

March 27, 2023

Via email (craig.johnson@sstgb.org)  
Craig Johnson, Executive Director  
Streamlined Sales Tax Governing Board, Inc.  
100 Majestic Drive, Suite 400  
Westby, Wisconsin 54667

Re: Request for Interpretation (RI22002) (“Prepared Food”)  
Comments In Opposition to the Proposed Interpretation

Dear Mr. Johnson:

Delta Air Lines, Inc. (“Delta”) appreciates the opportunity to submit these comments on the pending request for interpretation submitted by the Minnesota Department of Revenue (the “MN DOR” or “DOR”) on November 18, 2022, as supplemented by the MN DOR on January 9, 2023 (the “Interpretation Request”).

Notwithstanding the framing of the two issues raised by the MN DOR, Delta contends that the ultimate issue is whether the phrase *food sold with eating utensils provided by the seller* within clause (iii) of the definition *prepared food* is intended to apply where the seller of food merely delivers to the purchaser (e.g., an airline) utensils that the purchaser owns. Delta respectfully urges the Compliance Review and Interpretations Committee (“CRIC”) to (1) reject the MN DOR’s proposed interpretation and (2) issue an interpretive opinion that *eating utensils provided by the seller* does not include purchaser-owned utensils.

## **I. THE INTERPRETATION REQUEST**

The SSUTA defines *prepared food* to include *food sold with eating utensils provided by the seller*. Section C. of the definition, in turn, addresses the meaning of *food sold with eating utensils provided by the seller*. The meaning of *food sold with eating utensils provided by the seller* varies depending upon the seller’s prepared food sales percentage. Subsection C.2. applies where the seller’s prepared food sales percentage is 75% or less, and it is specifically C.2. that the MN DOR references as the subject of its Interpretation Request.

As explained in the *Notice for Public Comment* issued with respect to the Interpretation Request, the request is specifically asking:

(1) Whether “physically giving or handing utensils to the purchaser” includes a seller loading utensils owned by the purchaser into galley carts along with the food items being sold; and

(2) Whether “making plates, bowls, glasses, or cups available to purchasers” includes a seller placing food on plates, bowls, glasses, or cups that are owned by the purchaser and possessed by the seller and loaded into galley carts.

Notwithstanding what is specifically asked in the Interpretation Request with respect to C.2., the primary, or threshold, issue pertains to the phrase *sold with eating utensils provided by the seller* within clause (iii) of the definition *prepared food*. More specifically, the issue is whether *utensils provided by the seller*, as used within clause (iii) of *prepared food*, includes the seller delivering to the purchaser – an airline in Delta’s case – utensils that the purchaser owns.<sup>1</sup>

## II. FACTS

### A. Delta Contracts with Various Service Providers for the Provisioning of its Aircraft with Food, Beverages, Supplies, and Service Equipment

Delta believes that the facts provided by the MN DOR are insufficient for proper consideration of the interpretation the DOR seeks. Delta wishes to provide additional facts as they relate to the specific facts upon which the DOR seeks an interpretation.

Delta is a global airline headquartered in Atlanta, Georgia, with significant domestic hubs and key markets in Atlanta, Boston, Detroit, Los Angeles, Minneapolis-St. Paul, New York, Salt Lake City, and Seattle. It offers thousands of commercial flights each day to hundreds of domestic and international destinations. On nearly all of its flights, Delta provides complimentary beverages and snacks to its passengers. On certain flights, Delta provides complimentary meals. Although Delta also sells food and beverage items on certain flights, the DOR’s Interpretation Request is with respect to food purchased by Delta that is not for resale.

