



# Legislative Services Office

## Idaho State Legislature

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Eric Milstead  
Director

*Serving Idaho's Citizen Legislature*

### MEMORANDUM

**TO:** Senators SIDDOWAY, Guthrie, Stennett and,  
Representatives COLLINS, Trujillo, Erpelding

**FROM:** Mike Nugent - Division Manager

**DATE:** August 5, 2015; August 25, 2015

**SUBJECT:** Temporary Rule

IDAPA 35.01.02 - Idaho Sales and Use Tax Administrative Rulemaking - Temporary Rule - Docket  
No. 35-0102-1503

We are forwarding this temporary rule to you for your information only. No analysis was done by LSO. This rule is posted on our web site. If you have any questions, please call Mike Nugent at the Legislative Services Office at (208) 334-4834. Thank you.

Attachment: Temporary Rule

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Mike Nugent, Manager  
Research & Legislation

Cathy Holland-Smith, Manager  
Budget & Policy Analysis

April Renfro, Manager  
Legislative Audits

Glenn Harris, Manager  
Information Technology

Statehouse, P.O. Box 83720  
Boise, Idaho 83720-0054

Tel: 208-334-2475  
[www.legislature.idaho.gov](http://www.legislature.idaho.gov)

**IDAPA 35 - IDAHO STATE TAX COMMISSION**  
**35.01.02 - IDAHO SALES AND USE TAX ADMINISTRATIVE RULES**  
**DOCKET NO. 35-0102-1503**  
**NOTICE OF RULEMAKING - ADOPTION OF TEMPORARY RULE**

**EFFECTIVE DATE:** The effective date of the temporary rule is June 10, 2015.

**AUTHORITY:** In compliance with Section 67-5226, Idaho Code, notice is hereby given this agency has adopted a temporary rule for Sales Tax Administrative Rule 027, Computer Equipment, Software, and Data Services. The action is authorized pursuant to Sections 63-105(2), 63-3624(a), 63-3635, and 63-3039, Idaho Code.

**DESCRIPTIVE SUMMARY:** The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule:

House Bill 209 passed during the 2015 legislative session amending the definition of tangible personal property in Section 63-3616, Idaho Code, specifically addressing issues with computer software. The amendment limited the imposition of tax on a sale of a digital video, digital music, digital book, or digital game, when the purchaser has a permanent right to use the product. The rule has been amended to the extent necessary to address conflicts with House Bill 209. In particular, sections of the rule that indicate leases, rentals, or subscriptions to any of these digital products are taxable have been changed.

**TEMPORARY RULE JUSTIFICATION:** Pursuant to Section 67-5226(1), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

As noted in the Descriptive Summary above, House Bill 209 amended Section 63-3616, Idaho Code, the primary governing law for Rule 027. The passage of the bill created conflicts with the rule as soon as it went into effect on April 1, 2015. Since this deadline had already passed, the rule needed to be changed to comply with amendments to the governing law. The benefit to taxpayers is a reduction in confusion by eliminating conflicts between the code and rule.

**FEE SUMMARY:** Pursuant to Section 67-5226(2), the Governor has found that the fee or charge being imposed or increased is justified and necessary to avoid immediate danger and the fee is described herein: NA

**ASSISTANCE ON TECHNICAL QUESTIONS:** For assistance on technical questions concerning the temporary rule, contact McLean Russell at (208) 334-7531 or [mclean.russell@tax.idaho.gov](mailto:mclean.russell@tax.idaho.gov).

DATED this 8th Day of July, 2015.

