

You then propose that when prospectuses and financial reports are used by Registered Representatives with prospective customers to induce new sales, these prospectuses and financial reports should be treated as sales and promotional material and not be subject to Wisconsin sales or use tax.

### Ruling

Prospectuses of The Funds when transported outside Wisconsin for use solely outside Wisconsin, qualify for exemption from Wisconsin sales and use tax under sec. 77.54(25), Wis. Stats.

Prospectuses used in Wisconsin for any reason are subject to Wisconsin sales or use tax.

Annual reports are subject to Wisconsin sales or use tax because they do not qualify for exemption under sec. 77.54(25), Wis. Stats.

### Analysis

Section 77.54(25), Wis. Stats., provides an exemption from Wisconsin sales and use tax for "The gross receipts from the sale of and the storage of printed material which is designed to advertise and promote the sale of merchandise, or to advertise the services of individual business firms, which printed material is purchased and stored for the purpose of subsequently transporting it outside the state by the purchaser for use thereafter solely outside the state."

*Webster's Ninth New Collegiate Dictionary* (1991), defines "advertise" as follows: "to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize."

*Black's Law Dictionary*, Sixth Edition (1990), defines "prospectus" as

"A document published by a corporation ... setting forth the nature and objects of an issue of shares, debentures, or other securities created by the company or corporation, the investment or risk characteristics of the security and inviting the public to subscribe to the issue. ... It is the document which is to contain all material facts concerning a company and its operations so that a prospective investor may make an informed decision as to the merit of an investment."

When prospectuses are transported outside Wisconsin, they qualify for exemption since they are being used to "advertise," as defined above.

The exemption provided by sec. 77.54(25), Wis. Stats. (1991-92), applies to prospectuses, whether the prospectuses are transported outside Wisconsin for use by Registered Representatives with prospective customers to induce new sales or whether they are mailed to existing shareholders outside Wisconsin to induce additional sales. In both situations, prospectuses are used for advertising purposes.

Annual reports, whether sent to existing shareholders or to Registered Representatives, do not qualify for exemption under sec. 77.54(25), Wis. Stats. Section Tax 11.19(4), Wis. Adm. Code, March 1991 Register, provides that the exemption does not apply to stockholders' annual reports or proxy statements. □

✱ **W9434007**, May 27, 1994

**Type Tax:** Sales and Use

**Issue:** Exemptions — prosthetic devices; Exemptions — medicines

**Statutes:** Section 77.54(14), (14g)(a) and (b), and (22)(b), Wis. Stats. (1991-92)

This letter responds to your request for a private letter ruling regarding the sales and use tax status of various air support therapy beds and products sold, rented, and leased by Companies D, E, F, and G.

### Facts

The ABC and DEF products at issue are eight different products. The tradename "GHI" is used for a variation of the above products with alternating pressure/pulsations as an added air support therapy modality and the "JKL" frame is the frame to which all of the ABC and DEF air support therapy units may be attached.

The products are used by and in hospitals, and under the care of registered nurses for home patients, exclusively on a prescription by a physician basis. These air support therapy units are primarily available on a rental basis rather than sale, although occasional sales are made of the units. With the exception of sales directly to hospitals, all transactions are under doctor's prescription. Company F manufactures and sells parts to owners of the units described for repair and upkeep of these units.

The products in this ruling request are all designed in connection with the alleviation and treatment of skin ulceration caused by long-term bed care. Skin ulceration proceeds, in the long-term care patient, to involve muscle and bone damage, necrosis of bone, and damage to muscle, bone, and supporting structures. The ulceration described is caused by a malfunction of the capillaries in and adjacent to the skin and in the supporting structures, caused by the long-term confinement to bed care in the long-term patient.

The air support therapy beds and products alleviate the malfunction of the capillaries. Release air allows the

body to support the capillaries and allows the body to heal itself.

### Ruling Request

A ruling is requested that each and every one of the products and models of hospital beds and mattresses, mattresses, and mattress overlays described above, as well as future products and modifications with the same or similar function (and parts for repair and upkeep of these products) be exempt from sales and use tax on the basis that they are prosthetic devices, appliances, or aids. Alternatively, a ruling is requested that the described devices are exempt from sales and use tax as medicines for use by external application to the body and the cure, mitigation, treatment, or prevention of disease.

### Ruling

The air support therapy beds and products described above do not qualify for exemption from Wisconsin sales and use tax under either sec. 77.54(22)(b), Wis. Stats. (1991-92), as equipment worn as a correction or substitute for any functioning portion of the body, or under sec. 77.54(14), Wis. Stats. (1991-92), as medicines.

