

NOTICE AND REPORTING REQUIREMENTS FOR NON-COLLECTING RETAILERS

RULE 39-21-112(3.5)

Basis and Purpose

The basis for this rule is § 39-21-112(1) and § 39-21-112(3.5), C.R.S. The purpose of this rule is to clarify how a retailer that does not collect Colorado sales tax shall comply with notice and reporting requirements of § 39-21-112(3.5), C.R.S.

- (1) **General Rule.** Every Non-Collecting Retailer whose Total Gross Sales into Colorado are \$100,000 or more in a calendar year shall:
 - (a) Provide a Transactional Notice to all Colorado Purchasers as described in paragraph (4) of this rule;
 - (b) Provide an Annual Purchase Summary to all Colorado Purchasers by January 31 of each year as described in paragraph (5) of this rule; and
 - (c) Provide an Annual Customer Information Report to the Department by March 1 of each year as described in paragraph (6) of this rule.
- (2) **Definitions.**
 - (a) *“Annual Customer Information Report”* means the annual report required to be sent by a Non-Collecting Retailer notifying the Department of the information required pursuant to paragraph (6) of this rule.
 - (b) *“Annual Purchase Summary”* means the notification required to be sent by a Non-Collecting Retailer notifying Colorado Purchasers of the information required pursuant to paragraph (5) of this rule.
 - (c) *“Colorado Purchaser”* means a purchaser who makes a Colorado Reportable Purchase. If a good is purchased by one party, who may be inside or outside of Colorado, and is shipped to another party in Colorado, the Colorado Purchaser is the purchaser of the tangible personal property, not the recipient of the tangible personal property.
 - (d) *“Colorado Reportable Purchase”* means:
 - (i) With respect to sales of tangible personal property that are shipped, a purchase that is shipped to an address in Colorado, or
 - (ii) With respect to sales of tangible personal property that are downloaded or otherwise delivered electronically, a purchase that the Non-Collecting Retailer, using a-commercially reasonable method, determines is to be

downloaded or otherwise used by a person located in Colorado. A commercially reasonable method may be based on the Non-Collecting Retailer's existing billing, customer-tracking, or other systems. The commercially reasonable method used by a Non-Collecting Retailer must be the same for each purchaser. Unless good cause exists to use a different method, the Non-Collecting Retailer must also use the same commercially reasonable method every year the Non-Collecting Retailer makes sales and must use such method for all states into which the Non-Collecting Retailer ships tangible personal property.

- (iii) A Colorado Reportable Purchase does not include a purchase on which sales tax was collected at the time of the sale. This is true whether the sale was made by the Non-Collecting Retailer or a third-party and whether the collection was made voluntarily or was required.
 - (iv) A Colorado Reportable Purchase does not include a purchase of tangible personal property that is exempt from Colorado sales and use tax, the sale of a service that is separable and separately stated from the sale of tangible personal property, or shipping charges or other fees that are separable and separately stated from the sale of the tangible personal property.
 - (v) To the extent that disclosure of the purchaser's purchase or rental of video tapes, DVDs, Blu-Ray disks, or other video materials would violate 18 U.S.C. 2710A, the Colorado Reportable Purchase shall not include such purchases or rentals.
- (e) "*Department*" means the Colorado Department of Revenue.
 - (f) "*Non-Collecting Retailer*" means a retailer that sells tangible personal property to Colorado Purchasers and does not collect Colorado sales or use tax. All corporations included in a controlled group of corporations pursuant to 26 U.S. Code § 1563 shall be considered to be a single Non-Collecting Retailer for purposes of this rule. A retailer that collects Colorado sales or use tax is not a Non-Collecting Retailer, regardless of whether the retailer is obligated to collect the tax or voluntarily collects the tax.
 - (g) "*Total Gross Sales*" means the total sales of Colorado Reportable Purchases made by a Non-Collecting Retailer. If the Non-Collecting Retailer makes exempt sales of tangible personal property, such sales may be excluded from the Total Gross Sales calculation; however the Non-Collecting Retailer is not obligated to exclude such sales.
 - (h) "Transactional Notice" means the notice required to be provided by a Non-Collecting Retailer to a Colorado Purchaser at the time a Colorado Reportable Purchase is made notifying the Colorado Purchaser of the information required pursuant to paragraph (4) of this rule.