For any particular airport, Delta typically contracts with a third party service provider (“Service Provider”) for the provisioning of outbound aircraft with food, beverages, supplies, and service equipment (e.g., galley carts, trays, tray carriers, coffee pots, dishes, glasses, and eating utensils). The Service Provider also provides unloading services with respect to inbound flights. These services include, among other things, removing carts, carriers, and other equipment from the aircraft for cleaning, washing, and disposing of waste.<sup>2</sup> The service

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<sup>1</sup> Although the MN DOR’s *Statement of Background Facts* is not limited to airlines, it provides that the purchaser is in the travel industry and expressly lists airlines and trains as examples. For purposes of discussing the issue from the perspective of an airline, Delta may refer to the purchaser as an airline.

<sup>2</sup> Because Delta uses different service providers at different airports, the service provider providing unloading services at the destination airport is often not the same service provider that loaded the aircraft at the origination airport.

equipment, including galley carts, trays, coffee pots, etc., as well as all eating utensils, is owned by Delta and is not sold or otherwise made available to Delta by the Service Provider. In addition, not all food and beverage items loaded into Delta aircraft by the Service Provider are sold to Delta by the Service Provider. Delta purchases most items from third parties that are received and stored at a Service Provider facility for assembling and loading into Delta aircraft as requested by Delta.

A Service Provider typically operates a facility on or off airport premises with storage and holding areas for food and beverages, including Delta-owned food and beverages purchased from third parties, and Delta-owned service equipment. The Service Provider's facility also includes food preparation and handling areas where food is prepared and/or loaded into galley carts and other means of conveyances to aircraft for loading into the aircraft by the Service Provider. As stated, the food and beverage items handled by the Service Provider may be items that Delta purchased from someone other than the Service Provider and may include items purchased from the Service Provider. As indicated in the Interpretation Request, food sold by the Service Provider that would fall within either clause (i) or clause (ii) of the definition of *prepared food* is *not* the subject of the Interpretation Request.

The Service Provider loads the food, beverages, utensils, and other supplies requested by Delta into galley carts or other containers (e.g., carrier boxes), which are then transported to, and loaded in, Delta aircraft by the Service Provider.<sup>3</sup> As previously stated, the Service Provider also provides unloading services to remove galley carts and other Delta equipment for cleaning and reuse and to dispose of waste.

**B. All Utensils Loaded on Delta Aircraft are Owned by Delta**

All utensils handled by the Service Provider and loaded into Delta aircraft are owned by Delta. These utensils include expendable/disposable utensils that Delta has acquired from third parties and which are received at the Service Provider facility for storing and loading as requested by Delta. Delta's utensils also include reusable items, or rotables, owned by Delta and that rotate throughout Delta's system as a consequence of the loading and unloading services provided by different Service Providers. These utensils include flatware, plates, glassware, coffee mugs, linens, and trays, many of which may be branded or labeled as property of Delta.

As explained above, a Service Provider not only loads such Delta-owned utensils into galley carts or other means of conveyance for delivery to Delta aircraft as requested by Delta, but they are also typically unloaded by a Service Provider (often a different Service Provider than

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<sup>3</sup> The MN DOR's Interpretation Request assumes that food purchased from the seller "is loaded into a galley cart with utensils." Under Delta's facts, utensils are typically loaded into metal carrier boxes, which are distinct from galley carts and are stowed separately from the galley carts. However, this detail is not necessary to explain why the DOR's proposed interpretation should be rejected.

the one who originally loaded the utensils and service equipment), for cleaning, storing, and reusing.

### C. MN DOR Statement of Facts

Most of the facts presented by the DOR in its Interpretation Request are generally consistent with the facts discussed above. However, certain facts contained in the Interpretation Request warrant comment.

As mentioned above, under the DOR's facts, food items sold by the seller (or the Service Provider, under Delta's explanation of the facts) are not sold in a heated state or heated by the seller.<sup>4</sup> Also, the food sold by the seller does not include two or more food ingredients that are mixed or combined by the seller for sale as a single item. Delta highlights these facts to emphasize that food that would meet the SSUTA definition of "prepared food" under either clause (i) or clause (ii) of the definition is *not* the subject of the Interpretation Request. At issue is the sale of food that would meet the SSUTA definition of prepared food only because it is "sold with eating utensils provided by the seller."