### Analysis

Section 77.54(22)(b), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales and use tax for the gross receipts from the sales of or the storage, use or other consumption of artificial limbs, artificial eyes, hearing aids and other equipment worn as a correction or substitute for any functioning portion of the body.

The air support therapy beds and products do not qualify for exemption under sec. 77.54(22)(b), Wis. Stats., because they are not "worn" by the patient.

"Worn" is defined in Webster's Third New International Dictionary as the past part of "wear." "Wear" is defined as follows:

"1: to bear or have upon the person ... to have attached to the body or part of it or to the clothing ..."

Although the long-term care patient is not capable of operating independently of the bed, the air support therapy beds are not worn by the patient.

Section 77.54(14), Wis. Stats. (1991-92), provides an exemption for the gross receipts from the sales of and the storage, use or other consumption of medicines under certain circumstances.

"Medicines" are defined in sec. 77.51(14g), Wis. Stats. (1991-92), to mean any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment or prevention of disease and which is commonly recognized as a substance or preparation intended for such use.

Section 77.54(14g)(a), Wis. Stats. (1991-92), provides that "medicines" do not include any prosthetic device or appliance. Section 77.54(14g)(b), Wis. Stats. (1991-92), provides that "medicines" do not include articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices or other mechanical, electronic, optical or physical equipment or article or the component parts or accessories thereof.

The air support therapy beds and products do not qualify for exemption under sec. 77.54(14), Wis. Stats., because they are not "medi-

cines," as defined above. The air support therapy beds and products are physical equipment, which is specifically excluded from the definition of medicines. □

✱ **W9505001**, November 14, 1994

### Type Tax: Sales and Use

**Issue:** Purchases for resale — promotional campaigns

**Statutes:** Section 77.51(14)(intro.) and (14)(k), Wis. Stats. (1991-92)

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications relating to Company H's purchase of promotional items under several fact patterns.

### Facts

Company H is a manufacturer of dry-cell batteries and flashlights (products). In an effort to market its products, Company H offers numerous promotional campaigns including (but not limited to):

- Mountain bike giveaways (drawings). A mountain bike is shipped to the customer with every order of twelve cases of multi-pack alkaline batteries. For this promotion, all batteries (except for batteries sold to general retailers) are priced at "full distributor" price, which is substantially higher than the permanent pricing plan.

This promotion is primarily geared toward general and special industrial customers, although there was one mountain bike promotion involving general retailers.

- Fishing lure packaged with Company H lantern batteries.
- Company H baseball caps distributed to customers who give them away. Company H recommends customers give out a cap with the sale of three multi-packs, however, customers are free to set up their own promotional programs as they feel appropriate. The customer is required to make a minimum purchase from Company H to receive baseball caps. The required minimum purchase for the customer depends on the Company H pricing plan category of the customer.

This promotion is geared toward industrial customers, but on occasion is used for general retailers.

The promotional items are distributed to three different types of customers:

#### *Type I — General Retailer*

The general retailer does not pay a special price for the product during promotional campaigns. The promotional items are simply a means for increasing sales. The profits from the batteries and flashlights sales are more than enough to pay for the promotional items.

General retailers do not have the option of buying outside the program (i.e., buying product at a lower price without the promotional items).

#### *Type II — General Industrial*

General industrial customers have two pricing plans. The permanent pricing plan is used to sell batteries for non-promotional purchases, while a special pricing plan is used during promotional campaigns. The special pricing plan gives Company H additional margins which are meant to

pay for the promotional items. The essence of the special pricing plan is that the industrial customer pays the same price for the batteries with a premium to pay for the promotion.

General industrial customers have an option to buy outside the program.

#### *Type III — Special Industrial*

Company H has a special industrial customer that receives a promotional allowance of X% of purchases from Company H. The customer uses this allowance to purchase various promotional programs. If the customer does not use all of the allowance by the end of the year, a cash credit is applied to the customer's account.

The special industrial customer does not have the option of buying outside the program.

#### **Ruling Request**

Are Company H's purchases of promotional items which are distributed to the three different types of customers subject to Wisconsin sales or use tax?

#### **Ruling**

##### *Type I — General Retailer*

Company H may purchase fishing lures which it packages with its products and then distributes to general retailers without sales or use tax as purchases for resale. Company H is subject to sales or use tax on its purchases of mountain bikes and baseball caps which it distributes to general retailers.

##### *Type II — General Industrial*

Company H may purchase the promotional items to be resold to its general industrial customers without

Wisconsin sales or use tax as purchases for resale.

#### *Type III — Special Industrial*

Company H may purchase the promotional items to be resold to its special industrial customer without Wisconsin sales or use tax as purchases for resale.

