



Taxation of Digital Products Uniformity Project

Draft White Paper Section on Bundling

Presentation to the Work Group – October 3, 2024

(This is an incomplete draft meant to solicit feedback to further develop the white paper)

1. Introduction

The Digital Products Work Group was formed to draft a white paper on the issues states should consider when including digital products¹ in their sales tax base.² At their March 7, 2024 meeting, the work group voted to study bundling issues.³ As part of the larger white paper, we propose a subsection addressing bundling issues.

Bundling in a broad sense refers to the administrative rules for determining if there is a transaction involving a single product that has its own tax classification, or, if there is more than one product sold in a single transaction. For this purpose, the terms “distinct and identifiable” or “separable” are used, more on this below. Then, once it is determined that more than one product is involved, assigning some taxability decision to that package of products. Bundling rules serve two important purposes. First, they provide certainty to retailers, so they know when and how much tax to collect at the point of sale. Second, they promote simplification and consistency in tax administration.

Digital products may pose new challenges to states’ approaches to bundling when compared to bundles that include tangible personal property and/or services.

The primary question this section of the digital products white paper addresses is:

Does the presence of digital products in a sales and use tax base present any unique issues with respect to bundling compared to sales and use tax bases that are based on tangible personal property and services?

¹ For purposes of this MTC uniformity project, the term “digital product” means both goods and services.

² Visit the MTC project page at <https://www.mtc.gov/uniformity/sales-tax-on-digital-products/>.

³ Notes from that work group meeting are available here: <https://www.mtc.gov/wp-content/uploads/2024/04/Digital-Work-Group-Notes-03-7-24.pdf>

To address this question, this white paper (1) describes the primary approaches to the concept of bundling and their relation to digital products, (2) highlights the positives and negatives of those approaches, and (3) presents findings and recommendations. [Full summary TBD once the white paper is completed.]

State representatives, notably the work group members, and other stakeholders may review and comment on the draft to help provide guidance for policymakers.

Please direct any questions or feedback to Helen Hecht, hhecht@mtc.gov, or Jonathan White, jwhite@mtc.gov.

2. Table of contents

[TBD once the white paper is completed.]

3. Executive summary

[Assume a 1–2-page high-level summary.]

4. Recommendations to the states

[TBD if any].

5. Why and how states have developed bundling rules

The term “bundling” in sales and use tax systems addresses situations when one or more nontaxable products are sold for a single price with (i.e., bundled with) one or more other taxable products. Bundling is an administrative provision that allows states and businesses to assign consistent taxability rules for transactions that include products that are both taxable and nontaxable. Bundling rules only apply when there are separable or distinct and identifiable products involved.⁴

Bundling rules are needed because generally applicable sales and use tax statutes generally do not address new business models and product offerings in the same way those statutes apply to sales of individual goods or services, such as a book or a car wash.

While states differ on what a bundled transaction is and how a bundle may be taxed, as we will explain in more detail in Section 6 of this whitepaper, bundling rules in general may result in nontaxable products being subject to tax, leading to risks of inaccurate sales and use

⁴ For treatment of inseparably mixed transactions, see section of true object test below.

tax collection for sellers and confusion on the part of purchasers as to how sales and use tax is calculated.

Sometimes businesses are allowed to unbundle packages of separable taxable and nontaxable products and collect tax only on the taxable portions. This is typically based on some objective criteria such as customer invoices or books and records. Unbundling generally allows each product to be treated as if it were sold alone.

The Streamlined Sales Tax Governing Board, Inc. (Streamlined) has developed a comprehensive set of rules for defining what a bundled transaction is and how products can be unbundled, tax treatment of bundled transactions, and transactions excluded from bundling.⁵

6. Results of staff research into current state practices on bundling

A. Streamlined States

i. Streamlined Basics

As mentioned above, the Streamlined Sales Tax Governing Board, Inc. has developed a comprehensive set of rules governing bundling or as the Streamlined Agreement refers to them, “bundled transactions”.⁶

Under the Streamlined Agreement, a bundled transaction consists of three elements: (1) two or more distinct and identifiable products, (2) sold for one nonitemized price, and (3) a sales price that is not variable or negotiable, based on selections by the purchaser.⁷

Distinct and identifiable

Under the Streamlined agreement there must be two or more “distinct and identifiable” products. “Product” as used in this

Streamlined Step-by-Step (simplified)

Step 1: Is there a bundled transaction?

- Two or more distinct and identifiable products with the following not being distinct and identifiable:
 - Elements of sales price, e.g., material and labor costs
 - Packaging
 - Items offered for free
- One nonitemized price.
- Excluding any sale for which the sales price varies or is negotiable.

Step 2: Is there an exclusion?

- Exception transactions:
 - The true object is not taxable.
 - The taxable product is de minimis
 - The transaction contains specified industry products (food, drugs, etc.) and the taxable products are X% or less of the purchase price.

Step 3: Specify tax treatment of bundled transactions and exception transactions; apply applicable post-transaction unbundling rules.

⁵ See [Streamlined Agreement section 330](#) and accompanying definitions in [Appendix C, Part 1](#) of the Streamlined Agreement, and the [Streamlined Rules section 330](#).

⁶ See [Streamlined Agreement section 330](#) and accompanying definitions in [Appendix C, Part 1](#) of the Streamlined Agreement, and the [Streamlined Rules section 330](#).

⁷ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions.

context is broad capturing goods, services, and other things that can be sold.

The term “distinct and identifiable,” is defined, though only in the negative. The definition excludes packaging materials, bags, bottles, and other similar items. The definition also excludes things “provided free of charge with the required purchase of another product” as well as items included in the purchase price.⁸

At one MTC work group meeting a participant stated it this way: “if you can’t unbundle it, it isn’t a bundle.” This observation alludes to the distinct and identifiable element. However, this adage does not go both ways as bags and packaging materials can be unbundled but are deemed not to be distinct and identifiable items.

One non-itemized price

“One non-itemized price” is another element of a bundled transaction. The term is defined only in the negative. One non-itemized price excludes a price that is separately identified by product on binding sales documentation or other sales-related documentation that is made available to the customer. Qualifying documentation includes invoices, bills of sale, contracts, service or lease agreements, rate cards, and other similar documentation.⁹

The reasoning is that if the retailer makes individual product prices available, it will have an objective method of separating the products, establishing their appropriate selling price, and taxing the products according to their appropriate tax classification. The retailer controls itemization.

Variable sales price

This element of a bundled transaction applies to transactions where the sales price is variable or negotiable based on the purchaser’s selections. A transaction shall not be considered to be a bundled transaction if, by negotiation or otherwise, the sales price varies with the purchaser’s selection of the distinct and identifiable products being sold.¹⁰ A retail sale shall not be considered made for “one non-itemized price” if the purchaser has the option of declining to purchase any of the products being sold and, as a result of the purchaser’s selection of products, the sales price varies or a different price is negotiated.¹¹

For example, in a situation where a vendor offered “mix and match” packages where the customer got some choice in the package and the discounting depended on those choices, the Department of Revenue determined the sales price varied based on the purchaser’s selections and the transaction was not a bundle.¹²

⁸ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions.