The DOR presents two fact patterns for consideration that generally contain the same facts with the exception that the type of food being sold by the seller differs. Under the first fact pattern, the DOR essentially states that the utensils (i.e., a plate, bowl, glass, or cup) owned by the seller and loaded into a galley cart with food for delivery to an aircraft are "not necessary for the purchaser to receive the food item" and that the "food loaded does not require a plate, bowl, glass, or cup to receive the food." The DOR does not actually provide an example of a food item that is being sold under the first fact pattern (as it does in its second fact pattern where slices of premade cake are used as an example). Delta suggests that this fact pattern could include, e.g., bunches of bananas and multipacks of prepackaged cookies and chips.

The DOR's second fact pattern is essentially the same as the first fact pattern, except that, in the second fact pattern, the DOR states that a plate is "necessary for the purchaser to receive the food item." The DOR provides, as an example, that a premade cake is purchased by the seller, sliced into pieces by the seller, placed on plates owned by the customer, and then the cake and plates are loaded by the seller into the customer's galley cart.

Delta disagrees that, under the DOR's example, a plate is necessary for the purchaser (an airline) to receive the food. The MN DOR's statement that the plate is "necessary" to receive the food item is conclusory and should not be accepted as *a fact* for purposes of the DOR's Interpretation Request. In *Interpretation 2006-04*, examples of when a plate, bowl, glass, or cup are necessary to receive the food are with respect to "dispensed milk" and a "salad bar."

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<sup>4</sup> Although not a part of the MN DOR's statement of facts, food items served to passengers by Delta that are required to be heated or are served in a heated state are often purchased by Delta at low temperatures and are then heated in ovens equipped on the aircraft by Delta flight attendants prior to service.

Understandably, if milk is being “dispensed” to a purchaser, a glass or cup is necessary to receive the milk. Similarly, at a salad bar, a plate or bowl is arguably necessary to receive the salad.

Delta’s facts are distinguishable from the examples of dispensed milk and a salad bar. First, Delta is not being served the food it is purchasing. Second, Delta purchases many food items that it does not request to be plated by the Service Provider. Such items may be plated by Delta flight attendants prior to serving passengers. Assuming, *arguendo*, that Delta requests a Service Provider, as part of that provider’s service offering, to go ahead and plate certain foods, such a service does not render the plate, owned by Delta, necessary for Delta to receive the food. Since the food still has to be delivered to a Delta aircraft, the plate (and any necessary wrapping) is arguably more analogous to packaging than it is to a utensil necessary to receive the food. Delta’s facts are distinguishable from a situation where a plate is provided to an individual visiting a dessert bar that has slices of cake.

The DOR’s proposed interpretation is as follows:

The food sold in these transactions where utensils are owned by the purchaser and possessed by the seller meet the definition of prepared food.

A seller is considered to have physically given or handed utensils to the purchaser if the seller places both the utensils and the food being sold to the purchaser in the galley cart that is transferred to the purchaser, regardless of who supplied the utensils.

A seller is considered to have made the utensils available to the purchaser if the seller places the utensils that are necessary to receive the food items in the loaded galley cart along with the food, regardless of who supplied the utensils.

### **III. THE MN DOR’S PROPOSED INTERPRETATION SHOULD BE REJECTED**

#### **A. *Utensils Provided by the Seller, As Used Within Clause (iii) of the Definition of Prepared Food, Does Not Include Purchaser-Owned Utensils***

The MN DOR’s proposed interpretation is contrary to the definition of prepared food and the clear import of the phrase *sold with eating utensils provided by the seller* contained in the definition of *prepared food*.

Appendix C, Part II of the SSUTA defines “prepared food” to mean:

- (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.

SSUTA, Appendix C Part II. As previously explained, what is ultimately at issue in the Interpretation Request is clause (iii) and, more particularly, the meaning of “food sold with eating utensils provided by the seller.”

