

*STATE OF WISCONSIN*  
*REPORT OF THE JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS*

*2003 SENATE BILL 267*

[Introduced by Senators Brown, Jauch, Roessler, Erpenbach, Chvala and Schultz, cosponsored by Representatives M. Lehman, W. Wood, Jeskewitz, Musser, Ainsworth, Olsen, Miller, Van Roy, Bies, J. Lehman, Kaufert, Gielow, Richards, Montgomery, Pettis, Hahn, Krawczyk, Ziegelbauer, McCormick and Schooff.]

**General Nature of Proposal**

Senate Bill 267 makes changes to the state sales and use tax statutes to assist the state in conforming to the terms in the multi-state Streamlined Sales and Use Tax Agreement. The agreement is intended to simplify and modernize sales and use tax administration for states that enter into the agreement and to encourage out-of-state retailers to collect and remit sales and use taxes voluntarily. Under current law and constitutional principles, Wisconsin may not compel an out-of-state retailer who sells goods or services to customers in this state to collect sales or use tax imposed on such sales if the retailer has no physical presence in the state.

States that wish to enter into the agreement must adopt uniform definitions related to the administration of sales and use taxes. Although a state retains the ability to determine the taxability of various goods and services, it must do so using the uniform definitions. Among other things, the bill adopts these various uniform definitions. Mostly because of the use of these uniform definitions, various items will have their taxable nature changed. Some items that are currently exempt from tax will become taxable and some items that are currently taxable will become exempt by the adoption of these definitions. Accordingly, it is these changes that affect tax exemptions that necessitates review by the Joint Survey Committee on Tax Exemptions.

The definition modifications and their consequent fiscal impacts are described in the "Fiscal Effect" portion of this report.

**Legality Involved**

There are no questions of legality involved.

**Fiscal Effect Upon the State and Its Subdivisions**

The Department of Revenue has described the fiscal effect of the tax exemptions contained in the bill, as follows:

**Current Law**

Under current law, a 5% sales tax is imposed on sales of tangible personal property and selected services. A compensating 5% use tax is imposed on purchases of tangible personal property and services that would be subject

to sales tax if sold in Wisconsin. In addition, using the same tax base as the state sales and use tax, a 0.5% sales and use tax is imposed in 57 counties, a 0.1% baseball park tax is imposed in 5 counties, and a 0.5% football stadium tax is imposed in Brown County.

### **Overview**

The bill adopts the provisions of the Streamlined Sales and Use Tax Agreement (the Agreement), a multistate agreement designed to simplify state and local sales and use tax systems and encourage out-of-state retailers to voluntarily register to collect sales and use tax. The Agreement requires states to adopt uniform definitions and uniform administrative procedures. Adoption of uniform definitions and administrative procedures by the Streamlined states is expected to reduce the businesses' costs of compliance with the tax laws of the states in which they operate. The bill would take effect July 1, 2004 (FY05).

In general, the fiscal estimate of the bill was developed based on nationwide sales of each affected product and the assumption that Wisconsin sales of the product are 1.83% of nationwide sales, the same percentage as Wisconsin's share of US disposable personal income in 2002. In general, Global Insight, Inc.'s forecasts of future economic activity were applied to adjust the estimates to FY05. The estimates also assume a compliance rate of 90%. Additional factors and assumptions regarding each estimate are noted as appropriate. . . .

### **Fiscal Effects of General Provisions**

1. In anticipation of the Agreement, several national retailers voluntarily began collecting and remitting sales taxes to a number of states, including Wisconsin, in February 2003. Since these retailers sell a wide variety of products, taxes on their sales are assumed to increase at the same rates as sales taxes projected for 2003-2005 biennial budget purposes. Under this assumption, these retailers would remit about \$2.02 million in state sales taxes and about \$0.15 million in county and stadium district sales taxes in FY05.
2. The bill amends the sales tax statutes to define and incorporate certain general tax terms, including "sales price", "purchase price", "lease or rental", "delivery charge", "purchaser", "seller", "retail sale", "tangible personal property", and "taxpayer".
  - a. Under current law, "gross receipts" refers to the measure of the sales tax and "sales price" refers to the measure of the use tax. Under the bill, "sales price" would refer to the measure of the sales tax and "purchase price" would refer to the measure of the use tax. These definitions would

make Wisconsin's terminology consistent with the agreement and may result in the following minor increase in sales taxes.

