

CHAPTER 33**(HB 429)**

AN ACT relating to the Streamlined Sales and Use Tax Agreement.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 139.010 is amended to read as follows:

As used in this chapter, unless the context otherwise provides:

- (1) ***"Advertising and promotional direct mail" means direct mail the primary purpose of which is to attract public attention to a product, person, business, or organization, or to attempt to sell, popularize, or secure financial support for a product, person, business, or organization. As used in this definition, "product" means tangible personal property, an item transferred electronically, or a service;***
- (2) "Business" includes any activity engaged in by any person or caused to be engaged in by that person with the object of gain, benefit, or advantage, either direct or indirect;
- ~~(3)(2)}~~ "Commonwealth" means the Commonwealth of Kentucky;
- ~~(4)(3)}~~ "Department" means the Department of Revenue;
- ~~(5)(4)}~~
 - (a) "Digital audio-visual works" means a series of related images which, when shown in succession, impart an impression of motion, with accompanying sounds, if any.
 - (b) "Digital audio-visual works" includes movies, motion pictures, musical videos, news and entertainment programs, and live events.
 - (c) "Digital audio-visual works" shall not include video greeting cards, video games, and electronic games;
- ~~(6)(5)}~~
 - (a) "Digital audio works" means works that result from the fixation of a series of musical, spoken, or other sounds.
 - (b) "Digital audio works" includes ringtones, recorded or live songs, music, readings of books or other written materials, speeches, or other sound recordings.
 - (c) "Digital audio works" shall not include audio greeting cards sent by electronic mail;
- ~~(7)(6)}~~
 - (a) "Digital books" means works that are generally recognized in the ordinary and usual sense as books, including any literary work expressed in words, numbers, or other verbal or numerical symbols or indicia if the literary work is generally recognized in the ordinary or usual sense as a book.
 - (b) "Digital books" shall not include digital audio-visual works, digital audio works, periodicals, magazines, newspapers, or other news or information products, chat rooms, or Web logs;
- ~~(8)(7)}~~
 - (a) "Digital code" means a code which provides a purchaser with a right to obtain one (1) or more types of digital property. A "digital code" may be obtained by any means, including electronic mail messaging or by tangible means, regardless of the code's designation as a song code, video code, or book code.
 - (b) "Digital code" shall not include a code that represents:
 - 1. A stored monetary value that is deducted from a total as it is used by the purchaser; or
 - 2. A redeemable card, gift card, or gift certificate that entitles the holder to select specific types of digital property;
- ~~(9)(8)}~~
 - (a) "Digital property" means any of the following which is transferred electronically:
 - 1. Digital audio works;
 - 2. Digital books;
 - 3. Finished artwork;
 - 4. Digital photographs;
 - 5. Periodicals;

6. Newspapers;
 7. Magazines;
 8. Video greeting cards;
 9. Audio greeting cards;
 10. Video games;
 11. Electronic games; or
 12. Any digital code related to this property.
- (b) "Digital property" shall not include digital audio-visual works or satellite radio programming;
- (10) (a) *"Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipient;*
- (b) *"Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail retailer for inclusion in the package containing the printed material; and*
- (c) *"Direct mail" does not include multiple items of printed material delivered to a single address;*
- ~~(11)(9)~~ (a) "Finished artwork" means final art that is used for actual reproduction by photomechanical or other processes or for display purposes.
- (b) "Finished artwork" includes:
1. Assemblies;
 2. Charts;
 3. Designs;
 4. Drawings;
 5. Graphs;
 6. Illustrative materials;
 7. Lettering;
 8. Mechanicals;
 9. Paintings; and
 10. Paste-ups;
- (12)~~(10)~~ (a) "Gross receipts" and "sales price" mean the total amount or consideration, including cash, credit, property, and services, for which tangible personal property, digital property, or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:
1. The retailer's cost of the tangible personal property or digital property sold;
 2. The cost of the materials used, labor or service cost, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, or any other expense of the retailer;
 3. Charges by the retailer for any services necessary to complete the sale;
 4. Delivery charges, which are defined as charges by the retailer for the preparation and delivery to a location designated by the purchaser including transportation, shipping, postage, handling, crating, and packing; and
 5. Any amount for which credit is given to the purchaser by the retailer, other than credit for tangible personal property or digital property traded when the tangible personal property or digital property traded is of like kind and character to the property purchased and the property traded is held by the retailer for resale.
- (b) "Gross receipts" and "sales price" shall include consideration received by the retailer from a third party if:

