

1 STATE OF OKLAHOMA

2 2nd Session of the 56th Legislature (2018)

3 HOUSE BILL 3401

By: Williams

4
5
6 AS INTRODUCED

7 An Act relating to revenue and taxation; amending 68
8 O.S. 2011, Section 1352, as amended by Section 2,
9 Chapter 311, O.S.L. 2016 (68 O.S. Supp. 2017, Section
10 1352), which relates to definitions used in the
11 Oklahoma Sales Tax Code; modifying certain
12 definition; amending Section 4, Chapter 311, O.S.L.
13 2016 (68 O.S. Supp. 2017, Section 1406.2), which
14 relates to notifications required of out-of-state
15 vendors; eliminating requirement to provide certain
16 notification; requiring notification be provided to
17 certain persons by certain date annually; requiring
18 notification include certain information; prohibiting
19 inclusion with other shipments; requiring certain
20 filing to the Tax Commission by certain date
21 annually; requiring filings include certain
22 information; requiring certain filings be provided in
23 certain manner; providing penalties; and providing an
24 effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 68 O.S. 2011, Section 1352, as
amended by Section 2, Chapter 311, O.S.L. 2016 (68 O.S. Supp. 2017,
Section 1352), is amended to read as follows:

Section 1352. As used in the Oklahoma Sales Tax Code:

1. "Bundled transaction" means the retail sale of two or more
products, except real property and services to real property, where

1 the products are otherwise distinct and identifiable, and the
2 products are sold for one nonitemized price. A "bundled
3 transaction" does not include the sale of any products in which the
4 sales price varies, or is negotiable, based on the selection by the
5 purchaser of the products included in the transaction. As used in
6 this paragraph:

7 a. "distinct and identifiable products" does not include:

- 8 (1) packaging such as containers, boxes, sacks, bags,
9 and bottles, or other materials such as wrapping,
10 labels, tags, and instruction guides, that
11 accompany the retail sale of the products and are
12 incidental or immaterial to the retail sale
13 thereof, including but not limited to, grocery
14 sacks, shoeboxes, dry cleaning garment bags and
15 express delivery envelopes and boxes,
- 16 (2) a product provided free of charge with the
17 required purchase of another product. A product
18 is provided free of charge if the sales price of
19 the product purchased does not vary depending on
20 the inclusion of the product provided free of
21 charge, or
- 22 (3) items included in the definition of gross
23 receipts or sales price, pursuant to this
24 section,

1 b. "one nonitemized price" does not include a price that
2 is separately identified by product on binding sales
3 or other supporting sales-related documentation made
4 available to the customer in paper or electronic form
5 including, but not limited to an invoice, bill of
6 sale, receipt, contract, service agreement, lease
7 agreement, periodic notice of rates and services, rate
8 card, or price list,

9 A transaction that otherwise meets the definition of a bundled
10 transaction shall not be considered a bundled transaction if it is:

11 (1) the retail sale of tangible personal property and
12 a service where the tangible personal property is
13 essential to the use of the service, and is
14 provided exclusively in connection with the
15 service, and the true object of the transaction
16 is the service,

17 (2) the retail sale of services where one service is
18 provided that is essential to the use or receipt
19 of a second service and the first service is
20 provided exclusively in connection with the
21 second service and the true object of the
22 transaction is the second service,

23 (3) a transaction that includes taxable products and
24 nontaxable products and the purchase price or

1 sales price of the taxable products is de
2 minimis. For purposes of this subdivision, "de
3 minimis" means the seller's purchase price or
4 sales price of taxable products is ten percent
5 (10%) or less of the total purchase price or
6 sales price of the bundled products. Sellers
7 shall use either the purchase price or the sales
8 price of the products to determine if the taxable
9 products are de minimis. Sellers may not use a
10 combination of the purchase price and sales price
11 of the products to determine if the taxable
12 products are de minimis. Sellers shall use the
13 full term of a service contract to determine if
14 the taxable products are de minimis, or

15 (4) the retail sale of exempt tangible personal
16 property and taxable tangible personal property
17 where:

18 (a) the transaction includes food and food
19 ingredients, drugs, durable medical
20 equipment, mobility enhancing equipment,
21 over-the-counter drugs, prosthetic devices
22 or medical supplies, and

