

State of Rhode Island and Providence Plantations  
Rhode Island Department of Revenue  
Division of Taxation

**Public Notice of Proposed Rule-Making**

**RULE IDENTIFIER:** ERLID 5995

**REGULATION TITLE:** Food and Food Ingredients, Prepared Food/Meals, Candy,  
Soft Drinks, Dietary Supplements, and Alcoholic Beverages

**TIMETABLE FOR ACTION ON THE PROPOSED RULE:**

Public Notice Date: February 15, 2018

End of Comment Period Date: March 18, 2018

Pursuant to the provisions of R.I. Gen. Laws § 42-35-2(a)(1), and in accordance with the Administrative Procedures Act, R.I. Gen. Laws Chapter 42-35, the Division of Taxation hereby gives notice of its intent to repeal a regulation regarding Food and Food Ingredients, Prepared Food/Meals, Candy, Soft Drinks, Dietary Supplements, and Alcoholic Beverages.

The proposed regulation and concise summary of non-technical requirements and proposed new rules are available for public inspection at [www.tax.ri.gov](http://www.tax.ri.gov), in person at the Rhode Island Division of Taxation, or requested by e-mail at Michael.Taylor@tax.ri.gov or by calling Michael Taylor at (401) 574-8930.

In the development of the proposed regulation, consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) whether the regulation, in and of itself, would have significant economic impact on small businesses. No alternative approach, duplication, or overlap was identified based upon available information.

All interested parties are invited to submit written or oral comments concerning the proposed regulations by March 18, 2018 to Michael Taylor, Rhode Island Division of Taxation, One Capitol Hill, Providence, RI – telephone number (401) 574-8930 or via e-mail at Michael.Taylor@tax.ri.gov.

This rule is not expected to be controversial and shall be submitted as a direct final rule pursuant to R.I. Gen. Laws § 42-35-2.11. The proposed rule takes effect thirty (30) days after publication if no objection is received. If no objection is received, the rule becomes final. If an objection to the rule is received from any person not later than thirty (30) days after publication of the notice of the proposed rule, the proposed rule does not become final.

**Rhode Island Department of Revenue**

**Division of Taxation**

**Concise summary of all non-technical requirements pursuant to R.I. Gen. Laws § 42-35-2(a)(1) for rules and regulations regarding Food and Food Ingredients, Prepared Food/Meals, Candy, Soft Drinks, Dietary Supplements, and Alcoholic Beverages.**

The purpose of this regulation is repeal the regulation regarding Food and Food Ingredients, Prepared Food/Meals, Candy, Soft Drinks, Dietary Supplements, and Alcoholic Beverages. **This regulation shall take effect March 18, 2018.**

**State of Rhode Island—Division of Taxation**

**Sales and Use Tax**

**Regulation SU-09-59**

**Food and Food Ingredients, Prepared Food/Meals, Candy,  
Soft Drinks, Dietary Supplements, and Alcoholic Beverages**

**Table of Contents**

**RULE 1 PURPOSE**

**RULE 2 AUTHORITY**

**RULE 3 APPLICATION**

**RULE 4 SEVERABILITY**

**RULE 5 DEFINITIONS**

**RULE 6 GENERAL**

**RULE 7 ITEMS NOT INCLUDED AS FOOD OR**

**FOOD INGREDIENTS**

**RULE 8 THRESHOLD TEST**

**RULE 9 ADDITIONAL TAX APPLICATIONS**

**RULE 10 EFFECTIVE DATE**

**RULE 11 CROSS REFERENCE**

**RULE 1 PURPOSE**

This regulation implements Chapter 44-18 and 44-19 of the RIGL. These Chapters provide for Sales and Use Taxes Liability and Computation, and Sales and Use Taxes Enforcement and Collection in regard to Food and Food Ingredients, Candy, Soft Drinks, Dietary Supplements, and Prepared Food.

**RULE 2 AUTHORITY**

This regulation is promulgated pursuant to RIGL Chapter 44-18 and 44-19 as amended. These rules have been prepared in accordance with the requirements of RIGL Chapter 44-1-4 and 44-18-30.