1. The retailer actually receives consideration from a third party and the consideration is directly related to a price reduction or discount on the sale to the purchaser;
 2. The retailer has an obligation to pass the price reduction or discount through to the purchaser;
 3. The amount of consideration attributable to the sale is fixed and determinable by the retailer at the time of the sale of the item to the purchaser; and
 4. One (1) of the following criteria is met:
 - a. The purchaser presents a coupon, certificate, or other documentation to the retailer to claim a price reduction or discount where the coupon, certificate, or documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate, or documentation is presented;
 - b. The price reduction or discount is identified as a third-party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser; or
 - c. The purchaser identifies himself or herself to the retailer as a member of a group or organization entitled to a price reduction or discount. A "preferred customer" card that is available to any patron does not constitute membership in such a group.
- (c) "Gross receipts" and "sales price" shall not include:
1. Discounts, including cash, term, or coupons that are not reimbursed by a third party and that are allowed by a retailer and taken by a purchaser on a sale;
 2. Interest, financing, and carrying charges from credit extended on the sale of tangible personal property, digital property, or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;
 3. Any taxes legally imposed directly on the purchaser that are separately stated on the invoice, bill of sale, or similar document given to the purchaser; or
 4. The amount charged for labor or services rendered in installing or applying the tangible personal property, digital property, or service sold, provided the amount charged is separately stated on the invoice, bill of sale, or similar document given to the purchaser.
- (d) As used in this subsection, "third party" means a person other than the purchaser;
- ~~(13)(11)~~ "In this state" or "in the state" means within the exterior limits of the Commonwealth and includes all territory within these limits owned by or ceded to the United States of America;
- ~~(14)(12)~~ (a) "Lease or rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A lease or rental shall include future options to:
1. Purchase the property; or
 2. Extend the terms of the agreement and agreements covering trailers where the amount of consideration may be increased or decreased by reference to the amount realized upon sale or disposition of the property as defined in 26 U.S.C. sec. 7701(h)(1).
- (b) "Lease or rental" shall not include:
1. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;
 2. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of the required payments and payment of an option price that does not exceed the greater of one hundred dollars (\$100) or one percent (1%) of the total required payments; or
 3. Providing tangible personal property and an operator for the tangible personal property for a fixed or indeterminate period of time. To qualify for this exclusion, the operator must be necessary for the equipment to perform as designed, and the operator must do more than maintain, inspect, or setup the tangible personal property.

- (c) This definition shall apply regardless of the classification of a transaction under generally accepted accounting principles, the Internal Revenue Code, or other provisions of federal, state, or local law;
- ~~(15)~~~~(13)~~ (a) "Machinery for new and expanded industry" means machinery:
1. Used directly in a manufacturing or processing production process;
 2. Which is incorporated for the first time into a plant facility established in this state; and
 3. Which does not replace machinery in the plant facility unless that machinery purchased to replace existing machinery:
 - a. Increases the consumption of recycled materials at the plant facility by not less than ten percent (10%);
 - b. Performs different functions;
 - c. Is used to manufacture a different product; or
 - d. Has a greater productive capacity, as measured in units of production, than the machinery being replaced.
- (b) The term "machinery for new and expanded industry" does not include repair, replacement, or spare parts of any kind regardless of whether the purchase of repair, replacement, or spare parts is required by the manufacturer or vendor as a condition of sale or as a condition of warranty.
- (c) The term "processing production" shall include the processing and packaging of raw materials, in-process materials, and finished products; the processing and packaging of farm and dairy products for sale; and the extraction of minerals, ores, coal, clay, stone, and natural gas;
- ~~(16)~~~~(14)~~ "Manufacturing" means any process through which material having little or no commercial value for its intended use before processing has appreciable commercial value for its intended use after processing by the machinery. The manufacturing or processing production process commences with the movement of raw materials from storage into a continuous, unbroken, integrated process and ends when the product being manufactured is packaged and ready for sale;
- ~~(17)~~~~(15)~~ (a) "Occasional sale" includes:
1. A sale of tangible personal property or digital property not held or used by a seller in the course of an activity for which he or she is required to hold a seller's permit, provided such sale is not one (1) of a series of sales sufficient in number, scope, and character to constitute an activity requiring the holding of a seller's permit. In the case of the sale of the entire, or a substantial portion of the nonretail assets of the seller, the number of previous sales of similar assets shall be disregarded in determining whether or not the current sale or sales shall qualify as an occasional sale; or
 2. Any transfer of all or substantially all the tangible personal property or digital property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer.
- (b) For the purposes of this subsection, stockholders, bondholders, partners, or other persons holding an interest in a corporation or other entity are regarded as having the "real or ultimate ownership" of the tangible personal property or digital property of such corporation or other entity;
- ~~(18)~~ (a) ***"Other direct mail" means any direct mail that is not advertising and promotional direct mail, regardless of whether advertising and promotional direct mail is included in the same mailing;***
- (b) ***"Other direct mail" includes but is not limited to:***
1. ***Transactional direct mail that contains personal information specific to the addressee, including but not limited to invoices, bills, statements of account, and payroll advices;***
 2. ***Any legally required mailings, including but not limited to privacy notices, tax reports, and stockholder reports; and***
 3. ***Other non-promotional direct mail delivered to existing or former shareholders, customers, employees, or agents, including but not limited to newsletters and informational pieces; and***

