

To: Russ Brubaker, President
Streamlined Sales Tax Governing Board

From: Compliance Review and Interpretations Committee
Myles Vosberg, Chairman

Subject: 2012 Compliance Review

Date: November 29, 2012

The Compliance Review and Interpretations Committee (CRIC) has completed its annual recertification review of member states in accordance with Rule 905 of the Streamlined Sales and Use Tax Governing Board Rules. CRIC with assistance from Governing Board staff reviewed member states' (states) compliance with the provisions of the Streamlined Sales and Use Tax Agreement (Agreement) following each state's submission of an updated certificate of compliance and taxability matrix.

Governing Board staff made an initial review of the certificates of compliance and identified issues of possible noncompliance with the Agreement. The states and the public had a thirty day period to respond to the staff's issues and to raise additional issues of possible noncompliance. All written comments submitted are posted to the Governing Board's website. States and the public were given an additional ten days to respond to any issues raised or to respond to comments made during the original thirty day comment period.

CRIC held a series of public hearings during which each state responded to the staff and public issues of noncompliance and the public was given an opportunity to comment. CRIC took a public vote on whether each state was or was not out-of-compliance pursuant to Section 805 of the Agreement.

Three issues were carried over from the 2011 review. None were resolved by the August 1, 2012 recertification date and, therefore, were not considered during the 2012 review. The issues are as follows:

1. How does Section 310 sourcing apply to the sourcing of digital goods that are transferred electronically without the download of the product? This issue was referred to SLAC by the Governing Board in September, 2009 and work is ongoing.
2. In Section 314.C.3 of the Agreement, is the option of using the mobile phone number in Section 310 sourcing of prepaid wireless calling service an option for the state to choose from or is it an option for the seller? The Agreement needs to be clarified with respect to the option to use the mobile phone number when sourcing prepaid wireless calling service. This issue should be assigned to SLAC or the Executive Committee to seek a final resolution.

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3. Under the Agreement, is access to prewritten computer software treated as tangible personal property, other products transferred electronically, or either as tangible personal property or other products transferred electronically? This issue affects Indiana, Michigan and Utah. In addition, Vermont has placed a moratorium until July 1, 2013 on its imposition of sales tax on prewritten computer software accessed remotely. Therefore, if unresolved, this issue may include Vermont in the future. This issue was referred to SLAC in 2011 for resolution and is currently under discussion by the State and Local Advisory Council's Remote Access to Prewritten Computer Software Workgroup. Accordingly, CRIC has deferred this issue. During the annual review process, the Business Advisory Council indicated that it was amenable to the continued deferral of the issue, but noted that their agreement should not be interpreted as acceptance to statements made by the member states on the issue during the annual compliance review process.

The following summary includes the issues of possible non-compliance that were raised for each member state and the results of CRIC's vote to recommend that the Governing Board find a state out-of-compliance or not out-of-compliance.

As chair of the committee, I would like to express my appreciation for the work of the committee members and the staff of the Governing Board in this important task. I would also like to thank the representatives of the states that worked with the committee and staff, the Business Advisory Council, and the members of the public that provided input.

State Action:

Arkansas

Finding: CRIC recommends that Arkansas not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Peters, Cram, Vosberg, Johnson, Mastin and Jennrich (Atchley abstained)

Georgia

Finding: CRIC recommends that Georgia be found out-of-compliance with the Agreement on issues 1, 2 and 3 below. There were no other issues.

Vote: 7-0; Atchley, Peters, Vosberg, Jennrich, Johnson, Cram and Mastin

Issues raised:

1. The states sales tax holidays in 2012 and 2013 for school supplies and computers (August) and for energy and water efficient products (October) do not use the definitions in the Agreement for such products.
2. The threshold on computers and computer accessories applies per single purchase, not per article purchased.
3. The Educational LOST generally applies to energy used in manufacturing, but the other local sales taxes provide an exemption for energy used in manufacturing.

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Georgia response:

The state agreed that they were out-of-compliance with the definitions in the Agreement for the items included in the sales tax holiday during the 2012 and 2013 review periods but indicated that this would not remain a compliance issue after next year. They indicated that the threshold for computers and computer accessories was applied on a single purchase basis and not on a single article basis. The state confirmed the energy exemption applies to all local taxes except the educational LOST and that the exemption applies to forms of energy not included in the Section 308 provisions.

Indiana

Finding: CRIC recommends that Indiana be found out-of-compliance with the Agreement regarding issues 1 and 2 below and remains out-of-compliance with respect to acceptance of SERs from Model 4 sellers and the blood glucose monitoring equipment exemption.