23 (b) the seller's purchase price or sales price
24 of the taxable tangible personal property is

1 fifty percent (50%) or less of the total
2 purchase price or sales price of the bundled
3 tangible personal property. Sellers may not
4 use a combination of the purchase price and
5 sales price of the tangible personal
6 property when making the fifty percent (50%)
7 determination for a transaction;

8 2. "Business" means any activity engaged in or caused to be
9 engaged in by any person with the object of gain, benefit, or
10 advantage, either direct or indirect;

11 3. "Commission" or "Tax Commission" means the Oklahoma Tax
12 Commission;

13 4. "Computer" means an electronic device that accepts
14 information in digital or similar form and manipulates it for a
15 result based on a sequence of instructions;

16 5. "Computer software" means a set of coded instructions
17 designed to cause a "computer" or automatic data processing
18 equipment to perform a task;

19 6. "Consumer" or "user" means a person to whom a taxable sale
20 of tangible personal property is made or to whom a taxable service
21 is furnished. "Consumer" or "user" includes all contractors to whom
22 a taxable sale of materials, supplies, equipment, or other tangible
23 personal property is made or to whom a taxable service is furnished
24 to be used or consumed in the performance of any contract;

1 7. "Contractor" means any person who performs any improvement
2 upon real property and who, as a necessary and incidental part of
3 performing such improvement, incorporates tangible personal property
4 belonging to or purchased by the person into the real property being
5 improved;

6 8. "Drug" means a compound, substance or preparation, and any
7 component of a compound, substance or preparation:

8 a. recognized in the official United States

9 Pharmacopoeia, official Homeopathic Pharmacopoeia of
10 the United States, or official National Formulary, and
11 supplement to any of them,

12 b. intended for use in the diagnosis, cure, mitigation,
13 treatment, or prevention of disease, or

14 c. intended to affect the structure or any function of
15 the body;

16 9. "Electronic" means relating to technology having electrical,
17 digital, magnetic, wireless, optical, electromagnetic, or similar
18 capabilities;

19 10. "Established place of business" means the location at which
20 any person regularly engages in, conducts, or operates a business in
21 a continuous manner for any length of time, that is open to the
22 public during the hours customary to such business, in which a stock
23 of merchandise for resale is maintained, and which is not exempted
24 by law from attachment, execution, or other species of forced sale

1 barring any satisfaction of any delinquent tax liability accrued
2 under the Oklahoma Sales Tax Code;

3 11. "Fair authority" means:

4 a. any county, municipality, school district, public
5 trust or any other political subdivision of this
6 state, or

7 b. any not-for-profit corporation acting pursuant to an
8 agency, operating or management agreement which has
9 been approved or authorized by the governing body of
10 any of the entities specified in subparagraph a of
11 this paragraph which conduct, operate or produce a
12 fair commonly understood to be a county, district or
13 state fair;

14 12. a. "Gross receipts", "gross proceeds" or "sales price"
15 means the total amount of consideration, including
16 cash, credit, property and services, for which
17 personal property or services are sold, leased or
18 rented, valued in money, whether received in money or
19 otherwise, without any deduction for the following:
20 (1) the seller's cost of the property sold,
21 (2) the cost of materials used, labor or service
22 cost,

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- 1 (3) interest, losses, all costs of transportation to
- 2 the seller, all taxes imposed on the seller, and
- 3 any other expense of the seller,
- 4 (4) charges by the seller for any services necessary
- 5 to complete the sale, other than delivery and
- 6 installation charges,
- 7 (5) delivery charges and installation charges, unless
- 8 separately stated on the invoice, billing or
- 9 similar document given to the purchaser, and
- 10 (6) credit for any trade-in.

11 b. Such term shall not include:

- 12 (1) discounts, including cash, term, or coupons that
- 13 are not reimbursed by a third party that are
- 14 allowed by a seller and taken by a purchaser on a
- 15 sale,
- 16 (2) interest, financing, and carrying charges from
- 17 credit extended on the sale of personal property
- 18 or services, if the amount is separately stated
- 19 on the invoice, bill of sale or similar document
- 20 given to the purchaser, and
- 21 (3) any taxes legally imposed directly on the
- 22 consumer that are separately stated on the
- 23 invoice, bill of sale or similar document given
- 24 to the purchaser.

