

# State of South Dakota

NINETY-FIRST SESSION  
LEGISLATIVE ASSEMBLY, 2016

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## SENATE BILL NO. 106

Introduced by: Senators Peters, Brown, Cammack, Heinert, Sutton, Tidemann, and White  
and Representatives Hunt, Bartling, Cronin, Gosch, Hawley, Mickelson,  
Westra, and Wink

1 FOR AN ACT ENTITLED, An Act to provide for the collection of sales taxes from certain  
2 remote sellers, to establish certain Legislative findings, and to declare an emergency.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That the code be amended by adding a NEW SECTION to read:

5 Notwithstanding any other provision of law, any seller selling tangible personal property,  
6 products transferred electronically, or services for delivery into South Dakota, shall be subject  
7 to chapters 10-45 and 10-52, and the seller shall collect and remit the sales tax. The seller shall  
8 follow all applicable procedures and requirements of law as if the seller had a physical presence  
9 in the state, if the seller meets either of the following criteria:

10 (1) The seller's gross revenue from delivery of tangible personal property, any product  
11 transferred electronically, or services into South Dakota in the previous calendar year  
12 or current calendar year exceeds one hundred thousand dollars; or

13 (2) The seller sold tangible personal property, any product transferred electronically, or  
14 services for delivery into South Dakota in two hundred or more separate transactions



1           in the previous calendar year or the current calendar year.

2           Section 2. That the code be amended by adding a NEW SECTION to read:

3           Notwithstanding any other provision of law, and whether or not the state initiates an audit  
4 or other tax collection procedure, the state may bring a declaratory judgment action under § 21-  
5 24-1 in any circuit court against any person the state believes meets the criteria of section 1 of  
6 this Act to establish that the collection obligation is applicable and valid under state and federal  
7 law. The circuit court shall act on this declaratory judgment action as expeditiously as possible  
8 and the circuit court shall proceed with priority over any other action presenting the same  
9 question in any other venue.

10          Section 3. That the code be amended by adding a NEW SECTION to read:

11          During a pending action provided in section 2 of this Act, and upon determining that a  
12 question is presented regarding the constitutionality of this law the court shall on the state's  
13 motion or the court's own initiative enjoin the state from enforcing the obligation in section 1  
14 of this Act against any taxpayer who does not affirmatively consent or otherwise collect the tax  
15 on a voluntary basis. The injunction does not apply if there is a previous judgment from a court  
16 establishing the validity of the obligation in section 1 of this Act with respect to the particular  
17 taxpayer.

18          Section 4. That the code be amended by adding a NEW SECTION to read:

19          Any appeal from the decision with respect to the cause of action established by this Act may  
20 only be made to the State Supreme Court. The appeal shall be heard as expeditiously as  
21 possible.

22          Section 5. That the code be amended by adding a NEW SECTION to read:

23          No obligation to collect and remit the sales tax required by this Act may be applied  
24 retroactively.

1 Section 6. That the code be amended by adding a NEW SECTION to read:

2 If an injunction provided by this Act is lifted, the state shall assess and apply the collection  
3 obligation only from that date forward with respect to any taxpayer covered by the injunction.

4 Section 7. That the code be amended by adding a NEW SECTION to read:

5 The Legislature finds that:

6 (1) The inability to effectively collect the sales or use tax from remote sellers who  
7 deliver tangible personal property, any product transferred electronically, or services  
8 directly to the citizens of South Dakota is seriously eroding the sales tax base of this  
9 state, causing revenue losses and imminent harm to this state through the loss of  
10 critical funding for state and local services;

11 (2) The harms from the revenue losses are especially serious in South Dakota because  
12 the state has no income tax, and sales and use tax revenues are essential in funding  
13 state and local services;

14 (3) Despite the fact that a use tax is owed on tangible personal property, any product  
15 transferred electronically, or services delivered for use in this state, many remote  
16 sellers actively market sales as tax free or no sales tax transactions;

17 (4) The structural advantages of remote sellers, including the absence of point-of-sale tax  
18 collection, along with the general growth of online retail, make clear that further  
19 erosion of this state's sales tax base is likely in the near future;

20 (5) Remote sellers who make a substantial number of deliveries into or have large gross  
21 revenues from South Dakota benefit extensively from this state's market, including  
22 the economy generally, as well as state infrastructure;

23 (6) In contrast with the expanding harms caused to the state from this exemption of sales  
24 tax collection duties for remote sellers, the costs of that collection have fallen. Given

1 modern computing and software options, it is neither unusually difficult nor  
2 burdensome for remote sellers to collect and remit sales taxes associated with sales  
3 into South Dakota;

4 (7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing*  
5 *Association v. Brohl*, the Supreme Court of the United States should reconsider its  
6 doctrine that prevents states from requiring remote sellers to collect sales tax, and as  
7 the foregoing findings make clear, this argument has grown stronger, and the cause  
8 more urgent, with time;

9 (8) Given the urgent need for the Supreme Court of the United States to reconsider this  
10 doctrine, it is necessary for this state to pass this law clarifying its immediate intent  
11 to require collection of sales taxes by remote sellers, and permitting the most  
12 expeditious possible review of the constitutionality of this law;

13 (9) Expeditious review is necessary and appropriate because, while it may be reasonable  
14 notwithstanding this law for remote sellers to continue to refuse to collect the sales  
15 tax in light of existing federal constitutional doctrine, any such refusal causes  
16 imminent harm to this state;

17 (10) At the same time, the Legislature recognizes that the enactment of this law places  
18 remote sellers in a complicated position, precisely because existing constitutional  
19 doctrine calls this law into question. Accordingly, the Legislature intends to clarify  
20 that the obligations created by this law would be appropriately stayed by the courts  
21 until the constitutionality of this law has been clearly established by a binding  
22 judgment, including, for example, a decision from the Supreme Court of the United  
23 States abrogating its existing doctrine, or a final judgment applicable to a particular  
24 taxpayer; and

1       (11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations  
2           to the limit of federal and state constitutional doctrines, and to thereby clarify that  
3           South Dakota law permits the state to immediately argue in any litigation that such  
4           constitutional doctrine should be changed to permit the collection obligations of this  
5           Act.

6       Section 8. Whereas, this Act is necessary for the support of the state government and its  
7       existing public institutions, an emergency is hereby declared to exist, and this Act shall be in  
8       full force and effect on and after April 1, 2016.