Sixty-first Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 6, 2009

SENATE BILL NO. 2325
(Senator Cook)
(Representatives Drovdal, Weiler)

AN ACT to create and enact three new subsections to section 57-39.2-01, subsection 9 to section 57-39.4-06, sections 57-39.4-11.1 and 57-39.4-14.1, subsection 4 to section 57-39.4-32, and sections 57-39.4-33.1 and 57-39.4-33.2 of the North Dakota Century Code, relating to the streamlined sales tax agreement; to amend and reenact subsection 1 of section 57-39.2-02.1, subsection 2 of section 57-39.2-04, subdivision a of subsection 26 of section 57-39.2-04, subdivision c of subsection 3 of section 57-39.2-04.1, section 57-39.4-05, subdivision d of subsection 2 of section 57-39.4-10, subsection 1 of section 57-39.4-11, subsection 4 of section 57-39.4-22, section 57-39.4-23, subsection 3 of section 57-39.4-28, sections 57-39.4-29 and 57-39.4-35, subsection 1 of section 57-40.2-01, subdivision a of subsection 12 of section 57-40.2-04, and subdivision c of subsection 3 of section 57-40.2-04.1 of the North Dakota Century Code, relating to the streamlined sales and use tax agreement; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Three new subsections to section 57-39.2-01 of the North Dakota Century Code are created and enacted as follows:

"Computer software maintenance contract" is a contract that obligates a vendor of computer software to provide a customer with future updates or upgrades to computer software, support services with respect to computer software, or both.

"Mandatory computer software maintenance contract" is a computer software maintenance contract that the customer is obligated by contract to purchase as a condition to the retail sale of computer software.

"Optional computer software maintenance contract" is a computer software maintenance contract that the customer is not obligated to purchase as a condition to the retail sale of computer software.

SECTION 2. AMENDMENT. Subsection 1 of section 57-39.2-02.1 of the North Dakota Century Code is amended and reenacted as follows:

1. Except as otherwise expressly provided in subsection 2 for sales of mobile homes used for residential or business purposes, and except as otherwise expressly provided in this chapter, there is imposed a tax of five percent upon the gross receipts of retailers from all sales at retail including the leasing or renting of tangible personal property as provided in this section, within this state of the following to consumers or users:

   a. Tangible personal property, consisting of goods, wares, or merchandise, except mobile homes used for residential or business purposes and including bundled transactions consisting entirely of tangible personal property.

   b. The furnishing or service of communication services or steam other than steam used for processing agricultural products.

c. Tickets or admissions to places of amusement or entertainment or athletic events, including amounts charged for participation in an amusement, entertainment, or athletic activity and the playing of any machine for amusement or entertainment in response to the use of a coin. The tax imposed by this section applies only to eighty percent of the gross receipts collected from coin-operated amusement devices.

d. Magazines and other periodicals.

e. The leasing or renting of a hotel or motel room or tourist court accommodations.

f. The leasing or renting of tangible personal property the transfer of title to which has not been subjected to a retail sales tax under this chapter or a use tax under chapter 57-40.2.

g. Sale, lease, or rental of a computer and prewritten computer software, including prewritten computer software delivered electronically or by load and leave. For purposes of this subdivision:

(1) "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.

(2) "Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(3) "Delivered electronically" means delivered from the seller to the purchaser by means other than tangible storage media.

(4) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(5) "Load and leave" means delivery to the purchaser by use of a tangible storage media when the tangible storage media is not physically transferred to the purchaser.

(6) "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 purchaser. If a person modifies or enhances "computer software" of which the person is not the author or creator, the person is 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, if such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains "prewritten computer software". However, if 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".

h. A mandatory computer software maintenance contract for prewritten computer software.

i. An optional computer software maintenance contract for prewritten computer software that provides only software upgrades or updates or an optional computer software maintenance

contract for prewritten computer software that is a bundled transaction and provides software upgrades or updates and support services.