**RULE 3 APPLICATION**

The terms and provisions of these rules and regulations shall be liberally construed to

permit the Division of Taxation to effectuate the purposes of RIGL Chapter 44-18 and 44-19 and other applicable state laws and regulations.

#### **RULE 4 SEVERABILITY**

If any provision of this regulation, or the application thereof to any person or circumstances, is held invalid by a court of competent jurisdiction, the validity of the remainder of this regulation shall not be affected thereby.

#### **RULE 5 DEFINITIONS**

**A. "Alcoholic beverages"** means beverages that are suitable for human consumption and contain one half of one percent (.05%) or more of alcohol by volume.

**B. "Candy"** means any preparation of sugar, honey, or other natural or artificial sweeteners as an ingredients in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the forms of bars, drops, or pieces. The term "candy" does not include any preparation containing flour and shall require no refrigeration.

**C. "Caterer"** means a person engaged in the business of providing meals, food, and/or beverages on the premises of customers but does not include employees hired by the hour or the day. The term caterer also includes a delicatessen store or deli area within a food store that sells prepared food as part of a party platter, deli tray, sandwiches etc.

**D. "Dietary supplements"** means any product, other than tobacco, intended to supplement the diet that:

(a) contains one or more of the following dietary ingredients:

(i) A vitamin

(ii) A mineral

(iii) An herb or other botanical

(vi) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or

(vii) A concentrate, metabolite, constituent, extract, or combination of any ingredient described above; and

(b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food

and is not represented for use as a sole item of a meal or of the diet; and  
(c) Is required to be labeled as a dietary supplement identifiable by the “Supplemental Facts” box found on the label and as required pursuant to Federal Law 21 C.F.R. §101.36.

**E. “Food and food ingredients”** means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. Food and food ingredients do not include candy, soft drinks, dietary supplements, alcoholic beverages, tobacco, food sold through vending machines or prepared food.

**F. “Meal”** means any prepared food offered or held out for sale for the purpose of being consumed by any person to satisfy the appetite.

**G. “Prepared food”** means any one of the following:

- (a) Food sold in a heated state or heated by the seller;
- (b) Food items that are a result of the combination of two or more food ingredients by the seller to make single items except:
  - (1) Food that is only cut, repackaged, or pasteurized by the seller; or
  - (2) Eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the U. S. Food and Drug Administration; or
  - (3) Food sold in an unheated state by weight or volume as a single item unless sold by the seller with utensils; or
  - (4) Bakery items sold as such, including but not limited to bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pie, tarts, muffins, bars, cookies, and tortillas unless sold by the seller with utensils; or
  - (5) Food sold by a seller that is primarily a manufacturer (NAICS Section 311), except Bakeries (Section 3118) unless sold by the seller with utensils.

(c) Food sold with eating utensils (plates, cutlery items, glasses, cups, napkins or

straws). Plates do not include containers for transport, Refer to Rule 8 for Threshold Test.

**H. “Soft drinks”** means nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” do not include beverages that contain milk or milk products (including soy, rice, or similar milk products) or greater than 50 percent vegetable or fruit juice by volume.

#### **RULE 6 GENERAL**

Under RIGL 44-18-30(9), the sale of food and food ingredients purchased for human consumption is exempt from sales tax.

#### **RULE 7 ITEMS NOT INCLUDED AS FOOD OR FOOD INGREDIENTS**

The following items are not considered food and food ingredients and are therefore subject to sales and use tax.

##### **A. Alcoholic Beverages**

Alcoholic beverages as defined in Rule 5 (A) are subject to tax.

##### **B. Candy**

Candy as defined in Rule 5 (B) is subject to sales tax, however many products commonly categorized as candy contain flour therefore packaging labels must be examined to determine which items are deemed taxable candy or exempt food products (contains flour). Examples of items exempt after January 1, 2007 include KitKats, Twix, some licorice, Nestle Crunch, and Milky Way.

If an item that would otherwise be included in the definition of “candy” above requires refrigeration under health regulations, it would be deemed an exempt food product.

