



April 28, 2010

*Via Electronic Mail*

Mr. Scott Peterson, Executive Director  
Streamlined Sales Tax Governing Board  
4205 Hillsboro Pike, Suite 305  
Nashville, TN 37215

**Re: West Virginia Amendment to SSUTA to Provide a Definition of Healthy Food**

Dear Mr. Peterson:

The Food Marketing Institute (FMI)<sup>1</sup> welcomes the opportunity to respond to the motion put forth by West Virginia to amend the Streamlined Sales and Use Tax Agreement (SSUTA) to provide a definition of “healthy food.” As discussed more fully below, FMI’s primary concerns are the narrowness of the definition, which is tantamount to taxing all categories of food, and the complexity of this category.

I. Definition

The proposed definition of “Healthy food” as put forth by West Virginia means food which:

- A. Meets the conditions for fat, saturated fat, cholesterol, and other nutrients as stated in 21 CFR § 101.65 or in any successor section of the Code of Federal Regulations; and
- B. Meets the conditions for sodium as stated in 21 CFR §101.65 or in any successor section of the Code of Federal Regulations.

II. Intent of FDA “Healthy” Definition

The Food and Drug Administration (FDA) definition at 21 CFR § 101.65(d)(2) of “healthy” is narrowly defined. The criterion set by FDA was narrow so that only limited foods would qualify to be able to advertise as “healthy.” If this item were to pass, it would essentially amount to a tax on most foods. Indeed, certain food stuffs such as bread, soup, yogurt, cheese, cereal and whole milk, considered by many to be “healthy” foods, may not even fall into the category of “healthy” as narrowly defined by FDA. The intent of the FDA definition was not to define to the

---

<sup>1</sup> FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 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 and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three-quarters of all retail food 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 more than 50 countries. FMI’s associate members include the supplier partners of its retail and wholesale members.

public what the Agency considers “healthy,” but to regulate the advertising claims that are placed on food products, i.e. “heart healthy,” et cetera. In fact, FDA has recognized the narrowness of this definition and in 2005, FDA amended its regulation by eliminating the “second-tier” sodium-level requirements for all food to be claimed as “healthy.” The reason FDA gave in reevaluating its position was that this narrow definition resulted in a smaller selection of nutritionally desirable foods that are allowed to be *advertised* as such in the marketplace. Future revisions should be expected.

### III. Complexity of the Definition

The FDA definition would lend another layer of complexity to the SSUTA food definition. In fact, the FDA definition itself is multi-faceted. It has carve-outs for both main dish products as defined in §101.13(m); meal products, as defined in § 101.13(m); and single ingredient seafood or game meat as defined in § 101.13 (d). Indeed, the Streamlined Sales Tax Governing Board’s Compliance Review and Interpretations Committee has busied itself in the last few years providing explanations and interpretations for the current “food” definition. This additional carve-out is not needed and would further complicate the “food” definition currently in place. To wit, there is a current proposal before the Governing Board that would carve out “bottled water.” This is on the precipice of a slippery slope that will produce a quagmire of complex taxes, which is not in the spirit of the original intent of the Streamlined Sales Tax Project.

### IV. Costly Burden

Manufacturers are continually reformulating food products and introducing new food products. An average sized grocery store sells some 45,000 items. To add another layer of tax complexity to the food definition would be asking the retail community to provide additional labor to read food labels for some 45,000 food items, and in addition, to keep track of the constant flow of new and reformulated products. In addition, complex changes would need to be made at the front end cash registers – all this in our current difficult economic times. If this definition should pass, significant changes would be required for retailers.

### V. Conclusion

Taxing food is not the answer to combating the obesity issue in America, but education is. In fact, the federal Women, Infant and Children (WIC) program has undergone a recent change that adds fresh fruits and vegetables to what a WIC Mother may purchase with her federal food benefits. Education from schools, government and the community on healthy lifestyles are key to ensuring that people know how to take care of themselves and their families. Adding more layers of complexity to the SSUTA “food” definition resulting in an additional tax on food to the public is like putting a band aid on a broken arm.

The complexity of the food definition as it is currently defined would seem small compared to adding another layer – the FDA “healthy” food definition. For retailers, it would reduce cost effectiveness and increase burdens while providing no education on healthy lifestyles to the

Streamlined Sales Tax Governing Board

April 28, 2010

Page 3

public. The public would pay additional food taxes and the price of their food overall would increase as the cost of conducting business would increase for retailers – all in a tough economy.

The proposal to require such a change in the SSUTA food definition is too restrictive – limiting the public’s ability to purchase lower taxed, or in some states, tax-free food – is an area which will certainly effect the elderly and lower-income the greatest.

FMI appreciates the opportunity to submit these comments.

Sincerely,

Elizabeth K. Tansing  
Director, State Government Relations