

The Project approved this paper and the definition of "tangible personal property" at its April 11-12, 2002 Project meeting

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STREAMLINED SALES TAX PROJECT

TANGIBLE PERSONAL PROPERTY ISSUE PAPER

(April 15, 2002)

Issue

How should tangible personal property be defined? More specifically, should the following be included in the definition of tangible personal property:

- digital property
- computer software
- prewritten computer software only
- electricity, natural gas, and other utilities

Background:

The task of defining tangible personal property was originally assigned to the Tax Base Work Group. Subsequently, this task was passed to the Tangible Personal Property subgroup of the Tax Base Work Group.

The group began its work by researching how each participating state currently defines tangible personal property. A summary of the definitions in other states is found in Attachment 1.

Recommendation

Over the past year, the subgroup has evaluated a number of alternatives, taking into account comments from business representatives and how states currently define tangible personal property. See Attachment 2.

It is recommended that the project adopt the definition of tangible personal property in Alternative 3, substituting the already defined term of "prewritten" for "canned" and eliminating the last sentence. The recommended definition will read as follows:

“Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, water, gas, steam, and prewritten computer software.

To exclude prewritten software delivered electronically from taxation, a state must draft an exemption for “prewritten computer software delivered electronically.” Note: Both “prewritten computer software” and “delivered electronically” are defined in the computer software issue paper.

For the few states that do not consider electricity, water, gas, or steam to be tangible personal property and, therefore, not taxable, those states must draft an exemption for electricity, water, gas, or steam to maintain the same tax treatment.

Digital property will not be addressed in the definition of tangible personal property. If a state wishes to impose tax on the sale, lease, or rental of digital property, it must specifically impose such tax separate from imposition of tax on tangible personal property.

The following table summarizes how states categorize computer software in various forms and the action they must take with respect to computer software in order to conform to the above recommendation of defining tangible personal property.

Characterization of Computer Software*	States	Action Required to Conform to Recommendation																		
All software is tangible personal property (TPP)	Louisiana Maine South Dakota Tennessee Texas	<ul style="list-style-type: none"> • Adopt project definition of tangible personal property. • Create section to specifically impose tax on the sale, lease, or license of computer software, except prewritten software. 																		
Prewritten software is TPP. Custom software is not TPP	<table border="0"> <tr> <td>Alabama</td> <td>Minnesota</td> </tr> <tr> <td>Arizona</td> <td>Nevada</td> </tr> <tr> <td>Colorado</td> <td>New Mexico</td> </tr> <tr> <td>Connecticut</td> <td>New York</td> </tr> <tr> <td>Hawaii</td> <td>North Dakota</td> </tr> <tr> <td>Idaho</td> <td>Ohio</td> </tr> <tr> <td>Illinois</td> <td>Utah</td> </tr> <tr> <td>Indiana</td> <td>Wisconsin</td> </tr> <tr> <td>Michigan</td> <td>Wyoming</td> </tr> </table>	Alabama	Minnesota	Arizona	Nevada	Colorado	New Mexico	Connecticut	New York	Hawaii	North Dakota	Idaho	Ohio	Illinois	Utah	Indiana	Wisconsin	Michigan	Wyoming	<ul style="list-style-type: none"> • Adopt project definition of tangible personal property.
Alabama	Minnesota																			
Arizona	Nevada																			
Colorado	New Mexico																			
Connecticut	New York																			
Hawaii	North Dakota																			
Idaho	Ohio																			
Illinois	Utah																			
Indiana	Wisconsin																			
Michigan	Wyoming																			

Characterization of Computer Software*	States	Action Required to Conform to Recommendation
Prewritten software not delivered electronically is TPP. Prewritten software delivered electronically and custom software is not TPP	Arkansas California Florida Carolina Georgia Iowa Kansas Kentucky Maryland Massachusetts Missouri New Jersey North Oklahoma Pennsylvania Rhode Island Vermont Virginia	<ul style="list-style-type: none"> • Adopt project definition of tangible personal property. • Create exemption for prewritten software delivered electronically.
Prewritten software and custom software not delivered electronically TPP. Prewritten software and custom software delivered tangible electronically is not TPP.	South Carolina West Virginia	<ul style="list-style-type: none"> • Adopt project definition of personal property. • Create exemption for prewritten software delivered electronically. • Create section to specifically impose tax on the sale, lease, or license of computer software, except prewritten computer software, not delivered electronically.
All computer software is not TPP. Tax is specifically imposed on computer software.	Nebraska Mississippi	<ul style="list-style-type: none"> • Adopt project definition of tangible personal property. • Revise imposition section to specifically impose tax on computer software, except prewritten computer software.
Prewritten computer software is not explicitly stated as TPP. Tax is specifically imposed on the retail sale of prewritten software, regardless of delivery.	Washington	<ul style="list-style-type: none"> • Adopt project definition of tangible personal property. • Remove specific imposition on retail sale of prewritten software.

