Sixtieth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2380

Introduced by

Senators Urlacher, Cook, Stenehjem

Representatives Berg, Drovdal, Weiler

A BILL for an Act to create and enact four new sections to chapter 57-39.4 of the North Dakota Century Code, relating to administration of the streamlined sales tax agreement; to amend and reenact subsection 2 of section 11-09.1-05, subsection 16 of section 40-05.1-06, section 57-39.2-01, subsection 1 of section 57-39.2-02.1, subsection 26 of section 57-39.2-04, sections 57-39.2-04.1, 57-39.4-01, 57-39.4-06, 57-39.4-07, and 57-39.4-08, subsection 1 of section 57-39.4-09, sections 57-39.4-10, 57-39.4-15, 57-39.4-16, 57-39.4-17, and 57-39.4-18, subsection 1 of section 57-39.4-20, subsection 12 of section 57-40.2-04, and section 57-40.2-04.1 of the North Dakota Century Code, relating to sales and use tax amendments necessary for compliance with the streamlined sales and use tax agreement; and to repeal sections 57-39.2-29 and 57-39.4-13 of the North Dakota Century Code, relating to administration of sourcing and multiple points of use rules for the streamlined sales tax agreement.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 2 of section 11-09.1-05 of the North Dakota Century Code is amended and reenacted as follows:

2. Control its finances and fiscal affairs; appropriate money for its purposes, and make payments of its debts and expenses; subject to the limitations of this section levy and collect property taxes, sales and use taxes, farm machinery gross receipts taxes, alcoholic beverage gross receipts taxes, motor vehicle fuels and special fuels taxes, motor vehicle registration fees, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; establish charges for any county or other services to the extent authorized by state law, and establish debt and mill

levy limitations; provided, that all property in order to be subject to the assessment provisions of this subsection must be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments. A charter or ordinance or act of a governing body of a home rule county may not supersede any state law that determines what property or acts are subject to, or exempt from, ad valorem taxes. A charter or ordinance or act of the governing body of a home rule county may not supersede section 11-11-55.1 relating to the sixty percent petition requirement for improvements and of section 40-22-18 relating to the barring proceeding for improvement projects. After December 31, 2005, sales and use taxes, farm machinery gross receipts taxes, and alcoholic beverage gross receipts taxes levied under this chapter:

a. Must conform in all respects with regard to the taxable or exempt status of items under chapters 57-39.2, 57-39.5, 57-39.6, and 57-40.2 and may not be imposed at multiple rates with the exception of sales of electricity, piped natural or artificial gas, or other heating fuels delivered by the seller or the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.

b. May not be newly imposed or changed except to be effective on the first day of a calendar quarterly period after a minimum of ninety days' notice to the tax commissioner or, for purchases from printed catalogs, on the first day of a calendar quarter after a minimum of one hundred twenty days' notice to the seller.

c. May not be limited to apply to less than the full value of the transaction or item as determined for state sales and use tax, except for farm machinery gross receipts tax purposes.

d. Must be subject to collection by the tax commissioner under an agreement under section 57-01-02.1 <u>and must be administered by the tax commissioner in accordance with the relevant provisions of chapter 57-39.2, including reporting and paying requirements, correction of errors, payment of refunds, and application of penalty and interest</u>.

After December 31, 2005, any portion of a charter or any portion of an ordinance or act of a governing body of a home rule county passed pursuant to a charter which does not conform to the requirements of this subsection is invalid to the extent that it does not conform. The invalidity of a portion of a charter or ordinance or act of a governing body of a home rule county because it does not conform to this subsection does not affect the validity of any other portion of the charter or ordinance or act of a governing body of a home rule county or the eligibility for a refund under section 57-01-02.1. Any taxes imposed under this chapter on farm machinery, farm irrigation equipment, and farm machinery repair parts used exclusively for agricultural purposes, or on alcoholic beverages, which were in effect on December 31, 2005, become gross receipts taxes after December 31, 2005.

SECTION 2. AMENDMENT. Subsection 16 of section 40-05.1-06 of the North Dakota Century Code is amended and reenacted as follows:

16. To impose registration fees on motor vehicles, farm machinery gross receipts taxes, alcoholic beverage gross receipts taxes, or sales and use taxes in addition to any other taxes imposed by law. After December 31, 2005, sales and use taxes and gross receipts taxes levied under this chapter:
    a. Must conform in all respects with regard to the taxable or exempt status of items under chapters 57-39.2, 57-39.5, 57-39.6, and 57-40.2 and may not be imposed at multiple rates with the exception of sales of electricity, piped natural or artificial gas, or other heating fuels delivered by the seller or the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.
    b. May not be newly imposed or changed except to be effective on the first day of a calendar quarterly period after a minimum of ninety days' notice to the tax commissioner or, for purchases from printed catalogs, on the first day of a calendar quarter after a minimum of one hundred twenty days' notice to the seller.

c. May not be limited to apply to less than the full value of the transaction or item as determined for state sales and use tax purposes, except for farm machinery gross receipts tax.

d. Must be subject to collection by the tax commissioner under an agreement under section 57-01-02.1 and must be administered by the tax commissioner in accordance with the relevant provisions of chapter 57-39.2, including reporting and paying requirements, correction of errors, payment of refunds, and application of penalty and interest.

SECTION 3. AMENDMENT. Section 57-39.2-01 of the North Dakota Century Code is amended and reenacted as follows:

57-39.2-01. Definitions. The following words, terms, and phrases, when used in this chapter, have the meaning ascribed to them in this section, unless the context clearly indicates a different meaning:

1. "Bundled transaction" means the retail sale of two or more products, except real property and services to real property, where the products are otherwise distinct and identifiable, and the products are sold for one nonitemized 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 do 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. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, drycleaning 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 definition of gross receipts.

b. The phrase "one nonitemized 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 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 in this section 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;

(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;

(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 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, or medical supplies; and

(b) If the seller's purchase price or sales price of the taxable tangible personal property is fifty percent 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 determination for a transaction.

2. "Business" includes any activity engaged in by any person or caused to be engaged in by the person with the object of gain, benefit, or advantage, either direct or indirect.

3. "Certified automated system" means software certified under chapter 57-39.4 to calculate the tax imposed by each jurisdiction on a transaction, determine the amount of tax to remit to the state, and maintain a record of the transaction.

~~2.~~ 4. "Certified service provider" means an agent certified under the agreement adopted under chapter 57-39.4 to perform all of the seller's sales and use tax functions, other than the seller's obligation to remit taxes on its own purchases.

