

## State Tax Alert July 2022

### State Sales and Use Tax Quarterly Update - July 2022

Ernst & Young LLP's Sales and Use Tax Quarterly Update provides a summary of recent major legislative, administrative and judicial sales and use tax developments.

#### Congress reviewing the impact of the *Wayfair* decision - four years later

For more than 50 years, nexus was the most significant issue that businesses faced with respect to multistate sales and use tax compliance. In June 2018, the U.S. Supreme Court effectively settled the issue with its decision in *South Dakota v. Wayfair, Inc. (Wayfair)*,<sup>1</sup> overruling over 50 years of precedent and holding that the Commerce Clause of the US Constitution did not prevent states - subject to some limitations - from requiring a business that lacked an in-state physical presence to collect and remit sales tax on transactions with customers located within the state. Within days of the decision, state legislatures began adopting economic nexus standards based on in-state sales and transaction volume. And, within three years of the *Wayfair* decision, every state that imposes a sales and use tax had adopted an economic nexus standard for both remote sellers and marketplace facilitators.

The decision immediately resulted in multistate and multinational sellers having to review their internal sales tax systems and processes, the filing of thousands of new sales and use tax registrations in various state and local taxing jurisdictions, state and local taxing jurisdictions reporting increased sales and use tax revenues and, quite frankly, a good deal of new costs and confusion for consumers, businesses, and tax authorities alike. Now, four years on, the U.S. Congress has decided to take a closer look at what the decision has done to the remote sales landscape and to consider whether any remediation is warranted.

On June 14, 2022, the Senate Finance Committee held a hearing to discuss what Committee Chair Sen. Ron Wyden (D-Ore.) described as "a major source of headaches and costs for small businesses across America." Noting that if the *Wayfair* ruling stands, Congress "ought to step in and give small businesses some relief," Sen. Wyden suggested that "clear, standardized rules that lay out what states can require of small businesses outside their borders" should be enacted. Among the suggestions for such relief, witnesses at the hearing requested: uniform standards for nexus determinations; simplified rates; consolidated state audits; uniform definitions; and new tax phase-ins and protection from retroactive taxation. The idea of a

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<sup>1</sup> *South Dakota v. Wayfair, Inc.*, 585 U.S. \_\_\_, 138 S. Ct. 2080 (2018).

centralized clearinghouse among the states for registering and paying sales and use taxes was also mentioned.

Some of the more vocal criticism of the economic nexus standard came from senators who represent states that do not impose sales or use taxes. Specifically, Sen. Maggie Hassan (D-N.H.) noted that the *Wayfair* decision had “forced small businesses to become tax collectors for out-of-state governments,” and urged Congress to “help small businesses by reversing the Supreme Court’s misguided decision.” Sen. Steve Daines (R-Mont.) asserted that *Wayfair* had placed an “unfair, unilateral burden” on small businesses, and called for Congress to exercise its Commerce Clause authority to remedy the situation created by the Court’s decision.

While Congressional action is not expected anytime soon, the fact that the Senate has now held a hearing on the matter demonstrates that the issue of nexus – for all state and local taxes<sup>2</sup> – may be ripe for Congressional review. The *Wayfair* decision, which represented a sea-change in how sales and use taxes are applied and administered, took effect seemingly overnight and with little advanced warning.<sup>3</sup> Businesses, especially small businesses, that operate as remote sellers have struggled to comply with the new reality, and hoped for more relief than the state “safe harbor” limits have provided. However, at this point, such relief has been elusive, and Congress seems to be their only potential source of remedy.

**Our Observation:** Make no mistake – economic nexus is here to stay. The deluge of state and local sales and use tax revenue that was remitted by requiring remote sellers to collect the state and local sales and use tax based on customer location has been too great for things to go back to the way they were under *Quill*.<sup>4</sup> That is not to say that there is no room for improvement of the current situation, as many small remote sellers have struggled with the costs and complexities of multistate sales and use tax compliance. But, given that any long-term solution will most likely focus on making compliance simpler and, possibly, expanding safe harbor protections, remote sellers will continue to have to deal with their multistate sales and use tax compliance obligations.

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<sup>2</sup> Since November 2018, the Multistate Tax Commission (MTC) has been studying the continued viability of, and potential revisions to, Public Law 86-272. That law, enacted in 1959, limits the states from imposing net income-based taxes on out-of-state businesses whose only in-state activity is the solicitation of sales of tangible personal property that are approved and fulfilled from locations outside of the state.

<sup>3</sup> While the issue had been debated since at least 1967, when the U.S. Supreme Court effectively established physical presence as the nexus standard in *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967) (*National Bellas Hess*) (which was also specifically overruled by the *Wayfair* decision), the outcome in *Wayfair* was far from certain, and the speed with which the states reacted in enacting economic nexus legislation in response to the *Wayfair* ruling was unprecedented.

<sup>4</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (*Quill*). In *Quill*, the U.S. Supreme Court affirmed the principle set forth in *National Bellas Hess* that in-state physical presence was required under the Commerce Clause of the U.S. Constitution in order for a state to require a remote seller to collect and remit use tax on sales to in-state residents.

## ***Other Recent Sales and Use Tax Developments***

### ***Nexus***

**Federal:** On June 14, 2022, the Senate Finance Committee held a hearing to address the impact of the U.S. Supreme Court's 2018 *Wayfair* decision, and to consider possible legislation to help simplify sales tax compliance for online retailers (see Commentary, *above*). U.S. Sen. Fin. Comm., Webpage entitled [Examining the Impact of South Dakota v. Wayfair on Small Businesses and Remote Sales](#) (June 14, 2022) (containing links to various written testimony presented at the hearing).