*Note: Each state was placed in a characterization that fit closest to state interpretations. There may be special conditions outside the general characterization.

State Definitions of Tangible Personal Property (as of 6/01)	
State	Definition
Alabama	No definition in the sales tax statutes.
Arizona A.R.S. § 42-5001	16. "Tangible personal property" means personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses.
Arkansas A.C.A. 26-53-102	(11) "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses;
California § 6016.	Tangible personal property "Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses.
Colorado § 39-26-102	(15) "Tangible personal property" means corporeal personal property. The term shall not be construed to include newspapers, as legally defined by section 24-70-102, C.R.S., preprinted newspaper supplements which become attached to or inserted in and distributed with such newspapers, or direct mail advertising materials which are distributed in Colorado by any person engaged solely and exclusively in the business of providing cooperative direct mail advertising.
Connecticut C.G.S.A. § 12-407	(13) "Tangible personal property" means personal property which may be seen, weighed, measured, felt or touched or which is in any other manner perceptible to the senses including canned or prewritten computer software. Tangible personal property includes the distribution, generation or transmission of electricity.
District of Columbia D.C. CODE 1981 § 47-2001	(s) "Tangible personal property" means corporeal personal property of any nature.
Florida F.S.A. § 212.02	(19) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, and all other types of vehicles. The term "tangible personal property" does not include stocks, bonds, notes, insurance, or other obligations or securities; intangibles as defined by the intangible tax law of the state; or pari-mutuel tickets sold or issued under the racing laws of the state.

State Definitions of Tangible Personal Property (as of 6/01)

State	Definition
Georgia Code of Georgia 48-8-2	(11) "Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. "Tangible personal property" does not mean stocks, bonds, notes, insurance, or other obligations or securities.
Hawaii	Not defined in the sales tax statute.
Idaho I.C. §63-3616	Personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses.
Illinois	No statutory or regulatory definition for tangible personal property.
Indiana 6-4.1-1-13	"Tangible personal property" means corporeal personal property, such as goods, wares, and merchandise
Iowa IA ST § 423.1	"Tangible personal property" means tangible goods, wares, merchandise, optional service or warranty contracts, except residential service contracts regulated under chapter 523C, vulcanizing, recapping, or retreading services, engraving, photography, retouching, printing, or binding services, and gas, electricity, and water when furnished or delivered to consumers or users within this state.
Kansas K.S.A. §79-3602	Corporeal personal property.
Kentucky K.R.S. 139.160	Personal property that may be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses.
Louisiana La.R.S. 47:301(16)	Personal property that may be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses.
Maine ME ST T. 36 § 1752	"Tangible personal property" means personal property that may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses, but does not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. "Tangible personal property" includes electricity. "Tangible personal property" includes any computer software that is not a custom computer software program.
Maryland MD TAX GENERAL § 11- 101	(i) Tangible personal property. -- (1) "Tangible personal property" means: (i) corporeal personal property of any nature; or (ii) a right to occupy a room or lodgings as a transient guest. (2) "Tangible personal property" includes: (i) farm equipment; (ii) wall-to-wall carpeting that is installed into real estate, regardless of the purpose, method, or permanency of its installation; and (iii) coal, electricity, oil, nuclear fuel assemblies, steam, and artificial or natural gas.

