At its November, 2008 meeting, the subcommittee reviewed a memorandum prepared by staff that compared the five existing MTC uniformity recommendations concerning the application of sales and use tax that may be affected by the Streamlined Sales and Use Tax Agreement (SSUTA). After discussion, the subcommittee determined that the recommendation entitled “Applicability of Sales and/or Use Tax to Sales of Computer software, adopted in 1988 should be revised, and directed staff to prepare a draft amendment for its consideration. The subcommittee also considered the Uniform Principles Governing State Transactional Taxation of Telecommunication Services—Vendor and Vendee Versions, and directed the drafting group for the Telecommunications Transaction Tax Project to review the 1993 recommendation and determine whether it should be amended to comport with SSUTA.

1. **Applicability of Sales and/or Use Tax to Sales of Computer Software**

Since the purpose of this project is to bring MTC uniformity recommendations in line SSUTA, as a preliminary matter the subcommittee should consider whether it should adopt the SSUTA definitions or draft new language based on SSUTA. Attached to this memorandum are redlined and clean versions of proposed model regulatory definitions utilizing SSUTA definitions including a definition of “custom” software that does not appear in SSUTA.

2. **Uniform Principles Governing State Transactional Taxation of Telecommunication Services—Vendor and Vendee Versions**

The sales and use tax uniformity subcommittee directed the telecommunications drafting committee to review the 1993 Statement Principles and the definitions contained therein. The telecommunications drafting group believes that the Statement requires substantial updating to conform with SSUTA, or alternatively, should be repealed. If the subcommittee chooses the latter course, industry representatives offer for the subcommittee’s review and discussion a white paper outlining “best practices” for telecommunications transaction taxes under Streamlined (attached).
Proposed Model Regulatory Definitions for the Applicability of Sales and/or Use Tax to Sales of Computer Software

DRAFT 3/17/09 FOR DISCUSSION PURPOSES ONLY

MTC Sales and Use Tax Subcommittee

Definitions

“Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

“Computer software” means a set of coded instructions designed to cause a “computer” or automatic data processing equipment to perform a task.

“Prewritten computer software” means “computer software,” including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more “prewritten computer software” programs or prewritten portions thereof does not cause the combination to be other than “prewritten computer software.” “Prewritten computer software” includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser. Where a person modifies or enhances “computer software” of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person’s modifications or enhancements. “Prewritten computer software” or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains “prewritten computer software;” provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute “prewritten computer software.” A member state may exempt “prewritten computer software” “delivered electronically” or by “load and leave.”

Custom software means computer software that is not prewritten.
Definitions

“Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

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Custom software means computer software that is not prewritten.
Overview

This white paper discusses the communications transactional tax issues that have been contemplated under the Streamlined Sales and Use Tax Agreement hereinafter referred to as the "SSUTA"). Specifically, it discusses the following:

- Telecommunications definitions;
- Sourcing of telecommunications services; and
- Taxation of “bundled transactions”.

Telecommunications Definitions

A. Background

The Streamlined Sales Tax Project developed a series of uniform definitions, which were ultimately contained in the “Library of Definitions” in the SSUTA in November, 2003. At that time SSUTA set forth sourcing rules for telecommunications services and definitions of certain terms applicable to those rules. Uniform definitions of “telecommunications services” and other related terms for purposes of imposition and exemption were adopted on April 16, 2005.

The effort for uniform definitions is not an effort for uniform tax bases across states. Defined terms should have the same meaning across the states, yet the definitions are intended to allow states to mirror their current treatment as closely as possible by enabling states to choose to tax or exempt specific services.

B. Benefits of Uniform Approach

The need for definitional uniformity of telecommunications terms is no different than for any other vendor of non-telecommunications products and services. Benefits of uniform definitions include the ability to efficiently develop taxability matrices and to make expeditious determinations on the taxability of products and services for state and local sales tax purposes. This will greatly simplify the compliance burden of telecommunications providers by making it much easier to determine which of their services are subject to tax in a particular state.
C. Consistency with Other States

Full member states were required to adopt any necessary definitions of telecommunications and ancillary services by January 1, 2008.

D. Body of Law to Draw Upon

Appendix A contains the telecommunications and ancillary service definitions contained in the SSUTA in effect as of January 1, 2008.

Member states cannot exclude from tax a component of telecommunications or ancillary services unless the SSUTA specifically allows the variation. However, member states can apply entity and use based exemptions for telecommunications and ancillary services. Under the SSUTA, the terms “telecommunications service” and “ancillary services” are defined as a broad range of services. They are broader than the sum of the subcategories. Definitions of subcategories of “ancillary services” and “telecommunications service” can be used by a member state alone or in combination with other subcategories to define a narrower tax base than the definitions of “ancillary services” and “telecommunications service” would imply. The subcategories can also be used by a member state to provide exemptions for certain subcategories of the more broadly defined terms. This provision was designed to allow states to closely match their existing tax base and does not force states to enact broader definitions for exemptions if there is a narrowly defined exemption currently (See Appendix B - Rule 327.2).
Telecommunications Sourcing Rules

A. Background

“Sourcing” is the determination of the jurisdiction within which a transaction is considered to take place for tax purposes. It is not a determination of whether the transaction is taxable or not. The sourcing rules contained in the SSUTA maintain state sovereignty in deciding whether to tax or exempt particular telecommunication services.