- (c) *"Other direct mail" does not include the development of billing information or the provision of any data processing service that is more than incidental to the production of printed material;*
- ~~(19)~~~~(16)~~ "Person" includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, governmental unit or agency, or any other group or combination acting as a unit;
- ~~(20)~~~~(17)~~ "Permanent," as the term applies to digital property, means perpetual or for an indefinite or unspecified length of time;
- ~~(21)~~~~(18)~~ "Plant facility" means a single location that is exclusively dedicated to manufacturing or processing production activities. For purposes of this section, a location shall be deemed to be exclusively dedicated to manufacturing activities even if retail sales are made there, provided that the retail sales are incidental to the manufacturing activities occurring at the location. The term "plant facility" shall not include any restaurant, grocery store, shopping center, or other retail establishment;
- ~~(22)~~~~(19)~~ "Prewritten computer software" means:
- (a) Computer software, including prewritten upgrades, that are not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two (2) or more prewritten computer software programs or portions thereof does not cause the combination to be other than prewritten computer software;
 - (b) Software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the original purchaser; or
 - (c) Any portion of prewritten computer software that is modified or enhanced in any manner, where the modification or enhancement is designed and developed to the specifications of a specific purchaser. When a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of the modifications or enhancements the person actually made. In the case of modified or enhanced prewritten software, if there is a reasonable, separately stated charge on an invoice or other statement of the price to the purchaser for the modification or enhancement, then the modification or enhancement shall not constitute prewritten computer software;
- ~~(23)~~~~(20)~~ "Purchase" means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property or digital property transferred electronically for a consideration and includes:
- (a) When performed outside this state or when the customer gives a resale certificate, the producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting;
 - (b) A transaction whereby the possession of tangible personal property or digital property is transferred but the seller retains the title as security for the payment of the price; and
 - (c) A transfer for a consideration of the title or possession of tangible personal property or digital property which has been produced, fabricated, or printed to the special order of the customer, or of any publication;
- ~~(24)~~~~(21)~~ "Recycled materials" means materials which have been recovered or diverted from the solid waste stream and reused or returned to use in the form of raw materials or products;
- ~~(25)~~~~(22)~~ "Recycling purposes" means those activities undertaken in which materials that would otherwise become solid waste are collected, separated, or processed in order to be reused or returned to use in the form of raw materials or products;
- ~~(26)~~~~(23)~~ (a) "Repair, replacement, or spare parts" means any tangible personal property used to maintain, restore, mend, or repair machinery or equipment.
- (b) "Repair, replacement, or spare parts" does not include machine oils, grease, or industrial tools;
- ~~(27)~~~~(24)~~ (a) "Retailer" means:
1. Every person engaged in the business of making retail sales of tangible personal property, digital property, or furnishing any services included in KRS 139.200;

2. Every person engaged in the business of making sales at auction of tangible personal property or digital property owned by the person or others for storage, use or other consumption, except as provided in paragraph (c) of this subsection;
 3. Every person making more than two (2) retail sales of tangible personal property or digital property during any twelve (12) month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy;
 4. Any person conducting a race meeting under the provision of KRS Chapter 230, with respect to horses which are claimed during the meeting.
- (b) When the department determines that it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property or digital property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors or employers, the department may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this chapter.
- (c) 1. Any person making sales at a charitable auction for a qualifying entity shall not be a retailer for purposes of the sales made at the charitable auction if:
- a. The qualifying entity, not the person making sales at the auction, is sponsoring the auction;
 - b. The purchaser of tangible personal property at the auction directly pays the qualifying entity sponsoring the auction for the property and not the person making the sales at the auction; and
 - c. The qualifying entity, not the person making sales at the auction, is responsible for the collection, control, and disbursement of the auction proceeds.
2. If the conditions set forth in subparagraph 1. of this paragraph are met, the qualifying entity sponsoring the auction shall be the retailer for purposes of the sales made at the charitable auction.
3. For purposes of this paragraph, "qualifying entity" means a resident:
- a. Church;
 - b. School;
 - c. Civic club; or
 - d. Any other nonprofit charitable, religious, or educational organization;
- ~~(28)(25)}~~ "Retail sale" means any sale, lease, or rental for any purpose other than resale, sublease, or subrent;
- ~~(29)(26)}~~ (a) "Ringtones" means digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.
- (b) "Ringtones" shall not include ringback tones or other digital files that are not stored on the purchaser's communications device;
- ~~(30)(27)}~~ (a) "Sale" means the furnishing of any services included in KRS 139.200; any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property; or digital property transferred electronically for a consideration, and includes:
1. The producing, fabricating, processing, printing, or imprinting of tangible personal property or digital property for a consideration for purchasers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing, or imprinting;
 2. A transaction whereby the possession of tangible personal property or digital property is transferred, but the seller retains the title as security for the payment of the price; and
 3. A transfer for a consideration of the title or possession of tangible personal property or digital property which has been produced, fabricated, or printed to the special order of the purchaser.

