

# State of South Dakota

NINETY-FIRST SESSION  
LEGISLATIVE ASSEMBLY, 2016

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## SENATE BILL NO. 151

Introduced by: Senators Sutton, Bradford, Buhl O'Donnell, Heinert, Hunhoff (Bernie), Parsley, and Peterson (Jim) and Representatives Hawley, Bartling, Bordeaux, Feickert, Gibson, Hawks, Kirschman, McCleerey, Ring, Schrempp, and Soli

1 FOR AN ACT ENTITLED, An Act to lower the state sales and use tax on most food items, to  
2 increase the rate of taxation for the sales and use tax on certain goods and services, to  
3 increase the amusement device tax, and to increase the per student allocation in the state aid  
4 formula.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

6 Section 1. That chapter 10-45 be amended by adding a NEW SECTION to read:

7 There is imposed a tax of zero percent on the gross receipts from the sale of food as defined  
8 in § 10-45-1.

9 Section 2. That § 10-45-1 be amended to read:

10 10-45-1. Terms used in this chapter mean:

11 (1) "Agricultural purposes," the producing, raising, growing, or harvesting of food or  
12 fiber upon agricultural land, including dairy products, livestock, and crops. The  
13 services of custom harvesters, chemical applicators, fertilizer spreaders, hay grinders,  
14 and cultivators are considered agricultural purposes;



- 1       (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and  
2       contains one-half of one percent or more of alcohol by volume;
- 3       (2) "Business," any activity engaged in by any person or caused to be engaged in by such  
4       person with the object of gain, benefit, or advantage, either direct or indirect;
- 5       (3) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in  
6       combination with chocolate, fruits, nuts or other ingredients or flavorings in the form  
7       of bars, drops, or pieces. The term, candy, does not include any preparation  
8       containing flour ~~and does not~~. No candy may require refrigeration;
- 9       (4) "Delivery charges," charges by the retailer for preparation and delivery to a location  
10       designated by the purchaser of tangible personal property, any product transferred  
11       electronically, or services including transportation, shipping, postage, handling,  
12       crating, and packing. The term does not include postage for direct mail;
- 13       (4A) "Dietary supplement," any product, other than tobacco, intended to supplement the  
14       diet that:
- 15       (a) Contains one or more of the following dietary ingredients:
- 16               (i) A vitamin;
- 17               (ii) A mineral;
- 18               (iii) An herb or other botanical;
- 19               (iv) An amino acid;
- 20               (v) A dietary substance for use by humans to supplement the diet by  
21               increasing the total dietary intake; or
- 22               (vi) A concentrate, metabolite, constituent, extract, or combination of any  
23               ingredient described in this subsection;
- 24       (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid

1                   form, or if not intended for ingestion in such a form, is not represented as  
2                   conventional food and is not represented for use as a sole item of a meal or of  
3                   the diet; and

4                   (c) Is required to be labeled as a dietary supplement, identifiable by the  
5                   supplemental facts box, found on the label and as required pursuant to 21  
6                   C.F.R. § 101.36 as of January 1, 2016;

7                   (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,  
8                   frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans  
9                   and is consumed for its taste or nutritional value. The term, food, does not include  
10                  any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement,  
11                  food sold through a vending machine, or prepared food;

12                  (5A) "Food sold through a vending machine," any food dispensed from a machine or other  
13                  mechanical device that accepts payment;

14                  (6) Repealed by SL 2007, ch 56, § 1.

15                  (7) "Person," any individual, firm, copartnership, joint adventure, association, limited  
16                  liability company, corporation, municipal corporation, estate, trust, business trust,  
17                  receiver, the State of South Dakota and its political subdivisions, or any group or  
18                  combination acting as a unit;

19                  (8) "Prepared food," any food sold in a heated state or heated by the seller; two or more  
20                  food ingredients mixed or combined by the seller for sale as a single item; or food  
21                  sold with eating utensils provided by the seller, including plates, knives, forks,  
22                  spoons, glasses, cups, napkins, or straws. A plate does not include a container or  
23                  packaging used to transport the food.

24                  Prepared food does not include food that is only cut, repackaged, or pasteurized by

1 the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods  
2 requiring cooking by the consumer as recommended by the Food and Drug  
3 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so  
4 as to prevent food borne illnesses;

5 (8A) "Product transferred electronically," any product obtained by the purchaser by means  
6 other than tangible storage media. A product transferred electronically does not  
7 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,  
8 or copyright.