B. Benefits of Uniform Approach

The lack of uniformity results from differing methodologies employed among the states for determining where a telecommunications transaction should be taxed. States may use varying definitions of service address, billing address, and some states employ differing special rules for newer telecommunication services. For example, prior to the SSUTA, 15 states defined service address as the location of the telecommunications equipment, 8 states defined service address as the location of the customer account and the rest lacked a definition. This lack of uniform sourcing rules can result in multiple taxation or nowhere taxation, and creates administrative and compliance burdens for taxpayers and tax administrators alike.

C. Consistency with Other States

Member states were required to enact the telecommunications sourcing rules under the SSUTA to remain in substantial compliance with the Agreement by January 1, 2008.

D. Body of Law to Draw Upon

Jurisdictions that tax interstate and international telecommunications generally follow what is referred to as the “Goldberg Rule,” which is based on an Illinois tax that was upheld by the U.S. Supreme Court in Goldberg v Sweet, 488 US 252 (1989). Under the Goldberg Rule a telephone call is subject to a jurisdiction’s tax if the call: (1) both originates and terminates in that jurisdiction or (2) originates or terminates in that jurisdiction and is charged to a service address in that jurisdiction.1 Because of the complexity of identifying the source of mobile telecommunications, federal legislation was passed that took effect on August 1, 2002 that sources mobile telecommunications transactions (other than pre-paid calling cards) at the place of primary use (usually the residential address or business premises of the purchaser.)

The sourcing of telecommunication services under the SSUTA sets forth a general rule for services sold on a call-by-call basis and a general rule for services not sold on a call-

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1 It is important to note that while “Goldberg Rule” was upheld by the U.S. Supreme Court, it was not seen as the only sourcing rule that would be acceptable.
by-call basis. In each case the general rule will apply unless the service falls within one of the four exceptions.

**General Rules**

- **Services Sold on a Call-by-Call Basis** are sourced under the generally accepted “Goldberg Rule.” Service address (the location where the transaction is sourced) is defined as the location of the telecommunications equipment to which the charge for the call is associated. This rule applies to direct-dialed and collect calls.
  
  - *Example:* A call that originates in Dallas, terminates in Houston, and which is charged to a service address in Dallas is sourced to Dallas.
  
  - *Reason for rule:* The majority of states follow this rule and it still works for landline telecommunication services sold in the traditional manner. Adoption of this rules results in the least amount of change for taxpayers and the taxing jurisdictions.

- **Services Not Sold on a Call-by-Call Basis,** such as basic local telephone services and unlimited calling plans, are sourced to the jurisdiction in which the customer’s place of primary use is located. This is either the residential or business street address of the customer.
  
  - *Example:* A residential customer in Dallas subscribes to a plan, which for $20 per month, entitles the customer to make an unlimited number of calls to or from anywhere in the country. The $20 charge is sourced to Dallas regardless of where any individual call is placed.
  
  - *Reason for rule:* Because it is impossible to allocate a portion of the plan’s price to each individual call, individual calls cannot be sourced based on the Goldberg Rule. The customer’s place of primary use is the location where the customer receives the right to use the service and is the only location known for certain.

**Exceptions**

- **Mobile Telecommunications:** With the exception of prepaid and air-to-ground services, mobile telecommunications are sourced to the customer’s place of primary use.
  
  - *Example:* A Boston customer traveling in the New York City area initiates a cellular call to Washington, D.C., while in New York and before the call ends, he has traveled to New Jersey. The call is sourced to Boston.
  
  - *Reason for Rule:* This is the rule specified in the federal Mobile Telecommunications Sourcing Act, which became effective in August, 2002.

- **Post-Paid Calling Service:** Post-paid calling services, such as calling card, credit card, debit card, and air-to-ground calls, are sourced to the origination point of the telecommunication signal as first identified by either (1) the seller’s telecommunications system, or (2) if the seller does not operate the
telecommunications system over which the call is carried, the information received by the seller from its service provider.

- **Example:** While traveling in Seattle, a San Diego resident places a call to Chicago using her long distance carrier’s calling card. The call is sourced to Seattle based on the location of the switch where the Seattle local exchange carrier hands off the call to the long distance carrier.

- **Reason for Rule:** This rule assures that all calls originated from a fixed location will always be sourced to the jurisdiction of origination of the signal regardless of the post-paid payment mechanism used, and it eliminates the possibility that a call might not be subject to tax in any jurisdiction. It also follows the Goldberg Rule as closely as possible, taking into account the fact that the carrier will not know the exact location of the telecommunications equipment where the call originates.

- **Pre-Paid Calling Service:** Although pre-paid calling arrangements are not tangible personal property, they are generally sourced in accordance with the rules for sourcing sales of tangible personal property.

  - **Example:** A person purchases a pre-paid calling card from a convenience store in Miami for $10. The card entitles the person to place calls from any telephone by dialing an access code until the $10 price for the card has been used. The purchase price of the card would be sourced to Miami.

  - **Reason for Rule:** Since the price is paid before any calls are made, it is impossible to source the individual calls. Therefore, the transaction is sourced to the jurisdiction in which the customer purchased the right to place the calls.

- **Private Communications Services (PCS):** PCS is a telecommunication service that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points. Charges associated with fixed customer termination points are sourced to such respective locations. Charges associated with the use of channels between or among such fixed customer termination points are sourced based on the ratio of the number of customer termination points in each jurisdiction to the total number of customer termination points. If the customer termination point is not known, the charges are sourced to the point where the signal is transferred to another carrier.

