

## Minnesota Department of Revenue

### STATEMENT OF NEED AND REASONABLENESS

Proposed Amendment to Minnesota Rules, part 8130.4700, Governing Food, Soft Drinks, Candy, and Meals Provided at Different Facilities; Proposed Repeal of Minnesota Rules, part 8130.0800.

### INTRODUCTION

The Minnesota Department of Revenue proposes to amend Minnesota Rules, part 8130.4700, and to repeal part 8130.0800. Some of the new subparts in the proposed amendment to part 8130.4700 replace obsolete provisions that are currently contained in part 8130.0800. The proposed rule, part 8130.4700, deals with meals served at hospitals, schools and other facilities, purchases of equipment and products by vendors of meals and drinks and meals served to employees. The proposed rule also deals with the definitions of soft drinks and candy.

The Department proposes amending part 8130.4700 and repealing part 8130.0800 because the current rules are outdated and do not deal with some of the topics that have been added to the law since the rule was originally promulgated in 1974<sup>1</sup>. The statutory language pertaining to the sale of food has been changed numerous times since these rules were drafted, and underwent a major re-codification in 2001. Additionally, the Minnesota Legislature has adopted uniform definitions provided by the Streamlined Sales Tax Project.

The proposed rule will likely affect taxpayers in the food industry; consumers; grocery stores, restaurants, and other vendors of food; hospitals, sanitariums, nursing homes, and senior citizens' homes; correctional, detention, and detoxification facilities; elementary, middle, and secondary schools; colleges and universities; and employers who provide meals to employees.

This document, the Statement of Need and Reasonableness (SONAR), has been prepared to establish the statutory authority, need for, and reasonableness of the proposed rules. It is submitted pursuant to Minnesota Statutes, section 14.23, and Minnesota Rules, part 1400.2070, requiring a Statement of Need and Reasonableness.

The Request for Comments was published in the State Register on Monday, May 15, 2000 (24 S.R.1653). No comments were received. A revised Request for Comments was published in the State Register on Monday, July 28, 2003 (28 S.R. 83). An Advisory Committee met on August 20, 2003, September 4, 2003, September 22, 2003, and October 22, 2003. Comments were received from the Advisory Committee and others.

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<sup>1</sup> The law changes related to the items discussed in this rule can be found in the following volumes of Laws of Minnesota: 1982, chapter 523, article 34 and chapter 641, article 2, sections 2 and 5; 1984, chapter 502, article 6, section 8; 1985, chapter 83, section 3; 1987, chapter 268, article 4, section 1; 1988, chapter 719, article 10, section 1; 1989 first special session, chapter 1, article 12, section 2; 1990, chapter 480, article 4, section 3; 1997, chapter 231, article 7, sections 4 and 13 and chapter 31, article 2, section 13; 1998, chapter 300, article 2, section 2; 2000, chapter 418, article 1, sections 4, 11, and 12; 2001 first special session, chapter 5, article 12, sections 8, 27, 28, 29, 34, and 36; 2002, chapter 377, article 3, sections 4 and 7; and 2003, chapter 127, article 6, sections 6 and 9.

## ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Michal Garber, Attorney; Minnesota Department of Revenue; Appeals and Legal Services Division, 600 North Robert Street, Mail Station 2220, St. Paul, Minnesota 55146-2220; telephone # (651) 556-4067; FAX # (651) 296-8229. TTY users may contact the Department by calling Minnesota Relay at 711.

## STATUTORY AUTHORITY

The Department's general statutory authority to adopt rules is set forth in Minnesota Statutes, section 270.06, clause (14). It provides that the Commissioner of Revenue has the authority to "administer and enforce the assessment and collection of state taxes . . . , and, from time to time, make, publish, and distribute rules for the administration and enforcement of . . . state tax laws." Under this statute, the Department has the necessary authority to adopt the proposed rule.

