CONCISE EXPLANATORY STATEMENT

In accordance with the Administrative Procedures Act, R.I. Gen. Laws § 42-35-2.6, the following is a concise explanatory statement:

AGENCY: Rhode Island Department of Revenue

DIVISION: Division of Taxation

RULE IDENTIFIER: 280-RICR-20-70-11

RULE TITLE: Exemption of Sales by Writers, Composers and Artists

REASON FOR RULEMAKING: The Rhode Island Division of Taxation (the "Division") is amending this regulation to make clarifying and organizational updates due to the passage of time. The amendment to the regulation clarifies which kinds of artistic works qualify for the sales tax exemption. The goal of the amendment is to provide further structure to the statutory requirement that a work of art under this program must be "one of a kind" and for "limited production." To qualify as an eligible work, the regulation specifies the work: must not be consumable; must not be intended for mass production or commercial production; must have a limited production of no more than 300 copies; and must not be sold through an online marketplace. These requirements are new regulatory language, although they codify standards already utilized by the Division and the Rhode Island State Council on the Arts ("RISCA"). In addition, the 300-copy limit is in line with the definition of "work of fine art" found in R.I. Gen. Laws Chapter 5-62, entitled "Works of Art – Artists' Rights."

ANY FINDING REQUIRED BY LAW AS A PREREQUISITE TO THE EFFECTIVENESS OF THE RULE: No findings were required.

TESTIMONY AND COMMENTS: The Division received the following general comments: 1) that the vagueness of R.I. Gen. Laws § 44-18-30B is not a bug, but a feature of the exemption's objective to promote the creation and sale of arts and that limiting and regulating the details would be a mistake; 2) that the Division's attempt to craft an unduly narrow definition of what constitutes a qualifying work of art negates the statute's goal of strengthening Rhode Island's identity as an arts-friendly destination; 3) that the regulation is being amended to the point where nearly all authors cannot qualify for a tax exemption; 4) that, from a First Amendment point of view, the Division and RISCA should not be "arts arbiters" and the government should not be able to declare what is considered art; and 5) that the tax exemption should apply to all authors regardless of how the work is published or how many copies are created.

The Division received comments regarding the requirement that an eligible work must have a limited production of no more than 300 copies to qualify for the sales tax exemption. The comments included that there is no compelling rationale for the arbitrary 300-copy limitation, that the 300-copy limitation does not take into consideration the

actual number of sales per author on average, and that a person would have no idea when applying for the exemption whether a book will sell more than 300 copies. Commenters also stated that authors should not have to agree in advance to sell no more than 300 copies of their work and that this limitation serves only to penalize an author for being successful and does not foster R.I. Gen. Laws § 44-18-30B's goal of fostering "creative, innovation, and entrepreneurship." Rather, the commenters urged that limited production should not be interpreted as being restricted to such a relatively small number of copies of a book or other writing and that there is no comparable limitation on the number of produced paintings, prints, photographs, or other like pictures. Per the comments, the regulation does not take into consideration that books differ greatly from the other forms of artwork covered by R.I. Gen. Laws § 44-18-30B and 280-RICR-20-70-11 based on the sales amount discrepancy. Therefore, the commenter stated that authors are being singled out by the 300-copy limitation and the proposed regulation considers any work over the 300-copy limit to no longer be art.

The regulation's amended definition for "limited edition" aligns with the definition of "work of fine art" contained in R.I. Gen. Laws § 5-62-2 ("'Work of fine art' means any original work of visual or graphic art of any medium that includes, but is not limited to, the following: painting; drawing; print; photographic print; or sculpture of *a limited edition of no more than three hundred (300) copies* . . . .") (emphasis added). The Division's regulatory clarification is consistent with the statutory provision for "one-of-a-kind, limited production" in R.I. Gen. Laws § 44-18-30B and with a Final Decision and Order of the Tax Administrator. *See* Final Decision and Order 2024-04 at 7 (Mar. 5, 2024), https://tax.ri.gov/sites/g/files/xkgbur541/files/2024-03/AD_2024-04.pdf ("limited edition means that only a certain number of the edition is printed, and the print run is numbered and signed"). To be eligible for the exemption, the author must sign and number each book (i.e., 1 of 300, 2 of 300). The use of 300 copies provides a benchmark for the author to determine what would be considered a one-of-a-kind, limited edition work. It is the author's responsibility to ensure compliance with the requirement that the work is a one-of-a-kind, limited production. The exemption applies to sales of a specific work, whether it be a book or any other original and creative work falling under the regulation's "Work" definition. Thus, subsequent editions or paperback copies of the same work would be included in the original 300-copy benchmark for that work.

