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STREAMLINED SALES TAX PROJECT
SOURCING ISSUE PAPER

This memorandum explains the sourcing provisions of Section 310 of the Streamlined Sales and Use Tax Agreement. For ready reference, Section 310 is attached as a single document Addendum.

PURPOSE OF SOURCING PROVISION. These provisions aid a seller by identifying which State's[1] taxes should be applied to a sale. The basic sourcing principle is to source the sale on a destination basis to the extent that it is reasonably possible. Sourcing a sale to a particular State does not mean that the transaction is taxable. The sale may in fact not be taxable under the law of the State to which the sale was sourced.

RATIONALE OF DESTINATION TAXATION AMONG STATES. Theoretically, an origin-based sales and use tax is a more manageable obligation for a seller. The seller presumably understands the applicable law in the jurisdictions from which she operates more easily than the law of the multiple jurisdictions into which she sells. An origin system also negates the need to know the location of the purchaser for application of the correct tax, a problem thought to be of some potential significance in electronic commerce. Finally, some assert, perhaps erroneously, the establishment of nexus is not the problem under the origin system that it is for the destination system. But these observations do not establish unchallengeable superiority of the origin system.

First, simple, uniform, and transparent tax laws of the destination jurisdiction lessen the burden of a destination system. The Streamline Project itself is testament to the importance of coupling destination taxation with tax laws that are easily complied with and administered.

Second, adoption of a sales threshold concept of nexus[2] can do much to minimize the disadvantage of a destination system. It becomes more

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[1] The sourcing rules also apply to determine the applicable local taxing jurisdiction(s). For economy of expression, the term "State" should be construed with this understanding when the context requires it.

[2]Sales threshold nexus recognizes nexus only when sales into the taxing jurisdiction exceed a specified minimum. Sales threshold nexus is sometimes stated in terms of a

reasonable to require remote sellers to report and pay sales taxes when the amount of the sales into the taxing jurisdiction is substantial. A sales threshold concept of nexus would exempt small businesses from the burden of complying with remote laws.

Further, the magnitude of the potential benefit of an origin system not having to know the location of the purchaser is unknown. While electronic commerce raises the possible inability of the seller to know the identity or location of the purchaser, raising the specter of a default origin sourcing rule, see Section 310(e), there is no research determining the potential extent of transactions with this circumstance. One research firm suggests that business has a high interest in knowing its customer base.[3] So there is probably a high likelihood that sales where the seller does not know the destination location will be low. As we best understand the current operation of the Internet, providing for an exception to the general destination sourcing rules in the form of an origin sourcing rule will not result in the general destination sourcing rules being subsumed. As further comfort to sellers, a seller may not be forced to collect a destination tax if the seller does not know where her sold product is to be used.[4]

Finally, the origin system raises its own array of nexus issues. The consumption activity to which an origin State can most probably attach its tax is a *sale*, and not a *use* that would normally occur in the importing State. It is quite likely, however, that the origin State will lack the necessary connection to tax the sale. In this regard it is important to acknowledge that the constitutional concept of a sale is dependent not upon a formal transfer of title but a true passage of the economic risk of ownership.[5] Passage of economic risk of ownership is a concept that can be applied to both tangible personal property and digital products. And if "the sale" does not occur in the origin State, the origin State lacks the capacity to impose a sales tax on the transaction.[6]

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state specific threshold and a nationwide threshold. See e.g., Sec. 3(a)(2), S.1586. 105th Cong., 2nd Sess. (1998).

[3] *Payments On The Web*, THE FORESTER REPORT—MONEY AND TECHNOLOGY STRATEGIES (vol. 1, No. 7, Mar. 1, 1996) at 6.

[4] See Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), as interpreted by Scripto, Inc. v. Carson, 362 U.S. 207, 212-213 (1960), and National Geographic Soc'ty v. California Bd. of Equalization, 430 U.S. 551, 558-59 (1977).

[5] See generally Paull Mines, *Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform*, 52 TAX L. REV. 581, 590 *ff.* (1997).

[6] There are several decisions of the U.S. Supreme Court that establish this principle. See Evco v. Jones, 409 U.S. 91 (1972) (State where contracted service performed to produce tangible goods lacked jurisdiction to impose a tax on a sale of those goods where the sale occurred in destination jurisdiction); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) (State of manufacture may not tax receipt of proceeds from sales of goods

Beyond these initial responses, there are many real-world impediments to the implementation of an origin system. These impediments generally make selection of an origin system of sales and use taxation impractical.

