

To: Compliance Review and Interpretations Committee

From: Scott Peterson and Pam Cook

Re: Preliminary report on 20101Annual Recertification

Date: August 24, 2011

**Arkansas:**

The following citations are needed on the (1) taxability matrix: food and food ingredients and dietary supplements – 26-52-317; and (2) certificate of compliance: Section 317, paragraphs D1 and D2 – 26-52-517(g) and GR 79(E); Section 318, paragraph A – 26-52-501(b)(3).

Not all local taxes have the effective date provisions for catalog sales and boundary changes.

The default provision for sourcing transactions (Section 310) does not contain the provision to source digital goods to the location they were first available for transmission by the seller. Digital audio visual works and digital audio works became taxable in July.

The definition of “receive” and “receipt” does not contain the provision for taking possession or making first use of digital goods.

The state does not tax digital codes the same as the digital product to which it relates.

The rule that provides the full definition of “bundled transactions” contains the provision related to bundles including food, drugs, etc. The 50% rule in the Agreement applies to taxable items that are 50% or less than the purchase or sales price. The rule is stated in terms of nontaxable items and applies when the nontaxable portion is 50% or more.

The state’s rounding rule requires that state and local taxes be aggregated. The Agreement provides that the state “shall allow” the rounding rule to be applied to aggregated state and local taxes.

**Kansas:**

The last citation in the first topic of Section 302 should be 79-3606(w), (x).

In Section 404, the state indicates that a written agent appointment does not need to be submitted to the state. Section 3608(a) requires it to be submitted to the director.

**Kentucky:**

According to the taxability matrix, bottled water is taxable. Bottled water is not defined and is not excluded from food and food ingredients.

The following citations are needed: Section 303, third question – 139.240(4); fourth question – 139.240(3).

In Section 317 of the certificate of compliance, the statute provided does not address blanket exemption certificates. The regulation cited only covers resale certificates and not other types of exemptions.

In Section 324 of the certificate of compliance, the state answered N/A for paragraph B.1. The state has no local taxes so that is appropriate with respect to aggregation of state and local taxes. However, that does not address the provision to allow tax to be computed on an invoice or item basis.

#### **Minnesota:**

The state was found out of compliance in 2010 because ringtones were taxed and digital audio works were not. The statute has been changed to exempt ringtones effective 10/1/2011.

The definition of “prepared food” does not include “two or more food ingredients mixed or combined by the seller for sale as a single item.” Also, the definition includes food sold without eating utensils in an unheated state by weight or volume as a single item, but exempts ready-to-eat meat and seafood in an unheated state sold by weight.

In Section 331, the statute cited could not be found.

#### **Nebraska:**

Code section 13-324 needs to be added to the citations for the first four questions in Section 301 and the paragraphs A, B and C in Section 305.

In Section 305, the state indicates that it does provide an address based database, but that the database does not meet the requirements of the Federal Mobile Telecommunications Sourcing Act.

In Section 314, air-to-ground radio-telephone service and prepaid calling service are not excepted from the sourcing for mobile telecommunications service.

“Place of primary use” is defined in terms of mobile telecommunications services only. It should apply to other types of telecommunications also.

The statute and regulations do not address allowing the rounding rule to be applied to aggregated state and local taxes.

Under relief from liability for purchasers (Section 331), the statute cited provides relief for sellers and CSPs that relied on erroneous data provided by the state on rates, boundaries, taxing jurisdictions or on the taxability matrix. It does not relieve a purchaser whose seller or CSP relied on such information.

**Nevada:**

The taxability matrix shows oxygen delivery equipment and enteral feeding devices are exempt if provided with a prescription. The statutes and administrative code show them to be exempt only when paid by Medicare and Medicaid. Both are included in the Agreement definition of durable medical equipment.

The following citation is needed on the taxability matrix: Digital products – 360B.485.

In Section 305, paragraph B, no citation was given for the provision related to the effective date for catalog sales. Is this provision documented anywhere?

The state adopted direct mail sourcing provisions legislatively in 2011. The new statute provides that if the purchaser gives the seller a direct mail form or other written form or exemption certificate claiming direct mail, a seller who maintains a place of business in the state must collect tax to locations in the state where the direct is delivered. The Agreement provides that all sellers are relieved of any obligation to collect tax if they receive such documentation.

The rounding rule statute does not contain a provision allowing the aggregation of state and local taxes.

In Section 329, the statutes cited do not address effective dates for rate changes for services covering a period of time. Is this documented elsewhere?

In Section 330, the citation given for transactions including telecommunications services, Internet access, ancillary services or audio or video programming services only defines bundled transactions.

In Section 331, the citation given for relief for liability for purchasers does not address situations where the purchaser's seller or CSP relied on erroneous information in the state's databases.