⁹ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions.

¹⁰ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions.

¹¹ Streamlined Rules and Procedures, Rule 330.1.B.2.

¹² Georgia Letter Ruling 2019-10 (Nov. 2019).

ii. Streamlined Exclusions

There are several exclusions from the Streamlined rules. What this means is that if the criteria of one of the exclusions is met, a transaction that would otherwise be considered a bundled transaction, is deemed not to be a bundled transaction.

a. True object exclusions

The Streamlined Agreement contains two true object exemptions as follows:

- If the taxable tangible personal property is essential to the exempt service, *and* is provided only in connection with the exempt service, *and* the true object of the entire transaction is the exempt service component, then the transaction is excluded from the Streamlined bundling rule.¹³ This means that even if the true object of a transaction is an exempt service, the transaction might still be treated under the Streamlined bundling rule, unless some other exception applies.
- If there is a 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.¹⁴

b. De minimis exclusion

The de minimis exclusion is what it sounds like. It excludes from a bundle a transaction that includes both taxable and nontaxable products if the purchase price or sales price of the taxable product is 10 percent or less of the total purchase or sales price.¹⁵

c. Food, drug, and medical equipment exclusion

This exclusion is a version of the de minimis rule. The exclusion states that if the transaction involves food, drugs, or certain medical equipment or devices and the purchase price or sales price of the taxable portion is 50 percent or less of the total purchase price or sales price, then the transaction is not a bundle.¹⁶

B. Other States

Outside of the rules and definitions created by Streamlined, there are not many explicit bundling statutes out there.

Colorado imposes tax on the entire price of a bundled transaction.¹⁷ Colorado also provides that services that are otherwise excluded from sales tax are taxable if provided as part of a mixed

¹³ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(1).

¹⁴ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(2).

¹⁵ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(3).

¹⁶ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(4).

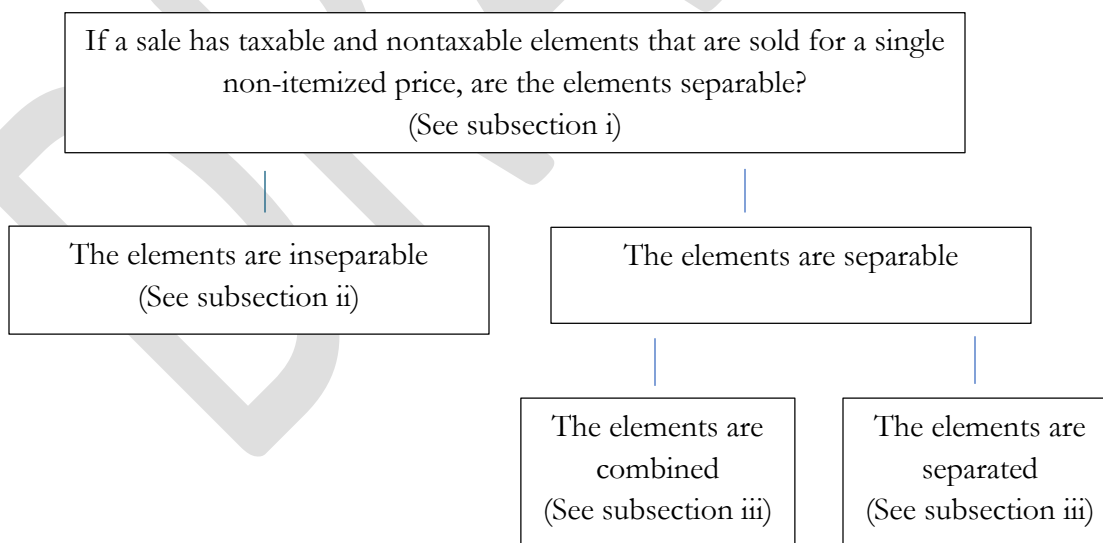
¹⁷ Colo. Prv. Ltr. Rul. No. 10-001; see also, Colo. Prv. Ltr. Rul. No. 12-006 (rescinded).

transaction that includes the sale of TPP or taxable services.¹⁸ Colorado law uses the term “separable” for bundling analysis. This concept is from the *A.D. Store* case.¹⁹ This is a similar concept to “distinct and identifiable” under Streamlined. Colorado Special Rule 18²⁰ states that transportation charges are not taxable if they are both separable and stated separately on a written invoice. In general, the Department requires the nontaxable items to be separately stated to avoid tax if those items are separable.

Colorado Private Letter Ruling 23-004 addresses the concept of separability. The ruling describes an item as separable if its nature remains the same whether it is contracted for as a part of the mixed transaction, or at a later time, and purchase of the item at a later time is possible.²¹ The ruling addressed travel experience packages that were sold for a fixed price. The ruling turned on the fact that the seller did not market or sell the parts of the package separately. The Department determined this meant the elements were not separable. Because the items were not separable, the true object test applied rather than the bundling treatment. The Department then determined the true object of the transaction was the two-day train travel experience.

C. Decision Tree (current law)²²

The decision tree below demonstrates the operation of current law.



¹⁸ Colo. Prv. Ltr. Rul. No. 23-004; see also, 1-CCR 201-4 § 39-26-102(12); -102(7)(a); *A.D. Store Co., Inc. v. Exec. Dir.*, 19 P.3d 680, 683-684 (Colo. 2001).

¹⁹ *A.D. Store Co., Inc. v. Exec. Dir.*, 19 P.3d 680 (Colo. 2001) (In *A.D. Store*, the Colorado Supreme Court held that if the price of the taxable TPP can be meaningfully separated from the price of the nontaxable service, then the service was not taxable. The court then determined that alteration services performed on clothing were separable from the clothing sold and altered.)

²⁰ 1-CCR 201-5, Special Rule 18.

²¹ Citing to *A.D. Store*, 19 P.3d at 684.

²² See below section 11.C for a potential new framework.

i. The question of separability.

Streamlined considers whether the elements are “distinct and identifiable.”²³ In Texas, services are separable if they are “distinct and identifiable” and of a type which is commonly provided on a stand-alone basis.²⁴ Colorado considers whether an item’s nature remains the same whether it is contracted for as part of the mixed transaction or at a later time, and purchase at a later time is an option.²⁵

ii. If the elements are inseparable.

Typically, some variant of the true object test applies. In Tennessee and Colorado, the true object test applies.²⁶ In Texas, the essence of the transaction test applies to inseparable TPP and services.²⁷ See section 6.D below for more on the true object test. Streamlined does not specify the tax treatment of elements that are inseparable.

iii. If the elements are separable.