SECTION 3. AMENDMENT. Subsection 2 of section 57-39.2-04 of the North Dakota Century Code is amended and reenacted as follows:

2. Gross receipts from the sales, furnishing, or service of passenger transportation service and gross receipts from the sales, furnishing, or service of freight transportation service when provided by a common carrier ~~and title to the transported tangible personal property has passed from the seller to the purchaser~~.

SECTION 4. AMENDMENT. Subdivision a of subsection 26 of section 57-39.2-04 of the North Dakota Century Code is amended and reenacted as follows:

a. "Durable medical equipment" means equipment, not including mobility-enhancing equipment, for home use, including repair and replacement parts for such equipment, which:

(1) Can withstand repeated use;

(2) Is primarily and customarily used to serve a medical purpose;

(3) Generally is not useful to a person in the absence of illness or injury; and

(4) Is not worn in or on the body.

"Durable medical equipment" includes equipment and devices designed or intended for ostomy care and management and equipment and devices used exclusively for a person with bladder dysfunction. An exemption certificate is not required to obtain exemption. Repair and replacement parts as used in this definition include all components or attachments used in conjunction with the durable medical equipment. Repair and replacement parts do not include items which are for single patient use only.

SECTION 5. AMENDMENT. Subdivision c of subsection 3 of section 57-39.2-04.1 of the North Dakota Century Code is amended and reenacted as follows:

c. If the prepared food ratio is greater than seventy-five percent, utensils are provided ~~to~~ by the seller if they are made available to the purchaser. When sellers with a food ratio greater than seventy-five percent sell items that contain four or more servings packaged as one item and sold for a single price, the item does not become prepared food unless the seller's practice is to physically give or hand the purchaser utensils as in subdivision b. Serving size is determined by the label of the item sold. If no label is available, the seller will reasonably determine the number of servings.

SECTION 6. AMENDMENT. Section 57-39.4-05 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-05. (304) Notice for state tax changes.

1. Each member state shall 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.

c. Notify sellers of legislative changes in the tax base and amendments to sales and use tax rules and regulations.

2. 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 shall not relieve the seller of its obligation to collect sales or use taxes for that member state.

3. Each member state failing to provide for at least thirty days between the enactment of the statute providing for a rate change and the effective date of such rate change shall relieve the seller of liability for failing to collect tax at the new effective rate if:

   a. The seller collected tax at the immediately preceding effective rate; and

   b. The seller's failure to collect at the newly effective rate does not extend beyond thirty days after the date of enactment of the new rate.

4. Notwithstanding subsection 3, if the member state establishes that the seller fraudulently failed to collect at the new rate or solicits purchasers based on the immediately preceding effective rate, this relief does not apply.

5. Member states may provide for relief of liability for failing to collect tax as a result of a tax change beyond the liability relief required by subsection 3.

SECTION 7. Subsection 9 to section 57-39.4-06 of the North Dakota Century Code is created and enacted as follows:

9. Make databases provided under subsections 5, 6, 7, and 8 available to a seller, or certified service provider by the first day of the month prior to the first day of a calendar quarter. Databases must be in a format approved by the governing board and available on each state's website or other location determined by the governing board.

SECTION 8. AMENDMENT. Subdivision d of subsection 2 of section 57-39.4-10 of the North Dakota Century Code is amended and reenacted as follows:

d. ~~Until December 31, 2009, florist~~ Florist sales as defined by each member state. ~~Prior to this date, these items~~ These sales must be sourced according to the requirements of each member state.

SECTION 9. AMENDMENT. Subsection 1 of section 57-39.4-11 of the North Dakota Century Code is amended and reenacted as follows:

1. ~~The~~ Except as provided in section 57-39.4-11.1, a retail sale, excluding lease or rental, of a product shall be sourced as follows:

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

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

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

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

e. When none of the previous rules of subdivisions a, b, c, and d apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided, disregarding for these purposes any location that merely provided the digital transfer of the product sold.

SECTION 10. Section 57-39.4-11.1 of the North Dakota Century Code is created and enacted as follows:

57-39.4-11.1. (310.1) Election for origin-based sourcing.