9 (9) "Relief agency," the state, and county, municipality or district thereof, or any agency  
10 engaged in actual relief work;

11 (10) "Retail sale" or "sale at retail," any sale, lease, or rental for any purpose other than  
12 for resale, sublease, or subrent;

13 (11) "Retailer," any person engaged in the business of selling tangible goods, wares, or  
14 merchandise at retail, or the furnishing of gas, electricity, water, and communication  
15 service, and tickets or admissions to places of amusement and athletic events as  
16 provided in this chapter, and the sale at retail of products transferred electronically.  
17 The term also includes any person subject to the tax imposed by §§ 10-45-4 and 10-  
18 45-5. The isolated or occasional sale of tangible personal property or any product  
19 transferred electronically at retail by a person who does not hold himself or herself  
20 out as engaging in the business of selling such tangible personal property or products  
21 transferred electronically at retail does not constitute such person a retailer;

22 (12) "Sale," any transfer, exchange, or barter, conditional or otherwise, in any manner or  
23 by any means whatsoever, for a consideration;

24 (13) "Soft drinks," any nonalcoholic beverages that contain natural or artificial

1 sweeteners. The term, soft drinks, does not include any beverage that contains milk  
 2 or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of  
 3 vegetable or fruit juice by volume;

4 (14) "Tangible personal property," personal property that can be seen, weighed, measured,  
 5 felt, or touched, or that is in any other manner perceptible to the senses. The term  
 6 includes electricity, water, gas, steam, and prewritten computer software;

7 (15) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that  
 8 contains tobacco.

9 Section 3. That chapter 10-46 be amended by adding a NEW SECTION to read:

10 There is imposed a tax of zero percent on the privilege of the use of food as defined in § 10-  
 11 46-1.

12 Section 4. That § 10-46-1 be amended to read:

13 10-46-1. Terms, as used in this chapter mean:

14 (1) "Business," any activity engaged in by any person or caused to be engaged in by such  
 15 person with the object of gain, benefit or advantage either direct or indirect;

16 (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and  
 17 contains one-half of one percent or more of alcohol by volume;

18 (2) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in  
 19 combination with chocolate, fruits, nuts or other ingredients or flavorings in the form  
 20 of bars, drops, or pieces. The term, candy, does not include any preparation  
 21 containing flour ~~and does not~~. No candy may require refrigeration;

22 (3) "Delivery charges," charges by the retailer for preparation and delivery to a location  
 23 designated by the purchaser of tangible personal property, any product transferred  
 24 electronically, or services including transportation, shipping, postage, handling,

1 crating, and packing. The term does not include postage for direct mail;

2 (3A) "Dietary supplement," any product, other than tobacco, intended to supplement the  
3 diet that:

4 (a) Contains one or more of the following dietary ingredients:

5 (i) A vitamin;

6 (ii) A mineral;

7 (iii) An herb or other botanical;

8 (iv) An amino acid;

9 (v) A dietary substance for use by humans to supplement the diet by  
10 increasing the total dietary intake; or

11 (vi) A concentrate, metabolite, constituent, extract, or combination of any  
12 ingredient described in this subsection;

13 (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid  
14 form, or if not intended for ingestion in such a form, is not represented as  
15 conventional food and is not represented for use as a sole item of a meal or of  
16 the diet; and

17 (c) Is required to be labeled as a dietary supplement, identifiable by the  
18 supplemental facts box, found on the label and as required pursuant to 21  
19 C.F.R. § 101.36 as of January 1, 2016;

20 (4) "Fair market value," the price at which a willing seller and willing buyer will trade.  
21 Fair market value shall be determined at the time of purchase. If a public corporation  
22 is supplying tangible personal property or any product transferred electronically that  
23 will be used in the performance of a contract, fair market value shall be determined  
24 pursuant to § 5-18B-7. This definition also applies to chapter 10-45;

1 (5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid,  
2 frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans  
3 and is consumed for its taste or nutritional value. The term, food, does not include  
4 any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement,  
5 food sold through a vending machine, or prepared food;

6 (5A) "Food sold through a vending machine," any food dispensed from a machine or other  
7 mechanical device that accepts payment;

8 (6) "Included in the measure of tax," the tangible personal property, any product  
9 transferred electronically, or the service was purchased from a retailer licensed under  
10 chapter 10-45 and that retailer has included the tax in the amount received from the  
11 sale;

12 (7) "In this state" or "in the state," within the exterior limits of the State of South Dakota  
13 and includes all territory within such limits owned by or ceded to the United States  
14 of America;

15 (8) "Prepared food," any food sold in a heated state or heated by the seller; two or more  
16 food ingredients mixed or combined by the seller for sale as a single item; or food  
17 sold with eating utensils provided by the seller, including plates, knives, forks,  
18 spoons, glasses, cups, napkins, or straws. A plate does not include a container or  
19 packaging used to transport the food.

