



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Administration
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MEMORANDUM

To: The Honorable Marvin L. Abney
Chairman, House Finance Committee

The Honorable Daniel Da Ponte
Chairman, Senate Finance Committee

From: Thomas A. Mullaney *Thomas A. Mullaney*
Executive Director/State Budget Officer

Date: February 27, 2017

Subject: Amendment to Article 9 of the FY 2018 Appropriations Act
(17-H-5175)

The Governor requests that amendments be made to Article 9 – Relating to Remote Sellers Sales Tax Collections. The proposed changes, as described below, are indicated with grey shading in the attached revised article.

The first change in section 44-70-3 would make the requirements for remote sellers to comply with this legislation effective two weeks after the enactment of the law. This will provide time for the Division of Taxation to make necessary notifications and is consistent with the revenue estimates included in the Governor’s recommended budget.

The second change in the same section adds an additional enforcement mechanism to require remote sellers who choose not to obtain a sales tax permit and collect the Rhode Island sales tax on sales made to the state to instead file a form with the Division of Taxation by February 15 of each year indicating that they are in compliance with the other reporting requirements of the statute. This change will strengthen the requirement that remote sellers proactively affirm that they are complying with the statute.

The final change which adds a 90 day requirement to certain notices is required to ensure that the State remains in compliance with the Streamlined Sales and Use Tax Agreement which is authorized under R.I. Gen. Laws § 44-18.1-1 *et seq.* and would strengthen the requirements surrounding marketplace providers or referrer with regards to the collection of sales tax. These entities are ones that may not directly make sales in the state, but facilitate the sales of other entities that may be subject to the state sales tax.

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If you have any questions regarding these amendments, please feel free to call me or my staff at 222-6300.

TAM:sma 18-Amend-8

cc: Sharon Reynolds Ferland, House Fiscal Advisor
Stephen Whitney, Senate Fiscal Advisor
Michael DiBiase, Director of Administration
Jonathan Womer, Director, Office of Management and Budget
Gregory Stack, Supervising Budget Analyst

ARTICLE 9

RELATING REMOTE SELLERS SALES TAX COLLECTION

SECTION 1. Title 44 of the general laws entitled "Taxation" is hereby amended by adding thereto the following chapter:

CHAPTER 70

REMOTE SELLER SALES TAX COLLECTION ACT

44-70-1. Legislative findings. --- The general assembly finds and declares as follows:

(1) The general assembly recognizes that the commerce clause prohibits states from imposing an undue burden on interstate commerce.

(2) The general assembly finds that, due to the ready availability of sales and use tax collection software and Rhode Island's status as a signatory to the Streamlined Sales and Use Tax Agreement under which there is an existing compliance infrastructure in place to facilitate the collection and remittance of sales tax by remote sellers, it is no longer an undue burden for remote sellers to accurately compute, collect and remit their sales and use tax obligations to Rhode Island.

(3) The general assembly further finds that there has been an exponential expansion of online commerce and related technology, and given that technology, it would not be an undue burden for remote sellers to collect and remit sales and use tax.

(4) The general assembly further finds that the sales and use tax system established under Rhode Island law does not pose an undue burden on remote sellers and provides sufficient simplification to warrant the collection and remittance of sales and use taxes that are due and owing to Rhode Island by remote sellers.

44-70-2. Definitions. --- For the purposes of this chapter:

(1) "Covered entity" means remote seller, marketplace provider, or referrer that meets the criteria described § 44-70-3.

(2) “Division of taxation” means the Rhode Island department of revenue, division of taxation. The division may also be referred to in this chapter as the “division of taxation,” “tax division”, or “division”.