Origin jurisdictions do not impose consumption taxes. It is the almost universal practice of States to exempt outbound transactions from their sales and use taxes.[7] If a workable sales and use tax needs the potential to reach the taxable sale at some point in time, then the choice not to tax outbound sales, if supported by sound policy, necessarily results in the choice to tax in-bound sales. Otherwise, a sales and use tax system that exempts, whether by policy choice and/or constitutional restriction, both outbound and in-bound sales will be a sales and use tax that does not apply to cross-border sales. Clearly the U.S. Constitution does not prohibit state sales and use taxation of interstate sales and that commerce should bear its fair share of taxes to support the marketplace.[8] Limiting sales and use taxes to intrastate sales is hardly fair to in-state sellers that attempt to compete in interstate and international commerce that includes access to the in-state seller's own State's market.[9]

There are sound policy reasons for origin States not subjecting their export sales to a sales and use tax. An origin-based consumption tax acts like an export duty and has all the disadvantages that flow from that kind of effect. Few States want to burden their own commerce with a tax charge that will potentially operate to place the State's own businesses at a competitive disadvantage in the remote market. Other business remote

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manufactured in State where State in which the goods are sold would be able to tax the sale); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) (to same effect). Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995), has recently reiterated these understandings.

[7]J. Due & J. Mikesell, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 271 (2D ED. 1994). This also appears to be the international rule. Destination consumption taxation has a long intellectual history beginning with the Economist David Ricardo and a long history of practice among nations beginning with the Second Act of Congress (July 4, 1789). See G. Hufbauer with C. Gabyzon, FUNDAMENTAL TAX REFORM AND BORDER TAX ADJUSTMENTS 21ff. and 37ff. (1996).

[8] Goldberg v. Sweet, 488 U.S. 252 (1989).

[9]The U.S. Supreme Court early on recognized the need to preserve fairness in this circumstance. See Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937) (use tax on imported goods that is inherently discriminatory against interstate commerce upheld as compensating tax). Unfairness to in-state sellers is reflected in the recent revelation of Jeff Bezos, the founder of Amazon.com, the virtual bookseller operating on the Internet. In deciding where to locate, Amazon.com ruled out the State of California, because location in California would have prevented selling ex sales tax in California, the largest market. D. Streitfeld, *Booking the Future; Does Amazon.com Show That Publishing Clicks on the Internet?*, WASH. POST, July 10, 1998, at A01; W. Taylor, *Who's Writing the Book on Web Business?*, FAST COMPANY at 132 (Oct./Nov. 1996), available at www.fastcompany.com/online /05/starwave2.html.

to the market jurisdiction that is not from a State imposing an origin tax will enjoy competitive advantage.

Also, an origin-based tax affects decisions on business location of origin activities. In these times of the promotion of economic development, a system of taxation that has the potential to discourage the location of a business in the taxing State is not favored.[10] Nor do States desire to obviate the detrimental effect of an origin system on business location by getting into a spiral of competition with other States to the lowest possible common denominator of consumption taxation. Working toward a zero rate for consumption taxation[11] is not likely to be an acceptable policy choice where sales taxes are a very significant source of state tax revenues.[12]

In addition, the destination tax is applicable in any event (at least theoretically if you ignore the practical difficulty of collecting the tax from the non-commercial purchaser when the remote seller is not subject to the taxing jurisdiction of the destination). The competing goods that are produced within and outside of the destination State will bear the same tax burden when consumption taxes are applied on a destination basis.[13] Destination-based consumption taxes that are enforced do not create competitive dislocation nor adversely affect business location. The remote seller sells into a taxing State because of the market that exists in that State and not because of tax breaks.

Further, the only way to avoid these practical impediments in an origin system is to require all jurisdictions to impose an origin sales and use tax on generally the same base and at generally the same rate. In this circumstance, there is no substantial disparity that follows from the origin of the goods or services coming into the destination State, at least for domestic, but not international, commerce. This requirement flies in the face of our federal form of government, however. “Our Federalism” allows each State to determine its own tax policy, including a policy of not taxing consumption through a sales and use tax at all. The States also

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[10]Bezos’ refreshing honesty about the attraction of being able to sell ex sales tax, see n.7, supra, also puts into question a State's reluctance to explore the limits of its jurisdiction to impose a sales or use tax on remote sales. Lax enforcement of nexus against remote sellers apparently promotes business locations outside of large market States that in turn threatens the viability of competing in-state business in those very States.

