



## State of Utah

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October 2, 2013

Mr. Craig Johnson  
Executive Director  
Streamlined Sales Tax Governing Board, Inc.  
100 Majestic Drive, Suite 400  
Westby, WI 54667

Mr. Johnson:

This letter is Utah's response to the potential compliance issues noted in the report detailing issues that may affect Utah's compliance with the requirements of the Streamlined Sales and Use Tax Agreement or the proper completion of the Certificate of Compliance or Taxability Matrix. Our responses are as follows.

### **Report Issue 1: Taxability Matrix Change**

Kidney dialysis equipment, not for home use, with a prescription - add 59-12-103(1).

Response: We have amended our taxability matrix to include the recommended change.

### **Report Issue 2: Certificate of Compliance Changes**

Section 318, paragraph D – change “yes” to “no” (question now reads “does the state require”).  
Section 332, paragraphs D1, D2 and D3 - should "N/A" be changed to "No" and 59-12-103 be added?

Response:

Section 318, paragraph D -- We have amended our certificate of compliance to include the recommended change.

Section 332, paragraphs DI, D2 and D3 -- We believe that the N/A in these sections is the correct response. Our statute does not impose a tax on specified digital products, but on products transferred electronically (59-12-103(1)(m)). 2013 legislation added the terms "digital audio work," "digital audio-visual work," and "digital book" to clarify that the sales tax exemption enacted in 2013 for amounts paid or charged to access a database did not include amounts paid or charged for specified digital products.

## **BAC Issue: Access to Prewritten Computer Software**

Utah sales and use tax statutes define “tangible personal property” as including “prewritten computer software, regardless of the manner in which the prewritten computer software is transferred.” (Emphasis added.) In addition, Utah’s has special sourcing provisions applicable to computer software that apply where “a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser” that conflict with Sections 311.A and 310.A.2 and A.3 of the agreement. The BAC believes Utah’s statutory scheme imposes tax on 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]making possession of the tangible personal property” as specified § 311.A of the SSUTA (defining when something is “received”). Further, if it is found that Utah can tax access to prewritten software based on it being “transferred electronically,” the requirements in § 332.D of the SSUTA must be met. Absent Utah 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 Utah may choose to tax access to prewritten software by specifically imposing a tax on the sale of such product, Utah cannot do it via the SSUTA’s definition of tangible personal property and remain compliant with the SSUTA.

### Response:

We continue to disagree with BAC’s conclusions and note that this issue has been referred to SLAC to develop some proposals to deal with this area. Accordingly, we understand this issue will not be resolved by CRIC or the Governing Board on a state-by-state basis, but will be addressed globally for all affected states. In addition, we would like to make the following points:

#### (1) Concern:

- a. *The BAC believes Utah’s statutory scheme imposes tax on 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.*

- b. Response: The Agreement nowhere precludes a state from taxing “mere access” to prewritten software. The Agreement defines “Retail sale” but it does not define “sale.” Thus Utah’s definition, which includes the transfer of “any right to possession, operation, or use of any article of tangible personal property” is not inconsistent with the Agreement. See Utah Code Ann. §59-12-102(108)(b). If the transaction is deemed a service, the Customer makes first use of the service in Utah. See SSUTA §311.B. If the transaction is deemed one for digital goods, the Customer still makes first use of the goods in Utah. See SSUTA §311.C.

(2) Concern:

- a. *Absent Utah 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.*
- b. Response: Utah law specifically provides that that tax can be imposed “regardless of whether the sale provides: (A) a right to permanent use of the product; or (B) a right to use a product that is less than a permanent right . . .” Utah Code Ann. §59-12-103(1)(m). See also §59-12-211(12)(a) which explicitly recognizes the taxability of the use of computer software where “there is not a transfer of a copy of that software to the purchaser.”

Also enclosed are the updated 2013 Certificate of Compliance and the updated 2013 Taxability Matrix. These documents have been posted to our website: [www.tax.utah.gov](http://www.tax.utah.gov).

Please let us know if you have any questions or concerns.

Respectfully



R. Bruce Johnson  
Commission Chair