- (b) This definition shall apply regardless of the classification of a transaction under generally accepted accounting principles, the Internal Revenue Code, or other provisions of federal, state, or local law;
- ~~(31)~~~~(28)~~ "Seller" includes every person engaged in the business of selling tangible personal property, digital property, or services of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax, and every person engaged in making sales for resale;
- ~~(32)~~~~(29)~~ (a) "Storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property or digital property purchased from a retailer.
- (b) "Storage" does not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state;
- ~~(33)~~~~(30)~~ "Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses and includes natural, artificial, and mixed gas, electricity, water, steam, and prewritten computer software;
- ~~(34)~~~~(31)~~ "Taxpayer" means any person liable for tax under this chapter;
- ~~(35)~~~~(32)~~ "Transferred electronically" means accessed or obtained by the purchaser by means other than tangible storage media; and
- ~~(36)~~~~(33)~~ (a) "Use" includes the exercise of any right or power over tangible personal property or digital property incident to the ownership of that property, or by any transaction in which possession is given, or by any transaction involving digital property where the right of access is granted.
- (b) "Use" does not include the keeping, retaining, or exercising any right or power over tangible personal property or digital property for the purpose of:
1. Selling tangible personal property or digital property in the regular course of business; or
 2. Subsequently transporting tangible personal property outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state.

➔Section 2. KRS 139.105 is amended to read as follows:

- (1) (a) For purposes of the retailer's obligation to pay or collect and remit the taxes imposed by KRS 139.200 and 139.310, the retailer shall source ~~the~~ retail ***sales not addressed in subsections (2), (3), and (4) of this section***~~sale, excluding sales of communications services and digital property~~ as follows:
- 1.~~(a)~~ Over the counter. When the purchaser receives tangible personal property, ***digital property***, or service at a business location of the retailer, the sale is sourced to that business location;
 - 2.~~(b)~~ Delivery to a specified address. When a purchaser or purchaser's donee receives tangible personal property, ***digital property***, or service at a location specified by the purchaser, the sale is sourced to that location; or
 - 3.~~(c)~~ ~~Delivery~~ Address unknown. When the retailer of a product does not know the address where the tangible personal property, ***digital property***, or service is received, the sale is sourced to the first address listed in this paragraph that is known to the retailer:
 - a.~~1~~ The address of the purchaser;
 - b.~~2~~ The billing address of the purchaser; ~~for~~
 - c.~~3~~ ***The address of the purchaser's payment instrument; or***
 - d. The address from which the tangible personal property was shipped; from which the computer software ~~was~~ delivered electronically or ***the digital property transferred electronically*** was first available for transmission by the retailer; or from which the service was provided, ***disregarding for these purposes any location that merely provided the actual digital transfer of the product sold.***

- (b) *Nothing included in this subsection shall affect the obligation of a purchaser to remit use tax pursuant to KRS 139.310.*
- (2) The retailer shall source communications services as follows:
- (a) A sale of mobile telecommunications services, other than air-ground radiotelephone service and prepaid wireless calling service, shall be sourced to the customer's or other purchaser's place of primary use;
 - (b) A sale of postpaid calling service shall be sourced to the origination point of the telecommunications signal as first identified by either the retailer's telecommunications system or information received by the retailer from its service provider, where the system used to transport the signals is not that of the retailer;
 - (c) A sale of prepaid calling service or a sale of a prepaid wireless calling service shall be sourced according to the provisions of subsection (1) of this section. If the sale is of a prepaid wireless calling service and the retailer does not know the address where the service is received, the sale shall be sourced to the first of the following that is known by the retailer:
 - 1. The address of the customer available from the business records of the retailer;
 - 2. The billing address of the customer;
 - 3. The address from which the service was provided; or
 - 4. The location associated with the mobile telephone number;
 - (d) A sale of a private communications service shall be sourced as follows:
 - 1. Service for a separate charge related to a customer channel termination point shall be sourced to each level of jurisdiction in which the customer channel termination point is located.
 - 2. Service where all customer termination points are located entirely within one (1) jurisdiction or levels of jurisdiction is sourced in the jurisdiction in which the customer channel termination points are located.
 - 3. Service for segments of a channel between two (2) customer channel termination points located in different jurisdictions and which segments of channel are separately charged shall be sourced fifty percent (50%) in each level of jurisdiction in which the customer channel termination points are located.
 - 4. Service for segments of a channel located in more than one (1) jurisdiction or levels of jurisdiction and which segments are not separately billed shall be sourced in each jurisdiction based on the percentage determined by dividing the number of customer channel termination points in the jurisdiction by the total number of customer channel termination points;
 - (e) A sale of an ancillary service is sourced to the customer's place of primary use; and
 - (f) A sale of other communications services:
 - 1. Sold on a call-by-call basis shall be sourced based on the taxing jurisdiction where the call either originates or terminates and in which the service address is also located; or
 - 2. Sold on a basis other than a call-by-call basis shall be sourced to the customer's or other purchaser's place of primary use.
- (3) ~~[The retailer shall source the sale of digital property to the place of primary use. For purposes of this subsection, "place of primary use" means the street address where the end user receives the digital property or from where the end user primarily accesses the digital property.]~~
- (4) ~~Florist wire sales shall be sourced in accordance with an administrative regulation promulgated by the department~~ *Nothing included in subsection (1), (2), or (3) of this section shall affect the obligation of a purchaser to remit use tax pursuant to KRS 139.310.*
- (4) *Advertising and promotional direct mail and other direct mail shall be sourced as provided in Section 7 of this Act.*

