



# SALT Alert!



## SALT Alert! 2017-21: Colorado Department of Revenue Holds Meeting on Permanent Use Tax Reporting Regulation

On August 16, 2017, the Colorado Department of Revenue held a rulemaking hearing for the public on Rule 39-21-112(3.5), which, once finalized, will provide guidance on the state's use tax notice and reporting requirements. The current version of the proposed rule largely follows with an emergency rule adopted on June 30, 2017. There are, however, many changes from the version of the rule adopted in 2010 shortly after the use tax notice and reporting requirements were enacted. During the meeting, the Department solicited input from affected parties on various aspects of the rule and certain questions were raised.

### Background

After years of litigation, Colorado's use tax notice and reporting requirements became effective on July 1, 2017. Under these requirements, retailers that do not collect sales or use tax on sales into Colorado (non-collecting retailers) must: (1) inform Colorado purchasers at the time of the sale that the purchase may be subject to Colorado's use tax, (2) mail an annual purchase summary with the dates, amounts, and categories of purchases to all Colorado purchasers with over \$500 in purchases from the seller, and (3) file with the Colorado Department of Revenue an annual customer information report listing the names, addresses, and total purchases for each Colorado customer.<sup>1</sup>

Non-collecting retailers that violate the notice and reporting requirements are subject to a \$5 penalty for each failure to provide the required transactional notice, a \$10 penalty for each failure to provide an annual statement to the customer, and a \$10 penalty for each customer that should have been included in the annual report to the Department.

### Takeaways

Discussed below are some issues and nuances raised at the hearing.

- **Placement and Requirements of the Transactional Notice:** The emergency and currently proposed versions of the rule both provide that for all purchases made online, a transactional notice shall be prominently located in close proximity to the "Tax" or "Sales Tax" line at checkout, or if no "Tax" line is available, in close proximity to the "Total Price" line shown at checkout. The currently proposed version of the rule provides that if "it is **impracticable** [emphasis added] for the Non-Collecting Retailer to display the Transactional Notice as described above, the Non-Collecting Retailer shall provide a prominent hyperlink in close proximity to the 'Tax' or 'Total Price' line shown at checkout that reads as follows: 'See here for information on the tax you may owe to Colorado' so

long as such hyperlink directs the Colorado Purchaser to the principal Transactional Notice.” Using the word “impracticable” differs from the emergency rule, which used the term “impractical.” At the hearing, this change was discussed, and it was established that a retailer will have to establish that it is unreasonable to provide notice as preferred under the rule; it must be more than just an inconvenience. The Department appears to want the transactional notice to be provided prior to check-out so that the purchaser can factor their use tax obligation into the total cost of the transaction. The Department did agree to modify the required language in the notice after one affected party noted that their system allowed only 60 characters.

