

**VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY**

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**CRUTCHFIELD CORP.,**  
Plaintiff,  
v.  
**CHRISTOPHER C. HARDING**, in his  
capacity as Commissioner, and  
**WILLIAM GRAHAM**, in his capacity  
as Deputy Commissioner, Tax  
Administration of the  
**MASSACHUSETTS DEPARTMENT  
OF REVENUE,**  
Defendants.  
\_\_\_\_\_

Case No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY JUDGMENT**

**COMPLAINT**

COMES NOW the Plaintiff Crutchfield Corp. (“Crutchfield”), by counsel, and pursuant to §§ 8.01-184 and 8.01-184.1 of the Code of Virginia brings this Complaint for Declaratory Judgment against Defendants Christopher C. Harding in his official capacity as Commissioner, and William Graham, in his official capacity as Deputy Commissioner, Tax Administration (together, “Commissioner”), of the Massachusetts Department of Revenue (“MDOR”). Crutchfield complains and alleges as follows:

**NATURE OF THE ACTION**

1. This is an action for declaratory judgment by Crutchfield, a Virginia corporation headquartered in Albemarle County, Virginia, challenging the validity, enforceability, and constitutionality of MDOR Regulation 830 CMR 64H.1.7: Vendors Making Internet Sales, effective October 1, 2017 (the “Massachusetts Regulation”, a true copy of which is attached hereto as Exhibit A), which has been asserted against Crutchfield by the Commissioner.

2. On or about September 14, 2017, the Commissioner sent Crutchfield a letter (“September 14 Letter”, a true copy of which is attached hereto as Exhibit B), asserting that because Crutchfield’s Internet sales in Massachusetts during the 12-month period ending on September 30, 2017 exceeded \$500,000 and the number of Massachusetts Internet sales transactions during that period were at least 100, Crutchfield was required by October 1, 2017, to register for, collect, and remit Massachusetts sales and use tax under the rule set forth in the Massachusetts Regulation. The September 14 Letter threatened Crutchfield with statutory penalties and interest if it failed to register for, collect, and remit sales and use tax to the MDOR, in addition to liability for the sales and use tax on such transactions.

3. As deemed to apply to Crutchfield by the Commissioner, the Massachusetts Regulation is invalid and of no legal effect because: (a) it violates the United States Constitution by exceeding the limitations on state authority to regulate interstate commerce under the dormant Commerce Clause, as interpreted by the Supreme Court in *Quill v. North Dakota*, 504 U.S. 298 (1992); (b) it constitutes an undue burden on interstate commerce within the meaning of Article I, Section 8, Clause 3 of the United States Constitution; and (c) it is preempted by the provisions of the federal Internet Tax Freedom Act, 47 U.S.C. § 151 (note) (“ITFA”), prohibiting state tax laws that discriminate against electronic commerce by imposing tax collection obligations on Internet vendors with respect to transactions conducted online that do not apply to vendors conducting similar transactions offline.

4. The General Assembly has specifically given this Court jurisdiction over actions of this type under Va. Code § 8.01-184.1. Crutchfield is a Virginia corporation and Defendants are government officials of another state who assert that Crutchfield is obligated to collect sales taxes for that state.

## **THE PARTIES**

5. Plaintiff Crutchfield is a Virginia corporation with its headquarters in Albemarle County, Virginia. Crutchfield is engaged in the business of making retail sales of consumer electronics, automotive, and other products via catalog and the Internet to customers nationwide, including customers in Massachusetts.

6. Defendant Harding is the head of the MDOR, the agency responsible for administration of the Commonwealth's sales and use tax laws. Defendant Graham is the Deputy Commissioner of the MDOR, and the author of the September 14 Letter attached as Exhibit B. The MDOR promulgated the Massachusetts Regulation and is responsible for overseeing its implementation and enforcement. The individual defendants are named solely in their capacities as Commissioner and Deputy Commissioner of the MDOR.

## **JURISDICTION AND VENUE**

7. This Court has jurisdiction under Va. Code Ann. § 8.01-184.1(A) and (C). This Court also properly has jurisdiction over the Plaintiff's claims asserted under 42 U.S.C. § 1983.

8. Venue is proper in this Court pursuant to Va. Code Ann. §§ 8.01-185 and 8.01-262.

## **BACKGROUND**

9. On or about June 2, 2017, the Commissioner sent a letter ("June 2 Letter", a true copy of which is attached hereto as Exhibit C) to Crutchfield with the subject line, "Re: Important Changes: Sales/Use Tax Laws for Internet Vendors."

