Legislative Fiscal Bureau
One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

October 20, 2003

TO: Members
Wisconsin Legislature

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 547 and Senate Bill 267: Streamlined Sales and Use Tax Provisions

This document presents information regarding 2003 Assembly Bill 547 and Senate Bill 267, which are companion bills that would amend Wisconsin's sales and use tax statutes so that they conform to the provisions of the multi-state Streamlined Sales and Use Tax (SSUT) Agreement.

This document is written in five parts:

•**PART 1** provides an executive summary of the bills.

•**PART 2** is a comprehensive summary of each provision of the bills.

•**PART 3** presents information regarding the bills' fiscal effects.

•**PART 4** includes two attachments relating to the treatment of food and beverages and durable medical equipment under the bills.

•**PART 5** is an appendix, which summarizes the Streamlined Sales and Use Tax Agreement.

Prepared by: Rob Reinhardt

TABLE OF CONTENTS

Part 1: Executive Summary

Part 2: Comprehensive Summary of Assembly Bill 547/Senate Bill 267

PART 1

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

BACKGROUND

AB 547/SB 267 would make a number of modifications to the state's sales and use tax statutes, most of which are required in order to conform to the terms of the multi-state Streamlined Sales and Use Tax (SSUT) Agreement.

Under current federal law and U.S. Supreme Court decisions, states may not require sellers to collect and remit sales and use taxes unless the seller has a sufficient business connection (or "nexus") with the state, which is established by the seller having a physical presence in the state. In Wisconsin, a seller has nexus if it does any of the following: (a) owns real property in this state; (b) leases or rents out tangible personal property located in this state; (c) maintains, occupies, or uses a place of business in this state; (d) has any representative or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or taking orders for any tangible personal property or taxable services; (e) services, repairs, or installs equipment or other tangible personal property in Wisconsin; or (f) performs construction activities in this state.

Sellers that do not have nexus with Wisconsin can voluntarily agree to collect and remit the tax on their sales to Wisconsin residents. Such agreements also are permitted in other states. In Wisconsin and other states, if a seller does not have nexus and has not voluntarily agreed to collect the tax, the state imposes a use tax on taxable purchases from the seller by state residents. However, collecting the use tax from individual purchasers presents a very difficult enforcement issue. Multi-state retailers have long resisted efforts by the states, and legislation introduced in Congress, to compel use tax collection, citing the high costs and difficulty of complying with numerous, disparate state and local sales tax systems.

One of the principal aims of the SSUT Agreement is to make sales and use taxes more uniform across states and local taxing jurisdictions. In addition, in order to streamline administration of the tax, states participating in the Agreement would jointly certify sales tax service providers and automated systems. Retailers could contract with certified service providers (CSPs) to assume the seller's sales and use tax responsibilities or use certified automated systems (CASs) for tax calculation and record-keeping purposes. Participating states would also be required to maintain databases that retailers could use to determine whether a transaction is taxable and the appropriate tax rate. The Agreement also includes an "amnesty" provision that would forgive back taxes for sellers that agree to collect and remit taxes. It is hoped that these modifications will encourage additional sellers to voluntarily agree to collect the tax or persuade Congress to pass legislation permitting states to require additional out-of-state sellers to collect and remit taxes. It is also believed that the provisions of the Agreement will improve administration of the tax for in-state sellers.

The SSUT Agreement is the product of the Streamlined Sales Tax Project, a multi-state effort begun by state revenue departments in March, 2000. Representatives of state legislatures, local governments, and business organizations have also been active participants in the Project. Currently 41 states (including Wisconsin) and the District of Columbia are voting members in the Project, which means that the legislatures of these states have enacted enabling legislation or their state executives have issued orders authorizing their participation. Wisconsin's participation was authorized under 2001 Wisconsin Act 16 (the 2001-03 biennial budget act). The SSUT Agreement was adopted by the Project's implementing states on November 12, 2002. The next step is for individual states to enact statutory modifications to bring their sales and use tax systems into conformance with the terms of the Agreement, which is the purpose of AB 547/SB 267.

The Agreement will take effect and become binding when at least 10 states comprising at least 20% of the total population of all states imposing a state sales tax have petitioned for membership and have been found to be in compliance with the Agreement's requirements by the Agreement's governing board. As of this writing, 20 states, which comprise approximately 32% of the total population of all states with a sales tax, have adopted legislation to make their statutes conform to the Agreement. These states include Arkansas, Indiana, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. However, no states have yet been found to be in compliance by the Agreement's governing board. It is anticipated that the governing board will begin reviewing certificates of compliance in early 2004.

This Executive Summary highlights the most significant changes to state law included in AB 547/SB 267. The next three parts of this memorandum provide a comprehensive analysis of the bills' provisions and their fiscal effects. Finally, a description of the SSUT Agreement is presented in the Appendix. AB 547/SB 267 would take effect on July 1, 2004. All of the statutory changes under the bills would take effect on that date, regardless of when, or whether, the SSUT Agreement takes effect.

DUTIES AND RESPONSIBILITIES OF THE DEPARTMENT OF REVENUE

Under 2001 Act 16, the Department of Revenue (DOR) was authorized to enter into the Streamlined Sales and Use Tax Agreement to simplify and modernize sales and use tax administration in order to reduce the tax compliance burden for all sellers and all types of commerce. DOR may promulgate rules to administer the SSUT provisions, procure goods and services jointly with other states that are signatories to the Agreement in furtherance of the Agreement, and take other actions reasonably required to implement these provisions.

Current law also authorizes the Department to act jointly with other states that are signatories to the Agreement to establish standards for the certification of certified service providers and certified automated systems and to establish performance standards for multi-state sellers. A "certified service provider" is an agent that is certified by the signatory states to perform all of a seller's sales tax and use tax functions related to the seller's retail sales. A "certified automated

system" is software that is certified by the signatory states and that is used to calculate state and local sales and use taxes on transactions by each appropriate jurisdiction, to determine the amount of tax to remit to the appropriate state, and to maintain a record of the transaction.

Current law provides that a certified service provider is the agent of the seller with whom the provider has contracted and is liable for the sales and use taxes that are due the state on all sales transactions that the CSP processes for a seller, except in cases of fraud or misrepresentation by the seller. A person that provides a certified automated system is responsible for the system's proper functioning and is liable to this state for tax underpayments that are attributable to errors in the system's functioning. A seller that uses a CAS is responsible and liable to this state for reporting and remitting sales and use tax. A seller that has a proprietary system for determining the amount of tax due and that has signed an agreement with the signatory states establishing a performance standard for the system is liable for the system's failure to meet the performance standard.

Current state law also provides that no law of this state, or the application of such law, may be declared invalid on the ground that the law, or the application of such law, is inconsistent with the SSUT Agreement. No provision of the Agreement in whole or in part invalidates or amends any law of this state and the state becoming a signatory to the Agreement does not amend or modify any law of this state.

Under AB 547/SB 267, DOR would be authorized to certify compliance with the SSUT Agreement and, pursuant to the Agreement, certify certified service providers and certified automated systems. The Department would also be authorized to maintain databases that indicate: (a) whether specific items are taxable or nontaxable; and (b) tax rates, taxing jurisdiction boundaries, and zip code or address assignments related to the administration of state and local taxes imposed in Wisconsin. These databases would have to be accessible to sellers and CSPs.

AB 547/SB 267 would also specifically permit DOR to audit (or authorize others to audit) sellers and certified service providers who are registered with the Department pursuant to the SSUT Agreement.

MODIFICATIONS TO THE TAX BASE

The sales tax base is the array of goods, services, and transactions that are subject to the tax. The SSUT Agreement does not require participating states to have identical tax bases. However, the Agreement does require states to use uniform definitions in establishing their tax bases. AB 547/SB 267 include the following changes to the current sales and use tax base in Wisconsin:

- Most types of food sales would be treated the same as under current law. However, some food sales that are now exempt would become taxable and certain sales that are now taxable would become exempt. These modifications are listed in Attachment 1.

- AB 547/SB 267 would expand the types of medical equipment that are exempt from

tax to include items such as hospital beds, patient lifts, and I.V. stands that are purchased for in-home use. A more detailed list of items that would become exempt under this provision is presented in Attachment 2.

- AB 547/SB 267 would eliminate the current exemption for antiembolism elastic hose.

- The current exemptions for equipment used in the treatment of diabetes and equipment used to administer oxygen would be limited to equipment purchased for in-home use.

- AB 547/SB 267 would repeal the current exemption for cloth diapers.

- Certain currently exempt sales of pre-written computer software that is customized for a specific purchaser would become taxable.

- The tax would be imposed on the entire sales price of products comprised of exempt items that are bundled with taxable items by the seller (such as a fruit basket that includes candy, or a cheese tray that includes a cutting board and knife). Currently, the seller is not required to pay tax on the value of the nontaxable items.

- Under AB 547/SB 267, if tangible personal property (such as a construction crane) is provided along with an operator, the transaction would be considered a service (which may or may not be taxable) rather than a lease (which generally is taxable) as long as the operator is necessary for the property to perform in the manner for which it is designed and the operator does more than maintain, inspect, or set up the property. Under current law, the determination of whether such transactions are a lease of property or a service depends upon the amount of control maintained by the operator and the degree of responsibility for completion of the work assumed by the operator.

- Purchases of items (such as catalogs, telephone directories, or candy) that are sold by an out-of-state seller to a Wisconsin purchaser and distributed directly by the seller by common carrier or U.S. mail to Wisconsin residents without the purchaser ever taking possession of the items would become taxable regardless of whether or not the out-of-state seller has nexus with Wisconsin. Under current law, as interpreted by the courts, such sales are not subject to the sales or use tax if the seller is located out-of-state and does not have nexus with Wisconsin.

According to DOR, all of these modifications are required in order to conform to the terms of the SSUT Agreement.

NON-EXEMPT USE OF PROPERTY AFTER PURCHASE

Currently, if a purchaser certifies that the items purchased will be used in a manner entitling the sale to be exempt from tax and the purchaser subsequently uses the property in some other manner, the purchaser is liable for payment of the sales tax. The tax is measured by the sales price

of the property to the purchaser unless the taxable use first occurs more than six months after the sale. In that case, the purchaser may base the tax either on that sales price or on the fair market value of the property at the time the taxable use first occurs. AB 547/SB 267 would eliminate the option to base the tax on fair market value if the taxable use first occurs more than six months after the purchase, so that the tax would always be based on the sales price to the purchaser.

TREATMENT OF DROP-SHIPMENTS

A Wisconsin "drop-shipment" occurs when a purchaser located in Wisconsin orders an item from an out-of-state retailer not registered to collect Wisconsin sales or use tax and the product is delivered to the customer directly from a Wisconsin manufacturer, without the retailer taking possession. Under current law, the Wisconsin manufacturer is required to collect the sales tax from the purchaser on such transactions. Under AB 547/SB 267, Wisconsin manufacturers would no longer be liable for the sales tax on drop-shipments to Wisconsin purchasers. Instead, the purchaser would be liable for use tax.

SOURCING

AB 547/SB 267 includes detailed provisions for determining the taxing jurisdiction in which a sale or lease of property or services occurs (sourcing). In general, the sourcing rules under the bills are destination-based, which is consistent with the current sourcing provisions in Wisconsin. However, the Department of Revenue has identified several situations where the SSUT provisions would differ from current law and practice. The most significant change would be to relieve sellers (printers) of direct mail of the burden of determining the destination of each piece of mail for tax purposes if the purchaser does not provide this information. Other sourcing changes involve towing services, admissions, certain sales by florists, leases, software and services (such as cable television) delivered electronically, and post-paid telecommunications services.

AGREEMENTS WITH DIRECT MARKETERS; RETAILER'S COMPENSATION

Under current law, sellers may deduct the retailer's discount from taxes due as compensation for administrative costs. The retailer's discount is equal to 0.5% of the tax liability per reporting period, with a $10 minimum. Also, under current law, DOR may enter into agreements with out-of-state direct marketers to collect state and local sales and use taxes. An out-of-state direct marketer that collects such taxes may retain 5% of the first $1 million of the taxes collected in a year and 6% of the taxes collected in excess of $1 million in a year. This provision does not apply to direct marketers who are required to collect sales and use taxes in Wisconsin because they have nexus with this state. To date, no agreements have been entered into under this provision.

AB 547/SB 267 would repeal the current provisions regarding agreements with direct

marketers. Instead, under the bills, the following persons could retain a portion of sales and use taxes collected on retail sales in an amount determined by DOR and by contracts that the Department enters into pursuant to the SSUT Agreement: (a) certified service providers; (b) sellers that use a certified automated system; and (c) large, multi-state sellers that have a proprietary system that calculates the amount of tax owed to each taxing jurisdiction. Under the bills' provisions, there would be no statutory limit on the amount of retailer compensation paid to such persons. Also, such compensation could be paid to in-state sellers, out-of-state sellers that have nexus with Wisconsin, and out-of-state sellers that do not have nexus. However, DOR indicates that, under the Agreement, only non-nexus sellers that voluntarily agree to collect taxes would receive additional compensation under item (c). Sellers that do not meet the above criteria would continue to receive the regular 0.5% retailer's discount.

"AMNESTY" PROVISION

Under AB 547/SB 267, a seller would not be liable for uncollected and unpaid state and local sales and use taxes (including penalties and interest) on previous sales made to Wisconsin purchasers if the seller registers with DOR to collect and remit state and local sales and use taxes on such sales in accordance with the SSUT Agreement. In order to receive amnesty, the seller would have to: (a) register within one year after the effective date of this state's participation in the Agreement; and (b) collect and remit state and local sales and use taxes on sales to purchasers in this state for at least three consecutive years after the date on which the seller registers.

The amnesty would not be available to: (a) sellers that were already registered with DOR during the year immediately preceding the effective date of Wisconsin's participation in the Agreement; (b) sellers that are being audited by DOR; or (c) sellers that have committed or been involved in a fraud or an intentional misrepresentation of a material fact.

ERRONEOUS COLLECTION OF TAX

AB 547/SB 267 would establish a procedure to settle disputes between purchasers and sellers regarding erroneous collections of sales or use tax. Under the bills, customers who believe that the amount of sales or use tax assessed on a sale is erroneous could send a written notice to the seller requesting that the alleged error be corrected. The seller would have to review its records within 60 days to determine the validity of the customer's claim. If the review indicates that there is no error as alleged, the seller would have to explain the findings of the review in writing to the customer. If the review indicates that there is an error as alleged, the seller would have to correct the error and refund the amount of any tax collected erroneously, along with the related interest. A customer could take no other action, or commence any action, to correct an alleged error in the amount of sales or use tax assessed unless the customer has exhausted his or her remedies under this provision.

Under current law, such disputes are handled through the court system. The bills' provisions

are intended to provide a more efficient dispute resolution process.

ROUNDING

AB 547/SB 267 would modify the rounding rules used by retailers so that sellers would be allowed to compute the amount of tax to be collected based on each invoice (including numerous items) or on each item included in the sale. Under current law, the amount of tax collected must be calculated by multiplying the tax rate by the total transaction price, not by the prices of individual items. These provisions do not affect the amount of tax due to the state from the retailer, only how the retailer may calculate the amount of tax collected from purchasers.

SSUT AGREEMENT AGENTS

The bills would authorize sellers to appoint an agent to represent the seller before the states that are signatories to the SSUT Agreement. Under AB 547/SB 267, sellers could designate such agents to: (a) register with DOR for a business tax registration certificate; (b) file an application with DOR for a permit for each place of operations; and (c) remit taxes and file returns under the sales and use tax statutes.

BUSINESS TAX REGISTRATION

Under current law, any person who is not otherwise required to collect Wisconsin sales and use taxes (because of a lack of nexus) and who makes sales to persons within this state of taxable property or services may register with DOR to voluntarily collect the tax. Sellers who register with DOR must obtain a business tax registration certificate, which authorizes and requires the person to collect, report, and remit the state use tax. AB 547/SB 267 would specify that registration with DOR under this provision could not be used as a factor in determining whether the seller has nexus with this state for any tax at any time.

In addition, the bills would specify that registration under the above provision would authorize and require the retailer to collect, report, and remit local use taxes, and local jurisdictions would be specifically authorized to impose the tax on such sellers. Under current law, voluntary registration only obligates out-of-state retailers to collect state use taxes, not local taxes.

The bills would also authorize DOR to waive the business tax registration fee for sellers that voluntarily register to collect sales and use taxes.

EXEMPTION CERTIFICATES

Under current law, it is presumed that all of a seller's receipts are subject to the sales and

use tax until the contrary is established. The burden of proving that a sale is not taxable is upon the seller unless the purchaser provides a certificate to the effect that the purchase is exempt. The exemption certificate must be taken by the seller in good faith. Under AB 547/SB 267, an exemption certificate would relieve the seller from the burden of proof as long as it is taken at the time of purchase. The "good faith" requirement would be deleted. However, an exemption certificate would not relieve the seller of the burden of proof if the seller fraudulently fails to collect sales tax or solicits the purchaser to claim an unlawful exemption.

Under present law, no certificate is required for certain types of tax-exempt livestock sales. AB 547/SB 267 would repeal this provision so that an exemption certificate would be required for such sales.

PROGRAM FOR CHILDREN AND FAMILIES

Under current law, the Department of Health and Family Services has a GPR appropriation for grants to counties for services for children and families. The amount of the appropriation is equal to one-eleventh of the amount of sales tax collected from out-of-state direct marketers who have entered into agreements with DOR, under which the sellers receive compensation over and above the normal 0.5% retailer's discount (described above). AB 547/SB 267 would repeal this appropriation and the statutory language relating to the grants. The program was created in 1999 Wisconsin Act 9. To date, no funding has been provided for the program because no agreements with direct marketers have been entered into.

OTHER PROVISIONS

AB 547/SB 267 would eliminate specific requirements relating to the content of sales and use tax returns and, instead, provide that the return must show the amount of taxes due for the period covered by the return and such other information as DOR deems necessary. This modification is intended to provide DOR with flexibility to simplify sales tax returns and make the returns conform to standards required under the SSUT Agreement.

Under current law, in order to protect the revenue of the state, DOR may require sellers to provide security in an amount determined by the Department, but not more than $15,000. The bills would authorize DOR to require a larger amount of security from certified service providers.

AB 547/SB 267 would restrict the use of personally identifiable information obtained by certified service providers from purchasers, and require CSPs to provide consumers clear and conspicuous notice of their practices regarding such information. CSPs would also have to provide sufficient technical, physical, and administrative safeguards to protect personally identifiable information from unauthorized access and disclosure.

The bills would require additional notice (120 days) of repeal of a county sales tax or

cessation of local baseball park or football stadium taxes.

DOR ADMINISTRATIVE FUNDING

AB 547/SB 267 would provide DOR with $25,000 GPR in both 2003–04 and 2004-05 to pay for administrative costs related to the SSUT Agreement.

FISCAL EFFECT

The Department of Revenue estimates that the changes to the tax base under the bills would reduce state sales tax revenues by $5,370,000 annually beginning in 2004-05, primarily due to expanded exemptions relating to food and durable medical equipment. These revenue losses would be partially offset by an estimated $2,020,000 revenue increase from out-of-state sellers that have voluntarily agreed to collect the use tax on sales to Wisconsin residents in anticipation of the Agreement, for a net annual revenue loss of $3,350,000. In addition, the provision that would provide a higher rate of retailer compensation to certain sellers would also result in a state revenue decrease. At this time, it is not possible to reliably estimate the cost of the higher retailer's compensation, because the rate of compensation and the number and size of sellers that would qualify are not known. However, it is possible that the cost of this provision could be significant. As noted above, the bills would also provide $25,000 GPR to DOR in 2003-04 and 2004-05 to administer the new provisions.