(3) “Marketplace provider” means any person or persons that facilitates a sale by a retailer. For purposes of this chapter, a marketplace provider facilitates a retail sale when the marketplace provider both:

(A) Lists or advertises for purchase tangible personal property or services in any forum, including a catalog or internet website; and

(B) Either directly or indirectly through agreements or arrangements with third parties, collects payments from the purchaser and transmits those payments to a marketplace seller. A person or persons may be a marketplace provider regardless of whether they deduct any fees from the transaction. The division may define in regulation circumstances under which a marketplace provider shall be deemed to facilitate a retail sale.

(4) “Marketplace seller” means a person, persons or retailer that has any sales facilitated by a marketplace provider.

(5) “Person” means person as defined in section § 44-18-6 of the general laws.

(6) “Referrer” means every person who:

(A) Contracts or otherwise agrees with a retailer to list for sale for a price one or more items of tangible personal property or services in any forum, including a catalog or internet website; and

(B) Receives a fee, commission, or other consideration from a retailer for the listing; and

(C) Transfers, via telephone, internet link, or otherwise, a purchaser to the retailer or the retailer’s employee, affiliate, or website to complete a purchase; and

(D) Does not collect receipts from the purchaser for the transaction.

(7) “Related” means:

(A) A person or persons has a relationship with the remote seller within the meaning of the internal revenue code of 1986 as amended; or

(B) A person or persons have one or more ownership relationships and such relationships were designed with a principal purpose of avoiding the application of this section.

(8) “Remote seller” means any person or persons who does not have physical presence in this state and meets at least one of the criteria below, regardless of whether or not the activity is related to the sale of tangible personal property or taxable services:

(A) Who is currently selling, leasing, or delivering in this state, or is participating in any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property and/or taxable services for use, storage, distribution, or consumption within this state. This includes, but shall not be limited to, the following acts or methods of transacting business on a regular or systematic basis:

(i) Engaging in, either directly or indirectly through a marketplace provider, referrer, or other third party, direct response marketing targeted at purchasers or potential purchasers in this state. For purposes of this subsection, “direct response marketing” includes, but is not limited to, sending, transmitting or broadcasting of flyers, newsletters, telephone calls, targeted electronic mail, text messages, social media messages, targeted mailings; collecting, analyzing and utilizing individual data on purchasers or potential purchasers in this state; using information or software, including cached files, cached software, or ‘cookies’ or other data tracking tools, that are stored on property in or distributed within this state; or conducting any other actions that use persons, tangible property, intangible property, digital files or information, or software in this state in an effort to enhance the probability that a person’s contacts with a purchaser in this state will result in a sale to that purchaser.

(ii) Entering into one or more agreements under which a person or persons that have physical presence in this state directly or indirectly refer potential purchasers of products to the remote seller for a commission or other consideration, whether by an internet-based link or an internet web site or otherwise.

An agreement under which a remote seller purchases advertisements from a person or persons in this state, to be delivered on television, radio, in print, on the internet, or by any other medium, is not an agreement described in this subsection (ii), unless the advertisement revenue paid to the person or persons

in this state consists of commissions or other consideration that is based in whole or in part upon sales of products; or

(B) Whose sales process includes listing products for sale, soliciting, branding products, selling products, processing orders, fulfilling orders, providing customer service or accepting or assisting with returns or exchanges occurring in this state, regardless of whether that part of the process has been subcontracted to an affiliate or third party. The sale process does not include shipping via a common carrier; or

(C) Who offers its products for sale through one or more marketplace providers that have physical presence in this state; or

(D) Who is related to a person that has physical presence in this state, and such related person:

(i) Sells under the same or a similar business name tangible personal property or taxable services similar to that sold by the person against whom the presumption is asserted; or

(ii) Maintains an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business in this state to facilitate the delivery of tangible personal property or taxable services sold by the person against whom the presumption is asserted to such person's in-state purchasers; or

(iii) Uses, with consent or knowledge of the person against whom the presumption is asserted, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the person against whom the presumption is asserted; or

