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Governor

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DEPARTMENT OF REVENUE  
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May 4, 2011

Mr. Bruce Johnson  
Chairman, Issue Resolution Committee  
Streamlined Sales Tax Governing Board

**RE: Nebraska's Response to [Business Advisory Council's February 11, 2011, Petition that it is not in Substantial Compliance with Sections 332 and 333 of the Streamlined Sales and Use Tax Agreement](#)**

Dear Chairman Johnson:

On behalf of the State of Nebraska, I would like to thank you and the other members of the Issue Resolution Committee members for reviewing Nebraska's response to the Business Advisory Council's (Petitioner) repeated claim to find Nebraska out of substantial compliance with the Streamlined Sales and Use Tax Agreement (Agreement).

**Issues Presented:** The Petitioner presents the following claims: (1) Nebraska is not substantially compliant with the Agreement because it includes "electronic mailing lists" in its definition of tangible personal property; and (2) by including electronic mailing lists in its definition of tangible personal property, Nebraska is imposing a substantial burden on business.

**Conclusion:** Nebraska is substantially compliant with Sections 332 and 333 of the Agreement.

**Standard of Review:** As Section 805 of the Agreement stipulates: "a state is in compliance with the Agreement if the effect of the state's laws, rules, regulations, and policies is substantially compliant with each of the requirements set forth in the Agreement." As set forth in [the Matter of the Substantial Compliance of the State of Nevada, IRC Appeal No. 2010-1](#), the Issue Resolution Committee (IRC) stated that "substantial compliance does not mean exact compliance... Thus a state may depart from the exact terms of the Agreement if it does not increase the burden on any taxpayer or the burden is *de minimus*." The burden of showing that a state is out of substantial compliance is on the Petitioner.

**Precedent:** In December of 2010, the Governing Board found Nebraska substantially compliant with Section 333 of the Agreement, with the following states voting that Nebraska was in substantial compliance with the Agreement: Arkansas, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Rhode Island, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming (Oklahoma and Washington voted that Nebraska was out of

compliance). In October of 2010, the Compliance Review and Interpretations Committee (CRIC) of the Governing Board also found Nebraska substantially compliant with Section 333 of the Agreement, with the following states voting that Nebraska was in substantial compliance with the Agreement: Arkansas, Kansas, North Dakota, and Oklahoma (South Dakota and Washington voted that Nebraska was out of compliance). It also should be pointed out that throughout the discussions and voting at both of these meetings, Nebraska's compliance with Section 333 of the Agreement had been the center of debate, and only upon receipt of the February, 2011 Petition did the Respondent and the Board become aware of the alleged compliance issue regarding Section 332 of the Agreement.

**Petitioner's Issue #1:** Nebraska is not substantially compliant with the Agreement because it includes "electronic mailing lists" in its definition of tangible personal property.

**Analysis:** Nebraska's Sales and Use Tax [REG-1-080.05](#) (2006) states: "Mailing lists and prospect lists provided in the form of labels, magnetic media, diskette, electronic or any other format are taxable." However, Nebraska statutes and regulations **do not** include electronically delivered mailing lists in its definition of tangible personal property. The Petitioner asserts at great length that Nebraska's imposition of sales tax on electronically delivered mailing lists is the result of our Supreme Court Case, *American Business Information, Inc v Egr*, 650 N.W.2d 251 (2002). However, Petitioner's argument goes beyond the scope of the IRC review and authority of the Governing Board, and is irrelevant to Nebraska's compliance with Section 333 of the Agreement. Section 333 of the Agreement only requires that a member state not include electronically delivered products (mailing lists) in its definition of tangible personal property. Petitioner has failed to demonstrate that Nebraska's definition of tangible personal property includes the term "mailing lists" and also appear to be questioning the legality of our taxation of these mailing lists.

The State of Nebraska would like to point out the distinction between administrative definitions and product definitions under the Agreement. Member States may not deviate from product definitions and rules governing these definitions. Administrative definitions do not have the same restrictions. The term "tangible personal property" is found in the administrative definitions of the Agreement and may be broadly interpreted by the states provided such products are clearly defined by the member state. [REG-1-080.05](#) clearly stipulates that all mailing lists are taxable.

The Petitioner also argues that since Nebraska responded "Yes" to Section 333 of its 2010 Certificate of Compliance (Certificate), that Nebraska must be found out of compliance based on that submission. The Certificate is not dispositive on the issue; rather the IRC must look to Nebraska statutes and regulations for an answer on this issue. A clarification to Nebraska's Certificate may only be warranted at the conclusion of these proceedings.

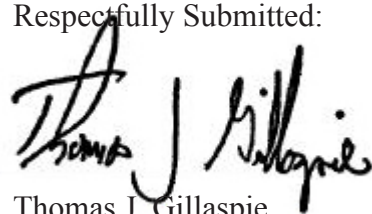
**Petitioner’s Issue #2:** Nebraska’s inclusion of electronic mailing lists with its definition of tangible personal property creates a substantial burden on business.

**Analysis:** Assuming *arguendo* that electronically delivered mailing lists were defined as tangible personal property, there is no additional burden placed on business under Section 805 of the Agreement. Since 2006, Nebraska has consistently disclosed that all mailing lists are taxable. The disclosure also includes statements on our [Certificate of Compliance](#) and in the [Taxability Matrix](#). In addition, the protections afforded to sellers and purchasers under Section 332.D of the Agreement are available to both a purchaser and a seller of electronically transferred products, including mailing lists under Nebraska law. See [Neb. Rev. Stat. § 77-2712.03\(2\)](#), which is our general language that states Nebraska will comply with all the provisions of the Agreement. Even if electronically delivered mailings lists were included in the definition of tangible personal property, Nebraska is still substantially compliant with the Agreement as the departure from the exact terms of the Agreement does not increase the burden placed on any taxpayer.

The Petitioner also asserts that Nebraska would be found substantially compliant with the Agreement if Nebraska had adopted a separate imposition statute for electronically delivered mailing lists, even though [REG-1-080.05](#) clearly stipulates that all mailing lists are taxable. A properly adopted regulation has the authority of statutory law. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763 (2009). A separate imposition statute on the matter is both unnecessary and duplicative. Additionally, the argument results in a distinction without a difference. Even if a separate statutory imposition were adopted by the State of Nebraska, the regulation would not change as [REG-1-080.05](#) clearly stipulates on its face that all mailing lists are taxable.

**Conclusion:** For the foregoing reasons, Nebraska respectfully requests that the IRC issue a finding and a recommendation to the Governing Board that Nebraska continues to be in substantial compliance with Sections 332 and 333 of the Agreement.

Respectfully Submitted:



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