[11]There are five States that lack a state sales and use tax. The States are Alaska (although the State does have an extensive system of local sales taxes), Delaware, Montana, New Hampshire, and Oregon.

[12]Due and Mikesell, n. 6, supra, at 1.

[13]See generally McLeod v. J.E. Dilworth Co., General Trading Co. v. State Tax Comm’n, International Harvester Co. v. Dept. of Treasury, 322 U.S. 349 (1944) (Rutledge, J., concurring in General Trading Co. and International Harvester and dissenting in Dilworth).

have implemented varying sales and use tax rates, with some States, notably some without a personal income tax, having state sales tax rates that are relatively high. These kind of considerations have had an effect even in the Europe Union where, based upon the assumption of an EU-wide, credit invoice VAT that has been harmonized as to base and rate, there is a long-standing commitment that would accompany the move to an origin system.[14] Recently the European countries acting through the OECD have acknowledged the necessity of a destination system with respect to electronic commerce.[15]

And so if the practical preference is for the application of a sales and use tax applied on a destination basis, it is the sales tax that ideally must first satisfy that duty.[16]

RATIONALE OF DESTINATION TAXATION AMONG LOCALS. Theoretically, a sales and use tax system could adopt a destination principle among the States and an origin principle among local governments. This theoretical approach has inherent difficulties, however.

First, when this choice was aired at a well-attended meeting of the participant States in the Streamlined Project, there was a decided majority of States that applied a destination principle for sourcing intra-state sales. Thus, although the choice of one approach will necessitate a change in law in the States applying the other approach, the destination principle appears to be the less disruptive.

Second, the policy rationale that supports the choice of destination taxation among the States, reviewed above, is just as applicable to intrastate sales affecting local government. As a tax on consumption, destination is the policy preference.

Finally, the implementation of different sourcing principles for intrastate sales and interstate sales appears to raise significant potential of

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[14]See generally, Sixth VAT Directive, arts. 8 and 9, reprinted in A GUIDE TO THE SIXTH DIRECTIVE, COMMENTARY TO THE VALUE ADDED TAX OF THE EUROPEAN COMMUNITY, vol. A (1991).

[15]Committee on Fiscal Affairs, Report on the OECD Ministerial Conference, *A Borderless World: Realising the Potential of Global Economic Commerce* at 5 (1998), available at <http:// webnet1.oecd.org/pdf/M000015000/M00015517.pdf >. The necessity should be apparent from the consequences of requiring all EU members to harmonize their VAT within a small range of rates. It seems a folly from the perspective of American federalism that the EU would compel Sweden with its culture, social policy, and a 25% general VAT rate to conform to Portugal with its culture, social policy, and a 17% general VAT rate, or vice versa. See A GUIDE TO THE VAT IN THE EU, THE SINGLE MARKET CHANGES, 1996 UPDATE, Appdx. 4, 313 (1997) (general VAT rates of member countries presented in table).

[16]Jefferson Lines, n. 5, supra. The U.S. Supreme Court views the sales tax as the primary tax and the use tax as a compensating tax that applies when the State imposing the use tax does not have sufficient connection to tax the sale. Id. at 193-94.

unconstitutional treatment of in-state commerce versus out-of-state commerce.[17] Thus, a claim of unconstitutionality may be maintainable by an out-of-state taxpayer that experiences a higher rate of sales or use tax that is attributable to application of the destination principle than would an intra-state taxpayer selling remotely into the same location due to application of the origin principle.

In the end, then, it seemed the best to provide for application of the destination principle in both the circumstance of interstate and intra-state commerce.

DRAFTING PRINCIPLES: Having determined that, to the extent reasonably possible, a sale should be sourced to the destination of the product sold, the sourcing provisions take into account what information about the destination a seller could reasonably be expected to possess at the time of the sale. For example, sales are sourced to the location where receipt by the purchaser occurs only in over-the-counter sales (subsection (a)) and when the location of such receipt is otherwise known to the seller (subsection (b)). Beyond those situations, sales are generally sourced to addresses for the purchaser that the seller possesses. And a seller makes her determination of these addresses that indicate the destination only from business records that are reasonably available at the time of the transaction. There is no intent to require the seller to rummage through the entirety of its business records to determine whether it has an address for the purchaser on file somewhere.