1 c. Such term shall include consideration received by the
2 seller from third parties if:

3 (1) the seller actually receives consideration from a
4 party other than the purchaser and the
5 consideration is directly related to a price
6 reduction or discount on the sale,

7 (2) the seller has an obligation to pass the price
8 reduction or discount through to the purchaser,

9 (3) the amount of the consideration attributable to
10 the sale is fixed and determinable by the seller
11 at the time of the sale of the item to the
12 purchaser, and

13 (4) one of the following criteria is met:

14 (a) the purchaser presents a coupon, certificate
15 or other documentation to the seller to
16 claim a price reduction or discount where
17 the coupon, certificate or documentation is
18 authorized, distributed or granted by a
19 third party with the understanding that the
20 third party will reimburse any seller to
21 whom the coupon, certificate or
22 documentation is presented,

23 (b) the purchaser identifies himself or herself
24 to the seller as a member of a group or

1 organization entitled to a price reduction
2 or discount; provided, a "preferred
3 customer" card that is available to any
4 patron does not constitute membership in
5 such a group, or

6 (c) the price reduction or discount is
7 identified as a third-party price reduction
8 or discount on the invoice received by the
9 purchaser or on a coupon, certificate or
10 other documentation presented by the
11 purchaser;

12 13. a. "Maintaining a place of business in this state" means
13 and shall be presumed to include:

14 (1) (a) utilizing or maintaining in this state,
15 directly or by subsidiary, an office,
16 distribution house, sales house, warehouse,
17 or other physical place of business, whether
18 owned or operated by the vendor or any other
19 person, other than a common carrier acting
20 in its capacity as such, or

21 (b) having agents operating in this state,
22 whether the place of business or agent
23 is within this state temporarily or
24 permanently or whether the person or

1 agent is authorized to do business
2 within this state, and

3 (2) the presence of any person, other than a common
4 carrier acting in its capacity as such, that has
5 substantial nexus in this state and that:

6 (a) sells a similar line of products as the
7 vendor and does so under the same or a
8 similar business name,

9 (b) uses trademarks, service marks or trade
10 names in this state that are the same
11 or substantially similar to those used
12 by the vendor,

13 (c) delivers, installs, assembles or
14 performs maintenance services for the
15 vendor,

16 (d) facilitates the vendor's delivery of
17 property to customers in the state by
18 allowing the vendor's customers to pick
19 up property sold by the vendor at an
20 office, distribution facility,
21 warehouse, storage place or similar
22 place of business maintained by the
23 person in this state, or
24

1 (e) conducts any other activities in this state
2 that are significantly associated with the
3 vendor's ability to establish and maintain a
4 market in this state for the vendor's sale,
5 and

6 (3) any retailer that does not collect the tax levied
7 by Section 1350 et seq. of this title that is part
8 of a controlled group of corporations, as defined
9 in the Internal Revenue Code, 26 U.S.C. Section
10 1563(a), which has a component member, as defined
11 in the Internal Revenue Code, 26 U.S.C. Section
12 1563(b), that is a retailer with physical presence
13 in the state.

14 b. The presumptions in divisions (1) and (2) of
15 subparagraph a of this paragraph may be rebutted by
16 demonstrating that the person's activities in this
17 state are not significantly associated with the
18 vendor's ability to establish and maintain a market in
19 this state for the vendor's sales.

20 c. The presumption in division (3) may be rebutted by
21 proof that during the calendar year in question, the
22 component member that is a retailer with physical
23 presence in this state did not engage in any
24 constitutionally sufficient solicitation in this state

1 on behalf of the retailer that does not collect the
2 tax levied by Section 1350 et seq. of this title.