~~3.~~ 5. "Commissioner" means the tax commissioner of the state of North Dakota.

~~4.~~ 6. "Delivery charges" means charges by the seller for preparation and delivery to a location designated by the purchaser of personal property or services. For purposes of this subsection, "preparation and delivery" includes transportation, shipping, postage, handling, crating, and packing. If shipment includes exempt property and taxable property, the seller should allocate the delivery charge by using a percentage based on:

a. The total sales price of the taxable property compared to the total sales price of all property in the shipment; or

b. 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 does not have to tax the percentage allocated to the exempt property.

~~5.~~ 7. "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address.

~~6.~~ 8. "Drug" means a compound, substance, or preparation and any component of a compound, substance, or preparation, other than food and food ingredients, dietary supplements, or alcoholic beverages:

a. Recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement of any of these publications;

b. Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or

c. Intended to affect the structure or any function of the body.

~~7.~~ 9. "Farm machinery" means all vehicular implements and attachment units, designed and sold for direct use in planting, cultivating, or harvesting farm products or used in connection with the production of agricultural produce or products, livestock, or poultry on farms, which are operated, drawn, or propelled by motor or animal power. "Farm machinery" does not include vehicular implements operated wholly by hand or a motor vehicle required to be registered under chapter 57-40.3. "Farm machinery" does not include machinery that may be used for other than agricultural purposes, including tires, farm machinery repair parts, tools, shop equipment, grain bins, feed bunks, fencing materials, and other farm supplies and equipment. For purposes of this subsection, "attachment unit" means any part or combination of parts having an independent function, other than farm machinery repair parts, which when attached or affixed to farm machinery is used exclusively for agricultural purposes.

~~8.~~ 10. "Farm machinery repair parts" means repair or replacement parts for farm machinery that have a specific or generic part number assigned by the manufacturer of the farm machinery. "Farm machinery repair parts" do not include tires, fluid, gas, grease, lubricant, wax, or paint.

~~9.~~ 11. a. "Gross receipts" means the measure subject to sales tax and means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

(1) The seller's cost of the property sold;

(2) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(4) Delivery charges; and

(5) ~~The value of exempt personal property given to the purchaser when taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise; and~~

~~(6)~~ Credit for any trade-in, as determined by state law.

b. "Gross receipts" also includes consideration received by the seller from third parties if:

(1) The seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;

(2) The seller has an obligation to pass the price reduction or discount through to the purchaser;

(3) The amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(4) One of the following criteria is met:

(a) The purchaser presents a coupon, certificate, or other documentation to the seller to claim a price reduction or discount where the coupon, certificate, or documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate, or documentation is presented;

(b) The purchaser provides identification to the seller to show that the purchaser is a member of a group or organization entitled to a price reduction or discount however, a "preferred customer" card that is available to any patron does not constitute membership in such a group; or

(c) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

c. "Gross receipts" also includes the total amount of sales of every clerk, auctioneer, agent, or factor selling tangible personal property owned by any other retailer.

~~c.~~ d. "Gross receipts" does not include:

(1) Discounts, including cash, term, or coupons that are not reimbursed by a third party, which are allowed by a seller and taken by a purchaser on a sale;

(2) Interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(3) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar documents given to the purchaser; and

(4) The sale price of property returned by a customer when the full sale price is refunded either in cash or credit. When tangible personal property is taken in trade or in a series of trades as a credit or part

payment of a retail sale taxable under this chapter, if the tangible personal property traded in will be subject to tax imposed by chapter 57-39.5 or 57-40.3 or if the tangible personal property traded in is used farm machinery or used irrigation equipment, the credit or trade-in value allowed by the retailer is not included in gross receipts of the retailer.

~~10.~~ 12. "Lease or rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A lease or rental may include future options to purchase or extend. "Lease or rental" does not include:

a. A transfer of possession or control of property under a security agreement or deferred payment plan, which requires the transfer upon completion of the required payments;

b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one percent of the total required payments; or

c. Providing tangible personal property with an operator for a fixed or indeterminate period of time. A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.

This definition will be applied only prospectively from the date of adoption and will have no retroactive impact on existing leases or rentals.

~~11.~~ 13. "Local governmental unit" means incorporated cities, counties, school districts, and townships.

~~12.~~ 14. "Person" includes any individual, firm, partnership, joint venture, association, corporation, limited liability company, estate, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number.

~~13.~~ 15. "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a person authorized by the laws of this state to prescribe drugs.

~~14.~~ 16. "Relief agency" means the state, any county, city and county, city or district thereof, or an agency engaged in actual relief work.

~~15.~~ 17. "Retail sale" or "sale at retail" means any sale, lease, or rental for any purpose other than for resale, sublease, or subrental. "Retail sale" or "sale at retail" includes the sale, including the leasing or renting, to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property; the sale of steam, gas, and communication service to retail consumers or users; the sale of vulcanizing, recapping, and retreading services for tires; the furnishing of bingo cards; the ordering, selecting, or aiding a customer to select any goods, wares, or merchandise from any price list or catalog, which the customer might order, or be ordered for such customer to be shipped directly to such customer; the sale or furnishing of hotel, motel, or tourist court accommodations, tickets, or admissions to any place of amusement, athletic event, or place of entertainment, including the playing of any machine for amusement or entertainment in response to the use of a coin; and the sales of magazines and other periodicals. By the term "processing" is meant any tangible personal property including containers which it is intended, by means of fabrication, compounding, manufacturing, producing, or germination shall become an integral or an ingredient or component part of other tangible personal property intended to be sold ultimately at retail. The sale of an item of tangible personal property for the purpose of incorporating it in or attaching it to real property must be considered as a sale of tangible personal property for a purpose other than for processing; the delivery of possession within the state of North Dakota of tangible personal property by a wholesaler or distributor to an out-of-state retailer who does not hold a North Dakota retail sales tax permit or to a person who by contract incorporates such tangible personal property into, or attaches it to, real property situated in another state may not be considered a taxable sale if such delivery of possession would not be treated as a taxable sale in that state. As used in this subsection, the word "consumer" includes any hospital, infirmary, sanatorium, nursing home, home for the aged, or similar institution that furnishes services to any patient or occupant. The sale of an item of tangible personal property to a person under a finance

leasing agreement over the term of which the property will be substantially consumed must be considered a retail sale if the purchaser elects to treat it as such by paying or causing the transferor to pay the sales tax thereon to the commissioner on or before the last day on which payments may be made without penalty as provided in section 57-39.2-12.

