AN ACT
RELATING TO TAXATION -- SALES AND USE TAX--NON-COLLECTING RETAILERS, REFERRERS, AND RETAIL SALE FACILITATORS ACT

Introduced By: Representative Marvin L. Abney
Date Introduced: February 05, 2019
Referred To: House Finance

It is enacted by the General Assembly as follows:

SECTION 1. The title of Chapter 44-18.2 of the General Laws entitled "Sales and Use Tax - Non-Collecting Retailers, Referrers, and Retail Sale Facilitators Act" is hereby amended to read as follows:

CHAPTER 44-18.2
Sales and Use Tax - Non-Collecting Retailers, Referrers, and Retail Sale Facilitators Act

SECTION 2. Section 44-18.2-2 of the General Laws in Chapter 44-18.2 entitled "Sales and Use Tax - Non-Collecting Retailers, Referrers, and Retail Sale Facilitators Act" is hereby amended to read as follows:

44-18.2-2, Definitions.

For the purposes of this chapter:

(1) "Division of taxation" means the Rhode Island department of revenue, division of taxation. The division may also be referred to in this chapter as the "division of taxation", "tax division", or "division."

(2) "In-state customer" means a person or persons who makes a purchase of tangible personal property, prewritten computer software delivered electronically or by load and leave as
defined in § 44-18-7.1(g)(v), vendor-hosted prewritten computer software, and/or taxable services as defined under § 44-18-1 et seq. for use, storage, and/or other consumption in this state.

(3) "In-state software" means software used by in-state customers on their computers, smartphones, and other electronic and/or communication devices, including information or software such as cached files, cached software, or "cookies", or other data tracking tools, that are stored on property in this state or distributed within this state, for the purpose of purchasing tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, and/or taxable services.

(4) "Marketplace" means a physical or electronic place including, but not limited to, a store, booth, Internet website, catalog, television or radio broadcast, or a dedicated sales software application where tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, and/or taxable services is/are sold or offered for sale for delivery in this state regardless of whether the tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, or have a physical presence in the state.

(5) "Marketplace facilitator" means any person or persons that contracts or otherwise agrees with a marketplace seller to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller's products through a physical or electronic marketplace operated by the person or persons, and engages:

(a) Directly or indirectly, through one or more affiliated persons in any of the following:

(i) Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;

(ii) Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;

(iii) Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or

(iv) Software development or research and development activities related to any of the activities described in (b) of this subsection (5), if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and

(b) In any of the following activities with respect to the seller's products:

(i) Payment processing services;

(ii) Fulfillment or storage services;

(iii) Listing products for sale;

(iv) Setting prices;
(v) Branding sales as those of the marketplace facilitator;
(vi) Order taking;
(vii) Advertising or promotion; or
(viii) Providing customer service or accepting or assisting with returns or exchanges.

(6) “Marketplace seller” means a person, not a related party to a marketplace facilitator, who has an agreement with a marketplace facilitator and makes retail sales of tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, and/or taxable services through a marketplace owned, operated, or controlled by a marketplace facilitator, whether or not such person is required to register to collect and remit sales tax.

(47) "Non-collecting retailer" means any person or persons who meets at least one of the following criteria:

(A) Uses in-state software to make sales at retail of tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services; or

(B) Sells, leases, or delivers in this state, or participates in any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services for use, storage, distribution, or consumption within this state. This includes, but shall not be limited to, any of the following acts or methods of transacting business:

(i) Engaging in, either directly or indirectly through a referrer, retail sale facilitator, or other third party, direct response marketing targeted at in-state customers. For purposes of this subsection, direct response marketing includes, but is not limited to, sending, transmitting, or broadcasting via flyers, newsletters, telephone calls, targeted electronic mail, text messages, social media messages, targeted mailings; collecting, analyzing and utilizing individual data on in-state customers; using information or software, including cached files, cached software, or "cookies", or other data tracking tools, that are stored on property in or distributed within this state; or taking any other action(s) that use persons, tangible property, intangible property, digital files or information, or software in this state in an effort to enhance the probability that the person's contacts with a potential in-state customer will result in a sale to that in-state customer;