  - **Example:** A customer purchases private line service with channel termination points located in its San Francisco, Los Angeles, and Phoenix offices. There is a flat monthly charge associated with each of the 3 termination points and an additional flat monthly charge associated with the priority use of the communications channel among the 3 termination points. Each of the monthly charges associated with the customer termination points is sourced to the jurisdiction (state and local) in which the respective termination point is located. The monthly charge for use of the communications channel is sourced as follows: For state tax purposes, the charge is sourced 2/3 to California and 1/3 to Arizona. For local tax purposes, the charge is sourced 1/3 to San Francisco, 1/3 to Los Angeles, and 1/3 to Phoenix.
Reason for Rule: It is impractical to determine each of the jurisdictions through which signals are transmitted in connection with a private communications service or the distance of a transmission in any given jurisdiction. This sourcing rule represents the most rational and feasible method of allocating the service charges among the jurisdictions with the strongest claims for taxing the service, i.e., those jurisdictions in which the customer actually uses the service. By standardizing the proration of channels that connect the customer channel termination points, the entire charge is sourced to specific locations without the risk of multiple jurisdictions claiming the same revenue.
Bundled Transactions

A. Background

The Streamlined Sales Tax Project formed a work group in August 2001 to address the lack of uniformity among states in determining if a transaction is bundled in light of the market trends toward the bundling of products, especially in the telecommunications industry. As a result of these trends, retailers’ and certified services providers’ need guidance when determining the taxability of sales of bundled products. The work group was charged with: 1) developing a uniform definition for a bundled transaction; 2) insuring the uniform definition for a bundled transaction would be consistent with the uniform definition for “sales price”; 3) identifying issues related to the application of a uniform definition considering the inconsistent treatment in many states when applying a ‘true object’ test, de minimus test, ‘primary object’ test or ‘essence of the transaction’ test as a result of administrative decisions and state court decisions; 4) making recommendations regarding whether unbundling should be allowed and, if so, how allocations of the sales price should be determined; and 5) making recommendations whether separate bundling provisions should be developed for telecommunications.

B. Benefits of Uniform Approach

Many states did not address rules for “bundled transactions”. The lack of a uniform definition and rules for bundled transactions creates administrative and compliance burdens for taxpayers and tax administrators alike.

C. Consistency with Other States

Member states were required to enact Section 330 (as described below) and the definition of “bundled transaction” in Appendix C, Part I of the Library of Definitions by January 1, 2008 to remain in substantial compliance with the SSUTA.

D. Body of Law to Draw Upon

The definition of “bundled transaction” includes uniform criteria for determining when a bundled transaction exists in much the same manner as the definition of “sales price” defines uniform criteria for determining the tax base that is either subject to tax or exempt from tax on the sale of a product. Member states are required to utilize the definition of “bundled transaction” in its entirety, and none of its parts are severable when making a determination as to whether a transaction is a bundled transaction. That is, all parts of the definition are to be used to determine whether a transaction is a bundled transaction; however, a single part may disqualify a transaction as a bundled transaction.
There is a special telecommunications bundled transaction rule, as set forth in Section 330. If a bundled transaction involved telecommunications service, ancillary service, Internet access, or audio or video programming service, providers can preserve the tax exempt status for part of the bundled transaction so long as the receipts from the tax-exempt part can be verified by the provider’s books and records. To qualify for this special rule, the provider must keep its books and records for business purposes other than mere sales tax accounting. This rule is consistent with the Internet Tax Freedom Act and the Mobile Telecommunications Sourcing Act.

Under the SSUTA, a “bundled transaction” is “the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price.” There are two basic elements of a bundled transaction - products and price. For purposes of the bundled transaction definition only, “products” include all types of products, except real property and services to real property. The second basic element of a bundled transaction is that the sales price of the bundled distinct and identifiable products must be for one price that is not itemized. If a retail sale of two or more products is not made for “one non-itemized price,” then the retail sale is not a “bundled transaction.” See Appendix C for a detailed discussion of products and price.
APPENDIX A

Streamlined Sales Tax Definitions – “Telecommunications,” “Ancillary Services” and “Bundled Transaction”

TELECOMMUNICATIONS (Effective on and after January 1, 2008)

Tax Base/Exemption Terms

“Ancillary services” means services that are associated with or incidental to the provision of “telecommunications services”, including but not limited to “detailed telecommunications billing”, “directory assistance”, “vertical service”, and “voice mail services”.

“Conference bridging service” means an “ancillary service” that links two or more participants of an audio or video conference call and may include the provision of a telephone number. “Conference bridging service” does not include the “telecommunications services” used to reach the conference bridge.

“Detailed telecommunications billing service” means an “ancillary service” of separately stating information pertaining to individual calls on a customer’s billing statement.

“Directory assistance” means an “ancillary service” of providing telephone number information, and/or address information.

“Vertical service” means an “ancillary service” that is offered in connection with one or more “telecommunications services”, which offers advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including “conference bridging services”.

“Voice mail service” means an “ancillary service” that enables the customer to store, send or receive recorded messages. “Voice mail service” does not include any “vertical services” that the customer may be required to have in order to utilize the “voice mail service”.

“Telecommunications service” means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term “telecommunications service” includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added. “Telecommunications service” does not include:

A. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser’s primary purpose for the underlying transaction is the processed data or information;

B. Installation or maintenance of wiring or equipment on a customer’s premises;
C. Tangible personal property;
D. Advertising, including but not limited to directory advertising.
E. Billing and collection services provided to third parties;
F. Internet access service;
G. Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance and routing of such services by the programming service provider. Radio and television audio and video programming services shall include but not be limited to cable service as defined in 47 USC 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 CFR 20.3;
H. “Ancillary services”;
or
I. Digital products “delivered electronically”, including but not limited to software, music, video, reading materials or ring tones.