In the aggregate, annual county and stadium sales and use tax collections are estimated to decrease by $240,000, and collections from the exposition district tax would increase by an estimated $250,000 annually, beginning in 2004-05. The sourcing provisions under the bills could also result in tax shifting across counties.

In addition to these short-term fiscal effects, it is possible that the passage of AB 547/SB 267, along with similar laws in other states, could result in a significant increase in sales and use tax collections from remote sales in future years. This could occur if the bills' provisions result in additional retailers voluntarily agreeing to collect and remit use taxes to Wisconsin or if Congress is persuaded to pass federal legislating allowing states to require out-of-state sellers to collect and remit the tax. DOR estimates that such future collections could total $150 million annually.

More detailed information about the bills' fiscal impacts is presented in Part 3 of this memorandum.

PART 2

COMPREHENSIVE SUMMARY OF ASSEMBLY BILL 547/SENATE BILL 267

COMPREHENSIVE SUMMARY OF ASSEMBLY BILL 547/SENATE BILL 267

INTRODUCTION

Assembly Bill 547 and Senate Bill 267 are companion bills that would amend Wisconsin's sales and use tax statutes so that they conform to the provisions of the multi-state Streamlined Sales and Use Tax (SSUT) Agreement. The following sections present a general overview of Wisconsin's sales and use tax under current law and a detailed description of the provisions of AB 547/SB 267.

OVERVIEW OF CURRENT LAW

Under current law, Wisconsin imposes a 5% general sales tax on the gross receipts from the sale and rental of personal property and selected services; counties have the option of imposing an additional 0.5% local sales tax. Other local sales taxes are imposed by professional football and baseball stadium districts, local exposition districts, and premier resort areas. The tax is imposed on the sale, lease, or rental of all tangible personal property not specifically exempted. This contrasts with the treatment of services, where the tax is imposed only on those services specifically listed in the statutes.

A use tax at the same rate is imposed on goods or services purchased out-of-state and used in Wisconsin, if the good or service would be taxable if purchased in Wisconsin. In computing the use tax liability, a credit is provided for sales tax paid in the state in which the good or service was purchased.

Although it is usually collected from the purchaser at the time of purchase, the sales tax is legally imposed on the gross receipts of the seller. In contrast, the use tax is imposed on the purchaser.

Wisconsin taxes a limited number of services, which include: (a) hotel and other short-term lodgings; (b) admissions to amusement, athletic, and entertainment events; (c) certain telecommunications services and telephone answering services; (d) laundry and dry cleaning services, except for coin-operated and diaper services; (e) photographic services; (f) parking and docking of motor vehicles, aircraft, and boats; (g) installation, repair, maintenance, and related services to personal property, other than real property improvements (unless the property being installed or repaired is exempt when sold); (h) producing, fabricating, processing, printing, and imprinting services for consumers who furnish the materials, except for printed advertising services that will be transported and used solely outside the state; (i) cable television services, including installation; and (j) landscaping and lawn maintenance services

A number of exemptions from the general sales tax are provided for specified types of personal property, transactions, and entities. In some cases, exemptions are provided for items used

in the course of business such as manufacturing machinery and equipment, property that becomes an ingredient in the manufacturing process, farm tractors and machines, seeds, and various other farming supplies. In other cases, the exemptions relate to personal and family needs such as food for home consumption, prescription drugs, and water delivered through mains. In addition, exemptions are provided for sales to governmental, educational, and charitable organizations and for specified sales by such organizations.

Sellers of taxable property and services must obtain a business tax registration certificate and a permit for each location from the Department of Revenue (and may be required to make a security deposit not to exceed $15,000) and periodically file a sales tax return and make payment of tax due. Returns and payment are generally due on a quarterly basis, but the Department may require larger retailers to report monthly.

Sellers may deduct the retailers' discount from taxes due, as compensation for administrative costs, equal to the greater of $10 or 0.5% of the tax liability per reporting period, but not more than the amount of tax actually payable.

Under current federal law and U.S. Supreme Court decisions, states may not require sellers to collect and remit sales and use taxes unless the seller has a sufficient business connection (or "nexus") with the state. Nexus is established by the seller having property or personnel in the state. Sellers that do not have nexus may voluntarily agree to collect and remit the tax on their sales to Wisconsin residents. If a Wisconsin resident purchases a taxable good or service from a seller that does not have nexus and has not voluntarily agreed to collect the tax, the purchaser is responsible for paying the use tax.

UNIFORM SALES AND USE TAX ADMINISTRATION ACT -- DUTIES AND AUTHORITY OF DOR

Current Law

Under 2001 Wisconsin Act 16 (the 2001-03 biennial budget act), the Department of Revenue was authorized to enter into the Streamlined Sales and Use Tax Agreement to simplify and modernize sales tax and use tax administration in order to substantially reduce the tax compliance burden for all sellers and for all types of commerce. The Department may act jointly with other states that are signatories to the Agreement to establish standards for the certification of a certified service provider and certified automated system and to establish performance standards for multi-state sellers. DOR also may promulgate rules to administer these provisions, may procure jointly with other states that are signatories to the Agreement goods and services in furtherance of the Agreement, and may take other actions reasonably required to implement these provisions. The Secretary of Revenue or the Secretary's designee may represent this state before the states that are signatories to the Agreement.

The Department may not enter into the SSUT Agreement unless the Agreement requires that a state that is a signatory to the Agreement do all of the following: (a) limit the number of state

sales and use tax rates; (b) limit the application of any maximums on the amount of state sales and use tax that is due on a transaction; (c) limit thresholds on the application of sales and use tax; (d) establish uniform standards for the sourcing of transactions to the appropriate taxing jurisdictions, for administering exempt sales, and for sales and use tax returns and remittances; (e) develop and adopt uniform definitions related to sales and use tax.; (f) provide, with all states that are signatories to the Agreement, a central electronic registration system that allows a seller to register to collect and remit sales and use taxes for all states that are signatories to the Agreement; (g) provide that the state may not use a seller's registration with the central electronic registration system, and the subsequent collection and remittance of sales and use taxes in the states that are signatories to the Agreement, to determine whether the seller has sufficient connection with the state for the purpose of imposing any tax; (h) restrict variances between the state tax bases and local tax bases; (i) administer all sales and use taxes imposed by local jurisdictions within the state so that sellers who collect and remit such taxes are not required to register with, or submit returns or taxes to, local jurisdictions and are not subject to audits by local jurisdictions; (j) restrict the frequency of changes in any local sales and use tax rates and provide notice of any such changes; (k) establish effective dates for the application of local jurisdictional boundary changes to local sales and use tax rates and provide notice of any such changes; (l) provide monetary allowances to sellers and certified service providers as outlined in the Agreement; (m) certify compliance with the Agreement before entering into the Agreement and maintain compliance with the Agreement; (n) adopt a uniform policy, with the states that are signatories to the Agreement, for certified service providers that protects a consumer's privacy and maintains tax information confidentiality; and (o) appoint, with the states that are signatories to the Agreement, an advisory council to consult with in administering the Agreement. The advisory council must consist of private sector representatives and representatives from states that are not signatories to the Agreement.

The current statutes state that the SSUT Agreement "is an accord among cooperating states to further their governmental functions and provides a mechanism among the cooperating states to establish and maintain a cooperative, simplified system for the application and administration of sales and use taxes that are imposed by each state that is a signatory to the agreement."

The SSUT Agreement binds, and inures to the benefit of, only the states that are signatories to the Agreement. Any benefit that a person may receive from the Agreement is established by this state's law and not by the terms of the Agreement. No person may have any cause of action or defense under the Agreement or because of the Department entering into the Agreement. No person may challenge any action or inaction by any department, agency, other instrumentality of this state, or any political subdivision of this state on the ground that the action or inaction is inconsistent with the Agreement.

Current state law also provides that no law of this state, or the application of such law, may be declared invalid on the ground that the law, or the application of such law, is inconsistent with the Agreement. No provision of the Agreement in whole or in part invalidates or amends any law of this state and the state becoming a signatory to the Agreement does not amend or modify any law of this state.

These current law provisions are known as the "Uniform Sales and Use Tax Administration Act."

Separate provisions of current law govern certified automated systems and certified service providers. A "certified automated system" is software that is certified jointly by the states that are signatories to the SSUT Agreement and that is used to calculate state and local sales tax and use taxes on transactions by each appropriate jurisdiction, to determine the amount of tax to remit to the appropriate state, and to maintain a record of the transaction. A "certified service provider" is an agent that is certified jointly by the states that are signatories to the Agreement and that performs all of a seller's sales and use tax functions related to the seller's retail sales.

Current law provides that a certified service provider is the agent of the seller with whom the provider has contracted and is liable for the sales and use taxes that are due the state on all sales transactions that the provider processes for a seller, except in cases of fraud or misrepresentation by the seller, as described in the following paragraph.

A seller that contracts with a certified service provider is not liable for sales and use taxes that are due the state on transactions that the provider processed, unless the seller has misrepresented the type of items that the seller sells or has committed fraud. The seller is subject to an audit on transactions that the certified service provider processed only if there is probable cause to believe that the seller has committed fraud or made a material misrepresentation. The seller is subject to an audit on transactions that the certified service provider does not process. The states that are signatories to the Agreement may jointly check the seller's business system and review the seller's business procedures to determine if the certified service provider's system is functioning properly and to determine the extent to which the seller's transactions are being processed by the certified service provider.

A person that provides a certified automated system is responsible for the system's proper functioning and is liable to this state for tax underpayments that are attributable to errors in the system's functioning. A seller that uses a certified automated system is responsible and liable to this state for reporting and remitting sales and use tax.

A seller that has a proprietary system for determining the amount of tax that is due on transactions and that has signed an agreement with the states that are signatories to the SSUT Agreement establishing a performance standard for the system is liable for the system's failure to meet the performance standard.

Provisions of AB 547/SB 267

Under AB 547/SB 267, DOR would be authorized to do all of the following related to the Uniform Sales and Use Tax Administration Act:

a. Certify compliance with the SSUT Agreement.

b. Pursuant to the Agreement, certify certified service providers and certified automated systems. [The bills would also modify the definition of "taxpayer" to include certified service providers.]

c. Consistent with the Agreement, establish performance standards and eligibility criteria for a seller that sells tangible personal property or taxable services in at least five states that are signatories to the Agreement; that has total annual sales revenue of at least $500 million; that has a proprietary system that calculates the amount of tax owed to each taxing jurisdiction in which the seller sells tangible personal property or taxable services; and that has entered into a performance agreement with the states that are signatories to the Agreement. For purposes of this provision, "seller" would include an affiliated group of sellers using the same proprietary system to calculate the amount of tax owed in each taxing jurisdiction in which the sellers sell tangible personal property or taxable services.

d. Issue a tax identification number to a person who claims a sales tax exemption and who is not required to register with DOR for sales tax purposes and establish procedures for the registration of such a person.

e. Maintain a database that is accessible to sellers and certified service providers that indicates whether items defined in accordance with the Uniform Sales and Use Tax Administration Act are taxable or nontaxable.

f. Maintain a database that is accessible to sellers and certified service providers that indicates tax rates, taxing jurisdiction boundaries, and zip code or address assignments related to the administration of state and local taxes imposed in Wisconsin

g. Set forth the information that the seller must provide to DOR for tax exemptions claimed by purchasers, and establish the manner in which a seller must provide such information.

h. Provide monetary allowances, in addition to the retailer’s discount, to certified service providers and sellers that use certified automated systems or proprietary systems, pursuant to the Agreement.

AB 547/SB 267 would also specifically authorize DOR to audit (or authorize others to audit) sellers and certified service providers who are registered with the Department pursuant to the SSUT Agreement.

In addition, the bills would require DOR to notify the Revisor of Statutes of the effective date of this state’s participation in the SSUT Agreement, no later than 30 days after such effective date is determined.

Finally, as required by the Agreement, the bills would provide that no seller or certified service provider would be liable for any deficiency or refund that is the result of the seller or certified service provider relying on erroneous information contained in the sales and use tax

databases maintained by DOR under items (e) and (f) above.

DEFINITION OF TAXABLE "TANGIBLE PERSONAL PROPERTY"

General Definition of Tangible Personal Property

Under current law, "tangible personal property" generally means all tangible personal property of every kind and description. Under AB 547/SB 267, consistent with the Agreement, "tangible personal property" would mean personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. According to DOR, this change would adopt the common law definition of tangible personal property and would not be a substantive modification to current law.

In addition, the definition of tangible personal property under AB 547/SB 267 would no longer specifically mention coins and stamps sold above face value and certain leased property affixed to real estate. Instead, the bills would specifically impose the sales and use tax on these items, resulting in the same treatment as current law.

Computer Software

Under current law, "tangible personal property" that is subject to the sales tax includes computer programs, except custom computer programs. The creation of custom computer programs is an exempt service under current law.

Administrative rules define "custom programs" as utility and application software that accommodate the special processing needs of the customer. The determination of whether a program is a custom program is based upon all the facts and circumstances, including the following: (a) the extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system; (b) whether the program is loaded into the customer's computer by the vendor and the extent to which the installed program must be tested against the program's specifications; (c) the extent to which the use of the software requires substantial training of the customer's personnel and substantial written documentation; (d) the extent to which enhancement and maintenance support by the vendor is needed for continued usefulness; (e) there is a rebuttable presumption that any program with a cost of $10,000 or less is not a custom program; (f) custom programs do not include basic operational programs or prewritten programs; and (g) if an existing program is selected for modification, there must be a significant modification of that program by the vendor so that it may be used in the customer's specific hardware and software environment.

Taxable basic operational programs (commonly referred to as "systems software") are programs that perform overall control and direction of the computer system and permit it to do the functions basic to the operation of a computer, and permit it to execute the instructions contained in utility software and applications software programs. Taxable prewritten programs (often referred to

as "canned programs") are programs prepared, held, or existing for general use normally for more than one customer, including programs developed for in-house use or custom program use which are subsequently held or offered for sale or lease.

AB 547/SB 267 would modify the statutory definition of taxable "tangible personal property" to specifically include the following types of prewritten computer software:

a. Computer software that is not designed and developed by the author or creator of the software according to a specific purchaser's specifications.

b. Computer software upgrades that are not designed and developed by the author or creator of the software according to a specific purchaser's specifications.

c. Computer software that is designed and developed by the author or creator of the software according to a specific purchaser's specifications and that is sold to another purchaser.

d. Any combination of computer software under (a) to (c), including any combination with any portion of such software.

e. Computer software as described above and any portion of such software, that is modified or enhanced by any degree to a specific purchaser's specifications, except such modification or enhancement that is reasonably and separately indicated on an invoice, or other statement of the price, provided to the purchaser.

"Computer software" would mean a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task. "Computer" would mean an electronic device that accepts information in digital or similar form and that manipulates such information to achieve a result based on a sequence of instructions.

As under current law, sales of custom computer programs that do not meet the definition of "prewritten computer software" outlined above would be exempt from tax.

The proposed statutory definitions are consistent with definitions required by the Agreement, and DOR indicates that the new definitions would be interpreted as identical to the current provisions of the administrative rule for most transactions. However, the Department has identified two situations where the tax would be imposed differently under AB 547/SB 267.

The first situation involves cases where one vendor sells taxable prewritten software to another vendor who, in turn, sells the prewritten software, along with modifications programmed by the second vendor, to the end-user. Under current law, the initial sale of the software from the first vendor to the second vendor would be taxable, and the subsequent sale of the modified software would not be subject to tax. Under AB 547/SB 267, the first sale of the software would be exempt as a sale for resale, but the tax would be imposed on the prewritten software, less any separately-stated charges for program modifications, in the second sale to the end-user. The

charges for the modifications would not be taxed under either current law or the bills.

The second situation involves cases where, in a single transaction, a vendor has developed prewritten software that must be modified by the vendor for use by the final customer. Under current law, the entire amount of the sale to the customer would be exempt. Under AB 547/SB 267, the tax would be imposed on the proceeds of the final sale, less any separately-stated charges for programmed modifications. As in the first example, the charges for the modifications to the software would not be taxed under either current law or AB 547/SB 267.

ANIMAL MEDICINE

According to DOR, the new definition of "drug" under AB 547/SB 267 (described below) would change how animal foods that may be considered medicines under current law sold by veterinarians are taxed. Under present law, veterinarians pay the sales tax on their purchases of animal food that would meet the definition of "medicine" (because it prevents disease, for example), and the tax is not imposed when the food is sold to the customer. Under AB 547/SB 267, the purchase of animal food sold by the veterinarian apart from the provision of veterinary services would be an exempt sale for resale and the final sale to the customer would be taxable, unless the customer could claim an exemption (because the food is for farm livestock, for example).

DEFINITIONS OF "GROSS RECEIPTS," "SALES PRICE," AND "PURCHASE PRICE"

Current law includes a detailed definition of "gross receipts", which is referenced in the statutes imposing the sales tax, the statutory exemptions, and other provisions. Current law also includes a similar definition of "sales price", which is referenced in the use tax statutes.

AB 547/SB 267 would repeal the definition of "gross receipts" and, instead, refer to a new definition of "sales price" in the language imposing the sales tax and in the exemption statutes. The bills would also create a definition for the term "purchase price", which would be identical to the new definition of "sales price." The term "purchase price" would be used in the use tax statutes. The new definitions would be consistent with the SSUT Agreement. The bills would also move certain provisions that are incorporated in the existing definitions of "gross receipts" and "sales price" to the section of the statutes relating to sales tax return adjustments and to other areas of the statutes.

Although the bills contain numerous statutory modifications relating to these definitions, the Department of Revenue indicates that most of the new provisions would be consistent with the current statutes, rules, and administrative practice. However, these definitional provisions would make one substantive change relating to bundled property, which is discussed below.

BUNDLED PROPERTY

Under current law, if exempt tangible personal property is bundled with taxable property by a seller and sold as a single product or piece of merchandise (such as a fruit basket that includes candy, or a cheese tray that includes a cutting board and knife), the seller is not required to pay tax on the value of the nontaxable items. Under AB 547/SB 267, the tax would be imposed on the entire sales price. [It should be noted that DOR believes that retailers may already be collecting and paying the tax on the entire sales price for such items because their cash registers do not allow for separation of a single item.]

DEFINITION OF "LEASE OR RENTAL"

Under current law, the state and local sales taxes are imposed on the privilege of selling, leasing, or renting tangible personal property and selling, performing, or furnishing taxable services. The current definition of "lease" includes rental, hire, and license. AB 547/SB 267 would repeal this definition and, instead, create a more detailed definition of "lease or rental" that conforms to the requirements of the SSUT Agreement.

Under AB 547/SB 267, "lease or rental" would mean any transfer of possession or control of tangible personal property for a fixed or indeterminate term and for consideration, including: (a) a transfer that includes future options to purchase or extend; and (b) agreements related to the transfer of possession or control of motor vehicles or trailers, if the amount of any consideration may be increased or decreased by reference to the amount realized on the sale or other disposition of such motor vehicles or trailers, consistent with federal provisions regarding the taxation of motor vehicle operating leases [section 7701 (h) (1) of the Internal Revenue Code].

Such transfers would be considered a lease or rental, regardless of whether the transfer is considered a lease or rental under generally accepted accounting principles, or any provision of federal or local law, or any other provision of state law.