### ***Tax Base and Taxability***

**Colorado:** The Colorado Department of Revenue (CO DOR), in response to a ruling request, said that for Colorado sales tax purposes, the taxable purchase price does not include a surcharge imposed by a seller or lessor on a buyer or lessee who uses a credit or charge card to make a payment if the surcharge complies with certain requirements. Starting July 1, 2022, under Colo. Rev. Stat. § 5-2-212 (added by [2021 Colo. Sess. Laws ch. 476](#) (2021 CO SB 21-091)), a seller or lessor can impose a surcharge on a buyer or lessee who uses a credit or charge card in lieu of payment by cash, check, debit payment, gift card or similar means. The CO DOR said to impose the surcharge, in addition to meeting the statutory requirements, it must be listed as a separate line item on the customer's receipt and it cannot be used to shift part of the actual sales price to the surcharge. Colo. Dept. of Rev., [GIL 22-004 Surcharges on Credit Transactions](#) (May 5, 2022).

**Kansas:** New law ([2022 Kan. Sess. Laws ch. 89](#) (2022 KS [HB 2106](#))) phases-out the state's sales and compensating use tax rate on food and food ingredients. Starting Jan. 1, 2023, the 6.5% rate applicable to food and food ingredients is reduced to 4.0%, and then to 2.0% on Jan. 1, 2024. The rate is reduced to 0.0% on Jan. 1, 2025. Under the new law, the term "food and food ingredients" is defined to include bottled water, candy, dietary supplements, soft drinks and food sold through vending machines, but does not include alcoholic beverages, tobacco and most prepared foods. Food and food ingredients remain subject to Kansas local sales and use taxes. 2022 Kan. Sess. Laws ch. 89 (2022 KS HB 2106), signed by the governor on May 11, 2022.

**Kansas:** New law ([2022 Kan. Sess. Laws ch. 63](#) (2022 KS [HB 2239](#))) excludes from "sales or selling price" for sales and use tax purposes delivery charges that are not separately stated on the invoice, bill of sale or similar document given to the purchaser. The new law also removes the sunset date for the exemption from "sales or selling price" for cash rebates granted by a manufacturer to a purchaser or lessee of a new motor vehicle. The rebate was previously set to expire on June 30, 2024. 2022 Kan. Sess. Laws ch. 63 (2022 KS HB 2239), signed by the governor on April 14, 2022.

**Massachusetts:** In response to a ruling request, the Massachusetts Department of Revenue (MA DOR) advised a durable medical equipment sales company that its retail sales of continuous glucose monitors are not exempt from the commonwealth's sales tax. The MA DOR reasoned that the monitors are not exempt because they do not treat or cure an illness and do not constitute medicine on prescriptions of a registered physician. Further, because the monitors do not supply insulin, they do not qualify as equipment worn as a correction or substitution for any functioning portion of the body. The MA DOR also advised that continuous glucose monitors paid in full or in part with MassHealth benefits remain taxable and do not become exempt sales to Massachusetts. Mass. Dept. of Rev., [Letter Ruling 22-1: "Taxability of Continuous Glucose Monitors"](#) (March 30, 2022).

**Michigan:** The Michigan Department of Treasury (MI DOT) issued revised guidance on the application of the state's sales and use tax to food for human consumption. Under Michigan law, food and food ingredients are exempt from sales and use tax, except for prepared food, which is subject to tax. The guidance defines the terms "food and food ingredients" and "prepared food", describes what the terms do and do not include, and provides examples of each. The guidance also addresses the taxability of the following food items: (1) items sold at concessions; (2) bottled water; (3) ice; (4) bakery items; (5) food bars (e.g., soup and salad bars); (6) delicatessens; (7) sandwiches; (8) frozen food; (9) prepackaged food items sold by carryout restaurants; (10) food sold and heated in convenience stores; (11) sealed containers of beverages; (12) popcorn and nuts; (13) food sold through vending machines; and (14) miscellaneous - federal food stamp program. Mich. Dept. of Treas., [RAB 2022-4 "Sales and Use Tax - Food For Human Consumption"](#) (March 31, 2022) (replaces MI DOT RAB 2009-8).

**New Jersey:** The New Jersey Division of Taxation (NJ DOT) said that retail sales of COVID-19 test kits are subject to the state's sales tax. Sales and use tax applies to purchases of such kits that are reimbursed by the federal or New Jersey state government. The NJ DOT said kits are presumed taxable because although they contain an exempt reagent, they also contain other taxable components. On the other hand, NJ DOT stated that COVID-19 test kits purchased directly by the federal or state government are exempt from sales and use tax. N.J. Dept. of Taxn., [COVID-19 Related Tax Information: Sales Tax](#) (last updated March 4, 2022).

**New Jersey:** The New Jersey Division of Taxation issued a notice regarding the \$2 per day casino room surcharge imposed on each occupied casino hotel room in Atlantic City starting March 1, 2022. The surcharge is imposed on the hotel which may pass the cost onto occupants by including it in the taxable sales price of the room. The surcharge is in addition to other taxes imposed on casinos, such as the 9% Atlantic City Luxury Tax, the 3.625% Sales Tax, the 1% State Occupancy Fee, the \$2 per day Tourism Promotion Fee and the \$3 per day Casino Room Fee. N.J. Dept. of Taxn., ["Notice to Atlantic City Casino Hotels Imposition of \\$2 per day Surcharge on Casino Room Rentals \(P.L. 2021, c.497\)"](#) (last updated April 6, 2022).

**Pennsylvania:** The Pennsylvania Department of Revenue has released an updated taxability matrix indicating, without comment or analysis, that non-fungible tokens (NFTs) are subject to Pennsylvania sales and use tax by simply including them in a list of computer hardware, digital products and streaming services and identifying them as taxable and newly added to that list. Several other states, the Multistate Tax Commission (MTC), and the Streamlined Sales Tax Governing Board (SST) are considering how NFTs should be subject to state sales or use taxes and whether they should be classified as "digital assets" for those purposes. See Pa. Dept. of Rev., [Retailer's Information - State and Local Sales, Use and Hotel Occupancy Tax - Public Transportation Assistance Fund Taxes and Fees - Vehicle Rental Tax \(REV-717\)](#) (May 2022).

