

Colorado Enacts Marketplace Fairness and Small Business Protection Act

June 20, 2014

Overview

Colorado Governor John Hickenlooper recently signed into law H.B. 14-1269, also known as the *Marketplace Fairness and Small Business Protection Act*, expanding the definition of “doing business” in Colorado for state sales and use tax purposes and strengthening the presumption of physical presence to a greater extent than was previously allowed under Colorado law.¹ H.B. 14-1269 represents a continuation of Colorado’s earlier legislative efforts to require sales and use tax reporting, collection, and remittance regarding remote (out-of-state) seller transactions. This new law is one of several bills being passed, or contemplated, by the Colorado General Assembly in anticipation of passage of the federal Marketplace Fairness Act or other similar federal legislation.

In this Tax Alert we summarize H.B. 14-1269 and provide some taxpayer considerations.

Discussion

Prior to H.B. 14-1269, Colorado law defined the term “doing business in this state” for sales tax purposes more narrowly than some states. Effective July 1 2014,² H.B. 14-1269 amends the current definition of “doing business in this state” to include the following:

- Retailers providing taxable services;³
- Remote sellers that employ a resident of Colorado who works from a home office;⁴ and
- Remote sellers that are doing business in the state as authorized under any federal Congressional Act.⁵

H.B. 14-1269 also amends the law to create statutory presumptions of “physical presence” in Colorado that, if applicable, will cause a remote seller to be “doing business” in Colorado, thus triggering sales tax reporting, collection, and remittance responsibilities. Under the amended law, a presumption of physical presence in the state applies when: (1) a remote seller is a member of a controlled group of entities and a component member of that controlled group⁶ (an “affiliate”) has physical presence in Colorado *and* performs certain enumerated activities, or (2) a remote seller enters into an agreement with a person (a “contractual third party”) that has physical presence in Colorado *and* performs certain enumerated activities.⁷ The enumerated activities performed by either an affiliate (scenario 1 above) or a contractual third party (scenario 2 above) include the following:

- selling, under the same or similar business name as the remote seller, tangible personal property or taxable services similar to that sold by the remote seller;⁸

¹ Colorado H.B. 14-1269, 2014 Regular Session; signed by the Governor on June 6, 2014. A copy of the enacted law is accessible at: http://www.leg.state.co.us/Clics/CLICS2014A/csl.nsf/fsbillcont3/6E7335C939D8631287257C390066585A?Open&file=1269_enr.pdf.

² H.B. 14-1269, Sec. 4.

³ H.B. 14-1269, Sec. 2, amending Colo. Rev. Stat. § 39-26-102(3).

⁴ H.B. 14-1269, Sec. 2, amending Colo. Rev. Stat. § 39-26-102(3)(a).

⁵ H.B. 14-1269, Sec. 2, amending Colo. Rev. Stat. § 39-26-102(3)(c), which references Colo. Rev. Stat. § 39-26-104(2). On May 28, 2013, Colorado enacted legislation (H.B. 13-1295) allowing the state to conform to potential federal legislation that would permit states to subject remote sellers to sales tax, such as the federal Marketplace Fairness Act.

⁶ Colorado applies the rules of I.R.C. § 1563 for purposes of defining a “controlled group” and a “component member” except that, for purposes of applying the test, any form of entity can be a component member and part of a controlled group. H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. § 39-26-102(3)(d)(II).

⁷ H.B. 14-1269, Sec. 2, amending Colo. Rev. Stat. § 39-26-102(3)(d), (e). Note that these presumptions do not apply where such affiliate or contractual third party is “a common carrier acting in its capacity as such.” See, *Id.*

⁸ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. §§ 39-26-102(3)(d)(I)(A); 39-26-102(3)(e)(I)(A).

- maintaining an office, distribution facility, salesroom, warehouse or storage place in Colorado to facilitate the delivery of tangible personal property or taxable services sold by the remote seller to Colorado customers;⁹
- delivering, installing, assembling, or performing maintenance or repair services in Colorado on tangible personal property that is sold to Colorado customers by the remote seller;¹⁰ or
- facilitating the delivery of tangible personal property to Colorado customers of the remote seller by allowing such customers to pick up the property at an office, distribution center, salesroom, warehouse, or storage place in Colorado.¹¹

Additionally, a remote seller is also presumed to have physical presence in Colorado if an affiliate with physical presence uses trademarks, service marks, or trade names in Colorado that are the same as or substantially similar to those used by the remote seller.¹²

These presumptions may be rebutted by proving that during the year in question the affiliate or contractual third party with physical presence in the state did not engage in any activities on behalf of the remote seller that are sufficient under the U.S. Constitution to establish nexus in Colorado on behalf of the remote seller.¹³

Regarding a remote seller that does not have “direct in-state physical presence,” the presumption of physical presence due to the remote seller’s agreement with a contractual third party doing business in Colorado does not apply to the following agreements:

- Advertising – An agreement under which a remote seller purchases advertising to be delivered in Colorado on any “mass-market medium;”¹⁴
- Affiliate Marketing Agreements - An agreement between an in-state independent contractor or other representative and a remote seller under which the independent contractor or other representative, for “a cost per action,” directly or indirectly refers potential customers through Internet promotional methods to the remote seller;¹⁵ or
- Small Businesses – An agreement between the contractual third party and a remote seller if the remote seller’s prior year gross receipts from Colorado customers are less than \$50,000.¹⁶

Considerations

H.B. 14-1269 is a continuation of Colorado’s ongoing efforts to require remote sellers with limited or no Colorado physical presence to collect sales tax. This new law appears directed at collection from large retailers who segregate their brick-and-mortar operations from their online retail operations. The law seeks to alleviate the concerns of many by providing exemptions from the presumption of physical presence for small businesses (prior year gross receipts in Colorado of less than \$50,000) and websites referring traffic to other online retailers. This bill does not address collection of sales tax by Colorado’s Home-Rule municipalities, leaving the question open as to how those municipalities will treat inter-state and intra-state remote sellers.

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⁹ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. §§ 39-26-102(3)(d)(I)(B); 39-26-102(3)(e)(I)(B).

¹⁰ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. §§ 39-26-102(3)(d)(I)(D); 39-26-102(3)(e)(I)(C).

¹¹ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. §§ 39-26-102(3)(d)(I)(E); 39-26-102(3)(e)(I)(D).

¹² H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. § 39-26-102(3)(d)(I)(C).

¹³ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. §§ 39-26-102(3)(d)(III); 39-26-102(3)(e)(II).

¹⁴ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. § 39-26-102(3)(e)(III)(A).

¹⁵ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. § 39-26-102(3)(e)(III)(B). A “cost per action” includes but is not limited to “a commission or other consideration based on completed sales.” *Id.*

¹⁶ H.B. 14-1269, Sec. 2, adding Colo. Rev. Stat. § 39-26-102(3)(e)(III)(C).

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