

Legislative Analysis



ADDING DEFINITIONS RELATED TO FOOD AND FOOD INGREDIENTS EXEMPTIONS

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<http://www.house.mi.gov/hfa>

House Bill 4377 (H-1) as reported from committee
Sponsor: Rep. Brenda Carter

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4378 (H-1) as reported from committee
Sponsor: Rep. Cynthia Neeley

Committee: Tax Policy
Complete to 5-11-23

(Enacted as Public Acts 141 and 142 of 2023)

SUMMARY:

House Bills 4377 and 4378 would amend the Use Tax Act and the General Sales Tax Act, respectively, to add definitions of the terms “food sold with eating utensils provided by the seller” and “food sold in an unheated state by weight or volume as a single item” as they relate to the definition of “prepared food” and the exemption of the sale or purchase of food or food ingredients. The bills are described together below.

Currently, each act exempts the sale or purchase of food or food ingredients from the sales and use tax, except for prepared food intended for immediate consumption. The acts specifically include *food sold with eating utensils provided by the seller* in the definition of prepared food and further specify that eating utensils include knives, forks, spoons, glasses, cups, napkins, straws, or plates, but do not include a container or packaging to transport the food. The bills would add that the applicable utensils are not limited to those specified in statute and would add a definition of *food sold with eating utensils provided by the seller*.

Food sold with eating utensils provided by the seller would mean food sold by a seller who meets the following requirements:

- For a seller with a *prepared food sales percentage* of greater than 75%, the seller makes eating utensils available to purchasers or, if a food item is *bottled water, candy, or soft drinks*, the seller gives or hands the eating utensils to purchasers or makes plates, bowls, glasses, or cups that are necessary for the purchaser to receive available to purchasers. If the food item has four or more servings packaged as one food item sold for a single price, the seller would have to give or hand the eating utensil to the purchaser. Serving sizes would be determined based on a label on the item sold or, if no label is available, would be a reasonable number of servings determined by the seller.
- For a seller with a prepared food sales percentage of 75% or less, the seller’s business practice is to give or hand eating utensils to purchasers. Eating utensils necessary for the purchaser to receive the food, such as bowls and cups, would need only to be made available to purchasers.

Food would not be considered *food sold with eating utensils provided by the seller* if the food items have a utensil placed in the package with them by a person other than the seller, and that person’s North American Industry Classification System (NAICS) classification code is that

of a manufacturer, subsector 311.¹ If the packager has any other NAICS classification code, the seller would be considered to have provided the eating utensil.

Prepared food sales percentage would mean a percentage determined by taking the seller's total annual sales of prepared food that is either sold in a heated state or heated by the seller or that is two or more food ingredients that are mixed or combined by the seller for sale as a single item, and food sold when plates bowls, glasses, or cups are necessary to receive the food, and dividing it by all of the seller's total annual sales of all food and food ingredients and prepared food. (The sale of alcoholic beverages would be excluded from both the numerator and the denominator.)

The percentage would be required to be calculated by the seller each tax year or business fiscal year, based on the previous year's data, as soon as possible after accounting records are available, but not later than 90 days after the beginning of the seller's tax year or business fiscal year. One percentage would be determined annually for all of the seller's establishments in the state. For a seller's first year in business, they would make a good-faith estimate that would be adjusted after three months of operation if the adjustment would affect the 75% threshold for determining food sold with utensils described above.

Bottled water would mean water that is placed in a safety sealed container or package for human consumption, including water delivered to the buyer in a reusable container that is not sold with the water. It would be calorie-free and not contain sweeteners or other additives, except that it could contain antimicrobial agents, fluoride, carbonation, vitamins, minerals, electrolytes, oxygen, preservatives, and only those flavors, extracts, or essences derived from a spice or fruit.

Candy would mean a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. It would not include any preparation containing flour and would not require refrigeration.

Soft drinks would mean nonalcoholic beverages that contain artificial or artificial sweeteners. They would not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or greater than 50% of vegetable or fruit juice by volume.

Each act also specifically excludes **food sold in an unheated state by weight or volume as a single item** without eating utensils from the definition of prepared food.

Under the bill, **food sold in an unheated state by weight or volume as a single item** would mean food sold in an unheated state and the sales price of which is determined by multiplying its per unit price by weight or volume and the sales price of which varies based on its weight or volume.

HB 4377: MCL 205.94d

HB 4378: MCL 205.54g

¹ <https://www.census.gov/naics/>

BACKGROUND AND BRIEF DISCUSSION:

According to committee testimony, the bills are intended to codify the Michigan Department of Treasury rules defining these terms,² part of which were struck down by the Michigan Court of Appeals in 2021,³ while making changes to bring Michigan into compliance with the Streamlined Sales and Use Tax Agreement (SSUTA).⁴

The SSUTA is a agreement by 24 states and other governmental bodies to simplify and make more uniform the sales and use tax collection and administration for retailers and states. The agreement's purpose is to reduce the burden of tax compliance on businesses operating in more than one state by creating uniformity in tax bases and definitions between states; simplifying exemptions, returns, and remittances; and requiring uniformity between state and local tax bases with collections being administered at the state level. Michigan joined the agreement in 2004 with the passage of the Streamlined Sales and Use Tax Administration Act.

Opponents of the bills argued that they will create confusion for business owners regarding what would and would not be subject to tax.

FISCAL IMPACT:

As written, the bills would not be expected to have a significant fiscal impact, although they are still being examined in an attempt to determine a more precise estimate. The fiscal impact will be updated as more information becomes available.

POSITIONS:

Representatives of the following entities testified in support of the bills (5-10-23):

- Department of Treasury
- Streamlined Sales Tax Governing Board

The Michigan Petroleum Association indicated support for the bills. (5-10-23)

The following entities indicated opposition to the bills (5-10-23):

- Michigan Chamber of Commerce
- Detroit Chamber of Commerce
- National Association of Theatre Owners of Michigan

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

² https://www.michigan.gov/taxes/-/media/Project/Websites/treasury/Rules/R_205-1_to_R_205-141_700772_7.pdf

³ https://www.michigan.gov/-/media/Project/Websites/treasury/Uncategorized/2021/3/Treasury_Update_March2021.pdf

⁴ https://council.legislature.mi.gov/JCAR/File?path=/JCARFiles/2020%20Documents%20Received/Regulatory%20Impact%20Statements/RISForm_2020-19_TY.pdf