## REGULATORY ANALYSIS

As required by 14.131, the Department consulted with Commissioner of Finance "to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

Minnesota Statutes section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. The Department's response to these seven factors follows:

**"(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule"**

The proposed rule will likely affect any person who purchases or provides food at hospitals, schools and other facilities. A list of these groups is included in the introduction. These classes of persons will benefit from having a clearer interpretation of the law, a better understanding of the types of food that are taxable, and the requirements for collecting the tax. There are no costs to be incurred by the general public. There may be some cost imposed on vendors of food who need to adjust their records in order to adequately separate food items that are not subject to tax from items that are taxable.

**"(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues."**

The Department of Revenue does not anticipate any additional administrative costs incurred by the agency or by other state agencies, due to the promulgation of this proposed rule. The proposed rules will clarify how the sales tax applies to the sale of food in different situations, thus tending to increase the efficiency with which this tax is administered. The promulgation of the rule will ensure better compliance with current tax law because of the guidance provided to taxpayers on the proper collection of sales tax when food is sold.

**“(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule”**

The Department is not aware of any less costly or less intrusive methods by which the purpose of the proposed rules could be achieved. Because of the complexity of the law in this area, the Department believes that a rule would be the most effective method to explain the various terms and situations involved when the tax is imposed on the sale of food.

**“(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule”**

The Department decided to promulgate this rule because of the complexity of the law in this area and the interplay between different subparts of the rule. Legislation could not appropriately explain the different terms and situations that arise when food is sold. The Department has also published a number of revenue notices that deal with the sale of food, alcohol, soft drinks, tobacco and dietary supplements. However, since revenue notices are binding only on the Department, a rule is needed in this area.

**“(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals”**

The rule may result in some compliance cost because of the need to change accounting systems in order to separate taxable sales from non-taxable sales. However, these changes are a direct result of the law changes that have been made in the last couple of years in the food area and are only indirectly related to the promulgation of the rule.

**“(6) the probable cost or consequence of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals”**

If this proposed rule is not adopted, the current rules dealing with food will reflect obsolete law because of the numerous law changes that have taken place since the rules were originally promulgated. People in the food industry, as well as other entities affected by this rule, will be unaware of their responsibilities and available exemptions under the sales tax law.

**“(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference”**

There are no directly applicable federal laws or regulations in the sales tax area.

## **PERFORMANCE-BASED RULES**

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

This proposed rule supports the Department's strategic plan. The Department's main objective in this rule is to repeal outdated information. By providing additional clarity and certainty in this area of the law, the proposed rule will promote the principle that everyone is paying the right amount of tax, no more and no less. The additional clarity and certainty provided by the proposed rule will also help improve the degree to which these particular tax laws are easy to understand and easy to administer.

## **ADDITIONAL NOTICE**

In order to provide notice to all persons who may be affected by the proposed rules, the Additional Notice Plan consists of:

- (1) posting the Request for Comments, Notice of Intent to Adopt Rules, and SONAR to the Department website at <http://www.taxes.state.mn.us>.
- (2) mailing a copy of the Notice of Intent to Adopt Rules and a copy of the proposed rules to the following:
  - Care Providers of Minnesota
  - Minnesota Department of Corrections
  - Minnesota Private College Council
  - University of Minnesota
  - Minnesota Grocers Association
  - Minnesota Soft Drink Association
  - Minnesota Services for the Blind
  - Duluth Schools, Nutritional Services
  - MNSCU
  - Members of the Advisory Committee
  - The Tax Section of the Minnesota State Bar Association
  - And others who specifically requested copies.

Our Notice Plan also includes giving notice required by statute. We will mail the rules and Notice of Intent to Adopt to everyone who has registered to be on the Department's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. We will give notice to the Legislature as required by Minnesota Statutes, section 14.116.

## **LIST OF WITNESSES**

If these rules go to a public hearing, the Department does not anticipate calling any witnesses. Department of Revenue employees may be called to testify in support of the rules.