3 d. Any ruling, agreement or contract, whether written or
4 oral, express or implied, between a person and
5 executive branch of this state, or any other state
6 agency or department, stating, agreeing or ruling that
7 the person is not "maintaining a place of business in
8 this state" or is not required to collect sales and
9 use tax in this state despite the presence of a
10 warehouse, distribution center or fulfillment center
11 in this state that is owned or operated by the vendor
12 or an affiliated person of the vendor shall be null
13 and void unless it is specifically approved by a
14 majority vote of each house of the Oklahoma
15 Legislature;

16 14. "Manufacturing" means and includes the activity of
17 converting or conditioning tangible personal property by changing
18 the form, composition, or quality of character of some existing
19 material or materials, including natural resources, by procedures
20 commonly regarded by the average person as manufacturing,
21 compounding, processing or assembling, into a material or materials
22 with a different form or use. "Manufacturing" does not include
23 extractive industrial activities such as mining, quarrying, logging,
24 and drilling for oil, gas and water, nor oil and gas field

1 processes, such as natural pressure reduction, mechanical
2 separation, heating, cooling, dehydration and compression;

3 15. "Manufacturing operation" means the designing,
4 manufacturing, compounding, processing, assembling, warehousing, or
5 preparing of articles for sale as tangible personal property. A
6 manufacturing operation begins at the point where the materials
7 enter the manufacturing site and ends at the point where a finished
8 product leaves the manufacturing site. "Manufacturing operation"
9 does not include administration, sales, distribution,
10 transportation, site construction, or site maintenance. Extractive
11 activities and field processes shall not be deemed to be a part of a
12 manufacturing operation even when performed by a person otherwise
13 engaged in manufacturing;

14 16. "Manufacturing site" means a location where a manufacturing
15 operation is conducted, including a location consisting of one or
16 more buildings or structures in an area owned, leased, or controlled
17 by a manufacturer;

18 17. "Over-the-counter drug" means a drug that contains a label
19 that identifies the product as a drug as required by 21 C.F.R.,
20 Section 201.66. The over-the-counter-drug label includes:

- 21 a. a "Drug Facts" panel, or
- 22 b. a statement of the "active ingredient(s)" with a list
23 of those ingredients contained in the compound,
24 substance or preparation;

1 18. "Person" means any individual, company, partnership, joint
2 venture, joint agreement, association, mutual or otherwise, limited
3 liability company, corporation, estate, trust, business trust,
4 receiver or trustee appointed by any state or federal court or
5 otherwise, syndicate, this state, any county, city, municipality,
6 school district, any other political subdivision of the state, or
7 any group or combination acting as a unit, in the plural or singular
8 number;

9 19. "Prescription" means an order, formula or recipe issued in
10 any form of oral, written, electronic, or other means of
11 transmission by a duly licensed "practitioner" as defined in Section
12 1357.6 of this title;

13 20. "Prewritten computer software" means "computer software",
14 including prewritten upgrades, which is not designed and developed
15 by the author or other creator to the specifications of a specific
16 purchaser. The combining of two or more prewritten computer
17 software programs or prewritten portions thereof does not cause the
18 combination to be other than prewritten computer software.
19 Prewritten software includes software designed and developed by the
20 author or other creator to the specifications of a specific
21 purchaser when it is sold to a person other than the purchaser.
22 Where a person modifies or enhances computer software of which the
23 person is not the author or creator, the person shall be deemed to
24 be the author or creator only of such person's modifications or

1 enhancements. Prewritten software or a prewritten portion thereof
2 that is modified or enhanced to any degree, where such modification
3 or enhancement is designed and developed to the specifications of a
4 specific purchaser, remains prewritten software; provided, however,
5 that where there is a reasonable, separately stated charge or an
6 invoice or other statement of the price given to the purchaser for
7 such modification or enhancement, such modification or enhancement
8 shall not constitute prewritten computer software;

9 21. "Repairman" means any person who performs any repair
10 service upon tangible personal property of the consumer, whether or
11 not the repairman, as a necessary and incidental part of performing
12 the service, incorporates tangible personal property belonging to or
13 purchased by the repairman into the tangible personal property being
14 repaired;

15 22. "Sale" means the transfer of either title or possession of
16 tangible personal property for a valuable consideration regardless
17 of the manner, method, instrumentality, or device by which the
18 transfer is accomplished in this state, or other transactions as
19 provided by this paragraph, including but not limited to:

- 20 a. the exchange, barter, lease, or rental of tangible
21 personal property resulting in the transfer of the
22 title to or possession of the property,
23 b. the disposition for consumption or use in any business
24 or by any person of all goods, wares, merchandise, or

1 property which has been purchased for resale,
2 manufacturing, or further processing,

3 c. the sale, gift, exchange, or other disposition of
4 admission, dues, or fees to clubs, places of
5 amusement, or recreational or athletic events or for
6 the privilege of having access to or the use of
7 amusement, recreational, athletic or entertainment
8 facilities,