Candy that does not require refrigeration is taxable even if sold as such. For example, a number of candy bars that are regularly marketed at room temperature in the candy aisle may also be found in the refrigerated section of a convenience store. These products are refrigerated for customer preference rather than as directed on the label. Therefore, these items are not exempt from sales tax.

##### **C. Dietary Supplement**

Dietary supplement as defined in Rule 5 (D) is subject to tax. This means any product

intended to supplement the diet required to be labeled as a dietary supplement, identifiable by the “Supplemental Facts” box found on the label and as required pursuant to Federal law. Dietary supplements sold on prescription are not subject to tax.

#### **D. Prepared Food/Meals**

Prepared food and meals are subject to tax based on the definitions in Rule 5 (F & G) and the application of the Threshold Test in Rule 8.

#### **E. Seed, Plants, Fertilizers**

The following items are subject to sales and use tax:

- Seeds and plants that ordinarily produce food for human consumption
- Fertilizers (including limestone)
- Insecticides and fungicides, seed inoculants and plant hormones

These items are exempt if sold to farmers that hold a valid exemption number with the State of RI.

#### **F. Soft Drinks**

Soft drinks as defined in Rule 5 (H) are subject to sales tax. Frozen, or powdered soft drink mixes are not deemed to fall within the definition of “soft drink”, which must be in liquid form, and are therefore exempt as foods.

#### **Examples of taxable soft drinks:**

- Naturally and artificially sweetened water
- Teas containing sweeteners
- Drinks labeled as containing 50 percent or less fruit or vegetable juice
- Sports drinks (Gatorade, PowerAde, etc.)
- Sodas (colas, root beer, artificially sweetened diet colas, ginger ales, etc.)

#### **Examples of items that are deemed exempt food products, rather than taxable soft drinks:**

- Unsweetened Water (regardless of carbonation)
- Fruit or vegetable juices that contain more than 50 percent juice by volume
- Nutritional drinks that contain soy (Ensure, Boost, etc.)
- Apple cider

- Beverage powders (Kool-aid, lemonade, sweetened iced tea)
- Frozen fruit juice concentrates (product is not in liquid form)

## **RULE 8 THRESHOLD TEST**

### **A. Rules**

The following rules have been adopted by the Streamlined Sales Tax Governing Board to determine how utensils are treated and their impact on the sale of various food items.

Under the approved interpretation, a Threshold Test, which determines the percentage of sales considered to be prepared food, was created to add consistency to the meaning of the term “provided by the seller.” The Division is required to use this test in making determinations of the taxability of prepared food and beverage sales. The calculation is as follows:

(1) The numerator includes sales of (i) prepared food under (a) and (b) of the definition of prepared food in Rule 5(G); and (ii) food where plates, bowls, glasses or cups are necessary to receive the food (e.g., dispensed milk, fountain beverages, salad bar).

Alcoholic beverages are not included in the numerator.

(2) The denominator includes sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks. Alcoholic beverages are not included in the denominator.

### **B. The following is the application of the Threshold Test:**

(1) For sellers with a sales percentage of 75% or less, utensils are provided by the seller if the seller’s practice for the item (as represented by the seller) is to physically give or hand the utensil to the purchaser, except that plates, bowls, glasses, or cups necessary for the purchaser to receive the food (e.g., dispensed milk, salad bar) need only be made available.

(2) For sellers with a sales percentage greater than 75%, utensils are provided by the seller if they are merely made available to purchasers. Thus, utensils at a kiosk or common area are treated as utensils “provided by the seller.”

(3) For sellers with a sales percentage greater than 75% who sell items that contain four or more servings packaged as one item sold for a single price, an item does not become



prepared food due to the seller having utensils available (e.g. ground coffee, whole cakes, loaves of bread). However, if the seller provides utensils for the item, the item is considered prepared food. Whenever available, serving sizes will be determined based on a label on an item sold. If no label is available, a seller will reasonably determine the number of servings in an item.

(4) When a seller sells food items that have a utensil placed in a package by a person other than the seller, and that person's NAICS classification code is that of a manufacturer (sector 311), the seller shall not be considered to have provided the utensil except as provided in 1-3 above. For any other packager with any other NAICS classification code (e.g., sector 722 for caterers), the seller shall be considered to have provided the utensil.