First, the definition of “sales price,” “purchase price,” or similar definition should be checked for any separable elements that are not allowed to be separated. Common examples are installation and delivery charges.²⁸

Under Streamlined, separable elements are not separated out if they are included in the definition of “sales price.”²⁹ Additionally, packaging and items provided for free are not separate out.³⁰ TPP and service elements are combined if the TPP is essential to the service, the TPP is provided exclusively with the service, and the true object is the service.³¹ A similar rule applies for multiple service elements. Multiple service elements are combined if the first service is essential to the second, the first service is provided exclusively with the second, and the true object is the second service.³² Finally, a separable taxable element is disregarded if it is 10% or less than the total purchase or sales price.³³

²³ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions.

²⁴ See 34 Tex. Admin. Code § 3.330.

²⁵ Col. Priv. Ltr. Rul. 23-004, citing *A.D. Store Co., Inc. v. Exec. Dir.*, 19 P.3d 680 (Colo. 2001).

²⁶ Tenn. Ltr. Rul. 14-10 & Col. Priv. Ltr. Rul. 23-004.

²⁷ *Black, Mann & Graham, LLP v. Hegar*, No. 03-20-00391-CV (Tex. App. – Austin 2022) (mem. op.).

²⁸ See, e.g., Miss. Code § 27-65-3(h) (definition of “gross proceeds of sale”).

²⁹ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions; Streamlined Rules and Procedures, Rule 330.1.B.1.

³⁰ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions; Streamlined Rules and Procedures, Rule 330.1.B.1.

³¹ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(1).

³² Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(2).

³³ Streamlined Agreement, Appendix C, Part 1, Administrative Definitions, para. (C)(3).

In Texas, separable elements are not separated out if they are included in the definition of “sales price.” For services, the entire charge is taxable if the taxable portion is more than 5% of the total. However, the presumption of taxability can be rebutted based on the taxpayer’s books and records.³⁴

In Colorado, separable elements are not separated out if they are included in the definition of “purchase price.” If not included in the definition of “purchase price,” then separate tax treatment of separable elements.

In Tennessee, if two items are separable, they are analyzed as a bundled transaction if sold for a single price.³⁵ In Tennessee, tax is imposed on the entire sales price if two or more items are sold for a single price and one of the items is taxable.³⁶

D. Not bundling

Bundling involves distinct and identifiable components, sometimes referred to as separable components. States have other rules that apply when the components are not separable. Some of these rules apply only in cases where the components are not separable. Some of these rules do not specify between separable and inseparable components.³⁷

i. The role of sales price

Many states address the issue raised by mixing of taxable and nontaxable components by relying on the definition of “sales price” or an equivalent term in their sales and use taxes. A straightforward example of this is Florida’s definition of “sales price” as the total amount paid, including any services that are part of the sale.³⁸ Florida’s law then excludes from tax professional or personal services transactions involving taxable sales that are inconsequential and not separately stated.³⁹

Taken together, the two provisions above create a rule under which any transaction that includes taxable TPP is taxable on the entire amount charged, regardless of the inclusion of nontaxable services, unless those services are both inconsequential and separately stated.

Idaho has adopted a regulation under their statutory definitions of “retail sale,” “sale,” and “sales price.”⁴⁰ The rule provides that when a sale of TPP includes incidental services, sales tax applies to the entire amount charged. The rule further provides that if a service transaction includes incidental

³⁴ See e.g., 34 Tex. Admin. Code § 3.330.

³⁵ Tenn. Ltr. Rul. 14-10.

³⁶ Tenn. Ltr. Rul. 14-10.

³⁷ Acknowledging the risk of conflating transactions that have separable or distinct and identifiable components (and are thus treated under bundling rules) with those that do not, we state here that if a state is silent on the question of separable and distinct and identifiable components, then the non-bundling rules below might apply to a transaction even though the transaction has separable or distinct and identifiable components as defined by the law of a state that actually addresses the question.

³⁸ Fla. Stat. § 212.02(16).

³⁹ Fla. Stat. § 212.08(7)(v)(1) (exemption statute).

⁴⁰ Id. Regs. § 35.01.02.011.01.

TPP, the transaction is not taxable. The rule provides that the test is whether the service involved is consequential or inconsequential.

ii. Rules not based on sales price

Arizona

In Arizona, TPP and services that are transferred together for a single, non-segregated price are taxable on the entire amount charged, if the TPP is a consequential element of the transaction.⁴¹ Arizona also provides that where the TPP is an inconsequential element of rendering the nontaxable service, then the entire amount is not taxed.⁴² To qualify as an “inconsequential element:” (1) the amount paid by the service provider for the TPP must be less than 15% of the amount charged by the service provider for their service; the TPP must not be in a form that is subject to retail sale; and (3) there is no separately stated charge for the TPP.⁴³

California – subject matter specific rules

For newspapers and periodicals: California regulations define the term mixed newspaper subscription⁴⁴ and establishes a presumption that 47% of the charge for a mixed newspaper subscription is taxable and 53% is non-taxable based on a study the newspaper industry provided.⁴⁵ It also provides a formula that publishers can use to rebut the presumption and establish a larger nontaxable percentage.⁴⁶

For technology transfer agreements⁴⁷ (TTAs): California law establishes a formula for determining the taxable portion of a transaction involving the transfer of TPP and patent or copyright interests.⁴⁸

The statute provides that gross receipts does not include the amount charged for intangible personal property transferred with TPP in a technology transfer agreement (TTA) if the TTA separately states a reasonable price for the TPP. If the price for the TPP is not separately stated and the TPP or like TPP has been offered for sale or lease to third parties, then the price for third parties is used to price the TPP. The statute provides the remainder is for the intangible property transferred.⁴⁹

If the TTA does not separately state the price for the TPP and the TPP or like TPP has not been offered for sale or lease to third parties, then the TPP is priced equal to 200 percent of the cost of

⁴¹ A.R.S. § 42-5061(F); Ariz. Admin. Code § 15-5-105.

⁴² A.R.S. § 42-5061(A)(1); Ariz. Admin. Code § 15-5-104(B).

⁴³ Ariz. Admin. Code § 15-5-104(C); *but see Val-Pak East Valley, Inc. v. Ariz. Dep't of Rev.*, 272 P.3d 1055 (Ariz. Ct. App. 2012) (applying the true object test to direct mail advertising rather than the bundling rule).

⁴⁴ Cal. Code Regs. tit. 18, §1590(a)(5).

⁴⁵ Cal. Code Regs. tit. 18, §1590(b)(3)(B).

⁴⁶ Cal. Code Regs. tit. 18, §1590(b)(3)(B).

⁴⁷ Cal. Rev. & Tax. Code §6012(c)(10)(D) defines “technology transfer agreement” as any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest.

⁴⁸ Cal. Rev. & Tax. Code §6012(c)(10).