1. A state that has local jurisdictions that levy or receive sales or use taxes may elect to source the retail sale of tangible personal property and digital goods under the provisions of this section in lieu of the provisions of subdivisions b, c, and d of subsection 1 of section 57-39.4-11 if the state complies with subsection 3 of this section and the only exception to section 57-39.4-11 is in subsection 2 of this section.

2. A state may source retail sales, excluding lease or rental, of tangible personal property or digital goods to the location where the order is received by the seller if:

   a. The order is received in the same state by the seller where receipt of the product by the purchaser or the purchaser's designated donee occurs;

   b. The location where receipt of the product by the purchaser occurs is determined under subdivisions b, c, and d of subsection 1 of section 57-39.4-11; and

   c. At the time the order is received, the recordkeeping system of the seller used to calculate the proper amount of sales or use tax captures the location where the order is received.

3. A state electing to source sales under this section shall comply with all of the following:

   a. When the location where the order is received by the seller and the location where the receipt of the product by the purchaser or the purchaser's designated donee occurs as determined under subdivisions b, c, and d of subsection 1 of section 57-39.4-11 are in different states, the sale must be sourced under the provisions of section 57-39.4-11.

   b. When the product is sourced under this section to the location where the order is received by the seller, only the sales tax for the location where the order is received by the seller may be levied. No additional sales or use tax based on the location where the product is delivered to the purchaser may be levied. The purchaser shall not be entitled to any refund if the combined state and local rate at the location where the product is received by the purchaser is lower than the rate where the order is received by the seller.

   c. A state may not require a seller to use a recordkeeping system that captures the location where the order is received to calculate the proper amount of sales or use tax.

   d. A purchaser shall not have an additional liability to the state for tax, penalty, or interest on a sale for which the purchaser remits tax to the seller in the amount invoiced by the seller if the invoice amount is calculated at either the rate applicable to the location where receipt by the purchaser occurs or at the rate applicable to the location where the order is received by the seller. A purchaser may rely on a written representation by the seller as to the location where the order for the sale was

received by the seller. When the purchaser does not have a written representation by the seller as to the location where the order for the sale was received by the seller, the purchaser may use the seller's business address that is available from the purchaser's business records maintained in the ordinary course of the purchaser's business to determine the rate applicable to the location where the order was received.

e. The location where the order is received by or on behalf of the seller means the physical location of a seller or third party such as an established outlet, office location, or automated order receipt system operated by or on behalf of the seller, where an order is initially received by or on behalf of the seller and not where the order may be subsequently accepted, completed, or fulfilled. An order is received when all of the information necessary to determine whether the order can be accepted has been received by or on behalf of the seller. The location from which a product is shipped must not be used in determining the location where the order is received by the seller.

f. A state must provide for direct pay permits under section 57-39.4-27 and the requirements of this subsection. Purchasers that remit sales and use tax under a direct pay permit shall remit tax at the rate in effect for the location where receipt of the product by the purchaser occurs or the product is first used as determined by state law. A state may establish reasonable thresholds at which the state will consider direct pay applications, provided the threshold must be based upon purchases with no distinction between taxable and nontaxable purchases. The state shall establish a process for application for a direct pay permit as provided in this chapter. The state may require the direct pay permit applicant to demonstrate:

(1) An ability to comply with the sales and use tax laws of the state;

(2) A business purpose for seeking a direct pay permit and how the permit will benefit tax compliance; and

(3) Proof of good standing under the tax laws of the state. The state shall review all permit applications in a timely manner. Notification of authorization or denial must be received by applicants within one hundred twenty days of application. The state may not limit direct pay permit applicants to businesses engaged in manufacturing or businesses that do not know the ultimate use of the product at the time of the purchase.

g. When taxable services are sold with tangible personal property or digital products under a single contract or in the same transaction, are billed on the same billing statement, and because of the application of this section, would be sourced to different jurisdictions, a state shall elect either origin sourcing or destination sourcing to determine a single situs for that transaction. The state election is required until the governing board adopts a uniform methodology to address these sales.

h. A state that elects to source the sale of tangible personal property and digital goods under the provisions of this section shall inform the governing board of the election.

