



Attention: Phil Horwitz, Tax Policy Analysis Director
Taxation Division
Colorado Department of Revenue

From: Colorado Association of Commerce & Industry Tax Council

Date: January 13, 2018

RE: *Comments on Proposed Rule 39-26-105(3) – Documenting Exempt Sales*

The Colorado Association of Commerce & Industry’s Tax Council hereby submits comments regarding the Colorado Department of Revenue (DOR’s) proposed rule 39-26-105(3) as referenced above regarding the documentation of exempt sales. The CACI Tax Council represents the state and local taxation interests of CACI’s multi-industry membership and the Colorado business community, and this memorandum summarizes CACI’s concerns.

First and foremost, CACI Tax Council members are concerned that proposed rule 39-26-105(3) will create significant administrative burdens on businesses in Colorado. Companies currently struggle to comply with Colorado’s very complicated tax regime and creating additional tax compliance burdens worsens the existing challenges, and creates potential for risk for taxpayers.

In the interest of simplifying taxpayers’ current compliance requirements and in consideration of the Department’s proposed rule, we would encourage the Department to consider using the SSUTA administration of documenting exempt sales as opposed to the rule that is being proposed. This would allow for greater uniformity for Colorado businesses – some of which operate in other states.

Concerns with Proposed Rule 39-26-105(3):

CACI believes this new rule will require sellers to hire additional full-time employees in order to meet the requirements for completion and verification of exemptions. The current Colorado tax system is complex, and the requirements proposed will be impossible to meet in certain situations. Currently, employees are trying to get “properly completed” certificates from customers who may not be familiar with Colorado’s complicated tax structure. There may be situations where information is not attainable. We would recommend that the Department use the procedures found in SSUTA Section 317 to establish that a seller has exercised “due diligence” to verify a purchaser’s claim of exemption and avoid the risk of losing the exemption claim.

We are also concerned that this burden is almost entirely placed on the sellers - not the purchaser - and recommend that a purchaser affirmatively notify a seller if there is a change in their tax situation. We would also note that this proposed rule does not contemplate a method for funds verification on electronic payments. Some form of electronic payment is rapidly becoming the norm for payments, indeed many businesses now transact almost no business via check or cash and the proposed rule does not provide any guidance for these types of transactions. For example,

electronic payments only require routing number and account numbers for processing but do not require an exact match on an account name, the transaction processes entirely without the account name and banks do not provide an account name back on the transaction.

The rule also does not appear to contemplate the use of a credit card for online or purchases made by telephone, which again do not require a matching name in the manner the DOR seems to be requiring, and it appears to forestall the ability of purchasers to utilize an MTC exemption certificate. The DOR should clearly state what, if any MTC documentation is acceptable and if it must be paired with any additional documentation. Additionally, the proposed rule does not specify when the 90-day period for a seller to gather documentation begins, nor what would constitute “good cause” for an extension.

Additional Comments on Proposed Language:

(1) *General Rule.* A seller must exercise due diligence to verify a purchaser’s claim for exemption from sales *or retailer’s use* tax and maintain **adequate and complete** records to demonstrate the seller’s due diligence. If the Department subsequently finds a transaction was not exempt at the time of sale, a seller who has complied with this rule’s requirements will be considered to have met its burden of proof.

- The Department has referenced in the past that current laws regarding sales and use tax do not authorize the imposition of a “retailer’s use” tax. Therefore, we believe the term “retailer’s use” tax should be removed since that term is not found anywhere in current law. We would also recommend removing the term “complete” since there is no clear guidance or definition in the rule on the term “complete.”

(2)(II) *Out-Of-State Purchasers* - A seller may accept from a purchaser located outside of Colorado a resale license, exemption certificate, or other authorized documentation from the issuing-state. The seller must keep a copy of the document for their records. A seller must also have the out-of-state purchaser complete a Department issued Exemption Certificate (DR 0563) or **Affidavit of Exempt Sale (DR 5002)**. See C.R.S. § 24-60-1301 for more information on out-of-state exemption documents.

- The affidavit referenced in this subsection does not include an option for the exempt entity to pay through electronic funds. We recommend that option be included.

(2)(b)(I) For sales to wholesalers, the seller must reasonably conclude that the goods sold are reasonably for resale in the course of purchaser’s ordinary business.

- During the DOR hearing held on December 20, 2018 regarding this proposed rule, Department representatives stated that “the ‘reasonable’ standard would not be satisfied in the example of a florist attempting to buy a mattress for resale.” Participants at the hearing requested that the Department include that example in its regulation to allow for guidance to taxpayers and DOR auditors as to the intended standard. We would reinforce that request made during the hearing to include that example in the regulation.

In summary, while the DOR may view the regulation as a defense in the case a transaction is subsequently found to be taxable; the practical outcome is going to be a rule that taxpayers could

never meet the burden of proof for and which sets up a huge number of individual requirements that would have to be argued over with auditors for each customer and transaction. Since this proposed rule raises multiple concerns by Colorado retailers, we would recommend that the Department consider the State of New Mexico model which allows the State to issue the certificates for claiming the exemption in an effort to prevent exemption certificate misuse.

CACI appreciates the Department's consideration of these comments, and looks forward to continuing to work with the Department on this matter. If you should have any questions/concerns regarding this matter, please do not hesitate to contact Loren Furman, Senior VP of State & Federal Relations, CACI, at 303-866-9642 or lfurman@cochamber.com.

Thank you.