The Division received comments that it would be inappropriate to limit the exemption to self-published works because the publication of a work is unrelated to the creative or Rhode Island-based nature of the work and the limitation penalizes authors for relying on a third party to handle the non-creative aspect of having their art presented to the public Further, a comment urged that using a publisher does not turn a work into a non-exempt commercial production. The phrase "self-published" has been removed from the definition of "limited edition" in the text of the final rule. *See* 280-RICR-20-70-11.5 (Definitions). The inclusion of "self-published" in the proposed rule was a typographical error and was not intended to be included in the final rule.

The Division also received comments that the regulation should not include a prohibition against selling works through an online marketplace, website, or third-party

vendor. A commenter noted that the regulation excludes art galleries from this limitation; therefore, the regulation acknowledges that there are legitimate bases for relying on third parties to sell a work of art. A comment stated that most shopping is done online. Therefore, disqualifying a book or other artwork from the sales tax exemption because copies are sold through a website inappropriately and unnecessarily hampers R.I. Gen. Laws § 44-18-30B's goals, and this limitation should not serve as a basis for denying the availability of the tax exemption to books separately sold directly by the author.

Selling a work through an online marketplace or a third-party vendor is inherently a commercial venture. *See* Final Decision and Order 2024-04 at 7 ("Selling the Book – no matter how many are actually sold – on [the online marketplace] is commercial."). The exemption only applies to one-of-a-kind, limited edition works of art that are signed and numbered and not to works sold for commercial purposes. The requirements that works be "signed and numbered" and "not intended for multiple or mass production[]" are in the current regulation and are not among the proposed amendments.

The Division received a comment questioning the Division's basis for requiring a work to be "solitary" because R.I. Gen. Laws § 44-18-30B(c)(2)(ii) refers to creative works written "either solely or jointly." "Solitary" as used in this regulation refers to works, not authors. The term "solitary" as used in this regulation refers to one work as opposed to a collection of multiple works (i.e., a book series). Additionally, the term "solitary" is in the current regulation and is not among the proposed amendments.

The Division received a comment encouraging it to make use of the Administrative Procedures Act's ("APA") advance rule-making provisions in R.I. Gen. Laws § 42-35-2.5, to bring interested stakeholders together to discuss the regulatory implementation of the artist sales tax exemption statute and to consider alternative definitions of what qualifies for the exemption. While the Division has taken the comment into consideration, and also has duly considered all comments made in the course of the public hearing process, the "tax administrator is authorized and empowered to make rules and regulations, as the administrator may deem necessary for the proper administration and enforcement of the tax laws of this state." R.I. Gen. Laws § 44-1-4. Further, the Division used its experience in administering R.I. Gen. Laws § 44-18-30B since its enactment and collaborated with RISCA in the amendment of this regulation.

CHANGE TO TEXT OF THE RULE: The Division made one change to the text of the rule as proposed. The phrase "self-published" was removed from the definition of "limited edition" in the text of the final rule. *See* 280-RICR-20-70-11.5 (Definitions). The inclusion of "self-published" in the proposed rule was a typographical error and was not intended to be included in the final rule.

REGULATORY ANALYSIS: Pursuant to the APA, R.I. Gen. Laws § 42-35-2.9(b)(1), the regulatory analysis must include "the benefits and costs of a reasonable range of regulatory alternatives." In addition to the proposed amendment, other alternatives were considered by the Division, including: 1) a higher threshold of 500 copies that can be produced to still qualify as an eligible work; 2) a lower threshold of 100 copies that can be

produced to still qualify as an eligible work; and 3) allow eligible works to be sold through online marketplaces. The Division analyzed the quantitative and qualitative societal costs and benefits resulting from the proposed regulatory amendments. Pursuant to the APA, R.I. Gen. Laws § 42-35-2.9(b), the Division has determined that there is no alternative approach among the alternatives considered during the rulemaking process which would be as effective and less burdensome to affected private persons as another regulation. Further, the Division has determined that the benefits of the proposed rule justify the costs of the proposed rule, and the proposed rule will achieve the objectives of the authorizing statute in a more cost-effective manner, or with greater net benefits, than other regulatory alternatives. *See* Division's Benefit-Cost Analysis and Fiscal Note submitted with the regulatory rulemaking package.