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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2016

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A N A C T

RELATING TO TAXATION -- REMOTE SALES TAX COLLECTION ACT

Introduced By: Representatives Kennedy, Shekarchi, O'Grady, Ackerman, and Williams

Date Introduced: January 28, 2016

Referred To: House Finance

It is enacted by the General Assembly as follows:

1 SECTION. 1 Title 44 of the General Laws entitled "TAXATION" is hereby amended by
2 adding thereto the following chapter:

3 CHAPTER 70

4 REMOTE SALES TAX COLLECTION ACT

5 **44-70-1. Legislative findings. --** The general assembly finds and declares as follows:

6 (1) The Commerce Clause of the United State Constitution prohibits states from imposing
7 sales or use tax collection obligations on out-of-state businesses unless the business has a
8 substantial nexus with the taxing state.

9 (2) The general assembly recognizes that the United States Supreme Court has held that a
10 person or entity must have a physical presence in the taxing state in order to find that a substantial
11 nexus for sales and use tax collection purpose exists. The general assembly finds that this
12 reasoning no longer applies for the reasons discussed below.

13 (3) The general assembly further recognizes that the Commerce Clause prohibits states
14 from imposing a burden on interstate commerce only when it constitutes an undue burden.

15 (4) The general assembly finds that due to the ready availability of sales and use tax
16 collection software, it is no longer an undue burden for companies without a physical presence in
17 Rhode Island to accurately compute, collect and remit their sales and use tax obligations.

18 (5) The general assembly further finds that given the exponential expansion of online
19 commerce and related technology, it is no longer an undue burden for states to require remote

1 sellers to collect sales and use taxes.

2 (6) The general assembly further finds the sales and use tax system established under
3 Rhode Island law does not pose an undue burden on out-of-state retailers and provides sufficient
4 simplification to warrant the collection and remittance of use taxes by out-of-state retailers that
5 are due and owing to Rhode Island and its local jurisdictions.

6 (7) Nothing in this chapter shall be construed as relieving in-state businesses and other
7 businesses having a substantial nexus with Rhode Island from their Rhode Island sales and use
8 tax collection obligations.

9 **44-70-2. Doing business; engaging in business; making retail sales. --** (a) In addition
10 to the definitions set forth herein, "doing business in this state" includes the selling, leasing, or
11 delivering in this state, or any activity in this state in connection with the selling, leasing, or
12 delivering in this state, of tangible personal property or taxable services for use, storage,
13 distribution, or consumption within this state. This subsection affects the imposition, application,
14 or collection of sales and use taxes only. "Doing business in this state" includes, but shall not be
15 limited to, the following acts or methods of transacting business on a regular or systematic basis:

16 (1) Maintaining within this state, directly or indirectly or by an affiliate, an office,
17 distribution facility, salesroom, warehouse, storage place, or other similar place of business,
18 including the employment of a resident of this state who works from a home office in this state.

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

30 (3) Entering into one or more agreements under which a person or persons that have a
31 nexus with this state directly or indirectly refer potential purchasers of products to the seller for a
32 commission or other consideration, whether by an Internet-based link, an Internet website or
33 otherwise.

34 (b) The activities described in this section constitute "doing business in this state"

1 regardless of whether or not the referral is related to the sale of tangible personal property or
2 taxable services.

3 (c) An agreement under which a seller purchases advertisements from a person or persons
4 in this state, to be delivered on television, radio, in print, on the Internet, or by any other medium,
5 is not an agreement for purposes of this section, unless the advertisement revenue paid to the
6 person or persons in this state consists of commissions or other consideration that is based in
7 whole or in part upon sales of products.

8 (d) This section does not apply if the seller can demonstrate that no person in this state
9 with whom the seller has an agreement to engage in referral activity in this state on behalf of the
10 seller satisfies the requirements of the Commerce Clause. In order to qualify for the safe harbor
11 provided herein, the seller must:

12 (1) Be able to demonstrate that each in-state person with whom the seller has an
13 agreement is prohibited from engaging in any solicitation activities in this state that refer potential
14 customers to the seller; and

15 (2) Obtain annually a certification from each such in-state person or persons that the
16 person or persons have complied with the prohibition stated herein. A person who intentionally or
17 negligently provides an inaccurate certification is subject to the penalties set forth hereunder.

18 (e)(1) A seller is doing business in this state if any part of the sale process, including
19 listing products for sale, soliciting, branding products, selling products, processing orders,
20 fulfilling orders, providing customer service or accepting or assisting with returns or exchanges
21 occurs in the state, regardless of whether that part of the process has been subcontracted to an
22 affiliate or third party. The sale process does not include shipping via a common carrier.