⁴⁹ Cal. Rev. & Tax. Code §6012(c)(10)(B).

materials and labor used to produce the TPP, with the remaining amount charged being attributable to the intangible personal property transferred.⁵⁰

D. True object test and Mixed Transactions

The true object test⁵¹ is a more subjective test used to determine whether a transaction with inseparable elements is classified by its taxable its nontaxable portion.⁵² The fact that it is used in inseparable transfers already highlights that it might not be the best to use in conjunction with bundling, as we have heard it well said that “if you can’t unbundle it, it isn’t a bundle.” Typically, the distinction is needed between taxable tangible personal property and nontaxable services or intangibles.⁵³

Tennessee has had extensive development in their true object test case law, so their law is useful to provide the basics. Examples of transactions subject to the true object test in Tennessee: a painting an artist was commissioned to make, discount cards, and for an example with two services, a staffing company that provides workers, which is a nontaxable service, to a company that repairs TPP, which is a taxable service.⁵⁴

In Tennessee, there are three categories of results:⁵⁵

- 1: A taxable true object and any crucial, essential, necessary, consequential, or integral elements of the transaction are taxable. This is not an all or nothing result, this is saying that even with a taxable true object, only the crucial, essential, necessary, consequential, or integral things come along with it for taxation. Components that are not crucial, essential, necessary, consequential, or integral are treated some other way, even though the true object is taxable.
- 2: A transaction with any taxable component that is crucial, essential, necessary, consequential, or integral is taxable, even if the true object is not independently taxable. This is a way to tax a transaction even if the true object is not taxable.
- 3: If the true object is not taxable and the taxable items are merely incidental to the true object, then the transaction is not taxable. This one is more straightforward, but still not all or nothing.

⁵⁰ Cal. Rev. & Tax. Code §6012(c)(10)(C).

⁵¹ In this whitepaper we use the term “true object test” to mean any similar terminology used by states, such as “essence of the transaction test.”

⁵² Hellerstein, Hellerstein & Appleby, *State Taxation*, § 12.08[1] (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2023) (online version accessed on Checkpoint (www.checkpoint.rig.com) July 11, 2024).

⁵³ Hellerstein, Hellerstein & Appleby, *State Taxation*, § 12.08[1].

⁵⁴ Tenn. Ltr. Rul. 14-10.

⁵⁵ Tenn. Ltr. Rul. 14-10.

Note there are variants to the true object test⁵⁶ and additional factors relevant to the true object test⁵⁷ that are beyond the scope of this white paper.

One situation where the true object test is not applicable is that of “mixed transactions.” Mixed transactions are those where the various items being analyzed are not packaged, bundled, or intertwined enough to be viewed as one. Or have too much independence from one another to be viewed as one.

In *Rylander v. San Antonio SMSA L.P.*,⁵⁸ the court considered transactions for network equipment and engineering services to configure the equipment. The equipment and services were priced separately but invoiced together. The court held the equipment and the engineering services were independently desired and independently provided, were readily separable, and neither was “incident” to the other. The result was that the engineering services and equipment must be analyzed separately for taxability. In *SMSA*, the Texas court cited extensively to *New England Tel. & Tel. Co. v. Clark*,⁵⁹ from Rhode Island. In *Clark*, the issue and result were similar.

7. Results of stakeholder discussions about bundling and digital products

At the July 30, 2024 MTC Uniformity Committee meeting in Denver, Colorado, the digital products work group chair, vice-chair, and staff reported on stakeholder calls conducted with taxpayers, their representatives, and other non-state representatives to solicit input on their experiences and information about bundling and digital products.⁶⁰

⁵⁶ See, e.g., *City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361 (Colo. 2003) (common understanding test); *Emery Indust., Inc. v. Limbach*, 539 N.E.2d 608 (Ohio 1989) (overriding purpose test); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124 (R.I. 1985) (real object test); *Quotron Systems, Inc. v. Comptroller of Treasury*, 411 A.2d 439 (Md. 1980) (predominant purpose test); *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977) (essence of the transaction test); *WTAR Radio-TV Corp. v. Commonwealth*, 234 S.E.2d 245 (1977) (true object test); *Catalina Marketing Sales Corporation v. Department of Treas.*, 678 N.W.2d 619, 626 (Mich. 2004) (incidental to service test).

⁵⁷ *Washington Times-Herald v. District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954) and *Fingerhut Prods. Co. v. Comm'r of Revenue*, 258 N.W.2d 606 (Minn. 1977) (value of TPP versus intangibles); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976) and *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977) (whether there was an alternative method of transfer); *Fingerhut Prods. Co. v. Comm'r of Revenue*, 258 N.W.2d 606 (Minn. 1977) and *Williams Lee Scouting Service, Inc. v. Calvert*, 452 S.W.2d 789 (Tex.App. 1970) (the length of time the information provided retains its value); *Dun & Bradstreet, Inc. v. City of New York*, 11 N.E.2d 728 (1937) (constraints on the buyer's ability to use the property); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976) and *Sneary v. Director of Revenue*, 865 S.W.2d 342 (Mo. 1993) (what is eventually done with the TPP); *Columbus Coated Fabrics Div. v. Porterfield*, 285 N.E.2d 50 (Ohio 1972); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124 (R.I. 1985) (whether the TPP is the product the purchaser sought).

⁵⁸ *Rylander v. San Antonio SMSA L.P.*, 11 S.W.3d 484 (Tex. App. 2000).

⁵⁹ *New England Tel. & Tel. Co. v. Clark*, 624 A.2d 298 (R.I. 1993).

⁶⁰ Add cite to the slides/presentation when added to the website.

A. Stakeholders who provided input

i. Academics

Andrew Appleby, Stetson College of Law

ii. Streamlined Representatives

Craig Johnson & Christie Comanita (work group ex officio members)
Sherry Hathaway & Michael Ward (TN)

iii. Taxpayers

Amazon – Jessie Eisenmenger & Roger Price
Apple – Terry Ryan and Sheila Bayley
Charter Communications – Brandi Drake

iv. Practitioners & Taxpayer Representatives

Eversheds Sutherland – Michele Borens and Charlie Helms
Kranz & Associates – Carolyn Kranz
Moss Adams – Phil Horwitz
MultiState Associates – Deborah Bierbaum
Yetter Tax – Diane Yetter
Pillsbury Winthrop Shaw Pittman - Zach Atkins

v. Organizations & Compliance Vendors

Avalara – Scott Peterson (via comments to the press)
Council On State Taxation – Fred Nicely
SofTec – Mark Nebergall
Sovos – Charles (Chuck) Maniace
TaxCloud – Bruce Johnson

B. Stakeholder perspectives

This subsection presents a general summary of the stakeholder perspectives without specific attribution. Some stakeholder perspectives are noted elsewhere in the paper and identified as such.

i. General observations

Many stakeholders explained that confusion exists when working with bundling issues across the states, regardless if the transaction includes digital products. The confusion frequently concerns how to identify a bundle versus how to identify a single product with multiple attributes and how to identify when a situation most accurately calls for application of the true object test.