The state has been declared out of compliance by the Governing Board because it has not fully implemented ACH credit payments. The state is in the process of completing the full implementation of ACH credit which is expected to happen in October

## **North Dakota:**

The following citations need to be corrected: Section 301, first question – 11-09.1-06(2)(a) should be 11-09.1-05(2)(a); Section 303, all sections – 57-39.4-03, 57-39.4-03(2), 57-39.4-03(3) and 57-39.4-03(4) should be 57-39.4-04, 57-39.4-04(3), 57-39.4-04(4) and 57-39.4-04(5), respectively; Section 308, first question – add 11-09.1-05(1)(a) and 40-05.1(16)(a); Section 311 – 57-39.4-11 should be 57-39.4-12; and Section 317 – 57-39.4-18(3)(c) should be 57-39.4-18(6).

## **Oklahoma:**

The taxability matrix shows dental prosthesis sold with and sold without a prescription as taxable. The statute exempts “sales of prosthetic devices to an individual for use by such individual. The definition in the statute excludes eyeglasses, contact lenses and hearing aids, but not dental prosthesis. This was an issue last year and the state corrected the taxability matrix.

The following citations are needed on the taxability matrix: Value of trade-in – 68 O.S. 1352(12); Prewritten computer software delivered via load and leave – 68 O.S. 1354(1), 1352(24); Non-prewritten computer software delivered electronically or via load and leave – Rule 710:65-19-52.

The following citations are needed or need to be changed on the certificate of compliance: Section 302 – 68 O.S.1370, 2701; Section 305, paragraph E – 68 O.S. 1354.32; Section 314, paragraph E – delete statute and add Rule 710:65-18-5; Section 317, paragraphs A.1 and 6 – 68 O.S. 1365(G), Rule 710:65-3-33; Section 318, paragraph C.3 – 68 O.S. 1365.1; Section 330, paragraph A – 68 O.S. 1354.35; paragraph C.1 – change 1354.30 to 1354(4)(e) and delete rule; Section 502, paragraphs B and E – 68 O.S. 1354.32.

With respect to sourcing leases or rentals in Section 310, the statute is correct. However, Rule 710:65-18-4 sources the first periodic payment for leases or rentals of motor vehicles, trailers, semi-trailers or aircraft under the rules for retail sale instead of to the primary property location.

The state answered the question in paragraph D of Section 318 “NO” which would mean that a return is required from a seller that is registered under the Agreement which has indicated at the time of registration that it anticipates making no sales which would be sourced to the state under the Agreement. No citation is given.

The citation given for paragraph F of Section 318 does not address giving 30 days notice to a seller registered under the Agreement before establishing liability for taxes solely due to a seller’s failure to timely file a return. Is this documented elsewhere?

The state's rounding rule requires that state and local taxes be aggregated. The Agreement provides that the state "shall allow" the rounding rule to be applied to aggregated state and local taxes.

In Section 330, paragraph C.2, change the "Yes" to "N/A" and delete the citations.

**Rhode Island:**

In Section 314, paragraph D should be marked N/A and the citation deleted. The citation for ancillary services (paragraph F) should be SU 09-129 and the statute deleted.

In Section 318, paragraphs A and B1 and Section 319, paragraph A1, the following citation should be added: 44-19-10.

In Section 319, paragraph A2 should be marked N/A as the state does not require more than one remittance.

In Section 319, paragraph C, the following citation should be added: EFT 09-01

In Section 502, the state answered "yes" to all questions but gave no citation. These questions relate to relief from liability.

In Sections 313 (Direct Mail Sourcing), Section 318 (Uniform Tax Returns), paragraphs D and F, and Section 331 (Relief from Liability for Purchasers), the citation given is the statute that adopts the Streamlined Sales Tax Agreement and gives the tax administrator the authority to promulgate rules and regulations. These sections are in Article III. The statute has not been updated for the provisions noted. The statute reads:

Rhode Island adopts the Streamlined Sales And Use Tax Agreement as created on November 12, 2002 and amended, by the member states of the Streamlined Sales Tax Project. The entire Agreement is adopted by reference with the exception of articles III, IV and VI which are adopted as set out in this chapter. The tax administrator shall promulgate rules and regulations necessary to be in compliance with the provisions of this Agreement.

**Vermont:**

Although some of the relief-from-liability provisions found in the Agreement are in the regulations, the following are not: 1) purchaser relief from liability (s. 331); 2) relief from liability when relying on the certification of software (s. 502). This was an issue last year and the state indicated that a policy statement was posted on their website. The policy statement could not be located.

The following citations are needed on the taxability matrix: Telecommunications nonrecurring charges- 32 V.S.A. 9701(4)(b)(vi); Digital audio visual works, digital audio works and digital

books sold to an end user with rights for permanent use – 32 V.S.A. 9771(8); Directory assistance – 32 V.S.A. 9771(6); International, Interstate and Intrastate private communications service, value-added non-voice data service, paging service and coin-operated telephone service – 32 V.S.A. 9771(5).

The statute taxes “specified digital products transferred electronically to an end user.” The taxability matrix and the certificate of compliance indicate that these products are taxable whether or not they are sold with the rights of use less than permanent or conditioned on continued payment. In the Agreement, it is presumed that specified digital products are sold to an end user with rights for permanent use unless the statute specifically imposes tax on less than permanent use or conditioned on continued payments.