## **RULE ANALYSIS**

Minnesota Statutes, chapter 14 requires the Department to explain the facts establishing the need for and reasonableness of the rules as proposed. "Need" means that a problem exists, which requires administrative attention. "Reasonableness" means that there is a rational basis for the Department's proposed action. The need for and reasonableness of the proposed amendment to the rule is explained in this section. It is necessary and reasonable to amend the rule to make it easier and more efficient for the Department to administer the laws related to the sales tax on food and to make sure that taxpayers are informed of their rights and obligations.

### **Part 8130.4700 – Amendments and Repealers**

**Subpart 1-repealed.** Subpart 1 is repealed since it no longer accurately reflects current law. Under Minnesota Statutes, section 297A.61, subdivision 3, paragraph (d), and section 297A.61, subdivision 31, the tax is imposed on food that is prepared by the seller rather than on the furnishing, preparing, or serving of food, meals, or drinks for consideration, as described in subpart 1. The law is no longer concerned with questions of whether the vendor is in the business of selling food or whether the food is ready for immediate consumption. The general introduction is provided in the new subpart 1a.

**Subpart 1a.** This new subpart provides a general introduction and a legal framework for the rule. It is necessary because the food area is covered by numerous laws that are spread throughout the sales tax chapter. These laws have undergone numerous changes since the rule was originally promulgated in 1974 and amended in 1978. This subpart explains which laws govern the rule. The subpart is reasonable because the positions taken by the department in this rule are governed by the sales tax laws that apply to sales price, the sale of food, soft drinks, candy, meals served at hospitals, sanitariums, nursing homes, senior citizens' homes, correctional, detention, and detoxification facilities, and schools.

**Subpart 2.** The amendment to subpart 2 is necessary to further explain the definition of food and food ingredients provided in Minnesota Statutes, section 297A.67, subdivision 2, and especially to give examples of exempt food and food ingredients. The amended subpart is necessary because of law changes that were made after the rule was initially promulgated. The law now refers to food and food ingredients rather than food products. Also, under the current law, prepared food, candy, soft drinks, and dietary supplements are subject to tax. These items were not subject to tax when the rule was originally promulgated.

Thus, since the emphasis in the current law is on what is exempt (or taxable) food or food ingredients, rather than on what are food ingredients, the rule amends the list of food by referring to it as a list of "exempt food." Therefore, certain examples of what constitutes food, found in the current rule, no longer belong in the amended rule listing of "exempt food and food ingredients," because either they contain sweeteners or they fall under other definitions of taxable items.

Several modifications are necessary in subpart 2 for the following reasons: Fruit juice is no longer included in the examples since it is better addressed in subpart 5 which deals with soft drinks. Candy, breath mints, lozenges, edible cake decorations, cough drops, and crackerjacks are deleted since they may qualify as candy if they contain a sweetener. The item "fizzies" is taken off the list because it is no longer manufactured. Saccharin is deleted and "artificial sweeteners" substituted, to give a more appropriate general term. Charged water is taken off the list since all drinking water is exempt. Vitamins are deleted since they are taxed as dietary supplements. The rule also clarifies the meaning of nonalcoholic cocktail mixes by inserting language in parenthesis to indicate that they are not meant to be consumed by themselves, and clarifies that they are not subject to tax. The rule adds ice and all drinking water to the list of nontaxable food as long as the ice or water does not contain a sweetener.

This subpart is reasonable since the amended rule reflects the law changes that were made after the rule was initially promulgated. The list of exempt food and food ingredients was researched by the Department in consultation with the Advisory Committee.

**Subpart 3-repealed.** It is necessary and reasonable to repeal subpart 3, "Not food products," for a variety of reasons. Most of the examples of items that do not qualify as food and food ingredients are now included in part 8130.4700, subpart 2, item C: that is, nonedible cake decorations, Easter egg dye, garden seeds, pet food, and softener salt. Beer and alcoholic beverages are clearly taxable under Minnesota Statutes, section 297A.67, subdivision 2, and the new subpart 1a in part 8130.4700 provides that alcoholic beverages are not food and food ingredients. Gum is now listed as candy in part 8130.4700, subpart 6, and candy, as defined in Section 297A.61, subdivision 33, is a taxable food or food ingredient; ice cubes, distilled water and spring water are considered exempt food and food ingredients and are covered in part 8130.4700, subpart 2, item A.