#### **Analysis**

##### *Type I — General Retailer*

Company H may purchase fishing lures without tax, for resale, because the fishing lures are packaged with Company H batteries. The fishing lures become a part of the product sold by Company H to general retailers. Section 77.51(14)(intro), Wis. Stats. (1991-92), provides that "sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms do not include sales of tangible personal property for resale. Therefore, the sale of the fishing lures to Company H is not a retail sale.

Company H's purchases of mountain bikes and baseball caps which are distributed to general retailers are subject to Wisconsin sales or use tax because they are not for resale. The promotional items are given to the general retailers without charge.

Section 77.51(14)(k), Wis. Stats. (1991-92), provides that "sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms includes: "Any sale of tangible personal property to a purchaser even though such property may be used or consumed by some other person to whom such purchaser transfers the tangible personal property without valuable consideration, such as gifts, and advertising specialties distributed gratis apart from the sale of other tangible personal property or service."

**Type II — General Industrial**

Because an additional charge is made by Company H to general industrial customers for promotional items, Company H is not giving away the promotional items, rather, it is selling them. As provided in sec. 77.51(14)(intro), Wis. Stats., "retail sale" does not include Company H's purchases of promotional items to be resold to general industrial customers. Company H should provide its suppliers with resale certificates for the promotional items which it will resell to general industrial customers.

**Type III — Special Industrial**

Because the special industrial customer can take its promotional allowance as a cash credit or apply it to promotional purchases, Company H is not giving away the promotional items, rather, it is selling them. Under sec. 77.51(14)(intro), Wis. Stats., "retail sale" does not include Company H's purchases of promotional items to be resold to its special industrial customer. Company H should provide its suppliers with resale certificates for the promotional items which it will resell to its special industrial customer. □

✱ **W9451009**, September 28, 1994

**Type Tax: Sales and Use**

**Issue:** Use tax — subsequent shipment out-of-state

**Statutes:** Sections 77.51(14)(intro.), (14)(i) and (14r), 77.52(1), 77.53(1), and 77.54(2), Wis. Stats. (1991-92)

**Wis. Adm. Code:** Section Tax 11.68, April 1994 Register

This letter responds to your request for a private letter ruling.

**Facts**

Company I is a Wisconsin corporation with manufacturing facilities in Wisconsin and another state and administrative, sales, and management offices in Wisconsin. Company I, directly or indirectly, manufactures and sells equipment. Additionally, Company I sometimes purchases for resale products manufactured by a related corporation located outside Wisconsin and by unrelated companies in Wisconsin and another state.

Company I products are sold nationally and internationally both through independent representatives and through a direct sales and service division of Company I (that is not a separate legal entity). Company I's equipment products are sold to end users and contractors, most frequently without installation. Installation of the equipment is a simple process and most frequently is performed by the customer, a contractor retained by the customer, or an independent representative or its subcontractor. Company I (through its sales and service division) and independent representatives do receive orders which include installation of the product.

For its internal sales locations, as an accommodation to its independent representatives, and for the convenience of its customers, Company I sometimes contracts with the customer and bills them directly for the sale and installation of the product.

In the case of installation contracts, Company I has paid Wisconsin sales or use tax, as applicable, on products manufactured and installed in Wisconsin.

Company I proposes to do the following:

1. Form a corporation (Company J) that will purchase the manufac-

turing assets and inventory of Company I at their fair market value.

2. Transfer 66 Company I employees, who perform manufacturing functions, to Company J.
3. Have Company I perform certain administrative functions for Company J. These services will be provided and purchased on an arms-length basis pursuant to an administrative services agreement.

Company J will purchase materials to manufacture or assemble products. The resulting products, in addition to other products purchased from suppliers, will be sold to Company I. Company I will resell some of the products purchased from Company J and will sell and install the remaining products in real property construction.

Company J will have no involvement in sales to the ultimate consumer or in any installation or construction activities. Rather, Company J will sell its products to Company I and deliver the products using common or contract carriers retained and paid for by Company J.

Except in the case of Wisconsin destination deliveries, possession of the products will not pass to Company I or its customer until delivered to the state of ultimate destination or installation. Company J will charge Company I for products sold on the basis of the cost of manufacturing and shipping plus an appropriate profit.

**Request**

You ask the following:

1. Is the sale of materials to Company J that it uses in manufacturing the equipment subject to Wisconsin sales or use tax?

2. Is the sale of equipment by Company J to Company I subject to Wisconsin sales or use tax when possession of the equipment is transferred from Company J to Company I outside Wisconsin?
3. Is the sale of equipment by Company J to Company I subject to Wisconsin sales tax when possession of the equipment is transferred from Company J to Company I in Wisconsin?