(3) **De Minimis Non-Collecting Retailers.** For purposes of this rule, a retailer that makes less than \$100,000 in Total Gross Sales in Colorado in the prior calendar year and reasonably expects Total Gross Sales in Colorado in the current calendar year will be less than \$100,000 is a retailer whose sales in Colorado are *de minimis*. A retailer must include all Total Gross Sales made by all corporations in a controlled group of corporations pursuant to 26 U.S. Code § 1563. If a Non-Collecting Retailer's sales are *de minimis*, such Non-Collecting Retailer is not subject to the notice and reporting requirements of section 39-21-112(3.5), C.R.S. and this rule.

(4) **Transactional Notices.** A Non-Collecting Retailer shall provide a Transactional Notice with every Colorado Reportable Purchase not exempt from Colorado sales and use tax.

(a) *Online Purchases.* For all purchases made online, a Transactional Notice shall be prominently located in close proximity to the "Tax" or "Sales Tax" line at checkout, or if no "Tax" line is available, in close proximity to the "Total Price" line shown at checkout.

(i) If it is impractical for the Non-Collecting Retailer to display the Transactional Notice as described above, the Non-Collecting Retailer shall provide a prominent hyperlink in close proximity to the "Tax" or "Sales Tax" line or the "Total Price" line shown at checkout that reads as follows: "See here for information on the tax you may owe to Colorado" so long as such hyperlink directs the Colorado Purchaser to the principal Transactional Notice.

(ii) The use of online marketplaces to make sales does not relieve a Non-Collecting Retailer from the obligation to provide a Transactional Notice with each Colorado Reportable Purchase. However, a marketplace may provide the Transactional Notice to Colorado Purchasers on behalf of the Non-Collecting Retailer.

(b) *All Other Purchases Not Made Online.* For all other purchases not made online, a Transactional Notice must be prominently located on any order form in close proximity the "Total Price" line.

(i) If it is impractical for the Non-Collecting Retailer to display the Transactional Notice as described above, the Non-Collecting Retailer shall state on the invoice or confirmatory communication near the "Tax" or "Total Price" line shown "See attachment for information on the tax you may owe" and provide a supplemental document containing the principal Transactional Notice with the invoice or confirmatory communication.

(c) The Transactional Notice shall contain the following information:

(i) The retailer does not collect Colorado sales or use tax;

(ii) The purchase is not exempt from Colorado sales or use tax merely because it is made over the Internet or by other remote means;

- (iii) The State of Colorado requires purchasers to (A) file a sales or use tax return reporting all purchases that are taxable in Colorado and for which no tax was collected by the retailer and (B) pay tax on those purchases.
- (d) The Transactional Notice may contain the following additional information:
 - (i) The retailer will provide to the purchaser an annual purchase summary of all purchases made by the purchaser during the previous calendar year in order to assist the purchaser in filing his or her tax return;
 - (ii) Details of how and when to file this return may be found at the Colorado Department of Revenue's website, www.colorado.gov/tax or successor URL. The notice may substitute a more specific URL when such URL is published by the Department;
 - (iii) The retailer is required by law to provide the Colorado Department of Revenue with an annual report indicating the total dollar amount of all the purchaser's Colorado purchases made throughout the calendar year. The retailer will not provide any other details of the transaction to the Department other than the amount of the purchase(s).
- (e) If the Non-Collecting Retailer is required to provide a similar transactional type notice for another state, in addition to Colorado, and the Non-Collecting Retailer provides a single transactional type notice to all purchasers, a notice will be sufficient if it contains substantially the same information as required in paragraph (4)(c) of this rule but is provided in a form that is generalized to any state.
- (f) *Penalties.*
 - (i) The Non-Collecting Retailer shall pay a penalty of \$5 for each sale to a Colorado Purchaser that does not provide the Transactional Notice.
 - (ii) If the Non-Collecting Retailer meets the criteria below, the penalty assessed against the Non-Collecting Retailer in a single year, pursuant to this section, shall not exceed the specified amounts:
 - (A) For a Non-Collecting Retailer that reasonably had no knowledge of the requirement to provide Transactional Notices and began to provide the required Transactional Notices within 60 days of demand by the Department, \$25,000;
 - (B) For a Non-Collecting Retailer that sells only tangible personal property that is not taxable in Colorado or sells tangible personal property only to Colorado Purchasers that are not subject to sales or use tax, no penalty shall be collected.
 - (iii) The Executive Director of the Department may waive all or any portion of a penalty for other reasonable cause shown.