McLean Russell  
Tax Policy Specialist  
Idaho State Tax Commission  
800 Park Blvd, Plaza IV  
PO Box 36  
Boise, ID 83722-0410  
Tel: (208) 334-7531  
Fax: (208) 334-7844

**THE FOLLOWING IS THE TEXT OF THE TEMPORARY RULE FOR DOCKET NO. 35-0102-1503**  
**(Only those Sections being amended are shown.)**

**027. COMPUTER EQUIPMENT, SOFTWARE, AND DATA SERVICES (RULE 027).**  
Section 63-3616, Idaho Code

- 01. Definitions.** For purposes of this rule, the following terms will have the following meanings: (4-11-15)
- a. Canned Software.** Canned software is prewritten software which is offered for sale, lease, or use to customers on an off-the-shelf basis with little or no modification at the time of the transaction beyond specifying the parameters needed to make the program run. Evidence of canned software includes the selling, licensing, or leasing of identical software more than once. Software may qualify as custom software for the original purchaser, licensee, or lessee, but become canned software when sold to others. Canned software includes program modules which are prewritten and later used as part of a larger computer program. (4-11-15)
  - b. Computer.** A computer is a programmable machine or device having information processing capabilities and includes word, data, and math processing equipment, testing equipment, programmable microprocessors, and any other integrated circuit embedded in manufactured machinery or equipment. (4-11-15)
  - c. Computer Hardware.** Computer hardware is the physical computer assembly and all peripherals, whether attached physically or remotely by any type of network, and includes all equipment, parts and supplies. (4-11-15)
  - d. Computer Program.** A computer program, or simply a program, is a sequence of instructions written for the purpose of performing a specific operation in a computer. (4-11-15)
  - e. Computer Software.** Computer software, or simply software, is defined as any of the following: (4-11-15)
    - i.** A computer program; (4-11-15)
    - ii.** Any part of a computer program; (4-11-15)
    - iii.** Any sequence of instructions that operates automatic data processing equipment; or (4-11-15)
    - iv.** Information stored in an electronic medium. (4-11-15)
  - f. Custom Software.** Custom software is software designed and written by a vendor at the specific request of a client to meet a particular need. Custom software includes software which is created when a user purchases the services of a person to create software which is specialized to meet the user's particular needs. (4-11-15)
  - g. Digital Product.** See definition for "Information Stored in an Electronic Medium" in Subsection 027.01.h. (4-11-15)
  - h. Information Stored in an Electronic Medium.** Any electronic data file other than a computer program which can be contained on and accessed from storage media. The term includes audio and video files and any documents stored in an electronic format. For purposes of this rule, the term is interchangeable with "digital product." (4-11-15)
  - i. Load and Leave Method.** A method of software delivery in which the vendor or an agent of the vendor loads software onto the user's storage media at the user's location but does not transfer storage media containing the software to the user. (4-11-15)
  - j. Remotely Accessed Computer Software.** Computer software that a user accesses over the internet, over private or public networks, or through wireless media, and the user only has the right to use or access the software by means of a license, lease, subscription, service, or other agreement. (4-11-15)

**k.** Storage Media. Storage media include, but are not limited to, hard disks, optical media discs, diskettes, magnetic tape data storage, solid state drives, and other semiconductor memory chips used for nonvolatile storage of information readable by a computer. (4-11-15)

**02. Computer Hardware.** The sale or lease of computer hardware is a sale at retail. Sales tax is imposed based on the total purchase price, lease, or rental charges. See Rule 024 of these rules. (4-11-15)

**03. Canned Software.** When canned software is sold and delivered on storage media to the user and the storage media remains in the possession of the user, it is tangible personal property and the sale is taxable. If the storage media is sold along with other computer hardware, any canned software loaded on the storage media is tangible personal property the sale of which is taxable. If canned software is sold and delivered electronically or by the load and leave method, it is not tangible personal property and the sale is not taxable. If canned software is sold using a physical package but the package does not contain the canned software on storage media, it is not tangible personal property and the sale is not taxable. For example, if a printed key code is sold in a box that allows the user to download canned software and activate the canned software using the key code, the sale is not taxable. (4-11-15)

**a.** If canned software is loaded on a user's computer but has minimal or no functionality without connecting to the provider's servers over the internet, the sale of that canned software may still be taxable based upon the delivery method of the canned software as outlined in Subsection 027.03 of this rule. (4-11-15)

**b.** Special rules apply to digital music, digital books, digital videos, and digital games. See Subsections 027.06 through 027.08 of this rule. (4-11-15)