Further consideration was given to practicalities like avoiding the requirement that a seller obtain a purchaser's address when it was commercially infeasible to do so. The sourcing rules should not slow down the transaction or offend an expectation of privacy. For example, over-the-counter sales are sourced to the business location of the seller where the sale occurs, as opposed to the ultimate destination for the product, in acknowledgment of the commercial impracticality of requiring a seller to ask for a destination for a product during such sales. In contrast, a seller is required to source a sale to a destination when delivery is remote from the seller's location, provided the seller has obtained the necessary information either during the transaction, as with a shipping address, or from prior transactions that are reasonably available at the time of the sale.

The remainder of this memorandum explains the specific sourcing provisions in the order in which they appear in Section 310. The actual provision is set off by a border and the material following the provision is a commentary on the provision's intended effect.

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[17] See Associated Industries of Missouri v. Lohman, 511 U.S. 641 (1994).

INTRODUCTION: The introductory language for the sourcing provisions follows:

> The member states agree to require sellers to source the sale (including the lease or rental) of a product in accordance with the following provisions. These provisions apply regardless of the characterization of a product as tangible personal property, a digital good, or a service (ex
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> cluding for the present telecommunications). These provisions only apply to determine a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's sale of a product. These provisions do not affect the obligation of a seller as purchaser to remit tax on the use of the product to the taxing jurisdictions of that use.

As the language indicates, these sourcing provisions are intended to apply to all types of transactions (excluding telecommunications and other items as noted in subsections (h) and (i) below). The sourcing provisions do not govern where to source a use tax that is owed by a seller in the role of a consumer. The rules are intended to apply in a hierarchical fashion. Thus, one first determines whether subsection (a) answers where to source the sale. If it does, then no further consultation of the remaining principles is necessary. If it does not, then the next lower level, subsection (b), is consulted and so on.

The sourcing provisions speak of "products" with the intention that the sales of all types of products, including tangible and digital goods, as well as services, would be covered by the same principles. A significant benefit of sourcing all types of sales in accordance with the same principles is that disputes over classifications of the types of sales in order to achieve a different sourcing result are avoided. The term "purchaser" contemplates agents acting on behalf of the purchaser. However, a shipping agent cannot "receive" a product thereby invoking the sourcing principle. See Section 310(g).

OVER-THE-COUNTER SALES: Subsection (a) addresses over-the-counter sales, as follows:

> (a) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

This provision reflects the current practice in every jurisdiction that, when a product is purchased over the counter, the seller charges the tax due for the jurisdictions in which receipt occurs. Likewise, when a service is provided at the seller's place of business, the sale is sourced there. So, when the product is a service to tangible property, and the serviced product is received by the purchaser at a business location of the seller, the sale would be sourced to that business location, regardless of where the services were actually performed or where purchaser takes and ultimately uses the product.

"Business location" of the seller covers not only a store but also other facilities of the seller at a location separate from the store. If a sale is agreed to at a retail location of the seller, but the purchaser picks the product up from a warehouse that is at another site, the sale is sourced to the location of the warehouse. For this first principle to apply, the business location must be the seller's.

SALES WITH KNOWN DESTINATION (SHIPPING ADDRESS): If the sale is not over-the-counter, a seller would move to subsection (b), as follows:

> (b) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.

This provision applies when the purchaser receives the product at somewhere other than a business location of the seller, and the seller knows where that receipt occurs. The operative language here is that the sale is sourced to "the location where receipt by the purchaser occurs . . . known to the seller." If the seller does not know where receipt by the purchaser occurs, this provision does not apply.

Subsection (b) applies when the seller ships the product to the purchaser, in which case the seller would source the sale to the location to which the product was to be delivered, regardless of whether the product was delivered by the seller or a third party. Subsection (g) provides that receipt of a service occurs at the location of the first use (which includes possession) of the service. Thus, if a seller provides a service directly to the purchaser at a location other than a business location of the seller, the sale would be sourced to that remote location. So, for example, a car repair performed in the shop would be sourced to the shop, while a repair performed on the side of the road would be sourced to that location on the road.

Under subsection (g) "receipt by the purchaser" does not include delivery to a shipper. Applying that separate principle with this principle of subsection (b) means that the seller sources a sale to the shipping address when the seller delivers the product to a shipper and the delivery address is known to the seller. However this principle does not apply when the seller knows only that it is to deliver the product to the shipper, but does not know the address to which the shipper is to deliver the product.

