

# STATE OF COLORADO

DEPARTMENT OF REVENUE  
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November 15, 2013

John W. Hickenlooper  
Governor

The Honorable Lucia Guzman  
President Pro Tempore of the Senate  
Colorado General Assembly

The Honorable Mark Ferrandino  
Speaker of the House  
Colorado General Assembly

Barbara J. Brohl  
Executive Director

The Honorable Morgan Carroll  
Senate Majority Leader  
Colorado General Assembly

The Honorable Dickey Lee Hullinghorst  
House Majority Leader  
Colorado General Assembly

The Honorable Bill Cadman  
Senate Minority Leader  
Colorado General Assembly

The Honorable Mark Waller  
House Minority Leader  
Colorado General Assembly

Dear Senators and Representatives:

Nine bills enacted from the 2010 legislative session require the Department of Revenue to account for, on a quarterly and cumulative basis, all revenue that is attributable to their enactment, to the extent such information is available. These bills are HB10-1189, HB10-1190, HB10-1191, HB10-1192, HB10-1193, HB10-1194, HB10-1196, HB10-1197, and HB10-1199. HB11-1005, which became effective July 1, 2011, repealed HB10-1195. HB10-1190 was repealed July 1, 2012; however, the reporting requirement remains.

The data available to the Department is not adequate to account accurately for all revenue attributable to the enactment of the nine bills mentioned above. The information on sales tax returns provided to the state by vendors on sales tax does not delineate sales to the level of detail that is necessary to isolate the impact of the implementation of the bills. For the Department to report this information, retailers would have to provide detailed information with regard to sales taxes collected for specific items.

To meet the spirit of the tracking requirements of these laws, the Department is reporting information that tracks the sales tax revenues collected by selected industries assumed to be affected by the enactment of HB10-1189, HB10-1191, HB10-1192, and HB10-1194, based on industry code classifications. While this data may include changes that are a direct result of the above-mentioned legislation, there are numerous factors that have an impact on the sales tax revenue collections by the selected industries such as:

- Changes in the economy (e.g. business cycles, employment variables, inflation, new businesses)
- Previously passed legislation that became effective during this reporting period
- Regulatory changes
- Inability to identify and isolate all businesses that may have been impacted
- Commodity price changes
- Sales within particular industry code classifications may include taxable items that are not specific to the legislation

Furthermore, additional collections due to implementation of the 2010 legislation are not captured exclusively through sales tax collections. Use tax payments by businesses have been affected by the legislation as well. Businesses or individuals pay use tax primarily if they purchase goods for use in the state when an out-of-state vendor does not collect sales tax. The Department cannot attribute increased use tax payments to the repeal of certain sale/use tax exemptions by focusing on specific industry sectors when nearly every industry sector may be affected. Also, an increase in the state's overall use tax collections cannot be isolated to specific products newly subject to the use tax due to 2010 legislative changes because use tax payers do not segregate the payments by product categories.

The following explanation is provided as an example of how the factors listed above result in an inability to isolate sales tax revenues from one specific piece of legislation. HB10-1191 eliminated the sales and use tax exemption on the sales of soft drinks and candy. Sales tax returns do not separate soft drinks and candy into a standalone category. So, the Department can only identify taxpayers by the industry codes that may be affected by the legislation. The targeted industry codes of businesses affected by this legislation include grocery stores, convenience stores, and warehouse clubs. However, these businesses sell many other items in addition to soft drinks and candy. The prices or popularity of those other items may increase or decrease, accounting for a resulting increase or decrease in taxable sales. Therefore, while the Department can report the increase in sales tax revenues collected by businesses in the targeted industry codes, some change in revenues are attributable to factors that affect the sales of other taxable items sold by these businesses. Another factor adding to the uncertainty is that there may be other types of businesses that sell candy or soft drinks that are not included in the targeted list (e.g. pizza delivery businesses that sell liter bottles of soft drinks or craft stores that sell candy).

As illustrated in the example and because of the factors listed above, it is impossible for the Department to determine the additional revenue that is attributable directly to the enacted legislation.

However, as indicated above, the Department has identified the industry codes that are most likely to distinguish businesses affected by five of the house bills and is providing the following table that indicates the net change in state sales tax revenues collected by the targeted industries, comparing collections in the second quarter of CY 2013 to those in second quarter of CY 2009 (the last second quarter period when the bills had not yet been enacted). The cumulative amount is the total increase in sales taxes collected by the targeted industries since the second quarter of CY 2010.

Net Change in Sales Tax Collections from Industries Affected by Sales Tax Budgetary Measures in Thousands of Dollars*			
Bill	Title	2nd Quarter, CY 2013 Net Change**	Cumulative Net Change
HB10-1189	Direct Mail	\$75	\$800
HB10-1190	Industrial Energy	***	38,874
HB10-1191	Candy and Soft Drinks	10,678	87,019
HB10-1192	Software Regulation	1,947	22,277
HB10-1194	Food Containers	557	5,356

\* Please see Appendix A for industry code classifications used above to estimate net change in sales tax collections

\*\* Net change is compared to 2nd Quarter, CY 2009.

