COLORADO CHAMBER
OF COMMERCE

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TO: Taxpayer Services Division, Colorado Department of Revenue

FROM: Colorado Chamber of Commerce, Tax Council

RE: Proposed Sales Tax Nexus Regulations

DATE: November 14, 2018

The Colorado Chamber of Commerce Tax Council hereby submits comments in reference to the Colorado Department of Revenue (DOR) emergency regulations scheduled for a final rulemaking hearing on November 30, 2018 which include 39-26-102 (1.3); 39-26-102 (9); 39-26-103.5; 39-26-104 (1)(b)(I); 39-26-105; and 30-26-204 (2).

The Tax Council represents the state and local taxation interests of the Colorado Chamber's multi-industry membership and the Colorado business community. Colorado is known as having one of the most complicated state sales tax systems in the country based on its multi-jurisdictional tax reporting requirements. The Colorado Chamber represents thousands of businesses across the State that must comply with this system, and for decades, the Tax Council has worked with the Department of Revenue and the Colorado General Assembly to find ways to relieve the compliance burdens those businesses face every day. It is through those interests that we have outlined our concerns regarding the Department's proposed rule changes as follows:

Background:
On September 11, 2018, the Department promulgated emergency rules on sales and use tax collection for in-state and out-of-state retailers that are intended to take effect on December 1, 2018. These emergency rules were in response to the U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc*. However, they also included destination sourcing requirements for sales tax which impose a new statewide local sales tax collection requirement for both in-state and out-of-state taxpayers.

While the Tax Council supports the adoption of a "level playing field" for all taxpayers, as is the stated goal by the Department, we believe the proposed "sourcing rule" creates additional reporting burdens on retailers across the state that were not contemplated in the implementation of the *Wayfair* decision. That decision specifically addressed the requirement for out-of-state retailers to collect sales tax on purchases made by Colorado residents when those retailers do not have a physical presence in Colorado. Since the Department is promulgating the "sourcing rule" at the same time as implementation of the *Wayfair* decision, we submit that conflating the additional changes further complicates an already difficult compliance process for in-state businesses. It also raises significant questions as to whether the changes when taken as a whole would clear any of the thresholds for simplification as laid out in *Wayfair*.

We believe this creates a reasonable basis for the Colorado General Assembly to provide clarification in C.R.S. 39-26-102(3) "doing business in the state" definition upon which the Department is relying to make these changes. The leadership taken by the Colorado General Assembly is especially timely considering that it recently created a Sales and Use Tax Simplification Task Force whose primary function is to address complicated state sales tax issues such as these. Given that the sourcing rule change will result in thousands of Colorado citizens paying taxes on hundreds of transactions involving perhaps millions of dollars, it would seem that such a change would be more appropriately addressed by the General Assembly rather than through a regulatory change by the Executive Branch.

The Department can also look to the legislative process and successful outcome of House Bill 13-1295 (Marketplace Fairness Act) as guidance in addressing this issue. That legislation provided a simplified solution to addressing the collection of sales tax by out-of-state retailers.

Concerns with Proposed Rules:
The proposed sourcing rule requires reporting on sales taxes owed to special districts, statutory cities, statutory counties and State collected home rule cities – and to each of these branches individually. This creates onerous administrative reporting burdens on retailers who may need to invest in expensive reporting systems or file paper returns for each branch which could result in untimely filings, audits and penalties.

The Council is also very concerned by the changes in Section 39-26-102(9)(3)(f)(iii) of the proposed regulations which provide that "receipt" does not include possession by a shipping company on behalf of the purchaser. In *Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1155 (Colo. App. 2010), the Court held that a sale occurred in Thornton when a common carrier hired by the purchaser (The Gap) picked up items at the Thornton loading dock of the seller (Leggett & Platt). Therefore, the Department of Revenue's proposed regulations are inconsistent with the holding in *Leggett & Platt*. The result will be a different rule for state and state-administered local sales taxes as compared to home rule city sales taxes. This will undoubtedly lead to confusion, inconsistent taxation, and potentially double taxation.

Additionally, there is confusion by Colorado Chamber members as to how the term "possession" in 39-26-102(9(3)(f)(iii) will be interpreted by the Department. Companies that enter into transactions with vendors rely on the Uniform Commercial Code and standard legal contract terms. Those contracts do not define "possession" as a physical meaning but use it in the application of title transfers and risk of loss. Clarification on the intent and meaning of "possession" should be considered in the proposed regulation.

The rule is also unclear as to when companies are responsible for paying county sales tax. Companies making purchases may not have knowledge as to when or if a seller reaches the $100,000 threshold or the 200 separate sales transaction limit and may not be aware of whether a supplier is correctly charging the company county sales tax. Thus, suppliers who have crossed the state thresholds will be charging tax and others, who are under the thresholds will not, leaving the purchaser unable to determine who is correctly charging tax.

