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Taxation

Digital Sales Tax Enacted in Rhode Island

Rhode Island has joined a growing number of states seeking to compel digital sellers to collect and remit the state's sales tax.

Signed by Gov. Gina Raimondo (D) Aug. 3, the \$9.2 billion Rhode Island state budget (H. 5175A) requires non-collecting retailers to begin collecting the state's 7 percent sales and use tax. Among many provisions, the Non-Collecting Retailers, Referrers and Retail Sale Facilitators Act requires tax collection by retailers with annual in-state sales equal to or exceeding \$100,000, or with 200 or more separate transactions with state residents. In lieu of collecting the tax, remote retailers must notify Rhode Island customers of their responsibility to pay taxes on purchases.

The new law also covers referrers—defined in the statute as persons that list or advertise goods or services for sale by other retailers—and retail sale facilitators—defined as persons that facilitate or advertise third-party sales and collect payment from in-state consumers. Referrers and retail sale facilitators are subject to varying notice and reporting requirements.

The state revenue department's Division of Taxation released several notices related to the new law, which has been projected to generate \$19.7 million in new revenue per year.

Mark Nebergall, president of the Software Finance and Tax Executives Council, told Bloomberg BNA Aug. 2 that Rhode Island “appears to be taking a kitchen sink approach, with the hope that something will stick. It's likely someone will sue for an injunction based on the usual” Internet Tax Freedom Act and commerce clause grounds.

‘Cookie Nexus’ Similar to a regulation proposed in neighboring Massachusetts, Rhode Island's law establishes that remote vendors have an in-state physical presence with “in-state software” used to facilitate sales through customers' smartphones and computers, including “cached files, cached software, or ‘cookies,’ or other data tracking tools” that are stored or distributed in Rhode Island.

Under the U.S. Supreme Court's 1992 decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, states are prohibited from imposing sales and use tax collection obligations on vendors without an in-state physical presence. Amazon agreed to start collecting sales and use taxes in Rhode Island earlier this year.

Steve DelBianco, executive director of Washington, D.C.-based trade group NetChoice, said that he believes the Rhode Island bill won't hold up under legal scrutiny. Netchoice joined another Washington, D.C.-based trade group, the American Catalog Mailers Association (ACMA), in a lawsuit challenging a former Massachusetts directive similar to its proposed regulation.

“The Rhode Island tax bill is a real Rube Goldberg machine, cobbled together from the most burdensome, unconstitutional, and privacy-invasive components we've seen in other states,” DelBianco told Bloomberg BNA in an Aug. 3 email. “I think their machine will fail under legal challenges on several counts, including their claim that customers who request web pages on their smartphone are actually creating physical presence for the remote business hosting the page.”

‘Rogue States’ Rhode Island is part of “a growing list of rogue states that are banking on small businesses lacking time and resources to challenge their overreaches in Court,” Paul Miller, ACMA vice president and deputy director, told Bloomberg BNA in an email. “This bill circumvents” the *Quill* physical presence rule, he said.

“Individual states do not get to reinterpret the highest court of the land, even if they think it is wrong or might change. Further, the bill is dead wrong by concluding ‘it is no longer an undue burden for non-collecting retailers to accurately compute, collect and remit and/or report with respect to their sales and use tax obligations to Rhode Island,’” Miller added. “This process is not only an enormous administrative burden on remote sellers of all sizes, but it is also extremely costly as we have shown and is certain to cause a great deal of consumer confusion.”

States have employed multiple measures to manage or overturn the 25-year-old *Quill* restraint in an ever-expanding digital economy, and litigation is pending in South Dakota, Alabama, Tennessee, Indiana, and Wyoming. Three bills related to state taxation of online sales are pending in Congress, though none has advanced to a chamber vote.

Different States, Different Processes Rhode Island chose to codify its remote sales tax proposal in a statute, while the Massachusetts Department of Revenue is promulgating a regulation.

“The Massachusetts provision may be subject to attack on the ground the regulation exceeds the scope of the statute it purports to interpret,” Nebergall said.

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Text of H. 5175A is at <http://src.bna.com/rkY>.