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

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

(C) Uses a sales process that includes listing, branding, or selling tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services for sale, soliciting, processing orders, fulfilling orders, providing customer service and/or accepting or assisting with returns or exchanges occurring in this state, regardless of whether that part of the process has been subcontracted to an affiliate or third party. The sales process for which the in-state customer is charged not more than the basic charge for shipping and handling as used in this subsection shall not include shipping via a common carrier or the United States mail;

(D) Offers its tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services for sale through one or more retail sale facilitators that has physical presence in this state;

(E) Is related to a person that has physical presence in this state, and such related person with a physical presence in this state:

(i) Sells tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services that are the same or substantially similar to that sold by a non-collecting retailer under a business name that is the same or substantially similar to that of the non-collecting retailer;

(ii) Maintains an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business in this state to facilitate the delivery of tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services sold by the non-collecting retailer;

(iii) Uses, with consent or knowledge of the non-collecting retailer, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the
non-collecting retailer;

(iv) Delivers or has delivered (except for delivery by common carrier or United States mail for which the in-state customer is charged not more than the basic charge for shipping and handling), installs, or assembles tangible personal property in this state, or performs maintenance or repair services on tangible personal property in this state, which tangible personal property is sold to in-state customers by the non-collecting retailer;

(v) Facilitates the delivery of tangible personal property purchased from a non-collecting retailer but delivered in this state 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 this state; or

(vi) Shares 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 engages 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 this state.

(F) Any person or persons who meets at least one of the criteria in subsections (4)(A) -- (4)(E) above shall be presumed to be a non-collecting retailer.

(G) The term "non-collecting retailer" will no longer apply to any entity that meets the definition of this subsection on or after July 1, 2019, at which time such entity shall be classified as a "remote seller" as referenced in R.I. Gen. Laws § 44-18-15.2.

(68) "Person" means person as defined in § 44-18-6.

(69) "Referrer" means every person who:

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

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

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

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

(E) A person or persons who engages in the activity set forth in all of the activities set forth in subsections (69)(A) -- (69)(D) above shall be presumed to be a referrer.

(210) "Related" means:
(A) Having a relationship with the non-collecting retailer within the meaning of the
internal revenue code of 1986 as amended; or
(B) Having one or more ownership relationships and a purpose of having the ownership
relationship is to avoid the application of this chapter.

(811) A "retail sale" or "sale at retail" means any retail sale or sale at retail as defined in §
44-18-8.

(912) "Retail sale facilitator" means any person or persons that facilitates a sale by a
retailer by engaging in the following types of activities:

(A) Using in-state software to make sales at retail of tangible personal property,
prewritten computer software delivered electronically or by load and leave, and/or taxable
services; or

(B) Contracting or otherwise agreeing with a retailer to list and/or advertise for sale
tangible personal property, prewritten computer software delivered electronically or by load and
leave, and/or taxable services in any forum, including, but not limited to, a catalog or internet
website; and

(C) Either directly or indirectly through agreements or arrangements with third parties,
collecting payments from the in-state customer and transmitting those payments to a retailer. A
person or persons may be a retail sale facilitator regardless of whether they deduct any fees from
the transaction. The division may define in regulation circumstances under which a retail sale
facilitator shall be deemed to facilitate a retail sale.

(D) A person or persons who engages in the type of activity set forth in subsection (912)
(A) above or both of the types of activities set forth in subsections (912) (B) and (912) (C) above
shall be presumed to be a retail sale facilitator.

(E) The term "retail sale facilitator" will no longer apply to any entity that meets the
definition of this subsection on or after July 1, 2019, at which time such entity shall be classified

(134) A "retailer" means retailer as defined in § 44-18-15.

(144) "State" means the State of Rhode Island and Providence Plantations.