State Definitions of Tangible Personal Property (as of 6/01)

State	Definition
Massachusetts MA ST 64H § 1	"Tangible personal property", personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. For purposes of this chapter, "tangible personal property" shall also include gas, electricity and steam.
Michigan M.C.L. 205.92(k), (l) and (m) and 1979 AC R 205.5	<p>Tangible personal property embraces all goods, wares, merchandise, products, and commodities, all tangible things and substances which are dealt in, capable of being possessed and exchanged.</p> <p>Tangible personal property includes computer software offered for general use by the public or software modified or adapted to the user's equipment by the seller, only if the software is available from a seller of software on an as is basis or as an end product without modification or adaption.</p> <p>An item of exchange for sales and use tax purposes includes a final product that may be, for tax purposes of bundle of services and property.</p> <p>Tangible personal property does not include commercial advertising elements.</p>
Minnesota M.S. 297A.01, Subd. 11	Corporeal personal property of any kind whatsoever, including property which is to become real property as a result of incorporation, attachment, or installation following its acquisition.
Mississippi MS ST 27-65-3	(j) "Tangible personal property" means personal property perceptible to the human senses or by chemical analysis as opposed to real property or intangibles and shall include property sold on an installed basis which may become a part of real or personal property.
Missouri Case law	Tangible property that is not real property.
Nebraska NE ST § 81- 1548.03	Tangible personal property shall mean all tangible personal property except: <ul style="list-style-type: none"> (1) Gas, electricity, and water delivered through mains, lines, pipes, or channels to purchasers; (2) Food and food products for human or pet consumption sold in bulk form and not packaged or subpackaged in individual containers, packages, or units, or a type of size not suitable for sale to consumers purchasing in the ordinary course of retail marketing; and (3) Fertilizer, seeds, annual plants, any form of animal life, and animal feed sold for resale or use in the agricultural food industry.
Nevada NV ST 372.085	"Tangible personal property" means personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses.

State Definitions of Tangible Personal Property (as of 6/01)

State	Definition
New Jersey NJ ST 54:32B-2	(g) Tangible personal property. Corporeal personal property of any nature including energy.
New Mexico New Mexico 7-9-3	I. "property" means real property, tangible personal property, licenses, franchises, patents, trademarks and copyrights. Tangible personal property includes electricity and manufactured homes;
New York NY TAX § 1101	(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. Such term shall also include newspapers and periodicals where the vendor ships or delivers the entire edition or issue of the newspaper or periodical, with or without the advertising included in the paper edition or issue, but not including anything, other than advertising, not in such paper edition or issue, to the purchaser by means of telephony or telegraphy or other electronic media, but only where the amount of the sale price to such purchaser of such newspaper or magazine or the subscription price, in the case of a subscription to a newspaper or periodical, including any charge by such vendor for shipping or delivery to the purchaser, is separately stated to such purchaser.
North Carolina N.C.G.S.§105-164.3(20)	Personal property that may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses.
North Dakota ND ST 57-40.2-01	Definitions. "Tangible personal property" means: a. Tangible goods, including the furnishing of bingo cards, wares, and merchandise, and gas, when furnished or delivered to consumers or users within this state, and the sale of vulcanizing, recapping, and retreading services for tires. b. The leasing or renting of tangible personal property, the sale, storage, use, or consumption of which has not been previously subjected to a retail sales or use tax in this state. c. The purchase of magazines or other periodicals. Provided, the words "magazines and other periodicals" as used in this subdivision do not include newspapers nor magazines or periodicals that are furnished free by a nonprofit corporation or organization to its members or because of payment by its members of membership fees or dues. d. The severance of sand or gravel from the soil.

State Definitions of Tangible Personal Property (as of 6/01)

State	Definition
Ohio Ohio 5701.03	(A) "Personal property" includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code. "Personal property" also includes every share, portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere. "Personal property" does not include money as defined in section 5701.04 of the Revised Code, motor vehicles registered by the owner thereof, electricity, or, for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings that are held for use and not for sale in the ordinary course of business, except to the extent that the value of the electricity, patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale.
Oklahoma OK ST T. 68 § 1352	"Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses;
Pennsylvania Pennsylvania 72 P.S. §7201(m)	"Tangible Personal Property" means Corporeal personal property including, but not limited to, goods, wares, merchandise, steam and natural and manufactured and bottled gas for non-residential use, electricity for non-residential use, premium cable or premium video programming service, spirituous or vinous liquor and malt or brewed beverages and soft drinks, interstate telecommunications service originating or terminating in the Commonwealth and charged to a service address in this Commonwealth, intrastate telecommunications service with the exception of (i) subscriber line charges and basic local telephone service for residential use and (ii) charges for telephone calls paid for by inserting money into a telephone accepting direct deposits of money to operate, provided further, the service address of any intrastate telecommunications service is deemed to be within this Commonwealth or within a political subdivision, regardless of how or where billed or paid. In the case of any such interstate or intrastate telecommunications service, any charge paid through a credit or payment mechanism which does not relate to a service address, such as a bank, travel, credit or debit card, is deemed attributable to the address of origination of the telecommunications service.
Rhode Island Gen.Laws 1956, § 44-18-16	"Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses.
South Carolina S.C.C.A. §12-36- 60	Personal property that may be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses, including services and intangibles.