9 d. the furnishing or rendering of services taxable under
10 the Oklahoma Sales Tax Code, and

11 e. any use of motor fuel or diesel fuel by a supplier, as
12 defined in Section 500.3 of this title, upon which
13 sales tax has not previously been paid, for purposes
14 other than to propel motor vehicles over the public
15 highways of this state. Motor fuel or diesel fuel
16 purchased outside the state and used for purposes
17 other than to propel motor vehicles over the public
18 highways of this state shall not constitute a sale
19 within the meaning of this paragraph;

20 23. "Sale for resale" means:

21 a. a sale of tangible personal property to any purchaser
22 who is purchasing tangible personal property for the
23 purpose of reselling it within the geographical limits
24 of the United States of America or its territories or

1 possessions, in the normal course of business either
2 in the form or condition in which it is purchased or
3 as an attachment to or integral part of other tangible
4 personal property,

5 b. a sale of tangible personal property to a purchaser
6 for the sole purpose of the renting or leasing, within
7 the geographical limits of the United States of
8 America or its territories or possessions, of the
9 tangible personal property to another person by the
10 purchaser, but not if incidental to the renting or
11 leasing of real estate,

12 c. a sale of tangible goods and products within this
13 state if, simultaneously with the sale, the vendor
14 issues an export bill of lading, or other
15 documentation that the point of delivery of such goods
16 for use and consumption is in a foreign country and
17 not within the territorial confines of the United
18 States. If the vendor is not in the business of
19 shipping the tangible goods and products that are
20 purchased from the vendor, the buyer or purchaser of
21 the tangible goods and products is responsible for
22 providing an export bill of lading or other
23 documentation to the vendor from whom the tangible
24 goods and products were purchased showing that the

1 point of delivery of such goods for use and
2 consumption is a foreign country and not within the
3 territorial confines of the United States, or
4 d. a sales of any carrier access services, right of
5 access services, telecommunications services to be
6 resold, or telecommunications used in the subsequent
7 provision of, use as a component part of, or
8 integrated into, end-to-end telecommunications
9 service;

10 24. "Tangible personal property" means personal property that
11 can be seen, weighed, measured, felt, or touched or that is in any
12 other manner perceptible to the senses. "Tangible personal
13 property" includes electricity, water, gas, steam and prewritten
14 computer software. This definition shall be applicable only for
15 purposes of the Oklahoma Sales Tax Code;

16 25. "Taxpayer" means any person liable to pay a tax imposed by
17 the Oklahoma Sales Tax Code;

18 26. "Tax period" or "taxable period" means the calendar period
19 or the taxpayer's fiscal period for which a taxpayer has obtained a
20 permit from the Tax Commission to use a fiscal period in lieu of a
21 calendar period;

22 27. "Tax remitter" means any person required to collect,
23 report, or remit the tax imposed by the Oklahoma Sales Tax Code. A
24 tax remitter who fails, for any reason, to collect, report, or remit

1 the tax shall be considered a taxpayer for purposes of assessment,
2 collection, and enforcement of the tax imposed by the Oklahoma Sales
3 Tax Code; and

4 28. "Vendor" means:

- 5 a. any person making sales of tangible personal property
6 or services in this state, the gross receipts or gross
7 proceeds from which are taxed by the Oklahoma Sales
8 Tax Code,
- 9 b. any person maintaining a place of business in this
10 state and making sales of tangible personal property
11 or services, whether at the place of business or
12 elsewhere, to persons within this state, the gross
13 receipts or gross proceeds from which are taxed by the
14 Oklahoma Sales Tax Code,
- 15 c. any person who solicits business by employees,
16 independent contractors, agents, or other
17 representatives in this state, and thereby makes sales
18 to persons within this state of tangible personal
19 property or services, the gross receipts or gross
20 proceeds from which are taxed by the Oklahoma Sales
21 Tax Code, or
- 22 d. any person, pursuant to an agreement with the person
23 with an ownership interest in or title to tangible
24 personal property, who has been entrusted with the

1 possession of any such property and has the power to
2 designate who is to obtain title, to physically
3 transfer possession of, or otherwise make sales of the
4 property.