(152) "Streamlined agreement" means the Streamlined Sales and Use Tax Agreement as
referenced in § 44-18-1-1 et seq.

(16) "Vendor-hosted prewritten computer software" refers to the same term as defined in
amended to read as follows:

44-18.2-3. Requirements for non-collecting retailers, referrers, and retail sale facilitators.

(A) Except as otherwise provided below in § 44-18.2-4, beginning on the later of July 15, 2017, or two (2) weeks after the enactment of this chapter, and for each tax year thereafter prior to July 1, 2019 or the effective date of the amendment of this chapter, any non-collecting retailer, referrer, or retail sale facilitator, as defined in this chapter, that in the immediately preceding calendar year either:

(i) Has gross revenue from the sale of tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or has taxable services delivered into this state equal to or exceeding one hundred thousand dollars ($100,000); or

(ii) Has sold tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services for delivery into this state in two hundred (200) or more separate transactions shall comply with the requirements in subsections (E)(F), (F)(G), and (G)(H) as applicable.

(B) A non-collecting retailer, as defined in this chapter, shall comply with subsection (E)(F) below if it meets the criteria of either subsection (A)(i) or (A)(ii) above.

(C) A referrer, as defined in this chapter, shall comply with subsection (F)(G) below if it meets the criteria of either subsection (A)(i) or (A)(ii) above.

(D) A retail sale facilitator, as defined in this chapter, shall comply with subsection (G)(H) below if it meets the criteria of either subsection (A)(i) or (A)(ii) above.

(E) Any noncollecting retailer, retail sale facilitator and/or referrer that is collecting and remitting sales tax into this state prior to the enactment of this amended chapter, date to be inserted after enactment, shall be deemed a remote seller and/or marketplace facilitator and/or referrer and shall continue to collect and remit sales tax. Beginning on ninety (90) days after the enactment of this amended chapter, date to be inserted after enactment, any remote seller, referrer, marketplace seller and/or marketplace facilitator, upon amendment of this chapter and shall continue to collect and remit sales tax.

Beginning on ninety (90) days after the enactment of this amended chapter, date to be inserted after enactment, any remote seller, marketplace seller, marketplace facilitator, and/or referrer, as defined in this chapter, who is not collecting and remitting sales tax shall comply with the requirements in subsection (I) if that remote seller, marketplace seller, marketplace facilitator, and/or referrer, as defined in this chapter, (i) has not been collecting or remitting sales tax in this state and, in the immediately preceding calendar year either:
(i) Has gross revenue from the sale of tangible personal property, prewritten computer
 software delivered electronically or by load and leave, vendor-hosted prewritten computer
 software, and/or has taxable services delivered into this state equal to or exceeding one hundred
 thousand dollars ($100,000); or

(ii) Has sold tangible personal property, prewritten computer software delivered
 electronically or by load and leave, vendor-hosted prewritten computer software, and/or taxable
 services for delivery into this state in two hundred (200) or more separate transactions.

(PE) Non-collecting retailer. A non-collecting retailer shall either register in this state for
 a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into the
 state or:

(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 this state
 requires the in-state customer to file a sales or use tax return;

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

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

(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 in-state customers who have cumulative annual
 taxable purchases from the non-collecting retailer totaling one hundred dollars ($100) or more for
 the prior calendar year. The notification shall 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
 taxation in Rhode Island. The notification shall include such other information as the division
 may require by rule and regulation. The notification shall state that the state of Rhode Island
 requires a sales or use tax return to be filed and sales or use tax to be paid on certain categories or
 types of purchases made by the in-state customer from the non-collecting retailer. The
 notification shall be sent separately to all in-state customers by first-class mail and shall not be
 included with any other shipments or mailings. The notification shall include the words
 "Important Tax Document Enclosed" on the exterior of the mailing; and
(5) Beginning on February 15, 2018, and not later than each February 15 thereafter, a non-collecting retailer that has not registered in this state for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into the state for any portion of the prior calendar year, shall file with the division on such form and/or in such format as the division prescribes an attestation that the non-collecting retailer has complied with the requirements of subsections (E) (1) -- (E) (4) herein.