➔Section 3. KRS 139.260 is amended to read as follows:

For the purpose of the proper administration of this chapter and to prevent evasion of the duty to collect the taxes imposed by KRS 139.200 and 139.310, it shall be presumed that all gross receipts and all tangible personal property

and digital property sold by any person for delivery or access in this state are subject to the tax until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless *the person*~~he~~ takes from the purchaser a certificate to the effect that the property is either:

- (1) Purchased for resale according to the provisions of KRS 139.270;
- (2) Purchased through a *fully completed*~~properly executed~~ certificate of exemption *or fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption* in accordance with KRS 139.270; *or*
- (3) Purchased according to *administrative* regulations *promulgated by*~~of~~ the department ~~of Revenue~~ governing a direct pay authorization~~;~~~~or~~
- ~~(4) Purchased under a form issued pursuant to KRS 139.777.~~

➔Section 4. KRS 139.270 is amended to read as follows:

- (1) The resale certificate,~~or~~ certificate of exemption, *or Streamlined Sales and Use Tax Agreement Certificate of Exemption* relieves the retailer or seller from the burden of proof ~~only~~ if *the retailer or seller*:
 - (a) *Within ninety (90) days after the date of sale*:
 1. *Obtains a fully completed resale certificate, certificate of exemption, or Streamlined Sales and Use Tax Agreement Certificate of Exemption; or*
 2. *Captures the relevant data elements that correspond to the information that the purchaser would otherwise provide to the retailer or seller on the Streamlined Sales and Use Tax Agreement Certificate of Exemption; and*
 - (b) *Maintains a file of the certificate obtained or relevant data elements captured in accordance with KRS 139.720*~~taken in good faith from a person who, at the time of purchasing the tangible personal property or digital property~~:
 - ~~(a) Indicates an intention to sell it in the regular course of business by executing the resale certificate; or~~
 - ~~(b) Indicates that the property purchased will be used in an exempt manner by executing a certificate of exemption.~~
- (2) ~~The~~~~This~~ relief from liability provided to the retailer or the seller in ~~subsection (1) of~~ this section does not apply to a retailer or seller who:
 - (a) Fraudulently fails to collect the tax;
 - (b) Solicits purchasers to participate in the unlawful claiming of an exemption; or
 - (c) Accepts an exemption certificate when the purchaser claims an entity-based exemption when:
 1. The product sought to be covered by the exemption certificate is actually received by the purchaser at a location operated by the retailer or seller; and
 2. The state in which that location resides provides an exemption certificate that clearly and affirmatively indicates that the claimed exemption is not available in that state.

For purposes of this paragraph, "entity-based exemption" means an exemption based on who purchases the product or who sells the product. An exemption available to all individuals shall not be considered an entity-based exemption.
- (3) (a) ~~["Good faith" shall be demonstrated by the retailer or seller if the retailer or seller:~~
 - ~~1. Accepts, within ninety (90) days subsequent to the date of sale, a properly completed resale certificate or certificate of exemption; and~~
 - ~~2. Maintains a file of the certificate or data elements in accordance with KRS 139.720.~~

~~(b) If the department requests that the seller or retailer substantiate that the sale was a sale for resale or an exempt sale and~~~~if~~ the retailer or seller has not *complied with subsection (1) of this section*~~obtained an exemption certificate or resale certificate or all relevant data elements within ninety (90) days subsequent to the date of sale, in keeping with the good faith standard~~, the seller or retailer *shall be relieved of any liability for the tax on the transaction if the seller or retailer, within one hundred twenty (120) days of the department's request:*