Note: The state was found out-of-compliance by the Governing Board in 2011 because they were unable to accept the SER from Model 4 sellers. The state indicated that they are in testing and expect to be able to accept SERs from all sellers in early 2013. The state was also found out-of-compliance by the Governing Board in 2011 because they have an exemption for blood glucose monitoring equipment that does not require a prescription, but the exemption for durable medical equipment does require one.

Vote: 5-0; Atchley, Vosberg, Jennrich, Cram and Mastin

Issues raised:

1. The state has not adopted the new direct mail sourcing and definitions. No distinction is made between sourcing for advertising and promotional direct mail and other direct mail.
2. The statute for the rounding rule does not contain a provision allowing the seller to elect to compute tax on an item or invoice basis. The statute requires the tax to be based on the gross retail income of the transaction.

Indiana response:

Indiana agreed that the statute for direct mail sourcing and definitions needs to be updated. The state had concerns that a seller could split transactions where items are normally sold together (1,000,000 nails sold for four cents each) in order to avoid the tax and had not changed the statute.

Iowa

Finding: CRIC recommends that Iowa not be found out-of-compliance with the Agreement. There were no issues.

Vote: 7-0; Atchley, Johnson, Vosberg, Cram, Jennrich, Peters and Mastin

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Kansas

Finding: CRIC recommends that Kansas not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Atchley, Vosberg, Peters, Johnson, Mastin and Jennrich (Cram abstained)

Kentucky

Finding: CRIC recommends that Kentucky not be found out-of-compliance with the Agreement. There were no issues.

Vote: 7-0; Atchley, Vosberg; Peters, Cram, Mastin, Johnson and Jennrich

Michigan

Finding: CRIC recommends that Michigan be found out-of-compliance with the Agreement regarding the direct mail issue and remains out-of-compliance with the taxation of paging services. The state was not found out-of-compliance on issue 2.

Note: The state was found out-of-compliance by the Governing Board in 2011 because the tax on paging services excludes one-way paging services.

Vote: 7-0; Atchley, Jennrich, Cram, Johnson, Peters, Mastin and Vosberg

Issues raised:

1. The new sourcing rules and definitions for “advertising and promotional direct mail” and “other direct mail” have not been adopted.
2. The statute cited for sourcing private communications services is sourcing for services billed on a call-by-call basis. No other statute could be found addressing private communications sourcing.

Michigan response:

The state agreed that they needed to change their statute with respect to the new direct mail provisions and definitions. With respect to issue 2, the state only taxes intrastate private communications and does not impose local sales taxes. Michigan would only impose state sales tax on private communication services that have all channel termination points located in Michigan consistent application of the Agreement under Sections 314(A) and (B) and so there is no effect on the taxation of those services. Michigan agreed to change the statute cited for the sourcing of private communications in their compliance documents to the default of primary place of use consistent with Agreement Section 314(B) to better correspond to industry billing practices.

Minnesota

Finding: CRIC recommends that Minnesota be found to remain out-of-compliance with the Agreement regarding the definition of prepared food. No other issues were found.

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Note: The state was found by the Governing Board out-of-compliance in 2011 because the definition of prepared food includes food sold without eating utensils in an unheated state by weight or volume as a single item, but exempts ready-to-eat meat and seafood in an unheated state sold by weight.

Vote: 7-0; Atchley, Johnson, Jennrich, Cram, Vosberg, Peters and Mastin

Minnesota response:

Minnesota asserts that it is in substantial compliance with the Agreement regardless of this issue. The response letter contains the state's position, which was provided last year also.

Nebraska

Finding: CRIC recommends that Nebraska not be found out-of-compliance with the Agreement. No issues were found.

Vote: 7-0; Atchley, Mastin, Vosberg, Cram, Peters, Johnson and Jennrich

Nevada

Finding: CRIC recommends that Nevada be found to remain out-of-compliance with the Agreement regarding the direct mail sourcing provisions and relief of the seller's obligation to collect tax if it receives a direct pay permit or an Agreement certificate of exemption claiming "direct mail". No other issues were found.

Note: The state was found out-of-compliance by the Governing Board with the direct mail sourcing provisions in 2011 because state statute requires in-state business to collect the tax regardless the documentation provided. The state had been declared out-of-compliance by the Governing Board because it had not fully implemented ACH credit payments. The state began accepting ACH payments in October, 2012.

Vote: 7-0; Vosberg, Peters, Atchley, Jennrich, Johnson, Mastin and Cram

New Jersey

Finding: CRIC recommends that New Jersey be found to remain out-of-compliance with the Agreement regarding the unavailability of the SER to sellers other than Model 1.

Note: The state was found out-of-compliance in 2011 because it is unable to accept the SER from sellers other than Model 1 sellers.

