



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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MEMORANDUM

**To:** The Honorable Marvin L. Abney  
Chairman, House Finance Committee  
  
The Honorable William J. Conley, Jr.  
Chairman, Senate Finance Committee

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

**Date:** May 25, 2017

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

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The Governor requests that Article 9 entitled "Relating to Remote Sellers Sales Tax Collection" submitted with the FY 2018 budget on January 19, 2017 be replaced with the attached version. Compared to the original version of the article, the new version:

- Imposes the customer notice requirements and the attestation requirement only upon the noncollecting retailer (not on all covered entities which previously also included marketplace providers, and referrers);
- Clarifies the definitions of noncollecting retailer, retail sale facilitator, and referrer;
- Imposes separate duties upon the retail sale facilitator and referrer; and,
- Amends the penalty range by increasing the per transaction penalty from \$5 per violation to \$10 per violation, but reducing the minimum penalty per calendar year from \$20,000 to \$10,000.

Also attached is a detailed explanation of the revised article from Tax Administrator, Neena Savage that describes the statutory changes in each section of the article.

If you have any questions regarding this amendment, please feel free to call me at 222-6300 or Neena Savage, the State Tax Administrator, at 574-8889.

TAM:sma 18-Amend-21

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  
Neena Savage, Tax Administrator

TDD#: 277-1227

customers annually of their sales/use tax liability and during the online sale via pop-up notice and email, and attest annually to their compliance with the terms and conditions of the law.

The \$100,000 annual gross RI sales and 200 separate annual RI sales transactions thresholds are also applicable to retail sale facilitators and referrers. Retail sale facilitators, if they meet the definitional and threshold requirements, have to annually provide the Division of Taxation with a list of names/addresses of retailers for which they collect and do not collect Rhode Island Sales and Use Tax. Referrers, if they meet the definitional and threshold requirements, have to provide all Rhode Island retailers notice of a duty to possibly collect and remit sales/use tax within 30 days of receiving more than ten thousand dollars in fees or commissions from referral activity in Rhode Island.

### Explanation of Sections

**Section 1:** **44-18.2-1. Legislative Findings:** This section articulates the rationale for the legislative proposal by recognizing the limits of the constitutional commerce clause prohibition but articulating the reduced burdens on compliance for remote sellers due to Rhode Island's participation in the Streamlined Sales and Use Tax Agreement and the growth of the online marketplace aided by more sophisticated technology which has aided the expansion of the online marketplace and will also aid compliance. This section also states that the existence and/or presence of a noncollecting retailer's, referrer's, or retail sale facilitator's software in Rhode Island constitutes physical presence and that the use of that software for the purpose of engaging in a significant number of transactions with in-state customers or receiving significant revenue from such transactions also evidences an intent to establish and maintain a market in this state for its sales.

**44-18.2. Definitions:** This section provides definitions for key terms including, but not limited to, noncollecting retailer, referrer, and retail sale facilitator.

**44-18.2-3. Requirements for Noncollecting Retailers, Referrers, and Retail Sale Facilitators:** This section provides that Noncollecting Retailers, Referrers, and Retail Sale Facilitators that have gross revenue in Rhode Island that meets or exceeds \$100,000 or two hundred or more separate transactions must meet specific compliance requirements. Noncollecting Retailers must either: register, collect or remit sales/use tax or for each transaction: i) post a conspicuous notice on its website that informs Rhode Island purchasers that sales or use tax is due on certain purchases; ii) at the time of purchase notify Rhode Island purchasers that sales and use tax is due; iii) email Rhode Island purchasers that sales or use tax is due, iv) send Rhode Island purchasers a notice annually which details their cumulative annual taxable purchases from the covered entity of \$100 or more; and, v) beginning February 15, 2018 and annually thereafter, if it has not registered to collect and remit sales tax, file an attestation with the Division of Taxation that it has complied with the four notice requirements in this subsection.

ARTICLE 9

RELATING TO SALES AND USE TAX – NONCOLLECTING RETAILERS, REFERRERS,  
AND RETAIL SALE FACILITATORS

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

CHAPTER 18.2

SALES AND USE TAX - NONCOLLECTING RETAILERS, REFERRERS, AND RETAIL SALE  
FACILITATORS ACT

44-18.2-1. Legislative findings. --- The general assembly finds and declares that:

(1) The commerce clause of the United States Constitution prohibits states from imposing an undue burden on interstate commerce.