**Subpart 4-repealed.** Subpart 4, on the sale or purchase of a package of food and nonfood products, is repealed since it no longer accurately reflects the law. The sales tax definition in Minnesota Statutes, section 297A.61, subdivision 7, clause (6) provides that the total amount of consideration is subject to tax without a deduction for exempt property that has been bundled together with taxable property and sold as a single item.

**The remainder of the proposed subparts in 8130.4700 are new.**

**Subpart 5.** Subpart 5 deals with the tax on soft drinks, and is needed to further explain the statutory definition of soft drinks found in Minnesota Statutes, section 297A. 61, subdivision 32. The law regarding soft drinks changed effective January 1, 2002. The legislation was passed in accordance with the Uniform Sales and Use Tax Administration Act proposed by the multistate Streamlined Sales Tax Project.

Items A, B, and the first sentence of item C, restate the statutory definition, and the remainder of the subpart is needed to provide clarification as to what is subject to tax and to give examples of taxable items.

The second sentence in item C, which states that beverages labeled as fruit juice, fruit drink, fruit ade, or fruit nectar are taxed as soft drinks if the percentage of fruit juice is not specified, is reasonable because it would be hard to verify what percentage of the drink consists of fruit juice. This was the department's position when the statutory definition required 15 percentage of fruit juice content (See Revenue Notice # 92-09) and remained the department's position when the statutory definition was amended to require 50 percent juice content (See Revenue Notice # 02-02).

Item D, which provides that soft drinks are taxable regardless of the serving size or the type of seller, is needed in order to clarify that all soft drinks are taxable, regardless of the circumstances of the sale (i.e., regardless of whether the vendor is in the business of selling soft drinks or whether the soft drinks are served for immediate consumption). The examples of the types of seller are reasonable as they are the most common types of sellers.

Item E. The examples of sweeteners in item E are reasonable as they were taken from Medline, a medical encyclopedia (<http://www.nlm.nih.gov/medlineplus/ency/article/002444.htm>), and from an article on sugar substitutes published by the U.S. Food and Drug Administration (<http://www.cfsan.fda.gov/~dms/fdsugar.html>).

Item F. The examples of soft drinks in item F are reasonable because they provide examples of typical soft drinks that contain sweeteners. Non-alcoholic beer is listed as a soft drink because it contains barley malt, which is a sweetener.

Item G. The examples of non-taxable items in item G are reasonable because they represent typical beverages that are not included in the definition of a soft drink: beverage powders, unsweetened beverages, juices that contain more than fifty percent of vegetable or fruit juice, and beverages that include milk.

Except for the treatment of certain non-alcoholic beverages, the examples in this subpart are also reflected in Sales Tax Fact Sheet 102C, Soft Drinks and Other Beverages, as revised January 2002 as well as Revenue Notice #02-02.

**Subpart 6.** Subpart 6 deals with the tax on candy and is needed to further explain the statutory definition of candy found in Minnesota Statutes, section 297A. 61, subdivision 33.

Item A and the first sentence of item B restate the statutory definition, and the remainder of the subpart is needed to provide clarification.

Item B. Under the law, food that contains flour is not included in the definition of candy. Item B explains the meaning of flour. The information was taken from The Epicurious Food Dictionary which explains fundamental facts about flour (<http://food.epicurious.com/run/fooddictionary>). It is reasonable to provide that the label must list "flour" as one of the ingredients for the product to not be taxed as candy since this is the best way, if not the only way, to put the vendor and the consumer on notice of the contents.