Vote: 6-1; Yes: Atchley, Peters, Johnson, Jennrich, Vosberg, and Cram; No: Mastin

North Carolina

Finding: CRIC recommends that North Carolina be found out-of-compliance with the Agreement regarding the direct mail issue. No other issue was found.

Vote: 7-0; Vosberg, Peters, Atchley, Jennrich, Johnson, Cram and Mastin

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Issue raised:

1. The state has not adopted the new direct mail sourcing rules. As a result, other direct mail may not be sourced correctly.

North Carolina response:

The state agrees that the statute needs to be changed to add the other direct mail sourcing provisions.

North Dakota

Finding: CRIC recommends that North Dakota not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Atchley, Johnson, Jennrich, Peters, Mastin and Cram (Vosberg abstained)

Ohio

Finding: CRIC recommends that Ohio not be found out-of-compliance with the Agreement regarding the issue for which they were declared out-of-compliance in 2011. There were no other issues. Ohio passed legislation to correct the notice provision, which was effective September 5, 2012.

Note: Ohio was ruled out-of-compliance in 2011 because the provision for notification to sellers for effective dates for catalog sales and boundary changes limits the notice requirement to sellers registered under the centralized registration system.

Vote: 6-0; Vosberg, Peters, Atchley, Johnson, Jennrich and Mastin

Oklahoma

Finding: CRIC recommends that Oklahoma not be found out-of-compliance with the Agreement. The issue was resolved.

Vote: 6-0; Atchley, Vosberg, Cram, Jennrich, Johnson and Peters (Mastin abstained)

Issue raised:

1. No citation was given for paragraph F of Section 318 to address giving 30 days' notice to a seller registered under the Agreement before establishing liability for taxes solely due to a seller's failure to timely file a return. This was an issue last year and the state indicated a rule would be promulgated.

Oklahoma response:

The Oklahoma Tax Commission does not require the filing of a return as required under the Agreement. No citation is currently available; however, information consistent with the Oklahoma Tax Commission's policy is maintained on their publically accessible website. A

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formal rule will be promulgated to evidence this policy. It will be promulgated in December and become final April or May of 2013.

Rhode Island

Finding: CRIC recommends that Rhode Island not be found out-of-compliance with the Agreement. The only issue was resolved.

Vote: 7-0; Vosberg, Cram, Atchley, Peters, Johnson, Mastin and Jennrich

Issue raised:

1. The regulation regarding advertising and promotional direct mail sourcing references the general sourcing statutes but does not specify (A)(5) for situations when no information or documents are provided by the purchaser.

Rhode Island response:

An update to the rule addressing this provision will be promulgated and should be effective the first quarter of 2013. The state has authority to adopt rules to implement provisions of the Agreement and is following these requirements administratively.

South Dakota

Finding: CRIC recommends that South Dakota not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Atchley, Vosberg, Jennrich, Mastin, Johnson and Cram (Peters abstained)

Tennessee

Finding: None

Note: The Governing Board referred the issue of Tennessee's compliance to the Executive Board in 2011. The Executive Committee took no action. The issues remain the same.

Utah

Finding: None

Note: CRIC did not review Utah's compliance since they had just undergone a full review and were admitted as a full member in September 2012.

Vermont

Finding: CRIC recommends that Vermont not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Johnson, Atchley, Peters, Vosberg, Jennrich, and Mastin

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Washington

Finding: CRIC recommends that Washington not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Atchley, Vosberg, Cram, Peters, Johnson and Mastin (Jennrich abstained)

West Virginia

Finding: CRIC recommends that West Virginia not be found out-of-compliance with the Agreement. There were no issues.

Note: The BAC indicated that they wanted to reserve the right to bring the motor vehicle lease payment issue back up if businesses inform them the provision imposes a burden on taxpayers. The Governing Board tabled the issue in 2011, which effectively meant that the Governing Board found West Virginia in compliance. The statute deviates from the uniform return and remittance provisions of the Agreement under Sections 318 and 319.

Vote: 5-0; Mastin, Atchley, Vosberg, Cram, and Jennrich

Wisconsin

Finding: CRIC recommends that Wisconsin not be found out-of-compliance with the Agreement. There were no issues.

Vote: 6-0; Atchley, Cram, Jennrich, Vosberg, Peters and Mastin (Johnson abstained)

Wyoming

Finding: CRIC recommends that Wyoming be found out-of-compliance with the Agreement regarding the direct mail issue. There were no other issues.

Vote: 5-0; Atchley, Cram, Vosberg, Jennrich, and Mastin

Issue raised:

1. The statute has not been updated to adopt the direct mail sourcing provisions and definitions.

Wyoming response:

The state agreed that the statute needs to be updated.