1. *Obtains a fully completed resale certificate, exemption certificate, or Streamlined Sales and Use Tax Agreement Certificate of Exemption from the purchaser for an exemption that:*
 - a. *Was available under this chapter on the date the transaction occurred;*
 - b. *Could be applicable to the item being purchased; and*
 - c. *Is reasonable for the purchaser's type of business; or*
 2. *Obtains other information establishing that the transaction was not subject to the tax* ~~[may offer additional documentation to the department that the transaction is not subject to tax after the ninety (90) day period which the department may consider].~~
- (b) *Notwithstanding paragraph (a) of this subsection, if the department discovers through the audit process that the seller or retailer had knowledge or had reason to know at the time the information was provided that the information relating to the exemption claimed was materially false, or the seller or retailer otherwise knowingly participated in activity intended to purposefully evade the tax that is properly due on the transaction, the seller or retailer shall not be relieved of the tax on the transaction. The department shall bear the burden of proof that the seller or retailer had knowledge or had reason to know at the time the information was provided that the information was materially false.*
- (4) *Notwithstanding subsections (1) and (3) of this section, the seller or retailer may still offer additional documentation that is acceptable by the department that the transaction is not subject to tax and to relieve the seller or retailer from the tax liability.*
- (5) If the department later finds that the retailer or seller *complied with subsections (1), (3), and (4) of this section*, ~~[exercised good faith according to the provisions of subsection (3) of this section]~~ but that the purchaser used the property in a manner that would not have qualified for resale status or the purchaser issued a certificate of exemption *or a Streamlined Sales and Use Tax Agreement Certificate of Exemption* and used the property in some other manner or for some other purpose, the department shall hold the purchaser liable for the remittance of the tax and may apply penalties provided in KRS 139.990.

➔Section 5. KRS 139.365 is amended to read as follows:

- (1) Notwithstanding KRS 139.340, a commercial printer or mailer engaged in business in this state shall not be required to collect use tax on sales of printing, *advertising and promotional direct mail*, or *other* direct mail ~~[advertising materials]~~ that are ~~[both]~~ printed out of state and delivered out of state to the United States Postal Service for mass mailing to third-party Kentucky residents who are not purchasers of the advertising *and promotional direct mail or other direct mail* ~~[materials]~~ if the commercial printers or mailers:
 - (a) Maintain records relating to those sales to assist the department in the collection of use tax; and
 - (b) File reports as provided by KRS 139.730 if requested by the department.
- (2) If the commercial printer or mailer complies with the provisions of subsection (1) of this section, the purchaser of the printing, *advertising and promotional direct mail*, or *other* direct mail ~~[advertising materials]~~ shall have the sole responsibility for reporting and paying the use tax imposed by KRS 139.310.

➔Section 6. KRS 139.735 is amended to read as follows:

- (1) The department shall not promulgate any administrative regulation or policy, either written or unwritten, whose provisions are more stringent than ~~[the provisions of] KRS 139.270 [and 103 KAR 31:030]~~ regarding the *acceptance of* ~~[good faith provisions for]~~ resale certificates, exemption certificates, *Streamlined Sales and Use Tax Agreement Certificate of Exemptions*, and direct pay authorizations.
- (2) It shall be mandatory upon the department ~~[of Revenue]~~ during any audit process to honor resale certificates, exemption certificates, *Streamlined Sales and Use Tax Agreement Certificate of Exemptions*, and direct pay authorizations when executed according to ~~[the good faith provisions defined and described in] KRS 139.270 and any administrative regulation promulgated by the department concerning direct pay authorizations [103 KAR 31:030].~~

➔Section 7. KRS 139.777 is amended to read as follows:

- (1) (a) *This section applies for purposes of uniformly sourcing:*
 1. *Advertising and promotional direct mail transactions;*