### ***Sales and Use Tax Exemptions, Exclusions and Refunds***

**Alabama:** New law (2022 Ala. Acts 293 (2022 AL [HB 20](#))) extends through May 30, 2027 (from May 30, 2022) the sales and use tax exemption for gross receipts from the sale of parts, components and systems that become a part of a fixed or rotary wing military aircraft or certified transport category aircraft that undergoes conversion, reconfiguration or general maintenance, if the address of the aircraft for FAA registration is outside of Alabama. The exemption does not apply to local sales tax unless previously exempted by local law or approved by a local governing board. This exemption is not available for sales of parts, components or systems for new contracts or projects entered into after May 30, 2027, unless legislation is enacted to continue or reinstate the exemption for new contracts or projects after that date. If such legislation is not enacted, the exemption for contracts or projects entered into on or before May 30, 2027 will be available until May 30, 2030. 2022 Ala. Acts 293 (2022 AL HB 20), signed by the governor on April 11, 2022.

**Alabama:** New law (2022 Ala. Acts 373 (2022 AL [SB 13](#))) extends the sales and use tax exemption for gross proceeds of sales of bullion or money through June 1, 2028 (from June 1, 2023). A person or company receiving a sales and use tax exemption for the gross proceeds of the sales of gold, silver, platinum and palladium bullion and money is not required to file a report on the exemption with the Alabama Department of Revenue. 2022 Ala. Acts 373 (2022 AL SB 13), signed by the governor on April 14, 2022.

**Maryland:** New law (2022 Md. Laws, ch. 14 (2022 MD [SB 488](#))) expands the list of items that qualify for the sales and use tax exemption for medical devices and products. The expanded list includes: (1) medical or clinical thermometers; (2) pulse oximeters; (3) blood pressure monitors; (4) certain filtering facepiece respirators; and (5) diabetic care items (e.g., insulin; glucose tablets, drinks or gel; ketone meters and supplies; insulin pumps and related items; syringes; continuous glucose monitors and related supplies; lancets and lancet devices; and testing strips). This change takes effect July 1, 2022. 2022 Md. Laws, ch. 14 (2022 MD SB 488), signed by the governor on April 1, 2022; see also, 2022 Md. Laws, ch. 13 (2022 MD [HB 1151](#)) (enacted April 1, 2022) (adds a similar sales and use tax exemption for diabetic care items).

**Colorado:** New law (2022 Colo. Sess. Laws ch. 106 (2022 CO [HB 22-1024](#))) expands the sales and use tax exemption for construction and building materials used for the building of public works, requiring Home Rule cities to exempt sales of such materials to contractors and subcontractors for use in the construction, alteration or repair of public schools. This provision will take effect on the day following the end of the 90-day period after final adjournment of the Colorado General Assembly. If, however, a referendum petition is filed against this law, these provisions will not take effect unless approved by Colorado voters during the November 2022 general election. 2022 Colo. Sess. Laws ch. 106, 2022 CO HB 22-1024, signed by the governor on April 18, 2022.

**Colorado:** New law (2022 Colo. Sess. Laws ch. 145 (2022 CO [HB 22-1025](#))), effective Jan. 1, 2023, repeals the sales and use tax exemption for storage, use or consumption of tangible personal property that is transferred to out-of-state vendees without consideration. 2022 Colo. Sess. Laws ch. 145 (2022 CO HB 22-1025), signed by the governor on May 2, 2022.

**Florida:** New law (2022 Fla. Laws ch. 97 (2022 FL [HB 7071](#))) creates a sales and use tax exemption for machinery and equipment used in green hydrogen production and expands the exemption for items used in agriculture production; provides temporary sales and use tax exemptions for certain goods; and creates various sales and use tax holidays. The green hydrogen production exemption applies to purchases of machinery and equipment: (1) primarily used in the production, storage, transportation, compression, or blending of green hydrogen/blending of ammonia derived from green hydrogen if the ammonia will be converted back to green hydrogen before its use or sale; and (2) that are necessary to produce electrical energy resulting from a reaction of green hydrogen and oxygen in a fuel cell. The exemption for machinery and equipment used in the production of electrical or steam energy is expanded to hydrogen used in a specific manner. The exemption for items used in agriculture production is expanded to include hog wire and barbed wire fencing (including gates and materials used to construct or repair such fencing) that is used on land classified as agricultural land. The law also exempts from sales and use tax admissions to certain events, including any FIFA World Cup matches, the Daytona 500 and Formula One Grand Prix races. This exemption also applies to qualifying matches and races held within a certain time period prior to any such event. Temporary sales and use tax exemptions are also provided for the following (with the applicable dates indicated in parentheses): (1) a two-year exemption for impact-resistant windows, doors and garage doors<sup>5</sup> (July 1, 2022 through June 30, 2024); (2) one-year exemptions for baby and children's clothing<sup>6</sup> (July 1, 2022 through June 30, 2023), and Energy STAR appliances<sup>7</sup>

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<sup>5</sup> See Fla. Dept. of Rev., [TIP #22A01-07](#) "Sales Tax Exemption Period on Impact-Resistant Doors, Garage Doors and Windows" (May 6, 2022).

<sup>6</sup> See Fla. Dept. of Rev., [TIP #22A01-06](#) "Sales Tax Exemption Period on Children's Diapers and Baby and Toddler Clothing, Apparel, and Shoes" (May 6, 2022).

<sup>7</sup> See Fla. Dept. of Rev., [TIP #22A01-05](#) "Sales Tax Exemption Period on New ENERGY STAR Appliances" (May 6, 2022).