**c.** When a sale of canned software is taxable, tax applies to the entire amount charged to the customer for canned software. If the consideration consists of license fees, royalty fees, right to use fees or program design fees, whether for a period of minimum use or for extended periods, all fees are includable in the purchase price subject to tax. (4-11-15)

**04. Remotely Accessed Computer Software.** Remotely accessed computer software is not tangible personal property and charges to use or access such software are not subject to tax. (4-11-15)

**05. Maintenance Contracts.** Maintenance contracts sold in connection with the sale or lease of canned software generally provide that the purchaser will be entitled to receive periodic program enhancements and error correction, often referred to as upgrades, either on storage media or through remote telecommunications. The maintenance contract may also provide that the purchaser will be entitled to telephone or on-site support services. (3-6-00)

**a.** If the maintenance contract is required as a condition of the sale, lease, or rental of canned software, the gross sales price is subject to tax if the software to which the contract applies is subject to tax. Tax applies whether or not the charge for the maintenance contract is separately stated from the charge for software. In determining whether an agreement is optional or mandatory, the terms of the contract shall be controlling. (4-11-15)

**b.** If the maintenance contract is optional to the purchaser of canned software: (3-30-07)

**i.** Then only the portion of the contract fee representing upgrades is subject to sales tax if the fee for any maintenance agreement support services is separately stated and the upgrades are delivered on storage media; (4-11-15)

**ii.** If the fee for any maintenance agreement support services is not separately stated from the fee for upgrades and the upgrades are delivered on storage media, then fifty percent (50%) of the entire charge for the maintenance contract is subject to sales tax; (4-11-15)

**iii.** If the maintenance contract only provides upgrades delivered on storage media, and no maintenance agreement support services, then the entire sales price of the contract is taxable; (4-11-15)

**iv.** If the maintenance contract only provides support services, and the customer is not entitled to or does not receive any canned computer software upgrades or enhancements, then the sale of the contract is not taxable.

(3-30-07)

c. If an optional software maintenance contract provides for software updates to be delivered electronically but also allows a customer to receive software updates on storage media, no portion of the contract is taxable unless the customer actually receives software updates on storage media. (4-11-15)

**06. Digital Products.** Digital music, digital books, and digital videos are tangible personal property regardless of the delivery or access method, but only if the purchaser has a permanent right to use the digital music, digital books, or digital videos. Where the purchaser has a permanent right to use these digital products, the sales, leases, and rentals of these digital products are is taxable. ~~Whether the user has the right to stream or download these digital products, the sale, lease, or rental of these digital products is taxable~~ Leases or rentals of these digital products are not taxable. (4-11-15)(6-10-15)T

a. Other than digital music, digital books, or digital videos, information stored in an electronic medium is tangible personal property only if it is transferred to the user on storage media that is retained by the user. (4-11-15)

b. Special rules apply to digital games. See Subsection 027.08 of this rule. (4-11-15)

**07. Digital Subscriptions.** Digital subscriptions consist of an agreement with a seller that grants a user the right to obtain or access digital products in a fixed quantity or for a fixed period of time. Digital subscriptions ~~granting access to a database of digital music, digital books, or digital videos~~ are not taxable ~~regardless of the method of access or delivery.~~ (4-11-15)(6-10-15)T

~~a. Subscription charges to a digital newspaper, magazine, or other periodical are not taxable.~~ (4-11-15)

~~b. Subscription charges to an online research database that includes products other than digital music, digital books, or digital videos, are not taxable. The charges are not taxable even if the user may download content from the database onto the user's storage media.~~ (4-11-15)

**08. Digital Games.** Digital games are tangible personal property regardless of access or delivery method ~~and, therefore,~~ but only if the purchaser has a permanent right to use the digital game. Where the purchaser has a permanent right to use a digital game, the sale of ~~a~~ the digital game is taxable. If a digital game requires the internet for some or all of its functionality, the sale of that digital game is still taxable if the purchaser has a permanent right to use the digital game. If a user pays a periodic subscription charge to play a digital game ~~that requires a constant connection over the internet to a remote server,~~ the periodic subscription charge is not taxable. If a user pays a periodic charge for a gaming service that enables certain functionality such as multiplayer capability in one (1) or more digital games, the periodic charge is not taxable. ~~If a user purchases virtual currency that enables additional content or progress in a digital game, the purchase of the virtual currency is taxable.~~ (4-11-15)(6-10-15)T