### Ruling

1. The sale of materials to Company J that become ingredients or component parts of the equipment it manufactures, or that are consumed or destroyed or lose their identity in the manufacture of the equipment, is exempt from Wisconsin sales or use tax under sec. 77.54(2), Wis. Stats. (1991-92).
2. The sale of equipment by Company J to Company I is not subject to Wisconsin sales or use tax when possession of the equipment is transferred from Company J to Company I outside Wisconsin.
3. The sale of equipment by Company J to Company I where possession transfers in Wisconsin is not subject to Wisconsin sales or use tax if Company I resells the equipment as tangible personal property. Sales of equipment by Company J to Company I in Wisconsin which Company I will use in real property construction either within or outside Wisconsin are subject to Wisconsin sales tax.

### Analysis

#### *Sales to Company J of Materials Used to Manufacture Product*

Section 77.54(2), Wis. Stats. (1991-92), provides an exemption from Wisconsin sales or use tax for

gross receipts from the sales of and the storage, use, or other consumption of tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of tangible personal property in any form destined for sale, not including fuel and electricity.

The materials that become an ingredient or component part of the equipment, or that are consumed, destroyed, or lose their identity in manufacturing the equipment, are not subject to tax because the equipment, which is tangible personal property when manufactured, is sold to Company I. Company J must provide its suppliers with properly completed exemption certificates for the materials it purchases and uses as described above.

#### *Sales by Company J to Company I — Possession Transfers Outside Wisconsin*

Section 77.52(1), Wis. Stats. (1991-92), provides that the sale of tangible personal property at retail in Wisconsin is subject to Wisconsin sales or use tax. Section 77.51(14r), Wis. Stats. (1991-92), provides that a sale takes place when and where possession of tangible personal property transfers from the seller or the seller's agent to the buyer or the buyer's agent. Common carriers and the U.S. Postal Service are agents of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

Since possession of the equipment transfers from Company J or its agent (i.e., a common carrier or a contract carrier hired by Company J) to Company I outside Wisconsin, the sale of the equipment takes place outside Wisconsin. Since the sale is

not at retail in Wisconsin, it is not subject to Wisconsin sales tax under sec. 77.52(1), Wis. Stats. (1991-92).

Section 77.53(1), Wis. Stats. (1991-92), as amended by 1993 Wisconsin Act 16, imposes a Wisconsin use tax on the storage, use, or consumption of tangible personal property in Wisconsin. Storage is defined in sec. 77.51(18), Wis. Stats. (1991-92), to include the keeping or retention in this state for any purpose except sales in the regular course of business of tangible personal property purchased from a retailer. Use is defined in sec. 77.51(22), Wis. Stats. (1991-92), to include the exercise of any right or power over tangible personal property incident to the ownership, possession or enjoyment of the property or services, or the results produced by the services, including installation or affixation to real property and including the possession of, or the exercise of any right or power over tangible personal property by a lessee under a lease, except that it does not include the sale or rental of the property in the regular course of business.

Because the products sold by Company J are not stored, used, or consumed by Company I in Wisconsin, use tax is not imposed on Company I's purchase of the equipment.

#### *Sales by Company J to Company I — Possession Transfers In Wisconsin*

##### 1. Sales for Resale by Company I

Section 77.52(1), Wis. Stats. (1991-92), imposes a Wisconsin sales tax on the sale of tangible personal property at retail in Wisconsin. Section 77.51(14)(intro.), Wis. Stats. (1991-92), provides that retail sale includes the transfer of the ownership of, title to, possession of, or

enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property.

If Company I resells to its customers the equipment sold to it by Company J (i.e., does not install the equipment), the sales to Company I are not retail sales because they are for resale. Sales tax is not imposed under sec. 77.52(1), Wis. Stats. (1991-92), on sales that are not retail sales. Company I should provide Company J with a properly completed resale certificate.

## 2. Sales and Installations by Company I

Section 77.52(1), Wis. Stats. (1991-92), imposes a Wisconsin sales tax on the sale of tangible personal property at retail in Wisconsin. Section 77.51(14)(i), Wis. Stats. (1991-92), defines retail sale to include sales of building materials, supplies and equipment to owners, contractors, subcontractors, or builders for the erection of buildings or structures or the alteration, repair, or improvement of real property. Section 77.51(2), Wis. Stats. (1991-92), further provides that contractors are the consumers of tangible personal property used by them in

real property construction activities and the sales and use tax applies to the sale of tangible personal property to them.

Section Tax 11.68(5)(d), Wis. Adm. Code (April 1994 Register), provides that buildings, and structural and other improvements to buildings are real property when installed.

The equipment is real property when installed by Company I. Therefore, the sale of the equipment by Company J to Company I in Wisconsin which Company I will use in real property construction is a retail sale which is subject to Wisconsin sales tax under sec. 77.52(1), Wis. Stats. (1991-92). □