b. Under current law, if a purchaser certifies to a seller that a purchase of otherwise taxable property is exempt from sales tax but subsequently converts the property to a taxable use, the purchaser is liable for the sales tax on the property. For example, a manufacturer may purchase a forklift for use in manufacturing (an exempt use) but later use the forklift for shipping (a taxable use). If the conversion to a taxable use occurs more than 6 months after the purchase, the purchaser has the option of using either the sales price or the fair market value in computing the tax due. Under the bill, purchasers would be required to use the sales price of the property to compute the tax liability. To the extent the fair market value of converted property is less than the sales price and assuming purchasers use the lower value to calculate their tax liability, sales taxes would increase by the amount of tax on the difference between the sales price and the fair market value. Data are not available to reliably estimate the fiscal effect of this provision but it is likely to be minimal.

c. Under current law, the term "lease" is defined to include license; hence, licensing tangible personal property is a taxable use of such property. The bill specifies that licensing tangible personal property is subject to sales and use taxes, along with selling, leasing, and renting such property. This provision makes Wisconsin's terminology consistent with the agreement and does not have a fiscal effect.

d. Under current law, equipment leased with an operator is a lease of tangible personal property or a service depending on whether the lessor or the lessee controls the operator. In general, leasing companies' purchases of equipment are exempt purchases for resale while charges for the use of leased equipment generally are taxable. Also under current law, the entire charge for equipment leased with an operator is a taxable service if the service is performed on personal property (if the service is performed on real property, the entire charge is exempt). Under the bill, equipment leased with an operator will always be a service. Purchases of equipment would be taxable but the charges for the service may or may not be taxable depending on the type of service performed. The revenue increase from taxing purchases of equipment that is leased with an operator and charges for taxable services is expected to largely offset the revenue decrease from exempting the charges for equipment leased with an operator such that the net fiscal effect is minor.

3. Under current law, sales are sourced for sales tax purposes to the destination at which the product is received or the service first used. The bill provides a hierarchy of rules for sourcing sales of tangible personal property and services to locations for tax purposes. In general, sales are sourced to the location at which the purchaser receives a product or

service. Since the state already sources to destination, the provision does not have a fiscal effect on state sales taxes. However, counties and stadium districts may experience minor fiscal effects; local fiscal effects are discussed in the section on County, Stadium, and Exposition District Fiscal Effects.

### **Food-Related Fiscal Effects**

Under current law, sales of food for off-premises consumption are generally exempt from sales tax while sales of food for on-premises consumption are taxable. However, sales for off-premises consumption of meals and sandwiches, heated foods and beverages, candy, confections and popcorn are taxable. Food does not include alcoholic beverages, soft drinks, vitamins or medicines - sales of these products are taxable sales of tangible personal property. The statutes and administrative code provide extensive clarification, including examples, of both taxable and exempt foods.

1. Under current law, sales of candy are taxable and would remain so under the bill. Under the bill, "candy" is defined as a preparation of sugar, honey or other sweeteners combined with chocolate, fruit or other ingredients in the form of bars, drops, or pieces. The bill also provides that "candy" does not include a preparation that contains flour or that requires refrigeration; these distinctions provide sellers with a bright-line test to determine whether a product is an exempt food or a taxable candy. Under the bill, the taxability of the [ ] following products would change:

a. Candy that contains flour, such as Kit Kat bars, would be exempt "food" under the bill. Based on 1997 Economic Census data on grocery, convenience and specialty store sales of candy and assuming that 10% of candy contains flour, sales taxes would decrease by about \$0.64 million in FY05 under the bill.

b. Under current law, frozen novelties (separately packaged, single servings of a frozen dessert such as popsicles) are subject to sales tax. Since frozen novelties require refrigeration, they would be exempt "food" under the bill. According to the International Dairy Foods Association, US sales of frozen novelties were about \$2.1 billion in 2001. Assuming Wisconsin sales are the same percentage as the state's share of personal income, sales taxes would decrease by about \$2.20 million in FY05 under the bill.

c. Under current law, chocolate chips, baking chocolate and marshmallows are exempt food. Since they contain chocolate and sweeteners, these products would be taxable "candy" under the bill. According to Marketresearch.com, chocolate chips and baking chocolate are about 8% of nationwide total chocolate sales, estimated to increase to

about \$17.48 billion in 2005. Assuming these sales are distributed in the same proportion as personal income, sales taxes would increase by about \$1.12 million in FY05 under the bill. Data regarding marshmallow sales are not available, however, the increase in sales taxes due to taxing sales of marshmallows is expected to be minor.

d. Under current law, sales of packaged ice are taxable sales of tangible personal property. Under the bill, sales of ice cubes would be exempt sales of "food" while sales of ice for commercial or industrial purposes generally would remain taxable. According to the International Packaged Ice Association, total US sales of ice were about \$2 - 2.5 billion in 2002. Assuming 50% of sales would be taxable commercial or industrial ice and 50% would be sales of exempt food, and that the sales were distributed in the same proportion as personal income, sales taxes would decrease by about \$1.01 million in FY05.