(FG) Referrer. At such time during any calendar year, or any portion thereof, that a referrer receives more than ten thousand dollars ($10,000) from fees, commissions, and/or other compensation paid to it by retailers with whom it has a contract or agreement to list and/or advertise for sale tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services, said referrer shall within thirty (30) days provide written notice to all such retailers that the retailers' sales may be subject to this state's sales and use tax.

(GH) Retail sale facilitator. Beginning January 15, 2018, and each year thereafter, a retail sale facilitator shall provide the division of taxation with:

(i) A list of names and addresses of the retailers for whom during the prior calendar year the retail sale facilitator collected Rhode Island sales and use tax; and

(ii) A list of names and addresses of the retailers who during the prior calendar year 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.

(I) Remote sellers, referrers, and marketplace facilitators. A remote seller, referrer, and marketplace facilitator shall register in this state for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into the state.

(i) A marketplace facilitator shall collect sales and use tax on all sales made through the marketplace to purchasers in this state whether or not the marketplace seller (1) has or is required to have a permit to make sales at retail or (2) would have been required to collect and remit sales and use tax had the sale not been made through the marketplace provider.

(ii) A marketplace facilitator shall certify to its marketplace sellers that it will collect and remit sales and use tax on sales of taxable items made through the marketplace. A marketplace seller that accepts a marketplace provider's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's returns under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws.

(iii) A marketplace facilitator with respect to a sale of tangible personal property it facilitates:
(A) shall have all the obligations and rights of a retailer under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws and under any regulations adopted pursuant thereto, including, but not limited to, the duty to obtain a certificate of authority, to collect tax, file returns, remit tax, and the right to accept a certificate or other documentation from a customer substantiating an exemption or exclusion from tax, the right to receive a refund or credit allowed by law; and (B) shall keep such records and information and cooperate with the tax administrator to ensure the proper collection and remittance of tax imposed, collected, or required to be collected under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws.

(iv) A marketplace facilitator shall be subject to audit by the tax administrator with respect to all retail sales for which it is required to collect and pay the tax imposed under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws. Where the tax administrator audits the marketplace facilitator, the tax administrator is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under this subsection (iv).

(v) If the marketplace facilitator demonstrates to the tax administrator's satisfaction that the marketplace facilitator has made a reasonable effort to obtain accurate information from the marketplace seller about a retail sale and that the failure to collect and pay the correct amount of tax imposed under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws was due to incorrect information provided to the marketplace facilitator by the marketplace seller, then the marketplace facilitator shall be relieved of liability of the tax for that retail sale. This subsection (v) does not apply with regard to a retail sale for which the marketplace facilitator is the seller or if the marketplace facilitator and seller are affiliates. Where the marketplace facilitator is relieved under this subsection (v), the seller is liable for the tax imposed under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws.

(vi) A class action may not be brought against a marketplace facilitator on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator, regardless of whether such action is characterized as a tax refund claim. Nothing in this subsection (vi) shall affect a purchaser's right to seek a refund as otherwise allowed by law.

(H) Any person or entity that engages in any activity or activities of a non-collecting retailer, referrer, and/or retail sale facilitator as defined herein shall be presumed to be a non-collecting retailer, referrer, and/or retail sale facilitator as applicable even if referred to by another name or designation. Said person or entity shall be subject to the terms and conditions set forth in this chapter.

SECTION 4. Section 44-18.2-4 of the General Laws in Chapter 44-18.2 entitled "Sales
and Use Tax - Non-Collecting Retailers, Referrers, and Retail Sale Facilitators Act” is hereby amended to read as follows:

**44-18.2-4. Exceptions for referrers and retail sale facilitators.**

(A)(i) Notwithstanding the provisions of § 44-18.2-3, no retail sale facilitator shall be required to comply with the provisions of § 44-18.2-3(GH), for any sale where the retail sale facilitator within ninety (90) days of the date of the sale has been provided either:

(1) A copy of the retailer's Rhode Island sales tax permit to make sales at retail in this state or its resale certificate as applicable; or

(2) Evidence of a fully completed Rhode Island or Streamlined agreement sales and use tax exemption certificate.