(July 1, 2022 through June 30, 2023); and (3) a three-month exemption for children's books<sup>8</sup> (May 14, 2022 through Aug. 14, 2022). In addition, multiple sales tax holidays will be held during 2022 for back-to-school shopping<sup>9</sup> (July 25, 2022 through Aug. 7, 2022), disaster preparedness supplies<sup>10</sup> (May 28, 2022 through June 10, 2022), tools and equipment used in skilled trades<sup>11</sup> (Sept. 3, 2022 through Sept. 9, 2022), and certain recreation items and activities<sup>12</sup> (July 1, 2022 through July 7, 2022). Lastly, the new law reduces the sales tax rate imposed on retail sales of new mobile homes to 3% (from 6%). Unless otherwise provided, these changes take effect on July 1, 2022. 2022 Fla. Laws, ch. 97 (2022 FL HB 7071), signed by the governor on May 6, 2022.

**Maryland:** New law (2022 Md. Laws, ch. 7 (2022 MD [SB 316](#))) expands the exemptions from sales and use tax to a sale of: (1) nicotine patches or gum or any other products used to aid in the cessation of tobacco use; (2) tangible personal property manufactured to support breast-feeding; (3) baby bottles; and (4) diapers, diaper rash cream, and baby wipes. Sales and use tax also does not apply to sales of infant car seats. These changes take effect July 1, 2022. 2022 Md. Laws, ch. 7 (2022 MD SB 316), signed by the governor on April 1, 2022.

**Maryland:** New law (2022 Md. Laws chs. 11 and 12 (respectively, 2022 MD [HB 492](#) and 2022 MD [SB 571](#))) exempts from sales and use tax sales of toothbrushes, toothpaste, tooth powders, mouthwash, dental floss or other similar oral hygiene products. The exemption takes effect July 1, 2022. 2022 Md. Laws, ch. 11 (2022 MD HB 492) and 2022 Md. Laws, ch. 10 (2022 MD SB 571), signed by the governor on April 1, 2022.

**Missouri:** An entity that provides nationwide telecommunications, video and internet services is entitled to a refund of Missouri state and local use tax paid on telecommunications replacement equipment. In so holding, a commissioner of the Missouri Administrative Hearing Commission (MO AHC) found that the equipment at issue (e.g., surge-gap taps, splitter/combiner modules, various router equipment, optical transport linecards, optical transport pluggable transmitter/receivers, optical transport commons, switches, and software) qualified for the manufacturing exemption from Missouri state and local sales and use tax. To qualify for the exemption under RSMo §144.030.2(4), each item (1) must be purchased as replacement equipment, (2) must be used directly in the manufacturing or fabricating of a product (i.e., telephone calls), and (3) is intended to ultimately be sold for final use or consumption. At issue in this case was whether the disputed items are used directly in the manufacturing of telecommunication services. To determine this, the MO AHC commissioner

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<sup>8</sup> See Fla. Dept. of Rev., [TIP #22A01-02](#) "2022 Sales Tax Exemption Period on Children's Books" (May 6, 2022).

<sup>9</sup> See Fla. Dept. of Rev., [TIP #22A01-08](#) "2022 Back-to-School Sales Tax Holiday" (May 5, 2022).

<sup>10</sup> See Fla. Dept. of Rev., [TIP #22A01-03](#) "2022 Disaster Preparedness Sale Tax Holiday" (May 6, 2022).

<sup>11</sup> See Fla. Dept. of Rev., [TIP #22A01-09](#) "2022 Sales Tax Holiday for Tools Commonly Used by Skilled Trade Workers" (May 6, 2022).

<sup>12</sup> See Fla. Dept. of Rev., [TIP #22A01-04](#) "Freedom Week Sales Tax Holiday on Specific Admissions and Outdoor Activity Supplies" (May 6, 2022).



applied the “integrated plant doctrine” and found the evidence established that the disputed items satisfied all three prongs on this doctrine as they: (1) are necessary for the production of telecommunications services to the entity’s customers; (2) interact with each other and cause changes in the voice signal to ensure telephone calls reach the recipients and, as such, are both physically and causally close to the finished product; and (3) operate harmoniously with other exempt machinery to make an integrated and synchronized system used to manufacture telephone calls. The Missouri Department of Revenue is appealing the decision. *Charter Communications Entertainment I, LLC v. Missouri Dept. of Rev.*, No. 14-1199 RS (Mo. Admin. Hearing Comm. January 18, 2022) (public access to which is available through the MO AHC website at <https://ahc.mo.gov/portal-instructions.html>).

**Oklahoma:** New law (2022 Okla. Sess. Laws ch. 146 (2022 OK [SB 72](#))), effective Nov. 1, 2022, repeals the Oklahoma Research and Development Incentives Act (68 Okla. Stat. §§ 54001 through 54005), which provides a sales and use tax exemption for qualified purchases to a qualified purchaser that is primarily engaged in computer services and data processing or research and development. A separate enacted bill, (2022 Okla. Sess. Laws ch. 150 (2022 OK [SB 410](#))), limits the period during which such qualified purchases are eligible for sales and use tax refunds. To be eligible for a refund a qualified purchase must be made before July 1, 2022 and the refund request must be submitted to the Oklahoma Tax Commission by July 1, 2022. According to the fiscal analysis prepared for 2022 OK SB 410, this exemption is being repealed because “it is ‘unnecessary due to the availability of more generous and easier to use incentives.’” 2022 Okla. Sess. Laws ch. 146 (2022 OK SB 72) and 2022 Okla. Sess. Laws ch. 150 (2022 OK SB 410), each signed by the governor on May 2, 2022.

**Tennessee:** New law (2022 Tenn. Pub. Acts ch. 1102 (2022 TN [SB 2480/HB 2608](#))) temporarily exempts from sales and use tax purchases and leases of all equipment, machinery, software, ancillary components, appurtenances, accessories or other infrastructure that is used in whole or in part to provide broadband communications services or internet access. The exemption is in place starting July 1, 2022 through June 30, 2025. The exemption does not apply to a retail sale of personal consumer electronics (e.g., smartphones, computers and tablets, Wi-Fi routers or consumer-grade modems). Broadband communications services are defined under the new law as telecommunications services, mobile telecommunications services, video programming services and direct-to-home satellite television programming services. The Tennessee Department of Revenue (TN DOR) has said that contractors can apply for the exemption if a qualifying service provider will use the items to provide broadband communications or internet access. The TN DOR issued guidance on how to make exempt purchases and vendor's reporting responsibilities. 2022 Tenn. Pub. Acts ch. 1102 (2022 TN [SB 2480/HB 2608](#)), signed by the governor on May 31, 2022. See also, Tenn. Dept. of Rev., [Notice #22-07 "Tennessee Broadband Investment Maximization Act"](#) (May 2022).