(iv) Delivers (except for delivery by common carrier for which the purchaser is charged not more than the basic charge for shipping and handling), installs, or assembles tangible personal property in this state, or performs maintenance or repair services on tangible personal property in this state, which tangible personal property is sold to in-state purchasers by the person against whom the presumption is asserted; or

(v) Facilitates the delivery of tangible personal property to in-state purchasers of the person against whom the presumption is asserted by allowing such purchasers to pick up tangible personal property sold by such person at an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business maintained in this state; or

(vi) Shares management, business systems, business practices, or employees with the person against whom the presumption is asserted, or engages in intercompany transactions with the person against whom the presumption is asserted related to the activities that establish or maintain the market in this state of the person against whom the presumption is asserted.

(9) A "retail sale" or "sale at retail" means any retail sale or sale at retail as defined in § 44-18-8 of the general laws.

(10) A "retailer" means retailer as defined in section § 44-18-15 of the general laws.

(11) "State" means the State of Rhode Island and Providence Plantation.(5) "Person" means person as defined in section § 44-18-6 of the general laws.

(12) "Streamline agreement" means the Streamlined Sales and Use Tax Agreement as referenced in § 44-18.1 *et seq* of the general laws.

44-70-3. Requirements for remote sellers, marketplace providers, and referrers. (A) Except as otherwise provided below in subsection (B)(4), beginning two weeks after the enactment of this chapter [Office of Law Revision to change this language to actual date of enactment] and for each tax year thereafter, if a remote seller, marketplace provider, or referrer meets either of the following criteria then it shall comply with the requirements in subsection (B):

(1) The gross revenue of the remote seller, marketplace provider, or referrer from the sale of tangible personal property, products delivered electronically, and services delivered into this state equals or exceeds one hundred thousand dollars (\$100,000) in the immediately preceding calendar year; or

(2) The remote seller, marketplace provider, or referrer sold tangible personal property, products delivered electronically, or services for delivery into this state in two hundred (200) or more separate transactions in the immediately preceding calendar year.

(B) A covered entity shall register for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into the state or, failing that, do each of the following:

(1) Post a conspicuous notice on its website that informs Rhode Island purchasers that sales or use tax is due on certain purchases made from the covered entity and that this state requires the purchaser to file a sale or use tax return; and

(2) At the time of purchase, notify Rhode Island purchasers that sales or use tax is due on taxable purchases made from the covered entity and that the state of Rhode Island requires the purchaser to file a sale or use tax return; and

(3) Subsequent to and within 48 hours of the time of purchase, notify Rhode Island purchasers by email that sales or use tax is due on taxable purchases made from the covered entity and that this state requires the purchaser to file a sale or use tax return after each taxable sale is completed; and

(4) Send notification to all Rhode Island purchasers who have cumulative annual taxable purchases from the covered entity totaling \$100 or more for the prior calendar year. The notification shall be sent by January 31 of each year, including January 31, 2018 for purchases made in calendar year 2017, showing the total amount paid by the purchaser for purchases delivered into this state made from the covered entity in the previous calendar year and such other information as the division may require by rule and regulation. Such notification shall include, if available, the dates of purchases, the dollar amount of each purchase, and the category or type of the purchase, including, if known by the covered entity, whether the purchase is exempt or not exempt from taxation in Rhode Island. The notification shall state that the state of Rhode Island requires a sales or use tax return to be filed and sales or use tax to be paid on certain categories or types of purchases made by the purchaser from the covered entity. The notification shall be sent separately to all Rhode Island purchasers by first-class mail and shall not be included with any other shipments or mailings. The notification shall include the words "important tax document enclosed" on the exterior of the mailing. The notification shall include the name of the covered entity.

(5) Beginning on February 15, 2018, and not later than February 15 of each year thereafter, a covered entity that has not registered for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into the state for any portion of the prior calendar year, shall file with the division on such form

and/or in such format as the division prescribes an attestation that the covered entity has complied with the requirements of 44-70-3(B)(4) herein.