~~16.~~ 18. "Retailer" or "seller" includes every person engaged in the business of leasing or renting hotel, motel, or tourist court accommodations, and every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of steam, gas, and communication services, or tickets or admissions to places of amusement, entertainment, and athletic events, including the playing of any machine for amusement or entertainment in response to the use of a coin, or magazines, or other periodicals; any organization licensed by the attorney general to conduct bingo games pursuant to section 53-06.1-03; and includes any person as herein defined who by contract or otherwise agrees to furnish for a consideration a totally or partially finished product consisting in whole or in part of tangible personal property subject to the sales tax herein provided, and all items of tangible personal property entering into the performance of such contract as a component part of the product agreed to be furnished under said contract shall be subject to the sales tax herein provided and the sales tax thereon shall be collected by the contractor from the person for whom the contract has been performed in addition to the contract price agreed upon, and shall be remitted to the state in the manner provided in this chapter; and shall include the state or any municipality furnishing steam, gas, or communication service to members of the public in its proprietary capacity. For the purpose of this chapter, retailer shall also include every clerk, auctioneer, agent, or factor selling tangible personal property owned by any other retailer. A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.

~~17.~~ 19. "Sale" means any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatever, for a consideration, and includes the furnishing or service of steam, gas, or communication, the furnishing of bingo cards, the furnishing of hotel, motel, or tourist court accommodations, the furnishing of tickets or admissions to any place of amusement, athletic event, or place of entertainment, including the playing of any machine for amusement or entertainment in response to the use of a coin, and sales of magazines and other periodicals. Provided, the words "magazines and other periodicals" as used in this subsection do not include newspapers nor magazines or periodicals that are furnished free by a nonprofit corporation or organization to its members or because of payment by its members of membership fees or dues.

~~18.~~ 20. "Sales tax" means the tax levied under section 57-39.2-02.1 or a conforming tax imposed under home rule authority by a city or county.

~~19.~~ 21. "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam, and prewritten computer software.

SECTION 4. 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 including the furnishing of bingo cards 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. Coal mined in this state and used for heating buildings, except for coal used in agricultural processing or sugar beet refining plants.

h. 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".

SECTION 5. AMENDMENT. Subsection 26 of section 57-39.2-04 of the North Dakota Century Code is amended and reenacted as follows:

26. Gross receipts from sales of prosthetic devices, durable medical equipment, mobility-enhancing equipment, or supplies for ostomy care or bladder dysfunction. For purposes of this subsection:

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.

b. "Mobility-enhancing equipment" means equipment, not including durable medical equipment sold under a doctor's written prescription, including repair and replacement parts for mobility-enhancing equipment, which:

(1) Is primarily and customarily used to provide or increase the ability to move from one place to another and which is appropriate for use either at home or in a motor vehicle;

(2) Is not generally used by persons with normal mobility; and

(3) Does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

"Mobility-enhancing equipment" includes crutches and wheelchairs for the use of disabled persons, equipment, including manual control units, van lifts, van door opening units, and raised roofs for attaching to or modifying a motor vehicle for use by a permanently physically disabled person, equipment, including elevators, dumbwaiters, chair lifts, and bedroom or bathroom lifts, whether or not sold for attaching to real property, for use by a permanently physically disabled person in that person's principal dwelling, and equipment, including manual control units, for attaching to or modifying motorized implements of husbandry for use by a permanently physically disabled person.

c. "Prosthetic device" means a replacement, corrective, or supportive device sold under a doctor's written prescription, including repair and replacement parts for such a device, worn on or in the body to:

(1) Artificially replace a missing portion of the body;

(2) Prevent or correct a physical deformity or malfunction; or

(3) Support a weak or deformed portion of the body.

"Prosthetic device" includes artificial devices individually designed, constructed, or altered solely for the use of a particular disabled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure, including the extremities of the individual, artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body, artificial teeth sold by a dentist, and eyeglasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.

d. "Supplies for ostomy care or bladder dysfunction" includes:

(1) Supplies designed or intended for ostomy care and management, including collection devices, colostomy irrigation equipment and supplies, skin barriers or skin protectors, and other supplies especially designed for use of ostomates.

(2) Supplies to be used exclusively by a person with bladder dysfunction, including catheters, collection devices, incontinent pads and pants, and other items used for the care and management of bladder dysfunction.

SECTION 6. AMENDMENT. Section 57-39.2-04.1 of the North Dakota Century Code is amended and reenacted as follows:

57-39.2-04.1. Sales tax exemption for food and food ingredients. Gross receipts from sales for human consumption of food and food ingredients are exempt from taxes imposed under this chapter. Gross receipts from sales for human consumption of food and food products given, or to be given, as samples to consumers for consumption on the premises of a food store are exempt from the sales tax imposed by this chapter. For purposes of this section, "food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for taste or nutritional value.

1. For purposes of this section, "food" and "food ingredients" do not include:

a. Alcoholic beverages.

b. Candy or chewing gum.

c. Dietary supplements.

d. Prepared food.

e. Soft drinks containing ~~less than~~ fifty percent <u>or less</u> fruit juice.

f. Tobacco.

2. For purposes of this section:

a. "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.

b. "Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavoring in the form of bars, drops, or pieces. Candy does not include any preparation containing flour and does not require refrigeration.

c. "Dietary supplement" means any product, other than tobacco, intended to supplement the diet which contains one or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; an oral concentrate, metabolite, constitute, extract, or combination of any dietary ingredients described in this sentence and which is intended for ingestion in tablet, capsule, powder, soft gel, gel cap, or liquid form, or if not represented for use as a sole item of a meal or of a diet; and is required to be labeled as a dietary supplement, identifiable by the supplemental facts box found on the label and as required pursuant to 21 CFR section 101.36.

d. "Prepared food" means:

(1) Food sold in a heated state or heated by the seller;

(2) Two or more food ingredients mixed or combined by the seller for sale as a single item; or

(3) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

e. "Prepared food" does not mean:

(1) Food that is only cut, repackaged, or pasteurized by the seller.

(2) Eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the food and drug administration in chapter 3, part 401.11, of its food code so as to prevent foodborne illness.

(3) If sold without eating utensils provided by the seller:

(a) Food sold by a seller whose proper primary North American industry classification system classification is manufacturing in sector 311, except subsector 3118, bakeries.

