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July 23, 2004

Ms. Diane L. Hardt
Administrator
Wisconsin Department of Revenue
2135 Rimrock Road, 6-40
P.O. Box 8933
Madison, WI 53708-8933

Mr. Scott C. Peterson
South Dakota Department of Revenue and Regulation
445 E. Capitol Ave.
Pierre, SD 57501

**Re: Request for Interpretation of “Provided by the Seller” from the SSTP
“Prepared Food” Definition**

Dear Ms. Hardt and Mr. Peterson:

The Food Marketing Institute¹ (FMI) is pleased to submit comments on the decision by the Minnesota Department of Revenue to interpret sandwiches and donuts as “Prepared Food” because napkins and utensils were available on a courtesy counter in a convenience store.

FMI respectfully disagrees with this interpretation and requests that the SSTP provide a “bright line” interpretation of “provided by the seller” in relation to napkins, utensils, and other items as they appear in number three, under the SSTP definition of “Prepared Food.” (Please see attachment.)

As you may know, FMI participated with the SSTP in the development of the “Prepared Food” definition. At that time, FMI discussed with the committee removing “napkins” from item three because they are oftentimes available to customers throughout a store as a courtesy and as such could cause interpretation challenges. For example, freshly baked donuts sold in the bakery would not be prepared food due to exception (c) for bakery

¹ FMI conducts programs in research, education, industry relations and public affairs on behalf of its 2,300 member companies — food retailers and wholesalers — in the United States and around the world. FMI’s U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of \$340 billion — three-quarters of all food retail store sales in the United States. FMI’s retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 60 countries.

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items, but if the customer takes a napkin from the dispenser when they purchase the donut, the item (c) exception may no longer apply, subject to interpretation (see “Prepared Food Definition” attachment).

SSTP officials told FMI they would keep “napkins” in the definition but that the mere presence of napkins in a grocery or convenience store would not constitute a “Prepared Food.”

To further support this interpretation, the Washington State Department of Revenue recently ruled in an April 16, 2004 *Special Notice* that,

... merely making utensils available for the customer to take at the customer’s discretion does not constitute ‘sold with eating utensils provided by the seller.’ For example, food items are not ‘sold with eating utensils’ when the seller has merely placed a napkin dispenser on the counter or has set up a utensil ‘island’ for customers in the store. (See attachment.)

The *Special Notice* also includes the following definition of “Sold with eating utensils provided by the seller:”

Food is considered to be sold with eating utensils provided by the seller when the seller *physically includes* the utensils with the food item. For example, the seller may serve the prepared food item on a plate or place napkins in a bag with the food item. (Emphasis added. See attachment.)

In the Minnesota circumstance, the store’s sandwiches were not made by the store (“the seller”) and were not specifically sold with eating utensils. Therefore, the sandwiches should not have been classified as “prepared food” because they were not (1) Food sold in a heated state or heated *by the seller*; (2) Two or more food ingredients mixed or combined *by the seller* for sale as a single item; or (3) Food sold with eating utensils *provided by the seller*, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. (Emphasis added.) The napkins and utensils were simply available at the self-service courtesy counter or island where a customer would have the choice of picking them up.

As FMI understands it, the SSTP “Prepared Food” definition is based on the Texas definition of “Prepared Food” (see Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter O, Rule §3.293 Food; Food Products; Meals; Food Service; Subsections (a)(9)(C) (i) and (ii) at www.window.state.tx.us).

In part, it reads, (C) When food is sold by a retailer who does not provide eating facilities (tables, trays, chairs, benches, or booths), food ready for immediate consumption also includes:

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- (i) all food sold in a heated state, when the food is heated by the retailer rather than the customer;
- (ii) all food sold with eating utensils provided, including plates, knives, forks, spoons, glasses, cups, or straws.

In February 2003, the Texas Department of Revenue provided the following interpretation of their definition of “food sold with eating utensils provided” in a correspondence to the SSTP:

As far as the issue of “food sold with eating utensils,” we mean that the retailer is actually providing the eating utensils with the food being purchased. In other words, not all food is taxable just because the retailer has straws and napkins on a counter available to customers.

FMI is concerned that not providing a “bright line” interpretation could lead to a slippery slope, where some products, never intended by the SSTP to be “Prepared Food,” could fall into this category, causing confusion to customers and store employees. For example, a quart of milk for sale in a convenience store could be deemed “Prepared Food” because a glass or straw, meant for a soda fountain, is available at a self-service island in the store. The Texas Department of Revenue, in their February 2003 correspondence to the SSTP, provided the following instance to further illustrate this possibility:

For example, a convenience store without eating facilities does not have to tax a bag of chips just because the hot coffee counter in the store has napkins and straws available for customers.

To that end, FMI formally requests that the SSTP amend the definition of “Prepared Food” by including a “bright line” interpretation of number three, stating that the mere presence of plates, knives, forks, spoons, glasses, cups, napkins, or straws in a store does not constitute a “Prepared Food.” In other words, food items are not “sold with eating utensils” when the seller has merely placed a napkin dispenser on the counter or has set up a utensil island for customers in their store.

FMI appreciates the opportunity to provide comments on this issue. Please do not hesitate to contact me at 703.560.5813 or etansing@fmi.org if I can provide further information.

Sincerely,

Elizabeth K. Tansing
Director, State Government Relations

Attachments (1) - http://dor.wa.gov/Docs/Pubs/SpecialNotices/2004/sn_04_PreparedFood.pdf
Attachments (2) – See below

SSTP Definition of Prepared Food

Prepared Food means:

1. Food sold in a heated state or heated by the seller;
2. Two or more food ingredients mixed or combined by the seller for sale as a single item; or
3. Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport food.

States may exclude any of the following from items 1 and 2 above:

- a. Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 [bakeries].
- b. Food sold in an unheated state by weight or volume as a single item.
- c. Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, muffins, bars, cookies, tortillas.

“Prepared food” does not include food that is only sliced, cut, repackaged, or pasteurized by the seller and raw eggs, fish, meat, poultry and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code so as to prevent food borne illnesses.