10. That letter informed Crutchfield of the recent issuance of Directive 17-1 by the MDOR, entitled, "Requirement that Out-of-State Internet Vendors with Significant Massachusetts Sales Must Collect Sales or Use Tax." The June 2 Letter purported "to bring to [Crutchfield's]

attention...recent changes in the application of the Massachusetts sales and use tax statutes”

(brackets and ellipsis added). The June 2 Letter further stated:

Under the Directive's guidelines a vendor is required to register, collect, and remit Massachusetts sales or use tax, beginning July 1, 2017, as follows:

- For the six-month period, July 1, 2017 to December 31, 2017, if during the preceding 12 months, July 1, 2016 to June 30, 2017, the vendor had in excess of \$500,000 in Massachusetts sales and made sales for delivery into Massachusetts in 100 or more transactions.
- For each calendar year beginning with 2018 if during the preceding calendar year the vendor had in excess of \$500,000 in Massachusetts sales and made sales for delivery into Massachusetts in 100 or more transactions.

The June 2 Letter continued,

Our estimates suggest that your business will likely meet the thresholds described in the Directive. Current DOR records indicate that you do not have a Massachusetts sales and use tax registration.

In order to meet any filing obligations, you must register as a vendor through DOR's website, Mass Tax Connect by June 26, 2017, and check the Internet Vendor box on the application.

It is important to note that if you meet the thresholds described in the Directive and you do not timely register and file the required returns with the required tax payment, statutory penalties and interest will accrue until the required returns are filed with such payments.

11. On June 28, 2017, a Massachusetts Superior Court issued a Memorandum of Decision and Order Entering Declaratory Judgment in litigation over the validity of MDOR Directive 17-1, specifically concluding that the Directive was invalid because it had not been promulgated in compliance with the Massachusetts Administrative Procedures Act.

12. Crutchfield never received notification from the MDOR that Directive 17-1 was no longer valid.

13. Instead, as noted, MDOR sent Crutchfield the September 14 Letter, informing Crutchfield of the forthcoming promulgation of the Massachusetts Regulation, and asserting the MDOR's belief that Crutchfield meets the requirements of the Massachusetts Regulation.

14. The September 14 Letter is essentially identical to the June 2 Letter, except that in place of references to Directive 17-1, the September 14 Letter refers to the Massachusetts Regulation. The September 14 Letter states:

Under the regulation's guidelines a vendor is required to register, collect, and remit Massachusetts sales or use tax, beginning October 1, 2017, as follows:

- For the three-month period, October 1, 2017 to December 31, 2017, if during the preceding 12 months, October 1, 2016 to September 30, 2017, the vendor had in excess of \$500,000 in Massachusetts sales completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.
- For each calendar year beginning with 2018 if during the preceding calendar year the vendor had in excess of \$500,000 in Massachusetts sales completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

And, in much the same fashion as the June 2 Letter, it continues:

Our estimates suggest that your business will likely meet the thresholds described in the regulation. Current DOR records indicate that you do not have a Massachusetts sales and use tax registration.

In order to meet your filing obligation, you must register as a vendor through DOR's website, [Mass Tax Connect](#) by October 1, 2017, and check the box on the application indicating that you are an Internet vendor with no location in-state.

It is important to note that if you meet the thresholds described in the regulation and you do not timely register and file the required returns with the required tax payment, statutory penalties and interest will accrue until the required returns are filed with such payments.

15. Crutchfield understands the September 14 Letter to state the MDOR's belief that Crutchfield has an obligation to register with the MDOR and to collect and remit Massachusetts Sales or Use Tax pursuant to the Massachusetts Regulation.

Massachusetts Sales and Use Tax

16. Massachusetts imposes a sales tax on the retail sale of certain tangible personal property and services and a corresponding use tax on their use within the state. *See* M.G.L. c. 64H & 64I.

17. Prior to the issuance of Directive 17-1, the MDOR had never asserted that out-of-state Internet vendors were required to collect and remit Massachusetts sale and use tax based solely on Internet sales and marketing activity reaching Massachusetts consumers.

18. After the Directive was invalidated, the MDOR engaged in an accelerated rulemaking proceeding, resulting in the publication of the Massachusetts Regulation on September 22, 2017, with an effective date of October 1, 2017.

19. The Massachusetts Regulation imposes new sales and use tax collection and remittance obligations upon affected Internet vendors.