"Lease or rental" would not include any of the following: (a) a transfer of possession or control of tangible personal property under a security agreement or deferred payment plan, if such agreement or plan requires transferring title to the tangible personal property after making all required payments; (b) a transfer of possession or control of tangible personal property under any agreement that requires transferring title to the tangible personal property after making all required payments and after paying an option price that does not exceed the greater of $100 or 1% of the total amount of the required payments; or (c) providing tangible personal property along with an operator, if the operator is necessary for the tangible personal property to perform in the manner for which it is designed and if the operator does more than maintain, inspect, or set up the tangible personal property.

These types of transfers would not be considered a lease or rental, regardless of whether such transfer is considered a lease or rental under generally accepted accounting principles, or any

provision of federal or local law, or any other provision of state law.

Equipment Provided with an Operator. According to the Department of Revenue, the most significant change under the new leasing provisions would be for transactions involving the use of equipment that is provided with an operator, such as cranes and other construction equipment.

Under current administrative rules, which are based on case law, the determination of whether such transactions are services (which may or may not be taxable) or leases of tangible personal property (which generally are taxable) depends upon how much control the lessor has over the operator's work and whether the customer or the lessor is responsible for satisfactory completion of the work. Specifically, under the current rule, a person who uses his or her own equipment to perform a job and who assumes responsibility for its satisfactory completion is considered to be performing a service. In contrast, if equipment is furnished with an operator to perform a job and the customer supervises and is responsible for the satisfactory completion of the work, the transaction is considered a lease of the equipment. If the transaction is a lease and it is customary or mandatory that the lessee accept an operator with leased equipment, the entire charge is subject to the tax. However, the operator's services are not taxable if billed separately and if a lessor customarily gives a lessee the option of taking the equipment without the operator.

Under AB 547/SB 267, any time tangible personal property is provided along with an operator the transaction would be considered a service rather than a lease as long as: (a) the operator is necessary for the property to perform in the manner for which it is designed; and (b) the operator does more than maintain, inspect, or set up the tangible personal property. The amount of control maintained by the lessor and the degree of responsibility for completion of the work assumed by the lessor or customer would no longer be considered in determining whether such transactions are leases or services.

Licensing Transactions. Because the SSUT definition of lease is silent as to licenses, the bills would specifically impose state and local sales taxes on the privilege of licensing tangible personal property and taxable services. These changes would ensure that the definition of "lease" conforms to the SSUT Agreement and that the licensing of computer software would remain taxable. According to DOR, these would not be substantive changes to current law.

Bargain Purchase Option Leases. AB 547/SB 267 would specify that "lease or rental" would not include transfers of possession or control of tangible personal property under agreements that require transferring title to the property after making all required payments and after paying an option price that does not exceed the greater of $100 or 1% of the total amount of the required payments (bargain purchase option leases). Instead, such transactions would be considered sales of property. Currently, the determination of whether such transactions are leases or sales is made based on federal guidelines set forth in an IRS Revenue Ruling. The federal guidelines consider a number of factors regarding the transaction, such as the lessor's investment in the property, lease term and renewal options, and whether the lessee has the option to purchase the property at less than market value. The proposed modification under AB 547/SB 267 would

streamline such determinations and would not affect the amount of tax owed on such transactions. However, the timing of when the tax is due would be affected in certain cases if a transaction is deemed to be a sale rather than a lease or vice-versa.

The remaining provisions would be consistent with DOR's current practice regarding the taxation of leases and rentals.

DEFINITION OF "RETAIL SALE"

AB 547/SB 267 would define "retail sale" or "sale at retail" to mean any sale, lease, or rental for any purpose other than resale, sublease, or subrent. This modification was required in order to conform to the SSUT Agreement, and is considered to be non-substantive by the Department.

DEFINITION OF "SALE" AND SIMILAR TERMS

Under current law, the general definition of the terms "sale," "sale, lease or rental," "retail sale," "sale at retail," or equivalent terms includes any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services. Under AB 547/SB 267, this general definition would be retained but would only apply to the term "sale." This would not be a substantive change.

The current definition of "sale" also incorporates a number of specific provisions regarding the taxation of drop-shipments, certain leases where possession is granted by the lessor to the lessee or another person at the direction of the lessee, auction sales, sales to contractors, and other transactions. AB 547/SB 267 would make a substantive change regarding drop-shipments, which is described below. The other provisions would be moved from the definition of sale to other sections of the statutes or modified slightly in order to conform to the SSUT Agreement. DOR indicates that these would not be substantive changes to current law.

DEFINITION OF "SALE FOR RESALE" AND SIMILAR TERMS

AB 547/SB 267 would specify that "sales, lease, or rental for resale, sublease, or subrent" includes transfers of tangible personal property to a service provider that the service provider transfers in conjunction with, but not incidental to, the selling, performing, or furnishing of any service, and transfers of tangible personal property to a service provider that the service provider physically transfers in conjunction with the selling, performing, or furnishing of photographic, repair, fabricating and printing, and landscaping services. This provision would not apply to sales to contractors engaged in real property construction.

"Sales, lease, or rental for resale, sublease, or subrent" would not include any of the

following: (a) the sale of building materials, supplies, and equipment to owners, contractors, subcontractors, or builders for use in real property construction activities or the alteration, repair, or improvement of real property, regardless of the quantity of such materials, supplies, and equipment sold; (b) any sale of tangible personal property to a purchaser even though such property may be used or consumed by some other person to whom such purchaser transfers the tangible personal property without valuable consideration, such as gifts, and advertising specialties distributed gratis apart from the sale of other tangible personal property or service; (c) transfers of tangible personal property to a service provider that the service provider transfers in conjunction with the selling, performing, or furnishing of any service, if the tangible personal property is incidental to the service, unless the service provider is selling, performing, or furnishing photographic, repair, fabricating and printing, and landscaping service; and (d) sales of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the U.S. or its instrumentalities for the construction of improvements on or to real property.

According to DOR, these provisions would be consistent with the current statutes and administrative practice.

DROP-SHIPMENTS

A Wisconsin "drop-shipment" occurs when a purchaser located in Wisconsin orders an item from an out-of-state retailer not registered to collect Wisconsin sales or use tax and the product is delivered to the customer directly from a Wisconsin manufacturer, without the retailer taking possession. Under current law (through the definition of taxable "sale"), the Wisconsin manufacturer is required to collect the sales tax from the purchaser on such transactions. Specifically, under current law, taxable sales include the delivery in this state of property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state. The person making the delivery must include the retail selling price of the property in that person's gross receipts and pay the sales tax on those receipts.

AB 547/SB 267 would repeal these current provisions. As a result, Wisconsin manufacturers would no longer be liable for the sales tax on drop-shipments to Wisconsin purchasers. The manufacturer could accept an exemption certificate claiming resale from the unregistered seller. Instead, the purchaser would be liable for use tax.

EXEMPTIONS FOR FOOD AND BEVERAGES

Current Law

General Exemption for Off-Premises Consumption. Under current law, an exemption is provided for food, food products, and beverages for off-premises human consumption. "Food," "food products," and "beverages" include, by way of illustration and not of limitation, items

commonly thought of as food (such as milk, meat, poultry, fish, fruit, fruit juices, vegetables, and condiments) and the following: (a) bottled water that is for human consumption and that is not carbonated or sweetened or flavored; (b) coffee, coffee substitutes, tea, and cocoa; (c) spices and flavoring; and (d) dietary foods and health supplements.

"Food," "food products," and "beverages" do not include: (a) medicines, tonics, vitamins, and medicinal preparations in any form; (b) fermented malt beverages (beer) and intoxicating liquors; or (c) soda water beverages, bases, concentrates, and powders intended to be reconstituted by consumers to produce soft drinks, and fruit drinks and ades not defined as fruit juices.

Taxable Food Sales. Sales of meals, food, food products, and beverages for direct consumption on the premises are generally taxable. In addition, sales of the following items for off-premises consumption are taxable: (a) meals and sandwiches, whether heated or not; (b) heated food or heated beverages; (c) soda fountain items such as sundaes, milk shakes, malts, ice cream cones, and sodas; and (d) candy, chewing gum, lozenges, popcorn, and confections.

For purposes of this provision, "meal" includes, but is not limited to, a diversified selection of food, food products, or beverages that are customarily consumed as a breakfast, lunch, or dinner, that may not easily be consumed without an article of tableware and that may not conveniently be consumed while standing or walking; except that "meal" does not include frozen items that are sold to a consumer, items that are customarily heated or cooked after the retail sale and before they are consumed, or a diversified selection of food, food products, and beverages that is packaged together by a person other than the retailer before the sale to the consumer. Current law also includes a definition of "sandwich."

For on-premises sales, taxable gross receipts include cover, minimum, entertainment, service, or other charges made to patrons or customers.

Other Non-Taxable Food Sales. The following sales of food and beverages are also exempt from tax:

a. Meals, food, food products, or beverages sold by, and served at, hospitals, sanatoriums, nursing homes, retirement homes, community-based residential facilities, or registered day care centers.

b. Meals, food, food products, or beverages sold to the elderly or handicapped by persons providing "mobile meals on wheels."

c. Otherwise taxable food and beverage items, or disposable products that are transferred with such items, that are provided by a restaurant to the restaurant's employee during the employee's work hours.

d. Meals, food, food products, or beverages, furnished in accordance with any contract or agreement or paid for to such institution through the use of an account of such institution, by a

public or private institution of higher education to an undergraduate student, a graduate student, or a student enrolled in a professional school if the student is enrolled for credit at that institution and if the goods are consumed by that student and meals, food, food products, or beverages furnished to a National Football League team under a contract or agreement.

e. Food, food products, or beverages and other goods that are packaged together by a person other than a retailer before the sale to the final consumer if 50% or more of the sales price of the package is attributable to goods that are exempt.

For purposes of these provisions "premises" is construed broadly, and, by way of illustration but not limitation, includes the lobby, aisles, and auditorium of a theater or the seating, aisles, and parking area of an arena, rink, or stadium or the parking area of a drive-in or outdoor theater. The premises of a caterer with respect to catered meals or beverages is the place where served. Sales from a vending machine are considered sales for off-premises consumption.

Provisions of AB 547/SB 267

The bills would repeal all of the existing provisions regarding sales of food and, instead, create new exemptions for:

a. Food and food ingredients, except candy, soft drinks, dietary supplements, and prepared food. "Food and food ingredient" would mean a substance in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion, or for chewing, by humans and that is ingested or chewed for its taste or nutritional value. "Food and food ingredient" would not include alcohol beverages or tobacco. AB 547/SB 267 also include definitions for "candy," "soft drinks," "dietary supplements," "prepared food," "alcohol beverages," and "tobacco," which are outlined below. These definitions are consistent with the Agreement.

b. Food and food ingredients, except soft drinks, sold by hospitals, sanatoriums, nursing homes, retirement homes, community–based residential facilities, or registered day care centers, including prepared food that is sold to the elderly or handicapped by persons providing mobile meals on wheels.

c. Food and food ingredients furnished in accordance with any contract or agreement or paid for to such institution through the use of an account of such institution, by a public or private institution of higher education to any of the following: (1) an undergraduate student, a graduate student, or a student enrolled in a professional school if the student is enrolled for credit at the public or private institution of higher education and if the food and food ingredients are consumed by the student; or (2) a National Football League team.

Similar to current law, AB 547/SB 267 would also provide an exemption for candy, soft drinks, dietary supplements, and prepared foods, and disposable products that are transferred with such items, furnished by a restaurant to the restaurant's employee during the employee's work hours. However, the bills would limit this exemption to only include such items that are furnished

for no consideration (as opposed to sold) by restaurants to their employees.

"Prepared food" would mean: (a) food and food ingredients sold in a heated state; (b) food and food ingredients heated by the retailer (except as provided below); (c) food and food ingredients sold with eating utensils that are provided by the retailer including plates, knives, forks, spoons, glasses, cups, napkins, and straws ("plate" would not include a container or packaging used to transport food and food ingredients); and (d) except as provided below, two or more food ingredients mixed or combined by a retailer for sale as a single item.

"Prepared food" would not include the following items, unless they are provided with utensils: (a) two or more food ingredients mixed or combined by a retailer for sale as a single item, if the retailer's primary classification in the 1997 North American Industry Classification System is manufacturing under sectors 31 to 33, not including bakeries and tortilla manufacturing under industry group number 3118; (b) two or more food ingredients mixed or combined by a retailer for sale as a single item, sold unheated, and sold by volume or weight; (c) bakery items made by a retailer, including breads, rolls, pastries, buns, biscuits, bagels, croissants, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas; (d) food and food ingredients that are only sliced, repackaged, or pasteurized by a retailer; or (e) eggs, fish, meat, and poultry, and foods containing any of them in raw form, that require cooking by the consumer, as recommended by the FDA to prevent food–borne illnesses.

"Candy" would mean a preparation of sugar, honey, or other natural or artificial sweetener combined with chocolate, fruit, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. "Candy" would not include a preparation that contains flour or that requires refrigeration.

"Dietary supplement" would mean a product, other than tobacco, that is intended to supplement a person's diet, if all of the following apply:

a. The product contains any of the following ingredients or any combination of any of the following ingredients: (1) a vitamin; (2) a mineral; (3) an herb or other botanical; (4) an amino acid; (5) a dietary substance that is intended for human consumption to supplement the diet by increasing total dietary intake; or (6) a concentrate, metabolite, constituent, or extract.

b. The product is intended for ingestion in tablet, capsule, powder, soft–gel, gel–cap, or liquid form, or, if not intended for ingestion in such forms, is not represented as conventional food and is not represented for use as the sole item of a meal or diet.

c. The product is required to be labeled as a dietary supplement under federal regulations [21 CFR 101.36].

"Soft drink" would mean a beverage that contains less than 0.5% of alcohol and that contains natural or artificial sweeteners. "Soft drink" would not include a beverage that contains milk or milk products; soy, rice, or similar milk substitutes; or more than 50% vegetable or fruit juice by volume.

"Alcohol beverage" would mean a beverage that is suitable for human consumption and that contains 0.5% or more of alcohol by volume.

"Tobacco" would mean cigarettes, cigars, chewing tobacco, pipe tobacco, and any other item that contains tobacco.

Net Impact of AB 547/SB 267

With the above modifications, most sales of food would be treated the same as under current law. Most sales of food for off-premises consumption would remain exempt; restaurant meals, alcohol, tobacco, and soda would continue to be taxable; and the current exemptions for institutional sales of meals and food (including "meals on wheels") would be retained. However, as noted, the exemption for food and disposable utensils that are provided by restaurants to their employees would apply only if such items were furnished for no consideration. Also, exempt food or beverages and other taxable goods that are packaged together by a person other than a retailer before the sale to the final consumer ("lunchables" for example) would always be exempt. Currently, these products are exempt only if 50% or more of the sales price of the package is attributable to goods that are exempt.

In addition to these changes, the Department of Revenue has identified a number of other types of food products that would be taxed differently under the new provisions. For example, chocolate chips and marshmallows, which are currently exempt, would be taxable under AB 547/SB 267, while unpopped popcorn, which is currently taxable, would be exempt. Attachment 1 presents a list of food items whose tax treatment would be modified under the bills.

EXEMPTION FOR PRESCRIPTION DRUGS

Under current law, a sales and use tax exemption is provided for medicines that are any of the following: (a) prescribed for the treatment of a human being by a person authorized to prescribe the medicines, and dispensed on prescription filled by a registered pharmacist in accordance with law; (b) furnished by a licensed physician, surgeon, podiatrist, or dentist to a patient for treatment of the patient; (c) furnished by a hospital for treatment of any person pursuant to the order of a licensed physician, surgeon, podiatrist, or dentist; (d) sold to a licensed physician, surgeon, podiatrist, dentist, or hospital for the treatment of a human being; (e) sold to this state or any political subdivision or municipal corporation thereof, for use in the treatment of a human being; (f) furnished for the treatment of a human being by a medical facility or clinic maintained by this state or any political subdivision or municipal corporation thereof; or (g) furnished without charge to a physician, surgeon, nurse anesthetist, advanced practice nurse, osteopath, or to any licensed dentist, podiatrist, or optometrist if the medicine may not be dispensed without a prescription.

AB 547/SB 267 would replace the word "medicine" with "drug" in the statute relating to this exemption and clarify that such drugs must be for a human being.

Under the current exemption statutes, "medicines," means any substance or preparation that is intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and that is commonly recognized as a substance or preparation intended for such use; but "medicines" do not include any of the following: (a) any auditory, prosthetic, ophthalmic, or ocular device or appliance; (b) articles that are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical, or physical equipment or articles, or the component parts or accessories thereof; or (c) any alcohol beverage the manufacture, sale, purchase, possession, or transportation of which is licensed or regulated under the laws of this state.

AB 547/SB 267 would repeal this definition. Instead, consistent with the SSUT Agreement, "drug" would be defined as a compound, substance, or preparation, or any component of them, other than food and food ingredients, dietary supplements, or alcoholic beverages, to which any of the following applies:

a. It is listed in the US Pharmacopoeia, Homeopathic Pharmacopoeia of the US, or National Formulary, or any supplement to any of them.

b. It is intended for use in diagnosing, curing, mitigating, treating, or preventing a disease.

c. It is intended to affect a function or structure of the body.

AB 547/SB 267 would also create a definition of "prescription", which would mean an order, formula, or recipe that is issued by any oral, written, electronic, or other means of transmission and by a person who is authorized by the laws of this state to issue such an order, formula, or recipe. The definitions of "food and food ingredients," "dietary supplements," and "alcoholic beverages" are included in the previous section regarding the taxation of food.

The bills would also create a new exemption for bandages, dressings, syringes, and similar items that are bundled together with exempt drugs for sale by the seller as a single product or piece of merchandise. This exemption would also apply only to items used on human beings.

The Department indicates that the new definition of "medicine" is consistent with how it interprets the current statute regarding this exemption. The new exemption for bandages and similar items that are bundled together with exempt drugs would be consistent with the Department's current practice in administering the exemption for medicine, although there is no statute or rule regarding these items under present law. The proposed definitions of "dietary supplement" and "prescription" are consistent with the Agreement.

MEDICAL EQUIPMENT EXEMPTION

Current law provides an exemption for the following property, including parts and accessories:

a. Artificial devices individually designed, constructed or altered solely for the use of a particular physically disabled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual.

b. Artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body.

c. Artificial teeth sold by a dentist.

d. Eye glasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.

e. Crutches and wheelchairs including motorized wheelchairs and scooters for the use of persons who are ill or disabled.

f. Antiembolism elastic hose and stockings that are prescribed by a physician and sold to the ultimate consumer.

g. Adaptive equipment that makes it possible for handicapped persons to enter, operate, or leave a vehicle, if that equipment is purchased by the individual who will use it, a person acting directly on behalf of that individual, or a nonprofit organization.

AB 547/SB 267 would repeal these current exemptions and, instead, create exemptions for durable medical equipment, mobility–enhancing equipment, and prosthetic devices, and accessories for such equipment or devices, if the equipment or devices are used for a human being. The bills would create the following definitions for these items, which are consistent with the definitions required by the Agreement:

"Durable medical equipment" would mean equipment (including repair parts and replacement parts) that is for use in a person’s home; that is primarily and customarily used for a medical purpose related to a person; that can withstand repeated use; that is not generally useful to a person who is not ill or injured; and that is not placed in or worn on the body. "Durable medical equipment" would not include mobility–enhancing equipment.

"Mobility–enhancing equipment" would mean equipment (including repair parts and replacement parts) that is primarily and customarily used to provide or increase the ability of a person to move from one place to another; that may be used in a home or motor vehicle; and that is generally not used by a person who has normal mobility. "Mobility–enhancing equipment" would not include a motor vehicle or any equipment on a motor vehicle that is generally provided by a motor vehicle manufacturer.