“800 service” means a “telecommunications service” that allows a caller to dial a toll-free number without incurring a charge for the call. The service is typically marketed under the name “800”, “855”, “866”, “877”, and “888” toll-free calling, and any subsequent numbers designated by the Federal Communications Commission.

“900 service” means an inbound toll “telecommunications service” purchased by a subscriber that allows the subscriber’s customers to call into the subscriber’s prerecorded announcement or live service. “900 service” does not include the charge for: collection services provided by the seller of the “telecommunications services” to the subscriber, or service or product sold by the subscriber to the subscriber’s customer. The service is typically marketed under the name “900” service, and any subsequent numbers designated by the Federal Communications Commission.

“Fixed wireless service” means a “telecommunications service” that provides radio communication between fixed points.

“Mobile wireless service” means a “telecommunications service” that is transmitted, conveyed or routed regardless of the technology used, whereby the origination and/or termination points of the transmission, conveyance or routing are not fixed, including, by way of example only, “telecommunications services” that are provided by a commercial mobile radio service provider.

“Paging service” means a “telecommunications service” that provides transmission of coded radio signals for the purpose of activating specific pagers; such transmissions may include messages and/or sounds.

“Prepaid calling service” means the right to access exclusively “telecommunications services”, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

“Prepaid wireless calling service” means a “telecommunications service” that provides the right to utilize “mobile wireless service” as well as other non-telecommunications services including the download of digital products “delivered electronically”, content
and “ancillary services”, which must be paid for in advance that is sold in predetermined units of dollars of which the number declines with use in a known amount.

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

“Value-added non-voice data service” means a service that otherwise meets the definition of “telecommunications services” in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance or routing.

Modifiers of Sales Tax Base/Exemption Terms

The following terms can be used to further delineate the type of “telecommunications service” to be taxed or exempted. The terms would be used with the broader terms and subcategories delineated above.

“Coin-operated telephone service” means a “telecommunications service” paid for by inserting money into a telephone accepting direct deposits of money to operate.

“International” means a “telecommunications service” that originates or terminates in the United States and terminates or originates outside the United States, respectively. United States includes the District of Columbia or a U.S. territory or possession.

“Interstate” means a “telecommunications service” that originates in one United States state, or a United States territory or possession, and terminates in a different United States state or a United States territory or possession.

“Intrastate” means a “telecommunications service” that originates in one United States state or a United States territory or possession, and terminates in the same United States state or a United States territory or possession.

“Pay telephone service” means a “telecommunications service” provided through any pay telephone.

“Residential telecommunications service” means a “telecommunications service” or “ancillary services” provided to an individual for personal use at a residential address, including an individual dwelling unit such as an apartment. In the case of institutions where individuals reside, such as schools or nursing homes, “telecommunications service” is considered residential if it is provided to and paid for by an individual resident rather than the institution.

The terms “ancillary services” and “telecommunications service” are defined as a broad range of services. The terms “ancillary services” and “telecommunications service” are broader than the sum of the subcategories. Definitions of subcategories of “ancillary services” and “telecommunications service” can be used by a member state alone or in combination with other subcategories to define a narrower tax base than the definitions of “ancillary services” and “telecommunications service” would imply. The subcategories
can also be used by a member state to provide exemptions for certain subcategories of the more broadly defined terms.

A member state that specifically imposes tax on, or exempts from tax, local telephone or local telecommunications service may define “local service” in any manner in accordance with Section 327 of the Agreement, except as limited by other sections of this Agreement.
Rule 327.2. Telecommunication Definitions.

A. Who is required to use. Uniform definitions pertaining to telecommunications that are contained in the Streamlined Sales and Use Tax Agreement shall be used by all member states in imposing sales and use taxes or in providing for exemptions.

B. Use of definitions. Definitions pertaining to telecommunications and related services that are provided in the Streamlined Sales and Use Tax Agreement shall be used by member states to impose sales or use taxes or in providing for exemptions. Nothing in the Agreement, its telecommunications definitions or in this rule shall be construed to require states with existing excise taxes on telecommunications and related services to modify their existing excise tax definitions.

C. Definitions not found in the Streamlined Sales and Use Tax Agreement. Definitions pertaining to telecommunications that are used for federal regulatory or tax purposes, for state or local regulatory purposes or for purposes of administering other state or local taxes do not apply for purposes of state sales and use taxation of telecommunication services, unless these definitions are specifically referenced in the Streamlined Sales and Use Tax Agreement.

D. Partial exclusion of a definition is prohibited. A member state choosing to tax telecommunication services shall use applicable definitions contained in the Streamlined Sales and Use Tax Agreement and shall not exclude from imposition a part of any definition or any item included in such a definition unless the Streamlined Sales and Use Tax Agreement specifically permits such a variation.

E. Telecommunications definitions are not limited to products sold by certain sellers. No definition pertaining to telecommunications services and related services in the Streamlined Sales and Use Tax Agreement shall be construed to limit such definition to products sold by a particular seller (i.e., “telecommunications services” sold by a telephone company may also be sold by other vendors).

F. Use-based and entity-based exemptions. A member state may choose to limit the imposition of sales taxes on telecommunications services by providing use based or entity based exemptions. A state’s incorporation of the Streamlined Sales and Use Tax Agreement definitions applicable to telecommunication services and related services shall not prohibit such state from applying “use-based” or “entity-based” exemptions.

G. “Telecommunications services” does not include telephone answering services. The term “telecommunications services” does not include telephone answering services because the primary purpose of the transaction is the answering service rather than message transmission.