Item C. Under the law, candy means a combination of a sweetener with other ingredients. The term sweetener is further explained in item C based on information taken from Medline, a medical encyclopedia (<http://www.nlm.nih.gov/medlineplus/ency/article/002444.htm>), and from

an article on sugar substitutes published by the U.S. Food and Drug Administration (<http://www.cfsan.fda.gov/~dms/fdsugar.html>).

Item D. The examples of candy in item D are reasonable because these examples further explain the definition of candy as provided in Minnesota Statutes, section 297A. 61, subdivision 33. The examples represent a variety of candy that is sold in the form of pieces, drops, or bars, and candy that includes fruit, chocolate, and nuts. The examples also include candy that is artificially sweetened, as well as naturally sweetened.

The examples of food items that are not candy are reasonable because they further explain the definition of candy as provided in Minnesota Statutes, section 297A. 61, subdivision 33 by providing examples of items that are not in the form of bars, drops, or pieces, items that contain flour, items that require refrigeration, and items that are not sweetened.

The examples in this subpart are also reflected in Sales Tax Fact Sheet 102B, Candy, as revised January 2002 and Revenue Notice # 02-04.

**Subpart 7.** Subpart 7 replaces part 8130.0800, subpart 3. Under the old rule, meals served at hospitals, sanitariums, nursing homes, and senior citizens' homes were exempt only if they were prepared, served, or furnished by the institution. Under the proposed rule, all food served to patients and residents at these facilities is exempt, including meals that are prepared by separate entities. The new rule is necessary to reflect the law in Minnesota Statutes, section 297A.67, subdivision 4, which exempts meals or drinks "served to" patients, inmates, or other persons residing at this facilities.

Item A. The statutory language is restated in the first sentence of subpart 7, item A, and provides support for the remainder of the clarifying language in this subpart. The second sentence in item A provides that the exemption applies when the meals and drinks are purchased, as well as sold, by the facilities. This is reasonable, as the law exempts all meals and drinks served to the inmates (etc.), and does not distinguish between what is purchased by these entities and what is sold.

Subitems (1) through (6) of Item A define the terms used in section 297A.67, subdivision 4. This is necessary as the definitions are not found in Minnesota Statutes, chapter 297A.

Subitem (1), which defines "meals and drinks" as prepared food, soft drinks, and candy (but not items sold at vending machines), is necessary because the term "meals and drinks" is not defined in Minnesota Statutes, section 297A.67, subdivision 4. The term "meals and drinks" incorporates all the other terms related to food that are defined elsewhere in chapter 297A. This subitem is reasonable since food sold through vending machines is not served to patients or inmates, as provided in section 297A.67, subdivision 4, but rather the food is purchased by the patients and inmates.

Subitem (2), defines "hospital or sanitarium." This definition is slightly different from the definition in part 8130.0800. This proposed definition is reasonable because it follows the current definition in Minnesota Statutes, section 144.50, subdivision 2, and separates the definition of hospital and sanitarium from the definition of a nursing home, pursuant to the definitions used by the Department of Health in section 144.50.



Subitem (3), defines “nursing homes.” This proposed definition is reasonable because it follows the current definition found in Minnesota Statutes, chapter 144A, which governs Nursing Homes.

Subitem (4) defines “senior citizen homes.” The definition of a senior citizens home is reasonable as it is based on the definition of a “housing with services establishment” in Minnesota Statutes, section 144D.01, subdivision 4. That provision defines a “housing with services establishment” as an establishment providing housing to adult residents, at least 80 percent of whom are 55 years of age or older, and offering or providing health-related services or other supportive services. The definition in part 8130.0800, proposed for repeal, is more restrictive in that it requires a senior citizens’ home to house persons over 65. Given section 144D.01, it is reasonable that the proposed subpart lowers the threshold for being defined as a senior citizen home. The language that the home may be either for-profit or non-profit is carried over from part 8130.0800, subpart 3, and is reasonable as Minnesota Statutes, section 297A.67, subdivision 4, does not limit the exemption to non-profit homes.

