

Streamlined Sales Tax Governing Board, Inc.

To: Senator Deb Peters, President
Streamlined Sales Tax Governing Board

From: Compliance Review and Interpretations Committee
Myles Vosberg, Chairman

Subject: 2015 Compliance Review Report

Date: November 19, 2015

The Compliance Review and Interpretations Committee (CRIC) has completed its annual recertification review of member states in accordance with Rule 803 of the Streamlined Sales and Use Tax Governing Board Inc. 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 its statement of compliance (or statement of noncompliance) and updated certificate of compliance and taxability matrix.

Governing Board staff made an initial review of the certificates of compliance and taxability matrix and identified issues of possible noncompliance with the Agreement. (Note: The staff also contacted states regarding suggested clarifications or corrections to the citations on the certificates of compliance and taxability matrix. These types of items were not included on the report if the state made the necessary changes and submitted a revised taxability matrix or certificate of compliance as needed.) 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 were 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 regarding any issues of noncompliance and the public was also given an opportunity to comment or raise other concerns with the states. CRIC took a public vote on whether each state was or was not out-of-compliance with the Agreement pursuant to Section 805.

Three issues were carried over from the 2014 review that had not been resolved by the August 1, 2015 recertification date and, therefore, were not considered during the 2015 review. The issues are as follows:

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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. Work on this issue was put on hold and the Governing Board is continuing to monitor federal legislation in this area.

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. CRIC recommends the issue be assigned to SLAC or the Executive Committee to seek a final resolution.

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 was referred to SLAC in 2011 for resolution and has been 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.

One issue was discussed that did not affect the states' compliance. A toggle was added under the prepared food definition to allow states to exclude food sold that ordinarily requires additional cooking (as opposed to just reheating) by the consumer prior to consumption. The states that indicated they allowed this exclusion were asked whether this position was documented elsewhere. The states have until January 1, 2017 or the first day of the calendar quarter following one full session of the state's legislature before any sanctions can be considered with respect to this issue.

The following summary includes for each member state: CRIC's finding as to whether the state is or is not out of compliance with the Agreement, the result of CRIC's vote on the finding for each state, a summary of the issues raised for each member state and the state's response.

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 be found not out-of-compliance with the Agreement. There were no issues identified.

Vote: 5-0; Cram, Noble, Jennrich, Steines, Vosberg (Atchley abstained)

Georgia

Finding: CRIC finds that Georgia remains out-of-compliance with the Agreement on the local tax base, exemption administration and SER issues.

Vote: 5-0; Atchley, Cram, Jennrich, Steines, Vosberg

Issues:

The Educational local option sales tax generally applies to energy used in manufacturing, but the other local sales taxes provide an exemption for energy used in manufacturing. The state originally was found out of compliance on this issue in 2012.

The legislature in 2012 reinstated the “good faith” requirement for accepting exemption certificates. The legislature did not make any change to this provision during the last legislative session.

The state accepts the SER from Model 1 sellers only. The SER has limitations in its schema that will not accommodate correct vendor compensation for sellers with multiple locations in Georgia. Such sellers receive more vendor compensation if they do not use the SER. CRIC recommends that the Certification Committee consider a possible schema change to help address this issue.

Indiana

Finding: CRIC finds that Indiana remains out-of-compliance with the Agreement on the issue of not accepting the SER from all sellers. Although Indiana was technically out of compliance on August 1st on the federal tax exemption issue, the SSUTA was amended to allow such exemptions in September and Indiana is no longer out of compliance on this issue.

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Issues:

The Federal Manufacturer's Tax and Federal Retailer's Excise Tax are exempt from the sales tax under Indiana's laws. The SSUTA was amended in September, 2015 to allow states to exclude these types of taxes and specifically identify them on the state's taxability matrix. Indiana has listed these items on their taxability matrix.

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The state was declared out of compliance in previous years because they cannot accept the SER from Model 4 sellers. The state also cannot accept SERs from sellers who are not registered through the Streamlined central registration system. Indiana is working to implement changes in mid-2016 to allow Model 4 and non-registered sellers to use the SER.

Iowa

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Kansas

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

Vote: 5-0; Atchley, Jennrich, Noble, Steines, Vosberg (Cram abstained)

Kentucky

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Michigan

Finding: CRIC finds that Michigan remains out-of-compliance with the Agreement with respect to the direct mail sourcing issue. The state Legislative Service Bureau is drafting legislation which is expected to be introduced next month.