H. Definitions may be used for imposition and exemption purposes. The following provisions shall apply to member states that impose a tax on all telecommunications services and related services, on all such services with certain exclusions or exemptions, or only on certain telecommunications services:
1. A member state choosing to broadly impose a tax on telecommunications services shall use the definition of “telecommunications services” set forth in the Streamlined Sales and Use Tax Agreement. In so doing, the state will impose tax on all telecommunications services, including residential telecommunications service, telegraph service, value-added non-voice data service and voice over Internet Protocol, as well as 800 service, 900 service, fixed wireless service, local service, mobile wireless service, paging service, and private communications service, unless the state provides a specific exclusion or exemption for one or more of such services.

2. A member state shall define any telecommunications service that it wishes to exclude or exempt from taxation substantially as it is defined in the Streamlined Sales and Use Tax Agreement. It will be necessary for the state to define one of the subsets of “telecommunications services” only if an exclusion or exemption is desired (i.e., a state that wishes to tax all telecommunications services except 800 service, 900 service, paging service, and private communications service would impose a tax on “all telecommunications services except 800 service, 900 service, paging service, and private communications service” and specifically adopt the Streamlined Sales and Use Tax Agreement definitions of such excluded or exempted services).

3. A member state that imposes a tax on telecommunications services or components thereof shall not exclude or exempt from tax an item that is a telecommunications service if there is no definition of such an item in the Streamlined Sales and Use Tax Agreement, except as provided for local telecommunications service.

4. A member state that wishes to tax only limited types of telecommunication services, rather than the broad category with exceptions, shall impose the tax only on the specific types of telecommunication services that it wishes to tax and shall use the definitions set forth in the Streamlined Sales and Use Tax Agreement to define the telecommunication services taxed (e.g., a state could choose to tax only “900 services” because such services are specifically defined in the Streamlined Sales and Use Tax Agreement).

5. If a state imposes tax on a broad group of services that includes telecommunications services, it shall use the definition of “telecommunications services” in the Streamlined Sales and Use Tax Agreement to make it clear that such services are included in the broad group of services taxed. If a state wishes to tax Ancillary Services, it must explicitly impose its tax on Ancillary Services as defined in the Streamlined Sales and Use Tax Agreement (e.g., if “communication services” are taxed, the language imposing the tax must specifically state that such services include “telecommunication services” and any “ancillary” services included in the broad group of communication services taxed).

6. A state that imposes sales and use tax on telecommunications services only if they originate and terminate in the state and that wishes to retain such a tax result under the Streamlined Sales and Use Tax Agreement shall amend its law to impose the tax on “intrastate” telecommunications services only and adopt the definition of “intrastate” services in the Streamlined Sales and Use Tax Agreement.

7. A state that imposes sales and use tax on telecommunications services that originate or terminate in the state and that wishes to retain such a tax result under the Streamlined Sales and Use Tax Agreement shall amend its law to impose the tax on “intrastate” and
“interstate” telecommunications services (and “international,” if applicable), and adopt the definitions of “intrastate” and “interstate” (and “international,” if applicable) services in the Streamlined Sales and Use Tax Agreement.

8. A state may tax or exempt only a specific use of telecommunications services, such as residential use.

9. A state may tax, or exclude from tax, any one or all of the “ancillary services” that are not telecommunications services. For example, the tax may be imposed on “all ancillary services except detailed telecommunications billing service and directory assistance.” Or, the tax may be imposed on any one or more of the specific ancillary services, such as “voice mail services,” rather than on “ancillary services” in general.

10. A state imposing tax on telecommunications services but desiring to exempt pay telephone services shall specifically provide a statutory exemption using definitions provided in the Streamlined Sales and Use Tax Agreement for “pay telephone service” and/or “coin operated telephone service.”

11. A state imposing tax on telecommunications services but desiring to exempt value-added non-voice data services, such as encryption, device management, security authentication or data monitoring services that otherwise meet the definition of telecommunications services, shall specifically provide a statutory exemption using the definition provided in the Streamlined Sales and Use Tax Agreement for “value-added nonvoice data service.”
APPENDIX C

BUNDLED TRANSACTION – Detailed Discussion of Products and Price

The language contained in the boxes below is language from the SSUTA (See Appendix D for the full text).

Products

For the first of the two basic elements, there must be a retail sale of two or more products that are distinct and separately identifiable products.

• For purposes of the bundled transaction definition only, “products” include all types of products except real property and services to real property. Types of products include tangible personal property, services, intangibles, digital goods, and products in which a member state has directly imposed tax on the retail sale thereof, but the imposition of tax on the retail sale of such products may not itself be considered tangible personal property, services, or digital goods according to applicable state law.

• Real property and services to real property are excluded from the definition of a bundled transaction. Services to real property include, for purposes of example only, such services as building framing, roofing, plumbing, electrical, painting, janitorial, pest control and window cleaning. Member states may continue current sales and use tax treatment for transactions including real property or services to real property and the provisions of this definition and Section 330 do not apply to such transactions.

(A) “Distinct and identifiable products” does not include:
   (1) Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides – that accompany the “retail sale” of the products and are incidental or immaterial to the “retail sale” thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes.
   (2) A product provided free of charge with the required purchase of another product. A product is “provided free of charge” if the “sales price” of the product purchased does not vary depending on the inclusion of the product “provided free of charge.”
   (3) Items included in the member state’s definition of “sales price,” pursuant to Appendix C of the Agreement.