4. Compliance with the provisions of this section satisfies a state's eligibility for membership in this agreement as follows:

a. If a state is in substantial compliance with the provisions of this agreement other than sourcing of sales of tangible personal property and digital goods as provided in section 57-39.4-11, and elects to source sales of tangible personal property and digital goods under this section, the state may become an associate member state in the same manner as provided for states to become full member states under article VIII of the agreement.

b. On or after January 1, 2010, a state that becomes an associate member state under this subsection shall automatically become a full member state, provided that at least five states which are not full member states on December 31, 2007, are determined to be in substantial compliance with the provisions of the agreement other than sourcing sales of tangible personal property and digital goods under section 57-39.4-11, and the state has notified the governing board of an election under subdivision h of subsection 3 of this section to source sales under this section and has been found to be in substantial compliance with the provisions of this section.

c. This section shall be fully effective for all purposes on or after January 1, 2010, provided at least five states which are not full member states on December 31, 2007, have been found to be in substantial compliance with the provisions of the agreement other than sourcing sales of tangible personal property and digital goods under section 57-39.4-11 and have notified the governing board of an election under subdivision h of subsection 3 of this section to source sales under this section and have been found to be in substantial compliance with the provisions of this section. States electing to source sales under this section after that time may become full member states if all other requirements for membership are satisfied.

SECTION 11. Section 57-39.4-14.1 of the North Dakota Century Code is created and enacted as follows:

57-39.4-14.1. (313.1) Election for origin-based direct mail sourcing.

1. Notwithstanding sections 57-39.4-11, 57-39.4-11.1, and 57-39.4-14, a member state may elect to source the sale of all direct mail delivered or distributed from a location within the state and delivered or distributed to a location within the state under this section.

2. If the purchaser provides the seller with a direct pay permit or an exemption certificate claiming direct mail, the seller is relieved of all obligations to collect, pay, or remit the applicable tax and the purchaser is obligated to pay or remit the applicable tax on a direct pay basis. An exemption certificate claiming direct mail shall remain in effect for all future sales of direct mail by the seller to the purchaser until it is revoked in writing.

3. Except as provided in subsection 2 and this subsection, the seller shall collect the tax according to subsection 1 of section 57-39.4-11. To the extent the seller knows that a portion of the sale of direct mail will be delivered or distributed to a location in another state, the seller shall collect the tax on that portion according to section 57-39.4-14.

4. Nothing in this section limits a purchaser's obligation for sales or use tax to any state to which the direct mail is delivered, except that a purchaser whose direct mail is sourced under subsection 3 shall owe no additional sales or use tax to that state based on where the purchaser uses or delivers the direct mail in the state.

5. A member state that elects to source the sale of direct mail under the provisions of this section shall inform the governing board in writing at least sixty days prior to the beginning of the calendar quarter such election begins.

SECTION 12. AMENDMENT. Subsection 4 of section 57-39.4-22 of the North Dakota Century Code is amended and reenacted as follows:

4. The governing board may certify a certified service provider only if that certified service provider certifies that:

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

b. ~~That personally~~ Personally identifiable information is only used and retained to the extent necessary for the administration of model 1 with respect to exempt purchasers and for proper identification of taxing jurisdictions;

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 shall be satisfied by a written privacy policy statement accessible by the public on the official web site of the certified service provider;

d. ~~Its~~ The 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 and for documentation of the correct assignment of taxing jurisdictions; and

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

SECTION 13. AMENDMENT. Section 57-39.4-23 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-23. (322) Sales tax holidays.

1. If a member state allows for temporary exemption periods, commonly referred to as sales tax holidays, the member state shall:

   a. Not apply an exemption ~~after December 31, 2003,~~ unless the items to be exempted are specifically defined in ~~the agreement~~ part II or part III(B) of the library of definitions and the exemptions are uniformly applied to state and local sales and use taxes.

   b. Provide notice of the exemption period at least sixty days prior to the first day of the calendar quarter in which the exemption period will begin.

   c. Not apply an entity-based or use-based exemption except a member state may limit a product-based exemption to items purchased for personal or nonbusiness use.

   d. Not require a seller to obtain an exemption certificate or other certification from a purchaser for items to be exempted during a sales tax holiday.