Some stakeholders, but not all, say bundling with digital products is more difficult than with other products. That said, businesses like bundles and they are here to stay. Bundles create perceived value to purchasers when they receive a group of items for one price. Bundles may be necessary in certain industries to stay competitive, such as the telecommunications industry that sells cable TV, internet

access, and phone service for one price. Marketing staff, who are typically not responsible for taxability determinations, may want to sell a bundled product for a single price, without tax added, to offer a better overall cost than what their competitors offer.

Digital apps frequently have various components or attributes which create confusion as to whether the item sold is a bundled product or not. More than one stakeholder noted that all digital services have some component of software, and since software in many states is considered tangible personal property, that causes tax administrators to look closely at the product. It was also noted that any digital attribute can be removed from a digital product, so digital products are not like tangible products.

Stakeholders mentioned the Internet Tax Freedom Act (ITFA)⁶¹ definitions and the implications of the ITFA accounting rule. Some stakeholders left an impression that taxpayers and states are not generally as aware of the ITFA accounting rule as tax practitioners are.

Software maintenance services come up frequently in bundles.

Streaming products can create disputes between taxpayers and tax agencies and the need for additional information. Tax agency staff often ask about the percentages associated with different parts of a streaming product or may request the percentage of downloads versus streamed views to determine taxability. Some stakeholders said the ability to download an otherwise streaming digital product should not be considered downloaded software, which can be a taxable item in states, because in their view the true object is the streaming.

ii. Coding compliance software

Stakeholders were aligned that coding bundled products with the correct taxability determination is very challenging for taxpayers who customize their sales tax compliance systems and for sales tax compliance software vendors who work with sellers. One taxpayer stated that it had been working for years with its third-party software provider to customize its platform to address the bundled products it sells, and further stated that representatives for that platform told the seller the platform had been working for years and was still not able to offer any standardized product and taxability codes for bundled products because of the complexity and lack of uniformity across the states.

iii. Case-by-case determinations

Stakeholders reported negotiating with states to allow sellers and tax agencies to determine what taxability determination controls in specific situations. They also reported requesting letter rulings to address the taxability of bundled products when state guidance is not otherwise clear. Sometimes long-term negotiations with states (as in years) have occurred with taxpayers or their representatives providing extensive information to allow the tax agency to make a determination relating to whether a product is a bundle or not.

⁶¹ Details on the relevant ITFA language are presented in section X of this white paper.

iv. Invoices vs. contracts

Stakeholders noted that when analyzing facts relating to a bundled transaction, or to make a determination whether the item sold is a bundle, details may exist in a contract about what is being purchased and how the product works to help auditors and tax agency staff. A lack of such detail may result in the unwillingness of tax agency staff to allow unbundling through an accounting rule.

8. Federal law considerations

Two federal laws, the Internet Tax Freedom Act and Mobile Telecommunications Sourcing Act, contain language addressing bundling issues that taxpayers, tax administrators, and policy makers must keep in mind. Below we present the relevant language from each law, with links to the full language. State tax laws or other guidance may also reflect these provisions.

Additionally, the Digital Goods and Services Tax Fairness Act, which was last introduced in 2019, contains language relating to bundling that we also include for consideration, as it represents the thoughts of the sponsors and proponents at that time.

A. Internet Tax Freedom Act⁶² (ITFA)

The relevant language relating to bundled telecommunications products is included below. The ITFA also includes definitions and other provisions that should be consulted to fully understand to what items the law applies.

SEC. 1106. ACCOUNTING RULE.

(a) In General.-If charges for Internet access are aggregated with and not separately stated from charges for telecommunications or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.”

(b) Definitions.-In this section:

(1) Charges for internet access.-The term 'charges for Internet access' means all charges for Internet access as defined in section 1105(5).

(2) Charges for telecommunications.-The term 'charges for telecommunications' means all charges for telecommunications, except to the extent such telecommunications are purchased, used, or sold by a provider of Internet access to provide Internet access or to otherwise enable users to access content, information or other services offered over the Internet.

⁶² 47 U.S.C. § 151 note. Link [here](#).

B. Mobile Telecommunications Sourcing Act⁶³ (MTSA)

The relevant language relating to bundled telecommunications products is below. The MTSA also includes definitions and other provisions that should be consulted to fully understand to what services the law applies.

§ 123. Scope; special rules

....

(b) **ADDITIONAL TAXABLE CHARGES.**—If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

(c) **NONTAXABLE CHARGES.**—If a taxing jurisdiction does not subject charges for mobile telecommunications services to taxation, a customer may not rely upon the nontaxability of charges for mobile telecommunications services unless the customer’s home service provider separately states the charges for nontaxable mobile telecommunications services from taxable charges or the home service provider elects, after receiving a written request from the customer in the form required by the provider, to provide verifiable data based upon the home service provider’s books and records that are kept in the regular course of business that reasonably identifies the nontaxable charges.

C. Digital Goods and Services Tax Fairness Act⁶⁴

The relevant language of this bill that did not become law is below. The bundling language essentially follows the same approach as the ITFA and MTSA by (1) providing that any bundle of taxable and nontaxable items sold for one price is subject to tax, and (2) allowing a seller to unbundle the taxable and nontaxable amounts based on their books and records.

SEC. 5. TREATMENT OF BUNDLED TRANSACTIONS, DIGITAL CODES, AND OTHER RULES.

(a) **BUNDLED TRANSACTION.**—If a charge for a distinct and identifiable covered electronic good or service is aggregated with and not separately stated from one or more charges for other distinct and identifiable goods or services, which may include other covered electronic goods or services, and any part of the aggregation is subject to taxation, then the entire aggregation may be subject to taxation, except to the extent that the seller can identify, by reasonable and verifiable

⁶³ Pub. L. No. 106-252, 114 Stat. 630 (2000) (codified at 4 U.S.C. § 123). Link [here](#).

⁶⁴ Digital Goods and Services Tax Fairness Act of 2019, S. 765, 116th Cong. (2019). Link [here](#).

standards, one or more charges for the nontaxable goods or services from its books and records kept in the ordinary course of business.

9. Examples of digital products in the marketplace and bundling issues.

In this subsection we identify examples of bundles based on staff research, stakeholder discussions, and work group state representatives.

A. Staff Research Examples

The following examples were drawn from staff discussions and staff research. A pure TPP example is a food platter from the grocery store. The product contains exempt food and a taxable cutting board and small knife.

In Rhode Island, the Department of Revenue considered a subscription giving customers unconditional access to a variety of products, including expedited shipping, streaming video, electronic books, streaming music, photo storage, and access to video games. The Department determined the subscription was a bundle because it bundled goods, services, and other benefits that were distinct and identifiable together for one non-itemized price.⁶⁵

In Iowa, the Department of Revenue considered a product offering remote storage services and a virtual computing environment that allowed customers to run applications. Part of the cost was “data transfer fees,” based on usage, that were only charged in connection with other services. The taxpayer itemized the data transfer fees separately. The Department determined the charges for data transfer fees were not for the sale of a separate item. The Department stated the fees were “included in the sales price.”⁶⁶

In Georgia, the Department of Revenue considered a product where the taxpayer “develops and sells consumer electronics, computer software, online services, and related support” and some third-party digital content and applications.⁶⁷ The taxpayer offered “preselected packages” as well as “custom packages.” Custom packages allowed purchasers to choose what was included in the package and the taxpayer offered discounts to encourage its customers to buy custom packages. The taxpayer stated there would be no individual prices shown to the customer.

