly or indirectly refers potential customers, whether by a link on an2Internet website, by telemarketing, by an in-person presentation or otherwise, to3the seller; and
- 4 (2) The cumulative gross receipts from retail sales by the seller to customers in 5 the State who are referred to the seller by all persons with this type of an 6 agreement with the seller are in excess of \$10,000 during the preceding 12 7 months.
- A seller who meets the requirements of this paragraph shall register with the assessor
 and collect and remit taxes in accordance with the provisions of this Part.
- 10 A seller may rebut the presumption created in this paragraph by submitting proof that the person with whom the seller has an agreement did not engage in any activity 11 12 within the State that was significantly associated with the seller's ability to establish or maintain the seller's market in the State during the preceding 12 months. Such 13 proof may consist of sworn, written statements from all of the persons within this 14 State with whom the seller has an agreement stating that they did not engage in any 15 solicitation in the State on behalf of the seller during the preceding 12 months; these 16 statements must be provided and obtained in good faith. 17
- 18 Sec. A-7. 36 MRSA §1754-B, sub-§4 is enacted to read:

4. Agreement requiring legislative approval. Any ruling, agreement or contract,
 whether written or oral, express or implied, between a seller and the Governor or a state
 agency or department stating, agreeing or ruling that a seller, as defined in subsection
 1-A, paragraph A, that meets the requirements of subsection 1-A, paragraph B or C is not
 required to collect sales and use tax in this State is null and void unless it is specifically
 approved by a majority vote of both Houses of the Legislature.

25 Sec. A-8. Application. The provisions of the Maine Revised Statutes, Title 36, section 1754-B, subsection 1-A, paragraph C apply to sales made, uses occurring and 26 services rendered on or after the effective date of this Act regardless of the date on which 27 28 the seller and the person entered into the agreement described in that paragraph; except 29 that, when calculating the 12-month period for purposes of determining whether the 30 threshold amount specified in Title 36, section 1754-B, subsection 1-A, paragraph C, 31 subparagraph (2) has been met, the 12-month period begins one year immediately 32 preceding the seller's registering as a retailer pursuant to this Act.

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PART B

34 Sec. B-1. Report and legislation regarding the "Streamlined Sales and 35 Use Tax Agreement." The Department of Administrative and Financial Services, 36 Bureau of Revenue Services shall prepare a report concerning the "Streamlined Sales and 37 Use Tax Agreement," referred to in this section as "the agreement," which is an effort of 38 state governments, with input from local governments and the private sector, to simplify 39 and modernize sales and use tax collection and administration. The report must:

40 1. Identify any changes to the Maine Revised Statutes that are needed to conform the
41 State's laws to the agreement and the options available to provide conformity;

2. Identify the impact of each option identified pursuant to subsection 1; and

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2 3. Identify and explain any fiscal and policy issues associated with conformity with3 the agreement.

The bureau shall submit its report, along with different proposals for legislation to conform the State's sales and use tax laws with the agreement, to the Joint Standing Committee on Taxation no later than January 15, 2014. The Joint Standing Committee on Taxation may submit a bill relating to the subject matter of the report to the Second Regular Session of the 126th Legislature.

9 **Emergency clause.** In view of the emergency cited in the preamble, this 10 legislation takes effect when approved.

SUMMARY

12 Part A of this bill creates a presumption that a seller of goods or services is engaged 13 in business in this State and therefore required to register with the State Tax Assessor as a retailer and collect and remit sales and use tax on purchases made by persons in the State, 14 if a person affiliated with the seller has a substantial presence in the State or a person who 15 has a substantial presence in the State engages in certain activities, such as selling a line 16 of products similar to that of the seller or maintaining an office or distribution center in 17 the State to facilitate the delivery of the seller's products. Alternatively, a seller is 18 presumed to be required to register with the State and collect and remit sales and use tax 19 20 if the seller has an agreement with a person to refer potential customers to the seller and the seller generates more than \$10,000 in sales in the State annually. Both presumptions 21 may be rebutted. Part A also requires any agreement or ruling by the Governor or an 22 23 executive branch department or agency that allows a seller to avoid registering as a seller to be approved by both Houses of the Legislature. 24

Part B directs the Department of Administrative and Financial Services, Bureau of Revenue Services to identify changes in the sales and use tax laws necessary to conform them to the national effort known as the "Streamlined Sales and Use Tax Agreement" and to submit its report and proposed legislation to the Joint Standing Committee on Taxation by January 15, 2014.