(b) Food sold in an unheated state by weight or volume as a single item.

(c) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

f. "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.

g. "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

<u>3. For purposes of this section, "eating utensils provided by the seller" is determined as follows:</u>

<u>a. Determine the prepared food ratio, where the numerator is the sum of food defined in paragraphs 1 and 2 of subdivision d of subsection 2 plus food when plates, bowls, glasses, or cups are necessary for the purchaser to receive the food and the denominator is all sales of food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks. Alcoholic beverages are not included in either the numerator or denominator.</u>

<u>b. If the prepared food ratio is seventy-five percent or less, utensils are provided by the seller if the seller's practice is to physically give or hand them to the purchaser, except plates, bowls, glasses, or cups necessary for the purchaser to receive the food need only be made available.</u>

c. If the prepared food ratio is greater than seventy-five percent, utensils are provided to 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.

d. When a seller sells food items that have a utensil placed in a package by a person other than the seller and that person's North American industry classification system classification code is that of manufactures (sector 311), the seller shall not be considered to have provided the utensils except as in subdivisions b and c above. For any other packager with any other North American industry classification system classification code, the seller shall be considered to have provided the utensil.

e. The prepared food ratio is to be calculated by the seller for each calendar or fiscal year not later than ninety days after the end of each year and based on the seller's data from the previous year.

f. A single prepared food ratio will be determined annually and used for all of the seller's locations in the state.

g. A new business shall make a good-faith estimate of the prepared food ratio for the first year and shall adjust its good-faith estimate after the first three months if the actual prepared food ratio is materially different than the estimate.

SECTION 7. AMENDMENT. Section 57-39.4-01 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-01. Adoption of streamlined sales and use tax agreement. North Dakota adopts the streamlined sales and use tax agreement as adopted November 12, 2002, by the member states of the streamlined sales tax project. The entire agreement is adopted by reference with the exception of ~~article~~ articles III and V, which ~~is~~ are adopted as set out in this chapter.

SECTION 8. AMENDMENT. Section 57-39.4-06 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-06. (305) Local rate and boundary changes. Each member state that has local jurisdictions that levy a sales or use tax shall:

1. Provide that local rate changes will be effective only on the first day of a calendar quarter after a minimum of sixty days' notice to sellers.
2. Apply local sales tax rate changes to purchases from printed catalogs wherein the purchaser computed the tax based upon local tax rates published in the catalog only on the first day of a calendar quarter after a minimum of one hundred twenty days' notice to sellers.
3. For sales and use tax purposes only, apply local jurisdiction boundary changes only on the first day of a calendar quarter after a minimum of sixty days' notice to sellers.
4. Provide and maintain a data base that describes boundary changes for all taxing jurisdictions. This data base shall include a description of the change and the effective date of the change for sales and use tax purposes.
5. Provide and maintain a data base of all sales and use tax rates for all of the jurisdictions levying taxes within the state. For the identification of states, counties, cities, and parishes, codes corresponding to the rates must be provided according to federal information processing standards as developed by the national institute of standards and technology. For the identification of all other jurisdictions, codes corresponding to the rates must be in the format determined by the governing board.
6. Provide and maintain a data base that assigns each five-digit and nine-digit zip code within a member state to the proper tax rates and jurisdictions. The state must apply the lowest combined tax rate imposed in the zip code area if the area includes more than one tax rate in any level of taxing jurisdictions. If a nine-digit zip code designation is not available for a street address or if a seller <u>or certified service provider</u> is unable to determine the nine-digit zip code designation ~~of~~ <u>applicable to</u> a ~~purchaser~~ <u>purchase</u> after exercising due diligence to determine the designation, the seller <u>or certified service provider</u> may apply the rate for the

five-digit zip code area. For the purposes of this section, there is a rebuttable presumption that a seller or certified service provider has exercised due diligence if the seller has attempted to determine the nine-digit zip code designation by utilizing software approved by the governing board that makes this designation from the street address and the five-digit zip code ~~of the purchaser~~ applicable to a purchase.

7. ~~Participate with other member states in~~ Have the ~~development~~ option of ~~an~~ providing address-based ~~system~~ boundary data base records for assigning taxing jurisdictions~~. The system~~ and their associated rates which shall be in addition to the requirements of subsection 6. The data base records must be in the same approved format as the data base records under subsection 6 and must meet the requirements developed pursuant to the federal Mobile Telecommunications Sourcing Act [4 U.S.C.A. sec. ~~119~~ 119(a)]. The governing board may allow a member state to require sellers that register under this agreement to use an address-based ~~system~~ data base provided by that member state. If any member state develops ~~an~~ address-based assignment ~~system~~ data base records pursuant to the ~~Mobile Telecommunications Sourcing Act~~ agreement, a seller or certified service provider may use ~~that system~~ those data base records in place of the ~~system~~ five-digit and nine-digit zip code data base records provided for in subsection 6. If a seller or certified service provider is unable to determine the applicable rate and jurisdiction using an address-based data base record after exercising due diligence, the seller or certified service provider may apply the nine-digit zip code designation applicable to a purchase. If a nine-digit zip code designation is not available for a street address or if a seller or certified service provider is unable to determine the nine-digit zip code designation applicable to a purchase after exercising due diligence to determine the designation, the seller or certified service provider may apply the rate for the five-digit zip code area. For the purposes of this section, there is a rebuttable presumption that a seller or certified service provider has exercised due diligence if the seller or certified service provider has attempted to determine the tax rate and jurisdiction by utilizing

software approved by the governing board that makes this assignment from the address and zip code information applicable to the purchase.

8. States which have met the requirements of subsection 6 may also elect to certify vendor-provided address-based data bases for assigning tax rates and jurisdictions. The data bases must be in the same approved format as the data base records under subsection 7 and must meet the requirements developed under the federal Mobil Telecommunications Sourcing Act [4 U.S.C.A. sec. 119(a)]. If a state certifies a vendor-provided address-based data base, a seller or certified service provider may use that data base in place of the data base provided for in subsection 6 or 7. Vendors providing address-based data bases may request certification of their data bases from the governing board. Certification by the governing board does not replace the requirement that the data bases be certified by the states individually.