(2) There has been an exponential expansion of online commerce and related technology, and 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 noncollecting retailers, it is no longer an undue burden for noncollecting retailers to accurately compute, collect and remit and/or report with respect to their sales and use tax obligations to Rhode Island.

(3) The existence and/or presence of a noncollecting retailer’s, referrer’s, or retail sale facilitator’s in-state software on the devices of in-state customers constitutes physical presence of the noncollecting retailer, referrer, or retail sale facilitator in Rhode Island under *Quill Corp. v. North Dakota*, 504 U.S. 298 (U.S. 1992).

(4) While such a physical presence of the noncollecting retailer, referrer, or retail sale facilitator may not be “presence” in the traditional sense, a noncollecting retailer, referrer, or retail sale facilitator who uses in-state software and engages in a significant number of transactions with in-state customers in a calendar year or receives significant revenue from internet sales to in-state customers in a given calendar year evidences an intent to establish and maintain a market in this state for its sales.

1 mailings; collecting, analyzing and utilizing individual data on in-state customers; using information or  
2 software, including cached files, cached software, or 'cookies', or other data tracking tools, that are stored  
3 on property in or distributed within this state; or taking any other action(s) that use persons, tangible  
4 property, intangible property, digital files or information, or software in this state in an effort to enhance  
5 the probability that the person's contacts with a potential in-state customer will result in a sale to that in-  
6 state customer;

7 (ii) Entering into one or more agreements under which a person or persons who has physical  
8 presence in this state refers, either directly or indirectly, potential in-state customers of tangible personal  
9 property, prewritten computer software delivered electronically or by load and leave, and/or taxable  
10 services to the noncollecting retailer for a fee, commission, or other consideration, whether by an internet-  
11 based link or an internet web site or otherwise. An agreement under which a noncollecting retailer purchases  
12 advertisements from a person or persons in this state, to be delivered in this state on television, radio, in  
13 print, on the internet, or by any other medium in this state, shall not be considered an agreement under this  
14 subsection (ii), unless the advertisement revenue or a portion thereof paid to the person or persons in this  
15 state consists of a fee, commission, or other consideration that is based in whole or in part upon sales of  
16 tangible personal property, prewritten computer software delivered electronically or by load and leave,  
17 and/or taxable services; or

18 (iii) Using a retail sale facilitator to sell, lease, or deliver in this state, or participate in any activity  
19 in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property,  
20 prewritten computer software delivered electronically or by load and leave, and/or taxable services for use,  
21 storage, or consumption in this state.

22 (C) Uses a sales process that includes listing, branding, or selling tangible personal property,  
23 prewritten computer software delivered electronically or by load and leave, and/or taxable services for sale,  
24 soliciting, processing orders, fulfilling orders, providing customer service and/or accepting or assisting with  
25 returns or exchanges occurring in this state, regardless of whether that part of the process has been  
26 subcontracted to an affiliate or third party. The sales process for which the in-state customer is charged not

1           (vi) Shares management, business systems, business practices, computer resources, communication  
2 systems, payroll, personnel, or other such business resources and activities with the noncollecting retailer,  
3 and/or engages in intercompany transactions with the noncollecting retailer, either or both of which relate  
4 to the activities that establish or maintain the noncollecting retailer's market in this state.

5           (F) Any person or persons who meets at least one (1) of the criteria in § 44-18.2-2(4)(A) through §  
6 44-18.2-2(4)(E) above shall be presumed to be a noncollecting retailer.

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

8           (6) "Referrer" means every person who:

9           (A) Contracts or otherwise agrees with a retailer to list and/or advertise for sale in this state tangible  
10 personal property, prewritten computer software delivered electronically or by load and leave, and/or  
11 taxable services in any forum, including, but not limited to, a catalog or internet website;

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

14           (C) Transfers, via in-state software, internet link, or otherwise, an in-state customer to the retailer  
15 or the retailer's employee, affiliate, or website to complete a purchase; and

16           (D) Does not collect payments from the in-state customer for the transaction.

17           (F) A person or persons who engages in the activity set forth in all of the activities set forth in §  
18 44-18.2-2(6)(A) through § 44-18.2-2(6)(D) above shall be presumed to be a referrer.

19           (7) "Related" means:

20           (A) Having a relationship with the noncollecting retailer within the meaning of the internal revenue  
21 code of 1986 as amended; or

22           (B) Having one or more ownership relationships and a purpose of having the ownership relationship  
23 is to avoid the application of this chapter.

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

1 software delivered electronically or by load and leave, and/or taxable services for delivery into this state in  
2 two hundred (200) or more separate transactions shall comply with the requirements in subsections § 44-  
3 18.2-3(E), (F), and (G) as applicable.

