BAC Compliance Subcommittee Proposed Changes to Draft No. 4 (clean copy)
Version 1 – Certificate of Compliance DOES NOT Represent Written Policy

Article II
Definitions

Rule ~~201~~ 805.2 Application of "Substantially Compliant" ~~Defined~~

A. The term "substantially compliant" as used in section 805 ~~shall be:~~ means:

1. something less than exact compliance that does not impose an increased burden on any seller or purchaser that is other than de minimis;
2. measured by the collective effect of a state's laws, rules, regulations and written policies in meeting the objective of each requirement of the Agreement;
3. achieved by a determination that each requirement of the Agreement has been met in a form sufficient to carry out the ~~essential~~ purposes for which that requirement was adopted (absent an inadvertent error, all of the requirements of the Agreement should be~~are~~ set forth in the Certificate of Compliance);
4. There is reasonable support under state law for the assertion that a requirement is met; and
5. There is no contrary evidence indicating that the state does not meet a requirement.

B. Examples.

Example 1:

SSUTA Provision: Section 322 of the SSUTA prohibits member states from having sales tax holidays for products that have not been defined in Part II or Part III(B) of the Library of Definitions.

Facts: State Q provides an exemption from its sales tax for footballs sold on Super Bowl weekend. Footballs are normally subject to sales tax in State Q. Footballs are not defined in Part II (product definitions) or III(B) (sales tax holiday definitions) of the Agreement's Library of Definitions.

Conclusion: State Q is not ~~in~~ substantially compliant~~ce~~ with the Agreement because the exemption~~it~~ violates Section 322's prohibition against sales tax holidays for products (footballs) that have not been defined in Part II or III(B) of the Library of Definitions.

Example 2:

SSUTA Provision: Section 318 of the SSUTA requires member states to accept sales and use tax return filings that include all taxing jurisdictions within the state, requires that returns be due no sooner than the 20th day of the following month, requires states to accept simplified electronic returns, prohibits states from requiring returns from sellers who make no sales in the state, and requires states to give at least 30 days notice before assessing tax for a failure to file a return unless the seller has a history of failing to timely file returns.

Facts: Member state B levies state sales and use tax, and many of its local jurisdictions also levy sales and use tax. State B's sales and use tax statutes provide that sales and use tax returns for a month are due on the 20th day of the

following month, and must include all taxing jurisdictions within the state. By adopted regulation, State B accepts simplified electronic returns and does not require sellers that make no sales in State B to file a return. State B's regulation does not indicate that a seller (without a history of filing late returns) will have at least 30 days notice before the seller is assessed tax for failing to file a return. State B's current Certificate of Compliance posted on ~~filed with~~ the ~~Streamlined Sales Tax~~ Governing Board's ~~(posted on State B's Department of Revenue~~ website~~)~~ indicates that State B gives a seller at least 30 days notice before assessing tax for failure to file a return, except where the seller has a history of not timely filing returns. **Conclusion**: State B is not ~~in~~ substantially compliant~~ce~~ with Section 318~~,~~. State B's Certificate of Compliance is used by the Governing Board for a state to certify its compliance with the Agreement; the Certificate of Compliance cannot be used to reflect a written policy of the state. ~~as the collective effect of State B's law, regulations and policy meet the objectives of Section 318. Assertions in a state's web-posted Certificate of Compliance are considered written policy. State B's statement in its web-posted Certificate of Compliance meets the requirement of a written policy, and there are no contradicting laws, rules, regulations, or written policies~~.

Example 3:

SSUTA Provision: Section 327 of the SSUTA requires each member state to use the common definitions set out in the Library of Definitions (Appendix C), adhering to the certain principles, including that if a term defined in the Library of Definitions appears in the state's sales and use tax laws, administrative rules or regulations, the state must use the Library definition of the term in substantially the same language as the Library definition. The SSUTA's Library of Definitions defines "alcoholic beverages" as beverages *suitable* for human consumption that contain 0.5% or more of alcohol by volume.

Facts: Member state C's sales tax statute exempts sales of "food and food ingredients" from tax. The statute defines "food and food ingredients" exactly as that term is defined in the SSUTA's Library of Definitions, including the exclusion of "alcoholic beverages". State C, by published policy statement, defines "alcoholic beverages" as beverages *intended* for human consumption that contain 0.5% percent or more of alcohol by volume. This results in alcoholic beverages containing 0.5% or more of alcohol by volume being subject to sales tax in State C.