"Prosthetic device" would mean a device (including repair parts and replacement parts) that is placed in or worn on the body to artificially replace a missing portion of the body; to prevent or correct a physical deformity or malfunction; or to support a weak or deformed portion of the body.

Current law also provides a separate exemption for the ultimate consumer of apparatus or equipment for the injection of insulin or the treatment of diabetes and supplies used to determine blood sugar level. AB 547/SB 267 would limit this exemption to only supplies used to determine blood sugar level. However, apparatus and equipment for the injection of insulin or the treatment of diabetes would still be exempt as durable medical equipment, but only for home use.

In addition, current law provides an exemption for equipment used to administer oxygen for medical purposes by a person who has a prescription for oxygen written by a person authorized to prescribe oxygen. AB 547/SB 267 would repeal this specific exemption. Instead, such equipment would be exempt as durable medical equipment, but only if used in the home.

The net result of these modifications would be an expansion of the types of medical equipment that are currently exempt from tax to include items such as hospital beds, patient lifts, and I.V. stands that are purchased for in-home use. A more detailed list of items that would become exempt under this provision is presented in Attachment 2. Also, under AB 547/SB 267, antiembolism elastic hose would no longer be exempt, because it would be considered clothing rather than a prosthetic device. Finally, the exemptions for equipment used in the treatment of diabetes and equipment used to administer oxygen would be limited to equipment purchased for in-home use.

EXEMPTION FOR CLOTH DIAPERS

AB 547/SB 267 would repeal the current exemption for cloth diapers. This change is necessary to conform to the Agreement, which includes cloth diapers in the definition of clothing.

EXEMPTION FOR WATER SOLD THROUGH MAINS

Under current law, an exemption is provided for water delivered through mains. AB 547/SB 267 would specify that this exemption would only apply to water that is not food or a food ingredient. According to DOR, this is a nonsubstantive change required to conform to the definitions required under the Agreement.

EXEMPTION CERTIFICATES

General Requirements

Under current law, it is presumed that all receipts are subject to the sales and use tax until the contrary is established. The burden of proving that a sale is not taxable is upon the seller unless the seller takes from the purchaser a certificate to the effect that the property or service is purchased for resale or is otherwise exempt. However, no certificate is required for sales of cattle, sheep, goats, and pigs that are sold at a livestock market, and no certificate is required for sales of commodities, that are consigned for sale in a warehouse in or from which the commodity is deliverable on a contract for future delivery subject to the rules of a commodity market regulated by the U.S. Commodity Futures Trading Commission if upon the sale the commodity is not removed from the warehouse.

AB 547/SB 267 would modify this provision in three ways. First, the exemption certificate could be an electronic or paper certificate taken by the seller in a manner prescribed by DOR ["Electronic" would mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.] Second, the provision specifying that no certificate would be required for sales of livestock or commodities would be repealed; therefore, an exemption certificate would be required for such sales. Third, AB 547/SB 267 would specify that no exemption certificate would be needed for the following items: occasional sales; separately-stated interest or finance charges; admission to Circus World Museum; state park fees; motor vehicle fuel; prescription drugs and associated bandages, dressings, syringes and similar items; newspapers and magazines; water delivered through mains; food; caskets and burial vaults; medical equipment and prosthetic devices; fuel and electricity; used primary-housing mobile homes; farm animal medicines; sales by American Legion baseball teams; long-term rentals of mobile homes; 911 calls; animal ID tags issued by the Department of Agriculture, Trade and Consumer Protection; utility public benefits fees; one-time licenses to purchase tickets to certain athletic events; and flags. According to DOR, not requiring an exemption certificate for these types of transactions would conform to the Department's current administration of the tax, which is done through publications but is not specified in the statutes or rules.

Seller's Burden of Proof

Under current law, an exemption certificate relieves the seller from the burden of proving that a sale is not taxable only if the certificate is taken in good faith from another seller who is purchasing the items for resale or from a person claiming exemption. The exemption certificate must be signed by and bear the name and address of the purchaser, and indicate the general character of the property or service sold by the purchaser and the basis for the claimed exemption. The certificate must be in such form as DOR prescribes.

Under AB 547/SB 267, an exemption certificate would relieve the seller from the burden of proof as long as it is taken at the time of purchase. The "good faith" requirement would be deleted. However, an exemption certificate would not relieve the seller of the burden of proof if the seller fraudulently fails to collect sales tax or solicits the purchaser to claim an unlawful exemption. The exemption certificate would have to provide information that identifies the purchaser and indicate the basis for the claimed exemption, and a paper certificate would have to be signed by the purchaser. The form of the certificate would have to be prescribed by DOR by

rule (no rule is required currently).

Goods or Services Purchased for Resale

Under current law, if a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration, or display while holding it for sale, lease, or rental in the regular course of the purchaser's operations, the use is subject to the use tax as of the time the property is first used by the purchaser, based on the sales price of the property to the purchaser. The seller is liable for sales tax with respect to the sale of the property to the purchaser only when there is an unsatisfied use tax liability under this provision because the seller has provided incorrect information about the transaction to DOR.

AB 547/SB 267 would delete the reference to "resale certificates", which are no longer used, and apply the existing provision to sales of services as well as property. In addition, the provision making the seller liable for sales tax in cases where the seller has provided incorrect information about the transaction to DOR would be eliminated. According to DOR, these modifications would make the statutes conform to its current administrative practice.

NON-EXEMPT USE OF PROPERTY AFTER PURCHASE

Under current law, if a purchaser certifies in writing to a seller that the property purchased will be used in a manner or for a purpose entitling the seller to regard the sale as exempt from tax and the purchaser subsequently uses the property in some other manner or for some other purpose, the purchaser is liable for payment of the sales tax. The tax is measured by the sales price of the property to the purchaser, but if the taxable use first occurs more than six months after the sale, the purchaser may base the tax either on that sales price or on the fair market value of the property at the time the taxable use first occurs.

AB 547/SB 267 would eliminate the option to base the tax on fair market value if the taxable use first occurs more than six months after the purchase so that the tax would always be based on the sales price to the purchaser. According to DOR, this change is needed to conform to the definitions of "purchase price" and "sales price" under the Agreement.

SOURCING PROVISIONS

AB 547/SB 267 include detailed provisions for determining the taxing jurisdiction in which a sale or lease of property or services occurs (sourcing). In general, the sourcing rules under the bills are destination-based, rather than origin-based, which is consistent with the current sourcing provisions in Wisconsin. However, the Department of Revenue has identified several situations where the SSUT provisions would differ from current law and practice. The most significant change would be for direct mail transactions; other changes involve towing services, admissions, certain sales by florists, leases, software and services (such as cable television) delivered electronically, and post-paid telecommunications services. The following sections describe the

current sourcing provisions and the provisions of AB 547/SB 267, and highlight areas where there would be a substantive change to current practice.

Current Sourcing Rules

General Rule. Current law provides that a sale or purchase involving transfer of ownership of property is deemed to have been completed at the place where possession is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent. A common carrier or the U.S. postal service is deemed the agent of the seller, regardless of any free on board (FOB) point and regardless of the method by which freight or postage is paid. This provision generally applies to both state and local sales taxes. However, for local tax purposes, sales of motor vehicles, boats, snowmobiles, mobile homes not exceeding 45 feet in length, trailers, semi-trailers, all-terrain vehicles, and aircraft are taxed by the county in which the property is customarily kept.

Rentals and Leases. Rentals and leases of property, except as provide below, have a situs at the location of that property. "Situs" identifies which jurisdiction may impose a sales or use tax on a transaction.

Leased or rented motor vehicles and other equipment used principally on the highway at normal highway speeds are located in the county in which they are customarily kept, except that drive-it-yourself motor vehicles and equipment used principally on the highway at normal highway speeds, if those vehicles or that equipment are used for one-way trips or leased for less than one month, are located in the county in which they come into the lessee's possession.

Except for motor vehicles and equipment described above, leased or rented property that characteristically is moving property, including but not limited to aircraft and boats, is located in a county if it is used primarily in that county or it is usually kept in that county when it is not in use.

Services. In general, services have a situs at the location where they are furnished. However, a communication service has a situs where the customer is billed for the service if the customer calls collect or pays by credit card. Mobile telecommunications subject to the federal Mobile Telecommunications Sourcing Act have a situs at the customer's place of primary use of the services, as determined under federal law. Towing services have a situs at the location to which the vehicle is delivered. Services performed on tangible personal property have a situs at the location where the property is delivered to the buyer.

Florists. Through administrative agreement, florists source wire orders based on the location where the order is taken rather than where the delivery is to occur.

Sourcing Provisions Under AB 547/SB 267

AB 547/SB 267 would repeal the existing provisions described above and create the following new provisions related to sourcing of transactions for sales tax purposes.

General Rules

Except as provided below, the location of a sale would be determined as follows:

a. If a purchaser receives the product at a seller's business location, the sale occurs at that business location. ["Receive" would mean taking possession of tangible personal property; making first use of services; or taking possession or making first use of digital goods, whichever comes first. "Receive" would not include a shipping company taking possession of tangible personal property on a purchaser's behalf. "Product" would include tangible personal property, digital goods, and services.]

b. If a purchaser does not receive the product at a seller's business location, the sale occurs at the location where the purchaser, or the purchaser's designated donee, receives the product, including the location indicated by the instructions known to the seller for delivery to the purchaser or the purchaser's designated donee.

c. If the location of a sale of a product cannot be determined under (a) or (b), the sale occurs at the purchaser's address as indicated by the seller's business records, if the records are maintained in the ordinary course of the seller's business and if using that address to establish the location of a sale is not in bad faith.

d. If the location of a sale cannot be determined under (a) through (c), the sale occurs at the purchaser's address as obtained during the consummation of the sale, including the address indicated on the purchaser's payment instrument, if no other address is available and if using that address is not in bad faith.

e. If the location of a sale cannot be determined under (a) through (d), the location of the sale is determined as follows: (1) if the item sold is tangible personal property, the sale occurs at the location from which the tangible personal property is shipped; (2) if the item sold is a digital good, or computer software delivered electronically, the sale occurs at the location from which the digital good or computer software was first available for transmission by the seller; and (3) if a service is sold, the sale occurs at the location from which the service was provided.

According to DOR, with four exceptions, the proposed general sourcing provisions would result in the same treatment as current law for sales of tangible personal property and services (other than telecommunications, which would have special sourcing rules described below). The four exceptions are as follows:

a. Under present law, if a purchaser hires a common carrier and the seller does not know where the person is having the property shipped, the law still requires sourcing to the location to which the property is shipped (because common carriers are always deemed to be agents of the seller). Under AB 547/SB 267, such sales would typically be sourced to either the purchaser's address as indicated by the seller's records [under (c) above] or to the seller's location [under (e) above] if the seller did not have an address for the purchaser.

b. Under current law, if the purchaser hires a contract carrier, the seller must source the sale to the seller's location (because the contract carrier is deemed to be the agent of the purchaser in such transactions). Under AB 547/SB 267, such sales would be sourced to the purchaser's address as indicated by the seller's records [under (c) above], assuming the seller does not have knowledge of where the item is shipped.

c. Towing services would be sourced to the location where the vehicle is picked up rather than the location to which it is delivered.

d. Admissions to in-state events would be sourced to the location of the event rather than to the location where the offer is accepted by the seller.

Direct Mail

Under current law, the general sourcing rules for tangible personal property apply to sales of direct mail. Therefore, the seller (printer) is required to determine the destination of each piece of direct mail and source a portion of the total charges for the transaction to each jurisdiction to which the mail is shipped based on the proportion of the total shipment going to that jurisdiction. For example, if half of the items shipped were mailed to Wisconsin addresses, then half of the printer's charges for the mailing would be sourced to Wisconsin.

Under AB 547/SB 267, the sourcing of a sale of direct mail would depend upon whether or not the purchaser provides the seller with a direct pay permit, a direct mail form, or other information that indicates the appropriate taxing jurisdiction to which the direct mail is delivered to the ultimate recipients:

a. If the purchaser provides a direct pay permit or a direct mail form to the seller, the purchaser would have to pay or remit, as appropriate, to DOR the use tax on all purchases for which the tax is due and the seller would be relieved from liability for collecting such tax. Under this provision, the tax would be due to the jurisdiction in which the direct mail is stored, used, or consumed.

b. If the purchaser provides the seller with other information that indicates the appropriate taxing jurisdiction to which the direct mail is delivered to the ultimate recipients, the general sourcing provisions under AB 547/SB 267 would apply and the printer would be required to collect and remit the sales or use tax to the appropriate jurisdictions on a destination basis.

c. If the purchaser does not provide a direct pay permit, direct mail form, or other information that indicates the appropriate taxing jurisdiction, the sale would occur at the location from which the mail is shipped. Under this provision, the seller would remit the sales tax to the jurisdiction from which the material was shipped.

Regarding item (c), under current law, if a taxable purchase was subject to sales tax by another state in which the purchase was made, the amount of tax paid to the other state is applied

as a credit against the amount of use tax due Wisconsin. Under AB 547/SB 267, however, no credit could be applied against a sales tax paid on the purchase of direct mail, if the direct mail purchaser did not provide to the seller a direct pay permit, a direct mail form, or other information that indicates the appropriate taxing jurisdiction to which the direct mail is delivered to the ultimate recipients. Therefore, under the provisions of item (c), payment of the tax by the seller would not eliminate the purchaser's obligation to pay use tax in jurisdictions where the direct mail is ultimately stored, used, or consumed. DOR indicates that the refusal of a credit for taxes paid in another state is intended to provide an incentive for purchasers of direct mail to provide a direct pay permit, direct mail form, or other information that indicates the appropriate taxing jurisdiction.

A direct pay permit allows a purchaser (typically a business purchaser) to pay tax directly to the state rather than to the seller. "Direct mail form" would mean a form for direct mail prescribed by the Department. "Direct mail" would mean printed material that is delivered by the U.S. postal service or other delivery service to a mass audience or to addressees on a mailing list provided by or at the direction of the purchaser of the printed material, if the cost of the printed material or any tangible personal property included with the printed material is not billed directly to the recipients of the printed material. "Direct mail" would include any tangible personal property provided directly or indirectly by the purchaser of the printed material to the seller of the printed material for inclusion in any package containing printed material. It would not include multiple items of printed material delivered to a single address.

Products that are Delivered Electronically--Multiple Points of Use

If the service, digital good, or computer software is delivered electronically (by means other than by tangible storage media), a business purchaser who does not provide a direct pay permit to the seller, and who knows at the time of purchase that the service, good, or software will be concurrently available for use in more than one taxing jurisdiction would have to provide a multiple–points–of–use exemption form (prescribed by the Department) to the seller, in conjunction with the purchase, and pay or remit, as appropriate, to DOR the use tax on all purchases for which the tax is due.

To apportion the amount of the tax due to multiple taxing jurisdictions, a purchaser who provides a multiple-points-of-use exemption form under the above provision would be required to use any reasonable, consistent, and uniform apportionment method supported by the purchaser's business records that exist at the time of the sale.

A multiple-points-of-use exemption form would remain effective for all sales by the seller who received the form to the purchaser who provided the form, unless the purchaser revokes the form in writing and provides such a revocation to the seller.

If the service, digital good, or computer software is delivered electronically, a business purchaser who holds a direct pay permit, and who knows at the time of purchase that the service, good, or software will be concurrently available for use in more than one taxing jurisdiction would

not be required to provide a multiple–points–of–use exemption form to the seller. Instead, the purchaser would provide the required direct pay permit information and pay, or remit, as appropriate, the use tax to DOR using the apportionment method described above to apportion the tax due multiple taxing jurisdictions.

A seller who receives a multiple–points–of–use exemption form under these provisions would be relieved from liability for collecting the use tax on purchases related to the multiple–points–of–use exemption form.

According to DOR, it appears that the only impact of these provisions in Wisconsin would be for software delivered electronically and cable television services, both of which could be used concurrently at multiple locations by a single purchaser. For example, under current law, software delivered to a server in Wisconsin that is downloaded in multiple locations is sourced to the Wisconsin server, regardless of where the software is downloaded and used. Under AB 547/SB 267, the transaction would be apportioned to multiple jurisdictions based on a reasonable apportionment method supported by the purchaser's business records. On the other hand, if such software were delivered to a non-Wisconsin server and downloaded to Wisconsin users, under current law, the initial sale would not be sourced to Wisconsin but the ultimate users of the software in Wisconsin would be subject to the use tax (with a credit provided for sales tax paid to the other state). Under AB 547/SB 267, the initial sale would be apportioned to all the states in which the software is stored, used, or consumed.

Leases and Rentals

General Rules. Except as provided below, with regards to the first or only payment on a lease or rental, the lease or rental of tangible personal property would occur at the seller's business location or, if delivered, the delivery location. If the property is moved from the place where the property was initially delivered, the subsequent periodic payments on the lease or rental would occur at the property's primary location as indicated by an address for the property that is provided by the lessee and that is available to the lessor in records that the lessor maintains in the ordinary course of business, if the use of such an address does not constitute bad faith. The location of a lease or rental as determined under this provision would not be altered by any intermittent use of the property at different locations.

These provisions differ from current law in that current law generally does not source the first payment to the seller's location. In addition, current law sources subsequent lease payments to the actual location of the property at the time of payment, rather than to the primary location of the property per the lessor's records. DOR indicates that the proposed provisions for subsequent payment would be consistent with current practice regarding the state sales tax, but some lease payments could be sourced differently for local sales tax purposes.

Vehicles. The lease or rental of motor vehicles, semitrailers, and aircraft, that are not transportation equipment (as defined below), would occur at the primary location of such property as indicated by an address for the property that is provided by the lessee and that is available to the

lessor in records that the lessor maintains in the ordinary course of the lessor's business, if the use of such an address does not constitute bad faith. The location of a lease or rental as determined under this provision would not be altered by any intermittent use of the property at different locations. This provision is generally the same as current law, except that the SSUT provision would specify that the sourcing would occur at the property's primary location.

Transportation Equipment. The lease or rental of transportation equipment would occur at the seller's business location or, if delivered, the delivery location. "Transportation equipment" would mean all of the following:

a. Locomotives and railcars that are used to carry persons or property in interstate commerce.

b. Trucks and truck tractors that have a gross vehicle weight rating of 10,001 pounds or greater, trailers, semitrailers, and passenger buses, if such vehicles are registered under the International Registration Plan and operated under the authority of a carrier that is authorized by the federal government to carry persons or property in interstate commerce.

c. Aircraft that is operated by air carriers that are authorized by the federal government or a foreign authority to carry persons or property in interstate commerce.

d. Containers that are designed for use on the vehicles described above and component parts attached to or secured on such vehicles.

These provisions are included in AB 547/SB 267 in order to conform to the SSUT sourcing rules. However, sales and leases of the types of transportation equipment identified above are typically exempt from tax under current law and would remain exempt under AB 547/SB 267.

Telecommunications

AB 547/SB 267 include a number of detailed statutory provisions regarding the sourcing of various types of telecommunications services, which are described below. According to DOR, these provisions are generally consistent with the current statutes, rules, and administrative practice, except that post-paid calling services (paid for on a call-by-call basis with a credit card or similar method of payment) for local tax purposes would be sourced to the location where the call originates rather than to the location where the purchaser is billed for the call.

Definitions. "Air–to–ground radiotelephone service" would mean a radio service in which common carriers are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

"Call–by–call basis" would mean any method of charging for telecommunications services by which the price of such services is measured by individual calls.

"Communications channel" would mean a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.