In order for food to be considered prepared food under clause (iii), the food must be “sold with eating utensils” and such utensils must be “provided by the seller.” A seller simply cannot be considered to provide to a purchaser, or make available to a purchaser, something that already belongs to the purchaser. The MN DOR has not offered any support that *utensils provided by the seller* was ever intended to apply to a scenario other than where the seller owns such utensils.

The meaning of *food sold with eating utensils provided by the seller* has been previously interpreted by the CRIC, and a definition is now provided in C. as part of the definition of *prepared food*. When food is considered to be *sold with eating utensils provided by the seller* varies depending upon the seller’s prepared food sales percentage. The MN DOR quotes the meaning of *food sold with eating utensils provided by the seller* as provided in C.2. Under C.2., for a seller with a prepared food sales percentage of 75% or less, generally, “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.” See SSUTA, Appendix C Part II, Prepared Food, C.2 (underline added).

Teeing off of the underlined phrase in the language of C.2. quoted above, the MN DOR first raises the issue whether “physically giving or handing utensils to purchasers” includes a seller loading utensils owned by the purchaser into galley carts along with the food items being sold by the seller. Without offering any support for its position, the DOR simply proposes that this issue be answered in the affirmative. Delta disagrees.

Delta contends that the issue is not, at least initially, whether *physically* giving or handing utensils to a purchaser *includes* loading utensils owned by the purchaser into galley carts along with the food. Rather, as addressed above, the issue is whether the phrase *utensils provided by the seller* within clause (iii) of the definition of *prepared food* is intended to include purchaser-owned utensils, i.e., utensils that were never the seller’s utensils. Only if it is determined that *utensils provided by the seller* includes purchaser-owned utensils does the issue arise under C.2. whether *physically* giving or handing utensils to a purchaser *includes* loading utensils owned by the purchaser into galley carts along with the food.

As Delta reads C. and understands its history, this part of the SSUTA is intended to address when, in order to satisfy the requirement in clause (iii) that utensils be *provided by the seller*, the seller must physically give or hand the utensils to the purchaser, as opposed to simply making such utensils available to the purchaser at the seller's food establishment. The clear import of C. is that the utensils being provided *by* the seller are utensils *of* the seller. Only then does the issue arise whether there must be a physical handing of the utensil to the purchaser or simply making the utensil available. As stated, Delta contends that a seller cannot be considered to provide utensils to the purchaser that are already the purchaser's utensils.

In 2005, SSUTA implementing states were provided with an issue paper setting forth recommended interpretations of SSUTA definitions for consideration under Section 902 of the SSUTA. A copy of this paper, the *Streamlined Sales Tax Project Discussion Paper, Food Definition Issues* (January 10, 2005) ("*Issue Paper*") is attached. With respect to the definition of prepared food, the issue "*When does a seller provide utensils?*" is addressed on page 5 of the *Issue Paper*, and four examples are provided. In all situations, it is clear that the seller owns the utensils being provided, whether they are physically handed to the customer or otherwise made available to the customer.

None of the examples in the *Issue Paper* support that the phrase *provided by the seller* within the definition of *prepared food* includes purchaser-owned utensils. Furthermore, the fact patterns in the *Issue Paper* are not even remotely similar to the facts of the Interpretation Request or, more particularly, Delta's facts. Delta's facts do not involve a seller of food handing Delta *a napkin* or simply providing or making available a fork, or spoon, or straw, similar to a deli or eating establishment. Delta's Service Providers, as part of a contracted service, clean and return to Delta reusable utensils owned by Delta and/or deliver to Delta utensils that Delta has purchased in bulk from third parties.

