

**Streamlined Sales Tax Governing Board, Inc.**  
**Compliance Review and Interpretations Committee**

**INTERPRETATION/DEFINITION REQUEST**

Complete each section

1. **Name(s) of Requestor(s):** Software Finance & Tax Executives Council (SoFTEC)

2. **Contact Person:**

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3. **Agreement Section(s) involved:** 312A

4. **Statement of Background Facts** (be succinct): The Multiple Points of Use provision applies when software, services or digital goods are concurrently available for use in more than one jurisdiction. “Concurrently available for use” is an undefined term. SoFTEC’s members request an interpretation of this term as applied to the following fact patterns:

Fact Pattern (1): Software Company sells software that can be loaded onto Customer’s server and can be accessed and used concurrently by Customer’s employees located in several states. The only copy of the software received by the Customer is the one loaded onto the Customer’s server. No subsequent copies of the software are made and sent to employees in other states.

Fact Pattern (2): Software is loaded onto Software Company’s server and Software Company sells access to the software to Customer. Customer’s employees gain concurrent access to the software from multiple locations. No copy of the software is ever delivered to the Customer.

Fact Pattern (3): A copy of a computer program is licensed by Software Company to Customer along with the right to make multiple copies of the software which will be delivered to Customer’s users/employees in multiple jurisdictions.

**5. Issues:**

Issue (1): Is software loaded onto a server located in a single state that can be accessed by users in several states “concurrently available for use in more than one jurisdiction” within the meaning of Section 312A of the Agreement?

Issue (2): Is delivery of a copy of the computer program to the Customer necessary to invoke the “concurrently available for use in more than one jurisdiction” language of Section 312A?

Issue (3): Is a license of a copy of a computer program that allows the licensee/Customer to make copies of the software that will be used in more than one jurisdiction by the Customer “concurrently available for use in more than one jurisdiction” within the meaning of Section 312A?

**6. Proposed Interpretation:**

(1) In cases where software is loaded onto a server in a single state and accessed by users in more than one jurisdiction concurrently, such software is concurrently available for use in more than one jurisdiction within the meaning of Section 312A of the Agreement.

(2) Delivery of a copy of a computer program is not necessary to invoke the “concurrently available for use in more than one jurisdiction” language of Section 312A.

(3) A license of a computer program that allows the licensee to make copies of the software that will be used in more than one jurisdiction qualifies as “concurrently available for use.”

**7. Is expedited consideration requested?      X   No           Yes**

A request for interpretation/definition normally requires a minimum 60-day comment period. The comment period may be shortened to 10 days if the Committee grants a request for expedited consideration. See Governing Board Rule 902(D) and (H).

**8. Date this Request is submitted:   April 11, 2006**

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## MEMORANDUM IN SUPPORT OF REQUEST FOR INTERPRATION OF SECTION 312A OF THE AGREEMENT

The Software Finance and Tax Executives Council (SoFTEC), in accordance with Section 902 of the Agreement, requests that the Governing Board issue an interpretation of the phrase “concurrently available for use in more than one jurisdiction” as it appears in Section 312A of the Agreement. Specifically, SoFTEC requests that the Governing Board interpret Section 312A as encompassing computer software loaded onto a server in a single location and accessed by users in more than one jurisdiction and where the licensee is permitted to make copies of the software that will be used by its employees in several jurisdictions. SoFTEC submits this memorandum in support of its request for an interpretation.

**Background:** The Agreement generally defines computer software as a set of coded instructions that cause a computer to perform a task. The software industry refers to this ability to cause a computer to perform a particular task as the software’s “functionality.” The ways in which software companies deliver software functionality to customers has evolved as technology has evolved. Early on, there was no separate market for computer software functionality; the software came preloaded on mainframe computers. Later, aftermarket software companies sprang up who delivered copies of computer programs on reel-to-reel tapes. The advent of the personal computer gave rise to a new set of third-party software companies that distributed their products on magnetic floppy disks. As storage technology improved, software companies delivered functionality on optical CD-ROM devices. Advances in communications technology have done away with the need to deliver a copy of the software to the customer; the functionality can be accessed remotely. Software companies that deliver copies of software to their customers might also provide remote access to the software’s functionality or find themselves in competition with vendors that only allow remote access to the same or similar functionality.

Many times, when a user is remotely accessing software functionality, the user has no way of knowing, nor cares much, where the server on which the software is loaded is located. Computer servers with remote access capability are mobile devices and can be located virtually in any state or country. All that is necessary is to place the server in a location that has access to a communications network such as the Internet. Connecting the server to the communications network makes the functionality of the software loaded onto the server available for use around the globe.