• Packaging is not a separate and distinct product, when such packaging is the wrapping or packing that accompanies the retail sale of a product(s) and such packaging is incidental or immaterial to the retail sale of the product(s). Member states are not prohibited from exempting from tax the purchase or use of packaging or subjecting to tax the purchase of packaging that will accompany retail sales of products by limiting the seller’s authority to utilize a resale exemption.
• A product provided free of charge is not a separate and distinct product. A product is considered to be provided free of charge in a retail sale when in order to obtain the product the purchaser is required to make a purchase of one or more other products and the price of the purchased products does not change based on the seller providing a product free of charge. Such products provided free of charge with the necessary purchase of another product are promotional products. Member states are not prohibited from exempting from tax the purchase by a seller of products that will be provided free of charge to a purchaser of another product or subjecting to tax the purchase of products that will be provided free of charge to a purchaser of another product by limiting the seller’s authority to utilize a resale exemption. For purposes of example only:
  
  o A gas station providing a free car wash with the purchase of 15 or more gallons of gas.
  o A grocery store providing a free place-setting of dinnerware with the purchase of $30 of groceries.
  o An auto parts store providing a free cap with the purchase of a case of motor oil.

• A retail sale may not be considered to be for “two or more distinct and identifiable products” if the items are included in the member states' definitions of “sales price” and “purchase price.” A member state may not treat a retail sale as including multiple products when the products or items are considered to be a part of the sale of a product in accordance with the definition of sales price as adopted by the member state.

• For example, a member state adopts a definition of “sales price” that includes “delivery charges” whether separately itemized or not. In such a state, the retail sale of a product and delivery of that product for a single price is not considered a bundled transaction because delivery charges are included in the sales price of the product as adopted by the member state.

• Items that are currently a part of the definitions of “sales price” and “purchase price” are:
  
  o Costs of property sold
  o Costs of materials used, labor or service costs, interest, losses, costs of transportation to the seller, taxes imposed on the seller, and expenses of the seller
  o Charges for services necessary to complete the sale of a product (unless a member state has excluded from the sale price of a product even if separately itemized on an invoice given to the purchaser)
  o Delivery charges (unless a member state has excluded from the sales price of a product even if separately itemized on an invoice given to the purchaser)
Installation charges (unless a member state has excluded from the sales price of a product even if separately itemized on an invoice given to the purchaser)

Credit for any trade-in as determined by state law (unless a member state has excluded from the sales price of a product if separately itemized on an invoice given to the purchaser)

- On April 16, 2005, the definition of “sales price” was amended in the SSUTA to delete the following language: “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.” Member states had to comply with this change to the definition of sales price by January 1, 2008.

**Price**

The second basic element of a bundled transaction is that the sales price of the bundled distinct and identifiable products must be for one price that is not itemized. If a retail sale of two or more products is not made for “one non-itemized price,” then the retail sale is not a “bundled transaction.”

| A “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction. |

- That is, a bundled transaction does not exist when the sales price varies, whether by negotiation or otherwise, with the selection of the distinct and identifiable products by the purchaser. A purchaser having the option of declining to purchase any of the products where the sales price will vary as a result of the selection of products or a different price is negotiated as a result of selections of products made by the purchaser evidences that the retail sale was not made for “one non-itemized price.”

- For example, an information technology company enters into a multi-year contract with its purchaser to provide information technology services (data processing, help desk, software installation, and web hosting) from the provider’s data processing facility. Through negotiation, the provider and the purchaser agree on the services to be provided and the price. The price is a function of the mix of services to be provided. The provider bills one non-itemized price on its invoice to the purchaser. Because the price of products being sold varied or was negotiated as a result of the selection by the purchaser of the products included in the transaction, no “bundled transaction” exists.

| (B) The term “one non-itemized price” does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list. |
“One non-itemized price” is defined to exclude a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the purchaser in paper or electronic form, including (in part) an invoice, bill of sale, contract, periodic notice of rates and services, or a rate card.

The sales-related documents made available to a purchaser must provide enough information to a purchaser so that the purchaser is able to determine the price(s) of taxable and exempt products.

- If a seller bills or invoices one price for distinct and separate products that is equal to the total of the individually priced or itemized products contained in supporting sales-related documentation such as a catalog, price list, or service agreement, the transaction would not be considered a bundled transaction simply because the invoice contained one price.

- If a transaction includes a bundle of products and one or more additional product(s), and the additional product(s) were individually priced or itemized from the bundled products in a catalog or price list, but the invoice included one price, the additional products that were individually priced to the purchaser in the catalog or price list are not part of the bundled products sold for one non-itemized price.

- If a transaction is not otherwise characterized as a bundled transaction because the multiple products were itemized on other sales-related documentation and such transaction is further discounted, failing to itemize the amount of the discount for each product will not cause the transaction to now be characterized as a bundled transaction. Unless sales-related documentation or information is provided showing the allocation of the discount, the discounts should be considered allocated pro-rata among the otherwise separately itemized products.

Invoicing, service agreements, contracts or other sales documents that are given to the purchaser, as well as catalogs, price lists, and rate cards made available to the purchaser when pricing the products, are all documentation or evidence that must be maintained by the seller to show whether the retail sale was for one or more distinct and identifiable products and whether the products were sold for one non-itemized price. A member state is not restricted in assessing tax because the seller or purchaser failed to provide documentary proof that the price varied based on selections of products by the purchaser.

The following are examples of when a retail sale is not sold for “one non-itemized price.”

- A cable television service provider provides subscribers for $100.00 a month audio-video programming services, Internet access, a digital converter and a remote control device. Subscribers’ monthly billing contains the following
single line item description and price “Digital Cable & Internet Access (includes charge for digital converter and remote control) $100.00.” Rate cards are mailed annually to subscribers and made available via the service provider’s website that individually price or itemize the portion of the single $100.00 price attributable to the digital cable service, Internet Access, digital converter and remote control device. Because the products and their itemized prices are itemized on sales-related documentation, the rate card, the transaction is not considered a bundled transaction.