**Tennessee:** New law (2022 Tenn. Pub. Acts, ch. 1065 (2022 TN [HB 2378](#))) exempts from sales and use tax the fabrication, installation and repair of computer software by a person (including



the person's agent or direct employee<sup>13</sup>), for the person's own use and consumption. The new law also exempts from sales and use tax the access and use of software that remains in the possession of the dealer (or in the possession of a third party on behalf of the dealer) who provides the software (or in the possession of a third party on behalf of the dealer) where the software is accessed and used solely by the person (or person's agent or direct employee) for the exclusive purposes of fabricating other software that is (1) owned by that person and (2) is for that person's own use and consumption. These provisions take effect July 1, 2022. 2022 Tenn. Pub. Acts, ch. 1065, 2022 TN HB 2378, signed by the governor on May 25, 2022.

**Utah:** New law (2022 UT [SB 106](#)) exempts from Utah sales and use tax amounts paid or charged in connection with the construction, operation, maintenance, repair or replacement of facilities owned by or constructed for (1) a distribution electrical cooperative or (2) a wholesale electrical cooperative. This exemption takes effect July 1, 2022. 2022 UT SB 106, signed by the governor on March 23, 2022.

**Utah:** New law (2022 UT [HB 268](#)) establishes a sales and use tax exemption for sales of a note, leaf, foil or film if it: (1) is used as a currency; (2) does not constitute legal tender of a state, federal or foreign nation; and (3) has a gold, silver or platinum metallic content of 50% or more, exclusive of any transparent polymer holder, coating or encasement. An exemption from sales and use tax also is created for amounts paid or charged for admission to an indoor skydiving, rock climbing or surfing facility if a trained instructor is present with the participant (in person or by video) for the duration of the activity and actively instructs the participant. These changes take effect July 1, 2022. 2022 UT HB 268, signed by the governor on March 23, 2022.

**Utah:** New law (2022 UT [SB 93](#)) exempts from sales and use tax amounts paid by a service provider for tangible personal property, other than machinery, equipment, parts, office supplies, electricity, gas, heat, steam or other fuels, that: (1) is consumed in the performance of a taxable service under Utah Code §59-12-103(1)(b), (f), (g), (h), (i) or (j); (2) has been consumed in the performance of the service described in (1); and (3) will be consumed in the performance of a service described in (1), to one or more customers, to the point the tangible personal property disappears or cannot be used for any other purpose. This exemption takes effect on July 1, 2022. 2022 UT SB 93, signed by the governor on March 23, 2022.

**Virginia:** New law (2022 VA [SB 101](#)) extends through 2025 (from 2022) the expiration date of the retail sales and use tax exemption for an advertising business's purchases of printing materials from a Virginia printer for distribution outside the commonwealth. SB 101 takes

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<sup>13</sup> The new Tennessee law specifically defines a "direct employee" to mean "an employee to whom the person is obligated to issue a federal form W-2, wage and tax statement, and with respect to whom the person has responsibility for withholding taxes under the Federal Insurance Contributions Act (26 U.S.C. §§ 3101-3126), or such other entity or affiliate that upon petition to the [Tennessee Revenue] commissioner has been approved as having that responsibility under this section.") 2022 Tenn. Pub. Acts ch. 1065, sec. 1(a).

effect July 1, 2022. Va. Acts 2022, ch. 481 (2022 VA SB 101), signed by the governor on April 11, 2022.

**Virginia:** New law (2022 Va. Acts, ch. 435 (2022 VA [SB 683](#))) expands the sales and use tax exemption for amplification, transmission and distribution equipment used to provide Internet service to include network equipment. Under the new law, the term “‘network’ includes modems, fiber optic cables, coaxial cables, radio equipment, routing equipment, switching equipment, a cable modem termination system, associated software, transmitters, power equipment, storage devices, servers, multiplexers and antennas ... used to provide Internet services.” The exemption applies regardless of whether the service provider is also a telephone common carrier or provides services other than Internet services. This change is effective July 1, 2022. 2022 Va. Acts, ch. 435 (2022 VA SB 683), signed by the governor on April 11, 2022. Identical bill, 2022 Va. Acts, ch. 434 (2022 VA [HB 1155](#)), signed by the governor on April 11, 2022.

**Virginia:** The Virginia Department of Taxation announced that the retail sales and use tax exemption for qualifying business purchases of personal protective equipment related to COVID-19 expires on March 24, 2022. The exemption was effective for qualifying purchases made during the period from March 11, 2021 through March 23, 2022. Va. Dept. of Taxn., [Tax Bulletin 22-5](#) (March 23, 2022).

**Washington:** New law (2022 Wash. Laws, ch. 267 ([2022 WA HB 1846](#))) expands and extends the current sales and use tax exemption for data centers in rural counties, to provide an exemption for eligible equipment, services and related labor purchased by qualified business operating data centers (and qualifying tenants in such data centers) in counties with a population over 800,000. The law describes the revised eligibility requirements for data centers in rural counties as well as the new eligibility requirements for data centers in non-rural counties. New exemption certificates for data centers in rural counties may not be issued on or after July 1, 2036, with the exemption fully expiring on July 1, 2048. New exemption certificates for data centers in non-rural counties may not be issued on or after July 1, 2028, with the exemption fully expiring on July 1, 2038. In addition, newly constructed data centers - in both rural and non-rural counties - must meet specified sustainable design or green building standards within three years after being placed in service. 2022 Wash. Laws, ch. 267 (2022 WA HB 1846), signed in part and vetoed in part by the governor on March 31, 2022.

