

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

## **Streamlined Sales Tax Project Discussion Paper**

### **Food Definition Issues January 10, 2005**

#### **Background:**

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

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

#### **Issue:**

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

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

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

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

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

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

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