2. A member state may establish a sales tax holiday that utilizes price thresholds set by such state and the provisions of the agreement on the use of thresholds shall not apply to exemptions provided by a state during a sales tax holiday. In order to provide uniformity, a price threshold established by a member state for exempt items shall include only items priced below the threshold. A member state shall not exempt only a portion of the price of an individual item during a sales tax holiday.

3. ~~The governing board shall establish procedures to provide uniformity for the administrative issues involved with the implementation of a sales tax holiday. These issues include:~~

   ~~a. Treatment of layaway purchases;~~

   ~~b. Exempt and nonexempt items that are packaged together;~~

   ~~c. Treatment of coupons or discounts;~~

   ~~d. Splitting of items normally sold together;~~

~~e. Treatment of rainchecks;~~

~~f. Exchanges;~~

~~g. Shipping and handling charges;~~

~~h. Service charges;~~

~~i. Restocking fees; and~~

~~j. Order date and back orders.~~ The following procedures are to be used by member states in administering a sales tax holiday exemption:

a. Layaway sales. A sale of eligible property under a layaway sale qualifies for exemption if:

(1) Final payment on a layaway order is made by, and the property is given to, the purchaser during the exemption period; or

(2) The purchaser selects the property and the retailer accepts the order for the item during the exemption period, for immediate delivery upon full payment, even if delivery is made after the exemption period.

b. Bundled sales. Member states will follow the same procedure during the sales tax holiday as agreed upon for handling a bundled sale at other times.

c. Discounts and coupons. A discount by a seller reduces the sales price of the property and the discounted sales price determines whether the sales price is within a sales tax holiday price threshold of a member state. A coupon that reduces the sales price is treated as a discount if the seller is not reimbursed for the coupon amount by a third party. If a discount applies to the total amount paid by a purchaser rather than to the sales price of a particular item and the purchaser has purchased both eligible property and taxable property, the seller shall allocate the discount based on the total sales prices of the taxable property compared to the total sales prices of all property sold in that same transaction.

d. Splitting of items normally sold together. Items that are normally sold as a single unit must continue to be sold in that manner and cannot be priced separately and sold as individual items in order to obtain a sales tax holiday.

e. Rainchecks. A raincheck is a means to allow a customer to purchase an item at a certain price at a later time because the particular item was out of stock. Eligible property that is purchased during the exemption period with use of a raincheck qualifies for the exemption regardless of when the raincheck was issued. Issuance of a raincheck during the exemption period does not qualify eligible property for the exemption if the property is purchased after the exemption period.

f. Exchanges. The procedure for an exchange of eligible property purchased during a sales tax holiday is as follows:

(1) If a customer purchases an item of eligible property during the exemption period, and later exchanges the item for a similar eligible item, even if a different size, different color, or other feature, no additional tax is due if the exchange is made after the exemption period.

(2) If a customer purchases an item of eligible property during the exemption period, and returns the item and receives credit on the purchase of a different item after the exemption period, the appropriate sales tax is due on the sale of the newly purchased item.

(3) If a customer purchases an item of eligible property before the exemption period, returns the item, and receives credit on the purchase of a different item of eligible property during the exemption period, no sales tax is due on the sale of the new item if the new item is purchased during the exemption period.

g. Delivery charges. Delivery charges, including shipping, handling, and service charges, are part of the sales price of eligible property unless a member state defines "sales price" to exclude such charges. For the purpose of determining a sales tax holiday price threshold, if all the property in a shipment qualifies as eligible property and the sales price for each item in the shipment is within the sales tax holiday price threshold, the seller does not have to allocate the delivery charge to determine if the price threshold is exceeded and the shipment will be considered a sale of eligible products. If the shipment includes eligible property and taxable property, including an eligible item with a sales price in excess of the price threshold, the seller should allocate the delivery charge by using:

(1) A percentage based on the total sales prices of the taxable property compared to the total sales prices of all property in the shipment; or

(2) A percentage based on the total weight of the taxable property compared to the total weight of all property in the shipment. The seller must tax the percentage of the delivery charge allocated to the taxable property but is not required to tax the percentage allocated to the eligible property.