\*\*\*HB10-1190 repealed, effective July 1, 2012.

The table does not include revenues associated with the passage of HB10-1193, HB10-1196, HB10-1197, and HB10-1199 for the following reasons:

- The reporting requirements articulated in HB10-1193 were challenged in federal district court by the Direct Marketing Association (DMA). The federal district court had ruled in favor of the DMA and issued an injunction prohibiting the enforcement of the notification provisions of the law. However, upon appeal the 10th Circuit Court of Appeals ordered that this injunction be dissolved and the Commerce Clause claims dismissed for lack of federal jurisdiction. DMA has refiled its suit in state court and has requested that enforcement of the act be enjoined. Until the state district court rules on the constitutional challenges to the statute, use tax collections as a result of HB10-1193 cannot reasonably be estimated.
- HB10-1196 established a \$6,000 limit on the amount of income tax credit allowed for certain vehicles that are fuel efficient (category 7 vehicles) purchased on or after January 1, 2010 but before January 1, 2011 and eliminated the credit, thereafter. The Department is unable to report the revenue change due to this legislation as the amount of the credit that could have been claimed above the \$6,000 limit is not reported by the taxpayer and therefore cannot be data captured. For periods after January 1, 2011, the Department cannot determine the amount of credits that would have been claimed if the credit had not been repealed.
- HB10-1197 established a temporary annual cap of \$26 million on the total amount of conservation easement credits that can be claimed by taxpayers on the state income tax form. This cap is applied to income tax years 2011, 2012, and 2013. A subsequent bill—HB11-1300-- further limited the amount of credits that can be claimed for income tax years 2011 and 2012 to \$22 million while increasing the amount that could be claimed to \$34 million in income tax year 2013. HB13-1183 established an annual cap of \$45 million for income tax year 2014 and after. The bill further limited the amount to be placed on the wait list to \$15 million for any given calendar year. The data from income tax returns submitted by taxpayers for conservation easement credits does not list the value of credits that taxpayers did not claim; therefore, the change in revenues due to the impact of HB10-1197 cannot be reported from income tax data captured by the Department of Revenue. However, the Division of Real Estate in DORA is responsible for enforcing the caps established in HB10-1197 and HB11-1300. Agency data shows that \$23.8 million in conservation easement credits were submitted for certification during income tax year 2012. To adhere to the \$22 million cap, \$1.8 million of the credits submitted for certification in 2012 were waitlisted to be certified for income tax year 2013. Although the amount of credits that were waitlisted for income tax year 2013 are quantifiable, the amount of donations and the resulting credits that might have been claimed without the cap is unknown and may have been greater than the \$1.8 million in credits that were waitlisted for 2013. On the other hand, it is also possible that the full \$1.8 million in waitlisted credits, had they been certified for use in income tax year 2012, would not have been fully claimed. A 20-year carry-forward for the conservation easement credit is allowed, which means that if the donor does not have the tax liability to fully use the credit, the remaining credit can be carried forward and used against future income tax liabilities. And depending upon the market to sell the credits, the donor may not have been fully capable of selling the full amount of the credits to taxpayers who could use the liability against their 2012 income tax liabilities. Thus, the documented \$1.8 million in waitlisted credits might not have been claimed against 2012 income tax liabilities.
- HB10-1199 established a temporary cap of \$250,000 on the net operating loss that may be claimed by a company. This cap is in place for income tax years 2011, 2012 and 2013. Net operating loss may be carried forward one additional year for each tax year that a company is prohibited from claiming additional net operating loss. The Department will be unable to report the revenue impact of this legislation because the amount of a deduction carried forward by a corporation is not separately tracked by the Department's accounting system (although this information is available on a case-by-case basis to auditors by manually reviewing a submitted return).

Please contact Saskia Young, legislative liaison for the Department of Revenue, with questions that you may have about this letter. Saskia may be reached at 303-866-2819 or [Saskia.Young@state.co.us](mailto:Saskia.Young@state.co.us).

Sincerely,



Barbara J. Brohl  
Executive Director  
Colorado Department of Revenue

BILL #	Brief Description	Impacted Industries Code Classifications
HB10-1189	Direct Mail	Direct Mail Advertising
HB10-1190	Industrial Energy	Electric Power Generation, Transmission and Distribution Natural Gas Distribution Water, Sewage and Other Systems
HB10-1191	Candy and Soft Drinks	Supermarkets and Other Grocery (except Convenience) Stores Convenience Stores Confectionary and Nut Stores Pharmacies and Drug Stores (except Medical Marijuana Dispensaries) Food (Health) Supplement Stores Warehouse Clubs and Supercenters
HB10-1192	Software Regulation	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers Electronics Stores Software Publishers
HB10-1194	Food Containers	Service Establishment Equipment and Supplies Merchant Wholesalers Industrial and Personal Service Paper Merchant Wholesalers General Line Grocery Merchant Wholesalers