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**State and Local Advisory Council  
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**Bundled Transaction**

**Background of Definition of Bundled Transaction**

The Streamlined Sales Tax Project formed a work group in August 2001 to address the lack of uniformity among states in determining if a transaction is bundled in light of the market trends toward the bundling of products, especially in the telecommunications industry and as a result of these trends, retailers' and certified services providers' need for guidance when determining the taxability of sales of bundled products. The work group was charged with: 1) developing a uniform definition for a bundled transaction; 2) insuring the uniform definition for a bundled transaction would be consistent with the uniform definition for "sales price"; 3) identifying issues related to the application of a uniform definition considering the inconsistent treatment in many states when applying a 'true object' test, de minimus test, 'primary object' test or 'essence of the transaction' test as a result of administrative decisions and state court decisions; 4) making recommendations regarding whether unbundling should be allowed and, if so, how allocations of the sales price should be determined; and 5) making recommendations whether separate bundling provisions should be developed for telecommunications.

Since participating states did not have similar terms and definitions for a bundled transaction, as was the case in other administrative definitions, a survey was conducted to identify common elements among the states. While the survey was taken at the beginning of this effort and states' laws may have changed the survey and a summary of responses to the survey are attached to this white paper in Appendix B for informational purposes. The group considered both a broad definition of a "bundled transaction" with many provisions or requirements for member states regarding the use of the definition and the treatment of bundled transactions, versus a narrow definition with minimal provisions or requirements for member states for the use of the definition and requirements for the treatment of only certain types of bundled transactions. The group chose the latter. This paper is being prepared to explain and clarify provisions of the definition of a bundled transaction included in the Library of Definitions, Appendix C, Part I of Administrative Definitions, and the member states' requirements with regard to the adoption and use of the definition, as set out in Section 330 of the Streamlined Sales and Use Tax Agreement, as amended April 16, 2005.

**Definition of a Bundled Transaction**

The definition of 'bundled transaction' is included in Part I Administrative Definitions. It defines uniform criteria for determining when a bundled transaction exists in much the same manner as the definition of "sales price" defines uniform criteria for determining the tax base that is either

subject to tax or exempt from tax on the sale of a product. Member states are required to utilize the definition of 'bundled transaction' in its entirety, and none of its parts are severable when making a determination as to whether a transaction is a bundled transaction. That is, all parts of the definition are to be used to determine whether a transaction is a bundled transaction; however, a single part may disqualify a transaction as a bundled transaction. Member states must utilize the uniform definition in the member state's sales and use tax laws in accordance with the provisions of Sections 327 and 330 of the Streamlined Sales and Use Tax Agreement and in the same manner as required by other core definitions that are used for imposition and administration by January 1, 2008.

The language contained in the boxes below is language from the Streamlined Sales and Use Tax Agreement.

A bundled transaction is the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price.

There are two basic elements of a bundled transaction. The elements are products and price. This paper includes discussion of each element and examples for clarity.

## Products

For the first of the two basic elements, there must be a retail sale of two or more products that are distinct and separately identifiable products.

- For purposes of the bundled transaction definition, "products" include all types of products except real property and services to real property. Types of products include tangible personal property, services, intangibles, digital goods, and products in which a member state has directly imposed tax on the retail sale thereof, but the imposition of tax on the retail sale of such products may not itself be considered tangible personal property, services, or digital goods according to applicable state law.
- Real property and services to real property are excluded from the definition of a bundled transaction. Services to real property include, for purposes of example only, such services as building framing, roofing, plumbing, electrical, painting, janitorial, pest control and window cleaning. Member states may continue current sales and use tax treatment for transactions including real property or services to real property and the provisions of this definition and Section 330 do not apply to such transactions.

- (A) "Distinct and identifiable products" does not include:
- (1) Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides – that accompany the "retail sale" of the products and are incidental or immaterial to the "retail sale" thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes.
  - (2) A product provided free of charge with the required purchase of another product. A product is "provided free of charge" if the "sales price" of the product purchased does not vary depending on the inclusion of the product "provided free of charge."
  - (3) Items included in the member state's definition of "sales price," pursuant to Appendix C of the Agreement.