"Customer" would mean a person who enters into a contract with a seller of telecommunications services or, in any transaction for which the end user is not the person who entered into a contract with the seller of telecommunications services, the end user of the telecommunications services. "Customer" would not include a person who resells telecommunications services or, for mobile telecommunications services, a serving carrier under an agreement to serve a customer outside the home service provider's licensed service area.

"Customer channel termination point" would mean the location where a customer inputs or receives communications.

"End user" would mean an individual who uses a telecommunications service.

"Home service provider" would mean a home service provider as defined under the federal Mobile Telecommunications Sourcing Act [section 124 (5) of P.L. 106–252].

"Mobile telecommunications service" would mean a mobile telecommunications service as defined under the federal Mobile Telecommunications Sourcing Act [4 USC 116 to 126, as amended by P.L. 106–252].

"Place of primary use" would mean place of primary use, as determined under the federal Mobile Telecommunications Sourcing Act [4 USC 116 to 126, as amended by P.L. 106–252].

"Postpaid calling service" would mean a telecommunications service that is obtained by paying for it on a call–by–call basis using a bankcard, travel card, credit card, debit card, or similar method, or by charging it to a telephone number that is not associated with the location where the telecommunications service originates or terminates. "Postpaid calling service" would include a service that would otherwise be a prepaid calling service except that the service provided to the customer is not exclusively a telecommunications service.

"Prepaid calling service" would mean the right to access services that are exclusively telecommunications services, if that right is paid for in advance of providing such services, requires using an access number or authorization code to originate calls, and is sold in predetermined units or dollars that decrease with use in a known amount.

"Private communication service" would mean a telecommunications service that entitles the customer to exclusive or priority use of a communications channel or group of communications channels between or among termination points, regardless of the manner in which the communications channel or group of communications channels is connected, and includes switching capacity, extension lines, stations, and other associated services that are provided in connection with the use of such channel or channels.

"Radio service" would mean a communication service provided by the use of radio, including radiotelephone, radiotelegraph, paging, and facsimile service. "Radiotelegraph service" would mean transmitting messages from one place to another by means of radio, and "radiotelephone service" would mean transmitting sound from one place to another by means of radio.

Under current law, "service address" means the location of the telecommunications equipment from which telecommunications services are originated or at which telecommunications services are received by a buyer. If this is not a defined location; as in the case of mobile phones, paging systems, maritime systems, air-to-ground systems and the like; "service address" means the location where a buyer makes primary use of the telecommunications equipment as defined by telephone number, authorization code, or location where bills are sent.

Under AB 547/SB 267, "service address" would mean any of the following:

a. The location of the telecommunications equipment to which a customer's telecommunications service is charged and from which the telecommunications service originates or terminates, regardless of where the telecommunications service is billed or paid.

b. If the location described under (a) is not known by the seller of the telecommunications service, the location where the signal of the telecommunications service originates, as identified by the seller's telecommunications system or, if the signal is not transmitted by the seller's telecommunications system, by information that the seller received from the seller's service provider

.

c. If the locations described under (a) and (b) are not known by the seller of the telecommunications service, the customer's place of primary use.

According to DOR, the proposed SSUT definition reflects current practice, with the exception that the language relating to mobile services under current law may appear to give the seller a choice in how to source the mobile service rather than using the hierarchy provided under AB 547/SB 267.

General Telecommunications Sourcing Rules. Except as provided below, the sale of a telecommunications service that is sold on a call–by–call basis would occur in the taxing jurisdiction for sales and use tax purposes where the call originates and terminates, in the case of a call that originates and terminates in the same such jurisdiction, or the taxing jurisdiction where the call originates or terminates and where the service address is located.

Except as provided below, the sale of a telecommunications service that is sold on a basis other than a call–by–call basis would occur at the customer's place of primary use.

Mobile Telecommunications. The sale of a mobile telecommunications service, except an air–to–ground radiotelephone service and a prepaid calling service, would occur at the customer's place of primary use.

Postpaid Calling Services. The sale of a postpaid calling service would occur at the location where the signal of the telecommunications service originates, as first identified by the seller's telecommunications system or, if the signal is not transmitted by the seller's telecommunications system, by information that the seller received from the seller's service provider. As noted, this is a change from current law for local tax purposes. Under present law, such services are sourced to the location where the purchaser is billed for the call.

Prepaid Calling Services. The sale of a prepaid calling service would occur at the location determined under the general sourcing rules (the sourcing rules for all types of sales, not just telecommunications services), except that, if the service is a mobile telecommunications service and the location of the sale cannot be determined under the general provisions, the prepaid calling service would occur at the location from which the service was provided or at the location associated with the mobile telephone number, as determined by the seller.

Private Communications Services. The sale of a private communication service for a separate charge related to a customer channel termination point would occur at the location of the customer channel termination point.

The sale of a private communication service in which all customer channel termination points are located entirely in one taxing jurisdiction for sales and use tax purposes would occur in the taxing jurisdiction in which the customer channel termination points are located.

If the segments are charged separately, the sale of a private communication service that represents segments of a communications channel between two customer channel termination points that are located in different taxing jurisdictions would occur in an equal percentage in both such jurisdictions.

If the segments are not charged separately, the sale of a private communication service for segments of a communications channel that is located in more than one taxing jurisdiction would occur in each such jurisdiction in a percentage determined by dividing the number of customer channel termination points in that jurisdiction by the number of customer channel termination points in all jurisdictions where segments of the communications channel are located.

Florists

Under current administrative practice, wire order sales by Wisconsin retail florists are taxed using origin-based sourcing; that is, the sale is considered to have occurred in Wisconsin regardless of the location to which the goods are shipped. This is in contrast to the general sourcing rules outlined above (under current law and AB 547/SB 267), which are destination-based.

Under AB 547/SB 267, prior to January 1, 2006, sales of property by a retail florist who takes an order from a purchaser would occur at the location where the florist takes the order, if the florist forwards the order to another retail florist who is at a different location and who transfers the property to a person identified by the purchaser. Beginning in 2006, the general rules regarding

sales of tangible personal property would apply. The special provision for florists would retain origin-based sourcing for such sales until 2006. After that, destination-based sourcing would be used.

"Retail florist" would mean a person engaged in the business of selling cut flowers, floral arrangements, and potted plants and who prepares such flowers, floral arrangements, and potted plants. "Retail florist" would not include a person who sells cut flowers, floral arrangements, and potted plants primarily by mail or via the Internet.

Sourcing of Vehicles, Boats, and Aircraft for Local Sales Tax Purposes

Under the bills, the sourcing provisions described above would generally apply for both state and local sales tax purposes, except that, for local tax purposes, sales of motor vehicles, aircraft, boats, and mobile homes not exceeding 45 feet in length would continue to be sourced to the location where they are customarily kept.

As a result, for local tax purposes, retail sales of snowmobiles, trailers, semi-trailers, and all-terrain vehicles would be sourced in the same manner as other sales of tangible personal property, rather than to the location where they are customarily kept. However, as under current law, the bills would provide that if the sale of a snowmobile, trailer, semi-trailer, or all-terrain vehicle is sourced to a county that does not impose a local sales tax, the purchaser would owe the local use tax if the property is later kept in a county that has a tax.

When a Sale Occurs

As under current law, a sale or purchase involving transfer of ownership of property would be considered to be completed at the time when possession is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent. A common carrier or the U.S. postal service would be considered the agent of the seller, regardless of any FOB point and regardless of the method by which freight or postage is paid.

AGREEMENTS WITH DIRECT MARKETERS; RETAILER'S COMPENSATION

Current Law

Under current law, sellers may deduct the retailer's discount from taxes due as compensation for administrative costs. The retailer's discount is the greater of $10 or 0.5% of the tax liability per reporting period, but not more than the amount of tax actually payable.

Also, under current law, DOR may enter into agreements with out-of-state direct marketers to collect state and local sales and use taxes. An out-of-state direct marketer that collects such taxes may retain 5% of the first $1 million of the taxes collected in a year and 6% of the taxes collected in excess of $1 million in a year. This provision does not apply to an out-of-state direct marketer who

is required to collect sales and use taxes in Wisconsin (because the seller has nexus with Wisconsin). The Department may negotiate payment schedules and audit procedures with out-of-state direct marketers, and the regular retailer's discount does not apply to agreements under this provision.

Each year DOR must certify to the Department of Health and Family Services an amount equal to one-eleventh of the taxes collected under this provision for grants to counties for services for children and families. This provision was enacted in 1999 Wisconsin Act 9 (the 1999-01 biennial budget); to date, no agreements have been entered into by DOR with direct marketers under this provision.

Provisions of AB 547/SB 267

AB 547/SB 267 would repeal the current provisions regarding agreements with direct marketers outlined above and specify that certified service providers would not receive the regular retailer's discount. Instead, under the bills, the following persons could retain a portion of state and local sales and use taxes collected on retail sales in an amount determined by DOR and by contracts that the Department enters into pursuant to the SSUT Agreement:

a. Certified service providers.

b. Sellers that use a certified automated system.

c. Sellers that sell tangible personal property or taxable services in at least five states that are signatories to the SSUT Agreement; that have total annual sales revenue of at least $500 million; that have a proprietary system that calculates the amount of tax owed to each taxing jurisdiction; and that have entered into a performance agreement with the states that are signatories to the Agreement. For purposes of this provision, "seller" would include an affiliated group of sellers using the same proprietary system to calculate the amount of tax owed in each taxing jurisdiction in which the sellers sell tangible personal property or taxable services.

Under the bills' provisions, there would be no statutory limit on the amount of retailer compensation paid to persons who meet the above criteria. Also, such compensation could be paid to in-state sellers, out-of-state sellers that have nexus with Wisconsin, and out-of-state sellers that do not have nexus. However, DOR indicates that, under the Agreement, only non-nexus sellers that voluntarily agree to collect taxes would receive additional compensation under item (c). Sellers that do not meet the above criteria would continue to receive the regular 0.5% retailer's discount.

"AMNESTY" PROVISION

Under AB 547/SB 267, a seller would not be liable for uncollected and unpaid state and local sales and use taxes, including penalties and interest, on sales made to purchasers in this state before the seller registers with DOR, if all of the following apply:

a. The seller registers with DOR, in a manner that the Department prescribes, to collect and remit the state and local sales and use taxes on sales to purchasers in this state in accordance with the SSUT Agreement.

b. The registration occurs no later than 365 days after the effective date of this state's participation in the Agreement.

c. The seller was not registered to collect and remit state and local sales and use taxes during the 365 consecutive days immediately before the effective date of this state's participation in the Agreement.

d. The seller has not received a notice of the commencement of an audit from DOR or, if the seller has received an audit notice, the audit has not been resolved by any means, including any related administrative and judicial processes, at the time that the seller registers.

e. The seller has not committed or been involved in a fraud or an intentional misrepresentation of a material fact.

f. The seller collects and remits state and local sales and use taxes on sales to purchasers in this state for at least three consecutive years after the date on which the seller registers.

These provisions would not apply to state and local sales and use taxes that are due from the seller for purchases made by the seller.

RETURN ADJUSTMENTS

Deduction for Bad Debt

Currently, a retailer is relieved from liability for sales tax insofar as the measure of the tax is represented by accounts that have been found to be worthless and charged off for income or franchise tax purposes. If the retailer has previously paid the tax, the retailer may, under rules prescribed by DOR, take as a deduction from the measure of the tax the amount found worthless and charged off for income or franchise tax purposes. If any such accounts are thereafter collected in whole or in part by the retailer, the amount collected must be included in the first sales tax return filed after such collection and the tax must be paid with the return.

Under AB 547/SB 267, a seller could claim as a deduction on a sales and use tax return the amount of any bad debt that the seller writes off as uncollectible in the seller's books and records and that is eligible to be deducted as bad debt for federal income tax purposes, regardless of whether the seller is required to file a federal income tax return. Bad debt deductions would have to be claimed on the sales and use tax return that is submitted for the period in which the seller writes off the amount of the deduction as uncollectible in the seller's books and records. If the seller subsequently collects in whole or in part any bad debt for which a deduction is claimed, the seller

would have to include the amount collected in the return filed for the period in which the amount is collected and pay the tax with the return.

"Bad debt" would be defined as the portion of the sales price or purchase price that the seller has reported as subject to the sales or use tax and that the seller may claim as a deduction for federal income tax purposes. "Bad debt" would not include financing charges or interest, sales or use taxes imposed on the sales price or purchase price, uncollectible amounts on property that remains in the seller's possession until the full sales price or purchase price is paid, expenses incurred in attempting to collect any debt, debts sold or assigned to third parties for collection, and repossessed property.

For purposes of computing a bad debt deduction or reporting a payment received on a previously claimed bad debt, any payment made on a debt or on an account would be applied first to the price of the property or service sold, and the proportionate share of the sales tax on that property or service, and then to interest, service charges, and other charges related to the sale.

A seller could obtain a refund of the tax collected on any bad debt amount deducted under this provision that exceeds the amount of the seller's taxable sales. The period for making such a claim would begin on the date when the return on which the bad debt could be claimed would have been required to be submitted to DOR.

According to DOR, these provisions would modify the statutes to conform to the current rules and administrative practices. AB 547/SB 267 would also create two new provisions in order to conform to the SSUT Agreement:

First, if a seller is using a certified service provider, the CSP could claim a bad debt deduction on the seller's behalf if the seller has not claimed and will not claim the same deduction. A certified service provider that receives a bad debt deduction under this provision would have to credit that deduction to the seller and a CSP that receives a refund would have to submit that refund to the seller.

Second, if a bad debt relates to the retail sales of tangible personal property or taxable services that occurred in this state and in one or more other states, the total amount of such bad debt would have to be apportioned among the states in which the underlying sales occurred in a manner prescribed by DOR to arrive at the amount of the deduction.

Other Return Adjustments

The current definition of "gross receipts" allows deductions or credits for: (a) the sales tax on rental receipts if the property is purchased by the lessor and the lessor pays sales tax on the purchase; (b) such part of the sales price as is refunded in cash or credit as a result of property returned or adjustments in the sales price after the sale has been completed; (c) refunds or worthless accounts resulting from property being repossessed; (d) sales tax that has been included in the purchase price and absorbed by the retailer; and (e) motor fuel taxes refunded by the state or federal

government. AB 547/SB 267 would retain these provisions but move them to a new statutory section relating to return adjustments.

In addition, AB 547/SB 267 would specify in the statutes that a deduction for refunded sales taxes in cases of returned property or adjustments in the sales price [item (b)] would have to be claimed on the return for the period in which the refund is paid. According to DOR, this modification would be consistent with its current administrative practice.

ERRONEOUS COLLECTION OF TAX

Under AB 547/SB 267, if a customer purchases a taxable service or tangible personal property, and if the customer believes that the amount of sales or use tax assessed is erroneous, the customer could request that the seller correct the alleged error by sending a written notice to the seller. The notice would have to include a description of the alleged error and any other information that the seller reasonably requires to process the request. Within 60 days from the date that a seller receives a request under this provision, the seller would have to review its records to determine the validity of the customer's claim. If the review indicates that there is no error as alleged, the seller would have to explain the findings of the review in writing to the customer. If the review indicates that there is an error as alleged, the seller would have to correct the error and refund the amount of any tax collected erroneously, along with the related interest, as a result of the error. A customer could take no other action, or commence any action, to correct an alleged error in the amount of sales or use tax assessed unless the customer has exhausted his or her remedies under this provision.

As under current law, special provisions would apply to disputes involving mobile telecommunications services under the federal Mobile Telecommunications Sourcing Act.

AB 547/SB 267 further provide that, with regard to a purchaser's request for a refund of taxes, a seller would be presumed to have reasonable business practices if the seller uses a certified service provider, a certified automated system, or a certified proprietary system to collect sales and use taxes and if the seller has remitted to DOR all sales and use taxes collected, less any deductions, credits, or allowances.

ROUNDING

Current law requires DOR to provide a bracket system to be used by retailers in collecting the amount of sales and use tax from their customers, but the use of such brackets does not relieve the retailer from liability for payment of the full amount of the tax.

Administrative rules also permit sellers to use a mathematical computation to determine the amount of tax due on a transaction. Under this computation, the amount of tax to be collected is equal to the applicable tax rate multiplied by the aggregate sales price of all taxable

items sold in the transaction (rather than multiplying the tax rate by the sales price of each item and then summing the individual tax amounts). Tax amounts must be rounded to the nearest cent, with amounts less than 0.5 cent rounded down and amounts equal to or greater than 0.5 cent rounded up.

AB 547/SB 267 would repeal the current provisions regarding the bracket system and require retailers to use a straight mathematical computation to determine the amount of the tax that the retailer may collect from its customers. The tax amount would be calculated by multiplying the applicable combined state and local tax rate by the sales price or purchase price of each item or invoice, as appropriate. The tax amount would have to be calculated to the third decimal place, disregarding tax amounts of less than 0.5 cent, and considering tax amounts of at least 0.5 cent but less than 1 cent to be an additional cent. The use this computation would not relieve the retailer from liability for payment of the full amount of the tax levied. These rounding requirements are required under the Agreement beginning in calendar year 2006.

The new calculation would differ from the current rounding rule in that sellers would be allowed to compute the amount of tax collected based on each invoice (including numerous items) or on each item. Under current law, the amount of tax collected must be calculated by multiplying the tax rate by the total transaction price, not by the prices of individual items. These provisions do not affect the amount of tax due to the state from the retailer, only how the retailer may calculate the amount of tax collected from purchasers.

SSUT AGREEMENT AGENTS

AB 547/SB 267 would authorize sellers to appoint an agent to represent the seller before the states that are signatories to the SSUT Agreement. Under the bills, sellers could designate such agents to:

a. Register with DOR for a business tax registration certificate in the manner prescribed by the Department.

b. File an application with DOR for a permit for each place of operations.

c. Remit taxes and file returns under the sales and use tax statutes in a manner prescribed by DOR.

BUSINESS TAX REGISTRATION

Under current law, any person who is not otherwise required to collect Wisconsin sales and use taxes (because of a lack of nexus) and who makes sales to persons within this state of taxable property or services may register with DOR and must obtain a business tax registration certificate and thereby be authorized and required to collect, report, and remit the state use tax. AB 547/SB

267 would specify that the registration with DOR under this provision could not be used as a factor in determining whether the seller has nexus with this state for any tax at any time. This provision is required by the SSUT Agreement; DOR does not view it as a substantive change since the courts would be unlikely to consider voluntary use tax registration as a factor in determining nexus.

The bills would also specify that registration under the above provision would authorize and require the retailer to collect, report, and remit local use taxes. In addition, local jurisdictions would be specifically authorized to impose the tax on such sellers. Under current law, voluntary registration only obligates out-of-state retailers to collect state use taxes, not local taxes.

AB 547/SB 267 would also authorize DOR to waive the business tax registration fee if the person who is applying for or renewing the certificate is not required to hold such a certificate for sales and use tax purposes. This provision is required by the SSUT Agreement, which specifies that member states agree not to require the payment of any registration fees or other charges for a seller to register in a state in which it has no legal requirement to register. The current initial registration fee is $20 and the fee to renew the certificate is $10 every two years.

The bills would also add a definition of "sign" in the business tax registration statutes, based on the current definition used in the sales tax statutes, which means to write one's signature or use another method of authenticating prescribed by DOR.

ITEMS PURCHASED FROM OUT-OF-STATE SELLERS AND DELIVERED DIRECTLY TO END-USERS IN WISCONSIN

Under current law, the use tax is imposed on the use or consumption in this state of taxable property or services purchased from an out-of-state retailer. A credit is provided for the amount of any sales tax paid in the state where the good or service was purchased. "Use" includes, in part, the exercise of any right or power over tangible personal property or taxable services incident to the ownership, possession, or enjoyment of the property or services. "Enjoyment" includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property. "Enjoyment" also includes, but is not limited to, having shipped into this state by an out-of-state supplier printed material which is designed to promote the sale of property or services, or which is otherwise related to the business activities, of the purchaser of the printed material or printing service.