20 Prepared food does not include food that is only cut, repackaged, or pasteurized by  
21 the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods  
22 requiring cooking by the consumer as recommended by the Food and Drug  
23 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so  
24 as to prevent food borne illnesses;

1 (8A) "Product transferred electronically," any product obtained by the purchaser by means  
2 other than tangible storage media. A product transferred electronically does not  
3 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,  
4 or copyright.

5 (9) "Purchase," any transfer, exchange, or barter, conditional or otherwise, in any manner  
6 or by any means whatsoever, for a consideration. A transaction, whereby the  
7 possession of property is transferred but the seller retains the title as security for the  
8 payment of the price, is a purchase;

9 (10) "Purchase price," shall have the same meaning as gross receipts defined in chapter  
10 10-45;

11 (11) "Retailer," any person performing services in this state or engaged in the business of  
12 selling tangible personal property or products transferred electronically for use,  
13 storage or other consumption within the meaning of this chapter. However, if in the  
14 opinion of the secretary of revenue, it is necessary for the efficient administration of  
15 this chapter to regard any salesmen, representatives, truckers, peddlers, or canvassers  
16 as agents of the dealers, distributors, supervisors, employers, or persons under whom  
17 they operate or from whom they obtain the tangible personal property or any product  
18 transferred electronically sold by them irrespective of whether they are making sales  
19 on their own behalf or on behalf of such dealers, distributors, supervisors, employers,  
20 or persons, the secretary of revenue may so regard them and may regard the dealers,  
21 distributors, supervisors, employers, or persons as retailers for purposes of this  
22 chapter;

23 (12) "Retailer maintaining a place of business in the state," any retailer having or  
24 maintaining within this state, directly or by a subsidiary, an office, distribution house,



1 sales house, warehouse, or other place of business, or any agents operating within the  
2 state under the authority of the retailer or its subsidiary, irrespective of whether such  
3 place of business or agent is located here permanently or temporarily or whether such  
4 retailer or subsidiary is admitted to do business within this state pursuant to the laws  
5 of the State of South Dakota granting the rights of foreign corporations to do business  
6 in this state;

7 (13) "Secretary," the secretary of the Department of Revenue or any duly authorized and  
8 appointed assistant, deputies, or agents of the secretary charged with the  
9 administration or enforcement of this chapter;

10 (14) "Soft drinks," any nonalcoholic beverages that contain natural or artificial  
11 sweeteners. The term, soft drinks, does not include any beverage that contains milk  
12 or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of  
13 vegetable or fruit juice by volume;

14 (15) "Storage," any keeping or retention in this state for use or other consumption in the  
15 State of South Dakota for any purpose except sale in the regular course of business;

16 (16) "Tangible personal property," personal property that can be seen, weighed, measured,  
17 felt, or touched, or that is in any other manner perceptible to the senses if furnished  
18 or delivered to consumers or users within this state. The term includes electricity,  
19 water, gas, steam, and prewritten computer software;

20 (16A) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that  
21 contains tobacco;

22 (17) "Use," the exercise of right or power over tangible personal property or any product  
23 transferred electronically incidental to the ownership of that property, except that it  
24 does not include the sale of that property in the regular course of business. Use also

1 includes the use of the types of services, the gross receipts from the sale of which are  
2 to be included in the measure of the tax imposed by chapter 10-45, and the delivery  
3 or causing delivery into this state of tangible personal property or any product  
4 transferred electronically intended to advertise any product or service or promote or  
5 facilitate any sale to South Dakota residents.

6 Section 5. That § 10-45-2 be amended to read:

7 10-45-2. There is hereby imposed a tax upon the privilege of engaging in business as a  
8 retailer, a tax of ~~four~~ five percent upon the gross receipts of all sales of tangible personal  
9 property consisting of goods, wares, or merchandise, except as otherwise provided in this  
10 chapter, sold at retail in the State of South Dakota to consumers or users.