Vote: 5-0; Atchley, Cram, Jennrich, Steines, Vosberg

Issues:

The state was declared out of compliance with respect to the sourcing rules and definitions for “advertising and promotional direct mail” and “other direct mail” which have not been adopted. Draft legislation has been submitted.

Minnesota

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Nebraska

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Nevada

Finding: CRIC recommends that Nevada be found not out-of-compliance with the Agreement.

Vote: 5-0; Cram, Jennrich, Noble, Steines, Vosberg

Issues:

The state has not adopted a provision requiring 120 day notice of rate changes for catalog sales. Local jurisdictions in Nevada cannot change their rate without legislative approval so the point is moot until 2017. Nevada also indicated that the enabling legislation for any local rate changes would include this provision.

The state's Tax Bulletin SUT 15-0002 which explains the sales tax treatment of shipping, delivery charges, and handling was not in compliance with the requirements of the SSUTA. In addition, a taxpayer filed a compliance complaint related to separately stated transportation charges included in the sales price of ready mix concrete in response to an advisory opinion issued by the State of Nevada. The bulletin was updated and corrected. See Attachment 1 for a summary and additional information regarding this issue.

New Jersey

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

North Carolina

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

North Dakota

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

Vote: 5-0; Atchley, Cram, Jennrich, Nobel, Steines (Vosberg abstained)

Ohio

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Oklahoma

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Rhode Island

Finding: CRIC finds that Rhode Island remains out-of-compliance with the Agreement with respect to the clothing cap and threshold issue.

Vote: 5-0; Cram, Jennrich, Noble, Steines, Vosberg

Issues:

Effective 10/1/2012, the first \$250 of the sales price for an article of clothing is exempt from tax. Any amount above that is taxable. There has been no change to the statute. The statute provides that upon passage of any federal law which requires remote sellers to collect and remit taxes, the full exemption for clothing will apply once again, and the threshold will expire. The state does not believe this imposes an additional burden on sellers since their neighboring states have thresholds and retailers' systems are already set-up for caps, Section 323.D of the SSUTA permits states to have caps and thresholds if they had one in place prior to a certain date and because caps and thresholds are permitted during sales tax holidays. (Note: The cap and threshold permitted for sales tax holidays operates differently than the RI threshold in that the sales tax holidays language allows states to exempt items priced under a certain dollar amount whereas the Rhode Island threshold exempts the first \$250 of each qualifying item, even if it is priced above the \$250 threshold.)

South Dakota

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Tennessee (Associate Member State)

Finding: CRIC recommends that Tennessee be found not out-of-compliance with the requirements of the Agreement as an Associate Member State.

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Utah

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Vermont

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Washington

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

Vote: 5-0; Atchley, Cram, Noble, Steines, Vosberg (Jennrich abstained)

West Virginia

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

Vote: 6-0; Atchley, Cram, Jennrich, Noble, Steines, Vosberg

Wisconsin

Finding: CRIC recommends that Wisconsin be found out-of-compliance with the Agreement on the issue of sourcing of local taxes on single payment motor vehicle leases. The state has drafted legislation which is expected to be introduced soon and become law in the first quarter of 2016 that will correct this issue.

Vote: 4-0; Atchley, Cram, Jennrich, Vosberg (Steines abstained)

Wyoming

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

Vote: 5-0; Atchley, Cram, Jennrich, Steines, Vosberg (Noble abstained)

Brief Synopsis and Information Regarding the Transportation of Ready Mix Concrete Compliance Issue Raised in Nevada

The purpose of this document is to summarize the facts and circumstances surrounding the exclusion for separately stated transportation charges in Nevada as it relates to the sale and delivery of ready mix concrete.

SSUTA Definition

The SUTA defines Delivery Charges as “charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packaging.” The definition allows a member state to exclude all delivery charges from sales price, or it may exclude only (1) handling, crating, packaging, preparation for mailing or delivery, and similar charges or (2) transportation, shipping, postage, and similar charges.

Nevada Law

Under Nevada law, only the “transportation, shipping or postage” portion of “delivery charges” are excluded from the “sales price” if these items are separately stated on the invoice or other documentation provided to the purchaser. This is clearly indicated on Nevada’s Online Taxability Matrix and is permissible under the SSUTA.