- Packaging is not a separate and distinct product, when such packaging is the wrapping or packing that accompanies the retail sale of a product(s) and such packaging is incidental or immaterial to the retail sale of the product(s). Member states are not prohibited from exempting from tax the purchase or use of packaging or subjecting to tax the purchase of packaging that will accompany retail sales of products by limiting the seller's authority to utilize a resale exemption.
- A product provided free of charge is not a separate and distinct product. A product is considered to be provided free of charge in a retail sale when in order to obtain the product the purchaser is required to make a purchase of one or more other products and the price of the purchased products does not change based on the seller providing a product free of charge. Such products provided free of charge with the necessary purchase of another product are promotional products. Member states are not prohibited from exempting from tax the purchase by a seller of products that will be provided free of charge to a purchaser of another product or subjecting to tax the purchase of products that will be provided free of charge to a purchaser of another product by limiting the seller's authority to utilize a resale exemption. For purposes of example only:
  - ❖ A gas station providing a free car wash with the purchase of 15 or more gallons of gas.
  - ❖ A grocery store providing a free place-setting of dinnerware with the purchase of \$30 of groceries.
  - ❖ An auto parts store providing a free cap with the purchase of a case of motor oil.
- A retail sale may not be considered to be for "two or more distinct and identifiable products" if the items are included in the member states' definitions of "sales price" and "purchase price." A member state may not treat a retail sale as including multiple products when the products or items are considered to be a part of the sale of a product in accordance with the definition of sales price as adopted by the member state.

For example, a member state adopts a definition of "sales price" that includes "delivery charges" whether separately itemized or not. In such a state, the retail sale of a product and delivery of that product for a single price is not considered a bundled transaction because delivery charges are included in the sales price of the product as adopted by the member state.

- Items that are currently a part of the definitions of "sales price" and "purchase price" are:
  - ❖ Costs of property sold
  - ❖ Costs of materials used, labor or service costs, interest, losses, costs of transportation to the seller, taxes imposed on the seller, and expenses of the seller
  - ❖ Charges for services necessary to complete the sale of a product (unless a member state has excluded from the sale price of a product even if separately itemized on an invoice given to the purchaser)
  - ❖ Delivery charges (unless a member state has excluded from the sales price of a product even if separately itemized on an invoice given to the purchaser)
  - ❖ Installation charges (unless a member state has excluded from the sales price of a product even if separately itemized on an invoice given to the purchaser)

- ❖ Credit for any trade-in as determined by state law (unless a member state has excluded from the sales price of a product if separately itemized on an invoice given to the purchaser)
- On April 16, 2005 the definition of “sales price” was amended in the Agreement to delete the following language: “The value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise.” Member states must comply with this change to the definition of sales price by January 1, 2008.

## Price

The second basic element of a bundled transaction is that the sales price of the bundled distinct and identifiable products must be for one price that is not itemized. If a retail sale of two or more products is not made for “one non-itemized price,” then the retail sale is not a “bundled transaction.”

A “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

- That is, a bundled transaction does not exist when the sales price varies, whether by negotiation or otherwise, with the selection of the distinct and identifiable products by the purchaser. A purchaser having the option of declining to purchase any of the products where the sales price will vary as a result of the selection of products or a different price is negotiated as a result of selections of products made by the purchaser evidences whether the retail sale was for “one non-itemized price.”
  - ❖ For example, an information technology company enters into a multi-year contract with its purchaser to provide information technology services (data processing, help desk, software installation, and web hosting) from the provider’s data processing facility. Through negotiation, the provider and the purchaser agree on the services to be provided and the price. The price is a function of the mix of services to be provided. The provider bills one non-itemized price on its invoice to the purchaser. Because the price of products being sold varied or was negotiated as a result of the selection by the purchaser of the products included in the transaction, no “bundled transaction” exists.

(B) The term “one non-itemized price” does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

“One non-itemized price” is defined to exclude a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the purchaser in paper or electronic form, including (in part) an invoice, bill of sale, contract, periodic notice of rates and services, or a rate card.

