

To: Delegate John Doyle, President
Streamlined Sales Tax Governing Board

From: Myles Vosberg, Chairman
Compliance Review and Interpretations Committee

Subject: 2009 Compliance Review

Pursuant to Rule 905 of the Streamlined Sales and Use Tax Governing Board rules, the Compliance Review and Interpretations Committee (CRIC) completed its annual recertification review of member states. CRIC with assistance from Governing Board staff reviewed member states' compliance with the provisions of the Streamlined Sales and Use Tax Agreement (Agreement) following each state's submission of an updated certificate of compliance and taxability matrix. Emphasis was placed on reviewing items that states were required to enact since the 2008 compliance reviews or since the subsequent entry of new states. In addition, the Governing Board staff selected Kentucky for a detailed review of compliance with every section of the Agreement.

Governing Board staff made an initial review of the certificates of compliance and identified possible areas of noncompliance with the Agreement. CRIC created a thirty day comment period for states and the public to comment on the issues identified or to submit new items of concern. All written comments submitted are attached as part of this report. Member states were given an additional 15 days to respond to public comment. During a series of teleconference meetings, CRIC discussed the outstanding issues and took a public vote on whether each state was or was not out-of-compliance pursuant to Section 805 of the Agreement. Before each vote, the member state under review and the public were given the opportunity to comment.

During the review process, five issues came up in more than one state. Because they were either new or there was disagreement on how to apply the issues they need to be discussed by all the member states before CRIC can consider them when determining a state's compliance with the Agreement. These issues include:

1. Does an exemption for regulatory fees, surcharges and taxes imposed on the seller conflict with the Agreement's definition of "sales price"? This issue was referred to the State and Local Advisory Council (SLAC) by the Governing Board in September, 2009.

2. Does an exemption for one-way paging conflict with the Agreement's definition of "paging"? This issue was referred to SLAC by the Governing Board in September, 2009.

3. Does Section 310 sourcing apply to the sourcing of digital goods that are transferred electronically without the download of the product? This issue was referred to SLAC by the Governing Board in September, 2009.

CI09056
12/4/09

4. If a state has an exemption certificate that requests information not included in the Streamlined exemption certificate may that state not provide liability relief if a seller only collects the information required on the Streamlined exemption certificate? This issue has not been referred to SLAC.

5. Is a state required to have in law the liability relief required in Section 304, or is it only necessary that a state provide the liability relief if they change their tax rate without providing at least 30 days notice as required in Section 304? This provision is in effect, but no state can be sanctioned until January 1, 2011 as provided in Section 809. Most states have not enacted this into law.

The remainder of this report is a summary of the action taken for each member state. Because of their special associate state status, Ohio and Utah were not required to submit a revised certificate of compliance and are not included in the review. A pending second vote in December 2009 on an amendment addressing the types of membership in the Agreement impacts Tennessee. Because that amendment has not been adopted, Tennessee is not included in this review. The following summary includes the potential issues of non-compliance that were raised and if a finding of non-compliance was made, the item or items that resulted in that finding.

As chair of the committee, I would like to express my appreciation for the work of the committee members and the staff of the Governing Board in this important task. I would also like to thank the representatives of the states that worked with the committee and staff and the members of the public that provided input.

State Action:

Arkansas

Finding: Not out-of-compliance

Vote: 4-0; Peters, VanDevender, Vosberg, and Wilkie

Issues Raised:

None

Indiana

Finding: Out-of-compliance

Vote: 4-0; Atchley, Peters, Vosberg and Wilkie

Issues Raised:

- No provision relieving sellers and CSPs from liability for errors in the taxability matrix.
- Tax imposed under a bracket system.
- The taxability matrix indicates that “telecommunications nonrecurring charges” are exempt and services necessary to complete the sale are taxable. However, the statute does not specifically define or exempt “telecommunications nonrecurring charges.”

- The statutes do not define “digital codes” and do not provide a rule for their treatment. “Dietary supplements” are excluded from the exemption for “food and food ingredients” but are not excluded from the definition of “food or food ingredients.”
- The taxability matrix indicates that “mobility enhancing equipment” is exempt but the statute does not list it in the medical equipment and supplies exemption.

Basis of Finding:

The committee found that Indiana was not substantially in compliance with each requirement of the Agreement because of the issues above.

