

## **Business Advisory Council Compliance Subcommittee Report for Remaining States**

To: Compliance Review and Interpretations Committee

From: Fred Nicely, BAC Compliance Subcommittee Chair

Re: Second report on 2010 Annual Recertification

Date: November 8, 2010

---

As with the initial report, the BAC Compliance Subcommittee would like to thank Scott Peterson and Pam Cook for the excellent review work they have conducted regarding the member states' substantial compliance with each requirement of the Agreement.

The BAC incorporates by reference all the issues raised by Scott Peterson and Pam Cook in the BAC Compliance Subcommittee's comments. Any new or additional comments for a state are provided below.

### **Indiana**

From the statutes cited in Indiana's Certificate of Compliance, it is unclear whether a seller is held harmless if they electronically capture the data elements for claiming exemption. *See* IC 6-2.5-8-8 (no reference made to electronically captured data).

In addition, Indiana's Information Bulletin #57, referenced for drop shipment transactions, contains requirements that exceed those in the SSUTA. It should not require a: 1) description of the articles purchased or 2) statement indicating that the articles purchased are to be resold and that the purchaser is not required to register as an Indiana retail merchant.

Exemption for medical equipment under IC 6-2.5-5-18 distinguishes between a "sale" (subpart (a)) and a "rental" (subpart (b)) of certain medical equipment. Sales and rentals should be treated the same. Additionally, as compared to the sale of medical equipment, the rental provision is more limited in scope.

### **Michigan**

As written, Michigan's sourcing law is compliant with the SSUTA. However, Michigan's administration of the provision does not appear to be compliant with the SSUTA. Michigan is sourcing the sale of electronically downloaded (or remotely accessed) software at the billing location (Sec. 310.A.3 or A.4) instead of the known location(s) where the product was received or from which it was accessed (Sec. 310.A.2). *See* Rule 309.2(2) and (3) for examples on how Michigan should source these sales.

There also is a concern that Michigan is taxing remotely accessed software through its imposition on TPP. The Agreement only permits taxation of software under an imposition on

TPP when it is delivered to the customer. Including remote access to software under an imposition on TPP is non-compliance.

Section 205.581(2) regarding the Multistate Tax Commission requires good faith acceptance of exemption certificates.

There are also provisions discussing “drop shipment” sales, which appear to require periodic report information not required in the SSUTA. (§205.54k and §205.94i -- “For each transaction for which an exemption is claimed under subsection (1), the taxpayer shall provide the following information to the department annually in any reasonable form:”)

### **New Jersey**

There is no statute in the Sales and Use Tax Act that includes the terms “exemption certificates” or “good faith.” However, there are several regulations, bulletins, and publications on this topic. These all require that the exemption certificates be accepted in good faith. However, it is noted that Regulation 18:24B (incorporated in Chapter 24B, the “Streamlined Sales and Use Tax Rules and Procedures”) is valid from August 3, 2009 through August 3, 2014. It is unclear whether Chapter 24B supersedes Chapter 24. Further, as there is no statute referenced, it is unclear whether the various regulations promulgated under Chapter 24 are still valid.

Regulation 18:24B-1.2(c) states that the relief provided to sellers who obtain a fully completed certificate or relevant data elements within 90 days subsequent to the sale is only available for sales made after January 1, 2008. It is the BAC’s opinion that this limitation puts New Jersey out of compliance with the requirements of the SSUTA. NJ was a full member 10/1/2005.

### **Ohio**

This note applies to Ohio and Utah. Back in 2005, Ohio and Utah were admitted to the SSUTA as associate member states and found compliant with each requirement of the SSUTA except for the destination sourcing provision under Sec. 310 for intrastate delivery sales. Once Ohio complied with Sec. 310 it was to become a full member state. There was also a determination made that such states were not subject to the annual compliance reviews. (In contrast, Tennessee’s Associate Membership required it to file annual compliance reviews because it was found to have other SSUTA compliance issues.) Since Ohio (and Utah) has compliance issues beyond compliance with Sec. 310, Ohio is an associate member under the general requirements of Section 801.3; Ohio does not meet the requirements for an associate member to obtain full membership under Sec. 310.1 (*i.e.*, one of at least five qualifying states).

### **Oklahoma**

Oklahoma Statute §1361.1 requires acceptance of a certificate in good faith for the vendor to be relieved of liability. The good faith requirements in the provision conflicts with other

provisions: 1) §1361.A.2 [However, the Oklahoma Tax Commission shall relieve sellers or certified service providers that follow the requirements of this section from the tax otherwise applicable if it is determined that the purchaser improperly claimed an exemption and to hold the purchaser liable for the nonpayment of tax. This relief from liability does not apply to: ...] , 2) §1361.A.3 [The Tax Commission shall relieve a seller or CSP of the tax otherwise applicable if the seller obtains a fully completed exemption certificate or captures the relevant data elements required by the Tax Commission within ninety (90) days subsequent to the date of sale. If the seller or CSP has not obtained an exemption certificate or all relevant data elements as provided by the Tax Commission, the seller may, within one hundred twenty (120) days subsequent to a request for substantiation, either prove that the transaction was not subject to tax by other means or obtain a fully completed exemption certificate from the purchaser, taken in good faith. The Tax Commission shall relieve a seller or CSP of the tax otherwise applicable if it obtains a blanket exemption certificate for a purchaser with which the seller has a recurring business relationship. The Tax Commission shall not request from the seller or CSP renewal of blanket certificates or updates of exemption certificate information or data elements when there is a recurring business relationship between the buyer and seller. For purposes of this section, a recurring business relationship exists when a period of no more than twelve (12) months elapses between sales transactions.] and 3) Oklahoma Rule 710:65-7-6(b) requires “good faith.” In certain instances, the burden of proving the exemption exceeds the minimum requirements allowed under the SSUTA. Examples include Rule 710:65-7-15(a) 17 through 19, which require a card or statement from the purchaser claiming an exemption.

### **Utah**

Utah is sourcing interstate sales of electronically downloaded (or remotely accessed) software at the server location instead of the customer’s location or billing address (Sec. 310.A). Utah is not in compliance with the sourcing rules of Sections 310.1, 310.A and 311.C.

Also, Utah has a compliance issue with Sec. 333. That section states computer software “shall be excluded from the term ‘products transferred electronically.’” Utah has private letter rulings indicating computer software is included within the definition of “products transferred electronically.” Further, the SST definition of TPP specifically includes “prewritten computer software.” Utah excludes prewritten computer software from its definition of TPP if the software is delivered electronically. Utah is not in compliance with the SST definition of TPP.

For Utah’s associate membership status - see note above for Ohio.

### **Wisconsin**

Regulation 11.14(8) regarding a farmer’s exemption requires the exemption form to be signed. It is unclear whether Regulation 11.14(13) overrides this requirement.

### **Wyoming**

In addition to the §317 issues already identified in the preliminary review, there are certain instances where the burden of proving the exemption exceeds the minimum requirements allowed under the SSUTA. Examples include: 1) §9(f)(i) requires DOT#, permit and insurance, 2) §15(b) requires an affidavit that specifically identifies addresses outside of WY, and 3) §15(x)(vi) requires a seller receive the proper information required from the holder of a direct pay permit.