- The sales-related documents made available to a purchaser must provide enough information to a purchaser so that the purchaser is able to determine the price(s) of taxable and exempt products.
  - ❖ If a seller bills or invoices one price for distinct and separate products that is equal to the total of the individually priced or itemized products contained in supporting sales-related documentation such as a catalog, price list, or service agreement, the transaction would not be considered a bundled transaction simply because the invoice contained one price.
  - ❖ If a transaction includes a bundle of products and one or more additional product(s), and the additional product(s) were individually priced or itemized from the bundled products in a catalog or price list, but the invoice included one price, the additional products that were individually priced to the purchaser in the catalog or price list are not part of the bundled products sold for one non-itemized price.
  - ❖ If a transaction is not otherwise characterized as a bundled transaction because the multiple products were itemized on other sales-related documentation and such transaction is further discounted, failing to itemize the amount of the discount for each product will not cause the transaction to now be characterized as a bundled transaction. Unless sales-related documentation is provided showing the allocation of the discount, the discounts should be considered allocated evenly among the otherwise separately itemized products.
- Invoicing, service agreements, contracts or other sales documents that are given to the purchaser as well as catalogs, price lists, and rate cards made available to the purchaser when pricing the products are all documentation or evidence that must be maintained by the seller to show whether the retail sale was for one or more distinct and identifiable products and whether the products were sold for one non-itemized price. A member state is not restricted in assessing tax because the seller or purchaser failed to provide documentary proof that the price varied based on selections of products by the purchaser.
- The following are examples of when a retail sale is **not** sold for “one non-itemized price.”
  - ❖ A cable television service provider provides subscribers for \$100.00 a month audio-video programming services, Internet access, a digital converter and a remote control device. Subscribers’ monthly billing contains the following single line item description and price “Digital Cable & Internet Access (includes charge for digital converter and remote control) \$100.00.” Rate cards are mailed annually to subscribers and made available via the service provider’s website that individually price or itemize the portion of the single \$100.00 price attributable to the digital cable service, Internet Access, digital converter and remote control device. Because the products and their itemized prices are itemized on sales-related documentation, the rate card, the transaction is not considered a bundled transaction.
  - ❖ Assume the same facts as in the previous example, except the subscriber receives a promotion which discounts the package price by 20% to \$80.00 and the amount of the discount is not itemized for each product in other sales-related documents. The subscriber’s monthly billing contains the following line item

descriptions and prices: 1) "Digital Cable & Internet Access (includes charge for digital converter and remote control) \$100.00" and 2) "Less: Special 20% promotion discount -\$20.00." Because the transaction was not a bundled transaction prior to application of the 20% discount, applying the discount does not create a bundled transaction.

(C) A transaction that otherwise meets the definition of a "bundled transaction" as defined above, is not a "bundled transaction" if it is:

The provisions of Part C of the definition are exclusions that limit or narrow what transactions would be considered a bundled transaction. Part C provisions create a level of uniformity in the member states by incorporating in the definition elements for (1) a subjective true object test for transactions that are for tangible personal property and services or transactions that are for multiple services; (2) an objective, quantitative de minimis test for transactions including all types of products; and (3) a quantitative primary-test for which the application is limited to transactions that contain multiple products that are only tangible personal property and at least one of the products listed in subsection (C)(4).

➤ To determine whether a transaction is a bundled transaction, the provisions of Part C must be utilized prior to applying the provisions of Section 330 of the Streamlined Sales and Use Tax Agreement or a member state's tax statutes for bundled transactions.

(1) The "retail sale" of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or

(2) The "retail sale" of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or

From the survey taken in 2001, at the beginning of this effort, sixteen of twenty-nine states indicated they did not apply a subjective test to determine the true object of a transaction that includes only tangible personal property; therefore, the provisions of C(1) and (2) do not apply to transactions that include only tangible personal property. A summary of the survey results is attached in Appendix A.

➤ Sellers of a bundled transaction that includes tangible personal property and a service or multiple services may use the subjective test in (C)(1) and (C)(2) or use the quantitative de minimis test in (C)(3) which can be applied to bundles that include all types of products.

➤ When a transaction does not meet the definition of a bundled transaction because it meets (C)(1) or (C)(2), the transaction will be considered a retail sale of a service and the taxability of that service in the member state will apply. The true object of such a transaction would be the service. "True object" in (C)(1) and (C)(2) is the main product or item in the transaction.

➤ Because subsection (C)(1) and (C)(2) are subjective, the application of (C)(1) and (C)(2) are fact-based and should be applied on a case-by-case basis. For purposes of example, factors that might be considered include: what the seller is in the business of doing; whether the tangible good or service that is essential to a service is available for

sale without the service or available exclusively in connection with providing the service; how the tangible good or service is essential to the use of a service; and what the purchaser's object of the transaction is.

- ❖ For example an Electronics Retail Store sells a plasma television and one-year subscription to an audio-video programming service for a single non-itemized price of \$5,000. The audio-video programming service is not a product provided free of charge. While a television is essential to receiving the audio-video programming service, that specific television is not required and the purchaser could pay a much lesser price for a television of lesser value and the same audio-video programming service. The plasma television is the main item or object of the transaction based on the facts of the transactions. Subsection (C)(1) does not apply since the true object is not the service. Assuming the taxable products are more than 10% of the sales price or purchase price, the transaction is a bundled transaction.
- Member states are not prohibited from exempting from tax the purchase by a seller of a tangible good or service that is essential to the use of a service, and is provided exclusively in connection with a service, or subjecting such products to tax by limiting the seller's authority to utilize a resale exemption.