The Department ruled the preselected packages were bundles while the custom packages were not bundles. The custom packages were not bundles only because the sales price varied based on the purchaser’s choices.⁶⁸

⁶⁵ Rhode Island Dec. Rul. Req. No. 23017-01 (March 31, 2017).

⁶⁶ Iowa Declaratory Order 2018-300-2-0508 (Feb. 5, 2019).

⁶⁷ Georgia Letter Ruling 2019-10 (Nov. 2019).

⁶⁸ Georgia Letter Ruling 2019-10 (Nov. 2019).

B. Stakeholder Examples

1. Digital codes entitle the buyer to digital products, services, and tangible personal property, or some combination. An example is a digital code that entitles the purchaser to a streaming movie and a bag of chips.
2. Free items may be given away with a digital product that is sold. An example is a streaming concert video and t-shirt.
3. Exercise equipment sold with streaming video services.
4. Software maintenance comes up frequently in bundles.
5. Concerning streaming services, stakeholders reported that often states ask about percentages of different parts of the service, such as the percentage of downloads versus streamed views to determine taxability. Some stakeholders say the ability to download an otherwise streaming digital product should not be considered downloaded software; the true object is the streaming.

C. Work Group Member Examples

1. Assume a state does not tax software as a service (SaaS) but does tax software as TPP. If a seller of SaaS subscriptions includes an app (software) that allows the purchaser to more easily access the SaaS platform, is the transaction taxable?
2. Charges for personal services (e.g., training or consulting) or a membership to a trade or professional organization that include access to a digital library of forms, templates, articles, and/or training videos.
3. Vendor's non-itemized offering includes the following:
 - A. The right to use an online portal to access the vendor's proprietary digital research library,
 - B. The right to receive personal consulting from professional analysts, and
 - C. The right to view prerecorded online presentations, meetings, or workshops.
4. Vendor's non-itemized offering includes the following:
 - A. The right to access a Communications as a Service platform, which includes access to use VOIP, SMS/MMS texting through IP protocol, instant messaging and audio/video conferencing tools;
 - B. The ability to store and manage data (storage and management of communication data); and
 - C. The ability to integrate (e.g., through an Application Programmable Interface) the software platform with other 3rd party software.
5. Vendor's non-itemized offering includes following:
 - A. Lease of a live-stream camera with unlimited 4G LTE Data;

- B. A web-based platform to access the live video streaming of a location (e.g., construction site);
- C. The ability to control the camera through customer's computers or electronic devices;
- D. Unlimited storage of videos;
- E. Access to weather data; and
- F. Allows the customer to create time-lapsing videos/photos.

6. Vendor's non-itemized offering is the sale of a Non-Fungible Token that provides the owner with the following:

- A. Free admission to a set number of music concerts annually – (sourced to respective state);
- B. Access to in-person educational events;
- C. Lifetime subscription to video streaming service;
- D. Lifetime subscription to downloadable software; and
- E. Lifetime subscription to music streaming service.

7. Vendor's non-itemized offering is the sale of remote access software, providing users with the following:

- A. The right to exclusively use the software product remotely;
- B. Users can download an application (e.g., mobile, desktop, tablet) that provides access to the vendor's remote access software. The downloaded application does not include any offline functionality for the user; and
- C. The ability to create 3D renderings of a building or structure that can be downloaded or shared via email.

8. Vendor's non-itemized offering is the sale of remote access software, providing users with the following:

- A. The right to use the software product remotely;
- B. Users can download an application (e.g., mobile, desktop, tablet) that provides access to the vendor's remote access software. The downloaded application includes various offline functionalities when not connected to the vendor's platform, such as:
 - i. The ability for the user to take pictures within the application installed on their device;
 - ii. Data storage within the user's device; and
 - iii. Geolocation tracking features, such as:
 - a. Location history logging
 - b. The ability to tag the location where photos are taken or data is collected; and
- C. The ability to create 3D renderings of a building or structure that can be downloaded or shared via email.

9. College Application Platform — Ready for School

The Taxpayer provides an online application platform (Ready for School), which is a SaaS platform. Ready for School is a SaaS platform used by schools for two purposes. The first, Best Document Admin (BDA) is for prospective students to send in their application materials and pay deposits. The second, Easy Document Review (EDR) is for the educational institution to review the applications. Each of these functions is a separate SaaS platform used by the school and each is sold for one nonitemized price.

The Taxpayer summarizes the BDA SaaS platform as comprising four distinct components: (1) Document Processing (for applicants' applications), (2) Data Hosting (for applicants' information), (3) Payment Processing (for applicants to pay), and (4) Administrative Tools (for school to view, search, and retrieve applicants' data), which are sold together for one nonitemized price. The Taxpayer asserts that because of the components' separate functionality, the BDA is not a single product. The Taxpayer argues the component parts are distinct and identifiable products. The Taxpayer argues that the BDA SaaS platform is a bundle because it has four features: document processing, data hosting, payment processing, and administrative tools. The Taxpayer claims that each of the four features is an individual product. Additionally, the Taxpayer argues that the first three components listed above qualify for specific exclusions from tax. The Taxpayer argues the administrative tools, while arguably taxable, have a cost relative to the entire package that is de minimis. Alternatively, the Taxpayer argues the true object of the administrative tools, that consists taxable products such as electronic search functionality and data processing, is exempt data processing. Or, alternatively, the administrative tools are a bundle and the taxable products are de minimis.

The second SaaS platform used by schools is the Easy Document Review platform (EDR), which manages the entire application review process online. This platform can be purchased separately from BDA. EDR collects all reviewers' scores and comments into a single location. Applications are routed to the appropriate department. Built-in search tools make it easy for evaluators to retrieve and compare applications. EDR is customized for each educational institution based on their unique needs. EDR fully integrates several other Ready for School SaaS platforms, including those for potential students to upload letters of recommendation, verify credentials, and solicit prospective students to apply. Customers would pay for each additional platform separately. All data shared between the platforms is automatic. The EDR platform is also sold for one nonitemized price. The Taxpayer argues that EDR is single product, remote access prewritten software exempt as customization of prewritten software.

Whether someone is an employee of the university or a prospective student, they log onto the same Ready for School SaaS platform and have access to all the different platforms — BDA, EDR, or any additional platforms into which the customer has opted into. When Ready for School bills their customers, they itemize their invoices with a price for each individual platform that is integrated into the Ready for School SaaS platform.

