



SALT Alert!

SALT Alert! 2017-19: Rhode Island Budget Includes Use Tax Reporting Requirements Effective in Two Weeks; Also Adopts Amnesty Program

Rhode Island [House Bill 5175](#), which was signed into law on August 3, 2017, imposes certain requirements on “non-collecting retailers,” “referrers,” and “retail sale facilitators.” Specifically, two weeks after the enactment of the bill, which is August 17, 2017, any non-collecting retailer, referrer, and retail sales facilitator that has in the immediately preceding calendar year (1) over \$100,000 of taxable sales of tangible personal property, prewritten computer software, or taxable services delivered into Rhode Island, or (2) over 200 of such sales transactions must comply with certain reporting requirements or, in the case of a non-collecting retailer, register to collect and remit sales and use tax.¹ The definition of non-collecting retailer is complicated and does not simply capture retailers not currently collecting and remitting Rhode Island sales and use tax.

Requirements Imposed on Non-Collecting Retailers

A non-collecting retailer meeting the requirements set forth in the law (discussed below) must either register for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into Rhode Island or comply with certain reporting requirements. The five reporting requirements that apply to a non-collecting retailer are as follows:

- (1) Post a conspicuous notice on its website that informs in-state customers that sales or use tax is due on certain purchases made from the non-collecting retailer and that Rhode Island requires the in-state customer to file a sales or use tax return.
- (2) At the time of purchase, notify Rhode Island customers of the same information specified on the website notice.
- (3) Within forty-eight hours of the time of purchase, notify Rhode Island customers in writing of the same information.
- (4) On or before January 31 of each year, including January 31, 2018 for purchases made in calendar year 2017, send a written notice to all Rhode Island customers who have cumulative annual taxable purchases from the non-collecting retailer totaling \$100 or more for the prior calendar year. The notification must show the name of the non-collecting retailer, the total amount paid by the in-state customer to the non-collecting retailer in the previous calendar year, and if available, the dates of purchases, the dollar amount of each purchase, and the category or type of the purchase, including whether the purchase is exempt or not exempt

from Rhode Island sales and use tax. The notification must also (1) include other information that the Rhode Island Division of Taxation (Division) may require by rule and regulation; (2) state the same information as required on the notices described above; and (3) be sent separately by first-class mail and include the words "Important Tax Document Enclosed" on the exterior of the mailing.

(5) Beginning on February 15, 2018, and by each February 15 thereafter, a non-collecting retailer must file with the Division an "attestation" that the non-collecting retailer has complied with the requirements described above.

Requirements Imposed on Referrers

A referrer (as defined below) that has (1) over \$100,000 of taxable sales of tangible personal property, prewritten computer software, or taxable services delivered into Rhode Island, or (2) over 200 of such sales transactions AND—in addition to meeting one of these two thresholds—receives more than \$10,000 in compensation in a calendar year from retailers with whom it has an agreement to list or advertise taxable property or services must provide written notice to all such retailers that the retailers' sales may be subject to Rhode Island sales and use tax. A referrer must begin to provide this notice to retailers within 30 days after the referrer has received more than \$10,000 in compensation from retailers in the calendar year. The \$10,000 threshold is not specifically limited to compensation for referrals to Rhode Island customers.

However, no referrer is required to comply with the requirements specified above for any referral where the referrer receives, within 90 days of the date of sale, either: 1) a copy of the retailer's Rhode Island sales tax permit or resale certificate, as applicable, or 2) evidence of a fully completed Rhode Island or Streamlined Sales and Use Tax Agreement sales and use tax exemption certificate.

Requirements Imposed on Retail Sale Facilitators

Beginning January 15, 2018, and by January 15 of each year thereafter, a retail sale facilitator (as defined below) that has (1) over \$100,000 of taxable sales of tangible personal property, prewritten computer software, or taxable services delivered into Rhode Island, or (2) over 200 of such sales transactions, must provide the Division with 1) a list of names and addresses of the retailers for whom the retail sale facilitator collected Rhode Island sales and use tax during the prior calendar year, and 2) a list of names and addresses of the retailers that used the retail sale facilitator to serve in-state customers, but for whom the retail sale facilitator did not collect Rhode Island sales and use tax during the prior calendar year.

However, no retail sale facilitator is required to comply with the requirements specified above for any sale where the facilitator receives, within 90 days of the date of sale, either: 1) a copy of the retailer's Rhode Island sales tax permit or resale certificate, as applicable, or 2) evidence of a fully completed Rhode Island or Streamlined Sales and Use Tax Agreement sales and use tax exemption certificate.

Penalties for Noncompliance

Any non-collecting retailer, referrer, or retail sale facilitator that fails to comply with any of the requirements described above will be subject to a penalty of \$10.00 for each such failure, but not less than a total penalty of \$10,000 per calendar year. Each instance of failing to comply will constitute a separate violation.

The Rhode Island Division of Taxation recently issued a series of notices, which can be accessed [here](#). These notices provide additional details on these requirements. For instance, the notices provide proposed language to be included by non-collecting retailers on the various customer notices, including the annual notice.