(C) A referrer subject to the provisions of § 44-70-3(B) that receives more than \$10,000 from fees paid by retailers during the previous calendar year is also required to provide notice to retailers that the retailer's sales may be subject to sales and use tax. This notice is not required, however, if (i) the retailer has previously provided, or provides to the referrer within ninety (90) days of the date of the sale, either (1) a copy of the retailer's permit to make sales at retail in this state or (2) a fully completed sales and use tax exemption certification that includes the retailer's sales permit registration number for this state or (ii) if the referrer is a covered entity that collects and remits sales and use tax.

44-70-4. Exceptions for marketplace providers and referrers. --- (A) Notwithstanding the provisions of § 44-70-3 of this chapter, no marketplace provider or referrer is required to comply with the provisions of § 44-70-3(B) for any sale facilitated for a marketplace seller or retailer that has provided to the marketplace provider or referrer within ninety (90) days of the date of the sale either (1) a copy of its retailer's sales permit to make sales at retail in this state or (2) a fully completed sales and use tax exemption certificate that includes the retailer's sales permit registration number for this state.

(B) A marketplace provider or referrer is relieved of any liability under this chapter for failure to comply with the provisions of § 44-70-3 if the marketplace provider or referrer (1) can demonstrate (i) that the failure to comply was due to incorrect information given to the marketplace provider or referrer by the marketplace seller or retailer and (ii) that the marketplace provider or referrer and marketplace seller or retailer are not related or (2) provides to the marketplace provider within ninety (90) days of the date of the sale a fully completed sales and use tax exemption certificate that includes the retailer's sales permit registration number for this state.

(C) Nothing in this section shall be construed to interfere with the ability of a marketplace provider or referrer and a marketplace seller or retailer to enter into agreements with each other regarding fulfillment of the requirements of this chapter.

44-70-5. Penalties. --- Any remote seller, marketplace provider or referrer that fails to provide the notices described in § 44-70-3 and register for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into this state shall be subject to a penalty of five dollars for each such failure, but not less than a total penalty of \$20,000 per calendar year. This penalty shall be in addition to any other applicable penalties under title 44 of the general laws.

44-70-6. Other obligations. --- (A) Nothing in this section affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller or covered entity does not collect and remit an offsetting sales tax.

(B) Nothing in this chapter may be construed as relieving any business having substantial nexus with this state from its sales and use tax collection obligations to this state under applicable law.

(C) In the event that any section of this chapter is later determined to be unlawful, no remote seller, marketplace provider, or referrer who has remitted sales and use tax under this chapter shall be liable to a purchaser who claims that the sales tax should not have been collected.

44-70-7. Rules and regulations --- forms. The tax administrator may promulgate rules and regulations, not inconsistent with law, to carry into effect the provisions of this chapter.

44-70-8. Enforcement --- (A) General. The tax administrator shall administer and enforce this chapter and is authorized to make any rules and regulations, and to require any facts and information to be reported, that he or she may deem necessary to enforce the tax. The provisions of chapter 1 of this title relating to the tax administrator shall be applicable to this chapter.

(B) Examination of books and witnesses. The tax administrator, for the purpose of ascertaining the correctness of any filing or notice or for the purpose of confirming the terms of this chapter shall have the power to examine or to cause to have examined, by any agent or representative designated by the tax administrator for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of the person, or the attendance of any other person having knowledge in the premises, and

may take testimony and require proof material for its information, with power to administer oaths to the person or persons.

44-70-9. Appeal. --- If the tax administrator issues one or more final determinations hereunder any appeal may be made pursuant to the provisions of chapter 19 of title 44 of the general laws.

44-70-10. Severability. --- If any provision of this chapter or the application thereof is held invalid, such invalidity shall not affect the provisions or applications of this chapter which can be given effect without the invalid provisions or applications.

SECTION 2. Unless otherwise specified herein, this article shall take effect upon passage.