SECTION 9. AMENDMENT. Section 57-39.4-07 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-07. (306) Relief from certain liability. Each member state shall relieve sellers and certified service providers using data bases under subsections 6, 7, and 8 of section 57-39.4-06 from liability to the member state and local jurisdictions for having charged and collected the incorrect amount of sales or use tax resulting from the seller or certified service provider relying on erroneous data provided by a member state on tax rates, boundaries, or taxing jurisdiction assignments. ~~A~~ After providing adequate notice as determined by the governing board, a member state that provides an address-based ~~system~~ data base for assigning taxing jurisdictions under subsection 7 or 8 of section 57-39.4-06 ~~or under the federal Mobile Telecommunications Sourcing Act will not be required to provide~~ may cease providing liability relief for errors resulting from the reliance on the ~~information~~ data base provided by the member state under subsection 6 of section 57-39.4-06. If a seller demonstrates that requiring the use of the address-based data base would create an undue hardship, a member state and the governing board may extend the relief from liability to such seller for a designated period of time.

SECTION 10. AMENDMENT. Section 57-39.4-08 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-08. (307) Data base requirements and exceptions.

1. The electronic data bases provided for in subsections 4, 5, 6, and 7 of section 57-39.4-06 shall be in a downloadable format approved by the governing board. The data bases may be directly provided by the state or provided by a vendor as designated by the state. A data base provided by a vendor as designated by a state shall be applicable to and subject to all provisions of sections 57-39.4-06 and 57-39.4-07 and this section. These data bases must be provided at no cost to the user of the data base.
2. The provisions of subsections 6 and 7 of section 57-39.4-06 do not apply when the purchased product is received by the purchaser at the business location of the seller.
3. The data bases provided by subsections 4, 5, ~~and~~ 6, and 7 of section 57-39.4-06 are not a requirement of a state prior to entering into the agreement. ~~The governing board shall establish the effective dates for availability and use of the data bases.~~ A seller that did not have a requirement to register in a state prior to registering under this agreement or a certified service provider shall not be required to collect sales or use taxes for the state until the first day of the calendar quarter commencing more than sixty days after the state has provided the data bases required by subsections 4, 5, and 6 of section 57-39.4-06. Provided, for the initial implementation of the agreement, a certified service provider shall be required to collect sales and use taxes for each member state, subject to the provisions of the agreement, under the terms of the operating agreement entered into between the certified service provider and the governing board in order to provide adequate time for testing and loading of the data bases.

SECTION 11. AMENDMENT. Subsection 1 of section 57-39.4-09 of the North Dakota Century Code is amended and reenacted as follows:

1. No member state shall have multiple state sales and use tax rates on items of personal property or services ~~after December 31, 2005~~, except that a member state may impose a single additional rate, which may be zero, on food and food ingredients and drugs as defined by state law pursuant to the agreement.

SECTION 12. AMENDMENT. Section 57-39.4-10 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-10. (309) Application of general sourcing rules and exclusions from the rules.

1. Each member state shall agree to require sellers to source the retail sale of a product in accordance with section 57-39.4-11. The provisions of section 57-39.4-11 apply regardless of the characterization of a product as tangible personal property, a digital good, or a service. The provisions of section 57-39.4-11 only apply to determine a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product. These provisions do not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.
2. Section 57-39.4-11 does not apply to sales or use taxes levied on the following:
   a. The retail sale or transfer of watercraft, modular homes, manufactured homes, or mobile homes. These items must be sourced according to the requirements of each member state.
   b. The retail sale, excluding lease or rental, of motor vehicles, trailers, semitrailers, or aircraft that do not qualify as transportation equipment, as defined in subsection 4 of section 57-39.4-11. The retail sale of these items shall be sourced according to the requirements of each member state, and the lease or rental of these items must be sourced according to subsection 3 of section 57-39.4-11.
   c. Telecommunications services <u>and ancillary services</u>, as set out in section 57-39.4-16, <u>and internet access service</u> shall be sourced in accordance with section 57-39.4-15.
   <u>d. Until December 31, 2007, florist sales as defined by each member state. Prior to this date, these items must be sourced according to the requirements of each member state.</u>

SECTION 13. AMENDMENT. Section 57-39.4-15 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-15. (314) Telecommunications sourcing.

1. Except for the defined telecommunications services in subsection 3, the sale of telecommunications services sold on a call-by-call basis shall be sourced to each level of taxing jurisdiction where the call originates and terminates in that jurisdiction or each level of taxing jurisdiction where the call either originates or terminates and in which the service address is also located.
2. Except for the defined telecommunications services in subsection 3, a sale of telecommunications services sold on a basis other than a call-by-call basis is sourced to the customer's place of primary use.
3. The sale of the following telecommunications services shall be sourced to each level of taxing jurisdiction as follows:
   a. A sale of mobile telecommunications services other than air-to-ground radiotelephone service and prepaid calling service, is sourced to the customer's place of primary use as required by the Mobile Telecommunications Sourcing Act.
   b. A sale of post-paid calling service is sourced to the origination point of the telecommunications signal as first identified by either the seller's telecommunications system, or information received by the seller from its service provider, if the system used to transport such signals is not that of the seller.
   c. A sale of prepaid calling service <u>or a sale of a prepaid wireless calling service</u> is sourced in accordance with section 57-39.4-11. However, in the case of a sale of ~~mobile telecommunications services that are prepaid telecommunications services~~ <u>prepaid wireless calling service</u>, the rule provided in subdivision e of subsection 1 of section 57-39.4-11 shall include as an option the location associated with the mobile telephone number.
   d. A sale of a private communication service is sourced as follows:
      (1) Service for a separate charge related to a customer channel termination point is sourced to each level of jurisdiction in which such customer channel termination point is located.

(2) Service where all customer termination points are located entirely within one jurisdiction or levels of jurisdiction is sourced in such jurisdiction in which the customer channel termination points are located.

(3) Service for segments of a channel between two customer channel termination points located in different jurisdictions and which segment of channel are separately charged is sourced fifty percent in each level of jurisdiction in which the customer channel termination points are located.

(4) Service for segments of a channel located in more than one jurisdiction or levels of jurisdiction and which segments are not separately billed is sourced in each jurisdiction based on the percentage determined by dividing the number of customer channel termination points in such jurisdiction by the total number of customer channel termination points.

4. The sale of internet access service is sourced to the customer's place of primary use.

5. The sale of an ancillary service is sourced to the customer's place of primary use.

SECTION 14. AMENDMENT. Section 57-39.4-16 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-16. (315) Telecommunications sourcing definitions. For the purpose of section 57-39.4-15, the following definitions apply:

1. "Air-to-ground radiotelephone service" means a radio service, as that term is defined in 47 CFR 22.99, in which common carriers are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

2. "Ancillary services" means services that are associated with or incidental to the provision of telecommunications services, including detailed telecommunications billing, directory assistance, vertical service, and voice mail services.