(5) **Annual Purchase Summary.**

- (a) A Non-Collecting Retailer must send an Annual Purchase Summary to all Colorado Purchasers by January 31 of each year summarizing the Colorado Purchaser's Colorado Reportable Purchases for the prior calendar year. The notice shall meet the following requirements:
- (i) Except as otherwise provided, the Annual Purchase Summary shall be sent by first class mail to the last known address of the Colorado Purchaser. The envelope containing the Annual Purchase Summary shall be prominently marked with the words "Important Tax Document Enclosed".
 - (A) The last known address shall be determined in the following order of preference:
 - (I) An address ("notice address") expressly provided by the Colorado Purchaser to the Non-Collecting Retailer for the purpose of receiving the Annual Purchase Summary, or, if not applicable,
 - (II) The Colorado Purchaser's billing address, or, if not known,
 - (III) The Colorado Purchaser's shipping address, or, if not known or applicable,
 - (IV) Any other physical address for the Colorado Purchaser that can be ascertained by the Non-Collecting Retailer using any commercially reasonable method based on the Non-Collecting Retailer's existing billing, customer-tracking, or other systems.
 - (V) If no physical address may be reasonably ascertained using any of the above methods, the Non-Collecting Retailer shall send the Annual Purchase Summary to the most recent email address the Non-Collecting Retailer has for the Colorado Purchaser.
 - (ii) *Electronic Opt-In.* A Non-Collecting Retailer may, but is not obligated to, provide the option to Colorado Purchasers to receive the Annual Purchase Summary by electronic means, so long as the Colorado Purchaser agrees to receive tax notifications by electronic means. The electronic communication containing the Annual Purchase Summary must be prominently marked with the words "Important Tax Document Enclosed".
 - (A) In order to send the Annual Purchase Summary by electronic means, a Non-Collecting Retailer must send an annual opt-in

notification to Colorado Purchasers on or after December 15 of each year allowing the Colorado Purchaser the option to receive the Annual Purchase Summary by electronic means. The opt-in notification must make clear that the electronic communication is a tax document that may require action on the part of the Colorado Purchaser.

- (iii) The Annual Purchase Summary shall include the following information:
 - (A) The total amount paid by the Colorado Purchaser, including any taxable shipping charges or other fees charged to the customer, during the prior calendar year. However, if a Non-Collecting Retailer is certain the charges and fees are not subject to tax in Colorado, such charges and fees may be excluded;
 - (B) The State of Colorado requires the purchaser to file a sales or use tax return and pay tax on all taxable purchases for which no tax was collected by the retailer;
 - (C) The retailer is required by law to provide the Colorado Department of Revenue with the total dollar amount of purchases made by the purchaser during the prior calendar year, but no information about the purchase other than the dollar amount of the purchase(s) will be provided to the Department;
 - (D) If available, the dates of each Colorado Reportable Purchase;
 - (E) If available, the amounts of each Colorado Reportable Purchase, including any taxable shipping charges or other fees charged to the customer. However, if a Non-Collecting Retailer is certain the charges and fees are not subject to tax in Colorado, such charges and fees may be excluded;
 - (F) If available, a description of the type of item(s) purchased (e.g., books, food, consumer electronics, household appliances); and
 - (G) If known by the retailer, whether the purchase is subject to or exempt from Colorado sales and use tax.
- (iv) The Annual Purchase Summary may state that details of these requirements, including how to file, may be found at the Colorado Department of Revenue's website, www.colorado.gov/tax or successor URL. The notice may substitute a more specific URL when such URL is published by the Department.
- (v) If the net value of a Colorado Purchaser's return(s) and purchase(s) in a year are equal or result in a credit, then the Non-Collecting Retailer need not send an Annual Purchase Summary to the Colorado Purchaser.

(b) *De Minimis Colorado Purchaser.*

- (i) Any Non-Collecting Retailer that is required to send the Annual Purchase Summary to Colorado Purchasers and that has complied with paragraph (5)(b)(iii) of this rule is not required to send the Annual Purchase Summary to any Colorado Purchaser whose total Colorado Reportable Purchases for the prior calendar year are less than \$500.
- (ii) If the tangible personal property or other charges assessed against the Colorado Purchaser are not subject to Colorado tax, a Non-Collecting Retailer may choose to exclude such purchases from the calculation of the Colorado Purchaser's total purchases for the prior calendar year; however, the Non-Collecting Retailer is not obligated to do so.
- (iii) Any Non-Collecting Retailer that chooses not to send an Annual Purchase Summary to *de minimis* Colorado Purchasers shall make commercially reasonable business efforts, based on the business's existing billing, customer-tracking, or other systems, to identify multiple Colorado Reportable Purchases made by a single Colorado Purchaser from the Non-Collecting Retailer.