5 SECTION 2. AMENDATORY Section 4, Chapter 311, O.S.L.
6 2016 (68 O.S. Supp. 2017, Section 1406.2), is amended to read as
7 follows:

8 Section 1406.2 A. 1. Each retailer or vendor making sales of
9 tangible personal property ~~from a place of business outside this~~
10 ~~state for use in this state that is not required to collect use tax~~
11 ~~shall, by February 1 of each year, provide to each customer to whom~~
12 ~~tangible personal property was delivered in this state a statement~~
13 ~~of the total sales made to the customer during the preceding~~
14 ~~calendar year. The statement must contain language substantially~~
15 ~~similar to the following:~~

16 ~~"YOU MAY OWE OKLAHOMA USE TAX ON PURCHASES YOU MADE FROM US~~
17 ~~DURING THE PREVIOUS TAX YEAR. THE AMOUNT OF TAX YOU MAY OWE~~
18 ~~IS BASED ON THE TOTAL SALES PRICE OF [INSERT TOTAL SALES~~
19 ~~PRICE] THAT MUST BE REPORTED AND PAID WHEN YOU FILE YOUR~~
20 ~~OKLAHOMA INCOME TAX RETURN UNLESS YOU HAVE ALREADY PAID THE~~
21 ~~TAX."~~

22 ~~The statement must not contain any other information that would~~
23 ~~indicate, imply or identify the class, type, description or name of~~
24 ~~the products purchased. Any information that would indicate, imply~~

1 ~~or identify the class, type, description or name of the products~~
2 ~~purchased is strictly confidential~~ that does not collect the tax
3 levied by Section 1350 et seq. of this title shall notify purchasers
4 in this state that sales or use tax is due on certain purchases made
5 from the retailer, and that the State of Oklahoma requires the
6 purchaser to file a sales or use tax return. The notification shall
7 be sent to all purchasers in this state no later than January 31
8 each year showing all information the Tax Commission requires by
9 rule and the total amount paid by the purchaser for purchases made
10 from the retailer or vendor in the previous calendar year.

11 2. The notification required by this subsection shall include,
12 if available:

- 13 a. the dates of purchases,
14 b. the amounts of each purchase, and
15 c. the category of the purchase, including, if known by
16 the retailer or vendor, whether the purchase is exempt
17 from taxation in this state.

18 3. The notification required by this subsection shall state
19 that the State of Oklahoma requires a sales or use tax return to be
20 filed and sales or use tax paid on certain purchases in this state
21 made by the purchaser from the retailer or vendor.

22 4. The notification required by this subsection:

- 23 a. shall be sent separately to all purchasers in the
24 state by first-class mail,

1 b. shall not be included with any other shipments,

2 c. shall include the words "Important Tax Document
3 Enclosed" on the exterior of the mailing, and

4 d. shall include the name of the retailer.

5 5. Failure to provide the notifications required in this
6 section shall subject the retailer or vendor to a penalty of Ten
7 Dollars (\$10.00) for each such failure, unless the retailer shows
8 reasonable cause for such failure.

9 ~~B. The statement may be provided by first class mail, email or~~
10 ~~other electronic communication~~ 1. Each retailer or vendor making
11 sales of tangible personal property that does not collect the tax
12 levied by Section 1350 et seq. of this title shall, no later than
13 March 1 of each year, file an annual statement for each purchaser in
14 this state to the Tax Commission on such forms as are provided or
15 approved by the Commission showing the total amount paid for
16 purchases in this state by such purchasers during the preceding
17 calendar year or any portion thereof.

18 2. The Tax Commission may require any retailer or vendor making
19 sales of tangible personal property that does not collect the tax
20 levied by Section 1350 et seq. of this title that makes total sales
21 in this state greater than One Hundred Thousand Dollars
22 (\$100,000.00) in a year to file the annual statement described in
23 paragraph 1 of this subsection by magnetic media or other machine-
24 readable form for such year.

1 3. Failure to file the annual statement required in this
2 subsection shall subject the retailer or vendor to a penalty of Ten
3 Dollars (\$10.00) for each purchaser that should have been included
4 in such annual statement, unless the retailer shows reasonable cause
5 for such failure.

6 SECTION 3. This act shall become effective November 1, 2018.

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8 56-2-9231 JM 01/08/18

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