The parenthetical language referring to a donee is intended to apply a destination rule to gifts involving shipment. It is a condition of applying this sourcing principle to gifts that the seller know both that a gift is occurring and the address of delivery. If the product is being shipped to someone other than the purchaser who is not known by the seller to be a donee, this rule does not apply. In these circumstances the seller does not know a location for receipt by the purchaser.

IF (A) AND (B) INAPPLICABLE, (C) NEXT POSSIBLE RULE: We believe subsections (a) and (b) will apply to most sales of tangible personal property and services, because usually either the sale will occur at the seller's store or the seller will know the location to which to send the property that she is selling or servicing to the purchaser. But there still will be some instances involving tangible personal property where this knowledge will be missing, to say nothing of the potential for not having the pertinent information for some sales of digital goods. The potential for subsections (a) and (b) not to apply undoubtedly increases when the digital product is not sold on tangible media but is delivered electronically. Subsections (c), (d) and (e) are essentially intended to cover sales where the seller does not know the location at which receipt by the purchaser occurs. First, subsection (c):

> (c) When (a) and (b) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.

This provision is intended to cover what might be a common transaction, especially in the business-to-business setting, *i.e.*, sales when the seller has a billing address for the purchaser that was obtained in either a prior transaction or the current one. For a sale of tangible personal property that does not occur at the seller's store or does not include delivery to the purchaser–*e.g.*, when the seller delivers the product to a shipper without knowing where the product will be delivered by the shipper–the sale would be sourced to the address for the purchaser the seller has obtained either prior to or during the current sale. The same would be true for a sale of a digital good that would be transmitted electronically to a computer, *i.e.*, the sale would be sourced to the address for the purchaser the seller has obtained either prior to or during the current sale.

However, this rule does not contemplate that the seller must rummage through the entirety of her business records to see whether she has a prior address of the purchaser on file. Any use of a prior address is dependent upon the address being reasonably available to the seller at the time of the sale. This clear understanding is also the natural outcome of the practical reality that any audit is unlikely ever to discover a previous isolated sale about which the seller maintained no organized record for purposes of conducting its sales activity.

The provision "when use of this address does not constitute bad faith" is intended to prevent the seller from knowingly participating in fraud or acting with gross indifference, *e.g.*, by intentionally employing an address for the purchaser that the seller knows is not valid. This standard is intended to be less of a burden on a seller than that of operating in good faith, in that it would require a taxing jurisdiction to show that the seller knew, or acted with utter disregard of the truth, that the address to which it sourced the transaction was not an address of the purchaser. We do not expect the bad faith exception to be invoked except in rare circumstances.

IF (A), (B) AND (C) INAPPLICABLE, (D) NEXT: Next in the progression is Section (d):

> (d) When (a), (b), and (c) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.

Section (c) is intended to have priority over (d). Thus, the sourcing rules give priority to an address that the seller has in its reasonably retrievable records from prior dealing with the purchaser over an address obtained during the current transaction. This preference reflects the belief that an address that a seller has been using, *e.g.*, as a billing address, over the course of conducting prior business with the purchaser is likely to be more reliable than an address obtained during a first-time transaction with a purchaser. Nonetheless, when a seller's records do not include an address for the purchaser, (d) allows the seller to employ an address for the purchaser obtained during the transaction, so long as the address is not employed in bad faith, i.e., the seller does not know, or act in utter disregard of the truth, that that the address given is false.

There is a circumstance where the exception for bad faith in (c) would cause the general rule in (c) to cede to the rule in (d). This circumstance would occur when the purchaser at the time of the sale gives the seller notice of a change of address. This is a very practical result that should not create any difficulty.

While it is true that, in some sales, *e.g.*, sales of digital goods delivered electronically, there is no need to obtain a shipping address, it is also true that it is a common business practice for sellers of digital goods to obtain an address for the purchaser during the transaction, whether for marketing or other purposes. This rule allows the use of that kind of information to adhere to the principle of destination sourcing. It is acknowledged that, because information obtained in this manner is not as reliable as an address employed over a course of prior transactions, some fraud should be expected, and States have agreed to bear the burden of detecting that fraud, so long as sellers are not either active, knowing or collaborative participants in, or utterly indifferent to, that fraud.