11 Section 6. That § 10-45-5 be amended to read:

12 10-45-5. There is imposed a tax at the rate of ~~four~~ five percent upon the gross receipts of any  
13 person from engaging or continuing in any of the following businesses or services in this state:  
14 abstracters; accountants; ancillary services; architects; barbers; beauty shops; bill collection  
15 services; blacksmith shops; car washing; dry cleaning; dyeing; exterminators; garage and service  
16 stations; garment alteration; cleaning and pressing; janitorial services and supplies; specialty  
17 cleaners; laundry; linen and towel supply; membership or entrance fees for the use of a facility  
18 or for the right to purchase tangible personal property, any product transferred electronically,  
19 or services; photography; photo developing and enlarging; tire recapping; welding and all repair  
20 services, except repair services for farm machinery, attachment units, and irrigation equipment  
21 used exclusively for agricultural purposes; cable television; and rentals of tangible personal  
22 property except leases of tangible personal property between one telephone company and  
23 another telephone company, motor vehicles as defined pursuant to § 32-5-1 leased under a  
24 single contract for more than twenty-eight days and mobile homes. However, the specific

1 enumeration of businesses and professions made in this section does not, in any way, limit the  
2 scope and effect of the provisions of § 10-45-4.

3 Section 7. That § 10-45-5.3 be amended to read:

4 10-45-5.3. There is imposed, at the rate of ~~four~~ five percent, an excise tax on the gross  
5 receipts of any person engaging in oil and gas field services (group no. 138) as enumerated in  
6 the Standard Industrial Classification Manual, 1987, as prepared by the Statistical Policy  
7 Division of the Office of Management and Budget, Office of the President.

8 Section 8. That § 10-45-6 be amended to read:

9 10-45-6. There is hereby imposed a tax of ~~four~~ five percent upon the gross receipts from  
10 sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such  
11 sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary  
12 capacity, except as otherwise provided in this chapter, when sold at retail in the State of South  
13 Dakota to consumers or users.

14 Section 9. That § 10-45-6.1 be amended to read:

15 10-45-6.1. Except as provided in § 10-45-6.2, there is hereby imposed a tax of ~~four~~ five  
16 percent upon the gross receipts from providing any intrastate, interstate, or international  
17 telecommunications service that originates or terminates in this state and that is billed or  
18 charged to a service address in this state, or that both originates and terminates in this state.

19 However, the tax imposed by this section does not apply to:

- 20 (1) Any eight hundred or eight hundred type service unless the service both originates  
21 and terminates in this state;
- 22 (2) Any sale of a telecommunication service to a provider of telecommunication  
23 services, including access service, for use in providing any telecommunication  
24 service; or

1 (3) Any sale of interstate telecommunication service provided to a call center that has  
2 been certified by the secretary of revenue to meet the criterion established in § 10-45-  
3 6.3 and the call center has provided to the telecommunications service provider an  
4 exemption certificate issued by the secretary indicating that it meets the criterion.

5 If a call center uses an exemption certificate to purchase services not meeting the criterion  
6 established in § 10-45-6.3, the call center is liable for the applicable tax, penalty, and interest.

7 Section 10. That § 10-45-6.2 be amended to read:

8 10-45-6.2. There is hereby imposed a tax of ~~four~~ five percent upon the gross receipts of  
9 mobile telecommunications services, as defined in 4 U.S.C. § 124(7) as of January 1, 2002, that  
10 originate and terminate in the same state and are billed to a customer with a place of primary  
11 use in this state or are deemed to have originated or been received in this state and to be billed  
12 or charged to a service address in this state if the customer's place of primary use is located in  
13 this state regardless of where the service actually originates or terminates. Notwithstanding any  
14 other provision of this chapter and for purposes of the tax imposed by this section, the tax  
15 imposed upon mobile telecommunication services shall be administered in accordance with 4  
16 U.S.C. §§ 116-126 as in effect on July 28, 2000.

17 Section 11. That § 10-45-8 be amended to read:

18 10-45-8. There is imposed a tax of ~~four~~ five percent upon the gross receipts from all sales  
19 of tickets or admissions to places of amusement and athletic contests or events, except as  
20 otherwise provided in this chapter.

21 Section 12. That § 10-45-71 be amended to read:

22 10-45-71. There is imposed a tax of ~~four~~ five percent on the gross receipts from the  
23 transportation of passengers. The tax imposed by this section shall apply to any transportation  
24 of passengers if the passenger boards and exits the mode of transportation within this state.