20. The Massachusetts Regulation provides, in pertinent part:

General Rule. An Internet vendor with a principal place of business located outside the state that is not otherwise subject to tax is required to register, collect and remit Massachusetts sales or use tax with respect to its Massachusetts sales as follows:

- a. For the period, October 1, 2017 to December 31, 2017, if during the preceding 12 months, October 1, 2016 to September 30, 2017, it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.
- b. For each calendar year beginning with 2018, if during the preceding calendar year it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

830 CMR 64H.1.7(3). According to the Massachusetts Regulation, the MDOR may require Massachusetts sales and use tax collection by a vendor that meets such sales and transactions thresholds through its Internet sales and marketing activity.

21. Although the Massachusetts Regulation specifically targets Internet vendors with new sales and use tax collection obligations based on online sales and marketing activity, the MDOR asserts it does not discriminate against electronic commerce because any vendor with the types of Internet-based contacts referenced in the regulation would be required to collect tax. 830 CMR 64H.1.7.(1)(b)(iv). The Massachusetts Regulation, however, does not identify offline contacts of a similar nature that would require an out-of-state vendor not selling via the Internet to collect Massachusetts sales and use tax.

#### Commerce Clause Under Quill

22. The United States Supreme Court, in *Quill*, held that sellers “who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business” lack the necessary “substantial nexus” with a State for the State to require such out-of-state sellers to collect and remit the State’s sales and use taxes. 504 U.S. at 307, 313-19.

23. The Court in *Quill* reaffirmed that in order for a State to have the authority under the “substantial nexus” standard of the Commerce Clause to require an out-of-state seller to collect or report the State’s sales and use taxes, the seller must have a “physical presence” in the state. *Id.* at 314, 317-18.

24. The United States Supreme Court has not overruled, superseded, or limited its decision in *Quill*.

25. The physical presence requirement of *Quill* currently remains the law of the land under the United States Constitution. The States, and all state agencies, including the Commissioner and the MDOR, are bound by *Quill*.

26. Furthermore, in 2016, Congress made permanent the non-discrimination provisions of the ITFA, which expressly prohibit the kind of state tax obligations created by the Massachusetts Regulation, namely, those targeting Internet vendors precisely because they engage in electronic commerce and are shielded from burdensome state tax obligations under the physical presence standard of *Quill*.

Crutchfield's Business

27. Crutchfield sells consumer electronics, automotive, and other products via catalog and the Internet to customers located nationwide, including in Massachusetts. Crutchfield's retail website address is [www.crutchfield.com](http://www.crutchfield.com).

28. During the period October 1, 2016 to September 30, 2017, Crutchfield had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

29. Crutchfield did not and does not have a physical presence in the Commonwealth of Massachusetts.

30. Under Section 8.01-184.1(A) of the Code of Virginia, a Virginia business, such as Crutchfield, may obtain a declaration in Circuit Court as to whether the requirement of another state imposing upon the business an obligation to collect and remit sales or use tax to that state constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3.



**COUNT ONE:**  
**VIOLATION OF COMMERCE CLAUSE OF THE U.S. CONSTITUTION**  
**(Va. Code Ann. § 8.01-184.1(A); U.S. Const., art I, § 8, cl. 3; 42 U.S.C. § 1983)**

31. Crutchfield incorporates the foregoing paragraphs of the Complaint as if set forth in this paragraph.

32. The general rule set out in the Massachusetts Regulation requires an Internet vendor with a principal place of business located outside the state to register, collect and remit Massachusetts sales or use tax with respect to its Massachusetts sales if its meets the Internet sales and transactions thresholds set forth in the regulation, even though the Internet vendor does not have a physical presence in Massachusetts.

33. The Massachusetts Regulation runs afoul of the Commerce Clause physical presence standard as set forth in *Quill*.

34. During the period October 1, 2016 to September 30, 2017, Crutchfield had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

35. Crutchfield did not and does not have a physical presence in the Commonwealth of Massachusetts.

36. The Commissioner is the Massachusetts state official responsible for implementation and enforcement of the new Massachusetts Regulation.

37. The MDOR lacks the authority to enforce the Massachusetts Regulation against Crutchfield because the Massachusetts Regulation imposes an undue burden on interstate commerce under the Commerce Clause.

38. The Commissioner and the MDOR lack the authority to disregard the Supreme Court's controlling precedent in *Quill*.

39. The Court should declare the Massachusetts Regulation unconstitutional, invalid, and unenforceable against Crutchfield.

