

A motion by Michigan to amend Appendix C, Part II, Product Definitions, Food and Food Products, the definition of “prepared food” to allow states to either tax or exempt items that would become prepared food if a seller exceeds the 75% test and makes utensils available.

“Prepared food” means:-

- (i) Food sold in a heated state or heated by the seller;
- (ii) Two or more food ingredients mixed or combined by the seller for sale as a single item; or
- (iii) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

A.1. Substances within “food and food ingredients” may be taxed differently than “prepared food.”

2. For purposes of C.1., a state may exclude from “prepared food,” “bottled water,” “candy,” “dietary supplements,” “soft drinks” and items identified in subsection F. that would otherwise be exempt from tax in the state, but which would be considered “prepared food” if utensils are made available to the customer at the seller’s location. “Food and food ingredients” for which plates, bowls, glasses, cups or bowls are necessary for the purchaser to receive the food remain “prepared food.” If a state does not specifically adopt an exclusion under this subsection, these items are “prepared food.”

B. “Prepared food” in B. “Two or more food ingredients mixed or combined by the seller for sale as a single item” under (ii) does not include food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code so as to prevent food borne illnesses.

C. “Food sold with eating utensils provided by the seller” in (iii) means:

- 1. For a seller with a “prepared food sales percentage” of greater than 75% calculated per D. below,
 - a. The seller makes eating utensils available to purchasers or,
 - b. A food item has four or more servings packaged as one food item sold for a single price if and the seller physically gives or hands the eating utensils to purchasers. It is not prepared food if utensils are only made available, and the food is otherwise not considered prepared food. Serving sizes shall be determined based on a label on an item sold. If no label is available a seller must reasonably determine the number of servings in an item.
- 2. For a seller with a “prepared food sales percentage” of 75% or less calculated per D. below, food is sold with eating utensils provided by the seller if the seller’s business practice is to physically give or hand eating utensils to purchasers, except that plates, bowls, glasses and cups, necessary for the purchaser to receive the food need only be made available to purchasers.
- 3. Food is not sold with eating utensils provided by the seller if the food items have a utensil placed in a package with the food items by a person other than the seller, and that other person’s NAICS classification code is that of a manufacturer, sector 311. For any packager with any other NAICS classification code, the seller is considered to have provided the eating utensil.

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D. “Prepared food sales percentage” means a percentage determined by dividing the following described numerator by the following described denominator:

1. The numerator shall consist of the seller’s annual sales of prepared food described in (i) and (ii) and food sold when plates, bowls, glasses, or cups are necessary to receive the food. The numerator shall not include alcoholic beverages or food a member state has excluded from prepared food as permitted under the Agreement.

2. The denominator shall consist of the seller’s total annual sales of all food and food ingredients and prepared food, excluding alcoholic beverages.

E. 1. A seller must calculate the prepared food sales percentage for each tax year or business fiscal year based on the seller's data from the prior tax year or business fiscal year, as soon as possible after accounting records are available, but not later than 90 days after the beginning of the seller's tax year or business fiscal year.

2. A single prepared food sales percentage shall be determined annually for all the seller's establishments in this state.

3. A new seller shall make a good faith estimate of its prepared food sales percentage for its first year in business. AThe new seller must adjust its good faith estimate prospectively after the first 3 months of its business operation if actual prepared food sales percentages materially affect the 75% threshold described in D. 1 and 2.

F. The following items may be taxed differently than “prepared food” and each other, if sold without eating utensils provided by the seller, but may not be taxed differently than the same item when classified under “food and food ingredients.”

1. Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
2.
 - a. Food sold in an unheated state by weight or volume as a single item; or
 - b. Only meat or seafood sold in an unheated state by weight or volume as a single item.
3. Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas.
4. Food sold that ordinarily requires additional cooking (as opposed to just reheating) by the consumer prior to consumption.

~~Substances within “food and food ingredients” may be taxed differently if sold as “prepared food.” A state shall tax or exempt from taxation “bottled water,” “candy,” dietary supplements,” and “soft drinks” that are sold as “prepared food” in the same manner as it treats other substances that are sold as “prepared food.”~~

See Compiler’s Notes for history.