In the Interpretation Request, the MN DOR also quotes the language in C.2. that "plates, bowls, glasses and cups, necessary for the purchaser to receive the food need only be made available to purchasers." See SSUTA, Appendix C Part II, Prepared Food, C.2 (underline added). Teeing off of the underlined phrase, the next issue raised by the DOR is essentially whether "making available to purchasers" a plate, bowl, glass, or cup necessary to receive the food includes a seller placing plates, bowls, glasses or cups that are owned by the purchaser into galley carts. Here, too, the DOR proposes that this issue be answered in the affirmative. Delta disagrees with the proposed interpretation for the two primary reasons already discussed above. First, Delta disagrees with the DOR's purported fact that that the Delta-owned utensils are necessary for Delta to receive the food it is purchasing. Second, Delta disagrees with the proposed interpretation for the same reason it disagrees with the proposed interpretation of Issue 1 – the Service Provider cannot "make available" to Delta something that is already Delta's.

**B. Adoption of the MN DOR’s Proposed Interpretation Would Expand the Meaning of Prepared Food Beyond What Is Currently Contemplated by SSUTA States**

Delta contends that the MN DOR’s proposed interpretation, if adopted, would vastly expand the meaning of prepared food in a manner inconsistent with what is currently contemplated by SSUTA states. To illustrate the point, the following scenario describes a fact pattern analogous to the facts of the Interpretation Request.

Assume that an ordinary grocery store or warehouse-type store selling groceries offers online purchasing and delivery of food and beverage items as well as utensils. A purchaser accesses the store’s online ordering page to purchase (a) multipacks of cookies and chips (each multipack containing several individual bags of cookies or chips); (b) several bunches of bananas; (c) bags of ground coffee; (d) bags of ice; (e) multiple packages of napkins; (f) cartons of orange juice; and (g) several sleeves of cups (all analogous to the food and utensils ordered for an outbound aircraft). The purchaser pays for the items and requests home delivery. The seller/grocery store loads the food along with the purchaser’s utensils into grocery bags (analogous to loading galley carts and box carriers). The seller then transports and delivers the loaded grocery bags to the purchaser’s home (analogous to the airline’s aircraft). The purchaser intends to serve the food to its guests later that day or at some time in the future.

Following the MN DOR’s specific question in the Interpretation Request, the issue arises whether “physically giving or handing utensils to purchasers” includes the grocery store loading utensils previously purchased by the customer into grocery bags along with food items and delivering the bags to the purchaser. By adopting the MN DOR’s proposed interpretation, all of the purchased food would meet the definition of prepared food. It is doubtful that any SSUTA state, including Minnesota, would agree with such an outcome based on these facts. And yet, the facts of Delta are indistinguishable in all material respects.<sup>5</sup>

**IV. CONCLUSION**

For the reasons discussed above, Delta urges the CRIC to reject the MN DOR’s proposed interpretation and issue an interpretive opinion that *eating utensils provided by the seller* does not include purchaser-owned utensils.

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<sup>5</sup> Under Delta’s facts, the utensils are not even purchased from the Service Provider.



Delta respectfully requests to participate in the CRIC meeting at which the Interpretation Request will be discussed so that it can respond to other comments that may be filed and any questions that the CRIC may have. In the meantime, if you have any questions or wish to discuss any aspect of Delta's comments, please contact me at (404) 715-6427 or Mace Gunter at (404) 773-9281.

Respectfully Submitted,



Joel Hartman  
Managing Director – Tax

cc: Mace Gunter, Delta Air Lines, Inc.  
Andy Carlson, Taft Stettinius & Hollister LLP

Attachment

This issue paper was approved by the Streamlined Sales Tax Project on January 6, 2005. It will be forwarded to the Implementing States for consideration under Section 902 of the Streamlined Sales and Use Tax Agreement. The paper sets forth recommended interpretations of Agreement definitions that a state would be required to adopt in rules or regulations. These interpretations shall be considered part of the Agreement and shall have the same effect as the Agreement.