Indiana Response:

Indiana has drafted legislation which addresses all of these issues. The legislation will be introduced in the 2010 legislative session.

Iowa

Finding: Out-of-compliance

Vote: 6-0; Atchley, Mastin, Peters, VanDevender, Vosberg, and Wilkie

Issues Raised:

- The provisions for bundling are included in the state’s definition of “sales price”. (Carry over from 2008 review.)
- The Business Advisory Council (BAC) raised the issue of the state’s provisions for sourcing of services based on where the services are performed given that Iowa is a destination sourcing state.

Basis of Finding:

The committee found that Iowa was not substantially in compliance with each requirement of the Agreement since the sales price definition was not in conformity with the Agreement. The committee did not consider the sourcing of services issue as it is being addressed by SLAC as they develop a rule for sourcing services.

Iowa Response:

Iowa has drafted legislation to address the “sales price” issue. The legislation will be introduced during the 2010 legislative session

Kansas

Finding: Not out-of-compliance

Vote: 6-0; Atchley, Mastin, Vosberg, Kenley, Peters and Wicks

Issue Raised:

The BAC raised an issue relating to exemption certificates on whether the additional information requested on the state form is required and whether the Streamlined exemption certificate is sufficient to document an exemption.

Basis of Finding:

The committee found that Kansas was not substantially out-of-compliance with any requirement of the Agreement after the state clarified that the additional information requested on the state exemption form is voluntary and that the use of the Streamlined form has been accepted for use in the state. Kansas also changed its Publication KS - 1520 to include this information.

Kentucky

Finding: Not out-of-compliance

Vote: 6-0, Atchley, Mastin, Vosberg; Kenley, Peters, and Wicks

Issues Raised:

- Digital goods are sourced to place of primary use.
- The provision for when a cause of action against a seller accrues does not specify that the notification to the seller has to be in writing.
- The state exempts “rate increases” for school tax and any other taxes and surcharges imposed on the provider relating to telecommunications service.
- The BAC questioned whether using the state exemption certificate satisfies the good faith requirement in the statutes and if the additional information requested on the form is required.
- The BAC indicated that the 120 day period for providing a certificate or information substantiating an exemption was not in the statutes or rules.

Basis of Finding:

The committee found that Kentucky was substantially not out-of-compliance with any requirement of the Agreement after the state clarified that Section 310 was used in sourcing digital goods and that the state allows longer than the 120 day period allowed by the Agreement. The state agreed to put these positions in writing. The issues of sourcing digital products to place of primary use when the product is not downloaded, the exemption for “rate increases” for school tax and other taxes and surcharges and whether additional information requested on the state exemption certificate is required were not considered.

Michigan

Finding: Not out-of-compliance

Vote: 5-0; Atchley, Peters, VanDevender, Wilkie and Vosberg

Issues Raised:

- The statute for taxing interstate telecommunications excludes one-way paging service. “Paging service” as defined by the Agreement includes both one-way and two-way paging service.
- The bundling definition and rules only apply to transactions including telecommunications services, ancillary services, Internet access or audio or visual programming services.
- The state does not have a provision allowing sellers and CSPs 10 days to correct errors as provided in section 502E of the Agreement.

Basis of Finding:

The committee found that Michigan was not substantially out-of-compliance with any requirement of the Agreement since legislation addressing the 10 day rule has passed and been signed into law. The committee did not address the one-way paging issue as that issue has been referred to SLAC. The state explained that there isn't an issue with bundling because they have long followed a Michigan Supreme Court ruling which treats mixed transactions that meet the bundling definition in the same manner as the Agreement. To clarify the treatment of such transactions, the state will put this in writing and promulgate a rule.

Minnesota

Finding: Not out-of-compliance

Vote: 4-0; Atchley, Peters, VanDevender and Vosberg

Issue Raised:

- The taxability matrix indicates that “digital audio works” are not taxable, but that “ringtones” are. “Digital audio works” is a product definition that includes ringtones. The “specified digital goods” provisions are effective January 1, 2010.

Basis of Finding:

The committee found that Minnesota was not substantially out-of-compliance with any requirement of the Agreement. The committee noted that the state would not be in compliance with the Agreement on this issue effective January 1, 2010. However, for purposes of the 2009 review, the state was in compliance.