h. Order date and back orders. For the purpose of a sales tax holiday, eligible property qualifies for exemption if:

(1) The item is both delivered to and paid for by the customer during the exemption period; or

(2) The customer orders and pays for the item and the seller accepts the order during the exemption period for immediate shipment, even if delivery is made after the exemption period. For purposes of this subsection, the seller accepts an order when the seller has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on a mail order or assignment of an "order number" to a telephone order. An order is for immediate shipment when the customer does not request delayed shipment. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders or because stock is currently unavailable to or on back order by the seller.

i. Returns. For a sixty-day period immediately after the sales tax holiday exemption period, when a customer returns an item that would qualify for the exemption, no credit for or refund of sales tax shall be given unless the customer provides a receipt or invoice that shows tax was paid, or the seller has sufficient documentation to show that tax was paid on the specific item. This sixty day period is solely for the purpose of designating a time period during which the customer must provide documentation that shows that sales tax was paid on returned merchandise. The sixty-day period does not require the seller to change the seller's policy on the time period during which the seller will accept returns.

j. Different time zones. The time zone of the seller's location determines the authorized time period for a sales tax holiday when the purchaser is located in one time zone and a seller is located in another.

SECTION 14. AMENDMENT. Subsection 3 of section 57-39.4-28 of the North Dakota Century Code is amended and reenacted as follows:

3. Except as specifically provided in ~~section 57-39.4-15~~ sections 57-39.4-17 and 57-39.4-33.1, and the library of definitions, a member state shall impose a sales or use tax on all products or services included within each part II or part III(B) definition or exempt from sales or use tax all products or services within each definition. The requirements of this section shall only apply to part III(B) definitions to the extent such definitions are used in the administration of a sales tax holiday.

SECTION 15. AMENDMENT. Section 57-39.4-29 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-29. (328) Taxability matrix.

1. To ensure uniform application of terms defined in part II and part III(B) of the library of definitions, each member state shall complete a taxability matrix adopted by the governing board. The member state's entries in the matrix shall be provided and maintained in a data base that is in a downloadable format approved by the governing board. A member state shall provide notice of changes in the taxability of the products or services listed in the taxability matrix as required by the governing board.

2. A member state shall relieve sellers and certified service providers 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 certified service provider relying on erroneous data provided by the member state in the taxability matrix.

3. If a state levies sales and use tax on a specified digital product and provides an exemption for an item within the definition of such specified digital product under subsection 8 of section 57-39.4-33.1, such exemption must be noted in the taxability matrix.

4. Each state that provides for a sales tax holiday under section 57-39.4-23 shall, in a format approved by the governing board, give notice in the taxability matrix of the products for which a tax exemption is provided.

SECTION 16. Subsection 4 to section 57-39.4-32 of the North Dakota Century Code is created and enacted as follows:

4. In the case of a transaction that includes an "optional computer software maintenance contract" for prewritten computer software and the state otherwise has not specifically imposed tax on the retail sale of computer software maintenance contracts, the following provisions apply:

   a. If an optional computer software maintenance contract only obligates the vendor to provide upgrades and updates, it will be characterized as a sale of prewritten computer software.

   b. If an optional computer software maintenance contract only obligates the vendor to provide support services, it will be characterized as a sale of services.

   c. If an optional computer software maintenance contract is a bundled transaction in which both taxable and nontaxable or exempt products that are not separately itemized on the invoice or similar billing document, the contract shall be characterized as all taxable.

SECTION 17. Section 57-39.4-33.1 of the North Dakota Century Code is created and enacted as follows:

57-39.4-33.1. (332) Specified digital products.

1. A member state shall not include "specified digital products", "digital audiovisual works", "digital audio works", or "digital books" within its definition of "ancillary services", "computer

software", "telecommunication services", or "tangible personal property". This restriction applies whether the "specified digital product" is sold to a purchaser who is an end user or to a purchaser with less than the right of permanent use granted by the seller, or use by the purchaser which is conditioned upon continued payment from the purchaser. Until January 1, 2010, the exclusion of "specified digital products" from the definition of "tangible personal property" does not affect the classification of products transferred electronically that are not included within the definition of "specified digital products" as being included in, or excluded from, the definition of "tangible personal property".