### ***Transactions and Services***

**Indiana:** New law (2022 Ind. Acts, P.L. 137 ([2022 IN SB 382](#))) modifies the marketplace facilitator provisions of Indiana’s gross retail (sales) and use tax law to provide that a marketplace facilitator is considered the retail merchant of each retail transaction that is facilitated on its marketplace, regardless of whether the marketplace facilitator has a contractual relationship with the seller. A provision of the new law also provides that the

acquisition of an aircraft for rental or lease in the ordinary course of the person's business is not exempt from state gross retail tax unless the person establishes that the annual amount of gross lease revenue from the lease or rental of the aircraft is at least 7.5% of the book value of the aircraft or net acquisition price for the aircraft. The transaction is exempt from gross retail tax if the aircraft is acquired by a person to rent or lease to another person for predominant use in public transportation by the other person or by an affiliate. The exemption applies regardless of the relationship between the person or the lessor and the lessee or renter of the aircraft. These changes are effective July 1, 2022. 2022 Ind. Acts, P.L. 137 (2022 IN SB 382), signed by the governor on March 15, 2022.

**Kentucky:** On April 13, 2022, the Kentucky General Assembly overrode Governor Andy Beshear's veto of 2022 KY [HB 8](#) (enacted as 2022 Ky. Acts, ch. 212) which expands Kentucky's sales/use tax base to include over 30 services, imposes a 6% excise tax on gross receipts from renting motor vehicles, including shared vehicles from peer-to-peer car-sharing companies, selling transportation network company services and selling taxicab and limousine services, and establishes a 60-day tax amnesty program. The expansion of the sales and use tax base to a wide variety of services appears similar to those enacted for a short time in Kansas and considered in other states, such as Ohio. Taxpayers will need to carefully review the list of services that will be subject to sales and use tax starting Jan. 1, 2023 to (1) understand how the commonwealth defines those services and (2) modify their own internal compliance systems and processes to make certain that the taxability determinations in their systems account for the expanded scope of services that will be subject to Kentucky sales and use tax. In some cases, the new law does not contain detailed definitions of many of these services and affected taxpayers should expect to see the Kentucky Department of Revenue (KY DOR) issue future interpretative guidance on these matters. Taxpayers should also monitor the developments around the amnesty program as the initiation of a program during calendar year 2022 depends upon the KY DOR successfully procuring a third-party service provider to administer the program. If the KY DOR does not procure a successful bid from an outside service provider, it would administer the amnesty program for 60 days during 2023. For more on this development, see [EY Tax Alert 2022-0564](#) (April 6, 2022).

**New Jersey:** The New Jersey Division of Taxation (NJ DOT) issued guidance on the tax treatment of transactions involving convertible virtual currency (e.g., Bitcoin). For New Jersey sales tax purposes, the NJ DOT stated that the sale of convertible virtual currency is treated as the sale of intangible property. Thus, the purchase of convertible virtual currency for investment purposes is not subject to New Jersey sales tax. If, however, such currency is used as payment for taxable goods or services, New Jersey sales and use tax applies to such purchase. Sellers and retailers accepting convertible virtual currency as payment for taxable goods and services must determine the convertible virtual currency's fair market value in U.S. dollars as of the date of payment in order to determine the amount of sales tax charged on the underlying transaction. In addition to complying with general recordkeeping and registration requirements, sellers and retailers accepting convertible virtual currency as payment for

taxable goods and services also must comply with additional recordkeeping and reporting requirements, including recording in its books and records (1) the value of the convertible virtual currency accepted at the time of each transaction (converted to U.S. dollars) and (2) the amount of sales tax collected at the time of each transaction (converted to U.S. dollars). N.J. Div. of Taxn., [TAM-2015-1\(R\) "Convertible Virtual Currency"](#) (March 21, 2022).

### ***Technology and Digital Taxes***

**Connecticut:** A platform company's sales of on-demand digital learning plans and courses that can be streamed on computers or mobile devices, generally are not subject to Connecticut sales and use tax as digital goods but may be taxable as job-related training, computer training or software training. Such sales are not taxed as digital goods because the true object of the online learning is the provision of nontaxable services related to education and not to provide the user with a digital good in the form of an electronically accessed audio-visual product. Conn. Dept. of Rev. Serv., [Ruling No. 2022-2 Sales and Use Tax - Digital Goods - Training Services](#) (April 21, 2022).

**Georgia:** New law (2022 Ga. Laws, Act 842 (2022 GA [HB 1291](#))) extends the current sales and use tax exemption for the sale or lease of computer equipment to be incorporated into a high-technology company's facility through Dec. 31, 2023 (from June 30, 2023). The exemption with added limitations will also be effective from Jan. 1, 2024 through Dec. 31, 2028. The modified exemption is limited to those purchases or leases made by the high-technology company for calendar years in which the company purchased or leased at least \$15 million worth of such computer equipment. Notwithstanding this limitation to the contrary, on or after Jan. 1, 2024, the allowed exemption is limited so that each person claiming the exemption is subject to paying 10% of all sales and use tax on the first \$15 million of its eligible purchases or leases for which the exemption is claimed. Further, the definition of "computer equipment" is amended to make clear that such term does not include computers or devices issued to employees (e.g., smartphones, tablets, wearables, personal computers or laptops) or prewritten computer software. In addition, the sales and use tax exemption for high-technology data center equipment to be incorporated, or used, in high-technology data centers that meets specific investment thresholds and other conditions is extended through Dec. 31, 2031 (from Dec. 31, 2028). The new law changes the job creation requirements to qualify for this exemption. 2022 GA HB 1291 took immediate effect. 2022 Ga. Laws, Act 842 (2022 GA HB 1291), signed by the governor on May 9, 2022.