4 (B) A noncollecting retailer, as defined in this chapter, shall comply with § 44-18.2-3(E) below if  
5 it meets the criteria of either § 44-18.2-3(A)(i) or (ii) above.

6 (C) A referrer, as defined in this chapter, shall comply with § 44-18.2-3(F) below if it meets the  
7 criteria of either § 44-18.2-3(A)(i) or (ii) above.

8 (D) A retail sale facilitator, as defined in this chapter, shall comply with § 44-18.2-3(G) below if it  
9 meets the criteria of either § 44-18.2-3(A)(i) or (ii) above.

10 (E) Noncollecting retailer. A noncollecting retailer shall either register in this state for a permit to  
11 make sales at retail and collect and remit sales and use tax on all taxable sales into the state or:

12 (1) Post a conspicuous notice on its website that informs in-state customers that sales or use tax is  
13 due on certain purchases made from the noncollecting retailer and that this state requires the in-state customer  
14 to file a sales or use tax return;

15 (2) At the time of purchase, notify in-state customers that sales or use tax is due on taxable purchases  
16 made from the noncollecting retailer and that the state of Rhode Island requires the in-state customer to file  
17 a sales or use tax return;

18 (3) Within forty-eight (48) hours of the time of purchase, notify in-state customers in writing that  
19 sales or use tax is due on taxable purchases made from the noncollecting retailer and that this state requires  
20 the in-state customer to file a sales or use tax return reflecting said purchase;

21 (4) On or before January 31 of each year, including January 31, 2018 for purchases made in calendar  
22 year 2017, send a written notice to all in-state customers who have cumulative annual taxable purchases from  
23 the noncollecting retailer totaling one hundred dollars (\$100) or more for the prior calendar year. The  
24 notification shall show the name of the noncollecting retailer, the total amount paid by the in-state customer  
25 to the noncollecting retailer in the previous calendar year, and, if available, the dates of purchases, the dollar  
26 amount of each purchase, and the category or type of the purchase, including, whether the purchase is exempt

1 referrer, and/or retail sale facilitator as applicable even if referred to by another name or designation. Said  
2 person or entity shall be subject to the terms and conditions set forth in this chapter.

3 **44-18.2-4. Exceptions for referrers, and retail sale facilitators. --- (A)(i) Notwithstanding the**  
4 **provisions of § 44-18.2-3, no retail sale facilitator shall be required to comply with the provisions of § 44-**  
5 **18.2-3(G), for any sale where the retail sale facilitator within ninety (90) days of the date of the sale has**  
6 **been provided either (1) a copy of the retailer's Rhode Island sales tax permit to make sales at retail in this**  
7 **state or its resale certificate as applicable, or (2) evidence of a fully completed Rhode Island or Streamlined**  
8 **agreement sales and use tax exemption certificate.**

9 (ii) Notwithstanding the provisions of § 44-18.2-3, no referrer shall be required to comply with the  
10 provisions of § 44-18.2-3(F) for any referral where the referrer within ninety (90) days of the date of the  
11 sale has been provided either (1) a copy of the retailer's Rhode Island sales tax permit to make sales at retail  
12 in this state or its resale certificate as applicable, or (2) evidence of a fully completed Rhode Island or  
13 Streamlined agreement sales and use tax exemption certificate.

14 (B) Nothing in this section shall be construed to interfere with the ability of a noncollecting retailer,  
15 referrer, or retail sale facilitator and a retailer to enter into agreements with each other; provided, however,  
16 the terms of said agreements shall not in any way be inconsistent with or contravene the requirements of  
17 this chapter.

18 **44-18.2-5. Penalties. --- Any noncollecting retailer, referrer, or retail sale facilitator that fails to**  
19 **comply with any of the requirements of this chapter shall be subject to a penalty of ten dollars (\$10.00) for**  
20 **each such failure, but not less than a total penalty of ten thousand dollars (\$10,000) per calendar year. Each**  
21 **instance of failing to comply with the requirements of this chapter shall constitute a separate violation for**  
22 **purposes of calculating the penalty under this section. This penalty shall be in addition to any other applicable**  
23 **penalties under title 44 of the general laws.**

24 **44-18.2-6. Other obligations. --- (A) Nothing in this section affects the obligation of any in-state**  
25 **customer to remit use tax as to any applicable transaction in which the seller, noncollecting retailer, or**  
26 **retail sale facilitator has not collected and remitted the sales tax for said transaction.**