(c) *Penalties.*

- (i) The Non-Collecting Retailer shall pay a penalty of \$10 for each required Annual Purchase Summary that is not sent to a Colorado Purchaser.
- (ii) If the Non-Collecting Retailer meets the criteria below, the penalty assessed against the Non-Collecting Retailer, pursuant to this section, shall not exceed the specified amounts:
 - (A) For a Non-Collecting Retailer that sent the Annual Purchase Summaries to all Colorado Purchasers within 30 days after the due date, \$1,000;
 - (B) For a Non-Collecting Retailer that reasonably had no knowledge of the requirement and sent the Annual Purchase Summaries to all Colorado Purchasers within 60 days after demand by the Department to issue such Annual Purchase Summaries, \$50,000;
 - (C) For a Non-Collecting Retailer that sells only tangible personal property that is not taxable in Colorado or sells tangible personal property only to Colorado Purchasers that are not subject to sales or use tax, no penalty shall be collected.
- (iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

(6) **Annual Customer Information Report.**

- (a) Any Non-Collecting Retailer who is required to provide at least one Annual Purchase Summary to a Colorado Purchaser must file an Annual Customer Information Report with the Department containing the following information:
- (i) The name of each Colorado Purchaser;
 - (ii) The billing address, notice address, and shipping address of each Colorado Purchaser, if the information is known by the Non-Collecting Retailer;
 - (iii) The total dollar amount of Colorado Reportable Purchases, including shipping charges or other fees charged to the customer, made by the Non-Collecting Retailer to each Colorado Purchaser during the prior calendar year. However, if a Non-Collecting Retailer is certain the charges and fees are not subject to tax in Colorado, such charges and fees may be excluded. No other information about the purchase shall be provided.
- (b) If the Colorado Purchaser provided more than one Colorado billing address, notice address, or shipping address, the Non-Collecting Retailer shall provide all such addresses to the Department.
- (c) If the Non-Collecting Retailer made more than \$100,000 worth of Total Gross Sales in Colorado during the prior calendar year, the Non-Collecting Retailer shall electronically send to the Department the Annual Customer Information Report. The Department shall publish on its website, by November 1st of each year, the required format and data elements of the Annual Customer Information Report and shall publish details on how the Annual Customer Information Report file shall be transmitted to the Department.
- (d) If all of the Colorado Purchasers to whom a Non-Collecting Retailer makes sales are below the *de minimis* threshold in paragraph (5)(c) of this rule, the Non-Collecting Retailer does not need to provide the Annual Customer Information Report to the Department.
- (e) If a Non-Collecting Retailer is required to provide one or more Colorado Purchaser(s) with an Annual Purchase Summary, then the Non-Collecting Retailer must include all the Colorado Reportable Purchases made by all Colorado Purchasers in its Annual Customer Information Report, including any Colorado Reportable Purchases made by *de minimis* Colorado Purchasers.
- (f) If the Non-Collecting Retailer is part of an affiliated group of corporations under IRC §1504 and the affiliated group of corporations wishes to file the Annual Customer Information Report for all Non-Collecting Retailers within the group, any entity within such affiliated group of corporations may prepare and file the Annual Customer Information Report so long as such Annual Customer Information Report includes all Colorado Purchasers and all Colorado Reportable Purchases made from Non-Collecting Retailers within the group during the prior calendar year. However, an affiliated group of corporations may choose for each

individual Non-Collecting Retailer to file the Annual Customer Information Report separately.

(g) *Penalties.*

- (i) If a Non-Collecting Retailer fails to file the Annual Customer Information Report or files an incomplete Annual Customer Information Report, the Non-Collecting Retailer shall pay a penalty equal to \$10 for each Colorado Purchaser that should have been included in the Annual Customer Information Report.
- (ii) If the Non-Collecting Retailer meets the criteria below, the penalty assessed against the Non-Collecting Retailer, pursuant to this section, shall not exceed the specified amounts:
 - (A) For a Non-Collecting Retailer that filed a complete Annual Customer Information Report within 30 days of the due date, \$1,000;
 - (B) For a Non-Collecting Retailer that reasonably had no knowledge of the requirement and filed a complete Annual Customer Information Report within 60 days of demand by the Department, \$50,000;
 - (C) For a Non-Collecting Retailer that sells only tangible personal property that is not taxable in Colorado or sells tangible personal property only to Colorado Purchasers that are not subject to sales or use tax, no penalty shall be collected.
- (iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

Cross References

1. For additional information about the ability for a Non-Collecting Retailer to allow customers to opt-in to receive Annual Purchase Summary by electronic means, see the Uniform Electronic Transaction Act in article 71.3 of title 24 in the Colorado Revised Statutes.