**Streamlined Sales Tax Project  
Discussion Paper**

**Food Definition Issues  
January 10, 2005**

**Background:**

The Streamlined Sales and Use Tax Agreement (as amended November 19, 2003) provides uniform definitions for the following items that states will use in crafting exemptions and exclusions to exemptions:

- Food and food ingredients
- Alcoholic beverages
- Candy
- Soft drinks
- Prepared food
- Dietary supplement

**Issue:**

As states move forward in implementing changes to their sales and use tax law, interpretations by some states may be inconsistent with other states' interpretations. The following chart lists, by definition that issues that were raised, and the resolution reached for each that must be addressed consistently by states in a rule or regulation.

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Issues	Considerations by States	Resolution at Project Meeting
<p><b>Food and food ingredient</b> means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food and food ingredients” does not include “alcoholic beverages” or “tobacco.”</p>		
<p>1. <b>Used for medical or hygiene purpose but tastes good.</b> The following items may be considered ingested or chewed and can be chosen for their taste:</p> <ul style="list-style-type: none"> <li>• Cough drops (Drug Facts box)</li> <li>• Throat lozenges (Drug Facts box)</li> <li>• Breath mints (Nutrition Facts box)</li> <li>• Breath sprays (No Facts box)</li> <li>• Breath strips (Nutrition Facts box or nothing)</li> <li>• Toothpaste (Drug Facts Box)</li> </ul>	<ul style="list-style-type: none"> <li>• Items must be ingested or chewed <b>primarily</b> for taste or nutrition. These items are ingested or chewed <b>primarily</b> for medical or hygiene purposes and are not food or food ingredients.</li> <li>• Items meet definition of candy. Can an item be candy if it is not a food or food ingredient?</li> <li>• Is “commonly used” better terminology than “primarily used.” While a vendor will have an idea of how an item is commonly used, it might not know how a customer will primarily use it.</li> <li>• Use labeling to aid in determining whether these items are food or something other than food (Drug Fact box is not food vs. Nutrition Facts box is food).</li> </ul>	<p>The following items are not food and food ingredients.</p> <ul style="list-style-type: none"> <li>• Cough drops</li> <li>• Throat lozenges</li> <li>• Breath sprays</li> <li>• Breath strips</li> <li>• Toothpaste</li> </ul> <p>Breath mints are food and food ingredients. If a state exempts food and food ingredients, except candy, the sale of the breath mints is taxable.</p> <p>Items will be considered food or food ingredients if such items are commonly ingested or chewed for taste or nutrition.</p> <p>Note: Using the Facts box on the label does not properly distinguish this tax treatment (e.g., breath strips and breath mints both have Nutrition Facts boxes but only one is considered food and food ingredients).</p>