ORIGIN-BASED DEFAULT RULE: When the destination-based rules of (a) through (d) do not apply, Section (e) provides that a sale will be sourced to the origin of the sale, as follows:

> (e) When none of the previous rules of (a), (b), (c), or (d) apply, including the circumstance where the seller is without sufficientinformation to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good was first available for transmission by the seller or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

The origin of the sale will necessarily be determined based on the type of product being sold, since, while it is easy enough to say that tangible personal property will be sourced to the address from which it was shipped, an address associated with services or digital goods may not be easily established.

The origin of a sale of digital goods is the address from which the digital good was first available for transmission by the seller. It is assumed that, at some point, a digital good is available to be transmitted by the seller on its way to the purchaser, and that the seller will know the address at which that availability for transmission occurs. That is the address to which the sale is sourced, with earlier or later transmissions being disregarded. We intend to disregard with this rule “ghost servers.” Consistent with all the rules above, this rule focuses on information reasonably available to the seller at the time of the sale.

Similarly, a sale of a service that does not fit within any of the destination-based rules of (a) through (d), will be sourced to the address from which the service was provided. Again, it is assumed that the seller of a service will know the address from which it is providing that service.

MULTIPLE POINTS OF USE: Because the destination-based rules of (a) through (d) do not adequately address the situation of a product that can be accessed or used by several persons in different locations at once, such as software accessed by remote employees or a database accessed by various offices of a multistate firm, a separate mechanism was established to deal with such multiple points of use (MPU). Section (f) provides:

> (f) Notwithstanding the previously stated rules, a business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of a digital good or a service that the digital good or service will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase a form

disclosing this fact ("Multiple Points of Use or MPU" Exemption Form).

1. Upon receipt of the MPU Exemption Form, the seller is relieved of all obligation to collect, pay or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis.
2. A purchaser delivering the MPU Exemption Form may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale.
3. The MPU Exemption Form will remain in effect for all future sales by the seller to the purchaser (except as to the subsequent sale's specific apportionment that is governed by the principle of subparagraph (f)(2) and the facts existing at the time of the sale) until it is revoked in writing.
4. A holder of a direct pay permit shall not be required to deliver a MPU Exemption Form to the seller. A direct pay permit holder shall follow the provisions of subparagraph (f)(2) in apportioning the tax due on a digital good or a service that will be concurrently available for use in more than one jurisdiction.

As indicated by Subsection (1), when this rule applies, the obligation to collect and remit tax is removed from the seller. The circumstances in which the MPU rule applies include: (a) when the purchaser is not an individual consumer, but a business; (b) when that business is not a holder of a direct pay permit (if the purchaser does hold a direct pay permit, it would be reporting its purchases using that process and form); (c) the purchaser has to know at the time of the purchase that the product will be concurrently available for use (not necessarily concurrently used, but only concurrently available for use) in more than one jurisdiction (including local jurisdictions); and (d) the product sold is a digital good or service, but not tangible personal property (tangible personal property would generally not be available for use in different jurisdictions at the same time). If a purchaser in a sale under these circumstances provides the seller with an MPU form, the seller would not be required to collect and remit tax on that sale. And, if the purchaser failed to remit that tax, the government's recourse would be against the purchaser, not the seller.

Subsection (2) allows some flexibility in the apportionment of the tax among the various jurisdictions to take account of the different types of MPU circumstances that can arise. The method must be reasonable, consistent and uniform, and that it must be supported by the purchaser's business records at the time of the sale. Subsection (3) relieves a purchaser from providing a new MPU form for each sale, while requiring the apportionment to be adjusted to reflect the circumstances of each particular sale. (The provision that the MPU form will remain in effect "for all future sales by the seller to the purchaser" applies to all future sales for which an MPU form would be applicable, *i.e.*, when the purchaser knows that the digital good or service with be concurrently available for use in different jurisdictions.) And, Subsection (4) acknowledges that holders of direct pay permits will be using those permits to report their purchases, and allows such purchasers the same flexibility in apportionment that applies to purchasers using MPU forms.

DEFINITION OF RECEIPT: Section (g) provides:

(g) The terms "receive" and "receipt" mean:

1. taking possession of tangible personal property,
2. making first use of services, or
3. taking possession or making first use of digital goods, whichever comes first.

The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.