2. Under current law, sales of popcorn are taxable, Under the bill, sales of popcorn for home consumption would be exempt sales of "food." Based on data from the US Popcorn Board and the Snack Food Association, sales of popcorn for home consumption are estimated at about \$1,273 million in 2001. Assuming these sales are distributed in the same proportion as personal income, sales taxes would decrease by about \$1.25 million in FY05.

3. Under current law, sales of fruit drinks containing less than 100% juice are taxable. The bill defines "soft drink" and provides that a soft drink does not include a beverage that contains more than 50% vegetable or fruit juice. Thus, under the bill, beverages containing more than 50% but less than 100% juice would be exempt. According to [beverageworld.com](http://beverageworld.com), total receipts from sales of juice drinks were \$7.4 billion in 2001. Assuming 20% of sales of juice drinks contain more than 50% but less than 100% juice, and that sales of such drinks are distributed in the same proportion as personal income, sales taxes would decrease by about \$1.31 million in FY05.

4. Under current law, sales of powdered soft or fruit drink mixes are taxable. Under the bill, sales of powdered soft or fruit drink mixes would be exempt sales of "food". According to the trade publication "Beverage Industry", total receipts from sales of powdered drink mixes were \$625 million in 2001. Assuming these sales are distributed in the same proportion as personal income, sales taxes would decrease by about \$0.52 million in FY05.

5. Under current law, sales of non-alcoholic beer are taxable. Under the bill, sales of non-alcoholic beer would be exempt sales of "food". According to the trade publication "Supermarket News", total receipts from sales of non-alcoholic beer were \$514 million in 1998. According to

industry reports, non-alcoholic beer sales have been flat for several years and are assumed to remain so. Assuming sales are distributed in the same proportion as personal income, sales taxes would decrease by about \$0.42 million in FY05.

6. Under current law, sales of tea are exempt. Under the bill, sales of ready-to-drink (RTD) tea (e.g., Arizona, SoBe) would be taxable sales of "soft drinks" since they are sweetened. According to the trade publication "Beverage Digest", total receipts from sales of RTD teas were \$3.310 billion in 2001. Total receipts are reduced by 33% to adjust for sales whose tax status would not change under the bill, such as taxable restaurant sales and exempt sales of unsweetened herbal teas. Assuming sales are distributed in the same proportion as personal income, sales taxes would increase by about \$2.54 million in FY05.

7. Under current law, sales of carbonated, unsweetened water (e.g., club soda, seltzer) are taxable. Under the bill, sales of carbonated, unsweetened water would be exempt sales of "food". According to the trade publication "Beverage World", total receipts from sales of carbonated, unsweetened water in the Midwest were \$391 million in 1998. According to industry reports, sales of carbonated, unsweetened water have been flat for several years and are assumed to remain so. Assuming sales are distributed in the same proportion as personal income in the Midwest, sales taxes would decrease by about \$0.08 million in FY05.

8. Under current law, sales of meals, sandwiches, and party platters that could be considered meals or sandwiches sold by weight or volume and without cutlery are taxable. Under the bill, sales of products sold by weight or volume and without cutlery would be exempt sales of "food." According to the 1997 Economic Census, meals, unpackaged snacks, sandwiches, and nonalcoholic beverages sold by grocery stores, convenience stores, and specialty food stores totaled \$2.78 billion in 1997. Assuming 10% of such sales would become exempt under the bill, sales taxes would decrease by about \$0.33 million in FY05.

9. Under current law, sales of take-out salad bars that do not offer heated items are exempt. Under the bill, salad bars would be taxable "prepared food" because the retailer would provide utensils such as plates, forks, knives and napkins. Data are not available regarding these sales, however, the provision is expected to result in a minor increase in sales taxes.