State Definitions of Tangible Personal Property (as of 6/01)

State	Definition
South Dakota	Tangible goods, wares, merchandise, gas, and electricity if furnished or delivered to consumers or users within this state.
Tennessee T.C.A. §67-6-102	Personal property that may be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses.
Texas Tx.C.A. §151.009	Personal property that may be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses.
Utah Ut.C.A. §59-12-102(29)	All goods, wares, merchandise, produce, and commodities; all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged; water in bottles, tanks, or other containers; and all physically existing articles or things, including property severed from real estate.
Vermont 32 V.S.A. § 9701	(7) Tangible personal property: means personal property which may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses and shall include fuel and electricity, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership.
Virginia Code 1950, § 58.1-602	"Tangible personal property" means personal property which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance or other obligations or securities.
Washington	No statutes or administrative regulations define tangible personal property for sales or use tax purposes.
West Virginia § 11-15A-1	(12) "Tangible personal property" means tangible goods, wares and merchandise when sold by a retailer for use in this state.
Wisconsin W.S. §77.51(20)	Tangible personal property of every kind and description and includes electricity, natural gas, steam and water and also leased property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement, unless the lessor of the property is also the lessor of the realty to which the property is affixed. "Tangible personal property" also includes coins and stamps of the United States sold or traded as collectors' items above their face value and computer programs except custom computer programs.
Wyoming W.S. §39-15-101	Any property not real or intangible.

Alternatives to Defining Tangible Personal Property

The following is a discussion of each alternative that was considered by the Tangible Personal Property Subgroup of the Tax Base Work Group, including concerns expressed by state and business representatives.

Caution: The concerns stated are not statements of fact nor do they necessarily reflect the opinions of the Tangible Personal Property Subgroup.

Alternative 1 – Define Broadly, Including Digital Products

A. Definition

“Tangible personal property” is personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property does not include real property, or intangible assets such as promissory notes, stocks, and bonds. For the purposes of this definition, “tangible personal property” includes electricity, water, natural gas, steam, software, prepaid telecommunications cards, data and information, however delivered (physically, electronically or otherwise)¹.

B. Discussion

It was agreed upon early in the discussion that the use of the terminology “seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses” was the best starting point because this is the common law definition found in *Black’s Law Dictionary* (1990, Sixth Edition) and is similar to language used in 19 states.

In defining tangible personal property, the work group first decided to go with the approach of defining the term broadly to include those items that several states already treated as tangible personal property. The work group also made the decision to include digitized products in the definition of tangible personal property.

In arriving at this definition, it was the group’s understanding that if items in the draft definition were not currently treated by a state as tangible personal property or were not taxed in the same manner as if they were tangible personal property, that state, in addition to adopting the model definition, would create exemptions to arrive at its current tax treatment.

¹ The intent of the phrase “data and information, however delivered (physically, electronically or otherwise)” is to include items such as books, booklets, flyers, videotapes, compact discs, laser discs, digital video discs, photographic prints and negatives, photocopies, works of art, printed or embossed advertising specialties, finished art, etc. as personal property to be treated as tangible personal property.

Example 1: Wisconsin defines tangible personal property to include computer software, except custom computer software (regardless of whether transferred in a tangible form or digitally). Under the model definition, tangible personal property includes all computer software. In order to maintain the same revenues, while adopting the model definition of tangible personal property, Wisconsin would have to create an exemption for custom computer software.

Example 2: North Carolina currently includes computer software transferred by disk, tape, or other tangible form in its definition of tangible personal property. It has an exemption for custom computer software transferred by disk, tape, or other tangible form. If North Carolina adopted the definition of tangible personal property in Alternative 1 (which includes all computer software, regardless of the manner in which it is delivered), it would create an exemption for computer software delivered digitally or electronically so that there is no fiscal impact as a result of adopting the Alternative 1 definition.