23 (2) The seller is doing business in this state if it offers its products for sale through one or
24 more marketplaces operated by any marketplace provider that has substantial nexus with this
25 state.

26 (3) A seller is presumed to be doing business in this state if the total cumulative sales
27 price of products sold to purchasers in this state exceeds ten thousand dollars (\$10,000) in the
28 immediately preceding calendar year and the seller either has physical presence in or is registered
29 to collect and remit sales tax in a state that is a member of the streamlined sales and use tax
30 agreement. The seller is required to collect and remit sales and use tax unless it can prove that it
31 does not have nexus under the Commerce Clause with this state.

32 (4) A person is presumed to be doing business in this state if such person is related to a
33 person that has nexus under the Commerce Clause with this state, and such related person:

34 (i) Sells under the same or a similar business name tangible personal property or taxable

1 services similar to that sold by the person against whom the presumption is asserted;

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

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

9 (iv) Delivers, installs, or assembles tangible personal property in this state, or performs
10 maintenance or repair services on tangible personal property in this state, which tangible personal
11 property is sold to in-state customers by the person against whom the presumption is asserted;

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

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

20 (vii) For purposes of this subsection, two (2) persons are related if:

21 (A) Such persons are related to the remote seller within the meaning of the Internal
22 Revenue Code of 1986 as amended; or

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

25 (viii) The presumption set forth in this subsection may be rebutted by a preponderance of
26 evidence that during the taxable period in question the related person with nexus under the
27 Commerce Clause did not engage in any activities in this state that are sufficient under the
28 Commerce Clause to establish nexus in this state on behalf of the person against whom the
29 presumption is asserted.

30 (5) A marketplace provider or a referrer (as defined herein) is subject to this state's sales
31 and use tax jurisdiction if it performs any of the activities described herein.

32 **44-70-3. Imposition of tax on marketplace providers. -- (a) Marketplace provider. The**
33 **term "marketplace provider" means and includes any person who facilitates a sale by a retailer.**
34 **For purposes of this chapter, a marketplace provider facilitates a retail sale when the marketplace**

1 provider both:

2 (1) Lists or advertises tangible personal property and services for sale in any forum,
3 including a catalog or Internet website; and

4 (2) Either directly or indirectly through agreements or arrangements with third parties,
5 collects receipts from the customer and transmits those receipts to the marketplace seller, whether
6 or not the marketplace provider deducts any fees from the transmission of those receipts to the
7 marketplace seller. The division of taxation may promulgate rules and regulations that further
8 clarify when a marketplace provider facilitates a retail sale.

9 (b) "Marketplace seller" means a seller vendor or retailer that has any sales facilitated by
10 a marketplace provider.

11 (c) A marketplace provider doing business in the state is required to collect and remit the
12 sales and use tax on any sales facilitated by the marketplace provider to customers in this state.
13 However, no marketplace provider is required to collect and remit sales or use tax on a sale from
14 a marketplace seller to a customer in this state if the marketplace seller either:

15 (1) Provides a copy of the retailer's registration to collect sales and use tax in this state to
16 the marketplace provider before the marketplace provider facilitates on that sale; or

17 (2) The marketplace seller appears on a list published by the division of taxation of the
18 entities registered to collect sales and use tax in this state. The division of taxation shall
19 promulgate rules and regulations regarding the content and publication of the list. Nothing in this
20 section shall be construed to interfere with the ability of a marketplace provider and a
21 marketplace seller to enter into agreements with each other regarding fulfillment of the
22 requirements of this chapter.

23 (d) A marketplace provider is relieved of liability under this section for failure to collect
24 and remit the correct amount of the tax to the extent that the marketplace provider can
25 demonstrate that the error was due to incorrect information given to the marketplace provider by
26 the marketplace seller. Provided, however, this subsection shall not apply if the marketplace
27 provider and the marketplace seller are related as defined in herein.

28 **44-70-4. Referrer reporting and registration requirements. -- (a) Referrer. The term**
29 **"referrer" means every person who:**

30 (1) Contracts or otherwise agrees with a retailer to list multiple items of tangible personal
31 property and services for sale and the sales price of those items in any forum, including a catalog
32 or Internet website;

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

34 (3) Transfers, via telephone, Internet link, or otherwise, a customer to the retailer or the

1 retailer's website to complete a purchase; and

2 (4) Does not collect receipts from the customer for the transaction.