2. *Other direct mail transactions; and*
 3. *Bundled transactions that include advertising and promotional direct mail if the primary purpose of the transaction is the sale of advertising and promotional direct mail.*
- (b) *This section does not:*
1. *Impose requirements regarding the taxation of advertising and promotional direct mail or other direct mail or the application of sales for resale or other exemptions; or*
 2. *Apply to any transaction that includes the development of billing information or the provision of any data processing services that is more than incidental, regardless of whether advertising and promotion direct mail is included in the same mailing.*
- (c) *For a transaction characterized as a sale of services, this section applies only if the service is an integral part of the production and distribution of printed material that meets the definition of advertising and promotional direct mail or other direct mail.*
- (2) (a) *A purchaser of advertising and promotional direct mail may provide the retailer with:*
1. ~~A [Notwithstanding any other provision of this chapter, a purchaser of direct mail that is not a holder of a]~~ direct pay permit;
 2. *A fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption or other written statement approved, authorized, or accepted by the department; or*
 3. ~~[shall provide to the retailer in conjunction with the purchase either a Direct Mail Form or]~~ Information to show the jurisdictions ~~to [in]~~ which the *advertising and promotional* direct mail is *to be* delivered to recipients.
- (b) ~~(a)~~ *If the purchaser provides the retailer with a [Upon receipt of the] direct pay permit, a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption, or other written statement approved, authorized, or accepted by the department:*
1. ~~[Mail Form,]~~ The retailer, *in the absence of bad faith*, shall be relieved of all obligations to collect, pay, or remit the applicable tax *involving other direct mail to which the direct pay permit, Streamlined Sales and Use Tax Agreement Certificate of Exemption, or written statement apply;* and
 2. The purchaser shall *source the sale to the jurisdictions to which the advertising and promotional direct mail is to be delivered to the recipients and shall* pay or remit the applicable tax on a direct-pay basis. ~~[A Direct Mail Form shall remain in effect for all future sales of direct mail by the retailer to the purchaser until it is revoked in writing.]~~
- (c) ~~(b)~~ *If the purchaser provides the retailer [Upon receipt of] information [from the purchaser] showing the jurisdictions to which the *advertising and promotional* direct mail is delivered to recipients, the retailer shall *source the sale and* collect the tax according to the delivery information provided by the purchaser. In the absence of bad faith, the retailer is relieved of any further obligation to collect the tax on any transaction where the retailer has collected the tax pursuant to the delivery information provided by the purchaser.*
- (d) ~~(2)~~ If the purchaser of *advertising and promotional* direct mail does not ~~have a direct pay permit and does not~~ provide the retailer with ~~[either]~~ a direct *pay permit, a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption, or other written statement approved, authorized, or accepted by the department* ~~[Mail Form]~~ or delivery information, as *provided* ~~[required]~~ by subsection (2)(a) ~~(1)~~ of this section, the retailer shall *source the sale* ~~[collect the tax according]~~ to the address from where the *advertising and promotional* direct mail was shipped.
- (e) *Nothing in this subsection shall prohibit the department from disallowing credit for tax paid in another jurisdiction on sales sourced according to this subsection if the advertising and promotional direct mail is delivered to recipients in this state.*
- (3) (a) *The purchaser of other direct mail may provide the retailer with:*
1. *A direct pay permit; or*
 2. *A fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption or other written statement approved, authorized, or accepted by the department.*

- (b) *If the purchaser provides the retailer a direct pay permit, a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption, or other written statement approved, authorized, or accepted by the department:*
 - 1. *The retailer, in the absence of bad faith, shall be relieved of all obligations to collect, pay, or remit the applicable tax involving other direct mail to which the direct pay permit, Streamlined Sales and Use Tax Agreement Certificate of Exemption, or written statement apply; and*
 - 2. *The purchaser shall source the sale to the jurisdictions to which the other direct mail is to be delivered to the recipients and shall report and remit the applicable tax on a direct-pay basis.*
 - (c) *If the purchaser of other direct mail does not provide the retailer with a direct pay permit, a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption, or other written statement approved, authorized, or accepted by the department as provided in subsection (3)(a) of this section, the retailer shall source the sale to the location indicated by an address for the purchaser that is available from the retailer's business records that are maintained in the ordinary course of the retailer's business when use of this address does not constitute bad faith.*
 - (4) *If both advertising and promotional direct mail and other direct mail are combined in a single mailing, the sale shall be sourced as other direct mail as provided in subsection (3) of this section.*
 - (5) Nothing in this ~~section~~~~subsection~~ shall limit a purchaser's:
 - (a) Obligation for sales or use tax to any state ~~to~~~~in~~ which the *advertising and promotional direct mail or other direct mail* is delivered;
 - (b) *Right under local, state, federal, or constitutional law to a credit for sales or use taxes legally due and paid to other jurisdictions; or*
 - (c) *Right to a refund of sales or use taxes overpaid to any jurisdiction.*
 - ~~{(3) If a purchaser of direct mail provides the retailer with documentation of direct pay authority, the purchaser shall not be required to provide a Direct Mail Form or delivery information to the retailer.~~
 - ~~(4) "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail retailer for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address.}~~
- ➔Section 8. KRS 139.795 is amended to read as follows:
- (1)
 - (a) A certified service provider is the agent of a seller, with whom the certified service provider has contracted, for the collection and remittance of sales and use taxes.
 - (b) The certified service provider is liable for sales and use tax due each member state on all sales transactions it processes for the seller, except when the liability for not collecting the sales or use taxes results from the certified service provider's reliance on software certified by the state. Relief from liability shall not be granted if the certified service provider has incorrectly classified an item or transaction into a product-based exemption certified by the state, except when the item or transaction is classified based upon the individual listing of items or transactions within a product definition approved by the governing board or the member state.
 - (c) A person that is responsible for the certified automated system is responsible for the functioning of the system and is liable to the state for underpayments of tax attributable to errors in the functioning of the certified automated system.
 - (2)
 - (a) A seller that contracts with a certified service provider is not liable to the state for sales or use tax due on transactions processed by the certified service provider unless the seller misrepresented the type of items it sells or committed fraud;
 - (b) In the absence of probable cause to believe that the seller has committed fraud or made a material misrepresentation, the seller is not subject to audit on the transactions processed by the certified service provider; and
 - (c) A seller is subject to audit for transactions not processed by the certified service provider.