**COUNT TWO:  
VIOLATION OF THE INTERNET TAX FREEDOM ACT AND PREEMPTION UNDER  
THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION  
(U.S. Const., art IV, § 2; 42 U.S.C. § 1983)**

40. Crutchfield incorporates the foregoing paragraphs of the Complaint as if set forth in this paragraph.

41. The ITFA prohibits a state from imposing a discriminatory tax on electronic commerce. ITFA § 1101(a)(2).

42. Under the ITFA, a “discriminatory tax” includes “any tax...on electronic commerce that...imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.” *Id.* § 1105(2)(A)(iii) (ellipsis added).

43. The term “tax” under the ITFA includes both revenue raising measures and “the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.” *Id.* § 1105(8).

44. “Electronic commerce” is defined as “any transaction conducted over the Internet...comprising sales...of delivery or property, goods, service or information...” *Id.* § 1105(3) (ellipses added).

45. The Massachusetts Regulation imposes an obligation on certain Internet vendors, including allegedly Crutchfield, to collect and remit sales or use tax on electronic commerce that are not imposed on other vendors who do or might make sales of similar goods and services through other means, *e.g.*, by catalog, mail order, television infomercial, or toll-free telephone number.

46. In addition, the Massachusetts Regulation discriminates against electronic commerce in violation of the ITFA by relying on “electronic contacts” associated with Internet sales as the basis for establishing substantial nexus and imposing a sales/use tax collection obligation on affected Internet vendors.

47. The ITFA was drafted with the intent of prohibiting states and localities from using Internet-based contacts as a factor in determining whether an out-of-state business has substantial nexus with the taxing jurisdiction.

48. The ITFA expressly rejected a theory of substantial nexus or “physical presence” based on a vendor’s “electronic contacts” with a taxing jurisdiction.

49. The Massachusetts Regulation violates the ITFA because it justifies its general rule of nexus for affected Internet vendors on the basis of internet contacts with the Commonwealth while offline vendors are not required to collect and remit sales and use tax.

50. The Massachusetts Regulation thus conflicts with both the language and intent of the ITFA.

51. The Commissioner is the state official responsible for implementation and enforcement of the Massachusetts Regulation targeting Internet vendors.

52. The Massachusetts Regulation, if enforced against Internet vendors such as Crutchfield, would constitute an impermissible discriminatory tax on electronic commerce in violation of the ITFA.

53. Consistent with the Supremacy Clause of the United States Constitution, the ITFA preempts state laws or regulations that violate its prohibitions.

54. The Court should declare that the Massachusetts Regulation violates the prohibition on discriminatory taxes on electronic commerce set forth in the ITFA, is preempted by federal law, and is invalid and without legal effect.

**PRAYER FOR RELIEF**

WHEREFORE, Crutchfield respectfully prays that the Court:

- (A) Enter a declaration that the Massachusetts Regulation imposes an undue burden on interstate commerce in violation of the Commerce Clause, and is invalid and unenforceable against Crutchfield;
- (B) Enter a declaration that the Massachusetts Regulation is barred by the ITFA and void because it is preempted under the Supremacy Clause;
- (C) Enjoin the Commissioner from enforcing the Massachusetts Regulation against Crutchfield;
- (F) Enter judgment for Crutchfield;
- (G) Award Crutchfield its attorneys' fees and costs; and
- (H) Grant such further and other relief as the Court deems just and proper.

DATED this 24th day of October, 2017.

Respectfully Submitted,  
CRUTCHFIELD CORP.  
By Counsel



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# **EXHIBIT A**



The Official Website of the Department of Revenue (DOR)

## Department of Revenue

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## 830 CMR 64H.1.7: Vendors Making Internet Sales

830 CMR: DEPARTMENT OF REVENUE

830 CMR 64H.00: SALES AND USE TAX

830 CMR 64H.1.7: Vendors Making Internet Sales

### (1) Statement of Purpose; Background, Outline of Topics; Effective Date.

(a) Statement of Purpose. The purpose of 830 CMR 64H.1.7 is to explain how the general sales and use tax jurisdictional standard set forth in M.G.L. chs. 64H and 64I applies to vendors making Internet sales, taking into consideration the relevant provisions of the U.S. constitution and federal law. 830 CMR 64H.1.7 includes an explanation of the circumstances under which certain Internet vendors with a principal place of business located outside the state are required to register, collect and remit Massachusetts sales or use tax as set forth in M.G.L. chs. 64H and 64I.

### (b) Background.

1. General. A vendor that is engaged in making taxable sales in the commonwealth or that sells taxable tangible personal property or services for use in the commonwealth is subject to a sales or use tax collection duty when it is "engaged in business in the commonwealth" within the meaning of M.G.L. c. 64H, § 1 and meets the U.S. constitutional requirements. The provisions of M.G.L. c. 64H, § 1 are generally enforced to the extent allowed under the constitutional limits.