Subitem (5) defines “correctional and detention facilities.” The definition is necessary because Minnesota Statutes, section 297A.67, subdivision 4, does not provide a definition. This definition was suggested by the Department of Corrections and covers all possible facilities and programs under the control of the Department of Corrections or other facilities that are licensed by the Department.

Subitem (6) defines “detoxification” facilities. This definition is necessary because Minnesota Statutes, section 297A.67, subdivision 4, does not provide a definition. Detoxification facilities are licensed by the Minnesota Department of Human Services and are defined in Minnesota Statutes, section 254A.08.

Item B is needed to clarify that optional meals are also exempt if served to patients and residences by these facilities; meals do not have to be prepared by the facilities. This interpretation is reasonable because the law does not limit the exemption to meals that are served as part of the patient service and meals prepared by the facilities. All meals are exempt as long as they are served by the facilities included in the exemption. Thus, for example, seniors who live in a senior housing home may choose to eat only some of the meals that are served at the facility. These meals are exempt even if they were prepared by an outside vendor.

Item C is needed to clarify that food sold at vending machines, coffee shops, and cafeterias that operate in these facilities are subject to tax. As explained in the analysis of Item A, subitem (1) above, “meals and drinks” do not include items sold in vending machines. It is reasonable to provide that food sold by coffee shops and cafeterias at those institutions remains subject to tax since it is not sold as part of the service to the people residing in those institutions.

**Subpart 8.** Subpart 8 is needed to clarify the exemption for meals provided at schools, and replaces part 8130.0800, subpart 4, proposed for repeal. The new subpart deals with elementary and secondary schools separately from post-secondary schools. This is needed and reasonable, based on the different requirements that apply to these institutions.

Items A and B clarify the treatment of meals served at “public and private elementary, middle, or secondary schools.” It does not define “elementary, middle, or secondary” schools, since the statute references the definition found in Minnesota Statutes, section 120A.05. It is not

necessary to define "private and public" because as long as the schools meet the definitions found in section 122A.05, the exemption applies, regardless of their status as either public or private.

Item A. The last sentence of item A provides that the exemption applies when the meals and lunches are purchased, as well as sold, by the schools. This is reasonable, as the law exempts all meals and lunches served at the schools, and does not distinguish between what is purchased by the schools and what is sold by them.

Item B. Similarly, item B provides that all meals served at these schools, whether they are prepared or served by separate entities, purchased by employees, or the general public, are exempt from tax. This is reasonable, since the exemption is not limited to meals and lunches served to children, or to students, at the schools, but to meals and lunches served at the schools; this interpretation has been a long standing position of the Department on which the public relies.

Item C. The exemption provided in Minnesota Statutes, section 297A.67, subdivision 5, modifies the previous exemption so that meals served at post-secondary educational institutions are exempt only if the meals are provided under a board contract. Item C is needed to clarify this new statutory provision.

The position in this subpart modifies the position taken by the department in Revenue Notice # 02-11 which deals with all entities that sponsor educational or recreational programs. Under section 297A.67, subdivision 5, board contracts are exempt when provided to students at institutions of higher education and the rule requires that in order to be exempt, board contracts are to be signed directly between the student and the educational institution, or between students and residential student organizations recognized by the institution and the activity is required to occur on the premises of the institution. This means that certain activities occurring at an institution of higher education do not qualify as board contracts. Thus, for example, the following activities do not qualify as board contracts when the board contracts are not signed directly between the student and the educational institution: seminars conducted by a company for its employees and sports camps that take place on campus.

Item D restates the statute and states that food sold from vending machines is taxable.

Item E. The language of item E regarding meals and lunches served at administrative offices located off the school premises is reasonable as it takes the same position as found in part 8130.0800, subpart 4, that such meals and lunches are taxable as they are not considered a part of the school.

**Subpart 9.** Subpart 9 deals with incidental meals at recreational or educational programs. This subpart expands part 8130.0800, subpart 6.