Minnesota Response:

Minnesota indicated that legislation will be introduced in the 2010 legislative session to address this issue.

Nebraska

Finding: Not out-of-compliance

Vote: 6-0; Atchley, Mastin, Peters, VanDevender, Vosberg, and Wilkie

Issues Raised:

- The rule for telecommunications services is out-of-date and uses terms not in the “Agreement.” Also, the rule indicates that telecommunications taxes and surcharges which are normally imposed on the seller are exempt.
- The BAC raised an issue with respect to exemption certificate requirements. The state certificates require more information than what is required on the Streamlined certificate. The BAC also could not find anything that addressed the 90 and 120 day provisions with respect to obtaining exemption certificates or information.

Basis of Finding:

The committee found that the state was not substantially out-of-compliance with any requirement of the Agreement based on the state's responses to the issues. The state

indicated that the statute regarding telecommunications taxation was updated last session to use the terms “intrastate telecommunications service” and “ancillary service” as defined in the Agreement. The state indicated that taxes and surcharges on telecommunications services are imposed on the purchaser in Nebraska. The state does not require the additional information on the state exemption certificates and would accept certificates without it. The department indicated that it would amend the regulation to clarify this treatment. The department provided a citation for the rule covering the 90 and 120 day provisions.

Nevada

Finding: Not out-of-compliance

Vote: 5-0, Wilkie, Peters, VanDevender, Mastin, and Vosberg

Issues Raised:

- The state has not fully implemented ACH credit payments.
- Issues raised by BAC in its petition for resolution dated July 13, 2009 still existed although there was a rules hearing scheduled.

Basis of Finding:

The committee found the state was not substantially out-of-compliance with any requirement of the Agreement as the hearing on the proposed regulations covering the issues raised by BAC had been held and the regulations were adopted. Although the regulations would go to a legislative committee, the state indicated they would be approved. The regulations have been filed with the Secretary of State and are in effect. The state is working to implement ACH credit payments but has had budget issues that have delayed full implementation.

New Jersey

Finding: Not out-of-compliance

Vote: 6-0; Atchley, Mastin, Peters, VanDevender, Vosberg, and Wilkie

Issue Raised:

- The state taxes “digital products” which it defined as “electronically delivered music, ringtones, movies, books, audio and video works and similar products.” The “specified digital property” definitions are not used.

Basis of Finding:

The committee found that the state was not substantially out-of-compliance with any requirement of the Agreement based on the position that although the state only taxes items that would fall in the definitions of “specified digital property” they do not need to use those definitions since the state taxes products delivered electronically as allowed by section 332 of the Agreement.

North Carolina

Finding: Not out-of-compliance

Vote: 4-0, Wilkie, Vosberg, Peters, and VanDevender

Issues Raised:

- The statute taxes prepaid telephone calling service which is defined to include “prepaid wireline calling service” and “prepaid wireless calling service.” There is no definition in the statute for “prepaid calling service” which the Agreement defines in such a manner that it includes both wireline and wireless service. There is no definition in the Agreement for “prepaid wireline calling service.”
- The statute exempts pay telephone service but does not define it. There is a definition in the Agreement.
- The statute cited for providing relief from liability from errors in the taxability matrix for sellers and CSPs (section 328) and purchasers (section 331) only relates to errors in information on rates, boundaries and taxing jurisdiction assignments.
- The BAC raised two issues related to exemption certificates: (1) the 90 and 120 day time periods for sellers to obtain exemption certificates are not in the statutes (but compliance with section 317 is referenced in the instructions to the state form), and (2) exemption certificates for over-the-counter sales are limited to sales of property typically sold by the type of business stated on the certificate.

Basis of Finding:

The committee found that the state was not out-of-compliance with any requirement of the Agreement based on the state’s responses to the issues. The state pointed out that prepaid services are sourced in accordance with the Agreement and that the statute will be amended in the 2010 session to delete the word “wireline.” The state pointed out that the Streamlined definition of pay telephone is in a technical bulletin. The state provided an administrative provision in the statute that provides relief from liability for errors caused by written advice or information provided by the state and stated this provision covers errors in the taxability matrix. The state indicated that exemption certificates are administered in accordance with the Agreement and that the statute would be amended in the 2010 session. The state issued a technical bulletin to clarify this treatment.