Conclusion: State C's definition of "alcoholic beverages" meets the objective of Section 327 of the SSUTA. State C is ~~in~~ substantially compliant~~ce~~ with the SSUTA because the collective effect of its law and policy meets the objective of Section 327 of the SSUTA.

Example 4:

SSUTA Provision: Section 327 of the SSUTA requires each member state to use the common definitions set out in the Library of Definitions (Appendix C), adhering to certain principles, including that except as specifically provided in Sections 316 and 332 and the Library of Definitions, a member state shall impose a sales or use tax on all products or services included within each Part II or Part III(B) definition or exempt from sales or use tax all products or services within each such definition.

Facts: State D levies tax on the retail sale of tangible personal property in general, and on the sale of specifically identified services. State D's law imposes tax on the sale of telecommunications service, and uses the same definition of "telecommunications service" as is contained in the SSUTA Library of Definitions. State D does not define "ancillary services" in statute, rule or regulation, but its longstanding written policy and practice has been not to tax services that are associated with or incidental to the provision of telecommunications services

Conclusion: The Library of Definitions definition of "telecommunications service" (and that adopted by State D) specifically states that "telecommunications service" does not include "ancillary services." The cumulative effect of State D's statutes, ~~and~~ written policy and ~~/~~practice is that "telecommunications service" is subject to sales tax while ancillary services are not. The requirement of the SSUTA in defining telecommunications service and ancillary services has been met by State D in a form sufficient to carry out the ~~essential~~ purposes for which the definitions were adopted. State D is ~~in~~ substantially compliant~~ce~~ with Section 327 of the SSUTA.

Example 5:

SSUTA Provision: Section 328 of the SSUTA requires each member state to complete and maintain a taxability matrix in a format approved by the governing board, and to relieve sellers and CSPs from liability to the member state and its local jurisdictions for having charged and collected an incorrect amount of sales or use tax due to the seller or CSP relying on erroneous data provided by the member state in its taxability matrix.

Facts: While State E does not have a law, rule or regulation that relieves sellers or CSPs from liability to State E for charging or collecting the wrong amount of sales or use tax based on the seller's or the CSP's reliance on incorrect information contained in State E's taxability matrix, State E~~'s current (and web-posted) Certificate of Compliance~~ has a posted policy statement on its website that clearly indicates that State E provides that liability relief.

Conclusion: State E is substantially compliant with Section 328 of the Agreement because its written policy~~, as contained in its web-posted Certificate of Compliance,~~ indicates it provides liability relief to sellers and CSPs as required by Section 328. This applies provided there are no inconsistent laws, rules, regulations, written policies, past and current practices or case law indicating the state is not in compliance. For instance, if State E has a case that held the revenue agency has no ability to forgive a taxpayer for an error made by the revenue agency, State E cannot use a written policy to indicate it complies with that requirement of the Agreement.

Example 6:

~~**SSUTA Provision**: Section 324 of the SSUTA requires a member state to adopt a rounding algorithm, and prohibits a member state from requiring a seller to collect tax based on a bracket system.~~

~~**Facts**: While State F's current (and web-posted) Certificate of Compliance indicates that in State F tax must be rounded to a whole cent by using the rounding algorithm outlined in Section 324 of the SSUTA, State F's promulgated~~

~~administrative rules require a seller to collect sales tax based on a bracket system set forth in those rules.~~

~~**Conclusion**: State E is not in substantial compliance with the Agreement because it violates Section 324's prohibition against requiring a seller to collect tax based on a bracket system. A statement in the state's Certificate of Compliance that conflicts with the state's laws, rules, regulations, or other written policies cannot be relied upon to support a finding of substantial compliance.~~

~~Example 7:~~

SSUTA Provision: Under Section 318(C)(5) of the Agreement, a state may require a seller which elects to file an SER to give at least three months notice of the seller's intent to discontinue filing an SER.

Facts: State G, by statute, requires that a seller that~~which~~ elects to file an SER give at least 90 days notice of the seller's intent to discontinue filing an SER.

Conclusion: Depending on the months involved, the number of days in three consecutive months varies, and may be as few as 90 or as many as 92. If State G's requirement that a seller which has elected to file an SER give at least 90 days notice of the seller's intent to discontinue filing an SER imposes any additional burden on sellers, that additional burden is *de minimis*. A state may increase the burden on a taxpayer~~sellers~~ so long as the increase in the burden is not more than *de minimis*. State G is ~~in~~ substantially compliant~~ce~~ with the Agreement, as its "90-day notice" requirement imposes no more than a *de minimis* increase in a seller's~~'~~ burden, and carries out the essential purpose for which the requirement of Section 318(C)(5) was adopted.