A motion by Utah to amend the definition of a bundled transaction and to amend Appendix C, Library of Definitions, Part II, Product Definitions, to add a definition for software maintenance contracts.

A **"bundled transaction"** is the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. A "bundled transaction" does not include the sale of any products in which the "sales price" varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

(A)   "Distinct and identifiable products" does not include:

    1. Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides – that accompany the "retail sale" of the products and are incidental or immaterial to the "retail sale" thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes.

    2. A product provided free of charge with the required purchase of another product. A product is "provided free of charge" if the "sales price" of the product purchased does not vary depending on the inclusion of the product "provided free of charge."

    3. Items included in the member state's definition of "sales price," pursuant to Appendix C of the Agreement.

    4. <u>Software maintenance contracts as defined in Appendix C, Part II, within the computer related category</u>.

(B)   The term "one non-itemized price" does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

(C)   A transaction that otherwise meets the definition of a "bundled transaction" as defined above, is not a "bundled transaction" if it is:

(1) The "retail sale" of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or

(2) The "retail sale" of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or

(3) A transaction that includes taxable products and nontaxable products and the "purchase price" or "sales price" of the taxable products is de minimis.

   (a)   De minimis means the seller's "purchase price" or "sales price" of the taxable products is ten percent (10%) or less of the total "purchase price" or "sales price" of the bundled products.

   (b)   Sellers shall use either the "purchase price" or the "sales price" of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the "purchase price" and "sales price" of the products to determine if the taxable products are de minimis.

   (c)   Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

(4) The "retail sale" of exempt tangible personal property and taxable tangible personal property where:

   (a) the transaction includes "food and food ingredients", "drugs", "durable medical equipment", "mobility enhancing equipment", "over-the-counter drugs", "prosthetic devices" (all as defined in Appendix C) or medical supplies; and

   (b) where the seller's "purchase price" or "sales price" of the taxable tangible personal property is fifty percent (50%) or less of the total "purchase price" or "sales price" of the bundled tangible personal property. Sellers may not use a combination of the "purchase price" and "sales price" of the tangible personal property when making the fifty percent (50%) determination for a transaction.

Software Maintenance Contracts:

(a) Definitions: A "computer software maintenance contract" is a contract that obligates a vendor of computer software to provide to a customer in the future with updates or upgrades to computer software, support services with respect to computer software or both.

(1) A "mandatory computer software maintenance contract" is a computer software maintenance contract that the customer is obligated by contract to purchase as a condition to acquiring computer software.

(2) An "optional computer software maintenance contract" is a computer software maintenance contract that the customer is not obligated to purchase as a condition to acquiring computer software. Renewal of a mandatory or optional software maintenance contract is an optional software maintenance contract.

(b) Characterization of mandatory software maintenance contracts with respect to prewritten computer software:

(1) Price Not Separately Stated-If the price for a mandatory software maintenance agreement is not stated on the invoice as an item separate and apart from the price for the prewritten computer software, it will be characterized as part of the sale of the prewritten computer software.

(2) Price Separately Stated-If the price for the mandatory software maintenance agreement is stated on the invoice as an item separate and apart from the price for the prewritten computer software, it will be characterized as either:

(A) part of the sale of prewritten computer software or

(B) an optional software maintenance contract.

(c) Characterization of optional software maintenance contracts with respect to prewritten computer software:

(1) If an optional software maintenance contract only obligates the vendor to provide updates and upgrades, it will be characterized as prewritten computer software,

(2) If an optional software maintenance contract only obligates the vendor to provide support services, it will be characterized as services.

(3) If an optional software maintenance contract obligates the vendor to provide both support services and upgrades and updates and the invoice separately states the amount for each, then

    (A) the amount stated on the invoice for support services will be characterized as services, and

    (B) the amount stated on the invoice as the amount for updates and upgrades will be characterized as prewritten software;

    (4) If an optional software maintenance contract obligates the vendor to provide both support services and upgrades and updates without separate statement on the invoice, then

    (A) Twenty (20) [30] [40] [50] percent will be characterized as prewritten computer software and

    (B) Eighty (80) [70] [60] [50] percent will be characterized as services.

(d) Characterization of mandatory and optional software maintenance contracts with respect to non-prewritten computer software:

    (1) Software maintenance contracts with respect to non-prewritten computer software are characterized the same as non-prewritten computer software.

(e) Characterization of software maintenance provided someone other than the vendor of the software that does not obligate the provider to provide software updates or upgrades:

    (1) A software maintenance contract provided by someone other than the vendor of the software that does not obligate the maintenance vendor to provide software updates or upgrades is characterized as services.