**09. Reports Compiled by a Computer.** The sale of statistical reports, graphs, diagrams, microfilm, microfiche, photorecordings, or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is produced is a sale of tangible personal property and is taxable regardless of the means of transfer. If a report is compiled from information furnished by the same person to whom the finished report is sold, the report will be subject to tax unless the person selling the report performs some sort of service regarding the data or restates the data in substantially different form than that from which it was originally presented. (3-6-00)

a. Example: An accountant uses a computer to prepare financial statements from a client's automated accounting records. No tax will apply since what is sought is the accountant's expertise and knowledge of generally accepted accounting principles. (7-1-93)

b. Example: A company sells mailing lists which are transferred to the user on storage media that remains in the possession of the user. The seller compiles all the mailing lists from a single data base. Since the same data base is used for all such mailing lists it is not custom software. Therefore, the sale is subject to tax. (4-11-15)

**c.** Example: An auto parts retailer hires a data processing firm to optically scan and record its parts book on a computer disk. No analysis or other service is performed regarding the data. Essentially, this is the same as making a copy of the parts books and the sale is, therefore, subject to tax. (7-1-93)

**d.** When additional copies of records, reports, manuals, tabulations, etc., are provided, tax applies to the charges made for the additional copies. Additional copies are all copies in excess of those produced simultaneously with the production of the original and on the same printer, where the copies are prepared by running the same program, by using multiple printers, by looping the program, by using different programs to produce the same output, or by other means. (7-1-93)

**e.** Charges for copies produced by means of photocopying, multilithing, or by other means are subject to tax. (7-1-93)

**10. Online or Remote Data Storage.** Charges to store data on storage media owned and controlled by another party is a nontaxable service. (4-11-15)

**11. Training Services.** Separately stated charges for training services are not subject to the tax, unless they are incidental services agreed to be rendered as a part of the sale of tangible personal property as provided by Rule 011 of these rules. (3-6-00)

**a.** When separate charges are made for training materials, such as books, manuals, or canned software, sales tax applies. (7-1-93)

**b.** When training materials are provided at no cost to the purchaser in conjunction with the sale of tangible personal property, the training materials are considered to be included in the sales price of the tangible personal property. (7-1-93)

**c.** When no tangible personal property, computer hardware or canned software, is sold and training materials are provided at no charge to the customer, the provider of the training is the consumer of the training materials and must pay sales tax or accrue and remit use tax. (3-6-00)

**12. Custom Software.** The transfer of title, possession, or use for a consideration of custom software is not subject to sales tax. Custom software is specified, designed, and created by a vendor at the specific request of a client to meet a particular need. Custom software includes software which is created when a user purchases the services of a person to create software which is specialized to meet the user's particular needs. The term includes those services that are represented by separately stated and identified charges for modification to existing canned software which are made to the special order of the customer, even though the sales, lease, or license of the existing program remains taxable. Examples of services that do not result in custom software include loading parameters to initialize program settings and arranging preprogrammed modules to form a complete program. (7-1-93)

**a.** Tax does not apply to the sale, license, or lease of custom software regardless of the form or means by which the program is transferred. The tax does not apply to the transfer of custom software or custom programming services performed in connection with the sale or lease of computer equipment if such charges are separately stated from the charges for the equipment. (3-6-00)

**b.** If the custom programming charges are not separately stated from the sale or lease of equipment, they will be considered taxable as part of the sale. (7-1-93)

**c.** Custom software includes a program prepared to the special order of a customer who will use the program to produce and sell or lease copies of the program. The sale of the program by the customer for whom the custom software was prepared will be a sale of canned software. (7-1-93)

**13. Purchases for Resale.** Sales tax does not apply when computer hardware or software is purchased for resale. A properly executed resale certificate must be on file. See Rule 128 of these rules. (3-6-00)