Example 3: Many states do not tax the delivery of a book via the Internet because they do not consider it to be tangible personal property. Under the model definition, tangible personal property includes all data and information delivered digitally. In order to maintain the same revenues, while adopting the model legislation, states would have to create an exemption for digital products they do not wish to tax.

C. Concerns

1. Including data and information in the definition does not make sense since these products cannot be touched or felt. Concern was that if the group was trying to tax digitized products, it should not do so through the definition of tangible personal property. Instead, a separate third category of imposition (in addition to the category for tangible personal property and the category for selected services) should be created to tax such items.
 - Fifteen states (Arkansas, California, Georgia, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, New Jersey, Pennsylvania, Rhode Island, South Carolina, Vermont, and Wisconsin) currently do not tax digital products. Of these, eleven states (Arkansas, California, Georgia, Illinois, Kansas, Michigan, Minnesota, Missouri, New Jersey, Vermont, and Wisconsin) appear to exempt them on the theory that they are not tangible personal property.
 - Eight states (Connecticut, Idaho, Indiana, Louisiana, South Dakota, Texas, Utah, and Washington) currently tax digital products. Of these, four states (Idaho, Louisiana, Texas, and Washington) appear to tax them on the theory that they are tangible personal property.
2. Including digital products and software within the definition of tangible personal property could be viewed as an expansion of the tax base.

Opponents to this alternative felt that the states were trying to tax services with the use of “data or information.” For example, by defining data and information as tangible personal property, states that did not tax information services, such as the online research service “Lexis” used by attorneys, could now do so because what was previously a nontaxable service in some states would be deemed tangible personal property and taxable, unless an exemption applies.

Although exemptions could be created to arrive at the current tax treatment, states may choose not to in the name of simplification. The business representatives felt it might be necessary to lobby for such exemptions to maintain the status quo.

Example: Wisconsin defines tangible personal property to include computer software, except custom computer software, regardless of whether transferred in a tangible form or digitally. Under the model definition, tangible personal property includes all computer software. If Wisconsin adopted the model definition, all computer software would be taxable unless the Legislature also created an exemption for custom software. Some business representatives have expressed concern that it will be difficult to establish that exemption language.

3. Defining tangible personal property broadly and then crafting exemptions, rather than defining narrowly and creating imposition provisions, transfers the burden of proof from the state (to show that a transaction is clearly taxable) to the taxpayer (to show that a transaction is clearly exempt). If a person is claiming an exemption, because exemptions are matters of legislative grace, a person must show that they clearly fall within the exemption to claim it. However, if an item is not taxable because there is no clear imposition (e.g., certain services and intangibles in some states), the burden of proof falls on the state to show the tax is clearly imposed.

Alternative 2 – Define Broadly, Not Including Lists of Items

A. Definition

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property does not include real property or intangible property.

B. Discussion

A summary of the changes from the previous alternative is as follows:

1. Do not specifically include digital products in the definition of tangible personal property. For those states who do not have interpretations that digital products are tangible property, imposition section in the statutes would have to be created

for digital products, as is currently done for tangible personal property and services (in those states that tax certain services). The majority of the TPP subgroup agreed that most states interpreted digital products as not being perceptible to the senses and, therefore, did not meet definition of what is commonly understood to be tangible personal property. As such, if a state wanted to tax digital products, it would specifically impose a tax on them.

2. Exclude other items where there are differing interpretations by states as to whether the item is truly tangible personal property. These are items that have been added by a state to their definition of tangible personal in order to overturn a court decision or other interpretation that stated they were not tangible personal property. States with such a decision or interpretation must create an imposition statute that specifically imposes tax on the questionable item.

Example 1: The Tennessee Legislature has defined tangible personal property to specifically include computer software. This was done to overcome a court determination that computer software is not tangible personal property. If Tennessee adopts the proposed definition in Alternative 2, because of the prior court decision, it can no longer deem computer software to be tangible personal property. Therefore, it must create a law that specifically imposes sales tax on the transfer of computer software.

Example 2: Louisiana's courts have determined that computer software is tangible personal property under the proposed definition. Therefore, it will continue to treat computer software as tangible personal property.