(5) The prepared food sales percentage will be calculated by the seller for each tax year or business fiscal year, based on the seller's data from the prior tax year or business fiscal year, as soon as possible after accounting records are available, but not later than 90 days after the beginning of the tax or business fiscal year.

(6) A single prepared food sales percentage will be determined annually, for all of the seller's establishments in a state. A new business will make a good faith estimate of their prepared food sales percentage for their first year. A new business should adjust its good faith estimate prospectively after the first three months of operation if actual prepared food sales percentages materially affect the 75% Threshold Test.

#### **RULE 9 ADDITIONAL TAX APPLICATIONS**

**A. Gratuities and other charges:** When a retailer bills a customer for the rental of a public room or for gratuities, service charges, cover charges, or entertainment charges (including charges for bands or orchestras) in connection with the serving of meals or soft/alcoholic drinks, the amount billed or received by the retailer will be considered as part of the gross receipts from the sale of the meal or soft/alcoholic drinks and must be included in the measure of tax. Amounts designated as service charges, added to the price of meals, are a part of the selling price of the meals and, accordingly must be included in the retailer's gross sales subject to tax.

**B. Sales by Caterers:** The tax applies to the entire charge made by caterers for serving meals, food, and soft/alcoholic drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals. Sales of meals by caterers to social clubs, fraternal organizations, or other persons are sales for resale if a valid resale certificate is issued from the retailer of the meal.

**C. Social Clubs and Fraternal Organization:** "Social clubs and fraternal organizations" as used herein includes any corporation, partnership, association, group, or combination acting as a unit, such as service clubs, lodge organizations, community, country and athletic clubs. The tax applies to receipts from the furnishing of meals, food, and soft/alcoholic drinks by social clubs, and fraternal organizations.

**D. Meals Served to Students and Teachers:** The tax does not apply to the sale of meals by public, private, or parochial schools, school districts, colleges, universities, student organizations, and parent-teacher associations to the students or teachers of a school, college, or university whether the meals are served by the said educational institution or by a food service or management entity under contract to said educational institution. This applies even though the school is operated for profit. Items sold through vending machines located in areas designated primarily for students and teachers shall be considered a meal or a portion thereof. Those designated areas include cafeterias, student unions, classroom buildings, teachers' lounges, dormitories and faculty buildings. Food items and soft/alcoholic drinks sold by college/university rathskellers or taverns located on campus are subject to tax.

**E. Subsidized Employer Cafeterias and Food Service Operations:** An employer who engages a caterer or food service contractor to provide food and soft drinks or service in connection therewith to employees at the employer's expense is the purchaser of food and soft drinks and must pay the sales tax thereon. Any subsidy given by an employer to a caterer or food service contractor (whether termed a management fee, guarantee of profit or other designation) is taxable as a receipt from the sale of food and soft drinks. Where the subsidy is paid by an employer in addition to a specific amount paid by the

employee, both amounts are taxed as the receipt from the sale of food and soft drinks.

~~**F. Meals Sold to Employees:** The tax does not apply to meals served to employees where the compensation of such employees includes the providing of such meals without charge. For example, a waitress working in a restaurant who, as compensation for services, receives her meals without charge and who, in addition thereto receives a salary. The tax does apply to meals served to employees where a separate charge or deduction is made therefore by the employer. For example, where the contract of employment provides that the employer shall deduct the cost of meals served to the employee from the latter's salary, or where an actual charge is made for meals served to the employees.~~

~~**RULE 10** EFFECTIVE DATE~~

~~This regulation shall take effect January 1, 2010 and shall amend and supercede regulation SU-04-59 promulgated January 1, 1994~~

~~**RULE 11** CROSS REFERENCES~~

~~SU-02-97 "Room Rentals – By Hotels, Rooming Houses, Tourist Camps"; MBT-09-01 "Local Meals and Beverage Tax"~~

~~DAVID SULLIVAN~~

~~TAX ADMINISTRATOR~~