10. Online Banking Platform — GreenThumb

GreenThumb is an online banking platform built by the Taxpayer that allows member of financial entities (FT) to provide a variety of features to their customers including: paying bills, accessing electronic account statements, making balance transfers, accessing credit card accounts, checking their available credit, reviewing account data, ordering statements for the preceding year, requesting replacement cards and PIN numbers, updating account contact information, requesting a current credit score, initiating inquiries about payments and transactions, and reporting a lost or stolen card. To provide all these services, the Taxpayer retrieves data from a variety of databases. The Taxpayer maintains a website that hosts and manages the data pulls for each of the FT's selected options. Each individual FT selects its own preferences and options available for their customers separately.

The Taxpayer provides representative monthly billing statements to the FTs that include: a fee per unique user, a custom programming fee, a monthly maintenance fee, and separate charges for cardholder statement requests, and reporting lost/stolen cards. The Taxpayer argues that the GreenThumb platform, is a single product, that qualifies for an exclusion from tax for payment processing service. The Department has determined that some of the features, if sold alone, would be taxable digital services.

The Taxpayer charges the individual TF's one nonitemized, but scalable, priced based on the number of users of the service. The Taxpayer bills for access to GreenThumb, which is an online banking platform. The membership fee per user for GreenThumb includes all the services that comprise the program, such as paying bills, accessing electronic account statements, and making balance transfers. Additionally, the Taxpayer charges separately for services related to GreenThumb, such as custom programming fee, a monthly maintenance fee, and separate charges for cardholder statement requests, and reporting lost/stolen cards.

10. Approaches to addressing bundling issues

In researching bundling and gathering information from stakeholders, we identified several current or potential approaches to bundling. These approaches might be considered by states for use in the digital products context.

A. Tainting rule

Definition: Any taxable component in a bundle, typically two or more products sold for a single price, means the whole bundle is taxable.

- i. Pros: Easy for sellers to apply and explain to purchasers; less audit risk.
- ii. Cons:
 - Purchasers may push back and not want to pay tax on the full amount.

- Many negatively impact businesses or industries that state want preferences, e.g., agriculture or health care services

iii. Stakeholders comments: Some like it and others do not like it. It seems to depend on the nature of a taxpayer's business model and industry.

B. De minimis rule

A de minimis rule might be viewed as an exception to the tainting rule, since a tainting rule will mean that tax is applied to the total sales price because at least one item sold in the bundle is taxable. As noted above, if a tainting rule is universally applied, it may have negative impacts or create results that may seem unfair or contrary to legislative state policy prerogatives.

Imagine, for example, a nontaxable car wash service where the tires are treated with Armor All®. The Armor All® is not washed off, it goes down the road with the car. Under these facts, taxable TPP – the Armor All® - was transferred with the service, making the entire charge taxable. Whereas a competing carwash that does not treat tires with Armor All® will have no obligation to collect tax on the sale. Applying a de minimis rule can help to ameliorate some of these impacts by, for example, allowing for a determination that the cost of the Armor All® compared to all the other costs that the seller incurs to provide the car wash service, such as the water, soap, and labor, is de minimis and not enough to make the otherwise nontaxable service taxable.

However, applying a de minimis rule can be measured in different ways, by relative costs of the taxable and nontaxable portions (as in the above example), by cost of the taxable portions relative to the total purchase price, by an incidental standard, or other some other objective or subjective criteria. A de minimis rule can promote reasonable outcomes that states and taxpayers can agree to. The weakness is that it is hard to define exactly what qualifies as de minimis.

In addition, here are questions that arise when thinking about using a de minimis rule:

- i. Can taxability be determined based on verifiable cost information of the bundled products?
- ii. What costs control – input or output costs? May be harder to determine in the digital realm when there are fewer comparison products available.
- iii. What should the threshold be? Is 5-10% too low to make a difference? Is 20% better to allow taxpayers and tax administrators to feel more comfortable about the outcome?
- iv. What is the philosophy behind any de minimis rule? Does the use of a de minimis rule make it difficult for a bundle to escape taxation once something taxable is included in the bundle? Does a de minimis rule create fairness? If so, should it be high enough that when the de minimis amount is exceeded it won't seem unreasonable to tax the entire cost of the bundle?

i. Pros:

ii: Cons:

iii. Stakeholders comments: Some like it and others don't. It seems to depend on the nature of a taxpayer's business model and industry.

C. Streamlined Agreement and related rules

i. Pros:

ii: Cons:

iii. Stakeholder comments: Some say Streamlined has the best approach to bundling and covers digital products, so states should look no further and not create any other options for bundling rules. Others say the Streamlined approach is good but could use an update for digital products since they were not considered when the rules were developed. Still others say Streamlined does not cover digital products because digital components are not distinct and identifiable (a condition under SST to be a bundle). Some say the "distinct product" concept from Streamlined is hard to distill with digital products; therefore, the Streamlined approach is unhelpful. Finally, even with any shortcomings, stakeholders indicated that Streamlined states are easier to navigate on bundling issues than non-Streamlined states.

D. Accounting rule (aka the unbundling rule)

Sellers can charge a single price for a bundled product and only collect tax on the taxable parts based on a reasonable position consistently taken and documented in books and records.

i. Pros: The preferred approach of the telecom industry; also memorialized in ITFA and MTSA federal laws. May work well for businesses that want to market a single price for a product it thinks is important for market share.

ii. Cons: May have more audit risk. Not easy for third party compliance vendors to program in their systems. Definition of "bundle" is critical.

iii. Stakeholder comments: Telecommunication companies prefer the accounting rule, which helps address their sale for one price of phone, internet, and cable service for one price. The rule is part of the Internet Tax Freedom Act and Mobile Telecommunications Sourcing Act. (See more detailed information in subsection x of this white paper). It is also part of many state laws.⁶⁹ Stakeholders reported with respect to the telecommunications industry it creates no disputes in audits across the

⁶⁹ For example, Tex. Tax Code Ann. § 151.025(d) states: "If any nontaxable charges are combined with and not separately stated from taxable telecommunications service charges on the customer bill or invoice of a provider of telecommunications services, the combined charge is subject to tax unless the provider can identify the portion of the charges that are nontaxable through the provider's books and records kept in the regular course of business. If the nontaxable charges cannot reasonably be identified, the charges from the sale of both nontaxable services and taxable telecommunications services are attributable to taxable telecommunications services. The provider of telecommunications services has the burden of proving nontaxable charges."

states. Stakeholders further explained that the accounting rule can be helpful for staying in compliance with non-tax regulations.

However, stakeholders also mentioned that the accounting rule is less transparent for purchasers who have a harder time understanding how tax is calculated and creates more audit risk for sellers if they do not get the accounting right. Some say everyone should be able to use the accounting rule if it fits their business needs.