AB 547/SB 267 would specify that the phrase "exercise of any right or power over tangible personal property or taxable services" in the definition of taxable "use" would include distributing, selecting recipients, determining mailing schedules, or otherwise directing the distribution, dissemination, or disposal of tangible personal property or taxable services, regardless of whether the purchaser of such property or services owns or physically possesses, in this state, the property or services.

This provision is intended to reverse case law regarding the imposition of the use tax on the

purchaser of materials (such as catalogs and telephone directories) that are sold by an out-of-state seller to a Wisconsin purchaser and distributed directly by the seller by common carrier or U.S. mail to Wisconsin residents without the purchaser of the materials ever taking possession. Under current law, as interpreted by the courts, the taxation of such transactions depends upon the characteristics of the seller (usually a printer):

a. If the printer is located in Wisconsin, the cost of the catalogs is subject to the sales tax, which may be collected from the printer or the purchaser.

b. If the printer is located out-of-state but has nexus with Wisconsin, the cost of the catalogs is subject to the use tax, which may be collected only from the printer.

c. If the printer is located out-of-state and does not have nexus with Wisconsin, the cost of the catalogs is not subject to either the sales tax or use tax.

The provisions of AB 547/SB 267 are intended to ensure that the sales tax or use tax would be imposed on all such transactions. Specifically, under the bills, in the transaction described under (b) above (where the out-of-state printer has nexus with Wisconsin), the use tax could be collected from either the printer or the in-state purchaser, rather than just from the printer. In the transaction described under (c) above (where the out-of-state printer does not have nexus), the purchaser would be subject to the use tax (as opposed to no sales or use tax under current law). The taxation of the transactions under (a) involving in-state printers would not be modified.

Although the case law on this issue involved printed materials, the bills' provisions would affect other types of products, such as candy delivered from an out-of-state seller to a purchaser's customers in Wisconsin.

CONTENT OF SALES AND USE TAX RETURNS; INFORMATION REQUIREMENTS

Under current law, the sales tax return must show the gross receipts of the seller during the preceding reporting period. For purposes of the use tax, in case of a return filed by a retailer, the return must show the total sales price of the property or taxable services sold, the storage, use, or consumption of which became subject to the use tax during the preceding reporting period. In the case of a sales or use tax return filed by a purchaser, the return must show the total sales price of the property and taxable services purchased, the storage, use, or consumption of which became subject to the use tax during the preceding reporting period. The return must also show the amount of the taxes for the period covered by the return and such other information as DOR deems necessary for the proper administration of the sales and use tax statutes.

AB 547/SB 267 would modify this provision to delete the specific requirements relating to sales and use tax returns and, instead, provide that the return must show the amount of taxes due for the period covered by the return and such other information as DOR deems necessary. This modification is intended to provide DOR with flexibility to simplify sales tax returns and make the

returns conform to standards required under the Agreement.

Under the bills, in addition to filing a sales and use tax return, sellers that contract with a certified service provider, persons that provide certified automated systems to sellers, and sellers that have a proprietary system for determining the amount of tax due would have to provide to DOR any information that the Department considers necessary for the administration of the sales and use tax. Such information would have to be provided in the manner prescribed by DOR, except that the Department could not require that the person provide such information more than once every 180 days.

PENALTIES FOR MISUSING DOCUMENTS

AB 547/SB 267 would provide that a person who uses any of the following documents in a manner that is prohibited by or inconsistent with the sales tax statutes, or provides incorrect information to a seller or certified service provider related to the use of such documents or regarding a sales or use tax exemption, would have to pay a penalty of $250 for each invoice or bill of sale related to the prohibited or inconsistent use or incorrect information: (a) an exemption certificate; (b) a direct pay permit; (c) a direct mail form; or (d) a multiple–points–of–use exemption form. These provisions would create penalties for improper use of these documents by purchasers as well as sellers.

SURETY BOND FOR CERTIFIED SERVICE PROVIDERS

Under current law, in order to protect the revenue of the state, DOR may require any person who is or will be liable to it for the sales and use taxes to place with it security in an amount determined by the Department, but not more than $15,000.

AB 547/SB 267 would require certified service providers who have contracted with sellers for the collection of sales and use taxes to submit a surety bond to DOR to guarantee the payment of sales and use taxes, including any penalty and interest on such payment. The Department would have to approve the form and contents of such bonds and determine the amount of such bonds. The surety bond would have to be submitted within 60 days after the date on which DOR notifies the CSP that the provider is registered to collect sales and use taxes. If the Department determines, with regards to any one CSP, that no bond is necessary to protect the tax revenues of this state, the Secretary of Revenue or the Secretary's designee could waive the bond requirement with regard to that provider. Any bond submitted under this provision would remain in force until the Secretary of Revenue or the Secretary's designee releases the liability under the bond.

This provision would authorize DOR to require a larger amount of security from certified service providers. The Department desires this authority because CSPs would likely be responsible for paying taxes on behalf of a number of retailers.

USE OF PERSONALLY IDENTIFIABLE INFORMATION BY CERTIFIED SERVICE PROVIDERS

Under AB 547/SB 267, and as required by the SSUT Agreement, a certified service provider could use personally identifiable information as necessary only for the administration of its system to perform a seller's sales and use tax functions and would have to provide consumers clear and conspicuous notice of its practice regarding such information, including how it collects the information, how it uses the information, and under what circumstances it discloses the information. "Personally identifiable information" would mean any information that identifies a person.

A CSP could retain personally identifiable information only to verify exemption claims, to investigate fraud, and to ensure its system's reliability. A CSP that retains an individual's personally identifiable information would have to provide reasonable notice of such retention to the individual and provide the individual reasonable access to the information and an opportunity to correct inaccurate information. If any person, other than a state that is a signatory to the SSUT Agreement requests access to an individual's personally identifiable information, the CSP would have to make a reasonable and timely effort to notify the individual of the request.

A certified service provider would have to provide sufficient technical, physical, and administrative safeguards to protect personally identifiable information from unauthorized access and disclosure.

VEHICLE, VESSEL, AND AIRCRAFT SALES BY RETAILERS WHO ARE NOT DEALERS

Under current law, in the case of motor vehicles, boats, snowmobiles, mobile homes not exceeding 45 feet in length, trailers, semitrailers, all-terrain vehicles, or aircraft registered or titled, or required to be registered or titled, in this state purchased from persons who are not Wisconsin dealers, the purchaser must file a sales tax return and pay the tax prior to registering or titling the property in this state. AB 547/SB 267 would modify this provision to refer to purchases from persons who are not "retailers" rather than persons who are not "dealers." This modification would require all retailers that sell the above items to collect and remit the sales tax, rather than just licensed dealers.

ADMINISTRATION OF LOCAL TAXES

Notice of Repeal of County Sales Tax

Under current law, a certified copy of a repeal of an ordinance authorizing a 0.5% county sales tax must be delivered to the Secretary of Revenue at least 60 days before the effective date of the repeal. Under AB 547/SB 267, the delivery would have to occur at least 120 days before the

repeal's effective date.

Baseball Park District Tax

Under current law, a local professional baseball park district, by resolution, may impose a sales and use tax at a rate of no more than 0.1%. The resolution is effective on the first day of the first month that begins at least 30 days after the adoption of the resolution. Under AB 547/SB 267, the resolution would be effective on the first January 1, April 1, July 1, or October 1 that begins at least 120 days after the adoption of the resolution.

Football Stadium District Tax Resolution

Under current law, a local professional football stadium district, by resolution, may impose a sales and use tax of 0.5%. The imposition of the taxes is effective on the first day of the first month that begins at least 30 days after the certification of the approval of the resolution by the electors in the district's jurisdiction. Under AB 547/SB 267, imposition of the taxes would be effective on the first January 1, April 1, July 1, or October 1 that begins at least 120 days after approval by the electors is certified.

Notice of Cessation of Baseball Park and Football Stadium Taxes

Under current law, retailers and DOR may not collect a sales or use tax for any local professional baseball park district after the calendar quarter during which the district board makes a certification to DOR that adequate revenues have been collected to retire all stadium bonds and provide sufficient funding for future maintenance of the stadium. However, DOR may collect from retailers taxes that accrued before that calendar quarter and fees, interest, and penalties that relate to those taxes.

Under AB 547/SB 267, the tax could no longer be collected after the last day of the calendar quarter that is at least 120 days from the date on which the district board makes its certification to DOR. The Department could continue to collect back-due taxes that accrued before the day after the last day of that calendar quarter, along with fees, interest, and penalties. The same modification would also be made for the professional football stadium district sales tax.

Local Rate Changes

Under current law, the gross receipts from taxable services are not subject to local sales taxes, and the incremental amount of tax caused by a local tax rate increase applicable to those services is not due, if those services are billed to the customer and paid for before the effective date of the county ordinance or special district resolution imposing the tax or rate increase, regardless of whether the service is furnished to the customer before or after that date. AB 547/SB 267 would change this provision to specify that the local tax would be due on such services beginning with the first billing period starting on or after the effective date of the ordinance, resolution, or rate increase, regardless of whether the service is furnished to the customer before or after that date.

AB 547/SB 267 would also specify that the sales price from taxable services would not be subject to local sales and use taxes, and a decrease in a local tax rate would first apply, beginning with bills rendered on or after the effective date of the repeal or sunset of the county ordinance or special district resolution imposing the tax or other rate decrease, regardless of whether the service is furnished to the customer before or after that date.

Administration of Local Taxes

AB 547/SB 267 would also change cross references to administrative provisions regarding the local rooms tax, exposition district tax, local rental car tax, premier resort area tax, and state vehicle rental fee.

Local Exposition District Tax

Currently, a local exposition district may impose a tax on retail sales within the district's jurisdiction of taxable meals and food products. Such taxable items include: (a) meals, food, food products, and beverages sold for direct consumption on the premises; (b) sales for off-premises consumption of meals and sandwiches (whether heated or not), heated food or heated beverages, soda fountain items such as sundaes, milk shakes, malts, ice cream cones, and sodas, and candy, chewing gum, lozenges, popcorn, and confections. Taxable gross receipts include cover, minimum, entertainment, service, or other charges made to patrons or customers.

Under AB 547/SB 267, the local exposition district tax could be imposed on candy, prepared food, and soft drinks, using the new definitions of these items outlined above. This modification would make the tax base for the exposition district tax consistent with the taxable food products under the state sales tax, with the exception of dietary supplements. According to DOR, the same modifications regarding taxable food described above for the state sales tax would also apply to the local exposition district tax. In addition, canned soft drinks would become taxable.

PROGRAM FOR CHILDREN AND FAMILIES

Under current law, the Department of Health and Family Services has a GPR sum sufficient appropriation for grants to counties for services for children and families. The amount of the appropriation is equal to one-eleventh of the amount of sales tax collected from out-of-state direct marketers who have entered into agreements with DOR, under which the sellers receive compensation over and above the normal 0.5% retailer's discount. AB 547/SB 267 would repeal this appropriation and the statutory language relating to the grants. The program was created in 1999 Wisconsin Act 9. To date, no funding has been provided for the program because no agreements with direct marketers have been entered into.

CROSS REFERENCE CHANGES IN OTHER PROGRAMS

AB 547/SB 267 would adopt the new definition of "food and food ingredient" in the definition of vending machines that are exempt from personal property taxes.

Under current provisions related to the ad valorem tax on air carriers, DOR must determine in-flight sales allocated to this state based on the sales tax rules, which specify that a sale or purchase involving transfer of ownership of property is deemed to have been completed at the time and place when and where possession is transferred by the seller or the seller's agent to the purchaser or the purchaser's agent, except that a common carrier or the U.S. postal service is deemed the agent of the seller, regardless of any FOB point and regardless of the method by which freight or postage is paid. Under AB 547/SB 267, the reference to the current sales tax provision would be replaced with a reference to the new sales tax sourcing provisions.

DOR ADMINISTRATIVE FUNDING

AB 547/SB 267 would provide DOR with $25,000 GPR in 2003–04 and 2004-05 in its general program operations appropriation for collection of taxes to pay for administrative costs related to the SSUT Agreement.

As noted below, the bills would take effect on July 1, 2004. Therefore, an amendment would be needed to provide funding to DOR in 2003-04, as intended.

EFFECTIVE DATE

AB 547/SB 267 would take effect on July 1, 2004. The modifications to state law outlined above would take effect on this date regardless of whether the SSUT Agreement has taken effect.

PART 3

FISCAL EFFECT

FISCAL EFFECT

A number of provisions of AB 547/SB 267 would have a fiscal effect. The following sections identify these provisions and provide information about their fiscal implications, based on information prepared by the Department of Revenue. With the bills' effective date of July 1, 2004, most of the fiscal effects would first occur in the 2004-05 state fiscal year.

Pre-Written Software. Certain currently exempt sales of pre-written computer software that is customized for a specific purchaser would become taxable. This provision is estimated to result in a minimal increase in tax revenues.

Bundled Items. The sales tax would be imposed on the entire sales price of products comprised of exempt items that are bundled with taxable items by the seller. Currently, the seller is not required to pay tax on the value of the nontaxable items. The fiscal effect of this modification is also estimated to be a minimal revenue increase.

Property Provided with an Operator. Under the bills, if tangible personal property is provided along with an operator, the transaction would be considered a service (which may or may not be taxable) rather than a lease (which generally is taxable) as long as the operator is necessary for the property to perform in the manner for which it is designed and the operator does more than maintain, inspect, or set up the property. Under current law, the determination of whether such transactions represent a property lease or a service depends upon the amount of control maintained by the operator and the degree of responsibility for completion of the work assumed by the operator. For individual taxpayers, this modification could result in a larger or smaller tax liability than current law, depending upon the specific circumstances of the transaction. The net fiscal effect is estimated to be minimal

Food and Beverages. As shown in Attachment 1, certain food sales that are now exempt would become taxable and certain sales that are now taxable would become exempt. In addition, the treatment of pet food sold by veterinarians would be modified. In total, these modifications are estimated to decrease state tax revenues by $3,870,000 in 2004-05 and decrease county and stadium sales tax revenues by $280,000 in that year. The largest revenue impacts relate to the treatment of: ready-to-drink tea ($2,540,000); frozen novelties (-$2,200,000); fruit drinks with 50% to 99% juice (-$1,310,000); popcorn (-$1,250,000); chocolate chips and baking chocolate ($1,120,000); and packaged ice (-$1,010,000). Exposition district tax revenues would increase by an estimated $250,000.

Medical Equipment; Antiembolism Elastic Hose. The bills would expand the types of medical equipment that are exempt from tax. In addition, the current exemptions for equipment used in the treatment of diabetes and equipment used to administer oxygen would be limited to equipment purchased for in-home use, and the existing exemption for antiembolism elastic hose would be repealed. The additional exemptions for durable medical equipment are estimated to

decrease state sales tax collections by $2,790,000 and reduce county and stadium sales tax collections by $200,000 in 2004-05. The other modifications would have a minimal fiscal effect.

Cloth Diapers. The current exemption for cloth diapers would be eliminated. The estimated fiscal effect is a $50,000 increase in state revenues and a minimal increase in local revenues in 2004-05.

Catalogs and other Property Delivered to Wisconsin Residents. Purchases of items that are sold by an out-of-state seller to a Wisconsin purchaser and distributed directly by the seller by common carrier or U.S. mail to Wisconsin residents without the purchaser ever taking possession of the items would become taxable regardless of whether or not the out-of-state seller has nexus with Wisconsin. Currently, such sales are not subject to the sales or use tax if the printer is located out-of-state and does not have nexus with Wisconsin. This provision would increase state sales taxes by an estimated $1,240,000 and increase county and stadium taxes by $90,000 in 2004-05.

Non-Exempt Use After Purchase. Currently, if a purchaser certifies that the items purchased will be used in a manner entitling the sale to be exempt from tax and the purchaser subsequently uses the property in some other manner, the purchaser is liable for payment of the sales tax. The tax is measured by the sales price of the property to the purchaser, but if the taxable use first occurs more than six months after the sale, the purchaser may base the tax either on that sales price or on the fair market value of the property at the time the taxable use first occurs. The bills would eliminate the option to base the tax on fair market value if the taxable use first occurs more than six months after the purchase, so that the tax would always be based on the sales price to the purchaser. This provision is estimated to result in a minimal revenue increase.

Drop-Shipments. Under the bills, Wisconsin manufacturers would no longer be liable for the sales tax on drop-shipments to Wisconsin purchasers. Instead, the purchaser would be liable for use tax. The fiscal effect of this change is estimated to be a minimal revenue loss.

Sourcing. DOR has identified several situations where the bills' sourcing provisions would differ from current law and practice. The most significant change would be to relieve sellers (printers) of direct mail of the burden of determining the destination of each piece of mail for tax purposes. Other sourcing changes involve towing services, admissions, certain sales by florists, leases, software and services (such as cable television) delivered electronically, and post-paid telecommunications services. These changes are estimated to have a minimal fiscal impact at the state level and in the aggregate for counties and other local taxing jurisdictions. However, the new provisions could result in an unknown amount of tax shifting among individual local taxing jurisdictions.

Retailer's Compensation. The bills would allow additional retailer's compensation for: (a) certified service providers; (b) sellers that use a certified automated system; and (c) large, multi-state sellers that have a proprietary system that calculates the amount of tax owed to each taxing jurisdiction. Under the bills, instead of the 0.5% regular retailer's discount, such persons could retain a portion of sales and use taxes collected on retail sales in an amount determined by DOR

and by contracts that the Department enters into pursuant to the SSUT Agreement. There would be no statutory limit on the amount of retailer compensation paid to these types of retailers, and such compensation could be paid to in-state sellers, out-of-state sellers that have nexus with Wisconsin, and out-of-state sellers that do not have nexus. However, the Department indicates that, under the Agreement, only non-nexus sellers that voluntarily agree to collect taxes would receive additional compensation under item (c). Sellers that do not meet the above criteria would continue to receive the regular 0.5% retailer's discount.

At this time, it is not possible to reliably estimate the cost of the higher retailer's compensation, because the rate of compensation and the number and size of sellers that would qualify are not known. However, it is possible that the cost of this provision could be significant.

"Amnesty" Provision. Under the bills, a seller would not be liable for uncollected and unpaid state and local sales and use taxes (including penalties and interest) on previous sales made to Wisconsin purchasers if the seller registers with DOR to collect and remit state and local sales and use taxes on such sales in accordance with the SSUT Agreement. In order to receive amnesty, the seller would have to: (a) register within one year after the effective date of this state's participation in the Agreement; and (b) collect and remit state and local sales and use taxes on sales to purchasers in this state for at least three consecutive years after the date on which the seller registers. The amnesty would not be available to: (a) sellers that were already registered with DOR during the year immediately preceding the effective date of Wisconsin's participation in the Agreement; (b) sellers that are being audited by DOR; or (c) sellers that have committed or been involved in a fraud or an intentional misrepresentation of a material fact. The fiscal effect of this provision, if any, is unknown.

Business Tax Registration Fee. The bills would permit DOR to waive the business tax registration fee if the person who is applying for or renewing the certificate is not required to hold such a certificate for sales and use tax purposes. This would result in a minimal loss of fee revenue.