10. Under current law, food, soft drinks, soda fountain items, candy popcorn, and disposable products transferred with such items provided by a restaurant to its employees during work hours are exempt. The bill repeals the part of the exemption which applies to food sold by the restaurant. The exemption for food purchased by the restaurant and given to employees remains exempt. Data are not available regarding these

products, however, the provision is expected to result in a minimal increase in sales taxes.

11. Under current law, sales of food, food products or beverages and other goods are exempt if they are packaged together by a person other than the retailer and if more than 50% of the price is attributable to goods that are exempt. Although the bill repeals the exemption, its effect is retained, with one exception, by excluding such sales from the definition of prepared food. The exception would apply when the product is sold directly by the producer to the end user (at retail) and provided with utensils in the package. If the producer's outlet store is a separate entity from the factory, there is no fiscal effect. There are likely to be few sales that would be affected by the bill and, therefore, the increase in sales tax is minor.

12. Under current law, pet food is generally taxable. However, if pet food falls within the definition of medicine, as occurs with pet food sold by veterinarians, the veterinarian pays tax on the purchase of the pet food but does not charge tax to the customer. Under the bill, "drug" excludes food and so the veterinarian would purchase the food without tax for resale and charge the customer sales tax unless an exemption applies. Thus, under the bill, the veterinarian's mark-up would become subject to sales tax. According to Pet Food Industry Online, US pet food sales were about \$12.4 billion in 2002 and, according to the Pet Food Institute, veterinarians sell about 4% of pet food or about \$496 million. Assuming veterinarians mark-up pet food 100%, sales taxes would increase by about \$0.23 million under the bill.

### **Medical-Related Fiscal Effects**

Current law lists prescription medicines and specific medical devices that are exempt from sales and use tax. Exempt sales include individually designed prosthetics, equipment used to administer oxygen for medical purposes, artificial limbs, artificial teeth, hearing aids, prescription eyeglasses, crutches, wheelchairs, prescription antiembolism hose and stockings, and adaptive equipment that enables a handicapped person to enter a motor vehicle.

Under the bill, these products would continue to be exempt, except that prescription antiembolism hose and stockings would become taxable as would equipment used to administer oxygen and diabetes testing equipment that is purchased by a for-profit hospital or clinic. In addition, the bill creates an exemption for durable medical equipment for home use, which retains the exemption for equipment used to administer oxygen and diabetes testing equipment that is purchased by individual.

1. Under the bill, "durable medical equipment" (DME) is defined as equipment for home use that is primarily and customarily used for a medical purpose related to a person, that is not generally useful to a person who is not ill or injured and is not placed in or worn on the body. The US Department of Health and Human Services publishes DME expenditures by state through 1998 and a 10-year forecast of national DME expenditures. The federal definition of DME includes products that are exempt from sales tax under current law and the bill, including prescription eyeglasses and hearing aids, equipment for administering home oxygen, wheelchairs and other mobility enhancement equipment. Also, purchases of DME by Medicare and other federal and Wisconsin governmental agencies and certain nonprofit agencies are exempt from Wisconsin sales tax. Assuming DME expenditures in Wisconsin increase at the same rate as nationally and that Medicare and other agencies pay for 28.3% of DME, and deducting DME that is currently exempt in Wisconsin, and estimated expenditures for DME in Wisconsin in FY05 are estimated at about \$55.8 million. Therefore, the exemption for DME under the bill would decrease sales taxes by about \$2.79 million in FY05.

2. Under current law, sales of antiembolism hose and stockings are exempt from sales and use tax. Under the bill, antiembolism hose and stockings fall within the definition of "clothing" which is taxable under both current law and the bill. The bill repeals the exemption for sales of antiembolism hose and stockings and is expected to result in a minimal increase in sales taxes.

### **Miscellaneous Fiscal Effects**

1. The bill creates clothing-related definitions, including "clothing", "clothing accessories", "sport or recreational equipment", and "protective equipment". Under current law and the bill, clothing would be taxable. In addition to prescription antiembolism hose and stockings, currently exempt cloth diapers would become taxable.

Under current law, sales of cloth diapers and diaper services are exempt from sales and use tax. Under the Streamlined Agreement, "diapers" are defined as "clothing". Since clothing is taxable under both current law and the bill, the bill repeals the diaper exemption. The diaper exemption was created as an incentive to use cloth diapers rather than taxable disposable diapers, which were perceived to have adverse environmental effects on landfills. Based on U.S. Bureau of the Census data on sales of diaper services, sales taxes may increase by about \$0.05 million annually under the bill.