- (3) A transaction that includes taxable products and nontaxable products and the "purchase price" or "sales price" of the taxable products is de minimis.
- (a) De minimis means the seller's "purchase price" or "sales price" of the taxable products is ten percent (10%) or less of the total "purchase price" or "sales price" of the bundled products.
  - (b) Sellers shall use either the "purchase price" or the "sales price" of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the "purchase price" and "sales price" of the products to determine if the taxable products are de minimis.
  - (c) Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

When reviewing the survey many states used a de minimis test. Some of the states utilized a de minimis test for all types of bundled products while others applied the test to limited types of bundled products such as food bundled with other types of tangible personal property as in the case of gift baskets. For purposes of determining whether a bundled transaction exists, Section (C)(3) can be applied to bundles that include all types of products.

- A seller may use the purchase price or sales price of each of the products in the bundle to measure or quantify whether the taxable products are de minimis. A seller may not use the purchase price for some of the products and sales price for other products to measure whether the taxable product in a single transaction is de minimis.
- When the taxable products are determined to be de minimis, the transaction is not defined as a bundled transaction.
- Member states may not limit the application of the de minimis test by placing a cap on the price of transactions to which the test would apply.

- Member states are prohibited from having thresholds for purposes of taxing a portion of the sales price of a transaction in which the taxable products are determined to be de minimis.
- Member states are not prohibited from subjecting to tax the seller's purchase of taxable products that are determined to be de minimis in such transactions by limiting the seller's authority to utilize a resale exemption or requiring the seller to remit tax on the seller's purchase price of the taxable de minimis products.
- Member states are not prohibited from requiring sellers to separately price taxable products that are otherwise determined to be de minimis products from the non-taxable products included in a transaction for purposes of subjecting the taxable products to tax.
- Where services have been sold via a service contract, the full amount of the price for the service will be used to measure the de minimis regardless of the period of time covered by the service agreement. The price of the service may not be prorated based on the term of the service contract to determine whether the service is de minimis.

(4) The "retail sale" of exempt tangible personal property and taxable tangible personal property where:

- (a) the transaction includes "food and food ingredients", "drugs", "durable medical equipment", "mobility enhancing equipment", "over-the-counter drugs", "prosthetic devices" (all as defined in Appendix C) or medical supplies; and
- (b) where the seller's "purchase price" or "sales price" of the taxable tangible personal property is fifty percent (50%) or less of the total "purchase price" or "sales price" of the bundled tangible personal property. Sellers may not use a combination of the "purchase price" and "sales price" of the tangible personal property when making the fifty percent (50%) determination for a transaction.

- The primary test in section (C)(4) applies only to transactions that contain multiple products that are only tangible personal property and at least one product is: food and food ingredients including soft drinks, candy, and dietary supplements; drugs including over-the-counter and grooming and hygiene products; durable medical equipment; mobility enhancing equipment; and prosthetic devices; all of which are defined in the Agreement, and medical supplies. The term "medical supplies" is not a defined term under the Agreement. Member states may define "medical supplies" according to its state laws for purposes of applying the primary test.
- If the transaction contains products that are not tangible personal property or the products are tangible personal property but none of the products are food and food ingredients including soft drinks, candy, and dietary supplements; drugs including over-the-counter and grooming and hygiene products; durable medical equipment; mobility enhancing equipment; and prosthetic devices; all of which are defined in the Agreement, and medical supplies, the primary test in section (C)(4) does not apply and the de minimis test in subsection (C)(3) will be used to determine whether the transaction is a bundled transaction.
- A seller may use the purchase price or sales price of each of the products in the bundled to measure or quantify whether the taxable products are the primary products (more than 50%) in the transaction. A seller may not use the purchase price for some of the products and sales price for other products, to measure whether the taxable products in a single transaction are the primary products.

- When the non-taxable products are determined to be the primary products in a transaction, the transaction is not defined as a bundled transaction.
- Member states may not limit the application of the primary test by placing a cap on the price of the transactions to which the test would apply.
- Member states are prohibited from having thresholds for purposes of taxing a portion of the sales price in which the non-taxable products were determined to be the primary products included in the transaction.
- Member states are not prohibited from subjecting the taxable products which are not the primary products in the transaction to tax by limiting the seller's authority to utilize a resale exemption or requiring the seller to remit tax on the seller's purchase price of the taxable products.
- Member states are not prohibited from requiring sellers to separately price taxable products that are not the primary products in the transaction for purposes of subjecting the taxable products to tax.