North Dakota

Finding: Not out-of-compliance

Vote: 5-0; Wicks, Atchley, Mastin, Peters, and Molnar

Issues Raised:

- It was noted during the last review that North Dakota omitted enacting a definition of prepaid calling services. The state confirmed that these services were being administered consistent with the Agreement under a different term and the rule on telecommunications services would be amended to include this item. The rule has not been amended.
- The state taxes communication service which is defined to include telecommunications service. Under the statute one-way communications services are not taxable. This means that one-way paging services are not taxable. The Agreement defines “paging service” which includes one-way and two-way paging.

Basis of Finding:

The committee found that North Dakota was not substantially out-of-compliance with any requirement of the Agreement after the state pointed out that “prepaid calling services” were defined in another chapter of the statutes. The state will send a letter that provides the information on that chapter and to substantiate that that chapter applies to sales and use taxes. The one-way communication service issue was not considered.

Oklahoma

Finding: Not out-of-compliance

Vote: 5-0; Wicks, Atchley, Vosberg, Kenley, and Peters

Issues Raised:

- There is no provision for sourcing of ancillary services.
- The rule for telecommunications services excludes from taxation “Regulatory assessments and charges, including charges to fund the Oklahoma Universal Service Fund, the Oklahoma Lifeline Fund and the Oklahoma High Cost Fund”.

Basis of Finding:

The committee found that Oklahoma was not substantially out-of-compliance with any requirement of the Agreement as the state had passed an emergency rule to provide for sourcing of ancillary services. The issue of regulatory assessments and other charges being exempt was not considered.

Rhode Island

Finding: Not out-of-compliance

Vote: 6-0; Mastin, Wicks, Vosberg, Peters, Atchley, and Molnar

Issues Raised:

- Rules for the sourcing of ancillary services have not been promulgated. This was an issue during the last review.

Basis of Finding:

The committee found that Rhode Island was not substantially out-of-compliance with any requirement in the Agreement as the state has had hearings on the rule and it goes into effect on January 1, 2010. The state confirmed in writing that it would source these services consistent with the Agreement.

South Dakota

Finding: Not out-of-compliance

Vote: 5-0; Wicks, Atchley, Vosberg, Mastin, and Molnar

Issues Raised:

- When moving the telecommunications definitions from the rule to the statutes, the definition for conference bridging service was not included.

- The statutes require information on the exemption certificate that is not a required data element on the Streamlined exemption certificate.

Basis of Finding:

The committee found that South Dakota was not substantially out-of-compliance with any requirement of the Agreement as the state taxes all ancillary services and conference bridging is an ancillary service. The state said that while their statute required more data than is allowed on the Streamlined exemption certificate issue, the state's certificate does not request the additional information. There will be legislation to delete these requirements from the statute in the next session.

Vermont

Finding: Not out of compliance

Vote: 6-0, Peters, Atchley, Wilkie, Vosberg, VanDevender, and Mastin

Issues Raised:

- On the Certificate of Compliance, the response in section 310.1, Election for Origin-Based Sourcing still indicates "yes". The statute provides for destination sourcing.
- Under section 314, a regulation is cited for sourcing prepaid wireless calling service, but the current regulation does not address it. This was an issue last year and the state has indicated that a regulation is being promulgated.
- Under section 314, the regulation cited for sourcing ancillary services defines "receive" and "receipt". It does not address ancillary services. No other regulation sourcing ancillary services was identified.
- The regulation section cited for treatment of software maintenance contracts deals with bundles including telecommunications services, ancillary services, Internet access or audio or video programming services. The bundling regulations do not address software maintenance contracts.
- The definition in the statute of "delivery charges" includes the following: Direct mail charges that are separately stated on an invoice or similar billing document given to the purchaser are excluded from the definition of "delivery charges". The Taxability Matrix indicates direct mail delivery charges are taxable.

Basis of Finding:

The committee found that Vermont was not substantially out of compliance with any requirement of the Agreement based on the state's responses to the issues. The errors in the Certificate of Compliance (origin based sourcing) and taxability matrix have been corrected. Regulations dealing with the sourcing of prepaid wireless calling service and ancillary services and with treatment of software maintenance contracts are in the promulgation process and will be effective early next year. Notices have been posted to the state's website to clarify the sourcing of prepaid wireless calling service and ancillary services. Vermont indicated on its website that the sourcing of these services would be in accordance with the Agreement.