Item A. Under item A, this subpart is no longer limited to children's camps. Rather, it applies to all educational and recreational activities where the providing of food is incidental to the educational or recreational purpose. Like the old rule, this subpart clarifies that food that is provided as part of an educational or recreational program is not taxable to the participants. Since these programs are not in the business of selling prepared food, candy, or soft drinks, the food is viewed as incidental to the recreational or educational purpose of the program unless the food, candy, or soft drinks are charged for separately.

Item B explains that educational programs must pay sales tax on the meals and lunches they purchase unless they separately charge the participants for these meals and lunches. This interpretation is reasonable since there is no exemption in the law for such expenses. The exemption in section 297A.67, subdivision 5, is limited to meals and lunches served at K-12 schools and meals and lunches that are provided as part of a board contract in institutions of higher education.

The new subpart does not deal with lodging since the rule is limited to the sale of food, drinks and meals. This does not represent a change in the department's position that lodging that is provided as part of an educational activity, is not taxable, as provided in part 8130.0800, subpart 6.

**Subpart 10.** Subpart 10 deals with meals provided to employees. This subpart is consistent with part 8130.0800, subpart 7, which it replaces. The new subpart does not deal with meals served to employees of a public school. That issue is addressed by subpart 8. The positions provided in this subpart are also reflected in Sales Tax Fact Sheet # 137.

**Subpart 11.** Subpart 11 deals with the purchase of equipment and products by vendors of meals and drinks. This subpart explains that the purchase of products to be used in the preparation of meals is subject to tax. It replaces Minnesota Rules, part 8130.0800, subpart 13, and is consistent with that subpart, making a few minor changes. This subpart is also consistent with Minnesota Rules, part 8130.5500, subpart 1, which provides: "Agricultural and industrial production does not include the preparation, cooking, mixing, or furnishing of meals." The term flatware replaces the term silverware since it is broader and includes all tableware. The changes are needed to make it clear that reusable paper products are exempt as provided in *Ludwig-Lockhart Co. Inc. v. The Commissioner of Taxation* (Minnesota Tax Court, Docket No. 2002, December 28, 1976). The court in that case stated that paper and plastic products such as paper plates, place mats, napkins, cups, plastic knives, and forks are not reusable and are supplied by restaurants to their customers with the meal. As such, they are resold by restaurants and were included in the price received from the restaurant's customer.

## **Repeal of part 8130.0800**

The following is an explanation of the need for and reasonableness of the repealer of Minnesota Rules, part 8130.0800. Many of its subparts are obsolete due to statutory amendments. Those that have language that is still valid have been replaced by subparts in the amended part 8130.4700, where appropriate. Since the modifications are so numerous, the Department decided it would be cleaner to repeal this part and draft new language, rather than to attempt to amend it.

**Subpart 1.** Subpart 1 should be repealed for a variety of reasons: Some of the language is obsolete because of the statutory changes dealing with prepared food. Also, food served by hospitals is dealt with in the new subpart 7 of the amended part 8130.4700 (hereinafter, the amended rule), and food served at schools is dealt with in the new subpart 8 of the amended rule. Charitable or church organizations are addressed by Minnesota Statutes, section 297A.70, subdivision 14 (see analysis for the repeal of subpart 5), and the provision

dealing with food served to individuals who are over 60 years of age and handicapped people is unnecessary as it is duplicative of Minnesota Statutes, section 297A.67, subdivision 6.

**Subpart 2.** Subpart 2, which provides criteria for determining taxability of meals and drinks, is obsolete since the tax is now imposed on the sale of prepared food rather than on the sale of food that is ready for immediate consumption. Minnesota Statutes, section 297A.61, subdivision 31, provides an extensive definition of "prepared food". The Department is considering a future rule to address any issues which may arise regarding the sale of prepared food.

**Subpart 3.** Subpart 3, which deals with meals served at hospitals, sanitariums, nursing homes, or senior citizens' homes, is replaced and further clarified by a new subpart 7 of the amended rule, part 8130.4700.

**Subpart 4.** Subpart 4 which deals with meals at schools is replaced and further clarified by subpart 8 of the amended rule, part 8130.4700.