3. "Call-by-call basis" means any method of charging for telecommunications services in which the price is measured by individual calls.

~~3.~~ 4. "Communications channel" means a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.

~~4.~~ 5. "Customer" means the person or entity that contracts with the seller of telecommunications services. If the end user of telecommunications services is not the contracting party, the end user of the telecommunications services is the customer of the telecommunications services, but this sentence only applies for the purpose of sourcing sales of telecommunications services under section 57-39.4-15. "Customer" does not include a reseller of telecommunications services or for mobile telecommunications services of a serving carrier under an agreement to serve the customer outside the home service provider's licensed service area.

~~5.~~ 6. "Customer channel termination point" means the location where the customer either inputs or receives the communications.

~~6.~~ 7. "End user" means the person who utilizes the telecommunications services. In the case of an entity, "end user" means the individual who utilizes the services on behalf of the entity.

~~7.~~ 8. "Home service provider" means the same as that term is defined in section 124(5) of Public Law 106-252, Mobile Telecommunications Sourcing Act.

~~8.~~ 9. "Mobile telecommunications service" means the same as that term is defined in section 124(7) of Public Law 106-252, Mobile Telecommunications Sourcing Act.

~~9.~~ 10. "Place of primary use" means the street address representative of where the customer's use of the telecommunications services primarily occurs, which must be the residential street address or the primary business street address of the customer. In the case of mobile telecommunications services, "place of primary use" must be within the licensed service area of the home service provider.

~~10.~~ 11. "Post-paid calling service" means the telecommunications services obtained by making a payment on a call-by-call basis either through the use of a credit card or payment mechanism such as a bank card, travel card, credit card, or debit card, or by charge made to which a telephone number which is not associated with the origination or termination of the telecommunications services. A post-paid calling service includes telecommunications services, except a prepaid wireless calling service, that would be a prepaid calling service except it is not exclusively telecommunications services.

~~11.~~ 12. "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.

13. "Prepaid wireless calling service" means a telecommunication service that provides the right to utilize mobile wireless service as well as other nontelecommunications 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 or dollars of which the number declines with use in a known amount.

~~12.~~ 14. "Private communication service" means telecommunications services that entitle 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.

~~13.~~ 15. "Service address" means:

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

b. If the location in subdivision a is not known, service address means the origination point of the signal of the telecommunications services first identified by either the seller's telecommunications system or in information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.

c. If the location in subdivisions a and b are not known, the service address means the location of the customer's place of primary use.

SECTION 15. AMENDMENT. Section 57-39.4-17 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-17. (316) Enactment of exemptions. A member state shall enact entity-based, use-based, and product-based exemptions in accordance with the provisions of this section and utilize common definitions in accordance with the provisions of section 57-39.4-28 and the agreement.

1. A member state may enact a product-based exemption without restriction if the agreement does not have a definition for the product ~~or for a term that includes the product. If the agreement has a definition for the product or for a term that includes the product, a member state may exempt all items included within the definition but shall not exempt only part of the items included within the definition unless the agreement sets out the exemption for part of the items as an acceptable variation~~.
   a. A member state may enact a product-based exemption for a product if the agreement has a definition for such product and the member state utilizes in the exemption the product definition in a manner consistent with the agreement and section 57-39.4-28.
   b. A member state may enact a product-based exemption exempting all items included within a definition in the agreement but shall not exempt specific items included within the product definition unless the product definition sets out an exclusion for such item.
2. A member state may enact an entity-based or a use-based exemption for a product without restriction if the agreement does not have a definition for the product ~~whose use or purchase by a specific entity is exempt or for a term that includes the product. If the agreement has a definition for the product whose use or specific purchase is exempt, a~~.
   a. A member state may enact an entity-based or a use-based exemption ~~that applies to that product as long as the exemption utilizes the agreement definition of the product. If the agreement does not have a definition for the product whose use or specific purchase is exempt but has a definition for a term that includes the product, a member state may enact an entity-based or a use-based exemption for the product without restriction~~ for a product if the agreement has a definition for such product and the member state utilizes in

the exemption the product definition in a manner consistent with the agreement and section 57-39.4-28.

b. A member state may enact an entity-based exemption for an item if the agreement does not have a definition for such items but has a definition for a product that includes such item.

c. A member state may not enact a use-based exemption for an item which effectively constitutes a product-based exemption if the agreement has a definition for a product that includes such item.

d. A member state may enact a use-based exemption for an item if the agreement has a definition for a product that includes such item, if not prohibited in subdivision c of this subsection and if consistent with a definition in the agreement.

~~3.~~ For purposes of complying with the requirements in this section, the inclusion of a product within the definition of tangible personal property is disregarded.

SECTION 16. AMENDMENT. Section 57-39.4-18 of the North Dakota Century Code is amended and reenacted as follows:

57-39.4-18. (317) Administration of exemptions.

1. Each member state shall observe the following provisions when a purchaser claims an exemption:

a. The seller shall obtain identifying information of the purchaser and the reason for claiming a tax exemption at the time of the purchase as determined by the governing board.

b. A purchaser is not required to provide a signature to claim an exemption from tax unless a paper exemption certificate is used.

c. The seller shall use the standard form for claiming an exemption electronically as adopted by the governing board.

d. The seller shall obtain the same information for proof of a claimed exemption regardless of the medium in which the transaction occurred.

e. A member state may utilize a system in which the purchaser exempt from the payment of the tax is issued an identification number that shall be presented to the seller at the time of the sale.

f. The seller shall maintain proper records of exempt transactions and provide them to a member state when requested.

g. A member state shall administer use-based and entity-based exemptions when practicable through a direct pay permit, an exemption certificate, or another means that does not burden sellers.

h. In the case of drop shipment sales, member states must allow a third-party vendor, drop shipper, to claim a resale exemption based on an exemption certificate by its customer or reseller or any other acceptable information available to the third-party vendor evidencing qualification for a resale exemption, regardless of whether the customer or reseller is registered to collect and remit sales and use tax in the state where the sale is sourced.