E. Hierarchy/Decision Tree

One stakeholder suggested creating a new approach based on a hierarchy that helps taxpayers and tax administrators think through various factors and fact patterns, with perhaps the ultimate default in the hierarchy/decision tree concluding the bundle is taxable. No specific example of what that might look like was provided, so many options are possible. It could resemble a list of options, as presented in this white paper, to approach bundling issues given that different fact patterns might lend themselves to better approaches than others. Or, a state could identify what approaches to bundling they would consider or not.

F. True object

This is a common test that has been around for a long time. Still, questions arise such as: Whose perspective controls the true object analysis? The seller's or purchaser's? Some stakeholders suggested states consider using a "reasonably prudent buyer" perspective to help everyone at least start the analysis from the same perspective. Also, what objective considerations play a role in the analysis, if any?

Stakeholder comments: Some say use the true object instead of a tainting rule because it is more accurate. Others say the true object test is too subjective and a more objective test, based for example on comparable cost data across similar industries, is more accurate. Several noted that when working with the true object test, disputes with tax agency staff can arise over whether the seller or purchaser perspective controls. Some suggested greater clarity could be achieved by using a "reasonably prudent buyer" standard for determining the true object of a bundled transaction.

i. Pros:

ii. Cons:

iii. Stakeholder comments:

G. Industry-specific

i. Already present in the Streamlined approach

ii. Telecom industry in all states benefits from the accounting rules in ITFA and MTSA

Beyond the provisions of the Streamlined agreement relating to specific industry treatment of bundled products, only the telecommunications industry was mentioned by stakeholders or others as having the accounting rule as the norm across the country and based on both the Internet Tax Freedom Act and the Mobile Telecommunications Sourcing Act. See also subsection (X) of this white paper.

i. Pros:

ii. Cons:

iii. Stakeholder comments:

H. Apply a taxability percentage

Streamlined section 330 concerns “Bundled Transactions.” Subsection 330.D.3. could be used as a model to develop an approach that would provide in certain circumstances that 50% of the transaction will be deemed taxable. This could be phrased as a rebuttable or an irrebuttable presumption. One stakeholder suggested an example of a subscription service that allows the subscriber to select products from a menu that include both digital and non-digital products. Payments would typically be made in advance and neither the customer nor the seller would know what allocation may be appropriate at the time of billing. Ease of administration might suggest a single taxable percentage for the monthly charge, regardless of the actual usage in any month.

For background, Streamlined section 330 provides in relevant part as follows:

D. 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:

....

2. If an optional computer software maintenance contract only obligates the vendor to provide support services, it will be characterized as a sale of services and a state may use any of the methods provided under subsection (D)(3) to determine the taxable and nontaxable or exempt portions.

3. 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, then states shall elect one of the following tax treatments:

....

d. The contract shall be characterized as twenty, thirty, forty or fifty percent taxable or eighty, seventy, sixty and fifty percent nontaxable or exempt respectively, as selected by each member state.

4. With respect to states that elect the method described in subparagraph 3(b):

a. Such states may prescribe the use of such reasonable methods as it deems appropriate, and

b. The method selected by the seller shall be binding on the purchaser.

The accompanying rule to Streamlined Agreement section 330.3 (Allocations with respect to Prewritten Computer Software Maintenance Contracts) provides: “Each state may elect one uniform percentage within the range allowed under Section 330 (D)(3)(d) for allocating between taxable and nontaxable or exempt products.”

I. Deciding between the various approaches

i. Questions states will have to answer to determine their approach

ii. Balancing the pros and cons of each approach

iii. Supporting provisions for each approach

11. Lessons learned / findings and conclusions

As stated in the introduction, the primary question this section of the digital products white paper addresses is:

Does the presence of digital products in a sales and use tax base present unique issues with respect to bundling compared to sales and use tax bases that are based on tangible personal property and services?

The work group presents findings and conclusions to highlight the questions policy makers should consider in creating a coherent policy framework for bundling in the digital space. We also identify approaches to bundling that states tried but were deemed to not work so that others can avoid the same mistakes or consider carefully those approaches before proceeding.

A. Definitions

What is a bundle versus what is a single digital product composed of a group of digital attributes? In the digital realm, digital components can be easily stripped out or added, which can lead to disputes and long discussions with tax agency staff who may be skeptical about the nature of the product and how it works.

B. Tax software compliance coding

Bundling issues can make coding compliance systems much harder. From discussions with stakeholders, the technology is not the problem; the problem is the complexity of products and the multitude of states' approaches. A percentage rule can make things easier provided that the percentages of the various parts of the bundle can be determined.

C. Possible New Framework

Based on our research, the Streamlined Agreement provides the most comprehensive existing framework for addressing bundling issues. What follows is a proposal that incorporates elements from other state approaches. This framework could provide policymakers, tax administrators, and taxpayers with a relatively comprehensive and tested framework to address bundling issues, including when digital products are part of a bundle. However, this framework was not created with digital products in mind and further refinement of this framework.

In summary, the framework first applies an objective test to determine if there is a bundled transaction, then it identifies both subjective and objective "exclusion" tests to determine if the transaction should not be deemed a bundled transaction. Finally, the framework gives the states authority to decide how bundled and exclusion transactions are taxed.

Step 1: Is this a bundled transaction?

A bundled transaction requires two or more "distinct and identifiable" products sold for one non-itemized price and excludes any transaction when the sales price varies or is negotiable.

Note: When determining if the transaction is a bundled transaction, the following items are not distinct and identifiable products:

1. Elements of sales price, e.g., material and labor costs
2. Packaging
3. Items offered for free

Potential issue with digital products: With tangible personal property, it is generally accepted that a buyer may purchase a finished product that is comprised of multiple components, which together comprise a single integrated finished product that cannot be further subdivided and treated as a stand-alone product. For example, the purchase of a customized wooden chair is comprised of a seat, arms, and legs that collectively consist of wood and metal in the form of screws and bolts and that are the product of labor and design services. There is less consensus as to what a single

integrated finished product is with respect to digital products. The framework may need refinements in this regard. See examples in this report.

Other issues?

Note about “one non-itemized price”:

“One non-itemized price” does not include a price that is separately identified by product on a binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list. If products are itemized, then each product is taxable according to its proper tax classification.

Potential Issues????

Note about “excluding any sale for which the sales price varies or is negotiable”:

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.

Step 2: Identify applicable exclusions

Exclusion transactions are transactions that would qualify as bundled transactions but are deemed excluded to allow policymakers the flexibility to apply different taxability rules.

Several exclusion transactions are:

1. The true object of the transaction is not taxable.
2. The taxable product is de minimis
3. The transaction contains specified industry products and the taxable products are X% or less of the purchase price.

Potential issue????

Step 3: Specify tax treatment of bundled transactions and exception transactions; apply applicable post-transaction unbundling rules

1. Apply the accounting rule due to federal or other applicable state law, such as the rules that apply to the telecommunications industry through the federal Mobile Telecommunications Sourcing Act and the Internet Tax Freedom Act.

12. Appendices

[TBD if needed]

DRAFT