Issues	Considerations by States	Resolution at Project Meeting
<p>2. <b>Purchaser will use food items other than to ingest or chew.</b> The following items when sold by a retailer are food, however, the purchaser may use them for a purpose other than ingestion or chewing:</p> <ul style="list-style-type: none"> <li>• Ice used in coolers</li> <li>• Salt used for freezing ice cream – rock salt (no Nutrition Facts box like granular salt)</li> <li>• Baking soda used as deodorizer (label for specialty product indicates odor absorber – other has Drug Facts box)</li> <li>• Pumpkins used for decorations</li> <li>• Apples and carrots fed to horses</li> </ul>	<ul style="list-style-type: none"> <li>• If seller knows it is not intended for ingestion or chewing by humans, the item is not a food or food ingredient (i.e., marketed or labeled for purpose other than ingestion or chewing).</li> <li>• If seller does not know whether an item will be ingested or chewed by humans the item is food; purchaser would owe use tax on items that are not ingested or chewed by humans.</li> <li>• Do salt products contain some labeling that indicates it is not for ingestion.</li> </ul>	<p>A seller can presume that items that are commonly ingested or chewed for taste and nutrition are food and food ingredients and apply tax appropriately, even though it is possible that the purchaser may not chew or ingest the item for taste and nutrition.</p> <ul style="list-style-type: none"> <li>• Ice sold by a food retailer in cubes or crushed can be ingested for taste. Therefore, a seller may exempt the sale of such ice. If the purchaser uses the ice to keep food cold rather than ingesting or chewing it, the purchaser would owe use tax on the purchase of the ice. Ice sold in blocks or dry ice, which are commonly sold for cooling purposes, would not be food or food ingredients.</li> <li>• Granular salt is commonly ingested for taste and nutrition and is a food or food ingredient. Rock salt that is less pure is commonly used for ice cream making and other freezing or for melting. Rock salt is not a food or food ingredient.</li> <li>• Pumpkins will be presumed to be food or food ingredients unless decorated at the time of sale. This is true even though the purchaser may use the pumpkin to carve and decorate or the fact the certain varieties of pumpkins are better for eating than others.</li> </ul>
<p><b>Alcoholic beverages</b> means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.</p>		
<p>1. <b>Alcohol used for cooking</b></p> <ul style="list-style-type: none"> <li>• Cooking wines and sherries</li> <li>• Vanilla extract</li> </ul>	<ul style="list-style-type: none"> <li>• Items exceed the alcohol content but are not intended or sold as a beverage (drinkable liquid).</li> </ul>	<p>Liquids used in cooking that exceed the alcohol content of 0.5% but are not intended for sale as a beverage (drinkable liquid), are food and food ingredients. Examples include cooking wine, vanilla extract.</p>

Issues	Considerations by States	Resolution at Project Meeting
<b>Soft drinks</b> means non-alcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.		
1. <b>Does beverage mean liquid?</b> <ul style="list-style-type: none"> <li>• Powdered fruit drinks</li> <li>• Powered tea with flavoring and sweeteners</li> <li>• Frozen fruit drink concentrate</li> </ul>	<ul style="list-style-type: none"> <li>• Because the items are intended to become beverages, they are soft drinks, or</li> <li>• Beverage is defined in the dictionary as a "drinkable liquid."</li> </ul>	Beverage means a liquid. Soft drinks will not include the following that may be made into a liquid by a purchaser. <ul style="list-style-type: none"> <li>• Powdered fruit drinks</li> <li>• Powered tea with flavoring and sweeteners</li> <li>• Frozen fruit drink concentrate</li> </ul>
<b>Prepared food</b> means food sold in a heated state or heated by the seller.		
1. <b>What is heated?</b>	Any temperature higher than the air temperature of the room or place where the item is sold.	Any temperature higher than the air temperature of the room or place where the item is sold.
2. <b>When is an item sold heated?</b>	<ul style="list-style-type: none"> <li>• Must be offered for sale heated.</li> <li>• Not sold heated if sold from a refrigerated display case and purchaser heats it in a seller-provided microwave either before or after paying the seller.</li> </ul>	<ul style="list-style-type: none"> <li>• Must be offered for sale heated.</li> <li>• Not sold heated if sold from a refrigerated display case and purchaser heats it in a seller-provided microwave either before or after paying the seller.</li> </ul>

