Business Advisory Council Compliance Subcommittee Report

To: Compliance Review and Interpretations Committee

From: BAC Compliance Subcommittee

Re: Preliminary report on 2011 Annual Recertification - First Group of States

Date: September 23, 2011

The Business Advisory Council (“BAC”) Compliance Subcommittee appreciates the thorough review the Governing Board staff (Scott Peterson and Pam Cook) conducted regarding the member states’ substantial compliance with each requirement of the Streamlined Sales and Use Tax Agreement (“SSUTA”). The BAC is grateful for the Governing Board’s continued commitment to self-police its member states’ compliance with the SSUTA.

Below is the list of compliance concerns the BAC would like to raise with the first grouping of states. Issues already addressed in the report issued by the Governing Board’s staff are not included (i.e., duplicated) in this report.

Arkansas

Sales Price Definition & Installation Charges - The “sales price” definition allows a state to toggle the taxability of installation charges on or off as part of the state’s “sales price” definition. This toggle is only applicable to separately stated installation charges on an invoice. Arkansas separately imposes a sales tax on certain installation services outside of its “sales price” definition (see A.C.A. § 26-52-301(3)(B)). While the limitations in § 327 of the SSUTA do not generally apply to definitions in Part I of the Library of Definitions (e.g., where the “sales price” definition is located), § 327 of the SSUTA also begins with the following qualifier: “Except as provided in Sections 316 and 332 and the Library of Definitions.” This introductory clause prohibits a state from using a definition inconsistent with its intended application. The toggle for installation charges under paragraph (E) of the “sales price” definition does not allow Arkansas to exclude installation services from its “sales price” definition and at the same time still tax installation charges as a separate service.

Kansas

“Lease or Rental” Definition - Kansas’ statutory provision for the “lease or rental” definition (K.S.A. § 79-3602) complies with the SSUTA’s definition. However, regulation K.A.R. 92-19-3a has conflicting terms on what constitutes a “financing lease.” Subsection (a)(6) of the regulation specifies that a lessor is presumed to have a financing lease if the lease is a financing agreement for federal income tax purposes. In contrast, subsection (i)(1) of the regulation in addressing a “financing lease” ignores such characterization and appears to comply with the SSUTA definition. This regulation should be amended to remove this conflict.

Kentucky

No additional issues.
Minnesota

No additional issues.

Nebraska

The BAC seeks confirmation that Nebraska’s tax on electronic mailing and prospect lists, per § 332.D.2 and D.4 of the SSUTA, are only imposed on an end user having a permanent use of such lists not conditioned on continued payments.

Nevada

No additional issues.

North Dakota

No additional issues.

Oklahoma

Sales Price Definition & Installation Charges - The “sales price” definition allows a state to toggle the taxability of installation charges on or off as part of the state’s “sales price” definition. This toggle is only applicable to separately stated installation charges on an invoice. Oklahoma separately imposes a sales tax on the installation of telecommunications equipment (see OAC 710:65-19-329) outside of its “sales price” definition (see 68 O.S. § 1352(12)). While the limitations in § 327 of the SSUTA do not generally apply to definitions in Part I of the Library of Definitions (e.g., where the “sales price” definition is located), § 327 of the SSUTA also begins with the following qualifier: “Except as provided in Sections 316 and 332 and the Library of Definitions.” This introductory clause prohibits a state from using a definition inconsistent with its intended application. The toggle for installation charges under paragraph (E) of the “sales price” definition does not allow Oklahoma to exclude installation services from its “sales price” definition and at the same time still tax installation charges for telecommunications equipment as a separate service.

Rhode Island

No additional issues.

Vermont

Access to Prewritten Software - Vermont Department of Taxes has issued Technical Bulletin TB-54 that states prewritten software that is licensed for use and available from a remote server is taxable. Vermont’s attempt to tax access to prewritten software (and any associated hardware)
from a customer merely accessing the prewritten software that is not delivered (i.e., downloaded) to the customer as a sale of “tangible personal property” is not compliant with the SSUTA. While the definition of “tangible personal property” specifically includes “prewritten software,” § 333 of the SSUTA excludes computer software, which prewritten software is a component of, from the term “products transferred electronically.” This is an important distinction because, as pointed out in Rule 332.2.B.4, the term “transferred electronically” is broader than the term “delivered electronically” that is used in computer related definitions. That rule specifies that just accessing a product can be considered something “transferred electronically;” however, this provision cannot apply to prewritten software because § 333 of the SSUTA excludes it from being a product “transferred electronically.” It also, logically, does not fit in as tangible personal property based on the SSUTA sourcing provisions for tangible personal property. When prewritten software is only accessed by a purchaser, there is no “[t]aking possession of the tangible personal property” as specified § 311.A of the SSUTA (defining when something is “received”). Further, if it is found that Vermont can tax access to prewritten software based on it being “transferred electronically,” the requirements in § 332.D of the SSUTA must be met. Absent Vermont having a law (i.e., statute), the tax on such software only reaches transactions where the purchaser: 1) has a right of permanent use, 2) has no obligation to make continued payments and 3) is an end user. Accordingly, while Vermont may choose to tax access to prewritten software by specifically imposing a tax on the sale of such product, Vermont cannot do it via the SSUTA’s definition of tangible personal property and remain compliant with the SSUTA.

**Washington**

No additional issues.

**West Virginia**

*Central Administration (§ 301) and Uniform Returns and Remittances (§§ 318 & 319)* - The BAC presently takes no position on sales/use tax payments that may be made to a department of motor vehicles (or similar agency) to obtain/transfer a title to a motor vehicle. The BAC, however, does take issue with West Virginia requiring motor vehicle lease payments to be made to the West Virginia Division of Motor Vehicles. See W.V.C. § 11-15-3c(f)(10). This requirement does not conform to the single entity requirement in § 301 of the SSUTA and it does not comply with the uniform return and remittance provisions in §§ 318 and 319 of the SSUTA.

“*Lease or Rental*” Definition - West Virginia’s statutory provision for the “lease or rental” definition (W. Va. Code § 11-15B-2(b)(28)) complies with the SSUTA’s definition. However, regulation W. Va. C.S.R. § 110-15-129 has conflicting terms on what constitutes a “financing lease.” Subsection 129.2.1.2.a and b of the regulation presume a lease is a “financing lease” (a lease treated as a “sale” rather than a “lease”) if the lease term constitutes 75% or more of the property’s economic life or the residual value is less than 10% of the fair market value of the property at the beginning of the lease. This is not compliant with the SSUTA’s provision that only looks at the price paid to transfer the leased property at the end of the lease. It is not a lease if the payment does not exceed the greater of $100 or 1% of the total required lease payments. This regulation should be amended to remove this conflict.