❖ The following illustrates the application of the primary test in subsection (C)(4):

<b>IV Start Kit Product</b>	<b>State Product Taxability</b>	<b>Purchase Price</b>
Medicated dressing	non-taxable	\$2.25
Gauze sponge	taxable	1.35
Glove	taxable	1.75
Medicated pad	non-taxable	1.90
Sterile sponge	non-taxable	1.65
Alcohol prep swabs	non-taxable	1.60
Sterile tape	non-taxable	1.80
Latex tourniquet	taxable	1.40
Total Purchase Price		\$13.70
Non-taxable		\$ 9.20
Taxable		\$ 4.50
Non-taxable %		67.15%
Taxable %		32.85%

Since the percentage for the taxable products is less than 50%, under subsection (C)(4), the transaction is not a bundled transaction.

### **Section 330: BUNDLED TRANSACTIONS (Effective on and after January 1, 2008)**

- A. A member state shall adopt and utilize to determine tax treatment, the core definition for a “bundled transaction” in Appendix C, Part I of the Library of Definitions in the Agreement.
- B. Member states are not restricted in their tax treatment of bundled transactions except as otherwise provided in the Agreement. Member states are not restricted in their ability to treat some bundled transactions differently from other bundled transactions.
- C. In the case of a bundled transaction that includes any of the following: telecommunication service, ancillary service, internet access, or audio or video programming service:
  - 1. If the price is attributable to products that are taxable and products that are nontaxable, the portion of the price attributable to the nontaxable products may be subject to tax unless the provider can identify by reasonable and verifiable standards such portion from its books and records that are kept in the regular course of business for other purposes, including, but not limited to, non-tax purposes.
  - 2. If the price is attributable to products that are subject to tax at different tax rates, the total price may be treated as attributable to the products subject to tax at the highest tax rate unless the provider can identify by reasonable and verifiable standards the portion of the price attributable to the products subject to tax at the lower rate from its books and records that are kept in the regular course of business for other purposes, including, but not limited to, non-tax purposes.
  - 3. The provisions of this section shall apply unless otherwise provided by federal law.

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Since most states laws did not use the term or define a bundled transaction, Section 330 of the Agreement was added to make it clear member states must adopt the definition of a bundled transaction in substantially the same form as provided in the Agreement and enact state laws specifying the taxability for a bundled transaction as defined under the Agreement. Member states must adopt and utilize the term and definition by January 1, 2008.

- Member states may enact different provisions that would treat some bundled transactions in one manner while treating other bundled transactions differently. Member states may enact laws that provide for different treatment of bundled transactions based on the distinct and separately identifiable products included in a bundled transaction.
- Member states are prohibited from enacting provisions for the treatment of a bundled transaction that are not in compliance with other requirements in the Agreement such

as imposing different tax rates or having caps or thresholds that would apply to bundled transactions.

- Member states are required to adopt provisions of Section 330(C) of the Agreement that applies to a bundled transaction including all types of products except real property and services to real property and at least one product is a telecommunication service, ancillary service, internet access, or audio or video programming service.
- Member states are not prohibited from imposing tax on the non-itemized price of a bundled transaction unless, the bundled transaction includes the distinct and separately identifiable products specified in Section 330(C) and the seller has maintained books and records identifying through reasonable and verifiable standards that portion of price attributable to the distinct products.
- Acceptable books and records used for purposes of subjecting to tax the taxable portion of the non-itemized price of a bundled transaction pursuant to Section 330(C) shall be maintained in the regular course of business and not created and maintained for tax purposes. Books and records will be considered to be maintained for tax purposes when such books and records identify taxable and nontaxable portions of the price while other books and records are maintained that identify different prices attributable to the distinct products included in same bundled transaction. For purposes of example only, books and records kept in the regular course of business that are acceptable include financial statements, general ledgers, invoicing and billing systems and reports, and tariffs and other regulatory reports.
  - ❖ For example: Company X sells a package of services that includes audio/video programming service, internet access and telecommunication service for a monthly fee of \$50. While company X records the sales of the bundled services into a single general ledger revenue account, the company maintains a billing system that identifies the portion of the price attributable to each of the distinct products (\$15 for audio/video programming service, \$10 for internet access, and \$25 for telecommunication service). The billing system records the \$50 sale in the general ledger. Sales tax is applied to the portion of the price attributable to the taxable products using tax-calculation logic within the billing system software and consistent with the Company's marketing and pricing policies. Even though the sales are recorded in a single general ledger account, the billing system detail serves as acceptable books and records because the billing system is maintained in the Cable Company's regular course of business and does not primarily serve a tax purpose.