**Subpart 5.** Subpart 5 which deals with occasional meals by a charitable or church organization has been superseded by Minnesota Statutes, Section 297A.70, subdivision 14 (1985 Laws of Minnesota, first special session, chapter 14, article 2, section 10). That law provides specific guidelines for fundraising events. The Department is considering addressing the sale of food by nonprofit groups in a future amendment of Minnesota Rules, part 8130.6200, which deals with charitable, religious, and educational organizations.

**Subpart 6.** Subpart 6, which deals with education programs and children's camps, is replaced by the amended rule, part 8130.4700 in its new subpart 9. As provided in the explanation to the new subpart 9, it does not deal with lodging since the rule is limited to the sale of food, drinks and meals. As stated above, this does not represent a change in the department's position that lodging that is provided as part of an educational activity, is not taxable, as provided in part 8130.0800, subpart 6.

**Subpart 7.** Subpart 7, which deals with meals furnished to employees, is replaced by the amended rule, part 8130.4700, subpart 10.

**Subpart 8.** Subpart 8, which deals with caterers, should be repealed because it no longer accurately reflects the law. The current law deals with the sale of prepared food and includes caterers as well as other entities that sell prepared food. Minnesota Statutes, section 297A.61, subdivision 31, provides an extensive definition of "prepared food," taxable under the definition of sale and purchase, as provided in Minnesota Statutes, section 297A.61, subdivision 3. The definition of prepared food was enacted in 2001 (2001 Laws of Minnesota, first special session, chapter 5, article 12, section 27). The Department is considering a future rule to address any issues which may arise regarding the sale of prepared food. The topic of meals served in schools is addressed in subpart 8 of the amended rule, part 8130.4700. The

rental of tangible personal property is addressed in Minnesota Rules, part 8130.0400 which deals with leases.

**Subpart 9.** Subpart 9, which deals with fraternities and sororities, should be repealed as it is no longer accurate, since Minnesota Statutes, Section 297A.67, subdivision 5 states that meals and lunches provided to students are taxable unless they are provided under a board contract (2002 Laws of Minnesota, chapter 377, article 3, section 7). The issue is explained in the amended rule in its subpart 8, which deals with meals and lunches served to students at colleges and universities.

**Subpart 10.** Subpart 10, which deals with meals served by transportation companies, is repealed because the general laws on taxing prepared food apply to any entity selling prepared food, including transportation companies. The issue of where the food is consumed is addressed by Minnesota Statutes, section 297A.668, which deals with the sourcing of sales.

**Subpart 11.** Subpart 11, which deals with cover or minimum charges, is no longer necessary. This subpart does not relate to food, but rather to charges imposed on patrons of places that serve food, drinks and entertainment. Under Minnesota Statutes, section 297A.61, subdivision 3, paragraph (g), item (1), admissions to places of amusement, recreational areas, or athletic events are subject to tax. The language regarding food that is served at a location other than the place of business of the vendor is irrelevant since, under current law, all prepared food is taxable, regardless of where it is served. Also, the definition of "sales price" under Minnesota Statutes, section 297A.61, subdivision 7, was amended effective January 1, 2002, and provides that the total amount of consideration is taxable. No deduction is allowed for cover or minimum charges.

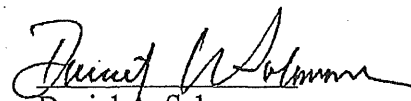
**Subpart 12.** Subpart 12, which deals with tips, should be repealed because under Minnesota Statutes, section 297A.61, subdivision 7, no deduction for tips is allowed. The definition of "sales price" was amended effective January 1, 2002, and provides that the total amount of consideration is taxable.

**Subpart 13.** Subpart 13, which deals with purchases of meals and drinks by vendors, is better addressed by the amended rule, part 8130.4700, in subpart 11.

## CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

11/22/04  
[Date]

  
Daniel A. Salomone  
Commissioner of Revenue