2. Dormant Commerce Clause. The provisions of M.G.L. c. 64H, § 1 are enforced to the extent allowed by the "physical presence" dormant Commerce Clause standard as set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), where a state sought to impose a use tax collection duty on an out-of-state mail order vendor on sales of tangible personal property shipped into the state. Unlike the mail order vendor at issue in *Quill*, Internet vendors with a large volume of Massachusetts sales invariably have one or more of the following contacts with the state that function to facilitate or enhance such in-state sales and constitute the requisite in-state physical presence:

- a. property interests in and/or the use of in-state software (e.g., "apps") and ancillary data (e.g., "cookies") which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers, and may enable the vendor's use of such physical devices;
- b. contracts and/or other relationships with content distribution networks resulting in the use of in-state servers and other computer hardware and/or the receipt of server or hardware-related in-state services; and/or
- c. contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-state services, including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics and consumer access to customer service.

3. Due Process Clause. The provisions of M.G.L. c. 64H, § 1 are enforced subject to the limitations of the Due Process Clause of the U.S. constitution. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In the instance of a vendor with a principal place of business located outside the state, due process generally requires that such vendor purposefully avail itself of the state's economic market. See *id.* The degree to which a vendor must purposefully avail itself of a state's economic market to meet the requirements of due process can be uncertain in the instance of Internet vendors with a principal place of business located outside the state. Therefore, 830 CMR 64H.1.7(3) sets a bright line threshold intended to reflect a level of purposeful availment at which the requirements of due process will be met in the case of such vendors.

4. Internet Tax Freedom Act ("ITFA"), Codified as Note to 47 U.S.C. § 151. ITFA contains certain prohibitions on state taxation of e-commerce transactions. Among other things, it prohibits discriminatory taxation of e-commerce transactions and prohibits a state from asserting jurisdiction over an Internet vendor on the basis of certain specific factors. 830 CMR 64H.1.7 is non-discriminatory because it asserts jurisdiction over all vendors (Internet or non-Internet) who have the contacts identified in 830 CMR 64H.1.7(1)(b)2.a. through c. and applies the same jurisdictional standards to all vendors (Internet or non-Internet) that are otherwise subject to tax. See 830 CMR 64H.1.7(3), (5) and (6). Further, 830 CMR 64H.1.7(3) does not assert jurisdiction based on the prohibited factors referenced in ITFA. See 830 CMR 64H.1.7(4).

### (c) Outline of Topics. Following is a list of sections contained in 830 CMR 64H.1.7:

- (1) Statement of Purpose; Background; Outline of Topics; Effective Date
- (2) Definitions
- (3) General Rule
- (4) Exceptions
- (5) Non-Internet Vendors
- (6) Internet Vendors with Other Contacts

- (7) Tax Returns and Payments
- (8) No Limitation on Other Authority

(d) **Effective Date.** 830 CMR 64H.1.7 is effective on September 22, 2017. The requirement that an Internet vendor register, collect and remit sales or use tax applies as stated in 830 CMR 64H.1.7(3).

(2) **Definitions.**

**Commissioner.** The Commissioner of Revenue or the Commissioner's duly authorized representative.

**Content Distribution Network or CDN.** A person that operates an organized network of servers and other computer hardware that is generally placed in geographically distributed data centers within close proximity to Internet users.

**Cookies.** Text data files generally used by an Internet vendor to enhance its customer sales. Cookies are stored locally on computers and physical communications devices of the customers of an Internet vendor when such customers visit the vendor's website for the first time and act to identify the customer on each subsequent visit.

**Delivery.** The method by which a vendor delivers tangible personal property or a service that it has sold to a customer, however effected, including through electronic delivery. A delivery includes a delivery made by the vendor itself, a related person or a contract party.

**Delivery Company.** An unrelated person who, pursuant to an agreement with a vendor, delivers tangible personal property or services sold by such vendor and may also provide additional services, including order fulfillment, order management, return processing, the preparation of sales reports or other analytics and consumer access to customer service.

**Internet Vendor.** A vendor that derives sales from transactions consummated over the Internet, whether such transactions are: (a) completed on a website maintained or operated by the vendor itself, or a website maintained or operated by a related person or a person with which the vendor contracts, including a marketplace facilitator and/or (b) fulfilled by a related person or a person with which the vendor contracts. An Internet vendor, in addition to its Internet sales, may also derive sales from orders completed other than over the Internet.