Definition of Non-Collecting Retailer, Referrer, and Retail Sale Facilitator²

Non-collecting Retailer: The definition of a non-collecting retailer is broad and captures retailers that have a wide range of contacts and connections with Rhode Island. The definition does not simply capture retailers that are making taxable sales to Rhode Island customers and are not collecting Rhode Island sales and use tax. In addition, certain retailers that might be considered to have sufficient nexus under representational nexus theories (e.g. affiliate nexus or click-through nexus) for the state to impose a collection obligation are considered non-collecting retailers subject to the collect or report mandate in Rhode Island.³

The term non-collecting retailer includes any person that uses in-state software to make sales at retail.⁴ In-state software means software used by in-state customers on their computers, smartphones, and other devices, including cookies or other data tracking tools stored on property in Rhode Island or distributed within the state, for the purpose of purchasing taxable goods and services.

The term non-collecting retailer also includes a person that sells, leases, or delivers taxable goods and services into Rhode Island, OR participates in any activity in Rhode Island in connection with the selling, leasing, or delivering of taxable goods and services into Rhode Island under various methods of transacting business. These include, but are not limited to:

- Directly or indirectly engaging in direct response marketing (as defined) targeted at Rhode Island customers.
- Entering into click-through agreements with in-state persons wherein commissions are paid, based on completed sales, for direct or indirect referrals to the seller.
- Using a retail sale facilitator to sell, lease, or deliver taxable goods and services into Rhode Island.

A non-collecting retailer also includes a person that (1) uses a sales process that includes listing, branding, or selling taxable goods and services, soliciting, processing orders, fulfilling orders, providing customer service and/or accepting or assisting with returns or exchanges occurring in Rhode Island, regardless of whether that part of the process has been subcontracted to an affiliate or third party and (2) offers its taxable goods and services for sale through one or more retail sale facilitators that has physical presence in Rhode Island.

Finally, the definition of non-collecting retailer captures persons that are related to a person that has physical presence in Rhode Island if the in-state person does certain things in Rhode Island on behalf of the retailer, such as:

- Selling taxable goods and services that are the same or substantially similar to those sold by a non-collecting retailer under a business name that is the same or substantially similar to that of the non-collecting retailer.
- Maintaining an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business in Rhode Island to facilitate the delivery of goods sold by the non-collecting retailer.
- Using, with the consent or knowledge of the non-collecting retailer, trademarks, service marks, or trade names in Rhode Island that are the same or substantially similar to those used by the non-collecting retailer.
- Delivering (except for delivery by common carrier or U.S. mail for which the in-state customer is charged not more than the basic charge for shipping and handling), installing, or assembling tangible personal property in Rhode Island, or performing maintenance or repair services on tangible personal property in Rhode Island, which tangible personal property is sold to in-state customers by the non-collecting retailer.
- Facilitating the delivery of tangible personal property purchased from a non-collecting retailer by allowing an in-state customer to pick up the tangible personal property at an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business maintained in Rhode Island.

- Sharing management, business systems, business practices, computer resources, communication systems, payroll, personnel, or other such business resources and activities with the non-collecting retailer, and/or engaging in intercompany transactions with the non-collecting retailer, either or both of which relate to the activities that establish or maintain the non-collecting retailer's market in Rhode Island.

Referrer: A referrer is defined as a person who agrees with a retailer to list or advertise for sale in Rhode Island taxable property or services in any forum including an Internet website; receives consideration for doing so; transfers a customer to the retailer (including the retailer's website) to complete the purchase; and does not collect payment on the transaction.

Retail Sale Facilitator: A retail sale facilitator is defined as any person that facilitates a sale by a retailer by using in-state software to make taxable retail sales or contracting with a retailer to list or advertise for sale taxable retail sales in any forum including internet website, and collecting payment from the in-state customer and transmitting them to a retailer (either directly or indirectly through agreements with third parties). It is irrelevant whether or not the person deducts any fees from the transaction.

Rhode Island Tax Amnesty Act of 2017

House Bill 5175 mandates that a tax amnesty program be established for a 75-day period ending on February 15, 2018. In recently-issued guidance, the Division indicates it will start accepting applications on December 1, 2017. The program is applicable to all taxes collected by the Rhode Island tax administrator, including but not limited to, sales and use taxes, personal income taxes, and corporate income taxes. Taxpayers may seek amnesty for taxable periods ending on or prior to December 31, 2016. Under the terms of the program, all penalties will be waived and no criminal or civil prosecution will be sought in exchange for payment of the tax owed and required interest. Interest is computed under the normal provisions, but will be reduced by 25 percent. For example, the current interest rate of 18 percent would be reduced by 4.5 percentage points, to 13.5 percent. Previously billed tax liabilities and liabilities for which a notice of deficiency have been sent are eligible for amnesty; however taxpayers under criminal investigation or involved in pending criminal or civil litigation may not participate.

For more information on House Bill 5175, please contact [Joe Senier](#) or [Harley Duncan](#).

^[1] The sales threshold may not capture referrers who earn income solely from referrals and are not making any retail sales of their own. Also, it appears that a retail sales facilitator would have to meet the \$100,000/200 sales transactions threshold based on its own sales.

2. The definitions of non-collecting retailer, referrer, and retail sale facilitator are all framed as presumptions.
3. It is not clear how Rhode Island's existing click-through nexus statute, which presumes nexus exists for persons that derive in excess of \$5,000 during the preceding four calendar quarters from click-through sales to Rhode Island customers, can be reconciled with the collect or report mandate in House Bill 5175.
4. The legislative findings section of the bill declares that the "existence and/or presence of a non-collecting retailer's, referrer's, or retail sale facilitator's in-state software on the devices of in-state customers constitutes physical presence . . . in Rhode Island under Quill . . .".