Assume the same facts as in the previous example, except the subscriber receives a promotion which discounts the package price by 20% to $80.00 and the amount of the discount is not itemized for each product in other sales-related documents. The subscriber’s monthly billing contains the following line item descriptions and prices: 1) “Digital Cable & Internet Access (includes charge for digital converter and remote control) $100.00” and 2) “Less: Special 20% promotion discount - $20.00.” Because the transaction was not a bundled transaction prior to application of the 20% discount, applying the discount does not create a bundled transaction.

(C) A transaction that otherwise meets the definition of a “bundled transaction” as defined above, is not a “bundled transaction” if it is:

- The provisions of Part C of the definition are exclusions that limit or narrow what transactions would be considered a bundled transaction. Part C provisions create a level of uniformity in the member states by incorporating in the definition elements for (1) a subjective true object test for transactions that are for tangible personal property and services or transactions that are for multiple services; (2) an objective, quantitative de minimis test for transactions including all types of products; and (3) a quantitative primary-test for which the application is limited to transactions that contain multiple products that are only tangible personal property and at least one of the products listed in subsection (C)(4).

- To determine whether a transaction is a bundled transaction, the provisions of Part C must be utilized prior to applying the provisions of Section 330 of the Streamlined Sales and Use Tax Agreement or a member state’s tax statutes for bundled transactions.

(1) The “retail sale” of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or

(2) The “retail sale” of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or
From a survey taken in 2001, at the beginning of the work group’s effort, sixteen of twenty-nine states indicated they did not apply a subjective test to determine the true object of a transaction that includes only tangible personal property; therefore, the provisions of C(1) and (2) do not apply to transactions that include only tangible personal property.

- Sellers of a bundled transaction that includes tangible personal property and a service or multiple services may use the subjective test in (C)(1) and (C)(2) or use the quantitative de minimis test in (C)(3) which can be applied to bundles that include all types of products.

- When a transaction does not meet the definition of a bundled transaction because it meets (C)(1) or (C)(2), the transaction will be considered a retail sale of a service and the taxability of that service in the member state will apply. The true object of such a transaction would be the service. “True object” in (C)(1) and (C)(2) is the main product or item in the transaction.

- Because subsection (C)(1) and (C)(2) are subjective, the application of (C)(1) and (C)(2) are fact-based and should be applied on a case-by-case basis. For purposes of example, factors that might be considered include: what the seller is in the business of doing; whether the tangible good or service that is essential to a service is available for sale without the service or available exclusively in connection with providing the service; how the tangible good or service is essential to the use of a service; and what the purchaser’s object of the transaction is.

  - For example an Electronics Retail Store sells a plasma television and one-year subscription to an audio-video programming service for a single non-itemized price of $5,000. The audio-video programming service is not a product provided free of charge. While a television is essential to receiving the audio-video programming service, that specific television is not required and the purchaser could pay a much lesser price for a television of lesser value and the same audio-video programming service. The plasma television is the main item or object of the transaction based on the facts of the transactions. Subsection (C)(1) does not apply since the true object is not the service. Assuming the taxable products are more than 10% of the sales price or purchase price, the transaction is a bundled transaction. In this example the bundled transaction includes audio video programming services and the provisions of Section 330(c) of the agreement would apply.

- Member states are not prohibited from exempting from tax the purchase by a seller of a tangible good or service that is essential to the use of a service, and is provided exclusively in connection with a service, or subjecting such products to tax by limiting the seller’s authority to utilize a resale exemption.

(3) A transaction that includes taxable products and nontaxable products and the “purchase price” or “sales price” of the taxable products is de minimis.
(a) De minimis means the seller’s “purchase price” or “sales price” of the taxable products is ten percent (10%) or less of the total “purchase price” or “sales price” of the bundled products.

(b) Sellers shall use either the “purchase price” or the “sales price” of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the “purchase price” and “sales price” of the products to determine if the taxable products are de minimis.

(c) Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

When reviewing the survey many states used a de minimis test. Some of the states utilized a de minimis test for all types of bundled products while others applied the test to limited types of bundled products such as food bundled with other types of tangible personal property as in the case of gift baskets. For purposes of determining whether a bundled transaction exists, Section (C)(3) can be applied to bundles that include all types of products.

- A seller may use the purchase price or sales price of each of the products in the bundle to measure or quantify whether the taxable products are de minimis. A seller may not use the purchase price for some of the products and sales price for other products to measure whether the taxable product in a single transaction is de minimis.

- When the taxable products are determined to be de minimis, the transaction is not defined as a bundled transaction.

- Member states may not limit the application of the de minimis test by placing a cap on the price of transactions to which the test would apply.

- Member states are prohibited from having thresholds for purposes of taxing a portion of the sales price of a transaction in which the taxable products are determined to be de minimis.

- Member states are not prohibited from subjecting to tax the seller’s purchase of taxable products that are determined to be de minimis in such transactions by limiting the seller’s authority to utilize a resale exemption or requiring the seller to remit tax on the seller’s purchase price of the taxable de minimis products.

- Where services have been sold via a service contract, the full amount of the price for the service will be used to measure the de minimis regardless of the period of time covered by the service agreement. The price of the service may not be prorated based on the term of the service contract to determine whether the service is de minimis.