- **Marketplace Vendors:** The proposed and emergency versions of the rule provide that using an online marketplace to make sales does not relieve a non-collecting retailer from the obligation to provide a transactional notice with each purchase. However, a marketplace may provide the transactional notice to Colorado purchasers on behalf of the retailer. At the hearing, the Department clarified that the obligation for providing the transactional notice (and any penalties for failing to comply) remains with the non-collecting retailer.
- **Opt-In Requirements:** Some discussion at the hearing involved the process under which the annual notices to customers can be sent electronically, rather than by first class mail. Sending by first class mail is obviously expensive for non-collecting retailers, and it appears many affected retailers are interested in sending the annual notices electronically. The currently proposed and emergency versions of the rule allow non-collecting retailers to provide an option for Colorado purchasers to receive the notice by electronic means. The non-collecting retailer must send an annual opt-in notice to each Colorado purchaser on or after December 15<sup>th</sup> of each year giving the purchaser the option to “elect” or “opt in” to receive the annual notice electronically. The opt-in notification must make clear that the electronic communication is a tax document that may require action on the part of the purchaser. Although retailers would prefer a one-time opt in, the Department did not appear to be inclined to make changes to this section.
- **Returned Items:** At the hearing it was made clear that if a taxpayer returned a purchase during the calendar year, that purchase did not need to be on the non-collecting retailer’s annual report to purchasers. As support for this statement, the Department cited to a section of the currently proposed and emergency rule providing that “if the net value of a Colorado Purchaser’s return(s) and purchase(s) in a year are equal or result in a credit, then the Non-Collecting Retailer need not send an Annual Purchase Summary to the Colorado Purchaser.”
- **Penalties:** The rule originally promulgated by the Department in 2010 after the notice and reporting law was enacted included limits on the amount of penalties that could be imposed in certain situations. The current and emergency versions of the rule retain most of these penalty limits, with some revisions.<sup>2</sup> The 2010 version of the rule included provisions specifying the maximum amount of penalties that could be applied when a non-collecting retailer had no knowledge of the notice and reporting requirements and complied within 60 days of demand by the Department. Both the current and emergency rule retain these maximum penalty provisions and revise them to require that the non-collecting retailer’s lack of knowledge be “reasonable.” The applicable maximum penalties in the current and emergency versions for when a retailer complies within 60 days of demand by the Department are \$25,000 for the transactional notice (previously \$5,000 in the 2010 rule) and \$50,000 for the annual notices to customers and the Department (previously \$10,000 in the 2010 rule). The current and emergency rules (consistent with the 2010 version of the rule) retain maximum penalty provisions for a non-collecting retailer that sends within 30 days of the due date either an annual purchase summary to all Colorado purchasers or a complete annual customer information report to the Department. The penalty maximum in both cases is \$1,000. If a non-collecting retailer sells only tangible personal property that is not taxable in

Colorado or tangible personal property only to Colorado purchasers that are not subject to sales or use tax, no penalty will be collected for failure to comply with any of the notice and reporting requirements. Finally, as provided by statute, the Department may waive all or any portion of any penalty for reasonable cause.

- **Federal Controlled Group:** Both the currently proposed rule and the emergency rule provide guidance on the notice and reporting requirements for corporations that are part of a controlled group of corporations for federal income tax purposes. For example, all corporations included in a controlled group are considered a single “non-collecting retailer” for purposes of the rule. Thus, when determining whether the de minimis threshold (less than \$100,000 in Colorado sales) is met, a retailer must include sales for all corporations in its federal controlled group. Further, a non-collecting retailer may file the annual customer information report for all noncollecting retailers within the group.
- **Multistate Notices and Reports:** Both the currently proposed rule and emergency rule address multistate transactional notices. If a non-collecting retailer is required to provide a transactional notice for another state similar to that required in Colorado and the non-collecting retailer provides a single such notice to all purchasers regarding items purchased for delivery in all states, that notice will be sufficient if it contains “substantially the same information” as required for Colorado, but is provided in a form that is generalized to any state. It is unclear exactly what information is required on a multistate transactional notice for it to be considered to contain “substantially the same information” as required for Colorado.
- **Membership Clubs:** At the hearing, one attendee asked about how the transactional notice requirement would apply in the context of membership clubs, where a customer signs up to receive a different item every month for a set or indefinite period of time. The customer provides her credit card information when she signs up and is charged each month. The attendee inquired whether a transactional notice would be due each month or only upon the initial transaction. The Department indicated that this scenario was not addressed by the rule and suggested that the commentator could obtain a letter ruling. However, the Department appeared amenable to the idea that a transactional notice could be provided only at the time of the initial transaction or at the time of renewal.

Please contact [Steve Metz](#) or [Rebecca Bearden](#) with questions.

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<sup>[1]</sup> A retailer that makes less than \$100,000 in sales to Colorado purchasers in the prior calendar year and reasonably expects the same in the current year will be considered a retailer whose sales in Colorado are de minimis. If a non-collecting retailer's sales are de minimis, the retailer is not subject to the use tax notice and reporting requirements.

<sup>[2]</sup> While the current and emergency rule keep most of the penalty limits included in the 2010 version of the rule, one has been removed. The rule enacted in 2010 included penalty limits applicable to a non-collecting retailer for the first calendar for which the retailer was obligated to comply with the notice and reporting requirements. These provisions are excluded from the emergency and current versions of the rule.