2. For purposes of subsection 3 of section 57-39.4-28 and the taxability matrix, "digital audiovisual works", "digital audio works", and "digital books" are separate definitions.

3. If a state imposes a sales or use tax on products transferred electronically separately from its imposition of tax on "tangible personal property", the state will not be required to use the terms "specified digital product", "digital audiovisual works", "digital audio works", or "digital books", or enact an additional or separate sales or use tax on any "specified digital product".

4. For purposes of the agreement:

   a. A statute imposing a tax on "specified digital products", "digital audiovisual works", "digital audio works", or "digital books" and, after January 1, 2010, a tax on any other product transferred electronically must be construed as only imposing the tax on a sale to a purchaser who is an end user unless the statute specifically imposes and separately enumerates the tax on a sale to a purchaser who is not an end user. For purposes of this section, an "end user" includes any person other than a person who receives by contract a product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person or persons. A person who purchases products transferred electronically, or the code for specified digital products for the purpose of giving away such products or code shall not be considered to have engaged in the distribution or redistribution of such products or code and shall be treated as an end user.

   b. A statute imposing a tax on "specified digital products", "digital audiovisual works", "digital audio works", or "digital books" and, after January 1, 2010, on any other product transferred electronically must be construed as only imposing tax on a sale with the right of permanent use granted by the seller unless the statute specifically imposes and separately enumerates the tax on a sale with the right of less than permanent use granted by the seller. For purposes of this section "permanent" means perpetual or for an indefinite or unspecified length of time. A right of permanent use shall be presumed to have been granted unless the agreement between the seller and the purchaser specifies or the circumstances surrounding the transaction suggest or indicate that the right to use terminates on the occurrence of a condition subsequent.

   c. A statute imposing a tax on "specified digital products", "digital audiovisual works", "digital audio works", or "digital books" and, after January 1, 2010, on any other product transferred electronically shall be construed as only imposing tax on a sale which is not conditioned upon continued payment from the purchaser unless the statute specifically imposes and separately enumerates the tax on a sale which is conditioned upon continued payment from the purchaser.

   d. A member state which imposes a sales or use tax on the sale of a product transferred electronically to a person other than the end user or on a sale with the right of less than permanent use granted by the seller or which is conditioned upon continued

payment from the purchaser shall so indicate in its taxability matrix in a format approved by the governing board.

5. Nothing in this section or the definition of "specified digital products" shall limit a state's right to impose a sales or use tax or exempt from sales or use tax any products or services that are outside the definition of "specified digital products".

6. A state may treat a subscription to products transferred electronically differently than a nonsubscription purchase of such product. For purposes of this section, "subscription" means an agreement with a seller that grants a consumer the right to obtain products transferred electronically from within one or more product categories having the same tax treatment, in a fixed quantity or for a fixed period of time, or both.

7. The tax treatment of a "digital code" shall be the same as the tax treatment of the "specified digital product" or product transferred electronically to which the "digital code" relates. The retail sale of the "digital code" shall be considered the transaction for purposes of the agreement. For purposes of this section, "digital code" means a code, which provides a purchaser with a right to obtain one or more such products having the same tax treatment. A "digital code" may be obtained by any means, including e-mail or by tangible means regardless of its designation as "song code", "video code", or "book code".

8. Notwithstanding the provisions of section 57-39.4-17, a member state may provide a product-based exemption for specific items within the definition of "specified digital products", provided the items which are not transferred electronically must also be granted a product-based exemption by the member state.

9. For purposes of this section and section 57-39.4-33.2, the term "transferred electronically" means obtained by the purchaser by means other than tangible storage media.

SECTION 18. Section 57-39.4-33.2 of the North Dakota Century Code is created and enacted as follows:

57-39.4-33.2. (333) Use of specified digital products. A member state shall not include any product transferred electronically in its definition of "tangible personal property". "Ancillary services", "computer software", and "telecommunication services" are excluded from the phrase "products transferred electronically".