County Grants for Children and Family Services. Under current law, the Department of Health and Family Services has a GPR appropriation for grants to counties for services for children and families equal to one-eleventh of the amount of sales tax collected from out-of-state direct marketers who have entered into agreements with DOR, under which the sellers receive compensation over and above the normal 0.5% retailer's discount. The bills would repeal this appropriation and the statutory language relating to the grants. The program was created in 1999 Wisconsin Act 9. To date, no funding has been provided for the program because no agreements with direct marketers have been entered into; therefore there is no estimated fiscal effect.

DOR Administrative Costs. The bills would provide DOR with $25,000 GPR in 2003–04 and 2004-05 to pay for administrative costs related to the SSUT Agreement. These funds would be used to pay dues to the Agreement's governing board for the costs of: certifying compliance with the Agreement; certifying CASs and CSPs; establishing performance standards for large sellers that use proprietary systems; maintaining the required sales tax databases; issuing identification numbers for retailers that voluntarily agree to collect sales and use taxes; and informing sellers of

the new procedures regarding purchasers claiming tax exemptions. As noted, an amendment would be needed to the bills' general effective date in order to provide this funding in 2003-04.

Penalties. The bills would create a $250 penalty for using sales tax documents in a manner that is prohibited by or inconsistent with the statutes, or providing incorrect information to a seller or CSP related to the use of such documents or regarding a sales or use tax exemption. These penalties would result in an unknown, but small, revenue increase.

Voluntary Collections. The Department's fiscal note includes increased state revenues of $2,020,000 and increased county and stadium tax revenues of $150,000 in 2004-05 from retailers that have voluntarily agreed to collect and remit sales and use taxes in anticipation of the SSUT Agreement. Although these voluntary agreements were entered into prior to the passage of AB 547/SB 267, the Department believes that these revenues should be considered a fiscal effect of the bills because these retailers could back out of the agreements if Wisconsin does not pass the SSUT legislation.

These fiscal effects are summarized in Table 1. As shown in the table, these provisions would reduce state tax revenues by an estimated $3.4 million in 2004-05 and increase state expenditures by $25,000 GPR in 2003-04 and 2004-05, prior to accounting for the increased retailer's compensation for certain sellers. The revenue loss could be greater if a large number of sellers are provided a higher rate of retailer's compensation under the bills; however, the precise cost of this provision is unknown. In aggregate, county and stadium district revenues would decrease by an estimated $240,000 and local exposition district tax collections would increase by an estimated $250,000.

TABLE 1

Estimated Fiscal Effects of AB 547/SB 267
2004-05 State Fiscal Year

Revenue Changes--State, County, and Stadium Taxes

	State Tax	County and Stadium Taxes
Food and Beverages	-$3,870,000	-$280,000
Durable Medical Equipment	-2,790,000	-200,000
Cloth Diapers	50,000	Minimal
Items Shipped by Non-Nexus Sellers	1,240,000	90,000
Voluntary Collections	2,020,000	150,000
Total Revenue Changes*	-$3,350,000	-$240,000
Exposition District Tax Increase		$250,000
DOR Administrative Funding (GPR)**	$25,000	

*The revenue changes exclude the impact of providing additional retailer's compensation for certain sellers. The fiscal effect of this provision is unknown, but it could result in a significant decrease in state tax revenues.

**Administrative funding would be provided in both 2003-04 and 2004-05.

Source: Department of Revenue

In addition to the short-term fiscal effects outlined above, it is possible that the passage of AB 547/SB 267, along with similar laws in other states, could result in a significant increase in sales and use tax collections from remote sales in future years. This could occur if the bills' provisions result in additional retailers voluntarily agreeing to collect and remit use taxes to Wisconsin or if Congress is persuaded to pass federal legislating allowing states to require out-of-state sellers to collect and remit the tax. DOR estimates that such future collections could total $150 million annually.

PART 4

ATTACHMENTS

ATTACHMENT 1

Modifications Relating to Food and Beverages Under AB 547/SB 267

Food Item	Current Treatment	AB 547/SB 267 Treatment
Bakery products sold by bakeries and grocery stores	Exempt, unless for consumption on seller's premises	Exempt, unless provided with utensils (such as plates, forks, knives)
Bottled tea, sweetened	Exempt	Taxable
Bottled water, carbonated, non-sweetened	Taxable	Exempt
Candy containing flour (such as KitKat, Twix, and Licorice)	Taxable	Exempt
Chocolate Chips	Exempt	Taxable
Deli combination platters prepared by seller	Exempt, unless a meal or sandwich	Exempt if sold by weight or volume
Deli food sold by weight (such as potato salad, fruit salad, sliced deli meat)	Exempt, unless for consumption on the seller's premises	Exempt unless provided with utensils (such as plates, forks, knives)
Deli salad bar (self-service, utensils provided)	Taxable, if for on-premises consumption	Taxable
Frozen fruit juice	Exempt, except if less than 100% juice	Exempt
Ice cream novelties (such as ice cream cone, Popsicle)	Taxable	Exempt, unless prepared by retailer and retailer is not primarily a manufacturer and not solid by weight or volume
Liquid 51% - 99% fruit juice	Taxable	Exempt
Manufactured food sold at manufacturer's (seller's) outlet (for consumption off the premises)	Exempt, unless sandwich, ready-to-eat meal, candy, soft drink, dietary supplement, popcorn, or alcohol beverage	Exempt, unless utensils provided, candy, soft drink, dietary supplement, or alcoholic beverage

Food Item	Current Treatment	AB 547/SB 267 Treatment
Marshmallows	Exempt	Taxable
Nonalcoholic beer	Taxable	Exempt, unless sweetened
Nonalcoholic champagne	Taxable (fruit drink not 100% juice)	Exempt, unless sweetened
Popcorn, popped	Taxable	Exempt, unless prepared by retailer, retailer is not primarily a manufacturer, and not solid by weight or volume
Popcorn, unpopped	Taxable	Exempt
Powdered fruit drinks	Taxable	Exempt
Rotisserie chicken (sold heated)	Taxable	Taxable, unless sold by weight or volume
Sandwich prepared by grocer not sold by weight or volume	Taxable, unless frozen	Taxable
YoJo and other milk product/fruit drink combinations	Taxable	Exempt

Source: Department of Revenue

ATTACHMENT 2

Durable Medical Equipment That Would be Exempt from Sales Tax Under AB 547/SB 267

Alternating pressure pads
Bed rails
Bedside commodes
Bone fracture therapy devices
Continuous passive motion devices

Decubitus bed pads
Foam seating pads not for wheelchairs
Foam wedges not for wheelchairs
Hospital beds
Hydro-collators

Hydro-therm heating pads
I.V. stands
Leg weights (rehab. related)
Lift recliners
Muscle stimulators

Overbed tables
Paraffin baths
Patient transport devices, boards
Patient lifts
Patient lift slings

Posture back supports
Respiratory therapy equipment not used to administer oxygen
Restraints
Sitz baths
Specialized seating, desks, workstations

Standing frames, devices, and accessories
Stethoscopes
Toilet safety frames
Traction stands, pulleys, etc.
Trapeze bars/bar stands

Ultraviolet cabinets
Urinals
Ventilators not administering oxygen
Whirlpool bath equipment

Source: Department of Revenue

PART 5

APPENDIX

SUMMARY OF THE STREAMLINED SALES TAX AND USE TAX AGREEMENT

APPENDIX

Summary of the Streamlined Sales Tax and Use Tax Agreement

FUNDAMENTAL PURPOSE

The purpose of the Streamlined Sales and Use Tax Agreement is to simplify and modernize sales and use tax administration in the member states in order to reduce the burden of tax compliance. The Agreement focuses on improving sales and use tax administration systems for all sellers and for all types of commerce through state level administration, uniformity in the state and local tax bases and major definitions, a central, electronic seller registration system for all member states, uniform sourcing rules, and other simplification efforts.

TAXING AUTHORITY PRESERVED

The Agreement is not intended to influence a member state to impose a tax on or provide an exemption from tax for any item or service. However, if a member state chooses to tax an item or exempt an item from tax, that state must adhere to the Agreement's provisions concerning definitions.

REQUIREMENTS EACH STATE MUST ACCEPT TO PARTICIPATE

State and Local Tax Rates

Member states could not have multiple state sales and use tax rates on items of personal property or services after December 31, 2005, except that a member state could impose a single additional rate on food and food ingredients and drugs as defined by state law pursuant to the Agreement.

Member states that have local jurisdictions that levy a sales or use tax could not have more than one local sales tax rate or more than one local use tax rate per local jurisdiction. If the local jurisdiction levies both a sales tax and use tax, the local rates must be identical.

These provisions do not apply to sales or use taxes levied on electricity, piped natural or artificial gas, or other heating fuels delivered by the seller, or the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.

State and Local Tax Bases

Through December 31, 2005, if a member state has local jurisdictions that levy a sales or use tax, all local jurisdictions in the state must have a common tax base. After December 31, 2005, the tax base for local jurisdictions must be identical to the state tax base unless otherwise prohibited by federal law. These requirements do not apply to sales or use taxes levied on the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.

Seller Registration

Each member state must participate in an on-line sales and use tax registration system in cooperation with the other member states. Among other provisions, under this system: (a) a seller registering under the Agreement is registered in each of the member states; (b) the member states agree not to require the payment of any registration fees or other charges for a seller to register in a state in which the seller has no legal requirement to register; and (c) a seller may cancel its registration at any time under uniform procedures adopted by the Agreement's governing board. Cancellation would not relieve the seller of its liability for remitting to the proper states any taxes collected.

Notice for State Tax Changes

Each member state must lessen the difficulties faced by sellers when there is a change in a state sales or use tax rate or base by making a reasonable effort to do all of the following: (a) provide sellers with as much advance notice as practicable of a rate change; (b) limit the effective date of a rate change to the first day of a calendar quarter; and (c) notify sellers of legislative changes in the tax base and amendments to sales and use tax rules and regulations.

Failure of a seller to receive notice or failure of a member state to provide notice or limit the effective date of a rate change would not relieve the seller of its obligation to collect sales or use taxes for that member state.

Local Rate and Boundary Changes

Each member state that has local jurisdictions that levy a sales or use tax must:

a. Provide that local rate changes will be effective only on the first day of a calendar quarter after a minimum of 60 days' notice to sellers.

b. Apply local sales tax rate changes to purchases from printed catalogs wherein the purchaser computed the tax based upon local tax rates published in the catalog only on the first day of a calendar quarter after a minimum of 120 days' notice to sellers.

c. For sales and use tax purposes only, apply local jurisdiction boundary changes only on the first day of a calendar quarter after a minimum of 60 days' notice to sellers.

d. Provide and maintain a database that describes boundary changes for all taxing jurisdictions. This database must include a description of the change and the effective date of the change for sales and use tax purposes.

e. Provide and maintain a database of all sales and use tax rates for all of the jurisdictions levying taxes within the state.

f. Provide and maintain a database that assigns each five-digit and nine-digit zip code within a member state to the proper tax rates and jurisdictions. The state must apply the lowest combined tax rate imposed in the zip code area if the area includes more than one tax rate in any level of taxing jurisdictions. If a nine-digit zip code designation is not available for a street address or if a seller is unable to determine the nine-digit zip code designation of a purchaser after exercising due diligence to determine the designation, the seller may apply the rate for the five-digit zip code area. For the purposes of this provision, there is a rebuttable presumption that a seller has exercised due diligence if the seller has attempted to determine the nine-digit zip code designation by utilizing software approved by the Agreement's governing board that makes this designation from the street address and the five-digit zip code of the purchaser.

g. Participate with other member states in the development of an address-based system for assigning taxing jurisdictions. The governing board may allow a member state to require sellers that register under the Agreement to use an address-based system provided by that member state. If any member state develops an address-based assignment system pursuant to the federal Mobile Telecommunications Sourcing Act, a seller may use that system in place of the system provided for in (f) above.

Relief from Certain Liability

Each member must relieve sellers and certified service providers (CSPs) from liability to the member state and local jurisdictions for having charged and collected the incorrect amount of sales or use tax resulting from the seller or CSP relying on erroneous data provided by a member state on tax rates, boundaries, or taxing jurisdiction assignments. A member state that provides an address-based system for assigning taxing jurisdictions pursuant to section (g) above or pursuant to the federal Mobile Telecommunications Sourcing Act will not be required to provide liability relief for errors resulting from the reliance on the information provided by the member state under the provisions of section (f) above.

Sourcing

Each member state must agree to require sellers to source the retail sale of a product in accordance with the sourcing rules set forth in the Agreement. The sourcing 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 retail sale of a product. The sourcing provisions do not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.

The Agreement's sourcing provisions do not apply to sales or use taxes levied on sales of watercraft, modular homes, manufactured homes, mobile homes, motor vehicles, trailers, semi-trailers, or aircraft that do not qualify as transportation equipment. The retail sale of these items must be sourced according to the requirements of each member state.

Under the Agreement, states must use destination-based sourcing rather than origin-based sourcing. With destination-based sourcing, a sale is considered to occur in the jurisdiction where the purchaser resides or uses the property or service, rather than in the jurisdiction where the seller is located. The Agreement includes a number of detailed provisions for sourcing specific types of transactions.

Enactment of Exemptions

A member state may enact a product-based exemption without restriction if the Agreement does not have a definition for the product or for a term that includes the product. If the Agreement has a definition for the product or for a term that includes the product, a member state may exempt all items included within the definition but may not exempt only part of the items included within the definition unless the Agreement sets out the exemption for part of the items as an acceptable variation.

A member state may enact an entity-based or a use-based exemption without restriction if the Agreement does not have a definition for the product whose use or purchase by a specific entity is exempt or for a term that includes the product. If the Agreement has a definition for the product whose use or specific purchase is exempt, a member state may enact an entity-based or a use-based exemption that applies to that product as long as the exemption utilizes the Agreement definition of the product. If the Agreement does not have a definition for the product whose use or specific purchase is exempt but has a definition for a term that includes the product, a member state may enact an entity-based or a use-based exemption for the product without restriction.

Administration of Exemptions

The Agreement includes a number of provisions that must be observed by member states when a purchaser claims an exemption. For example, the seller must obtain identifying information of the purchaser and the reason for claiming a tax exemption and maintain proper records of exempt transactions and provide them to a member state when requested.

Each member state must relieve sellers that follow the Agreement's requirements from any tax otherwise applicable if it is determined that the purchaser improperly claimed an exemption, and to hold the purchaser liable for the nonpayment of tax. This relief from liability does not apply to a seller who fraudulently fails to collect the tax or solicits purchasers to participate in the unlawful claim of an exemption.

Uniform Returns, Rules for Remittances of Funds, and Recovery Of Bad Debts

The Agreement requires member states to abide by a number of uniform rules regarding sales and use tax returns, remittance of funds by sellers, and recovery of sales tax on bad debts.

Confidentiality and Privacy Protections Under Model 1

A "Model 1" seller is a retailer who has selected a certified service provider as its agent to perform all the seller's sales and use tax functions, other than the seller's obligation to remit tax on its own purchases.

The member states agree that a fundamental precept in Model 1 is to preserve the privacy of consumers by protecting their anonymity. With very limited exceptions, CSPs would be required to perform their tax calculation, remittance, and reporting functions without retaining the personally identifiable information of consumers. Under the Agreement, "personally identifiable information" means information that identifies a person.

The Agreement's governing board could certify a CSP only if the CSP certifies that:

a. Its system has been designed and tested to ensure that the fundamental precept of anonymity is respected.

b. Personally identifiable information is only used and retained to the extent necessary for the administration of Model 1 with respect to exempt purchasers.

c. It provides consumers clear and conspicuous notice of its information practices, including what information it collects, how it collects the information, how it uses the information, how long, if at all, it retains the information, and whether it discloses the information to member states. Such notice would be satisfied by a written privacy policy statement accessible by the public on the official web site of the CSP.

d. Its collection, use, and retention of personally identifiable information will be limited to that required by the member states to ensure the validity of exemptions from taxation that are claimed by reason of a consumer's status or the intended use of the goods or services purchased.

e. It provides adequate technical, physical, and administrative safeguards so as to protect personally identifiable information from unauthorized access and disclosure.

Each member state would have to provide public notification to consumers, including their exempt purchasers, of the state’s practices relating to the collection, use, and retention of personally identifiable information.

When any personally identifiable information that has been collected and retained is no longer required for sales tax purposes, such information could no longer be retained by the member states.

When personally identifiable information regarding an individual is retained by or on behalf of a member state, the state would have to provide reasonable access by such individual to his or her own information in the state's possession and a right to correct any inaccurately recorded information.

If anyone other than a member state, or a person authorized by that state's law or the Agreement, seeks to discover personally identifiable information, the state from which the information is sought would have to make a reasonable and timely effort to notify the individual of such request.

This privacy policy would be subject to enforcement by member states' attorneys general or other appropriate state government authority.

Each member state's laws and regulations regarding the collection, use, and maintenance of confidential taxpayer information remain fully applicable and binding. Without limitation, the Agreement does not enlarge or limit the member states' authority to: (a) conduct audits or other review as provided under the Agreement and state law; (b) provide records pursuant to a member state's Freedom of Information Act, disclosure laws with governmental agencies, or other regulations; (c) prevent, consistent with state law, disclosures of confidential taxpayer information; (d) prevent, consistent with federal law, disclosures or misuse of federal return information obtained under a disclosure agreement with the Internal Revenue Service; or (e) collect, disclose, disseminate, or otherwise use anonymous data for governmental purposes. "Confidential taxpayer information" means all information that is protected under a member state's laws, regulations, and privileges. "Anonymous data" means information that does not identify a person.

This privacy policy does not preclude the Agreement's governing board from certifying a CSP whose privacy policy is more protective of confidential taxpayer information or personally identifiable information than is required by the Agreement.

Sales Tax Holidays

The Agreement would permit states to implement temporary exemption periods, commonly referred to as sales tax holidays, subject to a number of restrictions regarding the use of uniform definitions, notice, price thresholds, and the treatment of special transactions (such as layaway sales, coupons, discounts, rain-checks, and exchanges).

Caps and Thresholds

Member states could not: (a) have caps or thresholds on the application of state sales or use tax rates or exemptions that are based on the value of the transaction or item after December 31,

2005; or (b) have caps that are based on the application of the rates unless the member state assumes the administrative responsibility in a manner that places no additional burden on the retailer.

Member states that have local jurisdictions that levy a sales or use tax could not place caps or thresholds on the application of local tax rates or exemptions that are based on the value of the transaction or item after December 31, 2005.

These restrictions do not apply to taxes levied on the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes or to instances where the burden of administration has been shifted from the retailer.

Rounding

The Agreement includes a uniform rounding rule to be used by retailers in calculating the amount of tax to be collected from purchasers.

Customer Refund Procedures

The Agreement includes customer refund procedures that apply when a state allows a purchaser to seek a return of over-collected sales or use taxes from the seller. These procedures provide the first course of remedy available to purchasers seeking a return of over-collected sales or use taxes from the seller. Under these provisions, a cause of action against the seller for the over-collected sales or use taxes does not accrue until a purchaser has provided written notice to a seller and the seller has had 60 days to respond. Such notice to the seller must contain the information necessary to determine the validity of the request. In connection with a purchaser's request from a seller of over-collected sales or use taxes, a seller would be presumed to have a reasonable business practice, if in the collection of such sales or use taxes, the seller: (a) uses either a provider or a system, including a proprietary system, that is certified by the state; and (b) has remitted to the state all taxes collected less any deductions, credits, or collection allowances.

None of these provisions would either require a state to provide, or prevent a state from providing, a procedure by which a purchaser may seek a refund directly from the state arising out of sales or use taxes collected in error by a seller from the purchaser. None of these provisions would operate to extend any person's time to seek a refund of sales or use taxes collected or remitted in error.