(ii) Notwithstanding the provisions of § 44-18.2-3, no referrer shall be required to comply with the provisions of § 44-18.2-3(GG) for any referral where the referrer within ninety (90) days of the date of the sale has been provided either:

(1) A copy of the retailer's Rhode Island sales tax permit to make sales at retail in this state or its resale certificate as applicable; or

(2) Evidence of a fully completed Rhode Island or Streamlined agreement sales and use tax exemption certificate.

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

(C) The provisions of subsections (A) and (B) herein will not be applicable as of July 1, 2019 or the effective date of the amendment of this chapter.

SECTION 5. Section 44-18.2-5 of the General Laws in Chapter 44-18.2 entitled “Sales and Use Tax - Non-Collecting Retailers, Referrers, and Retail Sale Facilitators Act” is hereby amended to read as follows:

**44-18.2-5. Penalties.**

Prior to the effective date of the enactment of the amendment of this chapter or date to be inserted upon enactment, any non-collecting retailer, referrer, or retail sale facilitator that fails to comply with any of the requirements of this chapter shall be subject to a penalty of ten dollars ($10.00) for each such failure, but not more than a total penalty of ten thousand dollars ($10,000) per calendar year. As of July 1, 2019, any remote seller, referrer, or marketplace facilitator that fails to comply with any of the requirements of this chapter shall be subject to a penalty of ten dollars ($10.00) for each such failure, but not less than a total penalty of ten thousand dollars ($10,000).
thousand dollars ($10,000) per calendar year. Each instance of failing to comply with the requirements of this chapter shall constitute a separate violation for purposes of calculating the penalty under this section. This penalty shall be in addition to any other applicable penalties under title 44.

SECTION 6. Section 44-18.2-6 of the General Laws in Chapter 44-18.2 entitled "Sales and Use Tax - Non-Collecting Retailers, Referrers, and Retail Sale Facilitators Act" is hereby amended to read as follows:

44-18.2-6. Other obligations.

(A) Nothing in this section affects the obligation of any in-state customer to remit use tax as to any applicable transaction in which the seller, non-collecting retailer, retail sale facilitator, remote seller, Marketplace Seller, or Marketplace Facilitator has not collected and remitted the sales tax for said transaction.

(B) Nothing in this chapter shall be construed as relieving any other person or entity otherwise required to collect and remit sales and use tax under applicable Rhode Island law from continuing to do so.

(C) In the event that any section of this chapter is later determined to be unlawful, no person, persons, or entity shall have a cause of action against the person that collected and remitted the sales and use tax pursuant to this chapter.


44-18-15.2. "Remote seller" and "remote sale" defined -- Collection of sales and use tax by remote seller.

(a) As used in this section:

(1) "Remote seller" means a person who makes remote sales in this state, any seller, other than a marketplace facilitator or referrer, who does not have a physical presence in this state and makes retail sales to purchasers.

(2) "Remote sale" means a sale into this state for which the seller would not legally be required to pay, collect, or remit state or local sales and use taxes unless provided by federal law.

(b) Upon passage of any federal law authorizing states to require remote sellers to collect and remit sales and use taxes, this state will require a remote seller making remote sales in the state to pay, collect, and remit sales and use taxes at the rate imposed under § 44-18-18, and in accordance with the provisions of this article, chapters 18.1 and 19 of this title, and applicable federal law.
SECTION 8. This act shall take effect upon passage.
This act would extend the requirement to collect sales tax to remote sellers in a way that conforms to a recent U.S. Supreme Court decision making it easier for states to compel collection of the sales tax from retailers who do not have a physical presence in their state. This act would take effect upon passage.