3 (b) Referrer permit. (1) By the first day of the last month of a calendar year, every
4 referrer that received more than ten thousand dollars (\$10,000) in fees paid by retailers for the
5 services described in the previous calendar year, or that received more than seventy thousand five
6 hundred dollars (\$70,500) for such services in the first three quarters (3/4) of the current calendar
7 year, must file with the division of taxation a notice, in a form prescribed by the division of
8 taxation, stating the referrer's intent to provide the services set forth herein in the following
9 calendar year.

10 (2) The division of taxation shall, within fifteen (15) days of receipt of the notice, issue a
11 permit to such referrer, without charge, to provide such services to retailers to refer customers in
12 this state to retailers.

13 (3) A referrer required to file the notice set forth in this subsection that fails to obtain a
14 permit shall not refer customers in this state to retailers. A referrer that does so without a permit
15 shall be required to pay the fee described herein.

16 (c) Referrer Information Reporting. (1) In addition to any other return or report required
17 to be filed under this chapter, a referrer that receives more than ten thousand dollars (\$10,000) in
18 fees paid by retailers for the activities described herein in the previous calendar year is required to
19 file a report annually listing the following:

20 (i) The name and address of each retailer who has contracted with the referrer to refer
21 customers within this state to the retailer; and

22 (ii) If available, the cumulative sales price and any available transactional-level detail for
23 referrals made by the referrer of customers in this state to each retailer, including listed price of
24 items and the number of times referrals were made to retailers for those items. The referrer shall
25 not be required to provide any information that could identify a purchaser; and

26 (iii) If available, the number of potential customers located in this state that were referred
27 to the retailer and if available, the number of customers who made purchases after a referral.

28 (2) A referrer that receives more than ten thousand dollars (\$10,000) from fees paid by
29 retailers during the previous calendar year is also required to provide notice to retailers that the
30 retailer's sales may be subject to sales and use tax and that the retailer's contact information and
31 sales volume into this state is being provided to the division of taxation. The division of taxation
32 may establish by rules and regulations what constitutes notice to retailers sufficient to meet the
33 requirements of this subsection.

34 (3) If a referrer does not meet the requirements of subsections (c)(1) or (c)(2) of this

1 section such referrer shall have its permit revoked.

2 (d) A referrer is not required to provide the information under subsection (c)(1) of this
3 section for a retailer if the retailer either:

4 (1) Provides a copy of the retailer's registration to collect sales and use tax in this state to
5 the referrer; or

6 (2) The retailer appears on a list published by the division of taxation. The division of
7 taxation shall promulgate rules and regulations regarding the content and publication of the list.

8 (e) A referrer is not required to provide the information under subsection (c)(1) of this
9 section if the referrer is a marketplace provider that collects and remits sales and use tax.

10 (f) Tax. When a referrer refers a customer to a retailer and the retailer makes a retail sale
11 to that customer in this state, liability for the sales and use tax on the transaction due from the
12 customer/seller is imposed on the referrer in the amount of the sales and use tax that would have
13 been due on the transaction, based on the sales price listed by the referrer or retailer, unless the
14 retailer either:

15 (1) Provides a copy of the retailer's registration to collect sales and use tax in this state to
16 the referrer; or

17 (2) The retailer appears on a list published by the division of taxation of the entities
18 registered to collect sales and use tax in this state. The division of taxation shall promulgate rules
19 and regulations regarding the content and publication of the list. This subsection shall not apply to
20 any referrer that has complied with subsections (b) and (c) of this section.

21 **44-70-5. Appeal.** -- Notwithstanding any section of the general or public laws to the
22 contrary, if the tax administrator issues one or more final determinations hereunder any appeal
23 may be made directly to the supreme court within sixty (60) days after the date the administrator
24 issued the determination if the primary issue raised by the petitioner is the constitutionality of this
25 chapter.

26 **44-70-6. Severability.** -- If any provision of this chapter or the application thereof is held
27 invalid, such invalidity shall not affect the provisions or applications of this chapter which can be
28 given effect without the invalid provisions or applications.

29 SECTION 2. This act shall take effect upon passage and shall apply to tax years
30 beginning on or after January 1, 2017.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

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RELATING TO TAXATION -- REMOTE SALES TAX COLLECTION ACT

1 This act would create the "Remote Sales Tax collection Act" to enable the state to collect
2 sales and use taxes from out-of-state retailers.

3 This act would take effect upon passage and would apply to tax years beginning on or
4 after January 1, 2017.

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