**Marketplace Facilitator.** A person who, pursuant to an agreement with a vendor, facilitates sales by such vendor through a physical or electronic marketplace operated by the person, and engages:

- (a) directly or indirectly, through one or more related persons in any of the following: 1. transmitting or otherwise communicating the offer or acceptance between a buyer and vendor; 2. owning or operating the infrastructure, electronic or physical, or technology that brings buyers and vendors together; 3. providing a virtual currency that buyers are allowed or required to use to purchase products from the vendor; or 4. software development or research and development activities related to any of the activities described in 830 CMR 64H.1.7(2): Marketplace Facilitator(b), if such activities are directly related to a physical or electronic marketplace operated by the person or a related person; and
- (b) in any of the following activities with respect to the vendor's products: 1. payment processing services; 2. fulfillment or storage services; 3. listing products for sale; 4. setting prices; 5. branding sales as those of the marketplace facilitator; 6. order taking; 7. advertising or promotion; or 8. providing customer service or accepting or assisting with returns or exchanges.

**Massachusetts Sales.** All sales made by a vendor of tangible personal property or services delivered into the state, however consummated.

**Online Marketplace Facilitator.** A marketplace facilitator that facilitates sales through an electronic marketplace.

**Otherwise Subject to Tax.** Massachusetts sales or use tax jurisdiction over a vendor that is conferred by in-state contacts other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. For example, an Internet vendor with a principal place of business located outside the state might maintain inventory in the state or contract with an in-state representative (including a related person) that creates sales or use tax jurisdiction. Only a vendor that is not "otherwise subject to tax" is potentially subject to the rule set forth in 830 CMR 64H.1.7(3).

**Sales.** Sales as defined in M.G.L. c. 64H, § 1, whether or not such sales qualify for a sales tax exemption.

**Services.** Services as defined in M.G.L. c. 64H, § 1.

**Software.** A set of coded instructions designed to cause a computer or other physical communications device or automatic data processing equipment to perform a task, including, but not limited to, native or mobile applications ("apps") that are downloaded and run on computers or other physical communications devices, and web applications or dynamic web pages in which the coded instructions, such as JavaScript, are downloaded, executed, and run on web browsers.

**Tangible personal property.** Tangible personal property as defined in M.G.L. c. 64H, § 1.

**Tax.** The sales tax imposed under M.G.L. c. 64H or the use tax imposed under M.G.L. c. 64I.

**Transaction.** A sale of tangible personal property or a service. The transactions of an Internet vendor include all such vendor's transactions for tangible personal property or a service, however consummated, including transactions completed on a website operated by (a) such vendor; (b) a related person, or (c) a contract party, including a marketplace facilitator.

**Vendor.** A retailer or other person selling tangible personal property or services, the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by M.G.L. c. 64H or c. 64I.

(3) **General Rule.** An Internet vendor with a principal place of business located outside the state that is not otherwise subject to tax is required to register, collect and



remit Massachusetts sales or use tax with respect to its Massachusetts sales as follows:

- (a) For the period beginning October 1, 2017 through December 31, 2017, if during the preceding 12 months, October 1, 2016 to September 30, 2017, it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.
- (b) For each calendar year beginning with 2018, if during the preceding calendar year it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.
- (4) **Exceptions.** 830 CMR 64H.1.7(3) does not apply if a vendor does not have any of the contacts referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. For example, 830 CMR 64H.1.7(3) does not apply in either of the following two circumstances:
- (a) 830 CMR 64H.1.7(3) does not apply if the vendor's only contacts with Massachusetts are that in-state customers may access a site on the vendor's out-of-state computer server. Further, the mere fact that in-state customers may access such site, without more, will not be considered a factor in determining a vendor's tax collection obligation. See ITFA § 1105.
- (b) A provider of Internet access service or online services (a "provider") is not deemed to be the agent of a vendor for purposes of determining the application of 830 CMR 64H.1.7(3) to such vendor solely as a result of: 1. the display of such vendor's information or content on the provider's out-of-state computer server, or 2. the processing of orders through the provider's out-of-state computer server. See *id.*
- (5) **Non-Internet Vendors.** The type of contacts referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. will generally establish state sales or use tax jurisdiction in the case of a non-Internet vendor when the U.S. constitutional requirements are met. Thus, for example, a non-Internet vendor may be subject to sales or use tax jurisdiction based upon the in-state ownership or use of computer software or hardware, or the receipt of in-state services provided by a marketplace facilitator or delivery company. The jurisdictional analysis in these cases is a facts and circumstances test.
- (6) **Internet Vendors with Other Contacts.**
- (a) **Prospective Tax Periods.** 830 CMR 64H.1.7(3) applies to Internet vendors with a principal place of business located outside the state that are not otherwise subject to tax. For tax periods commencing subsequent to September 22, 2017, however, an Internet vendor may be subject to tax other than by reason of the contacts referenced in 830 CMR 64H.1.7(1)(b)2.a. through c., in which case 830 CMR 64H.1.7(3) does not apply. For example, for purposes of illustration only, an Internet vendor with a principal place of business located outside the state might: 1. own or maintain inventory or other property in the state; or 2. contract with an in-state representative (including a related person) other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c., and thereby create state sales or use tax jurisdiction. In these cases, the Internet vendor is subject to tax on all of its Massachusetts sales for the tax periods in question.
- (b) **Prior Tax Periods.** An Internet vendor may have engaged in in-state contacts other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. during tax periods prior to September 22, 2017. In these cases, the vendor is liable for tax for such prior tax periods if: 1. the contacts created sales or use tax jurisdiction and; 2. the vendor did not collect and remit the tax. For example, for purposes of illustration only, an Internet vendor with a principal place of business located outside Massachusetts may have previously: a. owned or maintained inventory or other property in the state; or b. contracted with an in-state representative (including a related person) other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c., and thereby created state sales or use tax jurisdiction. In these cases, the Internet vendor would have been subject to tax on all of its Massachusetts sales for the tax periods in question. Such a vendor may seek to use the Department of Revenue's voluntary disclosure program for such prior periods.
- (7) **Tax Returns and Payments.**
- (a) **Requirement to File Tax Return.** An Internet vendor subject to 830 CMR 64H.1.7(3) must file a tax return in the form and manner prescribed by the Commissioner and pay the tax due for each calendar month on or before the 20th day of the following calendar month, whether or not the vendor must collect any other local or state excises. For applicable record retention requirements, see 830 CMR 62C.25.1: *Record Retention*.
- (b) **Payment of Tax.** Tax must be paid by the vendor in the format and manner specified by the Commissioner at the time for filing returns as specified by the Commissioner.
- (c) **Interest.** Any portion of tax that is not paid on or before the due date of the return will have added to it interest from the due date of the return to the date the tax is paid at a rate prescribed by M.G.L. c. 62C, § 32.
- (d) **Penalties.** A vendor may be subject to penalties under M.G.L. c. 62C if it fails to 1. timely file a return; 2. pay the required tax; or 3. file a return and/or pay the required tax in the format required by Commissioner. See 830 CMR 62C.33.1: *Interest, Penalties and Application of Payments*.
- (8) **No Limitation on Other Authority.** Nothing in 830 CMR 64H.1.7 shall be construed to limit or negate the Commissioner's authority to make adjustments as otherwise permitted under Massachusetts law.

Regulatory Authority: M.G.L. c. 14, § 6(I); M.G.L. c. 62C, § 3; M.G.L. c. 64H, § 1; M.G.L. c. 64I, § 1

Date of Promulgation: September 22, 2017

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# **EXHIBIT B**



*The Commonwealth of Massachusetts*  
*Department of Revenue*  
*Audit Division*  
*200 Arlington St., Room 4300*  
*Chelsea, MA 02150*

CHRISTOPHER C. HARDING

COMMISSIONER

WILLIAM R. GRAHAM, JR.

SENIOR DEPUTY COMMISSIONER

September 14, 2017

Crutchfield Corp.  
1 Crutchfield Park  
Charlottesville, VA 22911

Re: Important Changes: Massachusetts Sales/Use Tax Laws for Vendors Making Internet Sales

Dear Taxpayer:

As you may know, the Massachusetts Department of Revenue (DOR) recently filed Regulation 830 CMR 64H.1.7: Vendors Making Internet Sales, which is to take effect October 1, 2017. We are writing to bring to your attention the resulting changes in the application of the Massachusetts sales and use tax statutes.

DOR estimates indicate that your business will meet the regulation's annual defined thresholds that will now trigger a tax collection obligation for vendors making Internet sales to Massachusetts customers. This letter will help you understand the provisions of the new regulation and assist you in evaluating whether your level of activity in the Commonwealth triggers an obligation to register, collect, and remit Massachusetts sales and use tax.