(4) The “retail sale” of exempt tangible personal property and taxable tangible personal property where:
(a) the transaction includes “food and food Ingredients”, “drugs”, “durable medical equipment”, “mobility enhancing equipment”, “over-the-counter drugs”, “prosthetic devices” (all as defined in Appendix C) or medical supplies; and (b) where the seller's “purchase price” or “sales price” of the taxable tangible personal property is fifty percent (50%) or less of the total “purchase price” or “sales price” of the bundled tangible personal property. Sellers may not use a combination of the “purchase price” and “sales price” of the tangible personal property when making the fifty percent (50%) determination for a transaction.

- The primary test in section (C)(4) applies only to transactions that contain multiple products that are only tangible personal property and at least one product is: food and food ingredients including soft drinks, candy, and dietary supplements; drugs including over-the-counter and grooming and hygiene products; durable medical equipment; mobility enhancing equipment; and prosthetic devices; all of which are defined in the SSUTA, and medical supplies. The term “medical supplies” is not a defined term under the SSUTA. Member states may define “medical supplies” according to its state laws for purposes of applying the primary test.

- If the transaction contains products that are not tangible personal property or the products are tangible personal property but none of the products are food and food ingredients including soft drinks, candy, and dietary supplements; drugs including over-the-counter and grooming and hygiene products; durable medical equipment; mobility enhancing equipment; and prosthetic devices; all of which are defined in the Agreement, and medical supplies, the primary test in section (C)(4) does not apply and the de minimis test in subsection (C)(3) will be used to determine whether the transaction is a bundled transaction.

- A seller may use the purchase price or sales price of each of the products in the bundled to measure or quantify whether the taxable products are the primary products (more than 50%) in the transaction. A seller may not use the purchase price for some of the products and sales price for other products, to measure whether the taxable products in a single transaction are the primary products.

- When the non-taxable products are determined to be the primary products in a transaction, the transaction is not defined as a bundled transaction.

- Member states may not limit the application of the primary test by placing a cap on the price of the transactions to which the test would apply.

- Member states are prohibited from having thresholds for purposes of taxing a portion of the sales price in which the non-taxable products were determined to be the primary products included in the transaction.

- Member states are not prohibited from subjecting the taxable products which are not the primary products in the transaction to tax by limiting the seller’s authority to
utilize a resale exemption or requiring the seller to remit tax on the seller’s purchase price of the taxable products.

- The following illustrates the application of the primary test in subsection (C)(4):

<table>
<thead>
<tr>
<th>IV Start Kit Product</th>
<th>State Product Taxability</th>
<th>Purchase Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medicated dressing</td>
<td>non-taxable</td>
<td>$2.25</td>
</tr>
<tr>
<td>Gauze sponge</td>
<td>taxable</td>
<td>1.35</td>
</tr>
<tr>
<td>Glove</td>
<td>taxable</td>
<td>1.75</td>
</tr>
<tr>
<td>Medicated pad</td>
<td>non-taxable</td>
<td>1.90</td>
</tr>
<tr>
<td>Sterile sponge</td>
<td>non-taxable</td>
<td>1.65</td>
</tr>
<tr>
<td>Alcohol prep swabs</td>
<td>non-taxable</td>
<td>1.60</td>
</tr>
<tr>
<td>Sterile tape</td>
<td>non-taxable</td>
<td>1.80</td>
</tr>
<tr>
<td>Latex tourniquet</td>
<td>taxable</td>
<td>1.40</td>
</tr>
</tbody>
</table>

Total Purchase Price $13.70

Non-taxable $ 9.20
Taxable $ 4.50

Non-taxable % 67.15%
Taxable % 32.85%

Since the percentage for the taxable products is less than 50%, under subsection (C)(4), the transaction is not a bundled transaction.
APPENDIX D

BUNDLED TRANSACTION (Effective on and after January 1, 2008)

A “bundled transaction” is the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. A “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

(A) “Distinct and identifiable products” does not include:

(1.) Packaging—such as containers, boxes, sacks, bags, and bottles—or other materials—such as wrapping, labels, tags, and instruction guides—that accompany the “retail sale” of the products and are incidental or immaterial to the “retail sale” thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes.

(2.) A product provided free of charge with the required purchase of another product. A product is “provided free of charge” if the “sales price” of the product purchased does not vary depending on the inclusion of the product “provided free of charge.”

(3.) Items included in the member state's definition of “sales price,” pursuant to Appendix C of the Agreement.

(B) The term “one non-itemized price” does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

(C) A transaction that otherwise meets the definition of a “bundled transaction” as defined above, is not a “bundled transaction” if it is:

(1) The “retail sale” of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or

(2) The “retail sale” of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or

(3) A transaction that includes taxable products and nontaxable products and the “purchase price” or “sales price” of the taxable products is de minimis.
(a) De minimis means the seller's “purchase price” or “sales price” of the taxable products is ten percent (10%) or less of the total “purchase price” or “sales price” of the bundled products.

(b) Sellers shall use either the “purchase price” or the “sales price” of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the “purchase price” and “sales price” of the products to determine if the taxable products are de minimis.

(c) Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

(4) The “retail sale” of exempt tangible personal property and taxable tangible personal property where:

(a) the transaction includes “food and food ingredients”, “drugs”, “durable medical equipment”, “mobility enhancing equipment”, “over-the-counter drugs”, “prosthetic devices” (all as defined in Appendix C) or medical supplies; and

(b) where the seller's “purchase price” or “sales price” of the taxable tangible personal property is fifty percent (50%) or less of the total “purchase price” or “sales price” of the bundled tangible personal property. Sellers may not use a combination of the “purchase price” and “sales price” of the tangible personal property when making the fifty percent (50%) determination for a transaction.