1 Section 13. That § 10-46-2.1 be amended to read:

2 10-46-2.1. For the privilege of using services in South Dakota, except those types of services  
3 exempted by § 10-46-17.3, there is imposed on the person using the service an excise tax equal  
4 to ~~four~~ five percent of the value of the services at the time they are rendered. However, this tax  
5 may not be imposed on any service rendered by a related corporation as defined in subdivision  
6 10-43-1(11) for use by a financial institution as defined in subdivision 10-43-1(4) or on any  
7 service rendered by a financial institution as defined in subdivision 10-43-1(4) for use by a  
8 related corporation as defined in subdivision 10-43-1(11). For the purposes of this section, the  
9 term related corporation includes a corporation which together with the financial institution is  
10 part of a controlled group of corporations as defined in 26 U.S.C. § 1563 as in effect on January  
11 1, 1989, except that the eighty percent ownership requirements set forth in 26 U.S.C.  
12 § 563(a)(2)(A) for a brother-sister controlled group are reduced to fifty-one percent. For the  
13 purpose of this chapter, services rendered by an employee for the use of his employer are not  
14 taxable.

15 Section 14. That § 10-46-2.2 be amended to read:

16 10-46-2.2. An excise tax is imposed upon the privilege of the use of rented tangible personal  
17 property and any product transferred electronically in this state at the rate of ~~four~~ five percent  
18 of the rental payments upon the property.

19 Section 15. That § 10-46-58 be amended to read:

20 10-46-58. There is imposed a tax of ~~four~~ five percent on the privilege of the use of any  
21 transportation of passengers. The tax imposed by this section shall apply to any transportation  
22 of passengers if the passenger boards and exits the mode of transportation within this state.

23 Section 16. That § 10-46-69 be amended to read:

24 10-46-69. There is hereby imposed a tax of ~~four~~ five percent upon the privilege of the use

1 of mobile telecommunications services, as defined in 4 U.S.C. § 124(7) as of January 1, 2002,  
2 that originate and terminate in the same state and are billed to a customer with a place of  
3 primary use in this state. Notwithstanding any other provision of this chapter and for purposes  
4 of the tax imposed by this section, the tax imposed upon mobile telecommunication services  
5 shall be administered in accordance with 4 U.S.C. §§ 116-126 as in effect on July 28, 2000.

6 Section 17. That § 10-46-69.1 be amended to read:

7 10-46-69.1. Except as provided in § 10-46-69, there is hereby imposed a tax of ~~four~~ five  
8 percent upon the privilege of the use of any intrastate, interstate, or international  
9 telecommunications service that originates or terminates in this state and that is billed or  
10 charged to a service address in this state, or that both originates and terminates in this state.

11 However, the tax imposed by this section does not apply to:

- 12 (1) Any eight hundred or eight hundred type service unless the service both originates  
13 and terminates in this state;
- 14 (2) Any sale of a telecommunication service to a provider of telecommunication  
15 services, including access service, for use in providing any telecommunication  
16 service; or
- 17 (3) Any sale of interstate telecommunication service provided to a call center that has  
18 been certified by the secretary of revenue to meet the criterion established in § 10-45-  
19 6.3 and the call center has provided to the telecommunications service provider an  
20 exemption certificate issued by the secretary indicating that it meets the criterion.

21 If a call center uses an exemption certificate to purchase services not meeting the criterion  
22 established in § 10-45-6.3, the call center is liable for the applicable tax, penalty, and interest.

23 Section 18. That § 10-46-69.2 be amended to read:

24 10-46-69.2. There is hereby imposed a tax of ~~four~~ five percent upon the privilege of the use

1 of any ancillary services.

2 Section 19. That § 10-58-1 be amended to read:

3 10-58-1. There is imposed upon owners and operators a special amusement excise tax of  
4 ~~four~~ five percent of the gross receipts from the operation of any mechanical or electronic  
5 amusement device.

6 Section 20. That subdivision (4) of § 13-13-10.1 be amended to read:

7 (4) "Per student allocation," for school fiscal year ~~2016~~ 2017 is \$4,876.76 \$5,813.32.

8 Each school fiscal year thereafter, the per student allocation is the previous fiscal  
9 year's per student allocation increased by the index factor;

10 Section 21. That § 13-13-72 be amended to read:

11 13-13-72. It is the policy of the Legislature that the appropriation for state aid to education  
12 increase on an annual basis by the percentage increase in local need on an aggregate statewide  
13 basis so that the relative proportion of local need paid by local effort and state aid shall remain  
14 constant. ~~For school fiscal year 2013, it is the policy of the Legislature that the relative~~  
15 ~~proportion of the total local need paid by state aid shall be amended by adjusting the proportion~~  
16 ~~of state aid to fifty-three and eight-tenths percent of the total local need. However, the increase~~  
17 in the per student allocation on an annual basis that exceeds three percent shall be paid solely  
18 by the state and is not a factor in this policy.