- (3) The member states acting jointly may perform a system check of the seller and review the seller's procedures to determine if the certified service provider's system is functioning properly and the extent to which the seller's transactions are being processed by the certified service provider.
- (4) (a) A model 2 seller shall be relieved of liability for not collecting sales and use taxes if the liability resulted from the model 2 seller's reliance on software previously certified by the state. Relief from liability shall not be granted if the certified service provider has incorrectly classified an item or transaction into a product-based exemption certified by the state, except when the item or transaction is classified based upon the individual listing of items or transactions with a product definition approved by the governing board or the member state.
- (b)~~[(5)(a)]~~ The department shall notify the certified service provider or model 2 seller if an item or transaction has been incorrectly classified as to its taxability.~~[(b)]~~
- (c)~~[(b)]~~ The certified service provider or a model 2 seller shall have ten (10) days to revise the classification after the receipt of notice.~~[(c)]~~
- (d)~~[(c)]~~ Upon expiration of the ten (10) days, the certified service provider or the model 2 seller shall be liable for the failure to collect the amount of sales or use taxes due and owing.
- (5)~~[(6)]~~ A model 3 seller that has signed a performance agreement establishing a performance standard for that system is liable for the failure of the system to meet the performance standard.
- (6)~~[(7)]~~ A purchaser, ***purchaser's seller, or certified service provider*** shall not be subject to the additional tax, related penalties imposed under KRS 131.180, or related interest provided under KRS 131.183 for having failed to pay the correct amount of sales or use tax on specific transactions if:
- (a) The purchaser's seller or certified service provider relied on erroneous data provided by the department on tax rates, boundaries, or taxing jurisdiction assignments; ***or***
- (b) ~~[(The purchaser holds a direct pay authorization and relied on erroneous data provided by the department on tax rates, boundaries, or taxing jurisdiction assignments; or~~
- ~~[(c)]~~ The purchaser, purchaser's seller, or purchaser's certified service provider relied on erroneous data in the taxability matrix completed and made available to the public by the department. The relief prescribed in this paragraph for additional tax and related interest provided under KRS 131.183 shall be limited to the department's erroneous classification in the taxability matrix as "taxable" or "exempt," "included in sales price" or "excluded from sales price," or "included in the definition" or "excluded in the definition."
- (7) (a) ***If the department does not provide the seller with at least thirty (30) days' notice from the enactment of a sales and use tax rate change to the effective date of the rate change, the seller shall be relieved of liability for failing to collect tax at the new rate if:***
1. ***The seller collected tax at the immediately preceding effective rate; and***
 2. ***The seller's failure to collect tax at the new rate does not extend beyond thirty (30) days after the date of enactment of the new rate.***
- (b) ***Notwithstanding paragraph (a) of this subsection, if the department establishes that the seller fraudulently failed to collect tax at the new rate or solicits purchasers based on the immediately preceding effective rate, the relief provided to the seller in paragraph (a) of this subsection shall not apply.***
- (8) ***A purchaser shall not be subject to the additional tax, related penalties imposed under KRS 131.180, or related interest provided under KRS 131.183 for failing to pay the correct amount of sales or use tax on specific transactions if the purchaser holds a direct pay authorization and relied on erroneous data provided by the department on the tax rates, boundaries, or taxing jurisdiction assignments.***

➔Section 9. KRS 139.990 is amended to read as follows:

- (1) Any person who executes:
- (a) A resale certificate for property in accordance with KRS 139.270 knowing at the time of purchase that such property is not to be resold by him in the regular course of business, for the purpose of evading the tax imposed under this chapter;

- (b) An exemption certificate *or a Streamlined Sales and Use Tax Agreement Certificate of Exemption* for property in accordance with KRS 139.270, knowing at the time of the purchase that he is not engaged in an occupation that would entitle him to exemption status or any person who does not intend to use the property in the prescribed manner; *or*
 - (c) A direct pay authorization for property not in accordance with *an administrative regulation promulgated by the department governing direct pay authorizations* ~~[103 KAR 31:030; or~~
 - ~~(d) — A Direct Mail Form issued not in accordance with the provisions of KRS 139.777];~~
- shall be guilty of a Class B misdemeanor.
- (2) A person who engages in business as a seller in this state without a permit or permits as required by this chapter or after a permit has been suspended, and each officer of any corporation which is so engaged in business, shall be guilty of a Class B misdemeanor.
 - (3) Any person who violates any of the provisions of KRS 139.220, 139.380, or 139.700 shall be guilty of a Class B misdemeanor.
 - (4) Any person who violates any of the regulations promulgated by the department shall be guilty of a Class B misdemeanor.
 - (5) Any person, business, or motion picture production company falsifying expenditure reports, applications, or any other statements made in securing the tax credit afforded by KRS 139.538 shall be guilty of a Class D felony. Such motion picture production companies shall be denied any tax credit to which they would otherwise be entitled, and shall be prohibited from applying for any future credit afforded by KRS 139.538.
- ➔Section 10. This Act takes effect July 1, 2011.

Signed by Governor March 16, 2011.