Washington

Finding: Not out of compliance

Vote: 6-0, Peters, Atchley, Wilkie, Vosberg, VanDevender, and Mastin

Issues Raised:

- The statute sourcing prepaid calling and prepaid wireless calling services only refers to prepaid calling service in the rules for receipt at the seller's place of business and for receipt at the location delivered to the customer.
- The BAC raised an issue regarding whether the state accepts the Streamlined exemption certificates in lieu of the new state reseller permit.
- Public comment submitted by Mr. Timothy Gillis asserts that the newly enacted exemption for pay-per-view service sold by providers who pay a franchise fee conflicts with Section 316C of the Agreement.

Basis of Finding:

The committee found that Washington was not substantially out of compliance with any requirement of the Agreement. Washington pointed out that the state sources prepaid wireless calling service in accordance with the Agreement and posted a special notice on its website providing information on the sourcing of prepaid wireless calling service. Legislation is being drafted to make this clear in the statutes. Washington made it clear that all sellers are allowed to accept the Streamlined certificate in lieu of reseller permits and that the state accepts either the data elements or the certificate. With respect to the exemption for pay-per-view sold by providers who pay a franchise fee, the exemption is an entity based exemption that complies with Section 316 C (3).

West Virginia

Finding: Not out of compliance

Vote: 6-0, Peters, Atchley, Wilkie, Vosberg, VanDevender, and Mastin

Issues Raised:

- Statutes providing relief from liability for sellers and CSPs relying on incorrect information on rates, boundaries and taxing jurisdiction assignments limits the relief to sellers and CSPs that are registered under the Agreement. This was an issue last year and the state indicated that the statute would be changed.
- The Certificate of Compliance cites the same section of the statute for relief from liability for relying on erroneous information in the taxability matrix. That section of the statute does not include the taxability matrix.
- Errors and omissions of statute/regulations were found on the Certificate of Compliance and Taxability Matrix. The Taxability Matrix also had errors relating to the taxation of prepaid calling service and prepaid wireless calling service.
- The statute does not define "delivered electronically." Instead it defines "delivered" using the definition in the Agreement for "delivered electronically."

Basis of Finding:

The committee found that West Virginia was not substantially out of compliance with any requirement of the Agreement. West Virginia posted administrative notices

CI09056

12/4/09

clarifying the relief from liability issues on its website. The Certificate of Compliance and Taxability Matrix have been corrected. The omission of “electronically” from the term “delivered electronically” will be remedied by a technical correction in legislation during the next legislative session.

Wisconsin

Finding: Not out-of-compliance

Vote: 5-0, Atchley, Peters, VanDevender, Vosberg, and Wilkie

Issues Raised:

- The BAC raised the issue that the state defined video games as a digital product when the BAC believes that video games are prewritten computer software.

Basis of Finding:

The committee found that Wisconsin is not substantially out-of-compliance with each requirement of the Agreement after the state explained that video games that meet the definition of “prewritten computer software” would be considered as such and that other video games would be considered digital products.

Wyoming

Finding: Not out of compliance

Vote: 6-0, Peters, Atchley, Wilkie, Vosberg, VanDevender, and Mastin

Issues Raised:

- There is no provision for sourcing of ancillary services.
- The statute cited for sourcing of prepaid wireless calling service only addresses prepaid calling service. There is no provision for sourcing prepaid wireless calling service.
- The taxability matrix shows delivery charges for transportation, shipping, postage and similar charges and for direct mail as not included in the definition of sales price. The definitions for sales price and delivery charges in the statutes include such items.
- The statute exempts the sale of the service of transmitting radio waves to a one-way paging unit.

Basis of Finding:

The committee found that Wyoming was not substantially out of compliance with any requirement of the Agreement because the state indicated that sourcing of ancillary services and prepaid wireless calling services is in accordance with the Agreement. Wyoming a posted policy statement clarifying the sourcing of these services to its website and is drafting legislation to clarify it in the statutes. The state pointed out that although the definition of “sales price” includes delivery charges, there is a specific exemption for transportation charges elsewhere in the statutes. The one-way paging issue was not considered