We have also received feedback from Colorado Chamber members that they are very confused as to how the sourcing rule will be applied by the Department. We hope the Department can provide specific guidance on its website and through other Department outreach to help answer questions by Colorado businesses. An example of a question asked by a business person who failed to find an answer through the website is as follows:

> *Example: A seller had sales of $95,000 in Lake Count, and a company buys a part from this supplier for $10,000 putting the total sales at $105,000 (over the $100,000 threshold). Does the company pay the County tax on the total sale, $10,000, or only on the $5,000 that is in excess of the limit?*

Based on the increased reporting requirements, the Tax Council has significant concerns with the effective date of December 1, 2018, when these rules would take effect. This short time frame will not allow retailers sufficient time to register with the Department of Revenue nor collect the taxes owed by retailers. Although the Department has agreed to provide a grace period until March 31, 2019, to allow retailers leniency on a case-by-case basis, the Departmental guidance only allows that grace period for in-state retailers and not out-of-state retailers. This creates inconsistent treatment of retailers which is counter to the Department's goal of "leveling the playing field." The Department is asking retailers to undertake a major change to their reporting systems and implement software and process changes on a timeframe that is unachievable for many, if not most taxpayers.

Tax Council Recommendations:

Again, we understand that the Department believes it is properly exercising its authority to promulgate the "sourcing rule"; however, considering the extent to which these changes will impact businesses across the state, and the many unanswered questions prompted by the rule change, we recommend that the Colorado General Assembly provide clarification in the current statute through the Sales & Use Tax Simplification Task Force or through the legislative process. In the meantime, we have provided recommendations below that would allow for a smoother transition for businesses faced with the additional reporting requirements:

- The Council recommends that the Department consider an implementation date of July 1, 2019. This date would allow retailers sufficient time to register with the Department of Revenue and report taxes owed to the jurisdictional branches in an accurate and efficient manner.

- The Council recommends maintaining the definition of "receipt" as was decided by the Court in *Leggett & Platt* to avoid additional confusion, inconsistency between state-collected and home-rule jurisdictions, and double taxation for taxpayers.

- The Council recommends providing clarification on the intent and meaning of the term "possession" in the proposed language in 39-26-102(9)(3)(f)(iii).

- The Council recommends that the Department consider issuing formal guidance on the process for claiming the grace period protections, for both in-state and out-of-state retailers.

- The Council recommends consideration of the language provided in HB 13-1295 by requiring local jurisdictions that chose to participate in the collection of sales tax by out-of-state sellers to conform their transaction tax base with the State's tax base. The bill also ensured that in-state retailers have the information they needed for determining whether a vendor has a remote seller license so that they can determine to which tax base sales or use tax applies.

- The Council recommends that the Department provide a streamlined process for allowing retailers to manage the reporting requirements to each of the jurisdictional branches. *Example*: The Department can provide a single state-wide sales tax return that accommodates all state-collected local jurisdictions without the use of branch ID's. This process has been adopted by many other states and would create efficiencies in the reporting process.

- The Council recommends that the Department, if it continues to require branch ID based filing, allow retailers to register for all branch ID's at one time but only report those ID's to which they have sales in a given period.

- The Council recommends that the Department provide and maintain one master upload template with all state-collected jurisdictions listed with current rates, service fees and exemption formulas that all retailers could utilize. This would eliminate the current complicated modification and upload template approval process.

- The Council recommends that the Department include all relevant tax rate and jurisdiction information in the DR 0800 so that taxpayers can see the information required for tax reporting in one publication;

- The Council recommends that the Department accept negative amounts that result in tax credits for any particular branch ID assuming that the overall tax amount that will be uploaded is positive among all branch ID's. *Example*: A sale is made in a particular branch ID area one month, but a refund occurs in another month with insufficient or no offsetting sales in that branch ID. This results in a negative entry for the branch ID. We understand that under the current system, a negative amount cannot be entered on the upload return.

- The Council recommends that the Department provide guidance to taxpayers regarding the "good faith" standard included in the sourcing rules. We recognize that this language was taken from the Streamlined Sales Tax model; however, taxpayers have no guidance as to how those standards will be interpreted by this Department.

- Finally, we would ask the Department to provide further guidance on its website and to administer additional outreach to answer questions by Colorado businesses as this process evolves.

The Tax Council appreciates the Department's consideration of these comments and looks forward to working with the Department on this matter. If you should have any questions/concerns, please contact Loren Furman, Senior Vice President, State & Federal Relations at 303-866-9642 or lfurman@cochamber.com.

Thank you.