2. The bill creates computer-related definitions, including "computer", "computer software", "prewritten computer software", "electronic", and "delivered electronically". Under current law, prewritten software is



included within the definition of tangible personal property and is taxable. Custom software is treated as an exempt service. The terms "prewritten program" and "custom program" are defined by administrative rule. Under the bill, "prewritten software" is defined and included within the definition of tangible personal property. Since modifications of prewritten software would be taxable unless separately invoiced to the customer, the bill may result in a minor increase in sales taxes.

3. Under current law, purchases of items from out of state sellers (e.g., catalogs and directories) shipped by the seller to persons other than the purchaser are not subject to Wisconsin use tax. Under the bill, such purchases would be taxable if delivered into Wisconsin even though the purchaser did not have possession. This provision would have the effect of reversing the 1982 Wisconsin Department of Revenue v. JC Penney decision holding that a retailer's catalogs published by a printer located outside Wisconsin that did not have nexus in Wisconsin, and shipped directly to the retailer's customers in Wisconsin by mail or common carrier, were not subject to Wisconsin use tax. According to the 1997 Economic Census, total US sales of catalog printing were \$5.933 billion. Since printing is a major industry in this state, it is assumed that 75% of the catalogs distributed in Wisconsin are printed in Wisconsin. Under this assumption, sales taxes would increase by about \$1.24 million in FY05 under the bill.

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5. Under current law, when exempt goods are bundled with taxable goods as a single product, such as a gift basket, the single product is exempt or the price may be allocated taxable portion. Under the bill, such bundled goods would be taxable if combined by the retailer. Thus, under the bill, the sales tax on certain gift baskets would increase by the amount of tax on the portion that would have been exempt under current law. This provision is expected to apply to very few bundled goods for a minor increase in sales taxes.

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### **County, Stadium and Exposition District Fiscal Effects**

1. County and stadium sales and use taxes were about 7.25% of state sales and use taxes in FY03. Estimated fiscal effects of the bill on these local sales and use taxes are calculated as 7.25% of the corresponding state effect.

2. Under current law, county and stadium sales tax on sales of property that is licensed is sourced to the jurisdiction in which the property is licensed. Under the bill, sales of snowmobiles, trailers, semi-trailers and

all-terrain vehicles (ATVs) would be sourced to the jurisdiction where they are received by the buyer. The bill mitigates the tax incentive for purchasers of such vehicles to shop in jurisdictions that do not impose a local sales tax - the bill allows the jurisdiction where the snowmobile, trailer, semi-trailer or ATV is customarily kept to impose use tax on the purchase of the vehicle if the vehicle was purchased in a jurisdiction without a local tax. The bill continues to treat sales of motor vehicles and airplanes as under current law and so there is no fiscal effect.

3. Under current law, only retailers that are engaged in business in a county or stadium district are required to collect and remit that county's or district's tax. Under the bill, a county or special district may impose sales taxes on retailers that are not required to collect sales taxes but voluntarily register to collect sales taxes. A retailer so registered is required to collect and remit to the department sales taxes for all counties and special districts that have impose a sales tax.

4. Under current law, county and stadium sales tax on leases of property that is delivered is sourced to the jurisdiction in which the property is delivered and customarily used. Under the bill, the first or only payment on a lease is sourced to the location where the sales is made; subsequent payments on the lease are sourced to the location where the property is licensed or delivered and customarily kept. The provision may shift county sales taxes on first or only lease payments among counties but is not expected to have a net county or stadium district fiscal effect.

5. Under current law, collect or credit card telecommunications services are generally sourced to the jurisdiction where the customer is billed. Under the bill, postpaid telecommunications services would be sourced to the jurisdiction in which the telecommunications provider first identifies the signal. This provision may shift taxes among counties but the provision is not expected to have a net county or stadium district fiscal effect.

6. Under current law, exposition district sales taxes are levied on most food products that are subject to the state sales tax. However, exposition district sales taxes are not levied on soft drinks sold in cans or bottles for off-premises consumption. Although not required under the Agreement, for ease in administration of the tax by retailers who must also collect sales tax, the new definitions for food and food ingredient, soft drink, candy, and prepared food are extended to the local exposition district tax. The expansion of the exposition district tax base under the bill would increase exposition district sales taxes by about \$0.25 million in FY05.

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**Public Policy Involved**

The tax exemption provisions of the bill are good public policy.