Issues	Considerations by States	Resolution at Project Meeting
<p><b>Prepared food</b> means 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.</p>		
<p>1. <b><i>When does a seller provide utensils?</i></b>  The following examples illustrate the issue:</p> <ul style="list-style-type: none"> <li>• Food handling rules require that a deli have napkins near a service area for purchasers in the event of a spill, dirty hands, etc.</li> <li>• A fast food restaurant has a service area centrally located where purchasers may obtain napkins, forks, spoons, knives, straws and drink covers. The restaurant will place these same items into bags with “to-go” orders.</li> <li>• Concessions stand serves cream puffs on a napkin or places a napkin in the bag transferred to the purchaser.</li> <li>• A convenience store sells many packaged food items, including sandwiches it did not prepare. An area where these sandwiches, bags of chips, and other snack foods are displayed includes a microwave, napkin dispenser, packaged condiments, and knives. Purchasers may or may not choose to use the items made available by the seller.</li> </ul>	<ul style="list-style-type: none"> <li>• “Provided” means the seller’s employee must individually give a purchaser at least one of the items noted above with the transfer of food, or (TN, WA, TX)</li> <li>• “Provided” means they are made available by the seller for self-service by the purchaser on the seller’s premises, or</li> <li>• “Provided” means they are made available by the seller for self-service by the purchaser in the immediate area where the food is displayed. (MN, NC)</li> <li>• Language regarding utensils came from a Texas regulation (see attached e-mail from David Sommerville).</li> <li>• Consider all sales of food and food ingredients to be prepared food if a given percentage of sales by business meet the definition of prepared food.</li> <li>• Consider removing napkins and straws from the definition of utensils so that the mere presence of a napkin dispenser would not bring food not mixed or combined by the retailer into the definition of prepared food.</li> </ul>	<p>Define “provided by the seller” with respect to utensils to mean:</p> <ol style="list-style-type: none"> <li>1. Utensils need only be made available to purchasers if a seller’s sales of prepared food in A and B of the definition (except items 1 through 3 that a states chooses to exclude), soft drinks, and alcohol beverages at an establishment are more than 75% percent of the seller’s total sales at an establishment.</li> <li>2. For seller’s other than in 1, the seller’s customary practice is to give the utensil to the purchaser, except that plates, glasses, or cups necessary for the purchaser to receive the food or food ingredients need only be made available.</li> </ol>

Issues	Considerations by States	Resolution at Project Meeting
<p>2. <b>Utensils provided by wholesaler and resold by retailer</b> The following examples illustrate the issue:</p> <ul style="list-style-type: none"> <li>• A caterer sells box lunches to a concessionaire. The box lunches include a sandwich, bag of chips, fruit salad, coleslaw, condiments, salt, pepper, fork and knife. The concessionaire sells the box lunches to persons attending a music festival. Did the concessionaire provide utensils?</li> <li>• A food manufacture packages a ready-to-eat lunch that includes pizza crust, pizza sauce, cheese, pepperoni, beverage, straw, and plastic knife. The manufacturer sells the ready-to-eat lunch to a retailer. The retailer sells the ready-to-eat lunch to end-users. Is the retailer providing utensils?</li> </ul>		<p>Although a person other than the retailer may have originally placed the utensil in the package, the retailer provides it to the purchaser when it transfers the package to the purchaser. Therefore, in the examples given, utensils are provided by the retailer.</p>
<p>3. <b>Food sold by weight or volume.</b> The following examples illustrate the issue:</p> <ul style="list-style-type: none"> <li>• A retailer sells prepackaged sandwiches it has prepared. The sandwich package lists the weight of sandwich as 12 oz. Prices for the sandwiches may vary by the type of filling but not because of the weight.</li> <li>• A deli in a grocery store sells potato salad. The purchaser will ask the retailer to dish the potato salad in a container. The price will vary based on weight of potato salad in the</li> </ul>	<ul style="list-style-type: none"> <li>• Food sold by weight or volume means that the price will vary based on the weight or volume of the product a purchaser selects (e.g., it is sold by the pound and the price is determined by multiplying the weight selected by the price per pound).</li> </ul>	<p>Food sold by weight or volume means that the price will vary based on the weight or volume of the product a purchaser selects (e.g., it is sold by the pound and the price is determined by multiplying the weight selected by the price per pound).</p>

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<b>Bundles of Exempt Food With Taxable Food</b> –Sales price includes the value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise		
<ul style="list-style-type: none"> <li>• Trail mix – includes taxable candy and exempt raisins and peanuts</li> <li>• Lunchables – Includes taxable soft drink and exempt cheese, crackers, and cookie</li> <li>• Kids' meal includes taxable hamburger, French fries, and toy and exempt carton of milk</li> </ul>		This issue will be resolved with other bundling issues.