**Texas:** The Texas Comptroller of Public Accounts issued guidance on the types of services that are treated as data processing services subject to the state's sales and use tax, listing examples of taxable and nontaxable services. The guidance also addresses: (1) collecting tax when both taxable and nontaxable services are provided by the business or the taxable service represents 5% or less of the overall contract price; (2) when customers have locations inside and outside of Texas; (3) the use of a resale certificate; and (4) when services are provided to governmental

agencies or nonprofit organizations. Tex. Comp. of Pub. Accts., Pub. #94-127 “Data Processing Services are Taxable” [STAR System # 202203001L](#) (March 18, 2022).

### ***Controversy and Compliance***

**Colorado:** The Colorado Department of Revenue (CO DOR) [posted](#) guidance on a new retail delivery fee that will be imposed on all deliveries by motor vehicles to a Colorado location starting July 1, 2022.<sup>14</sup> The retail delivery fee must be collected and remitted by retailers and marketplace facilitators that collect sales and use tax on tangible personal property sold and delivered to purchasers in Colorado. Deliveries include goods that are mailed, shipped or otherwise delivered by motor vehicles. (The CO DOR in FAQs said that the retailer must consider all modes of transportation used to make the delivery from the time the order is accepted until the item is delivered.) The retail delivery fee is due at the same time as the sales tax return and will be reported and paid on new return DR 1786. The CO DOR's guidance lists the different fees that make-up the \$0.27 retail delivery fee which must be included on the receipt or invoice. If the entire retail sale is exempt from sales and use tax, the delivery is exempt from the retail delivery fee. Lastly, each sale for delivery is considered a single retail delivery, regardless of the number of shipments required to deliver all the goods purchased. The guidance also includes responses to FAQs, including that the retail delivery fee applies when at least one of the purchased items is taxable and is due even when shipping is free. Additional information is available on the CO DOR's Retail Delivery Fee [webpage](#). For more on this development, see [EY Tax Alert 2022-0902](#) (June 9, 2022).

**Colorado:** New law (2022 Colo. Sess. Laws, ch. 160 (2022 CO [SB 22-006](#))), effective for sales made on or after January 1, 2023, increases the amount of the vendor fee a retailer with total taxable sales of \$100,000 or less during a filing period can retain to cover the retailer's expense in collecting and remitting the tax to 5.3% of the tax reported (up from the 4% that had applied under prior law and continues to apply to retailers with more than \$100,000 in taxable sales in the filing period). In either case, a retailer cannot retain more than \$1,000 in any filing period. 2022 Colo. Sess. Laws, ch. 160 (2022 CO SB 22-006), signed by the governor on May 16, 2022.

**Colorado:** On April 21, 2022, Colorado Governor Jared Polis signed legislation (2022 Colo. Sess. Laws, ch. 160 (2022 CO [HB 22-1118](#))) that imposes significant new penalties on refund claims for sales and use taxes paid by a purchaser to a vendor (Buyer's Claims). The penalties apply to Buyer's Claims filed with the Colorado Department of Revenue (CO DOR) on or after July 1, 2022, and before July 1, 2026. In addition, interest will not be paid on any Buyer's Claims unless the CO DOR takes more than 180 days to review the claim. Interest will only be paid back to the claim date. If a Buyer's Claim totals \$5,000 or more, the new law requires the Director of the CO DOR (CO DOR Director) to assess and collect, in addition to other penalties provided by law, a civil penalty equal to: (1) 10% of any part of a refund claim that is duplicative

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<sup>14</sup> 2021 Colo. Sess. Laws, ch. 250 ([2021 CO SB 260](#)).

or lacking a reasonable basis in law or fact and (2) 5% of the entire refund claim if it is found to be incomplete. If a third party prepared the penalized refund claim, in whole or in part, the CO DOR Director will impose the penalty on the preparer instead of the purchaser. Recipients of a penalty assessment can appeal the determination within 30 days of receiving the assessment notice. A claim is considered "incomplete" under the new law if it does not include the correct form and lacks substantially all the pertinent data, information and documentation required by law and related regulations. The CO DOR Director is authorized to issue regulations prescribing the additional data, information and documentation that must be submitted with a sales-and-use-tax refund claim. The CO DOR Director must notify purchasers or preparers of an "incomplete" claim before assessing a penalty, including specific items that appear to be missing. The recipient of the notice will then have at least 60 days to perfect or withdraw the claim before penalties are imposed. The CO DOR Director may waive these penalties if the purchaser or preparer can establish a duplicate claim was unintentional and was either minimal or immaterial, or if they can demonstrate "other good cause for waiver of the civil penalty." As noted above, the new provisions are effective beginning July 1, 2022. The new law also repeals these provisions effective on July 1, 2030. 2022 Colo. Sess. Laws, ch. 160 (2022 CO [HB 22-1118](#)) signed by the governor on April 21, 2022. For more on this development, see [EY Tax Alert 2022-0746](#) (May 10, 2022).

**Colorado:** New law (2022 Colo. Sess. Laws, ch. 119 (2022 CO [SB 22-032](#))) modifies provisions regarding local sales and use tax compliance and administration for retailers making sales in any local jurisdiction where they have no or limited physical presence by requiring the Colorado Department of Revenue (CO DOR) to collect sufficient information from relevant retailers that use the CO DOR's sales and use tax simplification (SUTS) system and make that information available to the local taxing jurisdiction. The CO DOR, after consulting with retailers and local taxing jurisdictions (including home rule jurisdictions) to address any reasonable concerns they may have, has until July 1, 2023 to make necessary changes to the SUTS system. Further, on or after July 1, 2022, a local taxing jurisdiction is prohibited from charging a fee for a general business license to retailers with no or incidental physical presence in the local jurisdiction. Starting July 1, 2023, local jurisdictions in Colorado cannot require a retailer that has a Colorado state standard retail license, makes retail sales within the local jurisdiction and either has no or limited physical presence in the jurisdiction, to apply separately to the local jurisdiction for a general business license. 2022 Colo. Sess. Laws, ch. 119 (2022 CO SB 22-032), signed by the governor on April 21, 2022.