2. Each member state shall relieve sellers that follow the requirements of this section from ~~any~~ the tax otherwise applicable if it is determined that the purchaser improperly claimed an exemption and to hold the purchaser liable for the nonpayment of tax. This relief from liability does not apply to a seller who fraudulently fails to collect the tax ~~or~~; to a seller who solicits purchasers to participate in the unlawful claim of an exemption; to a seller who accepts an exemption certificate when the purchaser claims an entity-based exemption when the subject of the transaction sought to be covered by the exemption certificate is actually received by the purchaser at a location operated by the seller and the state in which that location resides provides an exemption certificate that clearly and affirmatively indicates graying out exemption reason types on the uniform form and posting it on a state's web site is an indicator that the claimed exemption is not available in that state.

3. Each state shall relieve a seller of the tax otherwise applicable if the seller obtains a fully completed exemption certificate or captures the relevant data elements required under the agreement within ninety days subsequent to the date of sale.

a. If the seller has not obtained an exemption certificate or all relevant data elements as provided by this section, the seller may, within one hundred twenty days subsequent to a request for substantiation by a member state, either prove that the transaction was not subject to tax by other means or

obtain a fully completed exemption certificate from the purchaser, taken in good faith. For purposes of this section, member states may continue to apply their own standards of good faith until such time as a uniform standard for good faith is defined in the agreement.

b. Nothing in this section shall affect the ability of member states to require purchasers to update exemption certificate information or to reapply with the state to claim certain exemptions.

c. Notwithstanding the aforementioned, each member state shall relieve a seller of the tax otherwise applicable if it obtains a blanket exemption certificate for a purchaser with which the seller has a recurring business relationship. States may not request from the seller renewal of blanket certificates or updates of exemption certificate information or data elements when there is a recurring business relationship between the buyer and seller. For purposes of this section, a recurring business relationship exists when a period of no more than twelve months elapses between sales transactions.

SECTION 17. A new section to chapter 57-39.4 of the North Dakota Century Code is created and enacted as follows:

(330) Bundled transactions.

1. A member state shall adopt and utilize to determine tax treatment, the core definition for a "bundled transaction" in the agreement.

2. Member states are not restricted in their tax treatment of bundled transactions except as otherwise provided in the agreement. Member states are not restricted in their ability to treat some bundled transactions differently from other bundled transactions.

3. In the case of a bundled transaction that includes any of the following; telecommunication service, ancillary service, internet access, or audio or video programming service:

a. If the price is attributable to products that are taxable and products that are nontaxable, the portion of the price attributable to the nontaxable products may be subject to tax unless the provider can identify by reasonable and verifiable standards such portion from its books and records that are kept in

the regular course of business for other purposes, including, but not limited to, nontax purposes.

b. If the price is attributable to products that are subject to tax at different tax rates, the total price may be treated as attributable to the products subject to tax at the highest tax rate unless the provider can identify by reasonable and verifiable standards the portion of the price attributable to the products subject to tax at the lower rate from its books and records that are kept in the regular course of business for other purposes, including, but not limited to, nontax purposes.

c. The provisions of this section shall apply unless otherwise provided by federal law.

SECTION 18. A new section to chapter 57-39.4 of the North Dakota Century Code is created and enacted as follows:

(331) Relief from certain liability for purchasers.

1. A member state shall relieve a purchaser from liability for penalty to that member state and its local jurisdictions for having failed to pay the correct amount of sales or use tax in the following circumstances:

a. A purchaser's seller or certified service provider relied on erroneous data provided by that member state on tax rates, boundaries, taxing jurisdiction assignments, or in the taxability matrix completed under section 57-39.4-29.

b. A purchaser holding a direct pay permit relied on erroneous data provided by that member state on tax rates, boundaries, taxing jurisdiction assignments, or in the taxability matrix completed by that member state under section 57-39.4-29.

c. A purchaser relied on erroneous data provided by that member state in the taxability matrix completed by that member state under section 57-39.4-29.

d. A purchaser using data bases under subsections 6, 7, and 8 of section 57-39.4-06 relied on erroneous data provided by that member state on tax rates, boundaries, or taxing jurisdiction assignments. After providing adequate notice as determined by the governing board, a member state that provides an address-based data base for assigning taxing jurisdictions under

subsection 7 or 8 of section 57-39.4-06 may cease providing liability relief for errors resulting from the reliance on the data base provided by the member state under the provisions of subsection 6 of section 57-39.4-06.

2. Except when prohibited by a member state's constitution, a member state shall also relieve a purchaser from liability for tax and interest to that member state and its local jurisdictions for having failed to pay the correct amount of sales or use tax in the circumstances described in subsection 1, provided that with respect to reliance on the taxability matrix completed by that member state under section 57-39.4-29, such relief is limited to the state's erroneous classification in the taxability matrix of terms included in the agreement as "taxable", "exempt", "included in sales price", "excluded from sales price", "included in the definition", or "excluded from the definition".

3. For purposes of this section, the term "penalty" means an amount imposed for noncompliance that is not fraudulent, willful, or intentional which is in addition to the correct amount of sales or use tax and interest.

4. A member state may allow relief on terms and conditions more favorable to a purchaser than the terms required by this section.

SECTION 19. A new section to chapter 57-39.4 of the North Dakota Century Code is created and enacted as follows:

(501) Certification of service providers and automated systems.

1. The governing board shall certify automated systems and service providers to aid in the administration of sale and use tax collections.

2. The governing board may certify a person as a certified service provider if the person meets all of the following requirements:

   a. The person uses a certified automated system;

   b. The person integrates its certified automated system with the system of a seller for whom the person collects tax so that the tax due on a sale is determined at the time of the sale;

   c. The person agrees to remit the taxes it collects at the time and in the manner specified by the member states;

d. The person agrees to file returns on behalf of the sellers for whom it collects tax;

e. The person agrees to protect the privacy of tax information it obtains in accordance with section 57-39.4-22; and

f. The person enters into a contract with the member states and agrees to comply with the terms of the contract.

3. The governing board may certify a software program as a certified automated system if the governing board determines that the program meets all of the following requirements:

a. It determines the applicable state and local sales and use tax rate for a transaction, in accordance with sections 57-39.4-10 through 57-39.4-17, inclusive;

b. It determines whether an item is exempt from tax;

c. It determines the amount of tax to be remitted for each taxpayer for a reporting period;

d. It can generate reports and returns as required by the governing board; and

e. It can meet any other requirement set by the governing board.

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

SECTION 20. A new section to chapter 57-39.4 of the North Dakota Century Code is created and enacted as follows:

(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. Upon completion of the review, the state shall certify to the governing board its acceptance of the classifications made by the system.