**Background**

Under the regulation's guidelines a vendor is required to register, collect, and remit Massachusetts sales or use tax, beginning October 1, 2017, as follows:

- For the three-month period, October 1, 2017 to December 31, 2017, if during the preceding 12 months, October 1, 2016 to September 30, 2017, the vendor had in excess of \$500,000 in Massachusetts sales completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

- For each calendar year beginning with 2018 if during the preceding calendar year the vendor had in excess of \$500,000 in Massachusetts sales completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

**Applicability to You**

Our estimates suggest that your business will likely meet the thresholds described in the regulation. Current DOR records indicate that you do not have a Massachusetts sales and use tax registration.

In order to meet your filing obligation, you must register as a vendor through DOR's website, Mass Tax Connect by October 1, 2017, and check the box on the application indicating that you are an Internet vendor with no location in-state.

It is important to note that if you meet the thresholds described in the regulation and you do not timely register and file the required returns with the required tax payment, statutory penalties and interest will accrue until the required returns are filed with such payments.

A vendor whose prior contacts with the Commonwealth may have triggered a sales or use tax collection obligation prior to October 1, 2017 may be able to file for past periods under the Department of Revenue's voluntary disclosure program as explained at <http://www.mass.gov/dor/businesses/filing-and-reporting/voluntary-disclosure.html>.

If you have any questions or need assistance with registering or filing, please contact Daniel Conlin at 617-887-6109 or Anthony Azevedo at 617-887-5024. You may also direct any written inquiries to Mr. Conlin at the address below.

Daniel Conlin, Tax Examiner  
Massachusetts Department of Revenue  
200 Arlington Street, Room 4300  
Chelsea, MA 02150

Sincerely,

William Graham  
Deputy Commissioner, Tax Administration

# **EXHIBIT C**



*The Commonwealth of Massachusetts*  
*Department of Revenue*  
*Audit Division*  
*200 Arlington St., Room 4300*  
*Chelsea, MA 02150*

MICHAEL J. HEFFERNAN

COMMISSIONER

WILLIAM R. GRAHAM, JR.

SENIOR DEPUTY COMMISSIONER

June 2, 2017

Crutchfield Corp.  
1 Crutchfield Park  
Charlottesville, VA 22911

Re: Important Changes: Sales/Use Tax Laws for Internet Vendors

Dear Taxpayer:

As you may know, the Massachusetts Department of Revenue (DOR) recently issued Directive 17-1: Requirement that Out-of-State Internet Vendors with Significant Massachusetts Sales Must Collect Sales or Use Tax. We are writing to bring to your attention these recent changes in the application of the Massachusetts sales and use tax statutes.

DOR estimates indicate that your business will meet the annual defined thresholds that will now trigger a tax collection obligation for Internet vendors. This letter will help you understand the provisions of the new Directive and assist you in evaluating whether your level of activity in the Commonwealth triggers an obligation to register, collect, and remit Massachusetts sales and use tax.

**Background**

Under the Directive's guidelines a vendor is required to register, collect, and remit Massachusetts sales or use tax, beginning July 1, 2017, as follows:

- For the six-month period, July 1, 2017 to December 31, 2017, if during the preceding 12 months, July 1, 2016 to June 30, 2017, the vendor had in excess of \$500,000 in Massachusetts sales and made sales for delivery into Massachusetts in 100 or more transactions.
- For each calendar year beginning with 2018 if during the preceding calendar year the vendor had in excess of \$500,000 in Massachusetts sales and made sales for delivery into Massachusetts in 100 or more transactions.

**Applicability to You**

Our estimates suggest that your business will likely meet the thresholds described in the Directive. Current DOR records indicate that you do not have a Massachusetts sales and use tax registration.

In order to meet any filing obligations, you must register as a vendor through DOR's website, Mass Tax Connect by June 26, 2017, and check the *Internet Vendor* box on the application.

It is important to note that if you meet the thresholds described in the Directive and you do not timely register and file the required returns with the required tax payment, statutory penalties and interest will accrue until the required returns are filed with such payments.

An Internet vendor whose prior contacts with the Commonwealth may have triggered a sales or use tax collection obligation prior to July 1, 2017 may be able to file for past periods under the Department of Revenue's voluntary disclosure program as explained at <http://www.mass.gov/dor/businesses/filing-and-reporting/voluntary-disclosure.html>. For more information on this situation, please see footnote 2 of Directive 17-1.

If you have any questions or need assistance with registering or filing, please contact Daniel Conlin at 617-887-6109 or Anthony Azevedo at 617-887-5024. You may also direct any written inquiries to Mr. Conlin at the address below.

Daniel Conlin, Tax Examiner  
Massachusetts Department of Revenue  
200 Arlington Street, Room 4300  
Chelsea, MA 02150

Sincerely,

William Graham  
Deputy Commissioner, Tax Administration