Brief Summary

The issue stems from a private letter ruling request submitted by Mr. Val Gibson to the State of Nevada with respect to the delivery charges for ready mix concrete. Nevada issued a 12-page private letter ruling in response to Mr. Gibson’s request on January 21, 2015. Mr. Gibson believed that opinion was in conflict with the requirements of the SSUTA, in part, because the ruling indicated that “...However, when the transportation or delivery is part of the sale, connected to the sale of tangible personal property, or include preparation, handling, crating and/or packing, the delivery charge is subject to sales tax, whether separately stated or not.” Based on this ruling, Mr. Gibson filed a compliance complaint against Nevada under SSTGB Rule 904. Various emails and conferences calls were held with Mr. Gibson and the State of Nevada to try to resolve the issue. While this correspondence and these discussions were occurring, Mr. Gibson also started the appeals process under Nevada law with respect to the ruling that Nevada had originally issued. Mr. Gibson agreed to withdraw the separate compliance complaint against Nevada on this issue as long as CRIC and the Governing Board would address the issue during the 2015 annual state compliance reviews.

Mr. Gibson’s Position

Mr. Gibson maintains that the amount labeled as “transportation charges” on the sample invoice provided as part of the ruling request is just for transportation and therefore should be excluded from the “sales price” of the ready mix concrete. On October 13, 2015, Nevada issued a letter to Mr. Gibson clearly indicating that they agreed that there was an element of

transportation involved in the delivery of concrete, but that the issue at hand is "...whether the amount that is being separately stated includes anything other than 'transportation' which the Department has maintained, it does."

Nevada's Position

Nevada maintains that the amount labeled as "transportation charges" on the sample invoice provided as part of the ruling request includes more than just "transportation." Therefore, although the amount is labeled "transportation charges" on the invoice, since Nevada believes the amount includes something more than just transportation, the entire amount labeled as "transportation charges" is includible in the "sales price" of the ready mix concrete. Nevada has suggested that Mr. Gibson initiate the state's regulatory process to resolve the issue and determine how much of the amount is for transportation and how much, if any, is for something other than transportation.

Other Information

In view of the various discussions that took place over time, including a CRIC interpretation, Mr. Gibson submitted a subsequent ruling request to the State of Nevada dated September 8, 2015. Nevada responded to that request indicating that since the request was for the same clients as the original request and was asking nearly identical questions and since Mr. Gibson filed a Petition for Judicial Review on the prior ruling, the Department could not issue an advisory opinion on the same matter to the same taxpayers since the issue was currently in litigation. The issue is still in the litigation stage.

The state of Nevada initially issued Tax Bulletin SUT 15-0002 on August 17, 2015. After review, it was determined that the bulletin was not in compliance with the requirements of the SSUTA. State of Nevada personnel along with Fred Nicely and Craig Johnson revised the bulletin, had it approved by the Nevada Tax Commission and re-issued it on October 5, 2015. The bulletin is now consistent with Nevada law and the SSUTA.

Executive Director Comments

All parties involved agree that Nevada's laws, rules and regulations are in compliance with the requirements of the SSUTA. The issue between the State of Nevada and Mr. Gibson that needs to be resolved is whether or not the amount labeled as "transportation charges" on the sample invoice is for something more than just transportation. If the charge includes anything in addition to transportation, Nevada is correct in including the entire amount in the sales price. If the amount labeled as "transportation charges" does not include anything other than transportation, then the entire amount should be excluded from the "sales price" as provided in Nevada's laws.

Nevada has suggested that Mr. Gibson initiate their regulatory process to resolve the issue and determine how much of the amount is for transportation and how much, if any, is for something other than transportation. This seems to be a reasonable way to resolve the issue. Mr. Gibson has also started the judicial process available to him in Nevada to resolve the issue and that process is currently underway. If that judicial process finally concludes that the charge only includes "transportation" and the State of Nevada still requires Mr. Gibson to

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include the entire amount in the “sales price,” this could potentially be a compliance issue. However, until that final determination is made, I do not believe that this is an issue that should be resolved by the Streamlined Sales Tax Governing Board. It needs to be resolved through the legal system in Nevada.

CRIC’s Recommendation

Based on the Nevada laws, Tax Bulletin SUT 15-002 issued October 5, 2015 and the letter dated October 13, 2015 from Ms. Deonne Contine, Executive Director for the Nevada Department of Taxation, CRIC recommended that Nevada was not out of compliance on this issue.