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 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 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 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 21. AMENDMENT. Subsection 1 of section 57-39.4-20 of the North Dakota Century Code is amended and reenacted as follows:

1. Require only one remittance for each return except as provided in this subsection. If any additional remittance is required, it may only be required from sellers that collect more than thirty thousand dollars in sales and use taxes in the member state during the preceding calendar year as provided herein. The state shall allow the amount of ~~the~~ any additional remittance ~~shall~~ to be determined through a calculation method rather than actual collections ~~and~~ . Any additional remittances shall not require the filing of an additional return.

SECTION 22. AMENDMENT. Subsection 12 of section 57-40.2-04 of the North Dakota Century Code is amended and reenacted as follows:

12. Gross receipts from sales of prosthetic devices, durable medical equipment, or mobility-enhancing equipment. For purposes of this subsection:

    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. <u>An exemption certificate is not required to obtain exemption.</u>

    b. "Mobility-enhancing equipment" means equipment not including durable medical equipment <u>sold under a doctor's written prescription</u>, including repair and replacement parts for mobility-enhancing equipment, which:

        (1) Is primarily and customarily used to provide or increase the ability to move from one place to another and which is appropriate for use either at home or in a motor vehicle;

        (2) Is not generally used by a person with normal mobility; and

        (3) Does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

        "Mobility-enhancing equipment" includes crutches and wheelchairs for the use of disabled persons, equipment, including manual control units, van lifts, van door opening units, and raised roofs for attaching to or modifying a motor vehicle for use by a permanently physically disabled person, equipment, including elevators, dumbwaiters, chair lifts, and bedroom or bathroom lifts, whether or not sold for attaching to real property, for use by a permanently

physically disabled person in that person's principal dwelling, and equipment, including manual control units, for attaching to or modifying motorized implements of husbandry for use by a permanently physically disabled person.

c. "Prosthetic device" means a replacement, corrective, or supportive device sold under a doctor's written prescription, including repair and replacement parts for such a device, worn on or in the body to:

(1) Artificially replace a missing portion of the body;

(2) Prevent or correct a physical deformity or malfunction; or

(3) Support a weak or deformed portion of the body.

"Prosthetic device" includes artificial devices individually designed, constructed, or altered solely for the use of a particular disabled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure, including the extremities of the individual, artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body, artificial teeth sold by a dentist, and eyeglasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.

d. "Supplies for ostomy care or bladder dysfunction" includes:

(1) Supplies designed or intended for ostomy care and management, including collection devices, colostomy irrigation equipment and supplies, skin barriers or skin protectors, and other supplies especially designed for use of ostomates.

(2) Supplies to be used exclusively by a person with bladder dysfunction, including catheters, collection devices, incontinence pads and pants, and other items used for the care and management of bladder dysfunction.

SECTION 23. AMENDMENT. Section 57-40.2-04.1 of the North Dakota Century Code is amended and reenacted as follows:

57-40.2-04.1. Use tax exemption for food and food ingredients. Gross receipts from sales for human consumption of food and food ingredients are exempt from taxes imposed under this chapter. Gross receipts from sales for human consumption of food and food products given, or to be given, as samples to consumers for consumption on the premises of a food store are exempt from taxes imposed by this chapter. For purposes of this section, "food" and "food ingredients" mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, which are sold for ingestion or chewing by humans and are consumed for taste or nutritional value.

1. For purposes of this section, "food" and "food ingredients" do not include:
   a. Alcoholic beverages.
   b. Candy or chewing gum.
   c. Dietary supplements.
   d. Prepared food.
   e. Soft drinks containing ~~less than~~ fifty percent <u>or less</u> fruit juice.
   f. Tobacco.
2. For purposes of this section:
   a. "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.
   b. "Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavoring in the form of bars, drops, or pieces. Candy does not include any preparation containing flour and that does not require refrigeration.
   c. "Dietary supplement" means any product, other than tobacco, intended to supplement the diet which contains one or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; an oral concentrate, metabolite, constitute, extract, or combination of any dietary ingredients described in this subdivision and which is intended for ingestion in tablet, capsule, powder, soft gel cap, or liquid form, or if not represented for use as a sole item of a meal or of a diet; and is

required to be labeled as a dietary supplement, identifiable by the supplemental facts box found on the label and as required pursuant to 21 CFR 101.36.

d. "Prepared food" means:

(1) Food sold in a heated state or heated by the seller;

(2) Two or more food ingredients mixed or combined by the seller for sale as a single item; or

(3) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

e. "Prepared food" does not mean:

(1) Food that is only cut, repackaged, or pasteurized by the seller.

(2) Eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the food and drug administration in chapter 3, part 401.11, of its food code so as to prevent foodborne illness.

(3) If sold without eating utensils provided by the seller:

(a) Food sold by a seller whose proper primary North American industry classification system classification is manufacturing in sector 311, except subsector 3118, bakeries.

(b) Food sold in an unheated state by weight or volume as a single item.

(c) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

f. "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.

g. "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

3. For purposes of this section, "eating utensils provided by the seller" is determined as follows:

a. Determine the prepared food ratio, where the numerator is the sum of food defined in paragraphs 1 and 2 of subdivision d of subsection 2 plus food when plates, bowls, glasses, or cups are necessary for the purchaser to receive the food and the denominator is all sales of food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks. Alcoholic beverages are not included in either the numerator or denominator.

b. If the prepared food ratio is seventy-five percent or less, utensils are provided by the seller if the seller's practice is to physically give or hand them to the purchaser, except plates, bowls, glasses, or cups necessary for the purchaser to receive the food need only be made available.

c. If the prepared food ratio is greater than seventy-five percent, utensils are provided to 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.

d. When a seller sells food items that have a utensil placed in a package by a person other than the seller and that person's North American industry classification system classification code is that of manufactures (sector 311), the seller shall not be considered to have provided the utensils except as in subdivisions b and c. For any other packager with any other North American industry classification system classification code, the seller shall be considered to have provided the utensil.

e. The prepared food ratio is to be calculated by the seller for each calendar or fiscal year not later than ninety days after the end of each year and based on the seller's data from the previous year.

f. A single prepared food ratio will be determined annually and used for all of the seller's locations in the state.

g. A new business shall make a good-faith estimate of the prepared food ratio for the first year and shall adjust its good-faith estimate after the first three months if the actual prepared food ratio is materially different than the estimate.

SECTION 24. REPEAL. Sections 57-39.2-29 and 57-39.4-13 of the North Dakota Century Code are repealed.