**Illinois:** New law (2022 Ill. Laws, P.L. 102-0700 (2022 IL [SB 157](#))) suspends for one year the sales and use tax imposed on food for human consumption off the premises where it is sold (other than alcoholic beverages, food consisting of or infused with adult use cannabis, soft drinks, candy and food prepared for immediate consumption). For the period beginning July 1, 2022 and until July 1, 2023, the tax rate is 0%; before and after this period, a 1% tax rate is imposed on these food items.<sup>15</sup> The law also provides for a school sales tax holiday on

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<sup>15</sup> See 35 ILCS 105/3-10.



qualifying items that will run from Aug. 5, 2022 through Aug. 14, 2022.<sup>16</sup> During this period, the state portion of the Illinois sales tax will be reduced from 6.25% to 1.25%, and the applicable rate will apply to sales of qualifying clothing and footwear with a retail selling price of less than \$125 per item and certain school supplies. In addition, starting in 2024 through 2030, taxes under the Use Tax Act (UTA), the Service Use Tax Act (SUTA), the Service Occupation Tax Act (SOTA), or the Retailers' Occupation Tax Act (ROTA) do not apply to proceeds from sales of any diesel fuel containing more than a set amount of biodiesel or renewable diesel.<sup>17</sup> The percentage amount of biodiesel or renewable diesel eligible for the special exclusion ranges from more than 10%, more than 13%, more than 16% and more than 19%, with different amounts applying to various periods during each year, as set forth in the law.<sup>18</sup> From Jan. 1, 2024 through Dec. 31, 2030, these taxes apply to 100% of the proceeds of sales of (1) biodiesel blends with no less than 1% and no more than 10% of biodiesel and (2) any diesel fuel containing no less than 1% and no more than 10% of renewable diesel. Other changes made by the law including: (1) suspending the inflation adjustment to the motor fuel tax from July 1, 2022 through Dec. 31, 2022;<sup>19</sup> (2) removing the sunset date for the tax exemption under the UTA, the SUTA, the SOTA or the ROTA for tangible personal property sold to or used by a hospital owner that owns hospitals licensed under the Hospital Licensing Act or operated under the University of Illinois Hospital Act (the Illinois General Assembly in the enacted law stated that it is its intention that the exemption apply on a continuous basis); and (3) starting July 1, 2022, exempting breast pumps, breast pump collection and storage supplies and breast pump kits from the UTA, the SUTA, the SOTA, or the ROTA. 2022 Ill. Laws, P.L. 102-0700 (2022 IL SB 157), signed by the governor on April 19, 2022.

**Mississippi:** New law (2022 Miss. Laws, ch. 384 (2022 MS [SB 2831](#))) establishes the "Taxation of Remote and internet-based Computer Software Products and Services Study Committee" to examine and develop recommendations for which remote and internet-based computer software products and services should be subject to Mississippi sales and use tax. The committee's recommendations and report is due to the legislature by Oct. 1, 2022. 2022 Miss. Laws, ch. 384 (2022 MS SB 2831), signed by the governor on March 28, 2022.

**Puerto Rico:** The Puerto Rico sales and use tax (SUT) holiday for hurricane-season purchases, enacted by 2022 P.R. Laws Act 20-2022, took place from June 17, 2022 to June 19, 2022. The SUT holiday was originally scheduled for the last weekend in May 2022. Because merchants were concerned that they would not be able to obtain enough inventory in time for the SUT holiday, the Puerto Rican Treasury Secretary exercised his discretion for this first year of the statute's implementation and postponed the holiday to the weekend of June 17, 2022. For additional information on this development, see [EY Tax Alert 2022-0847](#) (May 26, 2022).

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<sup>16</sup> See *Id.*

<sup>17</sup> See 35 ILCS 105/3-5.1.

<sup>18</sup> *Id.*

<sup>19</sup> Adding 35 ILCS 505/2(a-5).



**Tennessee:** New law (2022 Tenn. Pub. Acts, ch. 1082 (2022 TN [SB 500/HB 536](#))) allows all dealers required to register for and collect and remit sales and use tax to deduct a portion of sales and use tax collected on items sold during the period from July 1, 2022 through June 30, 2023. The deduction only applies to the state portion of sales and use tax at the following rates: (1) 2% of the first \$2,500 on each report, and (2) 1.15% of the amount over \$2,500 on each report. This deduction is not allowed on delinquent reports and tax remittance. The deduction is limited to \$25 per report. This change takes effect July 1, 2022. 2022 Tenn. Pub. Acts, ch. 1082 (2022 TN SB 500/HB 536), signed by the governor on May 27, 2022. See also, Tenn. Dept. of Rev., [Notice #22-09 "Vendor's Compensation"](#) (June 2022).

**Tennessee:** New law (2022 Tenn. Pub. Acts, ch. 783 (2022 TN [SB 2325/HB 2267](#))) removes auctioneers licensed in Tennessee from the definition of “marketplace facilitator” for purposes of the state’s sales and use tax law. This change took immediate effect. 2022 Tenn. Pub. Acts, ch. 783 (2022 TN SB 2325/HB 2267), signed by the governor on April 8, 2022.

**Virginia:** The Virginia Department of Taxation has announced that the requirement that certain Retail Sales and Use Tax dealers make an Accelerated Sales Tax (AST) payments has been eliminated for periods beginning after June 30, 2021. Accordingly, no AST payment is due in June 2022. Under prior law, dealers or permit holders with taxable sales and purchases of \$10,000,000 or greater for the 12-month period beginning July 1 and ending June 30 of the immediately preceding calendar year were required to make a payment equal to 90 percent of the sales and use tax liability for the previous June on or before the 30th day of June if payments were made by electronic fund transfer, or before the 25th day of June if made by another method. The 2022 Amendments to the 2021 Appropriation Act eliminate the requirement, however, penalties and interest for all prior years’ AST payments remain due and are collectible. [Tax Bulletin](#) 22-10 (Va. Dept. Taxn. June 22, 2022).

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