The following citations are needed or need to be changed on the certificate of compliance: Section 303, question 2 – Reg. 1.9707(1)(B)(3); question 4 – Reg. 1.9707(1)(B)(5) should be 1.9707(1)(C)(5); Section 305, paragraphs A, B and C – Reg. 1.138(a)(2) A, B and C, respectively; Section 317, question 1 – Reg. 1.9745-1(A)(3) should be 1.9745-1(A)(1) and 32 V.S.A. 9745 added; question 3 – Reg. 1.9745-1(A)(5) should be 9701-1(A)(3); question 6 – Reg. 1.9745-1(A)(6) should be 1.9745-1(A)(5); Section 318, paragraph B.1. – 32 V.S.A. 9775; paragraph C.3.c. – Reg. 1.9775(B) and the “No” changed to “Yes”; Section 319, paragraph A1. – Reg. 1-9776; Section 321, paragraphs F, G and H, - Reg. 1.9707(3)(C), (3)(D) and (3)(E), respectively, should be changed to Reg. 1.9707(3)(D), (3)(E) and (3)(F), respectively; Section 332, paragraph A – 32 V.S.A. 9701(7), 9701(19); paragraph D1. – 32 V.S.A. 9771(8); Section 404, question 1, - Reg. 9707(1)(B)(5) should be 9707(1)(C)(5).

The definition of “prepaid wireless calling service” in Reg. 1.9771(5)-1(A)(6) says “sold in predetermined units of dollars” instead of “predetermined units or dollars.”

In Section 307, the second question should be changed to N/A since the answer to paragraph H in Section 305 was No. In Section 333, the “Yes” should be changed to “No.”

In Section 318, paragraph F is marked “Yes” for the provision requiring a state to give sellers that have no legal requirement to register in the state 30 days notice prior to establishing a liability for taxes based solely on the seller’s failure to file a return. No citation is given. Is this position documented elsewhere?

In Section 324, the rounding rule in the statute does not address allowing the rule to be applied to aggregated state and local taxes.

The regulation cited in Section 329 for effective dates of rate changes for services covering a period starting before or ending after the statutory effective date is for “effective date of rate changes for Streamlined Sales Tax Registrants and Sellers that bill charges subsequent to the

time of sale.” The Agreement provision is for services billed both before and after they are provided.

### **Washington:**

The following citations are needed for digital products on the taxability matrix: RCW 82.04.050(2)(g) and (8), 82.04.190(11), 82.08.010(1), and 82.12.020(1)(e).

On the taxability matrix, the local service exemption should indicate that it applies to residential service only.

The following citations are needed on the certificate of compliance: Section 302, second question – 82.14.070; Section 330, paragraph A – 82.08.195; Section 330, paragraph D – WAC 458-20-15501

The state’s rounding rule requires that state and local taxes be aggregated. The Agreement provides that the state “shall allow” the rounding rule to be applied to aggregated state and local taxes.

In Sections 318, paragraphs D (sellers who do not expect to have sales in the state) and F (30 day notice if failed to file a return) are marked yes but no citation is given. Are these positions documented elsewhere?

### **West Virginia:**

Under Section 302, the questions about different tax bases for state and local taxes with respect to fuels and motor vehicles, aircraft, etc. are marked no. The statutes at 11-15B-34(b) indicate that the base is the same except in these two areas.

The following citations on the Certificate of Compliance need to be corrected: Section 313, last question should be 11-15B-17(b); Section 318, paragraph D should be 11-15B-25(d); Section 403, paragraph A should be 11-15B-2(b)(31), paragraph B should be 11-15B-2(b)(32) and paragraph C should be 11-15B-2(b)(33); Section 404, first question should be 11-15B-11(d); prewritten computer software should be 11-15B-2(b)(39); tobacco should be 11-15B-2(b)(62); prescription should be 11-15B-2(b)(38); ancillary services should be 11-15B-20(2).

Under Section 324, the rounding rule does not contain the provision allowing the aggregation of state and local taxes (no local taxes are currently imposed, but will be effective 10/1/11).

Section 330 indicates that the bundling rule for transactions that include telecommunications services, ancillary service, internet access or audio or video programming service is being followed. The only citation is for an administrative notice that contains the bundling definition but not this rule.

The following citations need to be added or corrected on the taxability matrix: non-prewritten computer software (plus delivered electronically and by load and leave), add 11-15-3(a); prepared food, add 11-15-3B; over-the-counter drugs for animal use with a prescription should be 11-15B-2(b)(34) instead of 11-15B-2(b)(15); and prepaid wireless calling service (international, interstate and intrastate) add 11-15-2(b)(13) and 11-15-3(a).

The taxability matrix indicates that over-the-counter drugs for human use with a prescription are exempt and that grooming and hygiene products for human use are taxable. The definition of over-the-counter drugs does not exclude grooming hygiene products.