C. Concerns

1. It is not clear, even with this uniform definition, whether or not electricity, steam, natural gas, and software are tangible personal property among the various states. For example, courts in various states have ruled differently as to the character of software (i.e., some courts have held that computer software is tangible personal property while others have held that computer software is an intangible or a service). Although this alternative definition looks uniform on its face, it is not uniform because of differing state courts' interpretations. In Louisiana, software is tangible personal property but in Tennessee it is not, even though both would adopt the same definition of tangible personal property.
2. The burden of proof is with the State to show that a transaction is subject to tax rather than the taxpayer having the burden of showing that the transaction is exempt.

Alternative 3 – Define Broadly, Including Lists of Items, Except Digital Property

A. Definition

“Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is perceptible to the senses in any other manner and includes electricity, water, gas, steam, and canned software. Tangible personal property does not include real property or intangible property.

B. Discussion

The aim of this alternative is to combine portions of Alternatives 1 and 2. The biggest concern with Alternative 1 was the inclusion of digital products and possibly some services. The biggest concern with Alternative 2 was the lack of certainty as to the character of certain property. It was thought that this alternative was a compromise addressing those concerns.

This definition includes the most common items that states deem to be tangible personal property.

C. Concerns

1. Some states don't treat electricity as tangible personal property either because of court interpretation or their Legislature chose to specifically exclude it from the definition of tangible personal property. By including electricity in the definition of tangible personal property, this alternative definition creates problems in the area of manufacturing or industrial processing exemptions. States that allow exemptions for items used in manufacturing or processing tangible personal property may have expanded their exemption to include utilities producing electricity.
2. All states treat canned software as taxable if it is delivered in a tangible form. However, some states provide that canned computer software is not tangible personal property when it is delivered electronically or is loaded by the seller onto a computer and the tangible media remains with the seller (“load and leave”). With the definition as proposed, those states that do not tax canned software delivered electronically because it is not tangible personal property would be required to create an exemption for canned software delivered electronically in order to retain the same tax treatment. There was concern that:
 - States would fail to create the exemption, thereby expanding their tax base through adoption of a uniform definition.
 - The burden of proof is with the State to show that certain software is subject to tax rather than the taxpayer having the burden of showing that the software is exempt.

3. It is not necessary to list intangible personal property or real property as exclusions from tangible personal property since by common law they are mutually exclusive.

Alternative 4 – Define Broadly, Including Lists of Items, Except Digital Property and Software Delivered Without Tangible Medium

A. Definition

“Tangible personal property” means personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, water, gas, steam, and personal property delivered with the transfer of an intermediate storage medium.

B. Discussion

This alternative features the added language of “personal property delivered with the transfer of an intermediate storage medium.” The work group thought that since items delivered on a tangible medium were thought by most states to be tangible personal property, it would be beneficial to clearly provide that in the definition.

It was the intent at all times not to change states’ interpretations of the “true object” or “essence of the transaction” test. Therefore, although data on a tangible storage medium would be tangible personal property, the transfer of that tangible personal property with the performance of a nontaxable service would continue to be nontaxable if the objective of the customer were to obtain the service.

C. Concerns

1. Although never intended by the states, this definition might overturn states’ interpretations as to the true object of the transaction. For example, although a will prepared on paper by an attorney is perceptible to the senses and is tangible personal property, the object of the transaction is to obtain the attorney’s legal services. If a state does not tax legal services, the charge for the will is not subject to sales tax. Similarly, if a company processes transactions for a financial company and transfers paper statements detailing the transactions processed, although the paper statements are tangible personal property, the object of the transactions is to obtain the data processing services, which may or may not be taxable in a state. Some thought that states might try to impose tax on legal or financial services because of the mere transfer of tangible personal property.
2. Without the definition of tangible personal property deeming prewritten computer software to be tangible personal property, states such as Wisconsin and Tennessee are bound by court decisions, which have held that computer software is *not* tangible personal property. Not adopting this alternative will mean

states with similar determinations will be required to amend their sales and use tax law to specifically impose tax on the sale of prewritten (or all) computer software. Some states may need to revise statutory language to expand manufacturing exemptions and other provisions that currently only apply to tangible personal property.

3. Digital products are the functional equivalent of tangible personal property and should be treated no differently. Buying a book at a bookstore and buying the same book delivered electronically should have the same tax consequences. Equal treatment would help to even the playing field. This argument would only apply to a narrow definition of digital products.

Alternative 5 – Define Broadly, Including Limited List of Items, Except Digital Property and Software

A. Definition

“Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, water, gas, and steam.