Direct Pay Permits

Each member state would have to provide for a direct pay authority that allows the holder of a direct pay permit to purchase otherwise taxable goods and services without payment of tax to the supplier at the time of purchase. The holder of the direct pay permit would have to make a determination of the taxability and then report and pay the applicable tax due directly to the tax

jurisdiction. Each state can set its own limits and requirements for the direct pay permit. The governing board will advise member states when setting state direct pay limits and requirements.

Library of Definitions; Taxability Matrix

Each member state would be required to utilize common definitions as set out in the Agreement's Library of Definitions. Member states would have to adhere to the following principles:

a. If a term defined in the Library of Definitions appears in a member state's sales and use tax statutes or administrative rules or regulations, the member state must enact or adopt the Library definition of the term in its statutes or administrative rules or regulations in substantially the same language as the Library definition.

b. Member states may not use a Library definition in their sales or use tax statutes or administrative rules or regulations that is contrary to the meaning of the Library definition.

c. Except as specifically provided in the Agreement's provisions regarding the enactment of exemptions and the Library of Definitions, member states must impose a sales or use tax on all products or services included within each definition or exempt from sales or use tax all products or services within each definition.

To ensure uniform application of terms defined in the Library of Definitions, each member state must complete a taxability matrix adopted by the Agreement's governing board. The member state's entries in the matrix must be provided and maintained in a database that is in a downloadable format approved by the Agreement's governing board. Member states must provide notice of changes in the taxability of the products or services listed in the taxability matrix as required by the governing board.

Member states must relieve sellers and CSPs from liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales or use tax resulting from the seller or CSP relying on erroneous data provided by the member state in the taxability matrix.

To date, the Agreement's Library of Definitions includes a number of definitions of core terms that apply in imposing and administering sales and use taxes. The Agreement also includes product definitions to be used in identifying each state's tax base. The Agreement's governing body also intends to develop definitions relating to sales tax holidays.

The current Library includes administrative definitions for "lease or rental," "sales price," "tangible personal property," and other general definitions. Current product definitions under the Agreement relate to clothing, computers, food, and health care products and services.

Effective Date for Rate Changes

Each member state would have to provide that the effective date of rate changes for services covering a period starting before and ending after the statutory effective date would be as follows: (a) for a rate increase, the new rate would apply to the first billing period starting on or after the effective date; and (b) for a rate decrease, the new rate would apply to bills rendered on or after the effective date.

Seller Participation

The member states would have to provide an online registration system that allows sellers to register in all the member states. By registering, the seller would agree to collect and remit sales and use taxes for all taxable sales into the member states, including member states joining after the seller's registration. Withdrawal or revocation of a member state would not relieve a seller of its responsibility to remit taxes previously or subsequently collected on behalf of the state.

In member states where the seller has a requirement to register prior to registering under the Agreement, the seller may be required to provide additional information to complete the registration process or the seller may choose to register directly with those states.

A member state or a state that has withdrawn or been expelled may not use registration with the central registration system and the collection of sales and use taxes in the member states as a factor in determining whether the seller has nexus with that state for any tax at any time.

Amnesty for Registration

Member states would be required to provide amnesty for uncollected or unpaid sales or use tax to a seller who registers to pay or to collect and remit applicable sales or use tax on sales made to purchasers in the state in accordance with the terms of the Agreement, provided that the seller was not so registered in that state in the 12-month period preceding the effective date of the state's participation in the Agreement.

The amnesty must preclude assessment for uncollected or unpaid sales or use tax together with penalty or interest for sales made during the period the seller was not registered in the state, provided registration occurs within 12 months of the effective date of the state's participation.

Amnesty must also be provided by any additional state that joins the Agreement after the seller has registered.

The amnesty is not available: (a) to a seller with respect to any matter for which the seller received notice of the commencement of an audit and which audit is not yet finally resolved including any related administrative and judicial processes; or (b) for sales or use taxes already paid or remitted to the state or to taxes collected by the seller.

The amnesty is fully effective, absent the seller's fraud or intentional misrepresentation of a material fact, as long as the seller continues registration and continues payment or collection and remittance of applicable sales or use taxes for a period of at least 36 months. Each member state must toll its statute of limitations applicable to asserting a tax liability during this 36-month period.

The amnesty is applicable only to sales or use taxes due from a seller in its capacity as a seller and not to sales or use taxes due from a seller in its capacity as a buyer.

A member state may allow amnesty on terms and conditions more favorable to a seller than the terms required by the Agreement.

Method of Remittance

When registering, the seller may select one of the following methods of remittances or other method allowed by state law to remit the taxes collected: (a) Model 1, wherein a seller selects a CSP as an agent to perform all the seller's sales or use tax functions, other than the seller's obligation to remit tax on its own purchases; (b) Model 2, wherein a seller uses a certified automated system (CAS) to calculate the amount of tax due on a transaction; or (c) Model 3, wherein a seller utilizes its own proprietary automated sales tax system that has been certified as a CAS.

Certification of Service Providers and Automated Systems

The Agreement's governing board would be required to certify automated systems and service providers.

The board could certify a person as a CSP if the person: (a) uses a CAS; (b) integrates its CAS with the system of a seller for whom the person collects tax so that the tax due on a sale is determined at the time of the sale; (c) agrees to remit the taxes it collects at the time and in the manner specified by the member states; (d) agrees to file returns on behalf of the sellers for whom it collects tax; (e) agrees to protect the privacy of tax information it obtains in accordance with the Agreement; and (f) enters into a contract with the member states and agrees to comply with the terms of the contract.

The governing board could certify a software program as a CAS if the governing board determines that the program: (a) determines the applicable state and local sales and use tax rate for a transaction, in accordance with the requirements of the Agreement; (b) determines whether or not an item is exempt from tax; (c) determines the amount of tax to be remitted for each taxpayer for a reporting period; (d) can generate reports and returns as required by the governing board; and (e) can meet any other requirement set by the governing board.

The governing board may establish one or more sales tax performance standards for Model 3 sellers that meet the eligibility criteria set by the board and that developed a proprietary system to determine the amount of sales and use tax due on transactions.

MONETARY ALLOWANCES FOR NEW TECHNOLOGICAL MODELS FOR SALES TAX COLLECTION

Model 1 Sellers

Each member state would have to provide a monetary allowance to a CSP in Model 1 in accordance with the terms of the contract between the governing board and the CSP. The details of the monetary allowance will be provided through the contract process. The governing board would have to require that such allowance be funded entirely from money collected in Model 1.

The contract between the governing board and a CSP may base the monetary allowance on one or more of the following: (a) a base rate that applies to taxable transactions processed by the CSP; or (b) for a period not to exceed 24 months following a voluntary seller's registration through the Agreement's central registration process, a percentage of tax revenue generated for a member state by the voluntary seller for each member state for which the seller does not have a requirement to register to collect the tax.

Model 2 Sellers

The Agreement states that the member states initially anticipate that they will provide a monetary allowance to sellers under Model 2 based on the following:

a. All sellers would receive a base rate for a period not to exceed 24 months following the commencement of participation by a seller. The base rate will be set after the base rate has been established for Model 1. This allowance will be in addition to any discount afforded by each member state at the time.

b. The member states anticipate a monetary allowance to a Model 2 Seller based on the following: (1) for a period not to exceed 24 months following a voluntary seller's registration through the Agreement's central registration process, a percentage of tax revenue generated for a member state by the voluntary seller for each member state for which the seller does not have a requirement to register to collect the tax; and (2) following the conclusion of the 24-month period, a seller will only be entitled to a vendor discount afforded under each member state's law at the time the base rate expires.

Model 3 Sellers and Other Sellers

The member states anticipate that they will provide a monetary allowance to sellers under Model 3 and to all other sellers that are not under Models 1 or 2 based on the following: (a) for a period not to exceed 24 months following a voluntary seller's registration through the central registration process, a percentage of tax revenue generated for a member state by the voluntary seller for each member state for which the seller does not have a requirement to register to collect the tax; and (b) vendor discounts afforded under each member state's law.

AGREEMENT ORGANIZATION

Effective Date

The Agreement becomes binding and takes effect when at least ten states comprising at least 20% of the total population of all states imposing a state sales tax have petitioned for membership and have been found to be in compliance with the Agreement's requirements. The Agreement will take effect on the first day of a calendar quarter at least 60 days after the tenth state is found in compliance, but cannot take effect prior to July 1, 2003.

As of this writing, 20 states, which comprise approximately 32% of the total population of all states with a sales tax, have adopted legislation to conform their sales and use tax statutes to the provisions of the Agreement. These states include Arkansas, Indiana, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. However, no states have yet been found to be in compliance by the Agreement's governing board. The board will begin reviewing certificates of compliance in early 2004.

Approval of Initial States

Prior to the effective date of the Agreement, a state may seek membership by forwarding a petition for membership and certificate of compliance to the Co-Chairs of the Streamlined Sales Tax Implementing States. A petitioning state must also provide a copy of its petition for membership and certificate of compliance to each of the Implementing States. A petitioning state must also post a copy of its petition for membership and certificate of compliance on that state’s web site.

Upon receipt of the requisite number of petitions, the Co-Chairs will convene and preside over a meeting of the petitioning states for the purpose of determining if the petitioning states are in compliance with the Agreement. An affirmative vote of three-fourths of the other petitioning states is necessary for a petitioning state to be found in compliance with the Agreement. A petitioning may not vote on its own petition for membership.

The Co-Chairs are required to provide the public with an opportunity to comment prior to any vote on a state’s petition for membership.

STATE ENTRY AND WITHDRAWAL

Entry Into Agreement

After the effective date of the Agreement, a state may apply to become a party to the Agreement by submitting a petition for membership and certificate of compliance to the governing board. The petition must include the state’s proposed date of entry, which must be on the first day

of a calendar quarter. The proposed date of entry must also be a date on which all provisions necessary for the state to be in compliance with the Agreement are in place and effective.

The petitioning state must provide a copy of its petition for membership and the certificate of compliance to each member state. A petitioning state must also post a copy of its petition for membership and certificate of compliance on its web site.

Certificate of Compliance

The certificate of compliance must be signed by the chief executive of the state's tax agency, and must document compliance with the provisions of the Agreement and cite applicable statutes, rules, regulations, or other authorities evidencing such compliance.

Annual Re-Certification of Member States

Each member state will be required to re-certify that it is in compliance with the Agreement by August 1 of each year. In its annual re-certification, the state will have to include any changes in its statutes, rules, regulations, or other authorities that could affect its compliance with the terms of the Agreement. The re-certification must be signed by the chief executive of the state's tax agency.

A member state that cannot re-certify its compliance would have to submit a statement of non-compliance to the governing board identifying any action or decision that takes such state out of compliance with the Agreement and the steps it will take to return to compliance. The governing board will promulgate rules and procedures to respond to statements of noncompliance.

Annual re-certifications and statements of non-compliance must be posted on the state's web site.

Requirements for Membership Approval

The governing board will determine if a petitioning state is in compliance with the Agreement, and a three-fourths vote of the entire board is required to approve a state's petition for membership. The board must provide public notice and opportunity for comment prior to voting on a state's petition for membership. A state's membership is effective on the proposed date of entry in its petition for membership or the first day of the calendar quarter after its petition is approved by the governing board, whichever is later, and is at least 60 days after its petition is approved.

Compliance

A state is in compliance with the Agreement if the effect of the state's laws, rules, regulations, and policies is substantially compliant with each of the requirements set forth in the Agreement.

Agreement Administration

Authority to administer the Agreement rests with the governing board comprised of representatives of each member state. Each member state may appoint up to four representatives to the board who are members of the executive or legislative branches of the state. Each member state is entitled to one vote on the governing board. Except as otherwise provided in the Agreement, all actions taken by the governing board require an affirmative vote of a majority of the governing board present and voting. The governing board will determine its meeting schedule, but must meet at least once annually. The governing board must provide a public comment period and provide public notice of its meetings at least 30 days in advance of such meetings. The governing board must promulgate rules establishing the public notice requirements for holding emergency meetings on less than 30 day's notice. The governing board may meet electronically.

The governing board is responsible for the administration and operation of the Agreement, including the appointment of all manner of committees. The governing board may employ staff, advisors, consultants, or agents, and may promulgate rules and procedures it deems necessary to carry out its responsibilities. The governing board may take any action that is necessary and proper to fulfill the purposes of the Agreement. The board may allocate the cost of administration of the Agreement among the member states.

Open Meetings

Each meeting of the governing board and the minutes thereof must be open to the public except as provided below.

Meetings may be closed only for one or more of the following:

a. Personnel issues.

b. Information required by the laws of any member state to be protected from public disclosure. In the meeting, the governing board must excuse any attendee to whom confidential taxpayer information cannot be disclosed under the law of any member state.

c. Proprietary information requested by any business to be protected from disclosure.

d. The consideration of issues incident to competitive bidding, requests for information, or certification, the disclosure of which would defeat the public interest in a fair and competitive process.

e. The consideration of pending litigation in a member state the discussion of which in a public session would, in the judgment of the member state engaged in the litigation, adversely affect its interests. In the meeting, the governing board must excuse any attendee to whom confidential taxpayer information cannot be disclosed under the law of any member state.

In addition, a closed session of the board may be convened by the chair or by a majority vote of the board. When a closed session is convened, the reason for the closed session must be noted in a public session. Any actions taken in the closed session must be reported immediately upon the reconvening of a public session.

Withdrawal of Membership or Expulsion of a Member

With respect to each member state, the Agreement will continue in full force and effect until the state withdraws its membership or is expelled. A state's withdrawal or expulsion cannot be effective until the first day of a calendar quarter after a minimum of 60 days' notice. A member state must submit notice of its intent to withdraw to the governing board and the chief executive of each member state's tax agency. The member state must also provide public notice of its intent to withdraw and post its notice of intent to withdraw on its web site.

The withdrawal by or expulsion of a state does not affect the validity of the Agreement among other member states. A state that withdraws or is expelled from the Agreement remains liable for its share of any financial or contractual obligations that were incurred by the governing board prior to the effective date of that state's withdrawal or expulsion. The appropriate share of any financial or contractual obligation will be determined by the state and the governing board in good faith based on the relative benefits received and burdens incurred by the parties.

Sanction of Member States

If a member state is found to be out of compliance, the governing board may consider sanctions against the state. Potential sanctions include expulsion from the Agreement, or other penalties as determined by the governing board. The adoption of a resolution to sanction a member state for noncompliance requires the affirmative vote of three-fourths of the entire governing board, excluding the state that is the subject of the resolution. The member state that is the subject of the resolution may not vote on such resolution. Resolutions seeking sanctions must be acted upon by the board within a reasonable period of time as set forth in the board's rules. The board must provide an opportunity for public comment prior to action on a proposed sanction.

Advisory Councils

The governing board would have to create a State and Local Government Advisory Council and a Business and Taxpayer Advisory Council from the private sector to advise it on matters pertaining to the administration of the Agreement. The membership of the Government Advisory Council would include at least one representative from each state that is a participating member of the Streamlined Sales Tax Project. In addition, the governing board will be required to appoint local government officials to the Council, and the board could appoint other state officials as it deems appropriate. The Agreement does not specify the membership of the Business and Taxpayer Advisory Council. These Councils would be required to advise and assist each other in performing their duties.

AMENDMENTS AND INTERPRETATIONS

Amendments to the Agreement

Amendments to the Agreement may be brought before the governing board by any member state. The Agreement may be amended by a three-fourths vote of the entire governing board. The governing board must give the Governor and presiding officer of each legislative house of each member state notice of proposed amendments at least 60 days prior to consideration. The governing board must also give public notice of proposed amendments at least 60 days prior to consideration, and provide an opportunity for public comment prior to action on an amendment.

Interpretations of Agreement

Matters involving interpretation of the Agreement may be brought before the governing board by any member state or by any other person. All interpretations require a three-fourths vote of the entire governing board. The governing board must publish all interpretations issued under these provisions, which will be considered part of the Agreement and have the same effect as the Agreement. The governing board must act on interpretation requests within a reasonable period of time and under guidelines and procedures as set forth in the board's rules. The board may determine that it will not issue an interpretation. The governing board must provide an opportunity for public comment prior to issuing an interpretation.

Definition Requests

Any member state or any other person may make requests for additional definitions or for interpretations on how an individual product or service fits within a definition. Such requests will be referred to the State and Local Government Advisory Council or other group under guidelines and procedures as set forth in the governing board's rules. The entity to which the request was referred must post notice of the request and provide for input from the public and the member states as directed by the governing board. Within 180 days after receiving the request, they would have to report to the governing board one of the following recommendations: (a) that no action be taken on the request; (b) that a proposed amendment to the Library be submitted; (c) that an interpretation request be submitted; or (d) that additional time is needed to review the request.

If either an amendment or an interpretation is recommended, the entity to which the request was referred would have to provide the appropriate language as required by the governing board. The governing board would have to take action on the recommendation at the next board meeting. Action by the governing board to approve a recommendation for no action would be considered the final disposition of the request. These provisions would not prohibit a state from directly submitting a proposed amendment or an interpretation request to the governing board.

ISSUE RESOLUTION PROCESS

The governing board must promulgate rules creating an issue resolution process. The rules must govern the conduct of the process, including the participation by any petitioner, affected state, and other interested party, the disposition of a petition to invoke the process, the allocation of costs for participating in the process, the possible involvement of a neutral third party or non-binding arbitration, and such further details as the board determines necessary and appropriate.

Any member state or person may petition the governing board to invoke the issue resolution process to resolve matters of: (a) membership of a state; (b) matters of compliance; (c) possibilities of sanctions of a member state; (d) amendments to the Agreement; (e) interpretation issues, including differing interpretations among the member states; or (f) other matters at the discretion of the board.

The governing board must consider any recommendations resulting from the issue resolution process before making its decision, which would be final and not subject to further review.

None of these provisions could be construed to substitute for, stay or extend, limit, expand, or otherwise affect, in any manner, any right or duty that any person or governmental body has under the laws of any member state or local government body.

RELATIONSHIP OF AGREEMENT TO MEMBER STATES AND PERSONS

The Agreement states that it is among individual cooperating sovereigns in furtherance of their governmental functions. The Agreement provides a mechanism among the member states to establish and maintain a cooperative, simplified system for the application and administration of sales and use taxes under the duly adopted law of each member state.

No provision of the Agreement in whole or part invalidates or amends any provision of the law of a member state. Adoption of the Agreement by a member state does not amend or modify any law of the state. Implementation of any condition of the Agreement in a member state, whether adopted before, at, or after membership of a state, must be by the action of the member state.

The Agreement binds and inures only to the benefit of the member states, and no person, other than a member state, is an intended beneficiary of the Agreement. Any benefit to a person other than a state is established by the laws of the member states and not by the terms of the Agreement.

No person may have any cause of action or defense under the Agreement or by virtue of a member state's approval of the Agreement. No person may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of any member state, or any political subdivision of a member state on the ground that the action or inaction is inconsistent with the Agreement. In addition, no law of a member state, or the

application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement.

The determinations pertaining to the Agreement that are made by the member states are final when rendered and are not subject to any protest, appeal, or review.

REVIEW OF COSTS AND BENEFITS ASSOCIATED WITH THE AGREEMENT

The governing board will review costs and benefits of administration and collection of sales and use taxes incurred by states and sellers under the existing sales and use tax laws at the time of adoption of the Agreement and the proposed Streamlined Sales Tax Agreement.

TREATMENT OF VENDING MACHINES

The provisions of the Agreement do not apply to vending machines sales and the Agreement does not restrict how member states tax vending machine sales.