The question of where taking possession of tangible personal property occurs should be fairly straightforward, especially in the limited contexts in which the sourcing provisions focus on receipt, *i.e.*, Sections (a) and (b). In an over-the-counter sale, or when the seller delivers the product to the purchaser, the seller will essentially be handing the product over to the purchaser. When the product is shipped to the purchaser, the seller will employ the ship-to address. When the product is hand-delivered or shipped to someone designated to be a donee, the seller will employ the location at which the hand-delivery will occur or the address provided for shipment to the donee.

With services, receipt is defined as "making first use of the services." While "use" is not defined within the sourcing provisions (it might be defined elsewhere by the Project at a later date), use should be thought of as generally including all activities most states include in their current definitions, including the exercise of any right incidental to ownership, custody or possession. Therefore, if a car repaired at the seller's shop is picked up at the shop by the purchaser, the sale is sourced to the shop; if the repaired car is delivered to the purchaser, the sales is sourced to where the purchaser receives the car. If psychological counseling is performed at the counselor's office, the sale would be sourced there; if the counselor goes to the patient's home, the sale would be sourced there.

Assuming that digital goods will be defined by the project on the basis of their delivery by electronic transmission, it is unlikely that many sales of digital goods will be sourced based on receipt, but when it does occur–*e.g.*, in a "load and leave" transaction, where the seller goes to the purchaser place of business and loads software onto the purchaser's computer–the same rules would apply.

In order to avoid having the offices or retail outlets of commercial shippers become primary locations to which all sales of individual sellers are sourced, Section (g) provides that receipt by a shipping company acting on behalf of a purchaser does not constitute receipt by the purchaser. Therefore, the sale of a product delivered to a shipping company is not sourced to the location of the shipping company, but rather, if the seller has the address to which the shipping company is to deliver the product to the purchaser, the sale would be sourced to that address under Section (b). This rule applies even if the shipper purports to be the purchaser's agent. If the seller does not have that address, the subsequent sections of the sourcing rule would apply.

PLACEHOLDER AND UNIQUE SOURCING RULES: Finally, Sections (h) and (i) provide that these sourcing provisions do not apply to sales of telecommunications services and other listed items. Sales involving those items would be sourced according to existing law.

STREAMLINED SALES AND USE TAX AGREEMENT

AS APPROVED DECEMBER 22, 2000 and AMENDED JANUARY 24, 2001

310UNIFORM SOURCING RULES

The member states agree to require sellers to source the sale (including the lease or rental) of a product in accordance with the following provisions. These provisions apply regardless of the characterization of a product as tangible personal property, a digital good, or a service (excluding, for the present, telecommunications). These provisions only apply to determine a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's sale of a product. These provisions do not affect the obligation of a seller as purchaser to remit tax on the use of the product to the taxing jurisdictions of that use.

a. When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
b. When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt–by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.
c. When (a) and (b) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
d. When (a), (b), and (c) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
e. When none of the previous rules of (a), (b), (c), or (d) apply, including the circumstance where the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

f. Notwithstanding the previously stated rules, a business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of a digital good or a service that the digital good or service will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase a form disclosing this fact ("Multiple Points of Use or MPU" Exemption Form).
   1. Upon receipt of the MPU Exemption Form, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis.
   2. A purchaser delivering the MPU Exemption Form may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale.
   3. The MPU Exemption Form will remain in effect for all future sales by the seller to the purchaser (except as to the subsequent sale's specific apportionment that is governed by the principle of subparagraph (f)(2) and the facts existing at the time of the sale) until it is revoked in writing.
   4. A holder of a direct pay permit shall not be required to deliver a MPU Exemption Form to the seller. A direct pay permit holder shall follow the provisions of subparagraph (f)(2) in apportioning the tax due on a digital good or a service that will be concurrently available for use in more than one jurisdiction.

g. The terms "receive" and "receipt" mean:
   1. taking possession of tangible personal property,
   2. making first use of services, or
   3. taking possession or making first use of digital goods, whichever comes first.

   The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.

h. This section is reserved for a specific sourcing rule applicable to telecommunications and possibly additional specific sourcing rules for other services as necessary to effect the intent of providing for uniform sourcing of transactions. Until the specific sourcing rule for telecommunications is adopted, the sourcing rules presently applicable to telecommunications will remain in effect in each State.

i. This section does not apply to sales or use taxes levied on the transfer of motor vehicles, aircraft, or watercraft. These items must be sourced according to the requirements of each member state.