**Fact Patterns Involved in the Request for Interpretation:** This request for interpretation extends to three fact patterns:

1. Software Company licenses to purchaser a copy of a computer program that will be loaded onto the Customer’s server. The server is connected to a communications network that permits the Customer’s employees to access and use the software from multiple locations in several states. The license does not permit the Customer to make any copies of the software and no copy of the software is ever delivered to any of the users of the software.
2. Software Company loads a copy of the very same software involved in example 1 onto its own computer server that is connected to a communications network. The Software Company allows its Customer’s employees located in multiple jurisdictions to access and use the software. Software Company charges Customer a monthly fee per user to access and use the software. No

copy of the computer software is ever delivered to the Customer or any of Customer's employees. The software at all time resides on the Software Company's server. From the individual user's standpoint, there is no difference in how the computer software's functionality is used.

3. Software Company licenses to Customer a copy of the same computer software described in the previous two scenarios. The software is loaded onto the Customer's computer server that is connected to a communications network. Once the software is loaded onto the Customer's server, copies of the software are uploaded to and installed on the desktop computers used by Customer's employees in multiple jurisdictions. Alternatively, instead of loading the software onto its server and uploading copies of the software to the employees' desktop computers, purchaser duplicates the software onto individual disks and ships the copies to its employees who load the copies onto their desktop computers.

## **Argument:**

### **1. The Plain Language of Section 312A Encompasses Remotely Accessed Software.**

By its very terms, Section 312A applies to computer software that “will be concurrently available for use in more than one jurisdiction.” We believe that the first factual scenario presented by this request for interpretation presents a clear case of software that is available for concurrent use in more than one jurisdiction. The scenario involves a single copy of a computer program physically located at a single location at all times during its use. Multiple users have the ability to access the software’s functionality from many jurisdictions at the same time, or under circumstances that give the users the appearance that multiple users are using the software at the same time; qualifying as “concurrent” within the meaning of the Section. The facts of this scenario fall squarely within the plain language of Section 312A.

The second factual scenario similarly implicates the “concurrently available for use in more than one jurisdiction” language of Section 312A. The only difference between the first and second scenarios is that no copy of the computer software is delivered to the purchaser and it is loaded onto and accessed at a server owned by the vendor. The touchstone of Section 312A is “use” and in no way requires that the copy of the computer software being used be delivered to the purchaser. The essence of both transactions is that the purchaser is buying the right to use the software’s functionality. It makes no difference from an economic standpoint how that functionality is made available to the purchaser.

The third scenario also implicates the “concurrently available for use in more than one jurisdiction” language of Section 312A. In the third scenario, a single copy of the computer software is delivered to the purchaser who makes copies of the software and distributes the copies to individual users, either on disk or electronically, who load the copies onto their desktop computers. In this scenario, the multiple copies all have their origin in the initial copy delivered to the purchaser. The software functionality initially was delivered to the purchaser upon delivery of the first copy. The functionality was then delivered to the users in multiple locations through delivery of the copies made from the initial copy. Here, the functionality represented by the initial copy is being concurrently used in several locations.

### **2. Sound Tax Policy Dictates that Section 312A Apply to Remotely Accessed Software.**

Section 312 shifts from the seller to the purchaser the burden of determining the appropriate jurisdictions in which tax is owed at the time of sale. Section 312 also results in distribution of the tax base represented by certain transactions to the various jurisdictions in which the subject matter of the transaction will be used concurrently. This is appropriate in cases, such as those presented here, where the purchaser has better information than the seller regarding the various jurisdictions where the software will be used.. As noted above, computer servers are very mobile pieces of equipment that can be placed in any location having access to a communications network, such as the internet. In other words, the location of the server on which the software is loaded is irrelevant from the standpoint of the ability of the user to access the software’s functionality. The server can be located in a jurisdiction with low or no sales or use tax. Determining the tax consequences of a transaction involving software that will be concurrently available for use in multiple jurisdictions based on the location of the server on which the software is loaded is not sound tax policy.

Put another way, it makes little if any sense from a tax policy standpoint to make tax determinations predicated on the location of the server. However, such may be the result if Section 312A is construed as not encompassing software that is to be remotely accessed by multiple users; a purchaser would have no obligation to apportion the purchase price of such software to any state other than the one in which the server on which it was loaded was located. This result would be the same if Section 312A were construed as not applying to cases where no copy of the software is delivered to the purchaser and the functionality is accessed from the vendor's computer server.

**Conclusion:** For the reasons set forth above, SoFTEC respectfully requests that the Governing Board conclude that the phrase “concurrently available for use in more than one jurisdiction” at it appears in Section 312 of the Agreement:

- (a) applies to software loaded on a server that can be accessed currently by users in multiple jurisdictions;
- (b) applies to a license that permits the purchaser to make copies of the software that will be used in multiple locations, and
- (c) does not require physical delivery of a copy of the computer software to the purchaser.