B. Discussion

This alternative is a combination of many of the alternatives preceding it. While it lists items that will be deemed tangible personal property (as most states do currently), it does not address software and digital products specifically. The intention is for states that have administratively or through court interpretation treated software and/or digital products as tangible personal property to continue to do so. Those states that have considered software and/or digital products to be tangible personal property only because they have been included in the definition of tangible personal property will have to create specific imposition provisions for these items to be subject to sales tax.

C. Concerns

1. It is not clear, even with this uniform definition, whether or not software is tangible personal property. Courts in various states have ruled differently as to the character of software. Although this definition looks uniform on its face, it is not uniform because of differing state court interpretations. In Louisiana, software is tangible personal property but in Tennessee it is not, even though both would adopt the same definition of tangible personal property.
2. Exemptions that currently apply to prewritten software in states because it is tangible personal property will be lost if prewritten software is no longer considered tangible personal property (e.g. manufacturing or industrial production, common carriers, pollution abatement, etc.). Adopting this

recommendation would mean states or businesses would be required to expand or create exemptions that currently extend to prewritten software. There is some risk that those exemptions would not be expanded to include prewritten software

3. The burden of proof is with the State to show that a transaction is subject to tax rather than the taxpayer having the burden of showing that the transaction is exempt.
4. The phrase “or which is in any other manner perceptible to the senses” may be overly broad. For example, intangible property is personal property. Intangible property includes material that is subject to copyright laws (i.e. music, movies, etc.). Therefore, if these intangible rights are in any other manner perceptible to the senses, they become tangible personal property. Since sight and hearing are included in the five senses, if the music and movies can be heard or seen, they might be considered tangible personal property.

In *State v. Jones*, 137 P. 2d 970 (Ariz. 1943), the Court held that placing a coin in a phonograph machine that played a musical tune constituted the sale of tangible personal property. The Court held that since sound is perceptible to the senses, the sale of that sound was taxable. This result is not consistent with an Iowa case, *Ramco, Inc v. Director, Department of Revenue* 248, N.W. 2d 122 (Iowa 1976), where the Court held that a musical tune was not tangible personal property.

In the case of *Freedom Broadcasting Of Tn, Inc., et al. v. Tennessee Department Of Revenue* (No. M2000-03111-COA-R3-CV, filed January 8, 2002), the Court of Appeals at Nashville held that broadcast signals are capable of measurement and perceptible to the senses and, therefore, fall within the definition of tangible personal property. Such a determination was necessary to hold that a television station’s purchase of broadcasting equipment qualified for Tennessee’s manufacturers’ exemptions. (Note: This decision is not final. It unknown whether the Tennessee Department of Revenue will appeal the decision.)

Alternative 6 – Do Not Define

A. Discussion

It has been suggested, but never considered by the work group, that tangible personal property not be defined. Instead, a state would continue to follow its current definition (if they have one) and court interpretations of that definition.

B. Concerns

1. Tangible personal property is the most commonly used term in the sales and use tax law. As such its application should be uniform among states.

2. Within a legal context, one area that has been settled law in every state is the definition of tangible personal property. From the standpoint of conforming legislation, some cannot envision any state needing to enact a proposed definition, as existing common law in each state conforms to the definition. Distinguishing tangible personal property from other property and services may not yield lasting uniformity benefits. On the other hand, since the common law within each state will continue to develop, any suggestion as to what product is or is not included in the definition of tangible personal property risks creating, in the long-term, an artificial distinction between states that adopt the conforming definition and those that do not and within states that adopt the conforming definition between the SSTP definition and the development of common law in those states.
3. If tangible personal property is a defined term of the Agreement and a state wishes to exclude certain items coming within the definition of tangible personal property from the rule of general taxability, the state must do that by exempting only those items for which the Agreement contains an express exception or definition and not by other approaches. By example, if a participating state establishes that tangible personal property, a defined term, is taxable except for items specifically exempted, the state may not also exempt newspapers unless newspapers are a specifically defined item in the Agreement. This concern could be addressed through an amendment to Section 312 of the Agreement (as amended 1/24/01).
4. Any reasonable definition will inevitably include some forms of digital products (an overlap).
5. Any definition of tangible personal property and/or digital products in the Streamlined Sales and Use Tax Agreement will potentially impact the presumption of taxability or nontaxability.

(Note: Concerns 3 through 5 above, although raised in discussing Alternative 6, are concerns that also apply to Alternatives 1 through 5.