SECTION 19. AMENDMENT. Section 57-39.4-35 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-35. (502) State review and approval of certified automated system software and certain liability relief.

1. Each member state shall review software submitted to the governing board for certification as a certified automated system as provided for in this chapter. Such review shall include a review to determine that the program ~~adequately classifies the state's product-based exemptions~~ accurately reflects the taxability of the product categories included in the program. Upon ~~completion of the review~~ approval by the state, the state shall certify to the governing board its acceptance of the ~~classifications made by the~~ system determination of the taxability of the product categories included in the program.

2. Each member state shall relieve certified service providers and model 2 sellers from liability to the member state and local jurisdictions for not collecting sales or use taxes resulting from the certified service provider or model 2 seller relying on the certification provided by the member state.

3. Each member state shall provide relief from liability to certified service providers for not collecting sales and use taxes in the same manner as provided to sellers under the provisions of section 57-39.4-18.

4. The governing board and the member states shall not be responsible for classification of an item or transaction within the ~~product-based exemptions~~ product categories certified. The relief from liability provided in this section shall not be available for a certified service provider or model 2 seller that has incorrectly classified an item or transaction into a ~~product-based exemption~~ product category certified by a member state. This subsection shall not apply to the individual listing of items or transactions within a product definition approved by the governing board or the member states.

5. ~~A~~ If a member state determines that an item or transaction is incorrectly classified as to its taxability, it shall notify the certified service provider or model 2 seller of the incorrect classification. The certified service provider or model 2 seller shall have ten days to revise the classification after receipt of notice from the member state of the determination. Upon expiration of the ten days, the certified service provider or model 2 seller shall be liable for the failure to collect the correct amount of sales or use taxes due and owing to the member state.

SECTION 20. AMENDMENT. Subsection 1 of section 57-40.2-01 of the North Dakota Century Code is amended and reenacted as follows:

1. "Business", "certified automated system", "certified service provider", "commissioner", "computer software contract", "farm machinery", "gross receipts", "lease or rental", "local governmental unit", "mandatory computer software maintenance contract", "optional computer software maintenance contract", "person", "relief agency", "retail sale", "sale", and "tangible personal property", each has the meaning given to it in section 57-39.2-01.

SECTION 21. AMENDMENT. Subdivision a of subsection 12 of section 57-40.2-04 of the North Dakota Century Code is amended and reenacted as follows:

a. "Durable medical equipment" means equipment, not including mobility-enhancing equipment, for home use, including repair and replacement parts for such equipment, which:

(1) Can withstand repeated use;

(2) Is primarily and customarily used to serve a medical purpose;

(3) Generally is not useful to a person in the absence of illness or injury; and

(4) Is not worn in or on the body.

"Durable medical equipment" includes equipment and devices designed or intended for ostomy care and management and equipment and devices used exclusively for a person with bladder dysfunction. An exemption certificate is not required to obtain exemption. Repair and replacement parts as used in this definition include all components or attachments used in conjunction with the durable medical equipment. Repair and replacement parts do not include items which are for single patient use only.

SECTION 22. AMENDMENT. Subdivision c of subsection 3 of section 57-40.2-04.1 of the North Dakota Century Code is amended and reenacted as follows:

c. If the prepared food ratio is greater than seventy-five percent, utensils are provided ~~to~~ by the seller if they are made available to the purchaser. When sellers with a food ratio greater than seventy-five percent sell items that contain four or more servings packaged as one item and sold for a single price, the item does not become prepared

food unless the seller's practice is to physically give or hand the purchaser utensils as in subdivision b. Serving size is determined by the label of the item sold. If no label is available, the seller will reasonably determine the number of servings.

SECTION 23. EFFECTIVE DATE. This Act is effective for taxable events occurring after June 30, 2009.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-first Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2325.

Senate Vote:	Yeas	46	Nays	0	Absent	1
House Vote:	Yeas	68	Nays	20	Absent	6

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2009.

Approved at _____ M. on _____, 2009.

Governor

Filed in this office this _____ day of _____, 2009,

at _____ o'clock _____ M.

Secretary of State